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October 2015, Wellington, New Zealand | REPORT 134

DEATH, BURIAL AND CREMATION

A NEW LAW FOR
CONTEMPORARY
NEW ZEALAND

A stylized, low-angle view of the Law Commission logo and text, appearing as if seen through a glass pane or a decorative frame. The logo features the coat of arms of New Zealand. The text "LAW·COMMISSION" and "TE·AKA·MATUA·O·TE·TURE" is visible, along with the word "COMMISSION" in large letters.

LAW·COMMISSION
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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled and accessible and that reflects the heritage and aspirations of the peoples of New Zealand.

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23 October 2015

The Hon Amy Adams
Minister Responsible for the Law Commission
Parliament Buildings
WELLINGTON

Dear Minister

NZLC R134—DEATH, BURIAL AND CREMATION: A NEW LAW FOR CONTEMPORARY
NEW ZEALAND

I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink that reads "Grant Hammond". The signature is written in a cursive, flowing style.

Sir Grant Hammond
President

Foreword

We all die. And someone must care for the dead, who, as mortician Caitlin Doughty has said, “have become useless at caring for themselves”.¹

Different cultures have seen this task differently. In ancient Egypt, it was the task of the jackal-headed god Anubis who would usher the dead to where their hearts would be weighed against the feather of justice; in Greek legend, the task fell to Charon, “a shaggy jowled, white haired demon who piloted sinners by boat across the river Styx into hell”.² In New Zealand, Māori express goodwill to those who are leaving, or have departed through death, through deeply spiritual expressions of poroporoaki (farewell).

As Stephen Cave indicates in his review of Doughty’s book, death is the point at which the profane and the sacred collide. It is a natural event yet surrounded by mystery and culture. It is steeped in the physical reality of bodily processes but surrounded by different ideas and philosophies about the long goodbye.³

The determination of death, and the way in which our society responds to the features attendant on, it necessarily falls to the lot of both medicine and the law. How we respond as people is no easy matter. In 1974, the American anthropologist Ernest Becker was awarded the Pulitzer Prize for his groundbreaking book *The Denial of Death*, in which he asserted that the fear of death “haunts the human animal like nothing else”. The book promoted a still thriving subfield of social psychology as to how we think and what we do about the problems associated with death.

In New Zealand, unsurprisingly given our social history, settlers brought with them essentially English traditions and thinking. Māori had and have their own tikanga. We have followed largely the traditions of those who were here and those who have come here, but the circle of those who have come here has steadily widened, and our ethnic makeup is now distinctly multi-cultural.

Mortality presents many practical challenges. These have been dealt with in largely piecemeal fashion as the colony evolved into a Dominion and then into fully independent nationhood. Our law relating to certification of death and disposal of bodies is old, out of date and fractured. It has been in need of fundamental revision and law reform for many years now. Most but not all the law is in a 50-year-old Act – the Burial and Cremation Act 1964 – which itself rests on old antecedents.

The area has been in need of true first principles law reform. That is the task the Law Commission was asked to assume in 2010.

This has been a demanding “true” law reform project. We have had to grapple with changing conceptions of when somebody can be said to be dead for legal purposes, outmoded systems for recording the event that has occurred, changing methods of dealing with bodies (such as the sharp rise in cremation), increasing demand for alternatives to traditional funeral arrangements such as eco-funerals and DIY funerals, problems with burial grounds and the incidents attaching to them around the country and the rightful claims of Māori and other ethnicities to have their cultural and spiritual concerns recognised.

1 Caitlin Doughty *Smoke gets in your eyes & other lessons from the crematory* (WW Norton & Company, 2014).

2 Stephen Cave “The long goodbye: confronting death” *Financial Times* (3 July 2015) < www.ft.com/intl/cms/s/0/90935928-1fe5-11e5-ab0f-6bb9974f25d0.html > .

3 Cave, above n 2.

Our legislation has also become misaligned with important management and infrastructure regimes such as the Resource Management Act 1991 and the Local Government Act 2002 and even the more fundamental requirements of the New Zealand Bill of Rights Act 1990.

In a first principles review such as this is, our concern must be for the citizens of New Zealand, who should be placed squarely at the forefront of any reform legislation. The Commission has endeavoured to advance a regime not just for contemporary New Zealand but also for a respectable period into the future. This is not a law reform topic that is likely to be revisited in the near future!

I express sincere thanks on behalf of the Commission to the many people from many parts of New Zealand, in many walks of life, who contributed their thoughts to this difficult but important task. They have helped us to suggest a new legal regime that, in a sensible feet-on-the-ground New Zealand kind of way, faces up to the reality of mortality and also the importance of the recognition of human dignity and human decency.



Sir Grant Hammond
President

Acknowledgements

We are grateful to all the people and organisations that provided input during this review. We would particularly like to thank the individuals, organisations, local authorities and government departments with whom we consulted, who made submissions or who expressed their views during our public meetings. A list of submitters can be found in Appendix C.

The Commissioner responsible for this reference project is the Honourable Dr Wayne Mapp. The legal and policy advisers for this Report were Linda McIver, Mihiata Pirini and Kate McKenzie-Bridle. We also acknowledge the contribution of present and past colleagues – law commissioner Dr Warren Young, senior researcher and policy adviser Cate Honoré Brett and legal and policy advisers Eliza Prestidge Oldfield, Jo Hayward and Jennifer Moore.

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Glossary of Māori terms

Māori terms used in this Report have the meanings set out below:⁴

Hapū	Sub-tribal group.
Iwi	Tribal group.
Kaumātua	Elder.
Mana	The esteem, prestige, authority, status or spiritual power of an individual or collective group.
Marae	A communal place associated with a particular iwi or hapū, serving the social role of a gathering place for hui including tangihanga.
Pākehā	Non-Māori New Zealander.
Tangi/tangihanga	Māori funeral rites, usually taking place at a marae, involving extended family and friends who gather to mourn and farewell the deceased.
Tikanga Māori	The body of Māori customary law, values, practices and procedures. Sometimes defined in New Zealand statute law as “Māori customary values and practices”.
Tino rangatiratanga	Sovereignty, self-determination.
Tono	In relation to burial, the customary process of arguing for the right to the deceased body.
Tūpāpaku	The body of the recently deceased person.
Urupā	A Māori burial ground.
Wairua	The spirit or soul, believed to linger in the human body until departure for Te Pō (world of departed spirits) or to Hawaiki (the ancestral homeland) after death.
Whakapapa	Genealogy/ancestral history, including relationships with people and place.
Whānau	Family group.
Whānau pani	Close family members of the recently deceased who are in mourning.

⁴ For further explanation, see www.maoridictionary.co.nz.

Executive summary

- 1 In 2010, we were asked to undertake a first principles review of the Burial and Cremation Act 1964 (the Act). That Act provides a framework for the management of cemeteries, regulates the operation of crematoria (through regulations made under the Act) and provides a process for doctors to determine the cause of death when a person dies from natural causes.
- 2 Through an extensive consultation process on this project, we determined that the Act is now significantly deficient in a number of respects. Some of the problems we encountered simply reflect outdated legislation that is overly specific and difficult to understand. In some cases, the legislation has not 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. Other problems reflect general trends in society, particularly a growth in diversity from increasing immigration and the changing nature of family relationships.
- 3 Other key trends and problems in this sector include the following:
 - Increasing use of cremation instead of burial (approximately 70 per cent of bodies are now cremated), which may reflect an increase in cremators privately operated by funeral homes.
 - Increasing demand for alternatives to traditional funeral arrangements and methods of disposing of deceased bodies, in particular:
 - increasing demand for eco-options, such as eco-burial and biodegradable coffins; and
 - increasing demand for “DIY funerals” – that is, where families engage funeral directors for only certain elements of a funeral and undertake other elements themselves.
 - A number of cemeteries (particularly smaller rural cemeteries) are struggling to fulfil their basic management obligations, often due to a decline in volunteers.
 - A number of older cemeteries are facing significant costs in maintaining older style headstones and monuments.
 - Changes to the nature of funeral businesses, particularly in terms of offering a much wider range of services and a decline in smaller family-operated businesses.
- 4 Consequently, we recommend that the current Act should be repealed and replaced by new statutes. The recommendations we make in this Report for the new statutory provisions reflect the basic principles of:
 - dignity of the deceased body;
 - recognition of tikanga Māori;
 - freedom of religion and belief; and
 - legislative certainty and accessibility.
- 5 We have divided our review into four parts, reflected in the four substantive parts of this Report, which cover:
 - death certification;
 - cemeteries and crematoria;

- the funeral sector; and
- burial decisions.

DEATH CERTIFICATION

A new online process for determining the cause of death

- 6 We encountered overwhelming support for significant reform of the process for determining the cause of death and ensuring that appropriate deaths are referred to the coroner. The current process involves a plethora of paper documents, which often duplicate the required information and ask questions that are unnecessarily difficult for doctors to answer.
- 7 We recommend that the current documents should be combined into one online process managed by the Ministry of Health. The process should have sections covering:
 - the verification of identity;
 - the verification of death;
 - questions designed to help the doctor determine whether the death should be referred to the coroner;
 - the determination of the cause of death;
 - hazards in the body; and
 - biographical and disposal details.
- 8 As much as possible, the questions should have pre-coded options to standardise responses and so reduce errors. The determination of the cause of death should be able to be sent directly from the online form to the Registrar-General of Births, Deaths and Marriages so that funeral directors will no longer be required to relay that information. Relevant parts of the form should be accessible to people who embalm, bury or cremate deceased bodies so they can check that the cause of death has first been determined.

Clarifying duties in relation to determining the cause of death

- 9 In addition to the problems with the forms completed by doctors after a death, we found a number of problems with the current statutory duties on doctors and funeral directors.

Extending the power to determine the cause of death to nurses

- 10 We received strong submissions from families and funeral directors about delays experienced in getting a doctor to certify that a death was from natural causes. The delays are caused by doctors being busy and prioritising treatment of sick patients, doctors being away, a lack of understanding by doctors of the complicated rules around when they must or must not certify the cause of death and perhaps a lack of understanding of the importance of the task of determining cause of death.
- 11 One of our recommendations to address this problem is that some nurses should have the power to determine the cause of death in some circumstances. This option will be particularly useful in rest homes and hospice facilities and in rural medical practices. However, we also recommend that there need to be controls around the competency of nurses to perform the task, together with support from experienced doctors.

Clarifying when the doctor must examine the body

- 12 The current rules around examining or viewing the body before determining the cause of death are inconsistent and often ignored. A doctor is only required to examine the body if he or she is not the doctor who attended the deceased person during their illness or if the body will be cremated. Also, we are told that doctors often only “view” the body, despite the Act requiring them to “examine” the body, because they consider that an examination will not elicit useful information and would be distressing for the bereaved family.
- 13 We recommend that it should be up to the attending doctor to decide whether he or she needs to examine the body in order to determine the cause of death. There will be many deaths that were expected, and examining the body is not warranted. However, if it is not the deceased person’s usual doctor who is determining the cause of death, that person should still be required to examine the body.

Clarify the timeframe and degree of certainty for determining the cause of death

- 14 We recommend that doctors should have a statutory duty to determine the cause of death to the best of their knowledge and belief.
- 15 We also make recommendations about timeframes and the degree of certainty required for cause of death certificates by doctors to help address the difficulty in getting doctors to attend to this task. Currently, the Act says that doctors must give their certificate *immediately* after learning of the death. That is clearly unworkable. In relation to the degree of certainty required, the current Act is very unclear. We have found that, while the antecedent and underlying causes of death can be accurately determined, the complication that actually caused the death will often be an educated opinion (or “best guess”).
- 16 We recommend that the new statute provides a new, more practical timeframe and clarifies the degree of certainty required of doctors. Our suggestion is that the doctor should be required to certify the cause of death to the best of the doctor’s knowledge and belief within 24 hours of learning of the death or as soon after that as is reasonably practicable.

Clarify when an alternative doctor may determine the cause of death

- 17 Currently, there are complicated rules as to when a doctor who was not the doctor attending the person during their illness may determine the cause of death. The result is that hospitals and other facilities often wait 24 hours for the attending doctor to return before the cause of death is determined. This is an unnecessary delay.
- 18 We recommend that the law should be pragmatic in this case and provide that an alternative doctor may determine the cause of death simply if the attending doctor is unavailable. However, in doing so, the alternative doctor must view the person’s medical notes and view the body.

Disposing and embalming bodies only after cause of death is determined

- 19 Currently, the Act states that a body may not be disposed of, nor may a person transfer the charge of the body, unless the cause of death has been determined. While we consider that the first requirement should be continued, the second requirement results in some problems. First, there are some complicated exceptions in the Act that are very difficult to understand. Second, waiting to move a body from the place of death until a doctor determines that the person died of natural causes can present practical issues, particularly when the person died in their home or in a rest home.

- 20 Instead, we consider that the second requirement should be repealed and replaced by a requirement that a body may not be embalmed unless the cause of death has been determined. In most cases, embalming a body is more likely to remove signs of the cause of death than moving the body from the place of death.

A national audit system

- 21 We found that there is likely to be a high rate of error in the determinations of cause of death in New Zealand, but the current system does very little to address this. Medical referees are currently charged with determining that cremation certification (including the cause of death) is accurate. However, they usually cannot do this confidently because they do not have access to the deceased person's medical notes. There are currently no checks at all on the documentation when a person is buried. Also, there is no formal education for doctors certifying cause of death and no process for feedback to them on the quality of their determinations.
- 22 As a result, we recommend that the medical referee system should be abolished and replaced by a national audit system for cause of death determinations. Experienced medical practitioners should be appointed as "cause of death reviewers" to review a random sample of all deaths except deaths that have been referred to the coroner. Deaths that occur in hospitals could also be excluded to reduce the workload and cost if hospitals implement their own reviews of cause of death determinations. The purposes of these random sample reviews would be to:
- detect error in the determination of the cause of death;
 - detect deaths that should have been referred to the coroner; and
 - provide education and support to doctors who certify the cause of death.
- 23 In addition, cause of death reviewers should undertake targeted reviews designed to detect problems with certifying deaths with particular characteristics. For example, deaths occurring in a particular aged care facility could be reviewed if there was concern about a disproportionate prevalence of a particular cause of death or circumstance accompanying deaths.
- 24 The Ministry of Health should be responsible for this audit system, including for measuring rates of error in cause of death certification and using information gleaned from audits to educate certifying doctors.

CEMETERIES AND CREMATORIA

Unlawful burial and cremation

- 25 Currently, it is unlawful to bury a body in any land that is not a cemetery, a denominational burial ground, a private burial ground or a Māori burial ground if there is such a place within 32 kilometres of the place of death or place where the body has been taken for burial. We consider that the strong public interest in the controlled development of burial land requires the continuation of this requirement. However, the 32 kilometre exception should be replaced by a defence under which the defendant is not liable if he or she can show both that it was impractical to transport the body to an approved cemetery and the body was buried respectfully in another place.
- 26 The current prohibition on cremation elsewhere than in an approved crematorium should be continued but modernised to reflect the possibility of alternative methods of cremation or other means of disposing of bodies that may become popular in the future. We discuss outdoor cremations below.

Obligations on cemetery managers

- 27 We found that it is sometimes very difficult for cemetery managers to know what their statutory obligations are because the current rules are complicated and overly prescriptive. We recommend that the new statute replaces the current rules with a simple set of basic obligations that covers all managers of land in which bodies are buried, no matter what category of cemetery is in question. Those obligations should be to:
- ensure that cemetery land is not used for other purposes;
 - keep a record of every burial and forward that information regularly to the local authority; and
 - maintain the cemetery in a reasonable condition, having regard to how the cemetery is used by the community.
- 28 The first obligation, to ensure that cemetery land is not used for other purposes, will also require the manager to register the cemetery with the local authority, enter into a covenant with the local authority prohibiting the use of the land for any purpose that is inconsistent with the use of the land as cemetery and ensure that covenant is noted on the certificate of title. If the cemetery manager wishes to use the land for other purposes, the manager may apply to the local authority either to vary the covenant or for permission to disinter all of the bodies. What uses of the land are considered to be “inconsistent with cemetery use” should be determined by local authorities taking into account their own circumstances and the views of their communities.

What is cemetery land and who is the manager?

- 29 In order to avoid the need to determine which category of cemetery a particular cemetery falls into, we recommend that all land in which bodies are buried should be deemed to be a cemetery. However, urupā set aside as a reserve under the Te Ture Whenua Māori Act 1993 should be excluded because they are covered by that Act.
- 30 We also recommend that the owner of cemetery land should generally be deemed to be the manager and therefore under the obligations of cemetery managers described above. However, we recommend an exception to this rule to recognise the managers of existing trustee cemeteries (we suggest they be known as community cemeteries).

Powers in cemetery managers

- 31 The Act currently has a wide range of very prescriptive powers for cemetery managers. This approach should not be replicated in a new statute because it is hard to understand and unnecessary. Cemetery managers generally do not need specific powers to manage and maintain cemeteries. They only require specific statutory powers to do things that may override the rights of other people. On that basis, we recommend that the statute should provide a specific power in cemetery managers to maintain any grave, memorial, vault or tablet. This power should operate despite any bylaw or contractual provision giving the bereaved family duties and rights to maintain these things.
- 32 We also consider that cemetery managers should have specific powers to approve the disinterment of single graves. We discuss this further below.

Extra obligations on local authority cemetery managers

- 33 Most cemeteries are currently managed by local authorities, and that is likely to continue due to the large amount of land that must be tied up in perpetuity for cemeteries. In addition to the standard obligations on cemetery managers described above, we recommend that local authority

cemetery managers should have some additional obligations in respect of those cemeteries as follows.

- 34 We described above that one of the key issues with the current law is that it does not adequately cater to the diverse needs of New Zealand's increasingly culturally diverse population. In response to this problem, we recommend that local authority cemetery managers must consider applications from any group of people for separate burial areas within the cemetery. Currently, they are only required to consider applications from religious denominational groups.
- 35 We also recommend that local authority cemetery managers must create and maintain a cemetery policy that will provide certainty and transparency for the population it serves about policy choices it is making in relation to the management of cemeteries. Key amongst these policy choices is the level of maintenance to be provided for various cemeteries under its responsibility and the provision of separate burial areas for minority groups.

Local authorities' role in relation to all cemeteries in its region

- 36 In addition to specific extra obligations on local authority cemetery managers, we consider that there is a public interest in local authorities having a number of duties in relation to all the cemeteries within its region.
- 37 Currently, local authorities have an obligation to provide cemeteries if there is otherwise insufficient provision for burial in its district. We recommend that this obligation should continue, but given the strong growth in cremation in recent decades and the high cost of land required to establish a cemetery, we recommend that the obligation should only require facilities for the disposal of bodies rather than cemeteries specifically.
- 38 We recommend below a new framework to describe who has the power and the duty to make post-death decisions, particularly about disposing of the body. Despite the clarity that this framework will bring, there will still be cases where there is no family member or other person to take responsibility for disposing of a deceased body. In these cases, we consider that there is a public interest in the local authority having a duty to dispose of the body. We expect that they should perform this task with the minimum of cost required to provide dignity to the body. Costs should be recoverable from the estate or, if that is insufficient, from the funeral grant from Work and Income New Zealand.
- 39 We propose above that all land in which bodies are buried should be subject to restrictions on the future inconsistent use of that land. However, our research found that there is no formal record of all cemeteries in New Zealand, so it could be difficult to know when land is cemetery land. We make a number of proposals to address this problem, but one proposal is that all cemetery land should be recorded on a central register or registers. We recommend that these registers should be kept by local authorities, rather than nationally, so that local authorities can provide oversight for cemeteries in their regions, can project demand for new cemeteries and can offer support to the managers of older cemeteries who may be failing to meet their obligations.
- 40 Currently, the power in the Act for health protection officers to inspect cemeteries is rarely exercised. This probably reflects the view that problems with cemeteries are not significant enough to warrant the expenditure of resources on regular inspections. We would agree with that conclusion. However, while a duty to inspect cannot be justified, a power to inspect is required for the rare occasions in which a local authority needs to take enforcement action against cemetery managers who are failing to fulfil the cemetery obligations.

- 41 Finally, we have described above that cemeteries should be maintained to at least a minimum standard. However, our research found that there are a number of small rural cemeteries run by community groups that may not be able to fulfil even this minimum requirement due to a lack of financial resources or volunteers. We recommend that, when such a cemetery fails, the local authority should be required to take over its management. The local authority could then decide on the level of maintenance required, but it should be open to it to decide to provide only a minimum level of maintenance.

Permission to disinter a body

- 42 We consider that providing dignity to deceased bodies and human remains requires that any interference with a body once it is buried should be done under strict controls. Consequently, it should continue to be an offence to disinter a body or remains without the appropriate consent.
- 43 Currently, a family wishing to disinter remains to relocate them to be closer to other family members must first obtain the permission of the Minister of Health. There are usually very limited health concerns in disinterment, and so we propose that applications for single disinterment should be simplified by requiring only the permission of the cemetery manager. When making those decisions, the cemetery manager must be satisfied that all interested relatives have been consulted and no objections have been expressed.
- 44 Sometimes, people wish to disinter multiple remains for the purpose of using the land for another purpose (a purpose that is inconsistent with burial). In those cases, we consider that the local authority should be the entity to provide permission unless the cemetery is a local authority cemetery, in which case, the permission should come from the Environment Court. We make recommendations for the matters that must be considered when making these decisions.

Approval of new cemeteries

- 45 Another key recommendation to address our finding that the current burial framework does not adequately cater to New Zealand's increasingly diverse cultural needs is that the new statute should reduce the restrictions on the types of new cemeteries. Specifically, any person or group should be able to apply to the local authority to establish a cemetery. We envisage that this option may be taken up by people wishing to establish eco-burial grounds. Also, any person should be able to apply for burial on private land if the land in question is rural land and the cemetery is intended for the burial of no more than five bodies.
- 46 However, we also recognise that opening up the provision of cemeteries to private providers presents significant challenges for local authorities. In particular, it requires them to determine whether or not the land in question may be required for other purposes in the future, and if the cemeteries fail to fulfil their statutory obligations in the future, the local authority would be required to take over. Consequently, we also recommend that, in addition to relevant considerations under the Resource Management Act, a local authority should have powers to decline applications for other good reasons. In particular, it may consider:
- the relevant expertise and experience of the applicants;
 - the likely effect of the proposed cemetery on neighbours;
 - the likelihood that the cemetery can be maintained as cemetery land in perpetuity; and
 - the extent to which any risks raised by the proposed cemetery can be adequately mitigated.

Establishing new crematoria

- 47 There is currently a cumbersome process for establishing a crematorium under which, in addition to any resource consent, two approvals of the Minister of Health are required. We consider that the Minister's approvals add very little to the process and should be abolished. It should be for local authorities to approve crematoria through the ordinary planning and resource consent processes.

Outdoor cremations

- 48 Continuing to have a mechanism to approve outdoor cremations is an important aspect of recognising the diversity of burial needs in New Zealand. However, we consider that this option should not be limited to religious denominations—rather, it should be the sincerity of the application that is relevant. It should be for local authorities to approve outdoor cremations, rather than the Ministry of Health, because this is largely a land use issue and the health concerns are small.

A duty to treat deceased bodies or remains with respect

- 49 Section 150(2) of the Crimes Act 1961 provides an offence of improperly or indecently interfering with or offering an indignity to any dead human body or human remains. We have found that there is a range of behaviour that is disrespectful to deceased bodies or remains, but that is not prosecuted under s 150(2), probably because the penalty for that offence is a maximum term of imprisonment of two years. Such behaviour includes treating a body in a way that is designed to cause cultural offence or the inappropriate storage of bodies.
- 50 We consider that the new statute should create a new duty in every person to treat any dead human body or human remains with respect. That duty should be supported by an offence punishable by a maximum fine of \$10,000. This offence is designed to capture lower-level offending than is prosecuted under s 150(2) of the Crimes Act.

Disposing of the body in a reasonable time

- 51 There is currently a requirement in the Act to dispose of a body within a reasonable time. However, it is not necessarily clear on whom that obligation falls or what amounts to “a reasonable time”. We propose that the requirement should be continued, but the obligation should fall on the person who has the duty to dispose of the body. We describe below our proposals for clarifying where that duty should lie. Furthermore, the requirement should be to dispose of the body “without undue delay, taking into account the mourning needs of the bereaved and any ceremonies to be performed”. This timeframe should provide more clarity yet sufficient flexibility to accommodate the different cultural needs of the bereaved family.

THE FUNERAL SECTOR

- 52 Our consultation and research did not reveal evidence of widespread problems of abuses in the funeral services sector. On the contrary, the vast majority of those operating in this industry do so with integrity and to high standards. However, we did encounter concerns in a couple of areas that we consider justify new statutory provisions.

Enhancing the registration system

- 53 We found that consumers of funeral services often have an inaccurate expectation that the legislation provides assurances of high standards in this industry. That expectation, combined with our findings that these consumers can be particularly vulnerable due to their grief and

that problems in this sector often cannot be put right or adequately compensated for, provides adequate justification for low-level regulation of this sector.

- 54 While the current system requires no prerequisite conditions to registration as a funeral director, we consider that, in future, the statute should require an applicant for registration to demonstrate the absence of certain serious convictions, the absence of other conditions that would make a person incompetent to provide funeral services and that the applicant is adequately qualified to provide funeral services.

Absence of convictions

- 55 After analysing a range of legislative registration schemes for other industries, we have formulated a list of offences that we consider will disqualify only people with serious and relevant offences and that requires a minimum amount of discretion by the registration authority. That list is:

- a conviction for an offence against section 150 of the Crimes Act;
- a conviction for dishonesty (as defined in the Crimes Act) within the previous 10 years;
- a conviction for an offence under Part 1 (relating to unfair conduct) or subparts 1 or 2 of Part 4 (relating to layby sales and uninvited direct sales) of the Fair Trading Act 1986 within the previous 10 years; or
- a conviction resulting in the imposition of a term of imprisonment of three years or more; or
- a conviction within the previous five years resulting in the imposition of a term of imprisonment of six months or more.

Absence of other disqualifying conditions

- 56 Similarly, we consider a person should be disqualified from registration as a funeral service provider if they:

- are under 18 years of age;
- are an undischarged bankrupt or are subject to subpart 4 of Part 5 of the Insolvency Act 2006;
- have already had their licence cancelled or suspended under the Act;
- have been 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;
- are a person in respect of whom a personal order has been made under the Protection of Personal and Property Rights Act 1988;
- are subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or
- have a conviction for an offence under the Burial and Cremation Act 1964 or the new statute.

Qualifications

- 57 Finally, a person should be able to demonstrate that they are adequately qualified for registration if they hold a relevant qualification prescribed by regulations or pass an examination that tests their knowledge of:

- the process of treating a body after death, including any health risks involved and how to deal with these;
- legal obligations and how to fulfil these in practice; and
- different cultural perspectives on how to put these matters into practice.

58 In addition, the statute should deem that people who have been providing the relevant funeral service for a period of five years are adequately qualified.

Who must be registered?

59 The aim of this enhanced registration process is to ensure that unsuitable people are not practising in the industry. Consequently, it should be the people providing funeral services that must be registered, not the businesses.

60 The funeral service industry generally operates on the basis that new entrants first gain employment with a funeral service business before going on later to gain qualifications. We consider that this system should be allowed to continue, provided that all unregistered people are supervised by a registered person.

61 Finally, we have given some thought to the range of funeral service providers that must be registered. First, it should cover people who provide funeral services as a business, not people who voluntarily provide these services. Second, it should cover funeral services that involve contact with or custody of a deceased body or involve contracting directly with the consumer. It should not cover the mere provision of accessories or equipment nor celebrant or organisational services without those additional elements.

Duties on funeral service providers

62 In addition to new restrictions on who may be registered to provide funeral services, we recommend that the new statute should impose a number of duties on the managers of funeral service businesses. It is appropriate that the managers of funeral businesses are responsible for these duties because the duties depend upon strong business processes that an individual employee may have limited ability to control. The duties are to ensure that:

- records are kept in respect of every human dead body in the funeral business's custody;
- the identity of a body is maintained while it is in the custody of the business;
- all unregistered employees are directly supervised; and
- the business holds unclaimed or disputed ashes for at least 10 years.

Mandatory disclosure of component prices

63 Through our consultation, we encountered widespread concern about the communication of the costs of funeral services. Funeral directors generally advise on costs after meeting with consumers and discussing their needs. We heard complaints that the component prices of funeral packages were not itemised, that costs were added to the invoice without further discussion with the consumer and that the "professional services fee" contained costs for services that the consumer neither wanted nor asked for. These problems meant that consumers often felt that it was not clear what was included in the cost of a funeral; it was difficult to compare prices between funeral service providers; and it was difficult to negotiate for only some of the elements of a funeral package.

- 64 We consider that these problems and the vulnerable nature of consumers of funeral services warrant some legislative controls to provide more protection for those consumers. Specifically, funeral service providers should be required to publish and make available a price list of all the funeral goods and services it provides, including:
- a description and total price of funeral goods and services offered;
 - a list of any service fees charged by the funeral service provider;
 - the maximum price that a funeral service provider charges for funeral goods and services; and
 - any particular items required by regulations made under the new statute.
- 65 Prior to entering an agreement for the supply of funeral goods or services, the funeral service provider should also be required to give the consumer a statement of the costs of the funeral. That statement of costs should set out:
- the cost of each of the goods and services to be supplied;
 - the cost of any disbursements;
 - the cost of any service fees;
 - if the goods and services to be supplied is a package, the description of each item in the package and a total cost of the package; and
 - how the consumer may make a complaint.

BURIAL DECISIONS

- 66 Currently, the rules covering the powers and duties to make decisions after a death as to how the body should be dealt with are found in the common law rather than statute. They have recently been clarified in the high-profile case of *Takamore v Clarke*.⁵ In that case, the Supreme Court said that:
- the executor (if one is appointed) has the duty to dispose of the body;
 - if no executor is appointed, the person who is the potential administrator of the estate (under the Administration Act 1969) has that duty;
 - when making the decisions, the decision-maker must take account of the views of those close to the deceased that are known or conveyed to him or her (including any cultural, religious or spiritual practices);
 - a decision may be challenged in the High Court;
 - the role of the Court under this jurisdiction is to determine what is appropriate (rather than whether the decision is reasonable); and
 - in making that determination, the Court must consider:
 - the nature and closeness of the deceased's relationships to relevant family members and to any proposed location for burial;
 - tikanga in relation to burial practice as well as other important cultural, spiritual and religious values; and

⁵ *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

- any wishes expressed by the deceased person.

67 We consider that while this clarification of the common law brings some certainty to the law, in a number of key ways, it does not go far enough in reflecting public expectations as to how these decisions should be made in practice. Consequently, we recommend that there should be new statutory rules establishing who may make these decisions; how they should be made; and how they should be dealt with by the courts if recourse to the courts is sought. In making these recommendations, we aim to ensure that:

- the rules bring clarity and certainty to this issue;
- the rules reflect public expectations of those decisions are made in practice;
- any wishes expressed by the deceased are followed wherever practicable; and
- a space is open for tikanga and other relevant cultural practices to operate as much as possible.

Compliance with the deceased's wishes

68 It is not uncommon for a person to express to relatives or friends their wishes as to how their funeral should be conducted or how their body should be dealt with. Currently, the law does not recognise those wishes, so the person making the decisions can override them, even if they are unequivocal and reasonable. Of course, in practice, they will usually be taken into account and often complied with.

69 We have found that there is an increasing legal and philosophical acceptance that the wishes of the individual are important and must hold considerable weight. This reflects the importance given to individual autonomy. Consequently, we propose that if a person has expressed their wishes in writing, those wishes must be given effect to unless there is a compelling reason not to do so. Such reason might be that the wishes are unreasonable or impractical, including that there are insufficient funds in the estate to provide for them. If the wishes have been expressed but not in writing, they must be taken account of by the person making decisions, but they should not be binding, given the lack of certainty that may surround verbally expressed wishes.

Appointment of a deceased's representative

70 Of course, what is considered to be a “compelling” reason not to follow the wishes of the deceased will depend upon the views of the person making the decisions. We do not consider that a tighter legal test is possible, given the vast range of circumstances that it will cover. For this reason, we propose that the new statute should enable people to appoint a trusted person as a “deceased's representative” to make decisions about the funeral and dealing with their body after their death. A trusted appointed person is much more likely to prioritise the wishes of the deceased person when faced with countervailing considerations. By appointing a deceased's representative, a person will have assurance that their wishes will be carried out.

71 A deceased's representative should be appointed in writing and the person must consent to the role. In addition to having the right to make decisions about funeral arrangements, how the body should be disposed of and how any remains of the body should be dealt with, the deceased's representative should have the right to custody of the body to facilitate those other decisions. He or she should also have the duty to dispose of the body within a reasonable time.

The role of the executor and a new framework for burial decisions

- 72 As we described, currently, if a person has a will and so has appointed an executor of that will, that person has the power and duty to make decisions about the body and about funeral arrangements if the family cannot agree, in addition to administering the deceased person's property. We consider that this rule should continue (and be reflected in statute), but it should be subject to the overriding right of any deceased's representative appointed by the deceased person before their death.
- 73 Under the proposed framework, if a person has both a deceased's representative and an executor of their will, the deceased's representative will make the decisions about the funeral and the body, leaving the executor to administer the estate. If no-one has been appointed to either of these roles, any member of the deceased person's family should have the power to make the decisions. If a funeral director receives instructions from one family member, he or she may rely on those instructions unless the director has reason to believe that another person has been appointed as the deceased's representative or executor or that there are challenges to the instructions.
- 74 If a person dies without appointing a decision-maker and there are no family members available to make the decisions, the statute should provide a power for any other person to make the decisions. If there is no-one stepping forward to arrange the funeral, the public interest requires that some public agency has a duty to provide for the disposal of the body in a reasonable timeframe. We consider that local authorities are best placed to do this. The costs should be minimal and should be covered by the estate or, if that is insufficient, the funeral grant from Work and Income New Zealand.

Jurisdiction of the court

- 75 While we consider that the proposals above increase certainty and decrease the likelihood of irreconcilable disputes by establishing a framework for who may make burial decisions and providing that any written wishes of the deceased person must be given effect to, there may still be disputes that need to be resolved by the courts.
- 76 Currently, only the High Court may resolve these types of disputes. We consider that the Family Court or the Māori Land Court may be better placed to resolve some types of burial disputes. For example, the Family Court has expertise in dealing with families in dispute who are likely to have an ongoing relationship after court proceedings. The Māori Land Court has expertise in dealing with burial disputes that involve consideration of tikanga.
- 77 For these reasons, we propose that a person may apply to the High Court, the Family Court or the Māori Land Court to resolve a burial dispute. Which court is chosen will depend upon the nature of the issue in dispute and other factors such as timing. However, the Family Court or the Māori Land Court may only hear the dispute if both parties agree to that jurisdiction. If they do not agree, only the High Court may resolve the issue.
- 78 In exercising this jurisdiction, a court must take account of a number of statutory considerations, including:
- the deceased's wishes;
 - the views of members of the deceased's family group;
 - relevant cultural considerations including tikanga Māori; and
 - the practicality, cost and timeliness of any proposed burial arrangements.

Leaving a space for tikanga to operate

- 79 One of the key questions of this review is how tikanga Māori should be given effect to in burial decisions. Tikanga prescribes a number of practices and decisions that must happen after the death, including that relatives must accompany the tūpāpaku (the body) to the marae or home and that visitors make a tonono or challenge for the right to bury the body. Under tikanga, these rules apply to a deceased person irrespective of their expressed desire for that to happen.
- 80 The Supreme Court in *Takamore v Clarke* held that tikanga is a value that should be taken into account where relevant to the burial decision. It is clear to us also that tikanga must be expressly recognised in New Zealand law on burial. However, balancing the interests of tikanga alongside legal certainty and individual autonomy has been a key challenge of this review. We consider that the proposed recommendations for burial decisions provide a framework of laws that creates space for tikanga to apply as much as possible as follows:
- A person who wishes to ensure that decisions about their funeral and body are made in accordance with tikanga may appoint a trusted person as a deceased's representative to ensure that happens. For example, they may appoint a kaumātua from their hapū.
 - Whoever makes decisions about the funeral and the body after a death, whether a deceased's representative, the executor or the family, must take account of tikanga Māori when that is appropriate. This means that if the deceased person is Māori and tikanga considerations are raised in respect of those decisions, tikanga cannot be ignored.
 - If there is an irreconcilable dispute, the parties may apply to the Māori Land Court to determine the dispute. That Court is much better placed to determine issues involving tikanga than other courts. However, if the parties do not agree on the Māori Land Court, the matter must be heard in the High Court as is currently the case.
 - Whichever court is asked to determine a burial dispute (whether the High Court, the Family Court or the Māori Land Court), when making its decision, that court must take account of tikanga Māori or other cultural considerations.

Summary of recommendations

- R1 The Burial and Cremation Act 1964 should be replaced by a new statute for burial, cremation and funerals to be administered by the Department of Internal Affairs. However, provisions relating to the determination of the cause of death should be transferred to a statute administered by the Ministry of Health.

DEATH CERTIFICATION

CENTRAL RESPONSIBILITY FOR THE CAUSE OF DEATH CERTIFICATION SYSTEM

- R2 The Ministry of Health should have responsibility for the quality of outputs and outcomes from the death certification process.

AN ONLINE PROCESS FOR CERTIFYING CAUSE OF DEATH

- R3 There should be an online death certification process created and managed by the Ministry of Health.
- R4 The online death certification process should have a section for verification of the identity of the body including the evidence for that verification.
- R5 The statute should require that a deceased body may not be disposed of unless a doctor or other authorised person has certified that the identity of the deceased has been adequately determined. If the doctor or authorised person considers the body is not adequately identified, they must refer the death to the Police.
- R6 The statute should require that a body may not be disposed of or embalmed unless a doctor has certified the cause of death of that person or the authorisation of the coroner is obtained.
- R7 The Births, Deaths, Marriages, and Relationships Registration Act 1995 should be amended so that the doctor or coroner who determines the cause of death has a duty to provide preliminary notice of the death (and the cause of death) to the Registrar-General.
- R8 The Births, Deaths, Marriages, and Relationships Registration Act 1995 should also be amended to make it clear that a person making decisions about disposal of the body has a duty to notify the Registrar-General of the death (in the manner prescribed by regulations made under that Act).

STATUTORY DUTIES IN DETERMINING THE CAUSE OF DEATH

- R9 The statute should enable some nurses to certify death in some circumstances.
- R10 The statute should not require the attending doctor to view the body prior to determining the cause of death. It should be up to the doctor to determine whether an examination or viewing of the body is required. However, the statute should require that an alternative doctor who is certifying the cause of death views the body prior to making that determination.
- R11 The statute should require the doctor certifying the cause of death to determine that cause to the best of the doctor's knowledge and belief.
- R12 The statute should state that the timeframe within which the attending doctor must determine the cause of death is "within 24 hours of learning of the death or as soon after that as is reasonably practicable".
- R13 The statute should provide that a doctor who did not attend the deceased person during their illness may certify the cause of death if the attending doctor is unavailable. "Unavailable" should be given its usual meaning, which is broader than that currently in the Act.
- R14 The statute should provide that a person may not embalm or dispose of a body unless the cause of death has first been determined.

AUDITING CAUSE OF DEATH DETERMINATIONS

- R15 The statute should create a statutory role of "cause of death reviewer" to be appointed by the Minister of Health.
- R16 A function of cause of death reviewers should be to undertake a review of a random sample of all deaths (except deaths that occurred in hospital and deaths that have been referred to the coroner) for the purpose of:
- detecting error in the determination of the cause of death;
 - detecting deaths that should have been referred to the coroner; and
 - providing education and support to doctors who certify the cause of death.
- R17 Additional functions of cause of death reviewers should be to:
- review deaths referred to them;
 - undertake targeted reviews of deaths; and
 - provide support and education for doctors who certify cause of death.

- R18 The statute should provide that, when a cause of death reviewer detects an error in the determination of the cause of death, the reviewer must:
- discuss the error with the certifying doctor with a view to reaching agreement (if necessary) about amending the certification of the cause of death; and
 - if agreement cannot be reached, refer the death to the coroner or to another authorised doctor for adjudication.
- R19 If the reviewer detects evidence of criminal activity, the reviewer must report the death to the Police.

CEMETERIES AND CREMATORIA

WHAT LAND IS CEMETERY LAND?

- R20 The Act should deem all land in which bodies are buried to be a cemetery (except urupā set aside under Te Ture Whenua Māori Act 1993).
- R21 The owner of any land who has reasonable grounds to believe that a body or bodies are buried in the land should be required to notify that fact to the relevant local authority. Local authorities should have a power to undertake such investigations as are necessary and desirable, in order to determine whether a piece of land has a body or bodies in it and should be deemed to be a “cemetery” under the Act.

OBLIGATIONS ON CEMETERY MANAGERS

- R22 The statute should require a cemetery manager to ensure that the cemetery is registered with the local authority.
- R23 A non-local authority cemetery manager must enter into a covenant in favour of the relevant local authority prohibiting the use of the land for any purpose that is inconsistent with the use of the land as a cemetery. The statute should allow a transition period of two years for these obligations. The covenant must be noted on the certificate of title of the land.
- R24 If a non-local authority owner or manager of a cemetery wishes to use the land for a purpose inconsistent with the covenant, that person may apply to the local authority either to vary the covenant or for permission to disinter all of the bodies (in which case, the covenant would be removed).
- R25 If the local authority agrees to vary or remove a covenant, this must be noted accordingly on the certificate of title.
- R26 If the local authority grants permission for all the bodies to be disinterred, it should provide notice to that effect to the District Land Registrar who should, upon notice from the land owner that all the bodies have in fact been disinterred, remove the covenant from the title.

- R27 The statute should provide that local authority cemeteries must not be used in any way that does not recognise or respect the dignity of the deceased bodies buried there.
- R28 A local authority cemetery owner or manager may apply to the Environment Court for approval to either use the land for a purpose that is inconsistent with R27 or to disinter the bodies.
- R29 In deciding whether to allow alternative uses of the cemetery or to allow the bodies to be disinterred, the local authority or the Environment Court must:
- consider the views of neighbours and users of the cemetery;
 - consider whether the public interest requires the disinterment of all the bodies; and
 - be satisfied that the interests of the community in retaining the land as a cemetery are outweighed by the interests of the community in using that land for the alternative purpose.
- R30 There should not be specific statutory restrictions on the leasing, mortgaging or selling of cemetery land.
- R31 Cemetery managers should have a statutory obligation to keep a record of every burial, including a description of the location of each grave and the identity of the person buried there, and to forward that information to the local authority at least once a year.
- R32 The statute should provide that a cemetery manager is under a duty to maintain the cemetery in a reasonable condition, having regard to how the cemetery is used by the community.

WHO IS RESPONSIBLE FOR THE MANAGEMENT OBLIGATIONS?

- R33 The statute should provide that, except as described below, the person who is the owner of the land on which bodies are buried is designated the cemetery manager and has responsibility for the management obligations under the statute. However, if, when the statute comes into force, a cemetery is managed by a group of people who are community managers of the cemetery and who do not have ownership of the cemetery land, that group is designated as the cemetery manager and has primary responsibility for the management obligations under the statute.
- R34 “Community manager” should mean a person who makes most of the day-to-day decisions in respect of a cemetery such as the provision of burial plots, maintenance of the grounds and the keeping of burial records, whether under a formal or de facto delegation from the cemetery owner.

R35 Any person who or group which who is the current manager of a cemetery on land for which the certificate of title notes previous managers as owners may apply to the District Land Registrar to be listed as an owner on the certificate of title. The District Land Registrar may make the amendment if satisfied that:

- the details in the application are, to the best of his or her knowledge, true and correct; and
- the purpose of the application is to further the management of the cemetery.

RENOUNCING, DELEGATING AND TRANSFERRING MANAGEMENT RESPONSIBILITY

R36 The local authority must assume responsibility for the cemetery management if:

- the current cemetery manager no longer wishes to manage the cemetery;
- it is in the interests of the community that the local authority manages the cemetery; and
- the local authority is able to fulfil the management obligations.

R37 The statute should provide that a person or group who is designated the cemetery manager under the exception described in R33 above, may renounce the role of cemetery manager by providing notice to that effect to the cemetery owner and to the local authority. The local authority must note in its cemetery register the fact that the role has been renounced.

R38 The statute should provide that any cemetery manager may delegate the role of cemetery manager, or any of the cemetery management powers and obligations, to any other person who provides consent.

R39 The statute should provide that the owner of cemetery land may transfer the ownership of the land, and therefore the cemetery management powers and obligations to any person, including to the local authority.

CEMETERY MANAGERS' POWERS

R40 A cemetery manager should have a statutory power to maintain any grave, memorial, vault or tablet, notwithstanding any power in any other person by virtue of a contract or bylaws.

R41 A cemetery manager that is not a local authority should have a power to apply to the local authority (and a cemetery manager that is a local authority should have a power to apply to the Environment Court) for permission to remove monuments or tablets from a whole cemetery or a part of a cemetery. In determining whether to grant permission, the local authority or Environment Court, as the case may be, must consider:

- the projected costs of maintenance of the cemetery;
- the availability of resources to perform the maintenance; and
- the reasons for any views of the community both for removal of the monuments and objecting to removal of the monuments.

- R42 The statute should provide an exception to section 42 of the Heritage New Zealand Pouhere Taonga Act 2014, such that cemetery managers may do work on a grave site for the purpose of ensuring that it is not a danger to any person working or visiting the cemetery, but only to the extent that such work is necessary for that purpose and only in a way that minimises the negative effect of the work on the historic value of the site.
- R43 The statute should provide that unless a contract for purchase of a burial plot provides otherwise, the term of interment is in perpetuity.
- R44 The statute should provide a power in cemetery managers to permanently set aside a portion of a cemetery for the burial of members of the armed forces and their spouses.

EXTRA OBLIGATIONS ON LOCAL AUTHORITY CEMETERY MANAGERS

- R45 All cemeteries that were required before the commencement of the new statute to be open for the burial of all deceased persons should continue to be subject to that requirement, except when the cemetery management has determined that the cemetery has reached full capacity.
- R46 The statute should require that local authority public cemetery managers must consider applications from denominational groups or any other group of people for a separate burial area within the cemetery. In considering such applications, managers must consider:
- costs to the cemetery of providing a separate area (including, where appropriate, the applicant's willingness to share those costs);
 - projected demand for the separate area; and
 - the effect of providing a separate area on the availability of land for burial within the cemetery and within the region.
- R47 Local authority public cemetery managers should have a duty to create and maintain a policy for their cemetery, subject to public consultation, that covers at a minimum:
- maintenance standards;
 - the provision of separate burial areas within the cemetery;
 - the opening hours of the cemetery and hours that burial services can be carried out;
 - the prices of plots and other fees for burial;
 - whether some plots may be sold for limited tenure; and
 - limitations on the rights of bereaved people to have memorials on the plot.

LOCAL GOVERNMENT'S ROLE IN RELATION TO ALL CEMETERIES

- R48 The statute should provide that local authorities have a duty to provide facilities for the disposal of dead bodies if there are otherwise insufficient facilities available in its district.
- R49 The statute should provide that local authorities have a duty to dispose of the body of any person for whom there is no other person available to do so. The reasonable costs of such arrangements should be recoverable from the estate of the deceased person or, where appropriate, from the funeral grant from Work and Income New Zealand.
- R50 The statute should require local authorities to keep a register of all cemeteries in their region and to allow public searches of that register. That register should include the names and contact details of current cemetery managers and burial information forwarded by cemetery managers.
- R51 The statute should provide a power in an authorised employee of a local authority to enter and inspect any cemetery (including any building in the cemetery, but not a dwelling house or marae unless the occupier has consented or a warrant has been obtained), for the purpose of:
- determining whether the requirements of the statute are being met; or
 - obtaining evidence that those requirements are not being met.
- R52 A local authority may provide notice to a cemetery manager of its intention to assume responsibility for the management of a cemetery if:
- it considers that the cemetery manager is failing to fulfil any or all of the obligations of cemetery management in respect of a cemetery;
 - that failure is significant; and
 - it is in the public interest for the local authority to assume management of the cemetery.
- R53 If the cemetery obligations remain unfulfilled one year after notice was given, the local authority may assume responsibility for the cemetery management by providing a second notice to that effect to the original cemetery manager and noting the change on its cemetery register. Notice is not required if the cemetery manager is unable to be found despite reasonable attempts or is unavailable due to death or incompetency.

DISINTERMENT

- R54 It should be an offence to remove a body or remains of a body buried in any cemetery or place of burial (including urupā) without the permission of the cemetery manager, the local authority or a court (as described below).
- R55 The permission of the Environment Court should be required for multiple disinterments from local authority cemeteries.

- R56 The permission of the local authority should be required:
- for multiple disinterment from cemeteries that are not local authority cemeteries;
 - when there are no more than 10 bodies buried in the cemetery (even if the application relates to fewer bodies); or
 - where the body has been buried illegally.
- R57 The permission of the cemetery manager should be required in all other cases. However, it should be open to a person to apply directly to the High Court, the Family Court or the Māori Land Court for permission, if they choose.
- R58 When deciding whether to grant permission for single disinterment, the cemetery manager, local authority or court (as applicable) may consider any relevant matter. However, except when the body was buried contrary to law or the burial was for a limited tenure that has reached its end, permission may not be granted for single disinterment unless the cemetery manager, the local authority or court (as applicable) is satisfied that all interested relatives have been consulted and there are no objections expressed.
- R59 Permission for disinterment may be granted subject to any conditions the cemetery manager, local authority or court (as applicable) considers are appropriate.
- R60 The statute should provide that no civil or criminal liability attaches to a cemetery manager or local authority who approves a disinterment in accordance with the statutory requirements.
- R61 The statute should provide that regulations may be made for the purpose of providing procedures to be followed when disinterring a body; ensuring the dignity of the body disinterred; and reducing or managing any health risks in the disinterment.

UNLAWFUL BURIAL

- R62 It should be an offence to knowingly bury a body in any land that is not an approved cemetery.
- R63 It should be a defence to this offence if the defendant can show that it was impractical to transport the body to an approved cemetery and the body was buried respectfully in another place.

APPROVED CEMETERIES

- R64 The statute should provide that any cemetery recognised under the Burial and Cremation Act 1964 as a cemetery or other burial place and that is registered with the local authority should be an “approved cemetery” for the purposes of the offence of unlawful burial.

- R65 The statute should provide that any new cemetery is an approved cemetery if:
- it has been approved by the local authority;
 - it has been registered as a cemetery on the local authority register; and
 - in respect of non-local authority cemeteries (including burial on private land), the certificate of title for the cemetery land provides a covenant indicating that bodies are buried in the land and restricting the use of the land.
- R66 The statute should permit any person or entity to apply to the local authority for approval to establish a new cemetery on any land, subject to the granting of permissions under the Resource Management Act 1991. (The process for approving burial on private land is set out in R71.)
- R67 In considering whether to grant approval for the establishment of a new cemetery, the local authority may consider any matter it considers relevant, including:
- the relevant expertise and experience of the applicants;
 - the likely effect of the proposed cemetery on neighbours;
 - the likelihood that the cemetery can be maintained as cemetery land in perpetuity; and
 - the extent to which any risks raised by the proposed cemetery can be adequately mitigated.
- R68 If a local authority decides to grant approval for the establishment of a new cemetery, it may impose any conditions it considers necessary, including:
- maintenance requirements in addition to those imposed by the statute;
 - the establishment of a fund (or a plan for the development of a fund) to provide for the maintenance of the cemetery land in perpetuity; and
 - the payment of a bond to cover the risk that the cemetery is not adequately managed into the future and the local authority would be required to take over management.
- R69 Any person may apply to the local authority for burial on private land if:
- the land in question is rural land; and
 - the cemetery is intended for the burial of no more than five bodies.
- R70 The Resource Management Act 1991 should not apply to such applications for burial on private land.
- R71 The local authority must approve any application for burial on private land if it is satisfied that:
- 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.
- R72 If a local authority decides to grant approval for burial on private land, it may impose any conditions on that approval as it considers desirable.

CREMATION

- R73 Unless the prior permission of the local authority is obtained, it should be an offence to knowingly cremate or otherwise dispose of a body except in an approved cremator or approved other device.
- R74 The scattering of ashes should not be restricted under the statute.
- R75 The statute should not require approval before the construction or use of a new crematorium. Rather, relevant considerations should be addressed through processes under the Resource Management Act 1991.
- R76 Any person should be able to apply to the local authority for permission to cremate or otherwise dispose of a body other than in an approved cremator or approved other device.
- R77 The statute should provide that, when determining whether to grant permission to cremate or otherwise dispose of a body other than in an approved cremator or approved other device, the local authority may consider any matter it considers appropriate, but it must consider:
- the reasons for applying for cremation other than in an approved cremator or approved other device;
 - 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); and
 - the views of any neighbours who may be adversely affected.
- R78 The local authority may grant permission for cremation or other disposal other than in an approved cremator or other approved device if it is satisfied that any risks are small or can be adequately mitigated. It may grant permission subject to any conditions it considers is appropriate.

STATUTORY DUTIES IN RESPECT OF THE DISPOSAL OF BODIES

- R79 The statute should provide that every person must treat any dead human body or human remains with respect. The breach of this requirement should be an offence.
- R80 The statute should provide that the person who has the duty to dispose of the body must do so without undue delay, taking into account the mourning needs of the bereaved and any ceremonies to be performed. Knowingly breaching this requirement without reasonable excuse should be an offence.

THE FUNERAL SECTOR

REGISTRATION OF FUNERAL SERVICE PROVIDERS

- R81 The statute should require that no person may carry on the business of providing funeral services unless that person is registered or is acting under the direct supervision of a registered person.
- R82 Registration should be a function of central government.
- R83 An applicant for registration must be registered if they pay the prescribed fee and demonstrate:
- the absence of convictions for offences described in R84;
 - the absence of disqualifying conditions described in R85; and
 - that the person holds the qualification required by regulations made under the statute to be held for the relevant type of funeral service or passes an approved examination.
- R84 The criminal convictions that should preclude a person from registration are:
- a conviction for an offence under the Burial and Cremation Act 1964 or the new statute;
 - a conviction for an offence against section 150 of the Crimes Act 1961;
 - a conviction for dishonesty (as defined in the Crimes Act 1961) within the previous 10 years;
 - a conviction for an offence under Part 1 (relating to unfair conduct) or subparts 1 or 2 of Part 4 (relating to layby sales and uninvited direct sales) of the Fair Trading Act 1986 within the previous 10 years;
 - a conviction resulting in the imposition of a term of imprisonment of three years or more; or
 - a conviction within the previous five years resulting in the imposition of a term of imprisonment of six months or more.
- R85 The conditions that would disqualify a person from registration should be that the person:
- is under 18 years of age;
 - is an undischarged bankrupt;
 - has already had their licence cancelled under the Burial and Cremation Act 1964 or the new statute;
 - has been prohibited from being a director, promoter or manager of a company;
 - is subject to a property order under the Protection of Personal and Property Rights Act 1988;
 - is a person in respect of whom a personal order has been made under the Protection of Personal and Property Rights Act 1988; or
 - is subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

- R86 The statute should provide that a person is deemed to hold the relevant qualification if that person has been providing the relevant funeral service for a period of five years prior to the application for registration.
- R87 Registration should be renewed every three years.
- R88 The registration authority should have the power to investigate and prosecute any breach of the registration requirements and to cancel the registration of a person if it is satisfied that one of the conditions for registration ceases to exist.
- R89 A person may appeal any decision of the registration authority to the District Court. Any appeal from such a decision of the District Court should be on questions of law only.
- R90 The statute should provide that carrying on business as a funeral director in breach of the requirement in R81 is an offence.

DUTIES ON PROVIDERS OF FUNERAL SERVICES

- R91 The statute should provide that every owner or manager of a funeral service business is under a duty to ensure that:
- records are kept in respect of 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; and
 - unclaimed or disputed ashes are held for at least 10 years.
- R92 A funeral service business should have a power to inter or scatter ashes in an appropriate location if:
- at least 10 years have elapsed since cremation;
 - the ashes remain unclaimed;
 - notice has been sent to the last known address of the applicant for cremation; and
 - the ashes remain unclaimed or in dispute six months after the date of the notice.
- R93 The statute should provide that:
- if a deceased person appointed a deceased's representative, that person has the right to custody of the ashes after the body has been cremated and to decide how they will be dealt with; and
 - if a deceased's representative has not been appointed, the family (as is defined in Part 4) has the right of custody of the ashes.
- R94 The statute should provide that a breach of the duties in R91 is an offence for which the owner, manager or the business itself may be liable.

INSPECTION OF PREMISES

- R95 The statute should provide that any authorised employee of a local authority or Police officer may at all reasonable times enter and inspect any land or building used for the provision of funeral services and seize records for the purpose of determining compliance with the statute or any regulations made under the statute.

DISCLOSURE OF COMPONENT PRICES

- R96 The department administering the new statute should develop and maintain a website providing consumer information to assist consumers making decisions after a death, particularly decisions about purchasing funeral services.
- R97 The statute should require that funeral service providers must publish and make available a price list of all the funeral goods and services it provides, including:
- a description and total price of funeral goods and services offered;
 - a list of any service fees charged by the funeral service provider;
 - the maximum price that a funeral service provider charges for funeral goods and services; and
 - any particular items required by regulations made under the new statute.
- R98 The statute should require that, prior to entering an agreement for the supply of funeral goods or services, the funeral service provider must give the consumer a statement of the costs of the funeral. A breach of this requirement should be an offence.
- R99 That statement of costs must set out:
- the cost of each of the goods and services to be supplied;
 - the cost of any disbursements;
 - the cost of any service fees;
 - if the goods and services to be supplied is a package, the description of each item in the package and a total cost of the package; and
 - how the consumer may make a complaint.
- R100 Each item on the statement of costs (except disbursements) must correspond with an item on the published price list.
- R101 If the funeral service provider does not know the cost of any disbursements at the time of providing the statement of costs, the funeral service provider must provide a reasonable estimation of the cost and a statement of the actual disbursement cost with the final invoice.
- R102 A service fee may only cover services for which the cost is not able to be ascertained at the time of providing the statement of costs.
- R103 The statute should provide that a breach of these requirements is an offence.

BURIAL DECISIONS

THE EXECUTOR

R104 The statute should provide that, in the event that the family is unable to agree on the funeral arrangements or disposal of the body or any remains, the executor should have the right to make these decisions and should have a duty to dispose of the body. This right and duty is subject to the right and duty of the deceased's representative, if one is appointed.

THE DECEASED'S REPRESENTATIVE

R105 The statute should provide that before their death, a person may appoint a deceased's representative.

R106 Upon the death of the appointer, a deceased's representative should have a power to make decisions, in preference to all others including the executor, as to:

- funeral arrangements;
- how the body will be disposed of; and
- how any remains of the body should be dealt with.

R107 A deceased's representative should have a duty to dispose of the body of the appointer after death.

R108 A deceased's representative (or the executor if there is no such representative or if the representative fails to act) should have a right to custody of the body of the appointer when he or she dies. That right can be exercised for the limited purposes of exercising the rights and duties in respect of funeral arrangements and disposal of the body. The right to custody of the body must be subject to other applicable laws, such as the right of Police to take custody of a body under the Coroners Act 2006.

OTHER POWERS AND DUTIES

R109 The statute should provide that every member of the deceased person's family should have all powers necessary to make decisions about funeral arrangements, disposal of the body or how to deal with any remains and should have a duty to dispose of the body of the deceased person in the event that:

- there is no deceased's representative or executor or that person fails to fulfil their role;
- it is reasonably practicable for that family member to do so;
- it is appropriate with regard to the relationship between the deceased and that family member; and
- there is no other reason why that family member should be exempt from the duty.

R110 The statute should provide that any person has the power to make decisions about funeral arrangements, disposal of the body or how remains of the body should be dealt with if there is no executor, deceased's representative or family member who is doing so.

- R111 The statute should provide that funeral service providers should not be liable for any deficiency in the authority of the person with whom they are contracting for the provision of funeral services if they have no reason to consider that there is a deficiency in that authority.
- R112 The statute should provide that the estate of the deceased person should be liable for the reasonable costs of funeral arrangements and disposal of the body. What is “reasonable” should depend upon the size of the estate left by the deceased and the deceased’s position and circumstances in life.
- R113 Decision-makers should be liable for any costs incurred by them in relation to funeral arrangements and disposal of the body to the extent that the costs are not reasonable or cannot be covered by the estate.

FACTORS TO BE TAKEN INTO ACCOUNT WHEN MAKING BURIAL DECISIONS

- R114 The statute should require that where a deceased person has expressed in writing his or her wishes relating to funeral arrangements, disposal of their body or handling of their remains, the person making the decisions about those matters must give effect to those wishes unless satisfied that there is a compelling reason not to do so.
- R115 Where a deceased person has expressed such wishes but not in writing, they must be taken into account by the person making the relevant decisions.
- R116 A person making decisions relating to funeral arrangements, disposal of the body or how any remains should be dealt with must take account of any views of the family. In particular, that person must seek out the views of family members to the extent that he or she considers is practicable in the time available, giving particular priority to obtaining the view of any spouse. That person must give preference to the views of those people closest to the deceased person, particularly any spouse.
- R117 A person making decisions relating to funeral arrangements, disposal of the body or how any remains should be dealt with must take account (where appropriate) of tikanga Māori, and any religious, cultural and ethical beliefs or practices of the deceased or their family.
- R118 A person making decisions relating to funeral arrangements, disposal of the body or how any remains should be dealt with must take account of the likely size of the estate and its ability to cover the costs of the decisions relating to funeral arrangements, disposal of the body and dealing with any remains.

THE ROLE OF THE COURTS

- R119 The statute should enable applications to be made to the High Court, the Family Court or the Māori Land Court for determination of post-death disputes in relation to funeral arrangements, disposal of the body or how any remains should be dealt with.
- R120 If the parties cannot agree on which court should hear the proceedings, the matter should be heard in the High Court.
- R121 In relation to such an application, the court should have power to:
- appoint a person to make a decision;
 - determine whether a decision that has been made is reasonable in the circumstances;
 - make a decision about funeral arrangements, disposal of the body or how any remains should be dealt with;
 - make an interim order to secure the position of the body, including a power to order that the body be moved to a new location and a power to appoint someone to act as custodian of the body; and
 - order disinterment of a body buried in breach of the rights of an executor or deceased's representative.
- R122 When exercising this jurisdiction, a court should be required to take account of:
- the deceased's wishes;
 - the views of members of the deceased's family group (with the specific weighting we describe above in R116);
 - relevant cultural considerations, including tikanga Māori;
 - the practicality, cost and timeliness of any proposed burial arrangements; and
 - any other factors the court thinks are relevant.
- R123 The statute should require the court to determine applications in this jurisdiction with expediency.
- R124 A court order made by the Family Court should be able to be appealed as of right to the High Court and should be heard by way of rehearing on matters of law only.
- R125 A court order made by the Māori Land Court should be subject to existing appeal processes to the Māori Appellate Court as set down in the Te Ture Whenua Māori Act 1993.
- R126 The statute should require that before proceedings are commenced under the burial dispute jurisdiction, the parties must file a genuine steps statement, outlining the steps they have taken, if any, to resolve the issues.
- R127 The court may take account of the genuine steps statement or any failure to file a genuine steps statement when exercising any of its powers or functions under the burial disputes jurisdiction and when considering costs.

Chapter 1

Introduction

SCOPE OF REVIEW

- 1.1 Every year there are approximately 30,000 deaths in New Zealand.⁶ Each of those deaths is a profound event in the lives of the surviving family. In the midst of their grief, they usually engage a funeral director and make decisions about funeral preparation and whether the body will be cremated or buried. How those decisions are made is unique to each family—determined in accordance with family dynamics and cultural, religious and ethnic background.
- 1.2 At another level, each of those deaths invokes the services of an array of private and public individuals, including the doctors and coroners who determine the cause of death; the funeral directors and embalmers who prepare the body for the funeral; the celebrants and others who perform services or provide materials for the funeral service; and the cremator operators and cemetery managers who dispose of the body.
- 1.3 Some of these post-death activities are controlled by the law, in particular, by the Burial and Cremation Act 1964 (the Act). In 2010, the government asked us to undertake a comprehensive first principles review of that law. The expectation was that the review would examine the basic precepts of the legislation to determine whether it was fit for purpose in the modern world and into the future and to make recommendations where it was found wanting.
- 1.4 Most of the Act concerns only cemeteries, following on from the Cemeteries Management Act 1877 and the Cemeteries Acts of 1882 and 1908. The Act is administered by the Ministry of Health. That reflects the now outdated idea that there are significant health concerns with the burial of bodies. That Act prescribes approved places to bury bodies, including local authority cemeteries, trustee cemeteries, denominational burial grounds and some special burial places. The Act has a few provisions covering cremation, but most cremation regulation is found in the Cremation Regulations 1973, made under the Act. In 2009, provisions relating to the certification of the cause of death were transferred into this Act from the Birth, Deaths, Marriages, and Relationships Registration Act 1995.
- 1.5 The terms of reference of this review are as follows:
 1. To undertake a first principles review of the Act identifying the key public interest questions relevant to the handling and burial or cremation of the dead.
 2. To undertake a process of targeted and public consultation to determine the principles, policies and objectives which should drive legislation regulating the handling and burial of the dead in contemporary New Zealand.

⁶ Statistics New Zealand “Births and Deaths: Year ended December 2014” (26 June 2015) Statistics New Zealand < www.stats.govt.nz/browse_for_stats/ > .

3. To determine whether the public interest requires the retention of primary legislation or whether the control and regulation of burials and cremations could be devolved to local authorities.
4. To improve the efficiency and effectiveness of the legislation by eliminating the current overlap and duplication between the Act and related legislation and regulations.
5. To deal explicitly with a number of issues, including:
 - whether the Act in its current form is meeting public expectations and needs with respect to the handling and burial or cremation of the dead with specific reference to:
 - The care and custody of the body after death;
 - The provision of culturally appropriate options for burial or cremation;
 - The responsiveness to individual or group requirements that fall outside the ambit of the current Act (e.g. eco or green burials);
 - The suitability of religious affiliation as the sole criteria for the establishment of burial grounds (Part 4 s 31); and
 - The responsiveness of the Act and associated territorial bylaws to the beliefs, customs and practices of Māori;
 - to examine the interface between the Act, the Coroners Act 2006, the Health Act 1956, the Local Government Act 2002 and the Resource Management Act 1991 to identify redundant and or duplicate provisions;
 - identify any residual public health provisions in the Act and make recommendations as to the most appropriate legal vehicle for these provisions;
 - consider whether the current system of self-regulation of funeral directors should be continued or an alternative system of regulation be instituted;
 - consider whether nationally consistent regulations are required to regulate the dispersal of human and animal ashes to avoid cultural offence and nuisance; and
 - examine the adequacy and efficiency of the current laws and regulations relating to death certification and notification and in particular whether there should be a statutory provision for certifying life is extinct.
6. To prepare an issues paper, undertake targeted and public consultation on the issues and call for public submissions.
7. To prepare a final report and draft Bill including recommendations as to the most appropriate government department to administer the new statute.

CONSULTATION

- 1.6 We divided this large project into four streams of work:
- Death certification—the process for determining the cause of death.
 - Cemeteries and crematoria—the framework for establishing cemeteries and crematoria and the obligations of managers of these facilities.
 - The funeral sector—whether the current system of self-regulation should be continued or an alternative system instituted.

- Burial decisions—whether there should be a new framework for making decisions about the deceased body.
- 1.7 The death certification stream was unique from the others because it was likely to be of particular interest to doctors, funeral directors and some public officials but not to the broader public. Consequently, we split that stream from the others and, in May 2011, published Issues Paper 23 on death certification entitled *Final Words: Death and Cremation Certification in New Zealand*.⁷ We received 45 submissions—half of those from medical professionals or medical organisations.
 - 1.8 In October 2013, we published Issues Paper 34 on the remaining three streams. That paper was entitled *The Legal Framework for Burials and Cremation in New Zealand: A First Principles Review*.⁸ Due to the broad public interest in these streams of the project, we utilised a comprehensive strategy for consultation, including printing and distributing copies of Issues Paper 34, including to public libraries.
 - 1.9 Of particular note, we held a series of public meetings throughout New Zealand on the issues raised in that paper, including many provincial centres such as Whangarei, Gisborne, Napier, Nelson and Rotorua. Particular attention was given to those places that had a significant Māori population where the practices of traditional tangihanga were well adhered to by the Māori community. These meetings were generally well attended and provided us with a clear perspective on the practical problems with the law in this area.
 - 1.10 We received over 260 submissions on these streams of the project—both comprehensive submissions on Issues Paper 34 and hard-copy or web-based responses to a shorter-form questionnaire. In addition to receiving submissions, we held meetings with a range of stakeholders. For example, we met with religious and community groups that had specific interest in how funerals and cremations are conducted. These included representatives from the Muslim, Hindu and Sikh communities. The funeral industry has taken a keen interest in the progress of this project. We met with the main industry bodies—the Funeral Directors Association of New Zealand, New Zealand Independent Funeral Homes and the New Zealand Embalmers Association—on several occasions and attended their conferences.
 - 1.11 We have heard the perspectives of local authorities in a number of ways including through discussions with Local Government New Zealand and the policy staff of several individual councils. We also heard the views of professional staff employed by councils to manage cemeteries and crematoria, through telephone conversations and attending the annual conference of the New Zealand Cemeteries and Crematoria Collective.
 - 1.12 Officials from various government departments have also been consulted throughout the course of this project, including officials from the Ministry of Health, the Ministry of Justice and the Department of Internal Affairs. We have also consulted coroners and the Registrar-General of Births, Deaths and Marriages.
 - 1.13 We found strong interest in this project from Māori due to the central role of tangihanga in Māori life. We consulted with Māori through the public meetings and also through private meetings with people holding special knowledge of tangihanga. Meetings with iwi were primarily held in the North Island including Whangarei, Hamilton, Rotorua, Gisborne and Napier. The meetings were held in venues that hold an important role in the relevant Māori community. They included the Māori Land Court, iwi and hapū marae and urban or university

⁷ Law Commission *Final Words: Death and Cremation Certification in New Zealand* (NZLC IP23, 2011).

⁸ Law Commission *The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review* (NZLC IP34, 2013).

marae. Iwi representatives were present at each of these meetings and ensured that iwi perspectives were well understood by us.

- 1.14 In 2012 we re-established our Māori Liaison Committee to provide us with a Māori perspective on all of our projects. The Committee has among its members some of New Zealand's foremost scholars and legal experts in tikanga and Māori law. The Committee provided us with invaluable guidance on the best way to deal with the sensitive issues of tangihanga. This is particularly reflected in the fourth stream of work on burial decisions. The intent of our recommendations in that section is to ensure that the principles of tikanga applicable to tangihanga are given space to operate in the decision-making framework.

THE NEED FOR REFORM

- 1.15 In the course of this consultation we formed the view, as we demonstrate in this Report, that the Act is no longer fit for purpose and should be replaced by a more modern statute. The problems tend to fit into two broad categories. First, the Act has not aged well. Many of its provisions are overly prescriptive to a modern reader, and it is difficult for people affected by its provisions to understand their powers and obligations. Also, it does not fit well with recent legislative developments such as the significant reforms in the Resource Management Act 1991 and the Local Government Act 2002.
- 1.16 Second, the Act does not reflect some of the more modern values and principles that New Zealanders consider are important in this area. For example, we found an increasing desire for more choice in burial and cremation arrangements. This desire is driven both by an increasing emphasis on personal autonomy in burial decisions and by our increasingly diverse cultural landscape. We found strong support for the legislation to recognise and permit people to exercise their cultural, religious and ethnic customs through post-death rituals and decisions. This particularly includes recognition of tikanga Māori and legislative amendments that allow for its operation after death, where appropriate. Finally, we found a growing trend for more environmentally friendly options for funerals and the disposal of bodies and, in particular, a strong trend towards eco-burial options.

A NEW STATUTE

- 1.17 This Report is divided into four substantive parts, reflecting the four streams of work in this project. In each part, we recommend that the existing legislative provisions be repealed and replaced by new, more modern requirements.
- 1.18 One of our key findings is that it is only the death certification provisions of the Act that have a primarily health focus. Consequently, in the future, the Ministry of Health should have responsibility for only those provisions. We consider that the provisions relating to the determination of the cause of death would fit better into the Health Act 1956 or another existing health statute.
- 1.19 We consider that the proposed new requirements for cemeteries, crematoria and the funeral sector should be in a new, standalone statute administered by the Department of Internal Affairs (DIA). Those areas closely align with other areas of responsibility of the Department, particularly the Resource Management Act 1991 and the Local Government Act 2002. Local governments already register funeral directors and, through the resource consent process, consider land use issues arising in the establishment of new cemeteries and crematoria.

- 1.20 Our recommendations in Part 4 for a new legislative framework for burial decisions could be located in the new burial, cremation and funeral sector statute or in a separate statute. The Ministry of Justice should have responsibility for administering this framework.

RECOMMENDATION

- R1 The Burial and Cremation Act 1964 should be replaced by a new statute for burial, cremation and funerals to be administered by the Department of Internal Affairs. However, provisions relating to the determination of the cause of death should be transferred to a statute administered by the Ministry of Health.

VALUES UNDERPINNING OUR PROPOSALS

- 1.21 In Issues Paper 34 we described four principles that must be fundamental to any reform in this area.⁹ Those principles, which we continue to endorse, are as follows:
- **Dignity of the deceased body**—in all cultures, the deceased body has a special status. While dead bodies do not have a *right* to dignity (because dead bodies cannot hold rights), it is broadly accepted that treating deceased bodies with dignity reflects our own dignity as human beings.
 - **Tikanga Māori**—the imperatives of tikanga relating to death, mourning and tangihanga are significant and deeply held. It is therefore important that any law reform in this area leaves space for tikanga to operate as much as possible, where appropriate.
 - **Freedom of religion and belief**—the New Zealand Bill of Rights Act 1990 recognises the right of all citizens to practise their religion or beliefs and the right of members of minority groups to enjoy their culture.¹⁰ Rituals around death and burial are often significant elements of culture, religion and ethnicity. Therefore, any law reform in this area must allow as much flexibility as possible around the customs and rituals of death.
 - **Legislative certainty and accessibility**—the law must always be clear in its requirements so that people know what their rights and responsibilities are. This is particularly important in the area of burial law where decisions must be made quickly and are often irrevocable.
- 1.22 In our view, the new statute should have a purpose provision that reflects these values and forms the backdrop for interpretation of all the other provisions in that statute and that informs how powers given under the statute should be exercised.

⁹ At 26.

¹⁰ New Zealand Bill of Rights Act 1990, ss 15 and 20.

Part 1

DEATH CERTIFICATION



Chapter 2

The current system of death certification

- 2.1 Since the 1840s, New Zealand has considered it important to account for every death—that is, to record the fact of death and the cause of death in a central register. In New Zealand, registration of the fact of death began for Pākehā in 1847 (although it was not standardised or comprehensive until 1856) and for Māori in 1913. However, it was only in the later part of the 20th century that full descriptions of the cause of death were also included.¹¹
- 2.2 Death certification is significant for several reasons. For the family, it is a record of the precious life that is now gone, it records important information as to familial medical histories and it might determine whether a life insurance claim can be paid. For the doctor, it marks the final act in the professional care relationship. However, for society, it provides vital demographic data upon which policy decisions are based and large sums of money are spent. Therefore, it is somewhat surprising to discover, as we describe in Chapter 3, that error in death certification is so common, not only in New Zealand but around the world. Doctors receive little training in correct death certification practice, and this task is commonly afforded low priority in the context of busy medical practices.
- 2.3 In 2011 we published Issues Paper 23 *Final Words: Death and Cremation Certification in New Zealand*.¹² It asked for feedback on a range of proposals for reform in this area. We received 45 submissions, with a particularly strong representation from the medical community.¹³ Submitters were very clear that the death certification process requires substantial reform. Common complaints were that it was cumbersome, produced inconsistent and inaccurate results and lacked independence and sufficient checks and balances.
- 2.4 In this part of the Report, we describe the current process of death certification, the problems we discovered through research and consultation and a range of proposals for reform of the system. In making proposals for reform, we are attempting to improve accuracy in the death certification process and create an efficient and cost-effective system.

THE CURRENT DEATH CERTIFICATION DOCUMENTS

- 2.5 The current system of death certification involves a number of statutory and non-statutory documents—some are old and antiquated, some duplicate the content required in others and some ask questions that are very difficult to answer. When a body is to be cremated, up to six documents must be completed between death and cremation. The various documents required are described below in chronological order.

11 Ian Pool “Death rates and life expectancy: Recording births and deaths” (13 July 2012) Te Ara: The Encyclopedia of New Zealand < www.teara.govt.nz/en/death-rates-and-life-expectancy/page-1 > .

12 Law Commission, above n 7.

13 The breakdown of submitters by type is as follows: 11 medical organisations; 11 medical professionals; 8 government organisations (central and regional); 3 submitters from the funeral industry; 3 legal professionals; 1 from the insurance industry; and 8 other individuals.

Life Extinct form

- 2.6 The Life Extinct form was developed by the Police to certify *the fact of death*. It is a form used by the Police in relation to sudden deaths when a doctor is not able to certify that the death was a natural consequence of illness. It provides a trigger for other Police duties in respect of sudden deaths, such as opening a sudden death file and referring the death to the coroner. It is also used by coroners as, in practice, this is what triggers their jurisdiction, although it is not a legal requirement.¹⁴
- 2.7 Currently, the Life Extinct form is completed by doctors and paramedics. There have been recent discussions amongst stakeholders about extending that authority to certain registered nurses, nurse practitioners and midwives. It was thought that extending the authorised group in that way would reduce delays in the processing of bodies after death, particularly in rural areas and in aged care facilities.
- 2.8 We have found that it is common for people to confuse the Life Extinct form (which certifies the *fact* of death) with the Medical Certificate of Cause of Death (which certifies the *cause* of death), described below. There also appears to be an erroneous understanding by some that the law requires the Life Extinct form to be completed before a body may be moved. Any requirement to complete a Life Extinct form prior to moving a body is a practical requirement imposed by the party concerned rather than a legal requirement.

Record of Death form

- 2.9 The Record of Death form was developed by the Chief Coroner to help doctors determine whether a death is reportable under the Coroners Act 2006. It was developed in Canterbury after the inquiry into deaths of patients of cardiothoracic surgeon Keith Ramstead and was subsequently rolled out to every District Health Board. It is used only for deaths in hospitals and is not a statutory requirement. There is currently no equivalent form for non-hospital deaths, although we understand that one is in development.
- 2.10 A death is reportable under section 13 of the Coroners Act if it occurs in New Zealand and:¹⁵
- the death is without known cause or is a suicide or is unnatural or violent;
 - there is no doctor's certificate given;
 - the death occurred in certain circumstances during medical, surgical or dental operation or treatment; or
 - the death occurred in official custody or care.
- 2.11 Doctors have found this form to be useful. However, it is also common for doctors to have a telephone conversation with the local coroner to discuss whether they should report the death or determine the cause of death themselves.

Medical Certificate of Cause of Death

- 2.12 The Burial and Cremation Act 1964 (the Act) requires a doctor to complete a “doctor's certificate” where a patient's death is a natural consequence of an illness.¹⁶ Also under that Act, a body must not be disposed of unless a doctor's certificate has been completed (or

¹⁴ The Life Extinct form is not a statutory form and is *not* required by law. In Chapter 5, we consider whether it should become a statutory requirement.

¹⁵ Amendments to these requirements are proposed in the Coroners Amendment Bill (239-1), clause 9, which was introduced in August 2014.

¹⁶ Burial and Cremation Act 1964, s 46B(1).

coroner's authorisation obtained).¹⁷ The form and requirements of the "doctor's certificate" are not provided in the Act, but doctors understand this to refer to the document that establishes the cause of death. In practical terms, this is the Medical Certificate of Cause of Death (MCCD) form created by the Ministry of Health to conform to the World Health Organisation's categorisation and codification of mortality and morbidity data.

- 2.13 That form records the cause of death; the date of death (as told to the doctor); the date the doctor last saw the deceased person alive; confirmation as to whether the doctor saw the body after death; place of death; and confirmation as to whether the deceased had an infectious disease.
- 2.14 In describing the cause of death, the form requires details of:
 - the disease or condition directly leading to death;
 - any antecedent causes of death;¹⁸
 - any underlying cause of the death; and
 - any other significant conditions contributing to the death but not related to the disease or condition causing death.
- 2.15 This form is sometimes erroneously referred to as the "death certificate". The death certificate is actually the document produced by the Registrar-General of Births, Deaths and Marriages, described below. In this Report, we will refer to this form as the MCCD.

Transfer of Charge of Body form

- 2.16 The Act requires that a Transfer of Charge of Body form must be obtained when a person is transferring the body into another person's charge.¹⁹ The form is a standard form issued under the Births, Deaths, Marriages, and Relationships Registration Act 1995 under which the person taking charge of the body undertakes responsibility for notifying the Registrar-General of Births, Deaths and Marriages of the death and for disposing of the deceased body. It also records the intended place of disposal of the deceased body.
- 2.17 The Transfer of Charge of Body form is not required in certain circumstances, including when a funeral director is collecting a body from an aged care facility or a private home.²⁰

Cremation certificates

- 2.18 There are a number of additional forms that must be completed under the Cremation Regulations 1973 (the Regulations) if a body is to be cremated.

Application for Cremation

- 2.19 The Regulations require that a cremation application in the prescribed form be completed, usually by the executor or near relative of the deceased.²¹ The purpose of the form is for the executor or near relative to identify any circumstances of the death that may indicate that the death should be referred for further investigation and to provide details that may be cross-referenced to other documentation such as the name of the attending doctor, the names of

¹⁷ Section 46AA.

¹⁸ The antecedent cause of death is the condition that led to or precipitated the immediate cause of death. For example, myocardial ischemia caused by coronary artery disease is an antecedent cause of heart failure (the immediate cause of death) where the underlying cause is coronary arterial atherosclerosis "Antecedent causes of death – Oxford Reference" < www.oxfordreference.com/view/10.1093/oi/authority.20110803095415920 > .

¹⁹ Burial and Cremation Act, s 46F.

²⁰ Section 46F(2).

²¹ Cremation Regulations 1973, reg 5(1).

people present at the time of death and the presence of biomechanical aids that may create a risk upon cremation.

Biohazards Certificate

- 2.20 A doctor must complete the Certificate in Relation to Pacemakers and other Biomechanical Aids (Biohazards Certificate) after examining the body.²² That certificate is prescribed in the Regulations and, as the name suggests, requires that the doctor identifies any pacemakers or biomechanical aids in the body.

Certificate of Medical Practitioner (Cremation Certificate)

- 2.21 A Certificate of Medical Practitioner (more commonly referred to as the Cremation Certificate) must also be completed by a doctor permitted to complete the doctor's certificate.²³ The Cremation Certificate is a prescribed form in the Regulations that 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 prior to cremation of the body.
- 2.22 If a doctor's certificate has not been completed in respect of the body (and therefore the death was referred to the coroner), a coroner's certificate, prescribed by the Regulations, is required instead of the Cremation Certificate.²⁴

Permission to Cremate form

- 2.23 No body may be cremated without a "medical referee" completing the Permission to Cremate form prescribed in the Regulations.²⁵ That form states that the referee is 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.
- 2.24 Medical referees are contracted by crematorium operators to complete these forms. Referees are paid for this service by the funeral director who then invoices this cost to the bereaved family. Completing the Permission to Cremate form requires an examination of the MCCD, the Cremation Certificate and the Biohazards Certificate, but medical referees do not generally have access to the medical records.

Notification of Death

- 2.25 A person who disposes of a body either through burial or cremation must notify the Registrar-General of Births, Deaths and Marriages of the death within three working days of the disposal of the body.²⁶ This notification is typically done by the funeral director on behalf of the family via an online form called the BDM 28. The form requires identifying details of the deceased person (including the date and place they were born); details of the deceased person's parents (including their professions); details of the deceased person's marriages and their children; and the dates of birth of any living spouses. It also requires details of the cause of death that must be transcribed from the doctor's handwritten MCCD.

22 Regulation 7(1).

23 As above.

24 As above.

25 Cremation Regulations, reg 4(2).

26 Births, Deaths, Marriages, and Relationships Registration Act 1995, ss 42 and 48.

Death certificate

- 2.26 The “death certificate” is the record of the details of the death from the statutory register of deaths that can be purchased from the Registrar-General of Births, Deaths and Marriages after the death has been registered.

THE ROLES OF KEY STAKEHOLDERS

- 2.27 There is currently no central agency with responsibility for the death certification system. Below, we outline the different roles involved in the process.

Doctors

- 2.28 Doctors are the key players in the death certification process because they are responsible for identifying the cause of death and completing most of the post-death documentation. The Act places an obligation on doctors to complete the MCCD immediately after they learn that a patient has died if they are satisfied that the death was a natural consequence of illness.²⁷ If the doctor is not satisfied of that, the death is referred to the coroner for further investigation. If the deceased person’s own doctor is unavailable, the Act provides for another doctor to complete the MCCD if they have examined the body and the medical notes.
- 2.29 After a death, the doctor may also be required to complete a Life Extinct form, a Record of Death form, the Biohazards Certificate and the Cremation Certificate.
- 2.30 Senior and experienced doctors are engaged by crematoria to fulfil the statutory role of medical referee in respect of disposals by cremation. Under the Regulations, they must not permit any cremation unless the documentation is complete and adequate and the death has been investigated by the coroner (where that is required by the Coroners Act).

The Police

- 2.31 Police are involved where a death is not clearly a natural consequence of illness. This includes sudden deaths in the community, such as car accident fatalities. When the Police attend a death, they will verify the fact of death by asking a doctor or paramedic to complete the Life Extinct form. Once the fact of death is verified, the Police will open a sudden death file, refer the death to the coroner and undertake procedures for identifying the body.

Coroners

- 2.32 Coroners investigate all deaths that are not a natural consequence of illness. Their main role in relation the death certification documents described above is at the initial stage, in accurately identifying deaths that require further investigation. Consequently, coroners provide assistance to doctors when deciding whether a death was a natural consequence of illness.
- 2.33 Prior to 2007, doctors would approach their local coroner for advice on completing the MCCD. However, since 2007, that service has been provided centrally by the National Initial Investigations Office, based in Auckland. Coroners are rostered to provide on-call advice to doctors. The previous Chief Coroner, Judge Neil McLean, advised us that, as coroners are generally not medically trained, this service usually discusses the degree of certainty required of the doctor when determining whether the death was a natural consequence of an illness.

²⁷ Burial and Cremation Act, s 46B.

Funeral directors

- 2.34 Funeral directors have a role in relation to most deaths in New Zealand. They are usually engaged by the deceased person's family to move the body from the place of death to the funeral home or mortuary and then to the place of disposal, whether a crematoria or cemetery. Although there is no statutory obligation to do so, they can play an important role in identifying circumstances of the death that may indicate that it should be referred for further investigation.
- 2.35 On behalf of the bereaved family, they undertake a number of functions in relation to death certification:
- They ensure that the MCCD is obtained before disposal of the body.
 - When the body is to be cremated, they arrange for the family to complete the application for cremation and ensure that all other cremation documentation is completed by a doctor and provided to the medical referee.
 - They obtain personal information from the bereaved family for notification of the death to the Registrar-General of Births, Deaths and Marriages. For this purpose, they also transcribe the cause of death from the MCCD.

The Registrar-General of Births, Deaths and Marriages

- 2.36 Every death must be notified to the Registrar-General of Births, Deaths and Marriages within three days of disposal of the body.²⁸ The usual practice is for the funeral director to complete an electronic notification form called the BDM 28. If a funeral director is not engaged, the family or executor must complete the BDM 28. The Registrar-General then enters that information onto the register of deaths. The death certificate is then available to purchase, and as an official record of death, it can be used by the family or executor to begin probate, claim life insurance and close bank accounts.
- 2.37 Every month, the Registrar-General provides electronic death registration data to the Information Group in the National Health Board at the Ministry of Health.

Mortality coders at Ministry of Health

- 2.38 The Ministry of Health has a small team of mortality coders who receive monthly notifications of deaths from the Registrar-General of Births, Deaths and Marriages. They use 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 in accordance with the World Health Organisation (WHO) Rules and Guidelines for Mortality Coding.
- 2.39 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 their international datasets.

28 Births, Deaths, Marriages, and Relationships Registration Act 1995, ss 42 and 48.

Chapter 3

Problems with the current system

- 3.1 Almost without exception, every person we consulted throughout the course of this review or who made submissions on Issues Paper 23 *Final Words: Death and Cremation Certification in New Zealand* considered that there were significant problems with the current death certification system. Funeral directors told us that the unavailability of doctors caused unnecessary and distressing delays in moving bodies from the family home or aged care facilities. On the other hand, doctors told us that they came under unreasonable pressure to complete documentation quickly. They also emphasised how difficult the documents were to complete and how little accompanying guidance there is. Coroners and government officials told us about the frequency of errors in the documents identifying the cause of death and whether or not a death should be referred to the coroner. Across the board, submissions were concerned about the current lack of oversight and checks on the system.
- 3.2 The current legal requirements for documentation after death serve a number of purposes—some public and some private in nature. Those purposes, and the relevant importance of each, must be understood in order to also understand the problems with the current system and the solutions for the future.
- 3.3 We consider that there are three primary purposes of death certification and a range of secondary purposes. The primary purposes are to:
- establish the fact of death—this is important for a range of functions, including maintaining accurate population data and preventing fraud;
 - inform the development of public health policies and programmes—information as to cause of death is used to inform decisions about resource allocation and programme development in the health sector, for example, it is used to measure life expectancy and determine the incidence of death from specific causes; and
 - detect wrongful and preventable death—cause of death information is also vital to identifying which deaths are from natural causes and which deaths are not (and so may require further investigation).
- 3.4 The secondary purposes of death certification include:
- enabling probate and the settling of estates;
 - enabling life insurance claims;
 - investigating and prosecuting crime;
 - reducing identity theft;
 - determining succession in the Māori Land Court;
 - researching genealogy; and
 - understanding family medical history.

- 3.5 It can be seen that the public purposes of death certification include health, justice and statistical purposes. Understanding these purposes is relevant to the discussion later about which government organisation should be responsible for the administration of the death certification system and how that system should be funded.
- 3.6 We have identified a range of problems with the current system, both described by submitters and encountered in our other research, that undermine its effectiveness in meeting those purposes. These problems fall into the following categories.

ERRORS IN RECORDING THE CAUSE OF DEATH

- 3.7 It is very important that the cause of death recorded on the MCCD is as accurate as possible. As described above, that information is used to inform decisions on future health programmes and policies, which may involve setting priorities and targeting interventions. On a private level, the cause of death gives family members information relevant to their own health and gives insurance companies information necessary for determining insurance claims.
- 3.8 Unfortunately, errors in recording the cause of death are fairly common. This is a worldwide problem. International examinations of the rate of error by doctors on death certification documents have found error rates of 24–37 per cent, with major errors (which may require reissuing the document) amounting to the bulk of errors.²⁹ In New Zealand, the error rate has not been seriously studied, possibly because there has been no central agency responsible for death certification. However, we reported in Issues Paper 23 that a “mini audit” of 1,331 MCCDs by the Ministry of Health found errors in 24 per cent, with errors ranging from non-specific causes of death, failure to correctly differentiate between underlying, proximate and contributory causes of death and failure to provide critical information such as the primary site of cancer.³⁰
- 3.9 The nature of errors in recording the cause of death can include incomplete forms, illegible handwriting, inattention to detail and inaccurate causes of death. 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.³¹ Anecdotally, we were told that myocardial infarction (heart attack) was often the default diagnosis of the cause of death where there are no indications of other causes. In some of those cases, a brain aneurism or pulmonary embolism may have been equally likely to have caused the death.
- 3.10 There are many factors that contribute to a high rate of error in recording the cause of death. They include a lack of experience; the task of death certification being given a low priority; a lack of education around death certification; fatigue; time constraints; unfamiliarity with the deceased’s medical history; frustration with the forms (in particular questions that are difficult to answer and are duplicated across different forms); only one doctor commonly completing all the documentation; and not viewing the body.
- 3.11 In addition, there are potential conflicts of interest in the system that could also contribute to this high rate of error. We have been told that the purposes of the death certification system, described above, and the importance of accurately recording the cause of death are not always

29 Bobbi S Pritt and others “Death Certification Errors at an Academic Institution” (2005) 129 Archives of Pathology & Laboratory Medicine 1476.

30 Law Commission, above n 7, at [2.136].

31 McKelvie PA “Medical certification of causes of death in an Australian metropolitan hospital Comparison with autopsy findings and a critical review” (1993) 158 Med J Aust 816.

clear to doctors. This may result in other interests or considerations influencing how doctors 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 suicide. It may also lead them to determine too easily that the death was of natural causes so that the family can have the body for funeral preparations rather than have to wait for the coronial process. Alternatively, the doctor's own interest may influence the determination of the cause of death, for example, if the doctor feels the need to hide negligent or wrongful behaviour.

- 3.12 Another type of error that can occur when completing death certification documents is failing to identify the death as reportable to the coroner. For most deaths (deaths in hospitals or after an illness), doctors are the gatekeepers to the coronial jurisdiction. A death must be reported to the coroner if the cause of death is unknown or if it is suicide; unnatural or violent; or if the death occurred during medical, surgical or dental treatment.³² If a doctor has not completed a MCCD in respect of a death, it must be reported to the coroner.³³
- 3.13 We found significant confusion among doctors as to when a death must be reported to the coroner. While some of the forms completed after death aim to assist doctors to make that determination, they are not required in every case. The MCCD requires a doctor to consider whether a death is reportable under the Coroners Act but does not give guidance as to what the legislation requires. When a death occurs in a hospital, the doctor completes the Record of Death form, which is designed specifically to help the doctor determine whether the death must be referred to the coroner. No such document is currently provided for deaths in the community, although one is in development. When the body is to be cremated, the Cremation Certificate asks similar questions designed to determine whether the death requires further investigation by the coroner.³⁴ However, there is no equivalent certificate or set of questions for when the body is to be buried.
- 3.14 As we described in Chapter 2, where a doctor has doubt about whether he or she should certify death, the usual practice is to telephone the coroner and discuss the death. The level of certainty to be reached by the doctor as to the cause of death is a difficult issue. That level is not specified in the Act. The MCCD requires the doctor to provide the information to the best of his or her knowledge. However, the Permission to Cremate form requires the medical referee to confirm that the cause of death has been *definitely* ascertained. Submissions from doctors on Issues Paper 23 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. We consider that the legislation could provide clearer guidance about the level of certainty required for a doctor to be able to certify death as a natural consequence of illness.

INEFFICIENCIES AND LACK OF CLARITY IN THE PROCESSES

Problematic forms

- 3.15 Doctors have consistently reported frustration at the nature of the documents that must be completed after a death. Of particular concern is the number of different forms, the duplication of questions across some of those forms and the lack of national consistency in the forms used.

³² Coroners Act 2006, s 13(1)(a) and (c). It should be noted that the specific wording of these requirements is slightly amended under clause 9 of the Coroners Amendment Bill, which was introduced to Parliament in July 2014.

³³ Coroners Act, s 13(1)(b).

³⁴ For example, it asks the certifying doctor whether the deceased underwent any operation during the final illness or within a year before death; whether, with knowledge of the deceased's habits and constitution, the doctor feels any doubt whatever as to the character of the disease or the cause of death; whether there is reason to suspect the death was due directly or indirectly to violence, poison, privation or neglect, or illegal operation; and whether there is any reason to suppose a further examination of the body is desirable.

Some of the language is archaic and some of the questions are difficult to answer.³⁵ We note that, of the submitters who answered the relevant question in Issues Paper 23, there was unanimous support for simplifying and modernising the MCCD.

- 3.16 Funeral directors have repeatedly told us that there are often difficulties in deciphering the doctor's handwritten cause of death on the MCCD. Funeral directors must transcribe the cause of death from the MCCD in order to complete the notification to the Registrar-General. In addition to unclear handwriting, doctors often use abbreviations and non-standardised language, which introduces risks in accurately transcribing the cause of death in the notification to the Registrar-General.

Timing of the death certification

- 3.17 There is some confusion around timeframes for completing the MCCD when death occurs as a natural consequence of illness. Section 46B(2) of the Act says that the doctor must complete the MCCD *immediately* after the doctor learns of the death. In an attempt to provide greater certainty as to this requirement, the former Chief Coroner, Judge Neil McLean, suggested that MCCDs should be completed "within 24 hours", but that opinion is not determinative. If a doctor learns of the death of a patient on the weekend or during holidays, it can be very difficult to comply with the statutory requirement, even if that means within 24 hours.
- 3.18 We have received strong submissions that delays to funeral preparations caused by the current death certification process are having unacceptable consequences for bereaved families. This is a particular problem for Māori and in rural areas. For example, we were told that there are ongoing difficulties in some regions in locating doctors to certify death, even when the death is a natural consequence of illness, which is leading to increased and unnecessary involvement of the coroner. That in turn increases the delay in returning the deceased body to whānau.
- 3.19 It is an important Māori cultural practice to take immediate care of deceased whānau members. This type of cultural requirement is recognised in section 3(2)(b) of the Coroners Act 2006, which states that the Act recognises both:
- (i) the cultural and spiritual needs of family of, and of others who were in a close relationship to, a person who has died; and
 - (ii) the public good associated with a proper and timely understanding of the causes and circumstances of deaths.
- 3.20 We consider that recognition of this important cultural practice is part of the wider goal in ensuring that death certification processes operate efficiently and effectively for all groups in New Zealand.

No legislative system for verifying identity

- 3.21 Currently, there are no legislative requirements for verifying the identity of a deceased body. While there is the occasional media story, usually from overseas, of bodies being "mixed up", during the course of this project, we have not identified any recent New Zealand examples. We therefore assume that problems of this nature are very rare, if they occur at all.
- 3.22 When the Police attend a sudden death, their hierarchy of procedures for formally identifying the body is:
- visual identification by a close relative or other acquaintance;

³⁵ In particular, the Cremation Certificate asks what the "mode" of death was. Submitters said that it was not clear what the "mode of death" means and that it is often confused with the cause of death.

- fingerprint identification, if other fingerprint records are available for comparison;
 - photographs;
 - personal effects;
 - medical examination and comparison with medical records;
 - dental examination and comparison with records; and
 - DNA analysis.
- 3.23 When a person dies in hospital, it is usually simple to verify their identity and identification documentation is transported with a deceased body to the mortuary. However, when a person dies in the community of natural causes, the systems for verifying identity are imprecise and rely upon the personal practices of the doctors and funeral directors involved.
- 3.24 If the certifying doctor is the deceased person's usual doctor and examines or views the body after death, identity can be confirmed and noted on the MCCD, which will usually be transported with the body to the funeral director. However, if the MCCD is completed without viewing or examining the body, in theory, there is no assurance that the person who died is in fact the doctor's patient. However, as the doctor will only complete the MCCD without viewing the body if the death was expected (because otherwise the doctor cannot be satisfied that the death was a natural consequence of illness), the risk is negligible.
- 3.25 If an alternative doctor completes the MCCD, that doctor may not know the patient and so may not be able to visually identify the deceased body. Alternative doctors will presumably have a variety of personal practices for verifying identity, but it is likely that most will rely on what they are told without making additional checks.
- 3.26 It is impractical, if not impossible, for identity to be confirmed to a point of absolute certainty in all cases, nor is there evidence of a problem with mistaken identification of deceased bodies in New Zealand. Accordingly, it should be acceptable for doctors issuing a MCCD to use available information if they are reasonably satisfied of its reliability, and the legislation should reflect this. For example, if Police attend a car accident and initially identify the deceased body by reference to a driver licence and this is then confirmed through visual identification by someone claiming to be a close relative of the deceased (such as the spouse or a parent), there should be no need for further steps unless there is cause for suspicion.

Confusion over requirements before the body can be moved

- 3.27 We have encountered significant confusion amongst doctors and funeral directors about whether the MCCD is required before a funeral director may move a deceased person from the family home or an aged care facility to the funeral home.
- 3.28 The Burial and Cremation Act 1964 (the Act) provides that a body must not be buried, cremated or otherwise disposed of unless the MCCD (or a coroner's authorisation) has been obtained.³⁶ In addition, a person having charge of a body must not transfer charge of it to another person

³⁶ Burial and Cremation Act, s 46AA(1).

unless the MCCD has been obtained.³⁷ However, this rule does not apply in some circumstances, including where someone transfers the body to a funeral director.³⁸

- 3.29 Despite that exception (and perhaps because of the confusing statutory language), there appears to be a widespread view amongst doctors and funeral directors that the Act requires the MCCD to be produced prior to the funeral director moving the body. Families and aged care facilities often place pressure on funeral directors to quickly move a body from the place of death and so doctors come under pressure to provide the MCCD quickly. That can be difficult when the death occurs out of normal business hours or when the doctor is on leave. Consequently, a widespread practice has developed in which the funeral director will move the body if the doctor has been contacted by telephone and has confirmed that the patient's death was a natural consequence of illness and that they will complete the MCCD as soon as possible.
- 3.30 Funeral directors have told us that this situation puts them in a difficult position. If more information subsequently comes to light and the doctor decides that the death should instead be referred to the coroner, the body may have already been embalmed, which will decrease the ability of any subsequent autopsy ordered by the coroner to help determine the cause of death. While we consider that the law currently does not prevent removing the deceased body, or even embalming it prior to obtaining the MCCD, these requirements should be clarified.

Payment for the MCCD

- 3.31 The current legislative system provides no formal method of payment to doctors for completing death certification documentation. In fact, it states that the Crown is not liable for the costs incurred by a person in supplying information required for the MCCD.³⁹ Doctors usually charge for completing the Cremation Certificate (which is recovered from the family or the deceased's estate by the funeral director). In relation to the MCCD, if the death occurs in a hospital, the time taken to complete the documentation is covered within the doctor's normal duties. If the death occurs in the community, most general practitioners do not charge because they consider this to be a final service to their patient. A few general practitioners apparently do charge for that service through the funeral director's invoice to the family, and some recover their costs via other government payments already received in respect of particular patients. As we discuss in Chapter 6, a coherent system for payment may assist in establishing consistently high standards of practice in relation to death certification.

LACK OF RESPONSIBILITY FOR THE QUALITY OF THE SYSTEM

- 3.32 While a number of government agencies have various responsibilities for matters related to death certification, none currently have responsibility for oversight of the system as a whole or for the quality of the outputs. There is no nationally consistent death certification training for doctors; no process for checking whether all deaths are certified or notified to the Registrar-General; and limited processes for checking the accuracy and quality of the cause of death information provided and for ensuring that appropriate deaths are referred to the coroner.

³⁷ Section 46F(2).

³⁸ The wording of this exception is awkward. A person does not have to comply with the requirement to obtain a MCCD before transfer in the following circumstance: "a person having charge of a body who is not a funeral director transferring charge of it to a funeral director". This means that, when the family, Police, or medical staff transfer charge of a body to a funeral director, it is not necessary for the MCCD to have been completed in advance. However, the funeral director may not transfer the body to a different funeral director until after the MCCD has been completed. There are also exceptions where the body is being transferred to a constable; where the body is being transferred to a doctor for a post-mortem; or where the body is being transferred to a hospital.

³⁹ Burial and Cremation Act, s 46D.

- 3.33 Currently, the only check on death certification documentation before a body is disposed of is by medical referees prior to cremation. Before a body is cremated, a medical referee must complete the Permission to Cremate form stating that he or she is 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. However, no equivalent process exists when a body is to be buried.
- 3.34 In Issues Paper 23 we asked whether the medical referee system for cremation is providing sufficient safeguards. Two-thirds of submitters who addressed this question said it did not and considered that a better system should be implemented. Many of these submitters were medical organisations or professionals. Some submitters considered the system to be a “rubber-stamping exercise”. Others thought that the system could provide a check on the accuracy of cause of death data but doubted its ability to catch deaths that require further investigation. In consultation, we were told that, while many referees do an excellent job, they are limited in their ability to detect problems because they often do not have access to the medical notes of the deceased person. That means that they can only detect errors that are apparent from the post-death documentation.
- 3.35 The remaining one third of submitters supported the current system but expressed reservations, such as the need for improved systems for appointment, training, monitoring and support. They supported the “local” nature of the system because it was efficient and quick. There was, however, broad support for the extension of any system to all deaths, not just those where the body will be cremated; and for there to be greater national oversight of the system.

CONCLUSION

- 3.36 We have concluded that there is significant room for improvement in the death certification system. The highest priority, and the area in which the greatest gains can be made, is to rationalise the various forms that are completed after death. The current problems with these forms are contributing to errors in data recording and an overall frustration with the system by the people entrusted to provide this information.
- 3.37 However, other improvements are also required. Training for certifying doctors and auditing the system’s outputs would both contribute to higher standards of reporting. In order to achieve improvements in those areas that are sustainable over time, there is also a need for clear direction as to which central government agency is responsible for this system.
- 3.38 In the following chapters we outline a number of proposals to achieve these improvements. The objectives of the reforms are to:
- improve the accuracy in recording cause of death;
 - improve the ability to identify deaths that require further investigation;
 - increase the efficiency of the death certification process; and
 - as much as possible, respect people’s different cultural and religious practices after death.

Chapter 4

Central responsibility for the cause of death certification system

- 4.1 As we described in the preceding chapter, responsibility for the cause of death certification process is spread across multiple government agencies. This means that no one agency has responsibility for the quality of the outputs and outcomes from the system. We consider that the accuracy and efficiency of the system would be improved if a single agency had overall responsibility for that system.
- 4.2 The main purpose of giving one central agency responsibility for cause of death certification is to make someone accountable for the quality of the outputs and outcomes of the system. That would require the agency to identify performance criteria for quality outcomes and be accountable to a minister for performance in respect of those outcomes.
- 4.3 That agency would have responsibility for managing the different elements that contribute to the quality of outcomes in cause of death certification. Those elements would include:
- creating, managing, storing and archiving all death certification documentation;
 - auditing the quality of that documentation; and
 - providing support and education to certifying doctors and auditors.
- 4.4 In subsequent chapters, we make a number of recommendations for legislative reform in respect of these elements of the cause of death certification system.

SUBMISSIONS

- 4.5 In Issues Paper 23 we asked whether a statutory body should have the responsibility for the monitoring and oversight of death and cremation certification in New Zealand and whether that responsibility should lie with the Ministry of Justice, which also has responsibility for the coronial system.
- 4.6 The 20 submitters who addressed this question unanimously supported the appointment of a statutory body to have responsibility for monitoring death certification. The reasons given focused on the importance of the purposes of death certification and the need for tighter control and scrutiny of the system.
- 4.7 However, submitters differed on where they thought the responsibility should lie. Some submitters favoured responsibility resting with the Ministry of Justice (MOJ) on the basis that they already have responsibility for the coronial system and they could be a “one-stop shop” for all deaths. Some favoured MOJ on the basis that, in their experience, it had managed matters in this area better than the Ministry of Health (MOH) in recent years.
- 4.8 MOJ itself was not in favour of taking responsibility for death certification. It distinguished the coronial system as being a legal rather than medical system. It considered that oversight of death certification required medical judgement for which it did not have expertise. This view was

supported by the former Chief Coroner and other submitters who thought that responsibility should lie with MOH.

ANALYSIS

- 4.9 We have considered a number of agencies for this responsibility, including the Department of Internal Affairs, the Health Quality and Safety Commission, MOJ and MOH.
- 4.10 As we described in Chapter 3, the three primary public purposes of death certification cover health, justice and statistical interests. However, our consultation and research has revealed that by far the greatest current problems, and therefore the main focus of our proposals, relate to the determination of the cause of death. Making improvements in that area requires medical expertise. It also follows that, where public money is required for these improvements, funding should largely come from health budgets rather than from justice or statistics.
- 4.11 Therefore, we consider that responsibility for death certification should lie with the Ministry of Health. In practice, the function could sit within the Information Group, which has operational responsibility for national collections of health and disability information (although we make no formal recommendation more specific than the Ministry of Health).⁴⁰ National collections provide health information to support decision-making in health policy development and funding. One dataset already under the responsibility of the Information Group is the Mortality Collection, which classifies the underlying cause of death for all deaths registered in New Zealand. It is likely that taking responsibility for the quality of outputs from the death certification process would be an extension of the current strategic direction of that service. However, given the stated function is to provide health information to support health policy decision-making, we see it as a natural extension.
- 4.12 The death certification system is the only aspect of the policy underlying the current Act that we consider should remain the responsibility of the Ministry of Health. As we mentioned in Chapter 1, responsibility for all other aspects—burials, cremations, regulation of the funeral industry and the framework for burial decisions—should be held by the Department of Internal Affairs. Given the retention of this responsibility by the Ministry of Health, it may be thought that the legislative provisions relating to death certification should best reside alongside other health legislation—perhaps as an amendment to the Health Act 1956—rather than alongside burial and cremation legislation.

RECOMMENDATION

- R2 The Ministry of Health should have responsibility for the quality of outputs and outcomes from the death certification process.

40 Ministry of Health “National collections and surveys” < www.health.govt.nz/nz-health-statistics/national-collections-and-surveys > .

Chapter 5

An online process for certifying cause of death

- 5.1 In Chapter 3 we described problems with the current forms that must be completed by doctors and others after a death. The number and nature of those forms is contributing to high rates of error in recording the cause of death and significant frustration from doctors and funeral directors. We have concluded that there is significant room for improvement in this system.
- 5.2 A key proposal in Issues Paper 23 was the simplification, modernisation and consolidation of the MCCD and cremation forms. Virtually all submissions agreed that the current forms should be improved. They described them as antiquated, ambiguous, difficult to use and not designed for a multi-disciplinary medical team managing a patient. They had particular complaints about having to record the cause of death separately on both forms.
- 5.3 Reform of the death certification documentation is constrained by the need to conform to World Health Organisation standards for reporting death. Adherence to those standards is important because it enables internationally consistent disease monitoring and reporting. This means that the specific way in which the cause of death is required to be described cannot be altered. Nonetheless, there is much that can be done to simplify and modernise other aspects of the reporting system.
- 5.4 Submitters were strongly supportive of an electronic death certification system that consolidated the documents (thereby removing the duplication), modernised the questions and standardised the possible responses as much as possible.
- 5.5 We consider that there should be an online death certification process created and managed by the Ministry of Health. The certification process should incorporate as many of the current forms as possible. In particular, this online process would be the mechanism by which the cause of death is certified and within which doctors answer questions to assist them to identify deaths that must be referred to the coroner for further investigation. Some parts of the process should be compulsory for all deaths, some parts should be compulsory for only certain deaths and some parts should be available if they are relevant even if not required by the statute. Different parts of the process could be completed by different people at different stages. As much as possible, the questions or sections of the process should have pre-coded options to standardise responses, particularly for the cause of death section. Privacy would be protected through a secure log-in system.
- 5.6 We have considered whether this online process should be provided for in legislation. Currently, while the Cremation Certificate is provided for in the Cremation Regulations 1973 (the Regulations), the MCCD is not. Section 46B(2) of the Burial and Cremation Act 1964 (the Act) states that the doctor must give a doctor's certificate, but it does not prescribe that certificate further, and the Ministry of Health provides the MCCD without specific legislative authority. We consider that there is little advantage in providing for the online process in legislation but some potential disadvantage in that amendments to the Regulations would be required to update the process.

- 5.7 Along with the online process, the central agency responsible for the system should also produce some paper-based forms, reflecting the content of the online process, for users who do not have access to the internet or who need to certify the cause of death in circumstances in which access to the internet is impractical.
- 5.8 Currently, the Act requires the person in charge of the disposal of the deceased body to send a copy of the MCCD to the Ministry of Health.⁴¹ This provision would not be required under an online process for determining the cause of death because the Ministry of Health would be administering the system and should automatically have access to the database.

RECOMMENDATION

- R3 There should be an online death certification process created and managed by the Ministry of Health.

- 5.9 The online death certification process should contain a number of sections as we briefly describe here.

VERIFICATION OF IDENTITY

- 5.10 The online death certification process should provide three fields in the identification section. The first field should state the name of the deceased person if that is known. It is obviously a mandatory requirement and should be completed by whoever initiates the record. The second field should provide space to describe the evidence for determining the name of the deceased person (for example, the driver licence was found in the deceased person's pocket, the deceased was wearing a hospital identification wrist band or a person identifying herself as the deceased person's mother identified the body for the Police). There should be space for more than one answer in the second field.
- 5.11 The third field should provide space for a doctor (usually the doctor who certifies the cause of death) or other authorised person to certify that the identity of the body has been ascertained. This certification should be a prerequisite to disposal of the deceased body.⁴² If the person certifying identity considers that there is any doubt as to identity, they must refer the death to the Police.

RECOMMENDATIONS

- R4 The online death certification process should have a section for verification of the identity of the body including the evidence for that verification.
- R5 The statute should require that a deceased body may not be disposed of unless a doctor or other authorised person has certified that the identity of the deceased has been adequately determined. If the doctor or authorised person considers the body is not adequately identified, they must refer the death to the Police.

⁴¹ Burial and Cremation Act, s 46AA(2).

⁴² The second prerequisite is that the cause of death has been certified.

VERIFICATION OF DEATH

- 5.12 Our terms of reference require us to consider whether there should be statutory provision for certifying that life is extinct rather than relying on the non-statutory system as currently exists for verifying the *fact* of death.
- 5.13 We consider that it would be helpful for the online death certification process to include a section that allows a qualified person to verify the fact of death. That section could be completed immediately after death, leaving other sections to be completed later. The Police may find that this section of the online form is more useful in some cases than their paper version of the Life Extinct form.
- 5.14 However, like the current Life Extinct form, completion of the verification of death section of the online form should not be a statutory requirement or a prerequisite to further actions, including disposal of the body. The duties and actions (statutory or otherwise) that are engaged at the point of death should be tied to the fact of death, not the fact that someone has certified the fact of death. To provide otherwise would be to create a risk of unnecessary delay. Despite that, there is nothing to prevent Police, coroners, funeral directors or mortuary staff from having policies or protocols that require verification of death before they undertake certain actions. In those cases, this section of the online process may be useful to them.

DETERMINATION OF CAUSE OF DEATH

- 5.15 This part of the process would replace the current MCCD. Certifying the cause of death should continue to be required in the same circumstances as it is currently and must be done prior to disposal and embalming of the body (as we recommend in Chapter 6).
- 5.16 Section 46B of the Act currently places a duty on the attending doctor to sign the MCCD. A number of practical and legal issues arise from that section. In the next chapter, we analyse and make recommendations on:
- who may certify the cause of death;
 - the timing of the cause of death determination;
 - the definition of “attending doctor”;
 - the degree of certainty required; and
 - whether there should be a requirement to view or examine the body before determining the cause of death.

RECOMMENDATION

- R6 The statute should require that a body may not be disposed of or embalmed unless a doctor has certified the cause of death of that person or the authorisation of the coroner is obtained.

TRIGGERS FOR REFERRAL TO THE CORONER

- 5.17 In cases of sudden death, it will usually be obvious that the death must be referred to the coroner if it is the result of an accident or violence, suspected suicide or where the death occurred in

official custody or care.⁴³ In most of those cases, the Police will refer the death directly to the coroner.

- 5.18 However, the majority of deaths occur after an illness or when the deceased person is elderly. In those cases, the doctor has a legal decision to make that will determine whether or not the death must be referred to the coroner. In most deaths after illness, if the doctor is not satisfied that the death was a natural consequence of illness, it must be referred to the coroner. However, it must also be referred to the coroner if it occurs:⁴⁴
- during a medical, surgical or dental operation or procedure or as a result of that operation or procedure;
 - as a result of medical, surgical or dental treatment;
 - while the person was under an anaesthetic or as a result of the anaesthetic; or
 - while a woman was giving birth or as a result of being pregnant or giving birth.
- 5.19 Amendments to section 13 of the Coroners Act 2006 are currently proposed in the Coroners Amendment Bill.⁴⁵ Those amendments will clarify that a death during or as a result of a medical procedure or anaesthetic must be reported to the coroner only if the death was not expected.
- 5.20 Currently, both the Cremation Certificate and the Record of Death require doctors to answer questions designed to help them determine whether a death should be referred to the coroner. A number of submitters said that these types of questions should be asked in relation to all deaths. We agree with that suggestion. Whether the body is cremated or buried, there is a strong argument that the cause of death should be properly ascertained before the body is disposed of.
- 5.21 Therefore, we consider that the online death certification process should ask questions of the certifying doctor, in respect of every death, that are designed to help the doctor determine whether the death should be referred to the coroner.

EXISTENCE OF HAZARDS IN THE BODY

- 5.22 Currently, the Certificate in Relation to Pacemakers and other Biomechanical Aids (Biohazards Certificate) provided for in the Regulations is the only formal channel by which funeral directors, embalmers and cremator operators receive information about potential hazards in the deceased body.
- 5.23 We propose that the identification of hazards in the body becomes a compulsory section of the online death certification process for every death. The online process should list a wide range of potential hazards from the body, such as radioactive substances or infectious diseases, and the doctor responsible for completing the form must confirm whether any hazards are present. The list of hazards should be regularly updated by the Ministry of Health.

BIOGRAPHICAL AND DISPOSAL DETAILS

- 5.24 Currently, it is usual practice for the funeral director to notify the fact of the death, along with the cause of death and a range of biographical and disposal details, to the Registrar-General of Births, Deaths and Marriages on behalf of the family. This is typically done via an online form called the BDM 28. We have identified three concerns with this process.

⁴³ Coroners Act, s 13.

⁴⁴ Section 13(1)(c) and (d).

⁴⁵ Coroners Amendment Bill 2014 (239-1).

First, the Registrar-General is not receiving the cause of death information directly from the certifying doctor or coroner. The cause of death information is health information that should be notified to the Registrar-General by a health professional, not by the funeral director (or family member when a funeral director is not engaged). Also, because the MCCD is currently a handwritten document, the funeral director must transcribe the cause of death information from the MCCD to the BDM 28 form. That increases the risk of errors through misinterpretation of the handwriting or through the doctor's use of abbreviations or non-standardised language.

- 5.25 Second, under this process, the Registrar-General receives notification of the death from only one source. In contrast, he or she receives notification of births from two sources—the hospital or medical facility in which the birth occurred and the parents of the baby. Each source is able to operate as a check on the receipt of information from the other source.
- 5.26 Third, it may not always be clear who is meant by “the person who disposes of the body” and therefore who bears the responsibility for notification. It may be the funeral director, the sexton (who lowers the body into the ground), the cremator operator or the friend or family member who contracts with those people for the disposal of the body.
- 5.27 We consider that these problems should be addressed by a new statutory system for notifying death that aligns with the notification of births process.⁴⁶ Preliminary notice of death should be given to the Registrar-General, along with notification of the cause of death, by the certifying doctor. That could be easily achieved electronically by an automatic process after those details are entered on the online cause of death form.
- 5.28 The obligation for the second notification of death should rest on the person or people who are making decisions about how the deceased body should be dealt with. In Part 4, we propose a new framework for making those decisions involving a deceased's representative or, where one is not appointed, the executor. If there is also no executor appointed, the decisions fall to the family of the deceased. The person making these decisions about how the body should be disposed of should also have a statutory duty to notify the Registrar-General of the death. The Registrar-General would then match that information with the cause of death received directly from the online process.
- 5.29 Of course, the people making decisions about the deceased body will often be grieving themselves, and there is a risk in those circumstances that the task of notifying the Registrar-General of the death will get overlooked. We expect that funeral directors would inform consumers of their responsibility in this regard, as they do now, and in many cases, decision-makers will contract with funeral directors to notify the Registrar-General on their behalf. This registration would also be completed electronically through the online system.

46 See Births, Deaths, Marriages, and Relationships Registration Act 1995, s 5A, for the process for preliminary notice of birth and s 9 for the primary responsibility for notification on the parents.

RECOMMENDATIONS

- R7 The Births, Deaths, Marriages, and Relationships Registration Act 1995 should be amended so that the doctor or coroner who determines the cause of death has a duty to provide preliminary notice of the death (and the cause of death) to the Registrar-General.
- R8 The Births, Deaths, Marriages, and Relationships Registration Act 1995 should also be amended to make it clear that a person making decisions about disposal of the body has a duty to notify the Registrar-General of the death (in the manner prescribed by regulations made under that Act).

OTHER DETAILS

- 5.30 A section of the online process should provide practical funeral arrangement details such as the name of the funeral director (if one is engaged) and the name of the next of kin or person to whom the body was released so that the Registrar-General can follow up if no notification after disposal of the body is received. This section could be completed by the person making decisions about the disposal of the body, but it should not be compulsory.

Chapter 6

Statutory duties in determining the cause of death

- 6.1 In addition to the problems with the death certification documents described above, we also found a number of problems with the operation of the statutory duties on doctors and funeral directors. Those duties are the doctor's duty to determine the cause of death and the related restrictions on dealing with the deceased body before the cause of death is certified. In this chapter, we describe a number of proposals to address these problems.

THE DUTY TO DETERMINE CAUSE OF DEATH

Extend the power to determine the cause of death to nurses

- 6.2 Currently, unless a death is referred to the coroner, only a registered medical doctor may determine the cause of death—either the attending doctor or an alternative doctor. We have considered whether nurses should also be authorised to determine the cause of death in certain circumstances. The main driver for this option is that it would enable the MCCD to be completed sooner, for example, where the attending doctor is unavailable but a nurse familiar with the patient's medical history is available. This would reduce delay for the family in beginning the funeral preparations. There is particular demand for this option when older people die in rest homes or hospice care, in which case, a palliative care nurse may be the most familiar with the medical situation and best able to complete the MCCD. In such circumstances, the interests of efficiency indicate that we should examine whether authorisation to determine the cause of death should extend beyond doctors.
- 6.3 In Issues Paper 23, we asked whether the cause of death information in the MCCD should be able to be completed by nurse practitioners in circumstances where they have been the deceased's lead carer. To be registered as a nurse practitioner, a registered nurse must have a minimum of four years' experience in a specific area of practice and have successfully completed a clinically focused master's degree programme approved by the Nurses Council.⁴⁷ Some nurse practitioners operate independently, while others operate in collaboration with other healthcare professionals. Their skills include diagnosing and prescribing. The role of nurse practitioner was introduced in New Zealand in 2001, and there are now approximately 150 nurse practitioners practising in a variety of roles including emergency departments of rural hospitals, palliative care, aged care facilities, rural medical practices and as first responders under the PRIME programme.⁴⁸
- 6.4 Two-thirds of submitters supported that proposal in Issues Paper 23. The reasons given included that nurse practitioners would be equally competent at diagnosing the cause of death, if not more competent than junior doctors who are often given the task of determining the

⁴⁷ Nursing Council of New Zealand "Nurse practitioner" < www.nursingcouncil.org.nz/Education/Nurse-practitioner > .

⁴⁸ The PRIME (Primary Response In Medical Emergencies) programme is administered by St John. It uses the skills of specially trained rural GPs and/or rural nurses to support the St John ambulance service in areas where response times may be longer than usual or where more specialised medical skills would assist the patient's condition. < www.stjohn.org.nz/What-we-do/Community-programmes/Partnered-programmes/PRIME > .

cause of death in hospitals; and it would decrease delays in obtaining the MCCD (particularly in rural areas and aged care facilities) and so would decrease delays in releasing the body to the family. Many of those in favour of this proposal cautioned that nurse practitioners would require training and supervision for this role.

- 6.5 Some doctors rejected the proposal on the basis that, unlike doctors, nurses are not trained to diagnose and so would not be competent to take a scientific approach to the diagnosis of death. While they conceded the efficiency aspects of this proposal, they feared that it would be counter-productive to efforts to increase the accuracy of cause of death determinations.
- 6.6 We consider that the task of certifying death should be extended to some nurses if there are sufficient controls around competency, support and experience.⁴⁹ More specifically, the limits under which nurses can certify death should be carefully prescribed to achieve a balance of:
- increasing the provision of death certification services in areas that currently struggle to find doctors able to do this task in a timely way;
 - ensuring that this role is restricted to nurses who have the training and experience to diagnose the cause of death;
 - ensuring there is adequate training for these nurses in certifying death, both before they begin and on an ongoing basis; and
 - ensuring that, where necessary, nurses have adequate support and supervision in certifying death.

RECOMMENDATION

R9 The statute should enable some nurses to certify death in some circumstances.

Examination of the body

- 6.7 Currently, it is not uncommon for a doctor to certify the cause of death without viewing or examining the body after death. The law only requires the doctor to view or examine the body in the following two circumstances:
- Where the doctor certifying death is not the doctor who attended the deceased during the preceding illness, that doctor (the alternative doctor) must first *examine* the body (and the relevant medical notes).⁵⁰ This requirement reflects the fact that the alternative doctor is not familiar with the patient and so cannot determine the cause of death with sufficient certainty (even with the benefit of the medical notes) without an examination.
 - When the body is to be cremated, the Biohazards Certificate requires that the doctor has *examined* the body,⁵¹ and the Cremation Certificate requires that the doctor has *seen and identified* the body.⁵²
- 6.8 Consequently, if a body is to be buried, the doctor who attended the deceased during the preceding illness may complete the death certification documentation without viewing or examining the body. The doctor must be satisfied that the death was a natural consequence

49 We note that the government has undertaken substantial work in this area during the course of this review and that the Health Practitioners (Replacement of Statutory Reference to Medical Practitioners) Bill was introduced to Parliament on 25 June 2015. Amongst other things, clause 9 of that Bill extends the power to determine the cause of deaths to nurse practitioners.

50 Burial and Cremation Act, s 46B(8)(c).

51 Cremation Regulations, sch 1, form AB.

52 Schedule 1, form B.

- of illness, so he or she is only likely to complete the documentation without viewing the body when the death was an expected event due to the natural progression of an illness.
- 6.9 There is obviously a difference between *examining* the body and *seeing and identifying* the body. Neither the Act nor the Regulations define either concept. As a minimum, an examination would require the removal of all clothing and a thorough visual examination of the body. However, several doctors told us in submissions that a visual examination would rarely detect useful information without an autopsy and toxicology report. While merely viewing the body would rarely provide information as to the cause of death, it would enable the doctor to verify the fact of death and (if the doctor knew the patient before death) the identity of the body.
 - 6.10 We are told that, despite the current requirement to *examine* the body in particular circumstances, it is common for general practitioners to merely *view* the deceased person's face and not to remove clothing. The reasons why general practitioners do not conduct a proper examination may be because they are already satisfied as to the cause of death, they do not consider it likely that an examination will reveal useful information or they consider that a request to examine the body may distress the bereaved family.
 - 6.11 We consider that the current distinction between burial and cremation in relation to the rules for examining the body after death are anomalous and should be removed. While it is true that cremation completely destroys the body (including the DNA), which makes it vital to accurately determine the identity of the body and the cause of death before cremation, the position in relation to disposal by burial is only slightly different. Once a body has been buried, disinterment is a significant step, and any evidence within the body of the cause of death is likely to be limited by embalming or decomposition. However, that leaves open the question of whether the requirement to examine the deceased body should be extended to all deaths or whether it should be removed for disposals by cremation and left to the discretion of the certifying doctor.
 - 6.12 In Issues Paper 23 we asked whether a doctor should be required to physically examine the body of every deceased person before completing the MCCD, irrespective of whether the deceased is to be buried or cremated. Submitters were divided on the question. Those who supported the proposal thought that it would be useful to verify the fact of death and to identify the deceased and any suspicious injuries. The New Zealand Police and coroners supported the proposal.
 - 6.13 Some submitters said that they supported the suggestion in principle but that, in practice, it would result in significant problems because it would cause further delays in obtaining the MCCD. We encountered very strong submissions from the funeral industry about significant frustration they commonly experience in obtaining MCCDs from doctors due to other time pressures on doctors and lack of cover after hours. This is a particular issue in, but is not confined to, rural areas. It means there are delays for the family in making funeral preparations, and this raises particular cultural problems when the deceased person is Māori. Funeral directors submitted in favour of a clear statutory timeframe within which the doctor is required to complete the MCCD.⁵³
 - 6.14 Doctors and medical professional organisations were divided on the issue of a physical examination. Some thought that compulsory examination would be useful, particularly if the doctor had not recently attended the patient or the death was unexpected. Others pointed out the limitations of a physical examination. The Medical Council of New Zealand said that the only benefit was in identifying the body. It said that viewing the body may alert a doctor to suspicious injuries but that, in the majority of cases, it would not assist the doctor to determine

53 We further discuss the timing issues of MCCDs below.

the cause of death in the absence of an autopsy and full toxicology report, which is impractical and unwarranted in many cases. They pointed out that the benefits of examining the body are reduced where the certifying doctor is not the patient's usual doctor so does not have a baseline from which to determine what is normal for that patient.

- 6.15 We are mindful that any statutory obligation to examine or even to view the deceased body will incur costs and cause delay in many cases due to the need for the doctor to travel to the body. It may also cause the grieving family some distress. Therefore, imposing such a requirement must be shown to produce a significant benefit.
- 6.16 The three potential purposes of viewing or examining the body after death are:
- verifying the fact of death;
 - verifying the identity of the body; and
 - gathering evidence to help determine the cause of death.
- 6.17 In relation to the first purpose, we are told that this is not a problem in practice. Tens of thousands of people die every year, and cases of the misidentification of death are extremely rare, certainly not enough to justify viewing or examining the body in every case.
- 6.18 In relation to identifying the body, if the certifying doctor attended the deceased person prior to death, viewing the body after death may enable identification to be confirmed. However, a statutory requirement on the certifying doctor to view the body may have limited benefit in relation to verifying identity for a number of reasons:
- The body may already have been adequately identified by other processes, such as the family providing identification information to the Police.
 - If the doctor did not know the deceased person before death, they cannot independently confirm identity after death.
 - Illness before death can significantly alter the appearance of a person so that a doctor who had not attended the person within several weeks of death may not recognise the patient after death.
- 6.19 In relation to determining the cause of death, while it may seem sensible to the layperson to examine every body after death to check for signs of wrongful death that require investigation by a coroner or the Police, the vast majority of deaths result from natural causes. In these cases, the cause of death is not usually informed by visually examining the body. Rather, doctors examine the medical history and the symptoms suffered by the person prior to death. If that does not present a conclusive cause, an autopsy and toxicology report may be required.
- 6.20 The question for us is whether the cost, delay and distress likely caused by a mandatory examination of the deceased body in every case is justified by the potential risk that an apparently natural death may in fact have been wrongful. On balance, we do not think that it is. The law requires the certifying doctor to be satisfied as to the cause of death.⁵⁴ Doctors are highly skilled practitioners, and it should therefore be left for them to determine whether they need to view or examine the body to determine the cause of death. Any questions as to the adequacy of these decisions by doctors should be dealt with through the education of doctors.⁵⁵
- 6.21 The same considerations arise in relation to the alternative (or non-attending) doctor certifying the cause of death. In theory, it could also be left to the alternative doctor to determine whether

⁵⁴ In the next section, we discuss the degree of certainty required in determining the cause of death.

⁵⁵ In Chapter 8, we discuss the need for better education of doctors in determining the cause of death.

he or she can only be satisfied as to the identity of the person or the cause of death by viewing or examining the body. In most cases, the cause of death will be determined in the same way—by examining the medical history and the person’s symptoms before death. However, there are two important differences. First, the doctor is relying upon medical notes rather than his or her personal knowledge and memory. Second, the lack of connection between the doctor and the deceased person may increase the risk of misidentifying the body. A statutory requirement for the alternative doctor to at least view the body would help compensate for that lack of connection and provide some assurance around the process. For that reason, we consider that requirement should continue.

- 6.22 Currently, one of the purposes of examination prior to cremation is to identify whether the body contains a pacemaker or other biomechanical aid that may pose a danger during the cremation process. We proposed in Chapter 5 that a question to that effect becomes a compulsory part of the online process for determining the cause of death, regardless of whether the body is examined. Accordingly, we do not consider it necessary for the statute to impose an additional requirement to view or examine a body before cremation.

RECOMMENDATION

R10 The statute should not require the attending doctor to view the body prior to determining the cause of death. It should be up to the doctor to determine whether an examination or viewing of the body is required. However, the statute should require that an alternative doctor who is certifying the cause of death views the body prior to making that determination.

Clarify the degree of certainty required

- 6.23 Currently doctors are often very unclear as to the degree of certainty required by them when determining the cause of death. This is a tricky issue because absolute certainty is often impossible. 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 cannot be justified in the majority of deaths. This is particularly true where the deceased person was elderly and had a variety of medical problems.
- 6.24 When death is an expected event, the attending doctor will be familiar with the range of health issues the patient was suffering from. The doctor will use that information, together with descriptions of the circumstances immediately before death, to form an opinion as to the cause of death. While the doctor will be able to accurately describe the antecedent and underlying causes of death, the complication that actually caused the death will often be a “best guess”.
- 6.25 When a person dies after an illness but death was not an expected event at that time, the doctor will need to determine from the circumstances whether the cause of death is sufficiently clear or whether it should be referred to the coroner for further investigation. There is obviously much scope for discretion in this situation. Many factors will influence the doctor’s decision, including matters such as time pressures, which may lead to error.
- 6.26 We have considered two possible reforms to give greater guidance to doctors when determining the cause of death. First, we considered whether the legislation should specify the degree of certainty required, such as the balance of probabilities. Second, we considered whether the statute should permit an “unknown” cause of death in some circumstances. For example, in some cases, a determination of “death natural but cause unknown” could be entered. As we describe below, we have reached the view that neither of these options present a good solution.

- 6.27 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 doctor 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”. However, the Cremation Regulations 1973 place a duty on medical referees to not permit cremation unless the referee is satisfied that the cause of death has been definitely ascertained. When a doctor is unsure whether to complete the MCCD or refer the death to the coroner, the doctor is encouraged to discuss the death with the on-call coroner at the National Initial Investigations Office.⁵⁶ While this system undoubtedly provides doctors with support, some doctors are frustrated that different coroners provide different advice as to the level of certainty required about the cause of death.
- 6.28 In Issues Paper 23, we asked whether the requirement to definitely ascertain the cause of death should be amended to reflect the actual level of certainty attainable without an autopsy. All 17 submissions that answered this question agreed that the requirement must be amended. It was variously described as “ludicrous” and “risible”. However, communication from the insurance industry told us that they did not support a proposal to remove the exact cause of death from the certification process. Life insurers rely on the cause of death information in the MCCD to determine whether the insured person had disclosed all material information when applying for the policy.
- 6.29 It appears that much of the current confusion arises from the requirement in the Regulations requiring the cause of death to be definitively determined. We agree with submitters that provision should be removed because it is impossible to comply with.
- 6.30 However, we do not think that the statute should permit the cause of death to be determined on the balance of probabilities nor for it to be determined as “unknown”. In both cases, there is a risk that these allowances would become the default position or would send a message to doctors that determining the actual cause of death is not important. This would not be helpful to efforts to increase the accuracy of causes of death. Instead, the statutory requirement should be “to the best of the doctor’s knowledge or belief”, which reflects the current wording in the MCCD.
- 6.31 We consider that doctors should receive more training in determining the cause of death, particularly around factors that should be taken into account when determining whether the doctor is sufficiently satisfied as to the cause. We consider that our proposal in Chapter 8 to have an education function for cause of death reviewers will serve this purpose.

RECOMMENDATION

- R11 The statute should require the doctor certifying the cause of death to determine that cause to the best of the doctor’s knowledge and belief.

Clarify the timeframe within which the cause of death must be determined

- 6.32 Currently the Act requires that the attending doctor must give the doctor’s certificate (which determines the cause of death) *immediately* after learning of the death if the doctor is satisfied that the death was a natural consequence of illness. Funeral directors have asked us to consider clarifying the timeframe within which the doctor must determine the cause of death. This request arises from their significant frustration at times, outlined above, in getting doctors to determine the cause of death so that the body can be moved and funeral preparations can begin.

⁵⁶ We described the National Initial Investigations Office further in Chapter 2.

Funeral directors consider that doctors would give this task greater priority if the statute stated that they must do it within, say, 24 hours of learning of the death.

- 6.33 We consider that the term “immediately” does not provide a practical timeframe. The Oxford Dictionary defines it as “at once, instantly”. That envisages that a doctor will stop whatever they are doing and determine the cause of death straight away. A doctor may learn of a death when woken from sleep, while attending to another patient, while on holiday or while attending a significant family event. We do not think that it is reasonable to expect a doctor to determine the cause of death immediately. This is particularly so, given that there is currently no formal method of payment for the MCCD and most doctors do it without payment.
- 6.34 Also, we do not consider it practical to impose a set number of hours within which the cause of death must be determined. Any number of hours would be arbitrary and would not take into account the particular circumstances of the death or the certifying doctor. In addition, a set number of hours would mean that the deaths of any people for whom the cause of death has not been determined within that period would be referred to the coroner. This is likely to unnecessarily increase the number of deaths referred to the coroner.
- 6.35 Consequently, an element of vagueness to accommodate differing circumstances is unavoidable. We consider that the timeframe should be “within 24 hours of learning of the death or as soon after that as is reasonably practicable”. This phrase both establishes the expectation that the cause of death should be certified within 24 hours but also allows some elasticity to accommodate the particular circumstances of the certifying doctor. What is “reasonably practicable” will depend upon the particular circumstances in question, in particular, the extent to which the doctor could reasonably have given the task greater priority.
- 6.36 We note that we are also making a number of proposals that should result in the quicker release of bodies to a funeral director, including:
- clarifying the requirements before a body may be moved; and
 - authorising nurses to determine the cause of death in some circumstances.

RECOMMENDATION

- R12 The statute should state that the timeframe within which the attending doctor must determine the cause of death is “within 24 hours of learning of the death or as soon after that as is reasonably practicable”.

Clarify the circumstances when alternative doctor may certify the cause of death

- 6.37 Currently, a doctor who did not attend the deceased person during their illness (an alternative doctor) may certify the cause of death only if:
- the attending doctor is “unavailable”;
 - less than 24 hours has passed since the death, and the attending doctor is unlikely to be able to give a doctor’s certificate for the death within 24 hours after the death; or
 - 24 hours or a longer period has passed since the death, and the attending doctor has not given a doctor’s certificate for the death.⁵⁷

⁵⁷ Burial and Cremation Act, s 46B(3).

- 6.38 We note that “unavailable” in the first condition means “dead, unknown, missing, of unsound mind, or unable to act by virtue of a medical condition”.⁵⁸ It does not cover circumstances where the attending doctor is not working, on holiday or temporarily working in another location. In those circumstances, an alternative doctor may only certify the cause of death within 24 hours of death if the attending doctor is unlikely to be able to do it within that timeframe.
- 6.39 We have received submissions that this provision is confusing and causes unnecessary delay. In hospitals, an alternative doctor could certify the cause of death immediately, but if the attending doctor will return within 24 hours, it is thought that they should wait for him or her.
- 6.40 We consider that this provision should be amended to make it clearer and more practical. We agree that it should generally be the attending doctor who certifies the cause of death because that doctor is likely to be most familiar with the deceased person’s medical conditions and therefore in the best position to determine the cause of death. However, that policy must be balanced against the strong interest in not delaying funeral preparations.
- 6.41 An alternative doctor should be able to certify the cause of death if the attending doctor is unavailable. We do not consider that the law should require doctors to interrupt their time outside work to certify death if there is another doctor available who could do it with sufficient certainty. Consequently, “unavailable” should have its usual meaning of “not free to do something; otherwise occupied”⁵⁹ rather than the restricted meaning currently in section 2 of the Act.

RECOMMENDATION

- R13 The statute should provide that a doctor who did not attend the deceased person during their illness may certify the cause of death if the attending doctor is unavailable. “Unavailable” should be given its usual meaning, which is broader than that currently in the Act.

Payment for doctors to determine the cause of death

- 6.42 In Chapter 3 we mentioned that there is currently no formal method of payment to doctors for completing the MCCD, although occasionally, general practitioners charge the family of the deceased person for completing it and usually charge them for completing the Cremation Certificate. We concluded that the lack of a consistent and coherent payment system may inhibit high standards of practice in relation to death certification.
- 6.43 While the amount or priority of funding for death certification, as a policy proposal, is beyond our terms of reference, in this section we discuss possible sources of funding because the source of funding can affect the quality and efficiency of policy outcomes. It may also have an effect on independence, engagement, accountability and transparency.⁶⁰ However, we merely describe potential funding sources and provide some analysis. We do not make any recommendation on this matter.
- 6.44 As with all statutory duties, certifying the cause of death has a cost for the person carrying out that task. Those costs involve the time taken to certify death, travel costs and the opportunity cost in forgoing other earning work. The current lack of a system for payments to doctors means

58 Burial and Cremation Act, s 2(1).

59 Oxford English Dictionary “Definition of ‘unavailable’ in English” Oxford Dictionaries < www.oxforddictionaries.com/definition/english > .

60 *Regulatory institutions and practices* (New Zealand Productivity Commission, 2014) at 323.

that the doctors themselves bear this cost unless they choose to pass it on. We have examined four options for funding death certification to determine whether reform is needed.

Status quo—the costs fall on doctors

- 6.45 The current system has a number of advantages. It is simple and it involves no administrative costs. It requires no direct expenditure of public funds (although some doctors will be indirectly funded by public money in other ways). Also, it fits within the “care” ethos of the doctor/patient relationship.
- 6.46 It also has some disadvantages. First, it is inequitable. The costs are falling upon people (doctors) who are receiving no benefit from the service. Also, where a doctor does charge a family to complete the MCCD, those families are disadvantaged against the families of patients of doctors that do not. This is not something a patient will usually contemplate when choosing a doctor.
- 6.47 Second, a lack of payment may affect the standards of accuracy achieved in determining the cause of death. The lack of payment sends a confusing message about whether the service is provided for the benefit of the patient’s family or for the benefit of the public. These two potential purposes may provide the doctor with a conflict, for example, about whether to include a cause of death that may be embarrassing to the family. Also, it provides little motivation on the doctor to upskill by undertaking training.

A publicly funded service

- 6.48 Funding or part funding by the government (that is, from the general tax base) may be appropriate given this activity has significant benefits to the public as a whole.⁶¹ As we describe in Chapter 3, while there are some private purposes of death certification, the main purposes (establishing the fact of death, informing the development of health policy and programmes and identifying deaths that require further investigation) are directed at the public generally.
- 6.49 Public funding would send a message both that certifying death is a public service, rather than a service to the deceased or the family; and that if you are being paid for it, you should achieve high standards of accuracy. This would motivate accountability and engagement in training.
- 6.50 The disadvantage of public funding is that it places an additional financial burden on the Crown. It is interesting to note that, in 2009, the Act was amended to make it clear that the Crown is not liable for the costs of death certification.⁶² We have not been able to find any evidence of the policy that motivated this amendment.
- 6.51 If death certification was to be funded by the Crown, that funding could be delivered either via the population-based funding to Public Health Organisations (a small top-up to the funding received for each enrolled patient), or doctors who are not otherwise funded for death certification could invoice the Ministry of Health for each death certificate completed.

A levy on the funeral industry

- 6.52 It may be possible to levy the funeral industry for the costs of determining the cause of death. In Chapter 18, we recommend that all people who provide funeral services for a fee must be registered. In theory, a levy could be added to the registration fee.

61 *Regulatory institutions and practices* (New Zealand Productivity Commission, 2014) at 332.

62 Burial and Cremation Act, s 46D.

- 6.53 This mechanism would have the advantage of reducing reliance on general public funds. However, it could be logistically difficult. In order to collect a funeral industry levy, the funeral *business* would need to be registered and declare the number of funerals it conducts. In Chapter 18, we recommended instead that *people* who conduct funeral services for a fee must be registered so as to control the type of people entering the industry. It would be administratively difficult to allocate funerals to particular funeral directors when it is common for more than one to be involved.

A fee paid by the family of the deceased person

- 6.54 A further option is to collect a fee to fund the death certification process directly from the family of the deceased person. This could occur when death is notified to the Registrar-General. Currently, when a body is to be cremated, the family pay a fee to the doctor for completing the Cremation Certificate, though this is not a statutory requirement. That fee is collected by the funeral director and paid to the doctor directly.
- 6.55 A significant disadvantage of collecting a fee from the family at the time of notification of death is that it may provide a disincentive to notify the death. Any funding method that discourages the notification of a death is to be avoided. In theory, that disincentive could be mitigated to some extent if notification of a death (and collection of the fee) was required before disposal of the body is permitted. This is the system in Scotland. However, notification prior to disposal would impose unacceptable delays upon funeral preparations. Also, we consider there would still be a risk of avoiding notification and disposing of the body in breach of any legislative requirement.

Discussion

- 6.56 In Issues Paper 23 we suggested that the question of how certification is funded should be addressed if new expectations of accuracy and timeliness are being imposed. We also pointed out the anomaly that doctors are paid for Cremation Certificates but not for asked who should bear the cost of death certification.
- 6.57 Two-thirds of the 19 submitters who addressed this question thought that the government should bear the cost of death certification. This included all but one of the eight submissions from medical professionals or organisations. The reasons they gave included that the primary beneficiary of death certification is society; that it would be a financial burden on many families; and that some families may attempt to hide the death and not register it if the costs fell on them.
- 6.58 The main advantage of funding death certification through either an industry levy or a “user-pays” fee is that it reduces reliance on taxation as a source of funding. However, such user-pays systems are usually implemented where there is scope for making efficiency gains, for example, by regulating demand for a service and decreasing the cost of supplying that service by ensuring that it is only provided when it is really needed. There appears to be no scope for such efficiency gains in this area because the policy objective is that all deaths are certified.
- 6.59 Another justification for user-pays systems of funding is that it can provide a motivation to keep costs under control because the people paying the fee will be motivated to monitor the performance of the regulator. This justification does not apply where the fee payers are the public in general rather than an industry body because, as a group, they are less able to monitor the performance of the regulator.

RESTRICTIONS ON DEALING WITH A BODY BEFORE DEATH HAS BEEN CERTIFIED

6.60 The Act currently provides that, until the cause of death has been determined (or the coroner's authorisation has been given):

- the body must not be disposed of;⁶³ and
- a person must not transfer charge of the body.⁶⁴

The second restriction does not apply in a number of circumstances, including where a funeral director collects a body from a private home or rest home.⁶⁵

6.61 These provisions recognise that moving the body or disposing of the body may destroy some of the evidence of the cause of death that the doctor or coroner may need to consider. We have considered whether these provisions should continue and whether there is justification to extend the restriction to embalming.

Disposing of the body

6.62 We consider that the prohibition on disposing of the body before the cause of death is determined (or the coroner has issued an authorisation) should continue under a new statute because it is vital that the doctor has established whether or not an examination of the body will be required to determine the cause of death, before the body is no longer available. While, currently, this requirement usually means that the funeral director obtains the actual MCCD form from the doctor, under the online process proposed above for recording the cause of death, there will need to be a process for checking that the online process has been completed.

Embalming the body and transferring the body

6.63 Embalming is the process of injecting chemical preservatives into the body to slow the process of decay. It alters the appearance of a body and its chemical composition. In that way, it destroys some of the evidence available to a doctor or coroner for determining the cause of death. For this reason, it has been suggested to us that the cause of death should be determined before embalming. The disadvantage of this suggestion is that it may delay embalming and other preparations for the funeral.

6.64 The purpose of the current restriction on transferring the body before the cause of death is determined is presumably so that all the circumstances of death are available to the doctor when making that determination. Similar to embalming, the disadvantage of this requirement is that it causes delay in funeral preparations while a doctor is found who can certify the cause of death. It can sometimes be distressing for families, or a management problem for rest homes, to have a delay in transferring the body to the funeral director.

6.65 The balance between accuracy in cause of death determinations and delay in funeral preparations is addressed in many of the issues identified in this part of the Report. We consider that, on balance, there is a greater risk to accurate assessments of cause of death when a body is embalmed than when it is moved. While the circumstances of the place of death will be relevant to sudden deaths, they will not be relevant to most deaths that are a natural consequence of illness. Therefore, a blanket restriction on moving a body before the cause of death is determined would produce an unacceptable level of delay.

63 Burial and Cremation Act, s 46AA.

64 Section 46F(1).

65 Section 46F(2).

- 6.66 In contrast, embalming a body may have a greater negative impact on the determination of the cause of death for the reasons described above. For that reason, we consider that the cause of death should be determined before a body may be embalmed.

RECOMMENDATION

- R14 The statute should provide that a person may not embalm or dispose of a body unless the cause of death has first been determined.

Chapter 7

Certainty about when death occurs

- 7.1 In this chapter we examine whether the proposed new statute should clarify the legal definition of death. When the law provides that rights, powers or duties arise (or cease) upon death, there can be uncertainty about whether those things apply when a person is in a state that resembles death, such as brain death.
- 7.2 Dying is a process, rather than an event that happens at one particular point in time. Prior to the 1960s, people were diagnosed as dead when they stopped breathing. This is known as “circulatory death”. With the advent of artificial respiration in the 1960s, the medical profession was prompted to re-examine the determination of death for the purposes of removing artificial respiration and of organ transplantation. Over the following two decades, medical professionals increasingly added a determination of “brain death” to the criteria for death, on the basis that the determination of death indicates that an irrevocable point in the dying process has been reached (not that the process has ended), and patients that are brain dead have reached that irrevocable point. The Australian and New Zealand Intensive Care Society’s *Statement on Death and Organ Donation*⁶⁶ therefore adopts the point of “brain death” as the point at which organ donation may proceed.
- 7.3 In the past few decades, many jurisdictions also adopted a *legal* definition of death as meaning the irreversible cessation of all function of the brain (sometimes as an alternative to circulatory death).⁶⁷ New Zealand is one of the few countries from those that we generally compare ourselves to, that has not adopted a statutory definition of death, although there have been a number of attempts to do so.⁶⁸
- 7.4 “Brain death” is determined by reference to evidence of sufficient intracranial pathology (meaning a brain injury) and by clinical testing or by imaging that demonstrates the absence of intracranial blood flow. There is no documented case of a person who fulfils the preconditions and criteria for brain death ever subsequently developing any return of brain function.⁶⁹

IS THERE A PROBLEM?

- 7.5 Within the context of this review, we have identified two duties that arise at the point of death and for which there may therefore be uncertainty if the point of death is not clearly defined. These are:
- the duty to determine the cause of death;⁷⁰ and

66 Australia and New Zealand Intensive Care Society *The ANZICS Statement on Death and Organ Donation Edition 32* (2013) at 14.

67 These statutes establish a general legal standard for determining death but do not determine the diagnostic tests and medical procedures required, leaving the medical profession free to formulate acceptable medical practices.

68 The Crimes Bill 1989 provided that a person would be dead “[W]hen an irreversible cessation of all function in the person’s brain stem has occurred”. That Bill did not proceed. A similar definition was in the Human Tissue (Organ Donation) Amendment Bill promoted as a member’s bill by Dr Jackie Blue, primarily to establish a register of organ donors. That Bill did not progress because it was considered unnecessary to establish a register at that time.

69 Australia and New Zealand Intensive Care Society, above n 66, at 17.

70 We discussed this in Chapter 6.

- the duty to dispose of the body without undue delay.⁷¹

7.6 Outside the context of this review, the legal question of the definition of death arises in a number of circumstances. Most commonly, it arises in relation to organ transplantation because the patient must be dead before removal of the organs if that removal would otherwise kill the patient. Other examples include insurance law, as the point of death is relevant to whether life insurance may be paid out. The criminal question is also significant—that is, is it murder to remove artificial respiration after brain death?

OTHER JURISDICTIONS

7.7 In the 1970s and 1980s, many jurisdictions enacted statutory definitions of death following a seminal report from the Harvard Medical School.⁷² In the Commonwealth, these statutory definitions typically followed reports of the law commissions in those jurisdictions, and they generally focused on the need for a definition of death as brain death in the context of organ transplantation.

7.8 Almost every Australian state and most states of the United States have a definition of death for all purposes along the following lines:⁷³

a person has died when there has occurred—

- (a) irreversible cessation of all function of the brain of the person; or
- (b) irreversible cessation of circulation of blood in the body of the person.

7.9 A few jurisdictions merely state that death means “brain death”.⁷⁴

7.10 It is interesting to note that in recommending a statutory definition of death as including “brain death”, the Australian Law Reform Commission also addressed the general application of such a definition:⁷⁵

[...] although appearing in this context of transplantation, the recommended statutory definition of death is intended to have general application. It should not be limited in its legal effect to any particular kind of patient, nor to patients maintained by support machinery (although, in practice it will no doubt principally, if not exclusively, affect only such patients), nor to transplantation. [...] Despite the greater accuracy of determining death by reference to cessation of brain function, it is clear that in most cases, death will be certified or determined according to the traditional respiratory-circulatory-cardiac standards. There will not be a great number of cases in which the need and facilities of, and opportunity of, employing the necessary ‘brain death’ criteria will be present.

7.11 While this statement talks of the brain death definition having “general application”, in fact it is clear that the Australian Law Reform Commission did not intend it to apply to the doctor’s duty to certify death.

71 We discuss this in Chapter 15.

72 Harvard Medical School ad hoc committee “Report of the ad hoc committee of the Harvard Medical School to examine the definition of brain death: The definition of irreversible coma” (1969) 7 *Transplantation* 204.

73 For Australia, see *Death (Definition) Act 1983 (SA)*, s 2; *Human Tissue Act 1982 (Tas)*, s 27A; *Human Tissue Act 1982 (Vic)*, s 41; *Transplantation and Anatomy Act 1979 (Qld)*, s 45. For the United States, the *Uniform Determination of Death Act* is a draft state law recommended in 1981 by the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, the American Medical Association and the American Bar Association for adoption by all states.

74 See, for example, the Canadian jurisdictions of Nova Scotia - *Human Organ and Tissue Donation Act SNS 2010 c 36*, s 2(j); and Newfoundland and Labrador - *Vital Statistics Act SNL 2009 c V-6.01*, s 2(1)(h); and also the *National Health Act 2003 (South Africa)*, s 1.

75 Australian Law Reform Commission *Human tissue transplants* (ALRC Report 7, 1977) at 63.

DISCUSSION

- 7.12 Currently in New Zealand, in the absence of a statutory definition of death, a person needing to know whether “death” includes brain death must look to the common law for clarification. Unfortunately, the common law is unhelpful in this area. There have been only two cases in New Zealand that have discussed the definition of death, but neither provides clear guidance. Even if more case law is developed, each will consider only a narrow range of facts, which may or may not be relevant to future issues.
- 7.13 In *Auckland Area Health Board v Attorney-General*,⁷⁶ L suffered severe Guillain-Barré syndrome⁷⁷ and had been on life support systems for 12 months but was not brain dead. The doctors sought a declaration from the High Court that the withdrawal of life support would not give rise to their criminal liability for homicide. The High Court acknowledged that the medical community no longer equates death with the cessation of a person’s heartbeat, instead using the concept of “brain death”, but it did not discuss a legal definition of death. It held that, on the facts of this case, the withdrawal of life support would not result in liability for homicide by the doctors because they were under no legal duty to provide life support and had a lawful excuse for withholding it (it provided no therapeutic benefit).
- 7.14 In *Joe v Joe*,⁷⁸ the Family Court had to consider whether to dissolve the marriage on the grounds that Mrs Joe was dead. Mrs Joe had suffered a severe stroke. She was permanently and irreversibly unconscious but was not brain dead and was able to breathe unassisted. Judge Inglis surveyed much of the literature on the definition of death and said:⁷⁹
- ... advances in medical science and technology have taken us beyond the position where it is appropriate to think of death solely in terms of an irreversible cessation of respiration or circulation. But I find myself unable to accept that the Family Court, unaided by any statutory guidance, should go as far as declaring the common law in terms of [brain death].
- [...] it could not be right for the common law to develop in such a way that the threshold of death could be fixed at different points depending on the individual circumstances. Some might find it acceptable to regard a state of permanent and irreversible unconsciousness, on its own, as a sufficient indication of death for the purposes of remarriage or for a grant of probate or administration. But it could be expected that there would be general difficulty in accepting the same criterion for the purpose of tissue or organ transplants, or for burial or cremation. [...] It seems to me, however, that these are issues on which people’s values might be expected to differ quite widely and that if a threshold for death is to be fixed for any purpose below a level which attracts general acceptance in situations where there must be a high degree of certainty that death has occurred, that is function of Parliament, not the Courts.
- 7.15 He then stated that Mrs Joe was not legally dead simply by attaining a state of permanent and irreversible unconsciousness. He added, however, that he might have been prepared to hold, as matter of law, that a person will be dead when there is irreversible cessation of brain stem function and when that person’s respiration and circulation can be sustained only by artificial cardiorespiratory processes. However, in this case, he was not required to do so nor thought it desirable to do so.
- 7.16 We consider that these cases provide only limited assistance to a person with a legal duty under the new statute proposed in this Report arising after death. In *Auckland Area Health Board*,

76 *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235 (HC).

77 In Guillain-Barré syndrome, patients suffer inflammation of the peripheral nerves connecting the skin and muscles to the central nervous system leading to progressive weakness in the arms and legs. “Guillain Barré Syndrome Support Group NZ Trust” Neurological Foundation of New Zealand < www.neurological.org.nz/resources/other-neurological-organisations/guillain-barré-syndrome-support-group-nz-trust > .

78 *Joe v Joe* (1985) 3 NZFLR 675 (FC).

79 At 682.

Thomas J described the medical profession's established approach to determining when death has occurred, and he implied that the medical profession will decide in future on these issues "sensitive to the values of the community and alert to the requirements of the law".⁸⁰ However, he did not describe what currently amounts to death, and he did not suggest that this question should be determined solely by doctors. In *Joe*, Judge Inglis gave a strong indication that, if he had been required to decide, he would have concluded that death meant brain death, but he did not decide on the point and thought that this question should be determined by Parliament, not the courts.

CONCLUSION

- 7.17 We have concluded that the common law does not provide certainty as to whether a person who is brain dead is dead for the purposes of the law. However, there is a separate question about the extent to which the lack of certainty presents a problem to be resolved through this project.
- 7.18 In the context of this Report, we consider that any uncertainty is unlikely to cause problems for the statutory duties that arise at the point of death, described above. Doctors do not certify death when a patient is diagnosed as brain dead. Rather, they wait until circulatory death has also occurred. We have not detected any suggestion that it should be otherwise. Similarly, no-one would suggest that the duty on the family to dispose of the body should arise while the body is still connected to a respirator.
- 7.19 While it is outside the scope of this project, we suspect that greater difficulty arises in respect of organ transplantation due to the potential for doctors to carry liability for removing organs. However, it is interesting to note that few cases have reached the courts in New Zealand in the four and a half decades since the advent of artificial respiration. This may indicate that brain death is not particularly common and practical legal issues are usually resolved or avoided by good communication by health practitioners, by consensus or by alternative dispute resolution processes outside court.
- 7.20 We have concluded that this Report should not make a recommendation for a statutory definition of death because the status quo does not present a significant practical problem for the statutory duties proposed in this Report. However, the lack of a statutory definition of death may present a greater problem in other areas of the law. Consequently, this issue would benefit from thorough analysis in the form of a separate specific reference. Such a project should analyse the current international thinking on brain death, whether the statutory definitions of death in other jurisdictions have in fact produced greater certainty and whether it is desirable or practical to have one definition of death for all legal purposes.

⁸⁰ *Auckland Area Health Board v Attorney General*, above n 76, at 247.

Chapter 8

Auditing cause of death determinations

- 8.1 In Chapter 3 we described the high rate of error found around the world in determining the cause of death and in referring deaths to the coroner for further investigation. We also described how that high error rate is likely to also occur in New Zealand, but because **there is no central agency responsible for the quality of outputs from the death certification process, there is no data about the reliability of reporting.**
- 8.2 Currently, the only check on the quality of cause of death documentation is performed by the medical referee before a body is cremated. In Chapter 3 we described the limitations of this system, most notably that it only applies when a body is to be cremated. Medical referees are also limited in their ability to detect errors because of the processes they work within, particularly the lack of formal access to medical notes. Additionally, **there are a range of practices amongst medical referees, there is no formalised training or support for them and there is no systematic quality control.** The medical referee system is not designed to measure the quality of the outputs from the death certification process generally or to use the information and experience they develop in an education system for certifying doctors.
- 8.3 **There was very strong support in submissions on Issues Paper 23 for a robust system of checks on the documentation of all deaths, irrespective of whether a body is to be buried or cremated. There was also strong support for a different system from the current medical referee system, although there were differing views as to the characteristics of a new system.** We have analysed a range of options designed to improve the accuracy of cause of death determinations. These options are discussed below.

OPTIONS FOR ADDITIONAL OVERSIGHT IN DETERMINING CAUSE OF DEATH

Two doctors

- 8.4 We considered whether two doctors, rather than one, should be required to certify the cause of death. While the second doctor could, in theory, be a useful check on the accuracy of the first, this option would likely create further delay, would divert limited medical resources and may not provide many gains in the accuracy of the cause of death. Funeral directors already tell us of their frustration in obtaining the MCCD from the certifying doctor so that they can begin funeral preparations. That frustration is likely to increase if two doctors are required to certify, particularly in rural areas. We also doubt whether the second doctor would be able to provide meaningful oversight of the first doctor if he or she is not previously familiar with the deceased's medical history.

Review committees

- 8.5 As we described earlier, some hospitals conduct their own systematic reviews of MCCDs. Those reviews have been successful at detecting errors in both cause of death determinations and referrals of deaths to the coroner. They have a range of mechanisms for using the lessons learned from the reviews to upskill certifying doctors, some more effective than others.
- 8.6 There are two limitations of such systems. First, the feedback loop is limited to lessons learned from experiences within the hospital itself. There is no capacity to learn from the experiences of other hospitals nationally.
- 8.7 Second, there is no equivalent system for the review of deaths in the community. In theory, it would be possible to require all deaths in the community to be reviewed by similar committees made up of general practitioners. However, that is likely to require large resources of time and money.

Improving the medical referee system

- 8.8 In Chapter 3 we described the problems with the current system of medical referees. We have examined various ways in which that system could be amended to provide greater checks on the accuracy of post-death documentation. One of the best features of the current system is that it is local. This means that the medical referee can respond quickly after a death. It also means that the medical referee is more likely to know the local doctors and can follow up easily with the doctor if an error is detected. However, it may also mean that the medical referee is less objective in his or her assessments.
- 8.9 If medical referees were to continue to be employed by local crematoria, there should be formal systems of training and support implemented from a centralised and independent body. The aim of that training and support would be to standardise levels of practice in reviewing cremation documentation. Also, there is an increasing trend for medical notes to be stored electronically. If that trend enabled medical referees to compare the cause of death determination to the medical notes of the deceased person, significant gains in the safeguards provided by this system could be made.
- 8.10 However, we do not consider that improving the medical referee system in this way would provide adequate safeguards because three significant problems remain:
- It is restricted to oversight of deaths in which the body is cremated.
 - There is no formal system of feedback to doctors about the types of errors detected by medical referees.
 - There is a lack of independence in the examination of post-death documentation by medical referees who are employed by the cremation authority.

Conclusion

- 8.11 We consider that all of these options have significant weaknesses and would fail to deliver a robust system of scrutiny and safeguards over the quality and accuracy of cause of death determinations. Instead, we propose that a national system of random audits of cause of death determinations should be introduced as we describe in more detail below.

OTHER JURISDICTIONS

England and Wales

- 8.12 New systems to review death certification have been developed in the United Kingdom. Legislation was passed in Scotland in 2011 and has come into force this year.⁸¹ The review system for England and Wales has been developed and trialled but not yet implemented.⁸²
- 8.13 Under the English and Welsh trialled system, all deaths that were not investigated by the coroner underwent scrutiny by locally appointed medical examiners to confirm the cause of death or identify cases that need further investigation by the coroner. Medical examiners also reviewed the medical records; examined the body (in most cases); sometimes discussed the death with a relative or other appropriate person; and discussed and agreed the confirmed cause of death with the certifying doctor.
- 8.14 A study in 2012 of the trialled system compared the cause of death determined by the certifying doctor against the cause of death confirmed by the medical examiner.⁸³ The study concluded that almost 20 per cent of death certificates had a different underlying cause following scrutiny by the medical examiner. Scrutiny resulted in amendments to the number, sequence and type of conditions mentioned on the cause of death certificate, and that is likely to affect trends in reported causes of death.

Scotland

- 8.15 In Scotland, the system is similar, but the reviewers are called “medical reviewers”. They are centrally appointed but operate locally, and they review a random sample of all deaths prior to disposal of the body.⁸⁴ Medical reviewers conduct either a level one or a level two review. In a level one review, in addition to reviewing the cause of death certificate, the medical reviewer discusses the death with the certifying doctor. In a level two review, the medical reviewer may also examine the medical records, view the body and speak to other professionals involved with the deceased person or the family.
- 8.16 An evaluation of two Scottish pilot sites was published in 2013 after a year of operation, but it focused on the processes of the new system rather than its overall effectiveness at increasing the accuracy of death certification. Within the evaluation period, medical reviewers found that only 3 per cent of cause of death certificates were not up to standard. However, that high rate of accuracy could, in part, be due to the fact that doctors in these areas knew their certifications would be subject to additional scrutiny.
- 8.17 The evaluation made the following findings in relation to the new processes:
- In most cases, both level one and level two reviews were completed within the expected time scale (30 minutes and up to three hours respectively), but delays were also frequent, caused by difficulty in locating the certifying doctor, accessing the medical records or contacting the responsible consultant. Also, the evaluation was not able to assess any delays in commencing the reviews.

81 Government of Scotland “Certification of Death (Scotland) Act 2011” (2 July 2012) The Scottish Government < www.scotland.gov.uk/Topics/Health/Policy/BurialsCremation/Death-Certificate > .

82 BMA “Election delays death certificate reforms” (14 November 2014) < <http://bma.org.uk/news-views-analysis/news/2014/november/election-delays-death-certificate-reforms> > .

83 Office of National Statistics *Death Certification Reform: A Case Study on the Potential Impact on Mortality Statistics, England and Wales* (2012).

84 Healthcare Improvement Scotland “Death certification in Scotland” < www.healthcareimprovementscotland.org/our_work > .

- Key attributes important for medical reviewers included strong communication skills, the ability to negotiate and compromise, a willingness to be flexible, an ability to act decisively and an ability to take on an educative role with doctors.

A NATIONAL AUDIT SYSTEM

- 8.18 Under a national audit system, experienced doctors would be employed to review the cause of death certificate with the aim of detecting and correcting error in the determination of the cause of death and in referrals to the coroner. However, unlike the current system of medical referees, a national audit system would have the additional features of:
- administration by a central government agency;
 - review of a random sample of all deaths;
 - reviews based on referrals;
 - targeted reviews of deaths; and
 - support for and education of certifying doctors.

Administration by central government

- 8.19 In Chapter 4, we recommended that the Ministry of Health should have statutory responsibility for the death certification process. The Ministry of Health would therefore also have responsibility for funding and implementing the national audit system and for ensuring the quality of its outcomes. That would involve providing ongoing education to the practitioners employed to review the cause of death certificates (we have called them “cause of death reviewers”) and checking the accuracy of their assessments. The cause of death reviewers would be accountable to a minister for the outcomes of the audit system and should provide a publicly accessible annual report to that effect.
- 8.20 We consider that centralisation brings an essential element of independence and integrity to the system. Medical referees have told us that their knowledge of local circumstances and local doctors enhances their ability to assess cremation certificates. While that may be so in some cases, it means that there is no scope to identify problems that occur nationwide and no ability to tailor training for common problems. It also risks a lack of independence if the medical referees generally know the certifying doctors. A structure that enables a more objective assessment is important.
- 8.21 We have not formed a view on whether, although centrally accountable, cause of death reviewers should be located centrally or regionally. This may depend upon the availability of suitable staff to perform the role. We cannot see that locating cause of death reviewers regionally would be a problem so long as they are well connected to each other so that audits in one region can be informed by the lessons learned from other regions.
- 8.22 One option is for the Ministry of Health to provide funding to the National Forensic Pathology Service to provide this service. Currently, that service is funded by the Ministry of Justice to provide forensic pathology services to coroners. Part of the core work of these pathologists is to analyse causes of death in light of medical notes and autopsy reports. While the purpose of the proposed audit function (detecting errors in cause of death certification) is slightly different from the purpose of their services for coroners, the skills required would be similar. It may be more efficient to incorporate this service into an existing service than to establish a new organisation.

How would the audit system work?

- 8.23 The primary function of cause of death reviewers would be to detect and correct errors in cause of death determinations. In undertaking reviews, **cause of death reviewers should have access to the deceased person's medical notes and the ability to discuss the documentation with the certifying doctor so that a full analysis can be made to check whether the cause of death is accurate.**
- 8.24 It is likely that a two-level approach to auditing death certification, similar to the system developed in Scotland, would be the most efficient. Level one reviews would involve scrutiny of the entries on the online certification system and any other certification documentation and (if necessary) speaking to the certifying doctor. The purpose of this review is to identify omissions or errors in the way that the cause of death is stated (for example, confusing the primary cause of death with an antecedent cause and underlying conditions).
- 8.25 If the death involves any one of a number of identified risk factors or "red flags", **a level two review would be carried out, which, in addition to reviewing the death certification entries and documents and speaking to the certifying doctor, would involve scrutiny of electronic or hard-copy medical records plus speaking to any other relevant people, such as the family, Police or other medical professionals involved in the care of the deceased. The** purpose of a level two review is to detect deaths where the stated cause of death is not verified by the medical records or where circumstances of the death may give rise to questions as to the cause of death. This would include identifying deaths that should have been referred to the coroner but were not.
- 8.26 When an error is detected, the cause of death reviewer should be required to discuss the error with the certifying doctor. That discussion will either provide further detail and context to satisfactorily address the reviewer's concern, or an amendment to the cause of death will be agreed upon. If the cause of death reviewer cannot agree with the certifier, it will be necessary to refer the question to an independent adjudicator. That could be a coroner where the issue raised by the reviewer is that the death should have been referred to the coroner. In other cases, it should be a third doctor or other cause of death specialist.
- 8.27 If the reviewer detects criminal behaviour, he or she should have a statutory duty to report that to the Police.

What deaths should be reviewed?

- 8.28 In designing a review system, we have considered whether every determination of cause of death should be reviewed or whether it is sufficient to review a random sample. The answer lies in the importance given to ensuring accuracy in each case versus improving levels of accuracy generally. Reviewing every cause of death would be important for many of the private purposes of cause of death determinations (such as the assessment of life insurance claims and knowledge of familial medical history). However, for public purposes such as the development of public health policies and programmes, it is more important that the accuracy of cause of death certification is improved overall.
- 8.29 There are two significant negative consequences of reviewing every cause of death determination: cost and delay. Obviously, auditing every death would require significantly more resources than auditing a sample. It is not clear that the benefits to the public justify these costs. **In relation to timing, for a review to be meaningful, it must be conducted prior to disposal of the body so that the body is available for further investigation if necessary.** However, reviewing every death before disposal would produce significant delays in funerals, burials and cremations. We have received strong submissions that avoiding such delay is very important

in New Zealand.⁸⁵ On balance, we consider that these cost and timing considerations tip the balance in favour of auditing only a sample of deaths.

- 8.30 Deaths that are referred to the coroner should be excluded from the national audit process because the purposes of the review will be satisfied by the coronial process.
- 8.31 We have also considered whether deaths in hospitals should be excluded from the audit process. Some hospitals have established their own internal review committees to examine the quality of cause of death certification within those hospitals. For example, in 1993, Christchurch Hospital devised its own system of auditing and quality control of death certification following an inquiry into deaths of a number of patients of cardiothoracic surgeon Keith Ramstead. That audit system has resulted in significant improvements in the accuracy of MCCDs and in assessing whether a death should be reported to the coroner. Other hospitals, particularly larger hospitals, have similar review committees with differing processes.
- 8.32 There are significant advantages in having one review process for all deaths, wherever they occur, where the lessons learned can be shared across all deaths. However, this is a more expensive approach. A cost-effective alternative is for hospital deaths to be excluded from the national audit system. If this approach was adopted, hospitals should be required to peer review their own cause of death determinations. We suggest that such peer-review systems must review a random sample of deaths and include a mechanism for providing feedback to the certifier when errors are identified.
- 8.33 In addition, there should be some national oversight from the Ministry of Health of these hospital peer-review systems to ensure they produce quality outcomes and the trends and lessons learned from them are shared between hospitals and are used to train hospital doctors who certify the cause of death. A further feature could be for the central agency responsible for auditing death certification when death occurs in the community to have a role in providing oversight for hospital peer-review systems.
- 8.34 In conclusion, we consider that the proposed national audit system should review a random sample of all deaths except hospital deaths and deaths that are referred to the coroner.

Referrals for audits

- 8.35 In addition to random sample reviews, cause of death reviewers should be able to receive referrals to review particular cases. This would be available if someone suspected there was an error in documentation related to a particular death (whether it be family members, funeral directors, the Police, the Health and Disability Commissioner or another party). This will mitigate the effect of auditing only a random selection of deaths. However, the cause of death reviewers should be entitled to dismiss a referral where they consider there are no circumstances that would justify review.

⁸⁵ For example, Dr Martin Sage contrasted New Zealand to England and Wales: “[...] there are practical cultural differences between England and Wales and New Zealand in this regard: in England and Wales the whole after-death process (that is, certification of death, release of the body to funeral directors, with or without autopsy) usually progresses at what New Zealanders would regard as an infuriatingly lackadaisical pace, certainly over a period of many days (often 5 -7 days or more) which are apparently accepted by families in the UK but which would be entirely intolerable to many sectors of our society.”

Targeted reviews

- 8.36 An important secondary function of cause of death reviewers should be to undertake targeted reviews of the cause of death certificates for deaths with particular characteristics. Decisions about the types of deaths targeted for review would be informed by a number of factors including:
- knowledge of risk factors and “red flags” developed via the random audits;
 - statistical analysis of death certificates to reveal unusual trends related to particular causes of death, certifying doctors, antecedent conditions, medication taken, medical facilities or treatments or other similar matters; and
 - concerns raised by the general public or medical profession.
- 8.37 An example of a targeted audit would be a review of cause of death certificates in respect of deaths occurring in a particular aged care facility if there is cause for concern over a disproportionate prevalence of a particular cause of death. Such a review may detect inaccuracies in death certification or problems resulting from neglect at particular facilities (such as an unusually high number of deaths from falls). The evidence gathered from these reviews should be used to change practices, procedures and accountability mechanisms. It should also be used to educate doctors who certify the cause of death.

Support for and education of doctors

- 8.38 A corollary of centralising the review of cause of death certificates is the potential to make significant improvements to accuracy via formal systems of support and education for doctors. Systematic audits of a random sample of death certificates, together with the targeted audits, will quickly enable cause of death reviewers to develop a strong understanding of the risk factors for error across the whole country. The expertise that cause of death reviewers will develop in this role makes them ideally suited to support doctors to improve the accuracy of death certification. We consider that support should take three forms:
- Regular formal training programmes.
 - Availability to answer questions from doctors before cause of death certification is completed, for example, by email or telephone.
 - Targeted education based upon feedback from particular reviews.
- 8.39 In Issues Paper 23, we asked whether all doctors who are required to complete MCCDs should have access to independent advice. All except one of the 18 submitters who responded to this question agreed. Submitters thought that discussing cases with experts is very valuable and is likely to improve the accuracy of death certification, particularly for rural or sole-practice doctors. We agree and consider that cause of death reviewers would be well placed to offer this kind of service.
- 8.40 There have been a number of formal studies into the effect of educating doctors on their accuracy in determining the cause of death:
- A 1993 Australian study examined the effect on accuracy of death certification of providing written educational material and a questionnaire to junior doctors. It found a small reduction in errors that was not statistically significant.⁸⁶

86 T Weeramanthri, W Beresford and V Sathianathan “An evaluation of an educational intervention to improve death certification practice” (1992) 13 Aust Clin Rev 185.

- A 1998 Canadian study examined the effect on the rate of major and minor errors in a hospital's death certificates before and after the delivery of a workshop to junior doctors.⁸⁷ The workshop covered background information on death certification, a description of common pitfalls and interactive sessions involving hypothetical case scenarios. It found a significant reduction in major errors after the workshop (32.9 per cent to 15.7 per cent) but little effect on minor errors. It was noted that the durability of the improvement in major errors was not tested.⁸⁸
- A 2002 United Kingdom study examining the effect of formal training in death certification at an undergraduate level revealed little effect on accuracy.⁸⁹
- A 2007 United States randomised controlled study looked at the effect of two different educational techniques—the provision of a printed hand-out and an interactive workshop. It found significant improvements resulted from both techniques, but the interactive workshop technique demonstrated a higher degree of improvement than the printed hand-out technique.⁹⁰
- A 2007 United Kingdom study audited all the death certificates issued during a four-month period within the elderly care department of a hospital (140 certificates) and provided education to the certifying doctors (including individualised performance data). Three months later, another audit was conducted. The study found the error rate fell from 13.6 per cent to 2.4 per cent on the second audit.⁹¹

8.41 Although these studies are few in number and diverse in their methods, they provide some evidence that education of doctors can produce significant improvements in accuracy. Based on these studies, best-practice training should:

- emphasise the purposes and importance of death certification;
- cover common pitfalls in determining the cause of death;
- involve interactive sessions where determinations of the cause of death are practised using real-life examples;
- target doctors who are in fact completing cause of death certificates so that the lessons learned can be practised immediately; and
- be delivered regularly.⁹²

8.42 In addition, the 2007 United Kingdom study provided evidence that the “audit, educate, audit” method can be very effective. We envisage that, through targeted reviews, cause of death reviewers may identify particular groups of doctors who have a high rate of error. Education would then be targeted based on the most common errors being made in practice.

87 Major errors included mechanisms of death without a legitimate cause of death, improper temporal sequencing of diseases and competing causes of death. Minor errors included the omission of time intervals for the presence of diseases, the use of abbreviations and the inclusion of the mechanism of death (but with a legitimate cause of death).

88 KA Myers and DR Farquhar “Improving the accuracy of death certification” (1998) 158 CMAJ 1317.

89 Eindra Aung, Chalapati Rao and Sue Walker “Teaching cause-of-death certification: lessons from international experience” (2010) 86 Postgraduate Medical Journal 143.

90 Dhanunjaya R Lakkireddy and others “Improving Death Certificate Completion: A Trial of Two Training Interventions” (2007) 22 J Gen Intern Med 544.

91 Christian P Selinger, Robert A Ellis and Mary G Harrington “A good death certificate: improved performance by simple educational measures” (2007) 83 Postgrad Med J 285.

92 Submissions indicated that, in hospitals, it is usually the junior doctors who are asked to certify death. Given the natural movement of junior doctors through their training system, regular training is important to capture new doctors.

Funding the audit system

8.43 In Chapter 3 we described options for sources of funding for doctors who certify the cause of death. We have conducted a similar analysis of the proposed new audit process and we consider that the audit process should be publicly funded for the following reasons:

- The benefit of the audit system is largely a public benefit.
- There are no efficiency gains to be made by a user-pays system because the audit process potentially applies to all deaths.
- There is no means of collecting a user-pays fee because official notification of the death to the Registrar-General of Births, Deaths and Marriages should continue to be required after disposal of the body.⁹³

RECOMMENDATIONS

- R15 The statute should create a statutory role of “cause of death reviewer” to be appointed by the Minister of Health.
- R16 A function of cause of death reviewers should be to undertake a review of a random sample of all deaths (except deaths that occurred in hospital and deaths that have been referred to the coroner) for the purpose of:
- detecting error in the determination of the cause of death;
 - detecting deaths that should have been referred to the coroner; and
 - providing education and support to doctors who certify the cause of death.
- R17 Additional functions of cause of death reviewers should be to:
- review deaths referred to them;
 - undertake targeted reviews of deaths; and
 - provide support and education for doctors who certify cause of death.
- R18 The statute should provide that, when a cause of death reviewer detects an error in the determination of the cause of death, the reviewer must:
- discuss the error with the certifying doctor with a view to reaching agreement (if necessary) about amending the certification of the cause of death; and
 - if agreement cannot be reached, refer the death to the coroner or to another authorised doctor for adjudication.
- R19 If the reviewer detects evidence of criminal activity, the reviewer must report the death to the Police.

93 See Chapter 5 for further discussion on the timing of the obligation to notify the death to the Registrar-General.

Part 2

BURIALS AND CREMATIONS



LAW • COMMISSION
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Chapter 9

Introduction

- 9.1 New Zealand had no national burial legislation until well after the arrival of British settlers. The first attempt at legislation to manage cemeteries was passed in 1877, but the Cemeteries Act 1882 was more comprehensive, seeking to impose some order on the disparate places of burial that had emerged to serve the settler communities. Since then, amendment legislation has tinkered at the edges, addressing the immediate burial demands of New Zealand as they arose. The Burial and Cremation Act 1964 (the Act) is the latest iteration of that legislation. It retains many of the original provisions and the framework of the 1882 Act. It has been amended several times, but it is now well overdue for a thorough and principled review.
- 9.2 The establishment and management of facilities for burial and cremation raise a number of important values. Chief among these is the value of showing respect for the dignity of dead bodies.⁹⁴ In general, it is considered appropriate and respectful to dispose of bodies after death by burial or cremation. Therefore, there is a need to provide adequate facilities for burial and cremation. The role of the law is to facilitate the provision of those facilities and to promote appropriate and respectful behaviour in respect of the disposal of bodies.
- 9.3 In achieving these goals, there are a number of values that should be recognised. For example, it is expected that places used to bury the dead are maintained to an acceptable standard. As the final resting place of former members of the community and as a place where surviving family and friends go to mourn, the cemetery is a focal point of community and social identity. They should be maintained to a standard that is acceptable to the communities they serve.
- 9.4 It is also important to recognise the value of individual commemoration of the deceased and of rituals for farewelling the deceased. The marking of the burial place with a gravestone or other monument serves as a physical memorial that brings comfort to the families of the deceased. The burial process for farewelling the deceased is ritualised and heavily influenced by cultural and religious beliefs. The families of the deceased are well served if those beliefs are respected, not only because this has positive social effects, in that it facilitates the mourning process, but also because section 15 of the New Zealand Bill of Rights Act 1990 guarantees the right to manifest one's religion or belief.
- 9.5 Finally, places of burial are repositories of community and national history and places of cultural enrichment. They are, according to one study of New Zealand's places of burial, "valuable and fragile pieces of our national heritage, providing valuable links to our past, commemorating the lives of ordinary, and not so ordinary, people".⁹⁵ Therefore, there is an interest in their preservation and protection.
- 9.6 In Chapter 10 we review the current legislative and policy landscape for the provision and management of facilities for the disposal of dead bodies by both burial and cremation. We also

⁹⁴ While deceased bodies do not have a right to dignity (because dead bodies cannot hold rights), it can be said that we nevertheless have an inherent duty to treat dead bodies with dignity. That duty rests on the notion that humans should be treated as ends not as means. See GP Fletcher "Human Dignity as a Constitutional Value" (1984) 22 University of Western Ontario Law Review 171 for a discussion about the duty to respect human dignity in the dead.

⁹⁵ Stephen Deed "Unearthly Landscapes: The Development of the Cemetery in Nineteenth Century New Zealand" (Master of Arts, Otago, 2004) at 1.

describe the current statutory obligations in relation to disposing of bodies. The Burial and Cremation Act 1964 is the key Act, but a number of other Acts are also relevant, dealing with resource management, heritage protection, land protection and health. Local authorities also have applicable bylaws and policies.

- 9.7 In Chapter 11 we examine the problems with the law:
- The legal status of many places of burial is unclear, which compromises their ability to be properly managed.
 - Certain provisions of the Act are inconsistent with contemporary legislative functions of local government.
 - There is a lack of legal clarity around rights, powers and duties of cemetery owners, plot holders and other stakeholders.
 - There is an unnecessarily cumbersome process for the establishment of crematoria.
- 9.8 In Chapter 12 we set out our recommendations for legal reform to address these problems. We propose a new statutory framework that will clarify the status of land used for burial and the rights and responsibilities that attach to that land.
- 9.9 Chapter 13 examines the current legal and policy framework for providing choice and responsiveness in places of burial. We have considered whether the Act takes an overly restrictive approach towards bodies being buried on private land and whether it would be possible for entities other than local authorities to establish new cemeteries. That chapter makes recommendations to increase public choice as to burial as much as possible within the existing resource management framework.

Chapter 10

Current legislation

- 10.1 Legislation governing burial and cremation is found across a number of legislative instruments. The Burial and Cremation Act 1964 (the Act) followed on from the Cemeteries Act 1908 and so has a strong focus on burial. Of particular note, the Act provides that it is unlawful to bury a body in any place other than a cemetery, burial ground or Māori burial ground (urupā) if there is such a place within 32 kilometres of the place where death occurred or where the body has been subsequently taken.⁹⁶ While we consider that the general prohibition on burial outside of an approved cemetery or burial ground should continue, in Chapter 13 we examine whether this exception to the general rule is still required.
- 10.2 While the Act makes brief mention of cremation, most of the detailed regulation of cremation is found in the Cremation Regulations 1973 (the Regulations).
- 10.3 In 2009, a number of provisions relating to the doctor's certificate as to the cause of death were transferred into the Act from the Births, Deaths, and Marriages Registration Act 1995 (as it was then known). We examine the need for reform of these provisions in Part 1 of this Report. The 2009 reform also transferred into the Act a number of general requirements in relation to the burial and cremation of bodies. In particular:
- a doctor's certificate as to the cause of death is required before a body is disposed of by any method;⁹⁷ and
 - a person having charge of a body must dispose of it within a reasonable time.⁹⁸

We consider that both of these provisions should be continued in the new statute.

- 10.4 In this chapter we give a general description of the legislative requirements for burial and cremation under the Act and Regulations.

BURIAL

- 10.5 Most of the Act is concerned with the provision of cemeteries and places of burial and, in particular, with classifying the various places where a body can be buried. It also contains a number of quite specific provisions about the control and management of places of burial and a number of provisions about their closure and clearance. It should be noted that it does not cover urupā that are set aside as burial grounds under Te Ture Whenua Māori Act 1993.

Different types of burial land

- 10.6 The Act recognises a variety of different types of burial land, reflecting the various ways in which such land has developed over the years. Each of these types of burial land has different rules relating to its establishment and management. The types of burial land are:

⁹⁶ Burial and Cremation Act, s 46(1).

⁹⁷ Section 46AA.

⁹⁸ Section 46E.

- cemeteries—local authority cemeteries and trustee cemeteries;
- burial grounds—denominational and private; and
- other places of burial—“private burial place” and “burial in a special place”.

Cemeteries

10.7 A cemetery is defined in the Act as:⁹⁹

Any land held, taken, purchased, acquired, set apart, dedicated, or reserved, under the provisions of any Act or before the commencement of this Act, exclusively for the burial of the dead generally, and, where the context so permits, includes a closed cemetery.

10.8 The Act recognises two types of cemetery—those under the control and management of local authorities or of trustees. The Act states that a local authority has control and management over cemeteries that are:¹⁰⁰

- on land for which it holds the title;
- on land that it administers;
- under its control and management as a trustee before the commencement of the Act; and
- under its control and management due to an appointment as such by the Governor-General under section 23.

10.9 We estimate that around 70–80 per cent of the cemeteries in New Zealand are local authority cemeteries. The majority of people who opt for burial are buried in local authority cemeteries. They range in size, with the largest local authority cemetery (and the largest cemetery in the country) in Waikumete, Auckland. That cemetery is controlled and managed by Auckland Council and has so far taken over 70,000 burials.

10.10 However, the earliest establishers of public cemeteries in New Zealand were not local authorities. They were community-based groups, operating before any burial legislation had been passed. Early cemetery legislation deemed these pre-existing groups to be trustees of the cemeteries that they operated.¹⁰¹ Now, the Act continues to recognise these trustee cemeteries,¹⁰² so for example, a cemetery that is on land held by the local authority will nonetheless be a trustee cemetery if it was under the control and management of trustees before the commencement of the Act in 1964.

10.11 Issues Paper 34 *The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review* recorded nearly 100 cemeteries operating as trustee cemeteries.¹⁰³ However, it is difficult to state exact numbers because of ambiguity around the legal status of some cemeteries.¹⁰⁴ Although many are small, they range in size and include, for example, Mangere Lawn Cemetery in South Auckland, which employs full-time staff and serves a large constituency. Some of these “trustees” are registered as a charitable trust or an incorporated society. Some refer to themselves as “cemetery committees” but may or may not have formal legal status.

⁹⁹ Burial and Cremation Act, s 2.

¹⁰⁰ Section 5(1). This is subject to Part 3, which applies to any cemetery that, immediately before the commencement of the Act, was “under the maintenance and care of trustees other than a local authority”: s 22(1).

¹⁰¹ Cemeteries Act 1882, s 5.

¹⁰² Burial and Cremation Act, s 22.

¹⁰³ However, records of the Auditor-General refer to auditing a greater number of trustee cemeteries, so figures are not exact.

¹⁰⁴ We describe this ambiguity further in Chapter 11.

- 10.12 The Act sets out how trustees are appointed and removed.¹⁰⁵ They can be removed at the discretion of the Governor-General, and the Governor-General is responsible for appointing new trustees if an existing trustee resigns, is absent from New Zealand for more than six consecutive months or is removed.
- 10.13 If the trustees number less than three, the Governor-General can appoint a local authority to take over control and management of the cemetery, with the local authority's consent.¹⁰⁶ A notice in the *Gazette* of the appointment of a local authority to have the control and management of a cemetery has the effect of vesting the land comprising the cemetery in the local authority and must be registered by the District Land Registrar upon presentation of the notice.¹⁰⁷ The Governor-General's powers under these sections can be delegated to local authorities.¹⁰⁸
- 10.14 The Act states that trustees have all the rights, powers and duties that a local authority has in respect of cemeteries.¹⁰⁹ Both types of cemetery are public in nature and must be open for interment of all deceased persons generally.¹¹⁰
- 10.15 The Act provides for the establishment of new cemeteries by local authorities but not by trustees.¹¹¹ It also provides that land may be taken for the purpose of a cemetery under the Public Works Act 1981.¹¹² The Act currently does not contemplate the possibility of local authorities providing cemeteries jointly with, or of cemeteries being established by, regional councils. Land use consent under the Resource Management Act 1991 may be required for the establishment of a cemetery, depending on the requirements of the relevant district plan. Consent from the regional council for discharge to land may also be required.

Burial grounds

- 10.16 The Act provides for two types of burial grounds—denominational and private. Denominational burial grounds are places of burial established as such under any Act by a religious denomination for burial of the adherents of that group.¹¹³ A religious denomination is defined in the Act as “the adherents of any religion and includes any church, sect, or other subdivision of such adherents”.¹¹⁴
- 10.17 This broad definition makes it difficult to state the precise number of denominational burial grounds in New Zealand. A number were set aside by the Catholic, Anglican, Methodist and Presbyterian churches in the mid-19th century and served the needs of small, rural parishes. However, not all denominational burial grounds are associated with small churches. Purewa Cemetery in Auckland, which was established as an Anglican burial ground in the 1890s, is now operated by an Anglican diocese trust. It covers 45 acres of land and seeks to remain “the premier cemetery in Auckland”.¹¹⁵
- 10.18 The owner of the land of a denominational burial ground is deemed to be the manager of the burial ground, although that person may appoint another person in lieu or in addition to them,

105 Burial and Cremation Act, ss 22 and 23.

106 Section 23(3).

107 Section 53(1).

108 Section 24.

109 Section 25(2), except the duty in section 4 to provide cemeteries and the power in section 20 to clear disused cemeteries.

110 Section 6.

111 Section 4.

112 Section 4(3).

113 Section 2.

114 As above.

115 Purewa Cemetery & Crematorium “Purewa Cemetery and Crematorium Offers Bereaved Families and Relatives” (2015) < www.purewa.co.nz > .

- or the Minister of Health may appoint a manager.¹¹⁶ A number of the specific powers and duties of trustees and local authorities apply also to these managers.¹¹⁷
- 10.19 If members of a religious denomination wish to establish a new burial ground, they must first obtain the approval of the Minister of Health.¹¹⁸ The Minister must consider the position of the land, its suitability as a burial ground, its suitability for alternative uses and any other material matters.¹¹⁹ In practice, applications are reviewed by a health protection officer at the Public Health Unit. He or she carries out a site visit to assess the suitability of the land for burial of the dead. We noted in Issues Paper 34 that, at that time, six new denominational burial grounds had been approved for establishment since 1993.¹²⁰
- 10.20 In addition to denominational burial grounds, the Cemeteries Amendment Act 1912 provided for the Governor to approve the creation of private burial grounds managed by a body corporate of trustees.¹²¹ Those trustees were to have the same rights, powers and duties as cemetery trustees.¹²² That Act placed no limits on the Governor's power other than what he "thinks fit", so in theory, this provision would have enabled groups other than religious denominations to create private burial grounds.
- 10.21 That power was repealed by the 1964 Act, although it continues to provide for any private burial grounds already established.¹²³ The Trustees of private burial grounds are subject to the same rights, powers and duties as the managers of denominational burial grounds with some exceptions relating to the alienation of the land, the proceedings of trustees, financial management and the requirement to register burials with the local authority.¹²⁴
- 10.22 It is difficult to know whether this provision for private burial grounds was widely taken up. However, we have found two prominent uses of the provision. First, in 1923, burial ground on the outskirts of the Bolton Street cemetery in Wellington was declared to be a private burial ground for Richard John Seddon, former Prime Minister of New Zealand, his wife and their descendants. Doubts then arose as to whether the power could be exercised in respect of land within the boundaries of a city, and his widow, Louise Jane Seddon, also applied to further limit the class of people who could be buried there to herself and any son or daughter of her and her husband's marriage. A special Act was passed, the Seddon Family Burial-Ground Act 1924, to validate the warrant and limit the burial ground. That Act remains on the statute book.
- 10.23 Second, land at Point Halswell in Wellington was declared to be a private burial ground for the Right Honourable William Ferguson Massey and his widow. An Act was passed, the Massey Burial-Ground Act 1925, to reserve the land as a burial ground and memorial, vest it in the Crown and limit the persons who could be buried there to William Massey and his widow. That Act also remains on the statute book.

Other places of burial

- 10.24 The Act recognises two more categories of place in which it is legal to bury a body, although it does not make provision for the management of those places.

116 Burial and Cremation Act, s 32.

117 Section 36(1).

118 Section 31(1).

119 Section 31(2).

120 Law Commission, above n 8, at n 184. Note that this includes an application in 2012 by a Taupo-based couple to establish a Jewish burial ground on a portion of their farm. This application followed the rejection of an application under section 48 of the Act for burial in a special place.

121 Cemeteries Amendment Act 1912, s 2.

122 Section 9.

123 Burial and Cremation Act 1964, ss 33-36.

124 Section 36(2).

- 10.25 First, a body may be buried in a “private burial place”, which is a place that was used for private burial before the commencement of the Act. However, the sanction of a District Court Judge (and, in some circumstances, the additional sanction of the Mayor or Councillors) must first be obtained.¹²⁵ That sanction can only be refused if such burial would be prejudicial to public health or decency. Ministry of Health officials can recall this provision being discussed in relation to only one piece of land.
- 10.26 Second, a person can be buried in a “special place” with a certificate from the Minister of Health (and, in some circumstances, with the additional sanction of the Mayor or Councillors).¹²⁶ The Minister may provide that certificate if satisfied that there are exceptional circumstances that make the burial of the body in that place particularly appropriate. According to parliamentary speeches, this new provision was designed for “burial in special places of honour”.¹²⁷ The Ministry of Health views the provision as being intended to provide for the burial of public notables whose deeds were of national significance.¹²⁸
- 10.27 Applicants for burial in a special place must provide:
- evidence of exceptional circumstances verified by independent written submissions;
 - evidence of consultation with the territorial authority, iwi and neighbours and required resource consent;
 - information about the site, including the history of ownership and a health protection officer’s assessment that the site is suitable; and
 - assurances of arrangements for the long-term maintenance and protection of the land.
- 10.28 From approximately 60 applications for burial in a special place since 1982, few were approved that relied purely on the deceased person’s connection with the land. Examples of declined applications include:
- an application for burial in a station in a remote part of the South Island, where the applicant claimed a lifelong association with the land and a significant contribution to farming in the area—the person’s spouse had been buried on the land in 1989;
 - an application for burial on land that had been owned since 1954 and on which a nationally significant amenity had been built; and
 - an application for burial on a farm in family ownership since 1975.
- 10.29 Examples of granted applications are:
- an application for burial of the remains of Bishop Pompallier, the founder of the Catholic Church in New Zealand, at the Church of St Mary at Motuti, Hokianga harbour;¹²⁹ and
 - an application to permit the burial of an unknown soldier at the National War Memorial in Buckle Street, Wellington.

125 Section 47.

126 Section 48. The Minister’s power to approve burial in a special place has been delegated to the Director of Public Health.

127 (22 October 1964) 340 NZPD 2910.

128 Ministry of Health *Environmental Health Protection Manual version 7* (2015). See Appendix 1.

129 “Bishop Pompallier’s remains to be buried on Hokianga shore” *New Zealand Herald* (19 April 2002) www.nzherald.co.nz.

Management powers and duties

10.30 The Act provides a range of very specific powers and duties on local authorities and trustees managing cemeteries.¹³⁰ These include the power to:

- change the name of the cemetery;¹³¹
- maintain and landscape the cemetery;¹³²
- permit graves and vaults to be dug and monuments to be erected;¹³³
- sell the exclusive right of burial, either in perpetuity or for a limited period;¹³⁴
- permanently set aside portions of the cemetery for burial of members of a religious denomination or of Her Majesty's Forces;¹³⁵
- make bylaws;¹³⁶
- appoint officers to assist in the execution of the Act;¹³⁷
- spend money to clear, clean or repair any closed, disused or derelict cemetery or place of burial;¹³⁸ and
- grant leases of any unused portion of the cemetery.¹³⁹

10.31 The management duties on local authorities and trustees include to:

- keep money received in a separate account and apply it to the management of cemeteries;¹⁴⁰ and
- not use cemetery land for other purposes nor mortgage or sell it except as provided by the Act.¹⁴¹

10.32 In addition, trustees have duties in respect to accounting records and preparing financial records (including having them audited).¹⁴²

10.33 There are other statutes that place obligations on local authorities and trustees managing cemeteries. In particular, the Reserves Act 1977 contains a broad definition of “reserve” as “any land set apart for any public purpose”.¹⁴³ That definition would appear to include cemeteries. That Act requires local authorities to classify its reserves according to its primary purpose (cemeteries are likely to be either local-purpose reserves or historic reserves).

10.34 The Heritage New Zealand Pouhere Taonga Act 2014 (the HNZPT Act) protects “archaeological sites”, which are defined as any place (including any building or structure) that was associated with human activity before 1900. Many cemeteries and burial grounds are

130 Burial and Cremation Act, s 36, sets out the extent to which those powers and duties also apply to the managers of denominational burial grounds and the trustees of private burial grounds.

131 Section 7.

132 Section 8.

133 Section 9.

134 Section 10.

135 Sections 11 and 15.

136 Section 16.

137 Section 19.

138 Section 20. This power does not apply to trustees.

139 Section 21(2).

140 Section 18.

141 Section 21(1).

142 Sections 29, 29A and 29B.

143 Reserves Act 1977, s 2.

therefore archaeological sites under this Act and may not be modified or destroyed without obtaining prior authority from Heritage New Zealand Pouhere Taonga (HNZPT). This is the case whether or not the archaeological site is registered under the New Zealand Heritage List/Rārangī Kōrero or the Landmarks List.¹⁴⁴

- 10.35 Section 45 of the HNZPT Act sets out the process for applying for authority to modify or destroy an archaeological site, which includes the need for HNZPT to be satisfied that the applicant “has sufficient skill and competency, is fully capable of ensuring that the proposed activity is carried out to the satisfaction of HNZPT, and has access to appropriate institutional and professional support and resources”.
- 10.36 The HNZPT Act also allows HNZPT or any other person to apply to put a place on the New Zealand Heritage List/Rārangī Kōrero.¹⁴⁵ According to HNZPT, of the approximately 5,600 historic sites included in the New Zealand Heritage List/Rārangī Kōrero, 41 are cemeteries. More than 500 churches are registered, 20 of which specifically include burial grounds.
- 10.37 In respect of a historic area entered on the New Zealand Heritage List/Rārangī Kōrero, HNZPT may make recommendations to the local authorities that have jurisdiction in that area as to the measures they should take to assist in the conservation and protection of that historic area.¹⁴⁶ In doing so, HNZPT must recognise the interests of any owner in the historic area as far as they are known. Local authorities must have particular regard to the recommendations.¹⁴⁷

Ministerial powers

- 10.38 As we described in Chapter 1, one of the main drivers behind the reform of the Act is that it provides for a great deal of control over burial and cremation by the Minister and Ministry of Health, despite more modern thinking recognising that the health concerns in this area are very limited. In particular, the Act gives powers to the Minister of Health, despite them being mainly concerned with the use of land rather than health issues, that entail:
- approval of the change of name of a cemetery;¹⁴⁸
 - approval of the declaration of a denominational burial ground;¹⁴⁹
 - provision of a licence to disinter a body;¹⁵⁰
 - closing a cemetery or burial ground and directing that no further burials take place there;¹⁵¹
 - specifying whether a crematorium within the boundaries of a cemetery is to be closed (except for the crematorium within Purewa Cemetery);¹⁵²
 - authorising the removal of monuments from any closed cemetery;¹⁵³ and
 - approving burial in a special place.

144 Heritage New Zealand Pouhere Taonga Act, s 42.

145 Section 67.

146 Heritage New Zealand Pouhere Taonga Act, s 74(1).

147 Section 74(3).

148 Burial and Cremation Act, s 7.

149 Section 31.

150 Section 51.

151 Section 41. The Minister may also vest the control and management of a closed cemetery or burial ground in any person (s 43 and s 44); reopen any closed cemetery or burial ground (s 45A); or vest control and management of any reopened cemetery or burial ground in any person (s 45B).

152 Section 41(2) and (3).

153 Section 45.

- 10.39 In relation to the provision of a licence to disinter a body, while the primary concerns are around land use and the management of cemetery resources, there may be some health concerns, particularly where the body has not been buried for a long period of time. Most applications for disinterment to the Minister are made on family or personal grounds, for instance, to relocate the body of the deceased closer to family members, either in the same or a different cemetery. Approximately 40 licences for disinterment are issued by the Ministry each year, and about three applications are declined on the basis of “non-agreement”.
- 10.40 Ministry policy 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. Usually, the cemetery sexton will also be present at the disinterment.

Special local authority duties

- 10.41 In addition to their powers and duties in respect of the management of their own cemeteries, local authorities have two special but more general obligations in relation to cemeteries. First, they must permit the bodies of any poor person or of any person from a hospital, prison or other public institution to be buried or cremated free of charge.¹⁵⁴ Second, they must establish and maintain cemeteries where sufficient provision for burial is not otherwise available within its district.¹⁵⁵

Power of health protection officers

- 10.42 The Act gives a power to health protection officers (or other employees of the public service appointed by the Minister for the purpose) to inspect any cemetery to ascertain its state and condition, examine the accounts and ascertain whether bylaws and regulations are being complied with.¹⁵⁶ Health protection officers are appointed by the Director-General of Health and are employed by District Health Boards’ public health units.

CREMATION

- 10.43 Cremation has been recognised in legislation since 1874 as a means of disposing of a dead body. However, the first crematorium in New Zealand was only established in 1909 by Wellington City Council in Karori Cemetery. Until the last 20 years, most crematoria were provided by local authorities, despite the legislation permitting private crematoria. However, since then, the price of new cremators has reduced, enabling many more private crematoria to be established. **Currently, about 70 per cent of deceased people are cremated.**
- 10.44 Some alternative methods of “cremating” bodies are gaining popularity overseas. In particular, alkaline hydrolysis has recently been legalised in 11 states in the United States of America and two in Canada.¹⁵⁷ This process uses liquid chemicals and high pressure to dissolve bodies. Its proponents believe it is more environmentally friendly than cremation because it does not pollute the air and requires less energy.
- 10.45 Although there is no central register of crematoria, for the purposes of our review, the Ministry of Health with the Funeral Directors Association of New Zealand compiled **data that shows there are 52 crematoria in operation, 15 of which are operated by local authorities and the remainder by private providers.** Many of the private cremators are located in funeral homes.

¹⁵⁴ Section 49.

¹⁵⁵ Section 4.

¹⁵⁶ Section 52.

¹⁵⁷ Jeff Parrott “Indiana considers legalization of alkaline hydrolysis as alternative to cremation, burial” (2 April 2015) The Elkhart Truth < www.elkharttruth.com > .

- 10.46 Currently, any person who wishes to establish a crematorium needs to consider both the Resource Management Act 1991 (the RMA) and the Burial and Cremation Act 1964. Whether or not a proposed crematorium requires resource consent under the RMA 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. If resource consent is required, the local authority must determine whether the consent should be notified, giving neighbours or the public the opportunity to make submissions.
- 10.47 The Act says very little about crematoria besides providing that the Minister of Health's approval is required for the construction of a crematorium.¹⁵⁸ The Ministry of Health has published guidelines for the siting and construction of crematoria.¹⁵⁹ In practice, an assessment is made of any resource consent (if required) and the specifications and plans for the crematorium against applicable guidelines.¹⁶⁰
- 10.48 A separate approval is required from the Minister of Health under the Regulations to begin to use a crematorium.¹⁶¹ Generally, a health protection officer observes a test firing of the cremator and provides a report as to whether or not there were any visible smoke emissions or identifiable odour emissions.
- 10.49 Other provisions in the Act empower local authorities to operate crematoria,¹⁶² and detailed requirements for the operation of crematoria are provided in the Regulations. In Chapter 11, we discuss problems with the Regulations and make proposals for reform in Chapter 14.
- 10.50 There is no guidance in the Act as to the scattering of ashes, although some local authorities have opted to produce their own guidance.¹⁶³ For example, the Wellington City Council Commemorative Policy of 2006 gives detailed guidance on places that have been approved for scattering, areas where scattering is allowed and how people may apply for approval for the scattering of ashes in other public places.¹⁶⁴ This policy has been developed in consultation with local iwi organisations.
- 10.51 In 2014, Auckland Council proposed that the scattering of ashes on public land may only take place with the written approval of the Council. This proposal created public controversy.¹⁶⁵ The Council amended its proposal in response to the public opposition. Under the new proposal, there is no requirement to apply to the Council to scatter ashes. Instead, the Council has published guidance about scattering ashes and will put up signs in sensitive places indicating that ashes should not be scattered there.¹⁶⁶

GENERAL OBLIGATIONS IN RELATION TO DISPOSAL OF BODIES

- 10.52 There are currently a number of statutory obligations concerning the treatment of bodies after death that are relevant both to people in the business of providing funeral services and to anyone who is dealing with bodies after death. For example, section 150 of the Crimes Act 1961

158 Burial and Cremation Act, s 38.

159 Guidelines on the siting and construction of crematoria (Department of Health, 1992).

160 Such as the Australian/New Zealand Standard: Management of clinical and related wastes. AS/NZS 3816:1998.

161 Cremation Regulations, reg 3.

162 Burial and Cremation Act, pt 5.

163 Also, ashes are "human remains" that it is an offence under section 150 of the Crimes Act 1961 to improperly or indecently interfere with or offer an indignity to.

164 Wellington City Council *Commemorative Policy* (2006) at [8.6]. The policy states that bylaws will require permission to be gained before ashes are scattered on public land, but it appears this has never occurred.

165 Newstalk ZB "Auckland's ashes saga nears conclusion" *New Zealand Herald* (online ed, Auckland, 5 July 2014) < www.nzherald.co.nz > .

166 Auckland Council *Scattering and settlement of ashes* (2014).

makes it an offence to either neglect to perform a duty imposed by law with reference to the burial or cremation of a dead body or human remains or to improperly or indecently interfere with or offer an indignity to any dead human body or human remains.

10.53 There are a number of obligations under the Act, including:

- a person who has charge of a body must dispose of it within a reasonable time;¹⁶⁷
- a person having charge of a body must not transfer charge of it to another person without first giving the other person a doctor's certificate or coroner's authorisation and getting from them the standard Transfer of Charge of Body form;¹⁶⁸ and
- a person who disposes of a body by burial, cremation or otherwise must first obtain a doctor's certificate or coroner's authorisation, and that person must also send that documentation to the Ministry of Health.¹⁶⁹

10.54 In Chapter 15 we make a number of proposals for the modernisation of these obligations in a new statute.

167 Burial and Cremation Act, section 46E.

168 Section 46E. Under this form, the transferee undertakes to notify the Registrar-General of the death and to dispose of the body. It also describes where it is intended to dispose of the body. There are several exceptions to the application of this rule in s 46E(2) and (3), including when funeral directors collect a body from the home or aged care facility. We discussed this section in more detail in Chapter 6.

169 Section 46AA.

Chapter 11

Problems with the current legislative scheme for burial and cremation

- 11.1 Given the age of the legislation, it is perhaps unsurprising that we have found a wide range of problems with the current legislative scheme for the provision of facilities for the burial and cremation of bodies. The majority of these problems relate to burial—the lack of recognition of the diversity of cultural and religious needs, the unclear legal status of land used for burial and the lack of certainty of the obligations of managers of that land. However, we have also identified problems with the legal procedures for establishing new crematoria and with the current general obligations on people disposing of bodies.

LACK OF RECOGNITION OF DIVERSITY OF NEEDS

- 11.2 Our terms of reference ask us explicitly to consider whether the Burial and Cremation Act 1964 (the Act) is meeting public expectations and needs in a number of ways, including:
- the provision of culturally appropriate options for burial or cremation;
 - responsiveness to individual or group requirements (for example, environmentally friendly burials);
 - the suitability of religious affiliation as the sole criterion for the establishment of burial grounds; and
 - the responsiveness of the Act to the beliefs, customs and practices of Māori.
- 11.3 As mentioned previously, the main thrust of the burial provisions of the Act is that cemeteries should be provided by local government. This means that groups that wish to adopt particular burial customs or practices must work with local authorities to have those customs and practices accommodated.
- 11.4 Everyone has a right to practise their faith and to enjoy their culture, profess and practise their religion and use the language of any ethnic, religious or linguistic minority they belong to.¹⁷⁰ The Act only goes part way towards requiring local authorities to recognise those rights. For example, the Act provides that every cemetery shall be open for the interment of all deceased persons to be buried with such religious or other ceremony, or without any ceremony as the friends of the deceased think proper.¹⁷¹ It gives local authorities the power to set aside portions of a public cemetery for the exclusive use of religious denominational groups¹⁷² and provides that those religious groups may apply to the Minister for permission to establish their own cemeteries.¹⁷³

¹⁷⁰ New Zealand Bill of Rights Act 1990, ss 15 and 20.

¹⁷¹ Burial and Cremation Act, s 6.

¹⁷² Sections 11 and 12.

¹⁷³ Section 31.

- 11.5 There are examples throughout New Zealand of local authorities responding pro-actively and positively to requests from different groups for accommodation of their beliefs and practices relating to burial, but the general picture is very inconsistent. Two positive examples were revealed in our consultation:
- Representatives of the Muslim community have entered into agreements with some cemetery managers to allow burial according to their beliefs within public cemeteries. This involves burial within 24 hours of death, alternatives to a coffin and mourners actively assisting with all aspects of the burial.
 - Wellington City Council has entered a partnership with Natural Burials New Zealand Limited to establish a natural burial area within the council-owned Makara Cemetery.
- 11.6 However, the current statutory provisions are very limited:
- The Act specifically requires councils to recognise requests from “religious denominations”¹⁷⁴ but not from ethnic groups or those with other beliefs, such as those who wish to have a natural burial, yet we have found that there is an increasing diversity in the ethnic, cultural and religious needs of New Zealand society in relation to burial.
 - While the Act specifically permits local authorities to set aside separate denominational areas, they are under no obligation to do so, and there are no guidelines in place governing the exercise of this discretion. Our local authority survey showed inconsistency in how councils are responding to these requests. The difficulty for local authorities is that requests for separate areas complicates cemetery management, increases maintenance costs and makes it more difficult to project future capacity.
- 11.7 The Ministry of Health has only approved six new denominational burial grounds since 1995. This may indicate either that groups feel their needs can be accommodated adequately within existing public cemeteries or that the cost and complexity of establishing a denominational burial ground under the current provisions are simply too great for most religious groups to contemplate.
- 11.8 We have concluded that, while some local authorities appear to be proactively accommodating requests to accommodate particular ethnic, cultural or other beliefs, the experience is patchy.

UNCLEAR LEGAL STATUS OF PLACES OF BURIAL

- 11.9 As described in the previous chapter, the Act makes distinctions between different categories of burial place, such as those that were originally created for burial of religious adherents and those that were open to the public generally. It is the last in a line of successive Acts that have sought to impose some order on the disparate collection of burial places existing in New Zealand.
- 11.10 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. This makes it difficult to know what powers, duties and statutory restrictions apply to the burial place. The Ministry of Health has sought legal advice on a number of occasions where the status of land under the Act and restrictions on its use was unclear.¹⁷⁵ Getting legal advice is a costly and lengthy process.

¹⁷⁴ Section 2 defines “religious denomination” as the adherents of any religion and includes any church, sect or other subdivision of such adherents.

¹⁷⁵ Examples include the process for reusing a piece of land forming part of the Oakura Cemetery in Taranaki; whether the Mangere Methodist Cemetery was a cemetery or a burial ground under the Act; whether a cemetery in Lawrence was or was not under the restrictions in the Act given there might be no-one buried in it; and the legal status of the Pauatahanui Burial Ground.

- 11.11 The confusion arises in a number of ways. For example, the Act states that Part 3 (relating to trustees) applies to “cemeteries which immediately before the commencement of this Act were under the maintenance and care of trustees other than a local authority”. Knowing whether a cemetery falls into this category requires examination of historical documents, which may have been lost over the years.
- 11.12 Another example of ambiguity is in the distinction in the Act between “trustee cemeteries” and “local authority cemeteries”. Although a cemetery is on local authority land, it may still be a trustee cemetery under the definition set down by the Act. For instance, according to Otago District Council, most of the trustee cemeteries in that district are on land owned by the Council. Thus, determining what is a trustee cemetery and what is a local authority cemetery cannot be discerned from the title. It requires tracing the historical control and management arrangements of a cemetery that is often a small, informally run cemetery and that may not have kept records of changes in control and management arrangements over the years.
- 11.13 The Act’s definition of trustee cemetery leads to an ambiguous legal relationship between the trustees and the local authority. A number of local authorities are aware of this but have not researched or clarified the legal position.¹⁷⁶ In a survey circulated to trustee cemeteries, 15 respondents provided their certificate of title for the land, six said the land was owned by the local council, five said it was owned by the Department of Conservation, one defined itself as an urupā, eight simply stated “cemetery trust” and six were unsure.
- 11.14 Also, it is not always clear whether a place of burial is a denominational burial ground or a cemetery. This causes problems because the reuse restrictions in the Act differ for each. A closed cemetery cannot be sold, leased or otherwise disposed of or diverted to any other purpose.¹⁷⁷ A closed burial ground is subject to the same statutory restriction, but the Minister can exempt it from that restriction.¹⁷⁸ Thus, when airport extensions were proposed over the Mangere Methodist Cemetery, the solicitors acting for the group proposing the extension claimed that it was a burial ground, not a cemetery. The Ministry of Health had to take legal advice on the matter. That advice concluded that it was unclear whether it was a cemetery or burial ground. The only information held by the Ministry was a description of the ground as the “Mangere Methodist Cemetery” or the “Westney Street Cemetery”.
- 11.15 In addition, many places that started out as denominational burial grounds are today open for burial of all people.¹⁷⁹ This raises the question of whether those places should now fall within the legal category of “cemeteries”, which are open to all.
- 11.16 A good illustration of these issues is captured in the status of the Pauatahanui Burial Ground in Porirua. It was set aside as a place of burial by the Stace family in 1856, prior to the passing of any national burial legislation. It was then managed by trustees as a public cemetery for almost 150 years. When it came time to close the cemetery after all the available plot space was filled, Porirua City Council realised that the trustees appointed under the Act had never been recorded on the certificate of title. In the notice giving effect to its closure in 2004, it was referred to as a denominational burial ground. Finally, a private Act of Parliament was passed in 2007 vesting the title in Porirua City Council and confirming Council control and management.¹⁸⁰

176 For instance, Dunedin City Council noted the lack of clarity. However, no research into the position has been undertaken, and legal actions “remain uncompleted”.

177 Burial and Cremation Act, s 43(2).

178 Section 44(4).

179 One example is Purewa Cemetery in Auckland.

180 Porirua City Council (Pauatahanui Burial Ground) Act 2007.

- 11.17 Any area where bodies are buried demands some form of management and protection, regardless of its formal legal status. In a similar vein, the distinction in the Act between a “private burial ground” and a “private burial place” is of historical interest only, since both places have bodies buried in the land and should therefore be dealt with consistently. We make recommendations in Chapter 12 for a single, cohesive framework that will apply to any piece of land that has a body or bodies buried in it.

CUMBERSOME PROCESS FOR TRANSFERRING CONTROL OF TRUSTEE CEMETERIES

- 11.18 Another issue is the method by which legal control over a cemetery is passed from a group of trustees to the local authority. This may be required if the trustees dwindle in number or are otherwise unable to manage the cemetery. Currently, the Governor-General may transfer control to a local authority by way of a notice in the *Gazette*.¹⁸¹ Such a notice has the effect of vesting the land in the local authority, and on the production of a copy of the notice, the District Land Registrar must issue a certificate of title to the local authority.¹⁸²
- 11.19 However, if there is no *Gazette* notice, there is nothing to vest the legal property and no express provision for the District Land Registrar to issue a new certificate of title. We know of at least one example where there was no *Gazette* notice issued upon vesting of the land in the local authority and, thus, no certificate of title for the land. The Ministry of Health received legal advice in October 2003 on the legal status of Oakura Cemetery in Taranaki. An Oakura Cemetery Order, dated 8 March 1960, had appointed Taranaki County Council as the trustee of the cemetery. Under the operative legislation at the time, the legal estate in cemetery land became vested in a trustee “immediately upon their appointment”.¹⁸³ Therefore, the legal estate in the land became vested in Taranaki County Council, but because there was no *Gazette* notice and nothing else in the Act providing for it, no title to the cemetery had ever been issued.
- 11.20 The legal process for transferring control and management to the local authority is cumbersome. For example, Blacks Cemetery (also known as Omakau Cemetery) was maintained by trustees since the 1890s, but the title to the land always remained with Otago District Council. The trustees were in their 60s and 70s and could not find anyone to continue their role. They approached the Council asking that control of Blacks Cemetery pass to the Council under section 23 of the Act, but the Council was unsure whether any formal process was required because the Council held the title to the land. Staff we spoke to resolved this matter through agreement but considered there was a pressing need for the process of transfer of control to be improved.

LACK OF CLARITY AND DETAIL IN THE STATUTE

- 11.21 There are a number of examples of areas of the Act that lack detail and clarity and that need updating to reflect the principles of good legislation.

Statutory powers of decision

- 11.22 For instance, the Act lacks criteria to guide the exercise of certain statutory powers of decision and, in particular, the Minister’s powers:
- to approve a disinterment;

181 Burial and Cremation Act, s 23(3).

182 Section 53(1).

183 Cemeteries Act 1908, s 11.

- to allow a cemetery or burial ground to be closed or cleared;
- to approve a new denominational burial ground; and
- to approve burial in a special place.

- 11.23 This lack of statutory detail is compensated somewhat by Ministry policies and publicly accessible guidance on how the Ministry of Health and its officers will exercise these powers. However, unlike legislation, these departmental policies are not necessarily binding, they are not as accessible to the public and they are not developed in a democratic manner, as legislation is.
- 11.24 The *Legislation Advisory Committee Guidelines* on process and content of legislation state that good legislation should set out the matters that should, may or must be considered when exercising a statutory power, in what circumstances it can be exercised and for what purposes.¹⁸⁴ At present, these matters are included in Ministry guidance, not legislation.¹⁸⁵
- 11.25 The same lack of detail is evident in respect of the statutory powers of those who have control and management of cemeteries. A local authority or trustee can determine whether or not it will provide a separate area within its cemetery for the burial of adherents of a particular religious denomination. However, the Act does not establish guiding criteria or principles for how that decision should be made, such as whether there is significant community demand and whether there is otherwise insufficient provision for that type of burial in the district. Only some local authorities have policies, rules or bylaws providing for this, and few trustee cemeteries, particularly those run on a voluntary basis, could be expected to.

Rights and duties in respect of monuments and burial plots

- 11.26 Another area where the Act departs from the principles of good legislation is in the provisions on monuments. The Act provides that the local authority or trustees may grant or refuse permission to erect a monument in a cemetery at its discretion.¹⁸⁶ In exercising that discretion, the local authority or trustees must consider its general plan for ornamenting the cemetery in an appropriate manner and safety concerns, but it does not require cultural or religious beliefs to be taken into account.¹⁸⁷
- 11.27 On the other hand, the Act contains some very specific provisions about the powers and duties of a cemetery manager in respect of vaults, monuments and so on. These include:
- the power to prohibit monuments other than those of a specified size and type;¹⁸⁸
 - the power to take down a monument or tablet placed otherwise than in accordance with terms and conditions agreed on;¹⁸⁹ and
 - a prohibition on a body being buried under any church, chapel or crematorium or within 5 metres of the outer wall of any church, chapel or crematorium.¹⁹⁰
- 11.28 The Act provides that a local authority or trustee may enter into agreements to maintain the graves in a cemetery either in perpetuity or for specified periods.¹⁹¹ Where this is not done,

184 Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (2014) at paragraph [8.3.4].

185 Ministry of Health, above n 128.

186 Burial and Cremation Act, s 9(b).

187 Section 9(c).

188 Section 9(e)(i).

189 Section 9(g).

190 Section 9(i).

191 Section 9(f).

the Act does not state who has basic duties of upkeep in respect of monuments on the burial plot—whether the person on the deed or their descendants or the local authority or trustee. Because the Act is somewhat unclear on this, practice varies. Twenty responses to our trustee survey said maintenance responsibilities fell on owners, 17 said trustees and 16 said both.

- 11.29 The legal ambiguity over the burial plot also results in uncertainty as to who must consent to an application to disinter a body from a burial plot (or inter an additional body in a burial plot). Even if the applicant for disinterment or additional interment is noted on the interment deed, it may be necessary to check that the other family members are in agreement with the proposal. The Ministry's process for granting a disinterment licence includes checking for family agreement as do the requirements imposed by several cemeteries themselves. However, this is simply good practice and is currently not required by the Act.

Reuse and sale of cemetery land

- 11.30 There are also significant ambiguities and a lack of detail in the provisions concerning reuse and sale of cemetery land.
- 11.31 The Act currently provides for cemeteries and burial grounds to be closed by the Minister of Health.¹⁹² This approach to places of burial, in which they can be definitively closed or opened, may be unnecessary. It may not reflect how cemeteries are used now or, in particular, how they may be used in the future. Certain parts of the cemetery may become full before other parts, and those parts may be put out of use while other parts of the cemetery continue in operation. It may not be desirable to completely discontinue burial in any cemetery—even if it is full, it may be possible to continue using it for burial, either by allowing interments in existing plots or allowing ash burials, which take up less room and can also be done in ash walls.¹⁹³
- 11.32 The closing of cemeteries may also lead to ambiguity. For instance, it has been asked in the past whether a closed cemetery is still a cemetery, subject to the Act, if all the bodies in it have been disinterred.¹⁹⁴ The Act also provides for a cemetery or burial ground to be “cleared” (monuments removed and so on) but does not state what consequences flow from this, other than that “no further burials shall take place” there.¹⁹⁵ It is unclear whether the land retains cemetery status.
- 11.33 Where part of a cemetery is not required for the burial of bodies, it can be sold, but certain processes must be gone through so that piece of land is no longer cemetery land.¹⁹⁶ These processes are cumbersome and difficult to use. In Chapter 12, we make proposals to simplify them.

LACK OF RECOGNITION OF LOCAL GOVERNMENT REFORMS

Local Government Act 2002

- 11.34 The Burial and Cremation Act does not reflect the passing of the Local Government Act 2002 (the LGA) or the principles underpinning the LGA. The LGA confers a general power of competence on local authorities, giving them full capacity to do acts or enter into transactions in

¹⁹² Part 6.

¹⁹³ For instance, even in historical cemeteries, surface-based ash interments can still occur. In one historical, urban cemetery, the Council dig a shallow trench alongside a burial plot in which ashes of a descendant of a plot holder can be spread.

¹⁹⁴ The Ministry of Health received legal advice on this question when Mangere Cemetery was to be diverted to alternative use, and it was asked whether disintering the bodies would mean the land was no longer a cemetery subject to the statutory restrictions in the Act.

¹⁹⁵ Burial and Cremation Act, s 45.

¹⁹⁶ Section 21(3)–(5).

order to fulfil the purpose of local government under the LGA.¹⁹⁷ This contrasts with the Burial and Cremation Act, which includes very specific powers for local authorities.

- 11.35 The Local Government Amendment Act 2012 changed the purpose of local government to include prioritising their activities and consulting with their communities to determine those priorities. Burial and cremation legislation could better reflect this philosophy by requiring local authorities to consult their communities about certain aspects of the provision of cemetery services, such as the level of maintenance of public cemeteries and the extent to which areas should be set aside for different groups.
- 11.36 We have also considered whether there are functions in the Burial and Cremation Act that should no longer be exercised by central government. They might be better exercised either by the relevant local authority or by the person who has control and management of the cemetery. One of the reasons for this is because delegating control to local bodies can ensure that local concerns are taken into account.

Resource Management Act 1991

- 11.37 We also note that the Burial and Cremation Act has not been updated to reflect the passing of the Resource Management Act 1991 and its resource consent framework. The only mention of the Resource Management Act is in the provisions dealing with the reopening of closed cemeteries and burial grounds. Ministry policy is 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, but the relevant provisions in the Burial and Cremation Act are otherwise silent.

LACK OF COMPLIANCE WITH CURRENT REQUIREMENTS

- 11.38 It appears that certain statutory functions and duties in respect of cemeteries and burial grounds are currently not being fulfilled. For instance, trustee cemeteries must keep full accounts of all money received and expended and prepare these for audit in April each year.¹⁹⁸ Compliance with these requirements was reported as sporadic in 1998, and 390 sets of accounts were said to be in arrears for a period of up to 18 years.¹⁹⁹ The 2005/2006 report noted an improvement but that “some trustees are still having difficulty”.²⁰⁰
- 11.39 In our trustee cemetery survey, some trustee cemeteries reported that they were unaware of the record-keeping requirement, and others said it was too onerous, especially for volunteers. In other cases, it seems that cemeteries are not adhering to the Act, perhaps because the requirements are perceived as impractical or outdated.
- 11.40 Another example is that it appears that effective use is not being made of the protective mechanisms under the Heritage New Zealand Pouhere Taonga Act 2014. Our local authority survey revealed a large number of cemeteries with archaeological sites that have not been registered on the New Zealand Heritage List/Rārangī Kōrero. In Auckland, 25 local authority cemeteries contained pre-1900 sites, but only three were registered. The statutory protections apply whether or not a site is registered on the New Zealand Heritage List/Rārangī Kōrero,²⁰¹ but some local authorities could not give a good reason for why they had failed to register

¹⁹⁷ Local Government Act 2002, s 12.

¹⁹⁸ Burial and Cremation Act, s 29.

¹⁹⁹ Office of the Auditor-General *Local Government: results of the 2005/2006 audits* (2007) at [4.106].

²⁰⁰ At [4.107].

²⁰¹ Heritage New Zealand Pouhere Taonga Act 2014, s 42(2).

historical sites. Some said that it inhibited maintenance and upkeep of cemetery plots. Trustee cemeteries also reported having many historical sites but not having registered them.

- 11.41 Finally, there are examples of functions within the ambit of the Ministry of Health that do not appear to be consistently or robustly carried out. For instance, the Ministry of Health policy on inspections of cemeteries states that cemeteries are not routinely inspected but inspections may be required as a result of complaint.²⁰² We have been told that inspections are usually not carried out on a regular basis because of resourcing issues.

PROBLEMS WITH ESTABLISHING NEW CREMATORIA

- 11.42 We have identified two issues with the process for establishing crematoria—the cumbersome multi-level process for approval and the lack of requirement for public notification of a proposal to build a crematorium.

Cumbersome multi-level process

- 11.43 As we described in Chapter 10, the establishment of a crematorium will require resource consent under the Resource Management Act (the RMA) (unless operating crematoria is a permitted activity under the district plan), the Minister of Health’s consent under the Burial and Cremation Act (the Act) to begin construction and then a second consent from the Minister under the Cremation Regulations (the Regulations) to begin operating the cremator.
- 11.44 In practice, the Minister’s consents provide little or no extra protection over the operation of the RMA protections. These consent powers are just two of a number of legislative powers of decision currently held by the Minister of Health that we consider should be amended because the relevant considerations are not primarily health concerns.²⁰³ In this case, as in the others, we consider that the relevant considerations are mainly matters of appropriate use of the land and so are better dealt with by local authorities under other legislation.

Lack of public notification

- 11.45 Currently, there is no certainty that the impact of the location of new crematoria on neighbours will be taken into account in the approval processes. Under the RMA, resource consent may not be required at all if the operation of crematoria is a permitted activity under the district plan, and even if it is required, a local authority may decide that the consent application does not need to be notified. Under the Act and Regulations, the impact of a crematorium on neighbours is not a matter that the Minister of Health will necessarily take into account either.
- 11.46 In Issues Paper 34, we asked whether applications to operate new crematoria should all be publicly notified under the RMA. It was clear from submissions that there was strong public concern about the location of crematoria. Some people expressed particular sensitivity about the location of places that deal with dead bodies. That is also a concern in tikanga Māori, which places restrictions on places where dead bodies are located. Other submitters suggested that sensitivities over dead bodies were irrational and merely an expression of a “not in my backyard” mentality.
- 11.47 The Ministry of Health noted that there were a number of crematoria established within funeral homes that were not notified and were operating satisfactorily and also a number of notified consent applications that have generated significant public concern due to the potential presence of a crematorium rather than any specific effects. Local Government New

202 Ministry of Health, above n 128. See Appendix 7.

203 We discussed these powers in Chapter 10.

Zealand submitted that this was just one of many similar issues that arise within the planning framework, and it is important that one activity does not receive inconsistent treatment. It submitted that the best practice was for this issue to be addressed within the district plan. The draft district plan is the appropriate vehicle for public consultation on this and a range of issues. This view was supported by the Ministry of Health and the New Zealand Law Society.

- 11.48 While the depth of feeling about the location of crematoria makes it clear that the public should be consulted on this matter, it is also important that any proposals in this Report work effectively with other legislative schemes. On balance, we consider that adequate protection in this regard is already provided by other legislative regimes. Specifically, these issues should be dealt with through ordinary local government planning processes, rather than by an exception to those processes in burial and cremation legislation.

LACK OF GUIDANCE ON THE DISPOSAL OF ASHES

- 11.49 We described in Chapter 10 that there is currently no legislative guidance on where or how ashes may be scattered in public places. We have considered this issue because there can be several conflicting interests at play when ashes are scattered. On the one hand, many people choose to scatter the ashes of their relatives in a public place that was of significance to the deceased person. This may be a park, a beach, a river or the sea. Besides the significance of the location, other advantages of scattering ashes in this way are that it is flexible and inexpensive.
- 11.50 However, such a practice can have an impact on other users of that public space. This may happen if the ashes are left visible or if so many ashes are scattered in a place that it affects the chemical composition of the soil. It can also be deeply offensive under tikanga Māori, which places restrictions and conditions on the handling of human remains, including ashes. In particular, the scattering of ashes on culturally or spiritually significant land, lakes or rivers may contravene Māori values and protocols.
- 11.51 The concerns of Māori in respect of the disposal of ashes were clearly identified in consultation, particularly during the public meetings held throughout New Zealand. Both individual Māori and iwi consistently expressed concern that ashes were being scattered without consideration of tikanga Māori. This was most evident in respect of ashes being scattered on beaches, in rivers and in the sea near the shoreline or over sources of kaimoana.
- 11.52 However, it also showed an increasing understanding of tikanga as it relates to funerals and burial. On a number of occasions, we were advised that Pākehā families seeking to dispose of ashes in the sea would consult with local iwi about the most culturally respectful way of doing so. In such cases, the family and iwi agreed on how the ashes would be scattered that met both the needs of tikanga Māori and the family of the deceased.

Chapter 12

Reform of places of burial

- 12.1 In Chapter 11 we described how it can be very difficult for the managers of cemeteries and burial grounds to ascertain their rights and obligations. We consider that there is significant scope for the legislative scheme to be simplified in a new statute. Most of the current distinctions between types of burial land are unnecessary. In our view, obligations should be based on the fact that land has been used for burial, rather than its legal classification as a certain category of burial land.
- 12.2 Also, many of the current detailed powers and duties of managers are no longer required, given a more modern understanding that people who own land (whether that is a local authority or a private entity) automatically have broad powers to manage and deal with that land except as is specifically circumscribed by the law. Rather than listing specific powers of managers, in our view, the statute should only limit the rights of land owners when there is a clear public benefit in doing so.
- 12.3 Consequently, in this chapter, we describe a new legislative framework for the management of all land that has been used for burial, including:
- the removal of most of the distinctions between different types of burial land;
 - a simplified list of obligations on cemetery managers;
 - establishing that the owner of any land in which bodies are buried is the cemetery manager and has the corresponding obligations; and
 - a savings provision for community cemeteries for which the managers do not own the land.
- 12.4 This framework reflects the (sometimes competing) values that are important in this area, drawing on the views given to us in consultation. Those values are outlined here:
- Respect—dead human bodies and remains should be treated with dignity and burial places should be accorded respect.
 - Cultural appropriateness—bereaved people should be allowed to mark a death according to the rituals and customs that are culturally appropriate for them.
 - Community engagement—local communities should have a say in how their cemeteries are managed.
 - Preservation—cemeteries are repositories of community and national heritage and should be protected and preserved.

WHAT LAND IS SUBJECT TO THE CEMETERY MANAGEMENT FRAMEWORK?

- 12.5 As described earlier, currently, a person must determine what category of cemetery land a particular piece of burial land falls under before determining what the obligations are in respect of that land. In contrast, we propose that the new statute deems all land where bodies are buried to be cemeteries and therefore subject to the same management obligations described below.

- 12.6 This means that the existing legal distinctions in the Burial and Cremation Act 1964 (the Act) between local authority and trustee cemeteries, burial grounds, private burial grounds and private burial places will be of historical interest only and would no longer be necessary to determine the rights and responsibilities of management. It means that all types of burial land will be subject to the cemetery management framework, whether or not they have been registered with the local authority, including pieces of burial land that currently have an uncertain status. Of particular note, it would mean that the large number of very small burial sites on private rural land would be subject to the framework, although as we describe below, the framework has sufficient flexibility to adapt its requirements to the wide range of circumstances.
- 12.7 We have considered whether there should be any exceptions to the standard rule that all sites where bodies are buried are deemed to be cemeteries. First, *urupā* should be excepted because they are currently controlled under Te Ture Whenua Māori Act 1993 and therefore do not come within the terms of reference of this review. However, it is possible that aspects of the proposed framework for cemeteries would also be suitable for the management of *urupā*. Second, we are aware that there are a number of battle sites marked around the country in which it is known that bodies are buried but that are not currently treated as burial grounds. We consider that, if it is known that bodies are buried at these sites, they should be treated as cemeteries for the purposes of the new statute. We doubt that this would mean new obligations on the owners of the land (often the Crown), given that the duties of cemetery owners will be limited to maintaining a record of the burials; maintaining the land in a reasonable condition; and not using the land for other purposes.
- 12.8 Management obligations should no longer apply to land that is currently designated as cemetery or burial ground but that in fact has never been used for burial.²⁰⁴ Nor should they apply to land previously used for burial but from which all the bodies have been disinterred. The reason for the special obligations on managers of cemeteries is because of the public interest in controlling the use of land in which people are buried. If there are in fact no burials on the land, that public interest does not exist. If restrictions on the management of this land were still required, it should be covered by other legislation, for example, the Reserves Act 1977.
- 12.9 There may be land in respect of which it is uncertain whether or not it has been used for burial. Similarly, bodies may be buried in land without the land owner's or local authority's permission. The statute should impose a duty on any land owner who has reasonable grounds to believe there is a body or bodies buried in the land to notify the local authority. The local authority should then have a power to undertake further investigations or inquiries as necessary. That power would be exercised in line with the Local Government Act 2002.²⁰⁵ If it was determined that there is a body or bodies buried there, a decision must be made whether to disinter the body and move it to an approved cemetery or to leave the body where it is. If the body is left there, the land will be deemed to be a cemetery and the subject of cemetery obligations.

204 We have come across examples of cemeteries or burial grounds that have never been used, yet the owners were facing difficulty in reusing or selling the land because of its restricted legal status. For example, in 1995, the Ministry of Health received legal advice on whether a piece of land in the town of Lawrence was a cemetery or a burial ground. It was unclear whether or not a miner had been buried in the land in 1860. Ultimately, because the land had indeed been set aside and known as a cemetery, it fell within the legal definition of cemetery, whether or not any burial had taken place there.

205 Part 8 of that Act sets out the regulatory, enforcement and coercive powers of local authorities. Under s 171, local authorities have a general power of entry to any land or building for the purpose of doing anything that the local authority is empowered to do under any Act.

RECOMMENDATIONS

- R20 The Act should deem all land in which bodies are buried to be a cemetery (except urupā set aside under Te Ture Whenua Māori Act 1993).
- R21 The owner of any land who has reasonable grounds to believe that a body or bodies are buried in the land should be required to notify that fact to the relevant local authority. Local authorities should have a power to undertake such investigations as are necessary and desirable, in order to determine whether a piece of land has a body or bodies in it and should be deemed to be a “cemetery” under the Act.

OBLIGATIONS ON CEMETERY MANAGERS

- 12.10 Clear statutory obligations on cemetery managers are important so that they know what they are required to do. This will help ensure that minimum standards are met and that appropriate action can be taken if they are not. In later sections, we discuss what land should be deemed to be a cemetery and who is deemed to be the manager.
- 12.11 Our proposed obligations fall into the categories of:
- not using cemetery land for other purposes;
 - record keeping; and
 - maintenance.

Not using cemetery land for other purposes

- 12.12 The Act currently states that a cemetery manager may not make use of cemetery land for any purpose not authorised by that Act.²⁰⁶ This means that, in general, the land may only be used for burial. This restriction reflects the special status that is given to cemeteries due to the need to accord dignity to the deceased, the need to respect the grief processes of the bereaved and the importance of maintaining the heritage characteristics of such land.
- 12.13 We have considered whether this restriction should continue in the new statute and, if so, the best mechanism for reflecting the policy goal. The law should only interfere with the rights of land owners (whether public or private owners) to use their property where there is strong public interest in doing so. However, the special status of land that is used for burial came through very strongly in submissions on Issues Paper 34, and many submitters thought that cemeteries should never be used for other purposes. Respecting the dignity of deceased bodies reflects our respect of humanity just as much as it does when we grant rights to dignity to living individuals.²⁰⁷
- 12.14 Consequently, we consider that there should be some mechanisms to ensure that land used for burial cannot be used for incompatible purposes. We have considered different ways to achieve this. We recommend requiring non-local authority cemetery managers (including owners of land used for private burial) to ensure that the cemetery is registered with the local authority and that a covenant in favour of the relevant local authority is registered against the certificate of title. The local authority would then have powers to enforce the land owner’s obligation not to use the site for purposes incompatible with burial.

²⁰⁶ Burial and Cremation Act, s 21(1).

²⁰⁷ Fletcher, above n 94.

- 12.15 However, a different mechanism is needed to provide independent enforcement and ensure accountability for cemeteries managed by local authorities. Consequently, we recommend that local authority cemeteries be subject to a statutory restriction that prohibits the cemetery being used for inconsistent purposes.

Covenants for protection of non-local authority cemeteries

- 12.16 A protective covenant over non-local authority cemeteries would require that the land owner does not use the land for purposes “inconsistent with its use as a cemetery”. This covenant would bind both current and future owners of the land and will give fair warning to prospective purchasers of the land that there are limits on the way the land can be used. It would, in theory, be possible for the covenant to cover only the particular part of a block of land that is actually being used for burial and for that part to be extended (and the description of the land on the covenant amended) as more land within the block is required for burials. The covenant may include a diagram to define the part of a piece of land to which the restrictions on use apply.
- 12.17 The statute should allow a transition period of two years to allow cemetery managers to register cemeteries with the local authority and ensure that the covenant restricting use is noted on the certificate of title.
- 12.18 The phrase “inconsistent with its use as a cemetery” is open to varied interpretations. To some people, any commercial enterprise within a cemetery would be unacceptable, whereas others may embrace the idea of an onsite café or walking tour venture, for example. Indeed, some regions may welcome certain commercial ventures as a means of funding the maintenance of a cemetery when it approaches full capacity.
- 12.19 We do not consider that the statute should provide a definitive definition for the phrase “inconsistent with its use as a cemetery”. Instead, this is a concept that should be determined based on that community’s needs, priorities and cultural expectations. It would be open to the land owner and the local authority to agree on modified wording of a covenant to give effect to specific restrictions if these were thought to be appropriate. One advantage of a covenant is that it can provide a greater level of responsiveness to the different circumstances of each cemetery. For example, in respect of an eco-burial ground, it would be possible for the covenant to state that the land must remain forested forever. A covenant could also give effect to particular management requirements of religious or cultural groups that establish cemeteries for the use of their community.
- 12.20 While ideally, cemetery land should only ever be used in a way that is consistent with burial and respects the dignity of the bodies buried there, there will be rare occasions when the use of the land will need to change to meet the needs of the living. On those occasions, the land owner would have two options—obtain the approval of the local authority to vary the covenant or obtain the approval of the local authority for the disinterment of all the bodies. If all the bodies were disinterred, the restrictions on the use of the land would no longer apply, and the covenant could be removed from the certificate of title.²⁰⁸
- 12.21 In granting either of these options, the local authority must consult with neighbouring land owners and other people from the community who may have an interest in the cemetery—such as regular visitors and users of the cemetery and the relatives of deceased people buried there. It should consider in every case whether all the bodies should be disinterred and relocated to another cemetery. It should only agree to vary the covenant or remove it and allow the disinterment of all the bodies if satisfied that the interests of the community in retaining

²⁰⁸ Later in this chapter, we discuss permission for the disinterment of single graves and standards for carrying out all disinterments.

the land as a cemetery are outweighed by the community's interest in using the land for the alternative purpose. The land owner should have a right to appeal the local authority's decision to the Environment Court.

- 12.22 If a land owner uses land for purposes inconsistent with the purposes of a cemetery in breach of the covenant registered on the title to the land, the land owner may be served with an abatement notice under section 322(1)(a)(ii) of the Resource Management Act 1991. Alternatively, the local authority could apply to the Environment Court for an enforcement order under section 314(1)(a)(ii). Breaching an abatement notice or an enforcement order is an offence punishable with a conviction and term of imprisonment of up to two years or a fine up to \$300,000 for an individual or up to \$600,000 in other cases.²⁰⁹

Statutory requirement for protection of local authority cemeteries

- 12.23 Because local authorities cannot make covenants with themselves, we recommend that local authority cemeteries should instead be subject to a statutory provision preventing those cemeteries from being used for any purpose that does not recognise or respect the dignity of the deceased bodies buried there. This requirement would send a clear message to local authority cemetery managers that there are strict limits on how they may use cemetery land because deceased bodies must be accorded respect and dignity.
- 12.24 Of course, there would remain some uncertainty within this provision as to what alternative uses of cemetery land would fail to recognise or respect the dignity of the deceased bodies. We do not think that the statute should attempt to define this concept further and that any question as to what uses would fail this test should be answered in light of local circumstances. Similar to the discussion of covenants above, restrictions on the use of local authority cemetery land should be determined by the community's needs, priorities and cultural expectations.
- 12.25 The statute must provide an alternative mechanism for approval in the rare event that a local authority wishes to use cemetery land for an alternative purpose that is inconsistent with the statutory provision. The local authority should be able to apply for either an order to allow an alternative use of the land or an order allowing the buried remains to be disinterred. We recommend that the decision-maker in these circumstances should be the Environment Court. The provision of a separate decision-maker for this purpose would provide a transparent and independent decision-making process. In making these decisions, the Environment Court must consider the same matters that must be considered by local authorities when considering applications for alternative uses from non-local authority cemetery managers, described above.

RECOMMENDATIONS

- R22 The statute should require a cemetery manager to ensure that the cemetery is registered with the local authority.
- R23 A non-local authority cemetery manager must enter into a covenant in favour of the relevant local authority prohibiting the use of the land for any purpose that is inconsistent with the use of the land as a cemetery. The statute should allow a transition period of two years for these obligations. The covenant must be noted on the certificate of title of the land.

²⁰⁹ Resource Management Act 1991, ss 338(1)(b) and (c) and 339(1).

- R24 If a non-local authority owner or manager of a cemetery wishes to use the land for a purpose inconsistent with the covenant, that person may apply to the local authority either to vary the covenant or for permission to disinter all of the bodies (in which case, the covenant would be removed).
- R25 If the local authority agrees to vary or remove a covenant, this must be noted accordingly on the certificate of title.
- R26 If the local authority grants permission for all the bodies to be disinterred, it should provide notice to that effect to the District Land Registrar who should, upon notice from the land owner that all the bodies have in fact been disinterred, remove the covenant from the title.
- R27 The statute should provide that local authority cemeteries must not be used in any way that does not recognise or respect the dignity of the deceased bodies buried there.
- R28 A local authority cemetery owner or manager may apply to the Environment Court for approval to either use the land for a purpose that is inconsistent with R27 or to disinter the bodies.
- R29 In deciding whether to allow alternative uses of the cemetery or to allow the bodies to be disinterred, the local authority or the Environment Court must:
- consider the views of neighbours and users of the cemetery;
 - consider whether the public interest requires the disinterment of all the bodies; and
 - be satisfied that the interests of the community in retaining the land as a cemetery are outweighed by the interests of the community in using that land for the alternative purpose.

Dealing with the land—leases, mortgages and sale

- 12.26 Currently, the Act contains very specific provisions as to leasing, mortgaging and selling cemetery land. Cemetery and burial ground managers may grant a lease of any unused portion of a cemetery for up to five years, and they may only mortgage or sell the land in accordance with the Act.²¹⁰ Cemetery land that is not required for cemetery purposes may be disposed of, but only with the permission of the Minister of Health. If it is disposed of, it ceases to be a cemetery.²¹¹ Local authorities may dispose of cemetery land to other local authorities if it will continue to be used for cemetery purposes.²¹²
- 12.27 As we mentioned earlier, the law should only interfere with the rights of land owners to use their property where there is strong public interest in doing so. We consider that such rules on leasing, mortgaging or selling cemetery land are not necessary if the law already protects the land in perpetuity (as we propose above). The fact that the use of the land is severely restricted will probably have an effect on the value of the land by way of lease, mortgage or sale, but there is no public interest in preventing those dealing with the land per se.

²¹⁰ Burial and Cremation Act, s 21. Cemetery land held in trust may be sold with Ministerial approval if it is not required for cemetery purposes. Cemetery land not held in trust nor subject to the provisions of any enactment may be sold if it is not required for cemetery purposes. A local authority may sell a cemetery to another local authority if it is to continue to be used for cemetery purposes.

²¹¹ Section 21(4).

²¹² Section 21(7).

RECOMMENDATION

R30 There should not be specific statutory restrictions on the leasing, mortgaging or selling of cemetery land.

Record-keeping

12.28 The Act currently requires that burials within every type of cemetery and burial ground are registered in a local authority register of burials.²¹³ We recommend this provision be retained but modernised.

12.29 Burial records serve several purposes:

- They demonstrate respect for the deceased if the location of their burial is adequately ascertained.
- They aid genealogical research.
- They may become vital if headstones or markers are removed or destroyed.
- They will assist the disinterment of bodies should the cemetery subsequently be required for another purpose, such as significant public infrastructural works.

12.30 We have considered whether there should be a national (rather than local) burial register. Unlike the registration of funeral directors (which we recommend in Chapter 18 becomes a national register), we cannot see sufficient justification for this in respect of burials. A local register of burials would be sufficient for each of the purposes of registration listed above, apart from genealogical research. A national register would require significant resources and cannot be justified for this limited purpose. In any event, information on the date and place of burial or cremation of the body is currently given on the Notification of Death for Registration form for the Registrar-General of Births, Deaths and Marriages, so is collected nationally.

12.31 Accordingly, we consider that records of burials should be kept at the local authority level and at the cemetery level. The statute should require cemetery managers to keep records of every burial within the cemetery, including the identity of the person buried, the name and contact details of the person authorising burial, the date of burial and descriptions of the location of the burial plot and the depth of the burial. It should also require them to forward details of all burials within their cemetery to the local authority at least once a year. Below, we also propose a duty on local authorities to keep records of all burials in their district.

RECOMMENDATION

R31 Cemetery managers should have a statutory obligation to keep a record of every burial, including a description of the location of each grave and the identity of the person buried there, and to forward that information to the local authority at least once a year.

Duty of maintenance of cemeteries

12.32 Setting statutory requirements as to maintenance duties in respect of cemeteries is complicated by the wide range of circumstances within cemeteries in New Zealand. For example, the maintenance needs of a large old cemetery that has reached full capacity might be quite different from a smaller, new cemetery still open for burials. Cemeteries with graves subject to the

213 Burial and Cremation Act, s 50.

Heritage New Zealand Pouhere Taonga Act 2014 and cemeteries catering only to eco-burials both have different needs.

- 12.33 In Issues Paper 34, we suggested that maintenance standards should be addressed in a National Environmental Standard (NES) on burial of human remains, made under the Resource Management Act 1993. While we would continue to support the development of such an NES, we have concluded that a new statute on burial should contain its own standard for maintenance of cemeteries.
- 12.34 Consistent with our other proposals, we consider that, while there should be a general statutory obligation to maintain cemeteries in a reasonable condition, the actual standards that should be achieved in each cemetery should be determined at a local level, based on the needs and priorities of that community. Consequently, the statute should provide that a cemetery manager is under a duty to maintain the cemetery in a reasonable condition, having regard to how the cemetery is used by the community. That obligation should extend to the land, the landscaping and graves, including any monument or tablet on the graves. The maintenance of graves is somewhat controversial (and we discuss powers to maintain monuments and tablets further below), but we consider that it should be included within the general maintenance duty because separating out the maintenance of graves from the rest of the cemetery is, in reality, an artificial distinction.
- 12.35 Below, we discuss the requirement for local authority cemetery managers to prepare a cemetery policy after consultation with the community. That document should establish the standards of maintenance required by the community for particular cemeteries, or parts of cemeteries, over and above the statutory minimum requirement.

RECOMMENDATION

- R32 The statute should provide that a cemetery manager is under a duty to maintain the cemetery in a reasonable condition, having regard to how the cemetery is used by the community.

WHO IS RESPONSIBLE FOR THE MANAGEMENT OBLIGATIONS?

- 12.36 We propose that the person who or group which is the owner of the land should be designated in the statute to be the cemetery manager, having responsibility for the management obligations. In this way, management responsibility will be clearly attributed on the basis of an ascertainable piece of legal information—ownership—rather than being dependent upon determining the type of burial land in question.
- 12.37 However, the intention of this proposal is to provide certainty around cemetery obligations rather than to alter current effective systems of management. There are a large number of mainly smaller cemeteries that are currently operated by entities that do not also own the land. Many existing trustee cemeteries fall into this category. The land owner might be the Crown, the local authority or even a private land owner. That owner may never have considered itself responsible for the management of the cemetery. Therefore, the framework should provide an exception to the general rule, to cover such cemeteries that are currently operating effectively.
- 12.38 The new statute should provide that the owner of cemetery land is the cemetery manager (and responsible for the cemetery obligations) except where, when this provision comes into force, the cemetery is being managed by a group of people who do not own the cemetery land and who

are operating as community managers of the cemetery. “Community manager” in this exception should mean a person who:

Makes most of the day-to-day decisions in respect of a cemetery such as the provision of burial plots, maintenance of the grounds and the keeping of burial records, whether under a formal or de facto delegation from the cemetery owner.

- 12.39 In those circumstances, the community manager should be deemed to be the cemetery manager under the new statute and subject to the new cemetery obligations.
- 12.40 While there is an element of uncertainty retained in this exception (because it will not be possible to know in every case whether a cemetery is within the exception or not), there is a greater benefit in recognising effective current management arrangements.
- 12.41 Under this proposal, in the vast majority of cases, the person who holds the cemetery obligations will be clear. It will be the person who is effectively managing the cemetery, or it will be the owner of the land. However, there are cemeteries where the owners of the land are also the managers, but the certificate of title has not been updated when previous owners or managers have changed or passed away. That presents a problem both in ascertaining who is responsible for the cemetery obligations and when the cemetery land needs to be dealt with by way of lease, mortgage or sale.
- 12.42 In these circumstances, the new statute should provide a straightforward mechanism by which the District Land Registrar has the power to update the certificate of title on the application of the current cemetery manager. The application should include a statutory declaration setting out the history of the ownership of the cemetery land and the purpose of the application to amend the certificate of title. The District Land Registrar should have a power to update the certificate of title if satisfied that:
- the details in the application are, to the best of his or her knowledge, true and correct;
 - the purpose of the application is to further the management of the cemetery; and
 - the proposed owners are proper persons to manage the cemetery.

RECOMMENDATIONS

- R33 The statute should provide that, except as described below, the person who is the owner of the land on which bodies are buried is designated the cemetery manager and has responsibility for the management obligations under the statute. However, if, when the statute comes into force, a cemetery is managed by a group of people who are community managers of the cemetery and who do not have ownership of the cemetery land, that group is designated as the cemetery manager and has primary responsibility for the management obligations under the statute.
- R34 “Community manager” should mean a person who makes most of the day-to-day decisions in respect of a cemetery such as the provision of burial plots, maintenance of the grounds and the keeping of burial records, whether under a formal or de facto delegation from the cemetery owner.

R35 Any person who or group which is the current manager of a cemetery on land for which the certificate of title notes previous managers as owners may apply to the District Land Registrar to be listed as an owner on the certificate of title. The District Land Registrar may make the amendment if satisfied that:

- the details in the application are, to the best of his or her knowledge, true and correct; and
- the purpose of the application is to further the management of the cemetery.

Renouncing, delegating and transferring the management responsibility

- 12.43 Our consultation revealed that sometimes it becomes impractical for non-local authority cemetery managers to continue to effectively manage cemeteries. This may be due to a lack of volunteers or a lack of financial resources. In these circumstances, the statute should provide straightforward mechanisms for the management powers and obligations to be transferred to the relevant local authority.
- 12.44 We consider that, when current cemetery management systems fail, the relevant local authority should be under an obligation to take over the management of that cemetery if the following criteria are met:
- The current cemetery manager no longer wishes to manage the cemetery.
 - It is in the interests of the community that the local authority manages the cemetery.
 - The local authority is able to fulfil the management obligations.
- 12.45 Under our proposals for maintenance duties described above, the local authority would be able to decide on the level of maintenance required for that cemetery after community consultation. If the cemetery is not considered a high priority and is not required for future burials, the local authority may decide to maintain it only to the most basic level.
- 12.46 The statute should provide straightforward mechanisms by which the cemetery management obligations can be renounced, delegated or transferred to the local authority. Which of these options is appropriate should be determined by the circumstances and negotiation between the parties. In each case, the original manager should be under an obligation to notify the local authority so that it can be noted on the cemetery register. Below, we also discuss powers of the local authority to take over management of cemeteries when the current managers are incapable of operating effectively.

Renouncing

- 12.47 This option is applicable when a person or group of people are designated to be the cemetery manager under the exception described in 12 above—that is, at the time the statute comes into force, the cemetery is effectively managed by them despite them not owning the cemetery land. Many current trustee cemeteries will be subject to this exception. If that person or group subsequently finds that it cannot meet the cemetery management obligations, it should be able to renounce that role by providing notice to the local authority and the owner of the land. After the role has been renounced, the management obligations should fall to the local authority, unless the owner of the land has expressed a desire to take over management responsibilities.

Delegating

- 12.48 This option would be appropriate when the management problem is temporary. A delegation must be done with consent so is really an agreement for another party to fulfil the cemetery management obligations. The other party may be the local authority or any other party that will agree to fulfil the role. If the management role is delegated, the original manager retains responsibility for the statutory obligations.

Transferring

- 12.49 This option would be used to permanently transfer management and ownership of a cemetery when the cemetery manager is also the land owner. Under a transfer, the cemetery land is transferred to the new owner along with the cemetery management obligations. The new owner becomes the cemetery manager and is subject to the statutory cemetery obligations, including the duty to maintain the cemetery and the limits on future use of the land.

RECOMMENDATIONS

- R36 The local authority must assume responsibility for the cemetery management if:
- the current cemetery manager no longer wishes to manage the cemetery;
 - it is in the interests of the community that the local authority manages the cemetery; and
 - the local authority is able to fulfil the management obligations.
- R37 The statute should provide that a person or group who is designated the cemetery manager under the exception described in R33 above, may renounce the role of cemetery manager by providing notice to that effect to the cemetery owner and to the local authority. The local authority must note in its cemetery register the fact that the role has been renounced.
- R38 The statute should provide that any cemetery manager may delegate the role of cemetery manager, or any of the cemetery management powers and obligations, to any other person who provides consent.
- R39 The statute should provide that the owner of cemetery land may transfer the ownership of the land, and therefore the cemetery management powers and obligations, to any person, including to the local authority.

CEMETERY MANAGERS' POWERS

- 12.50 Currently, there are a wide range of highly prescriptive powers for cemetery managers set out in the Act. We consider that this approach should not be replicated in a new statute because it is overly complicated and gives rise to uncertainty about the scope of the powers. Instead, we have considered whether a new power of general competence to manage cemeteries should be implemented.
- 12.51 A statutory power is only required if there is a lack of power in the common law or legislation to do the thing required.²¹⁴ Private bodies managing cemeteries have general rights of natural people to manage the land as they wish, subject to any restrictions in legislation or the common law. Public bodies managing cemeteries, such as local authorities, are in a different position because they must act within their powers or else their actions will be deemed to be ultra vires.

²¹⁴ Legislation Advisory Committee, above n 184, at ch 16, part 5.

However, the reforms in the Local Government Act 2002 gave local authorities full general powers to perform their role, subject to any statutory limitations.²¹⁵ That power extends to functions under other statutes, such as managing cemeteries.²¹⁶

- 12.52 The position of the Crown when it owns land with cemeteries is more complicated because, for many of these entities, there may be no positive legislative power that covers management of cemeteries. However, there has been some judicial recognition that government bodies have powers to act even in the absence of legislative power or Crown prerogative, under a third source of power.²¹⁷ This third source recognises that Parliament cannot have envisaged every circumstance that the Crown may face and provide positive powers for them all. This is particularly the case for management functions such as managing cemeteries. The theory holds that this third source of power provides authority for Crown action unless prohibited by other law.²¹⁸ However, this is a still developing area of jurisprudence and is not universally accepted.²¹⁹
- 12.53 In light of these existing sources of power to manage cemeteries, we do not consider that a power of general competence for cemetery managers is necessary in the new statute. Specifically, cemetery managers do not need the powers currently contained in the Act to:
- change the name of the cemetery;²²⁰
 - maintain and landscape the cemetery;²²¹
 - permit graves to be dug and monuments to be erected;²²²
 - sell the exclusive right of burial either in perpetuity or for a limited period;²²³
 - permanently set aside portions of the cemetery for burial of members of a religious denomination;²²⁴
 - appoint officers;²²⁵ or
 - spend money to clear, clean or repair any closed, disused or derelict cemetery or place of burial.²²⁶
- 12.54 These are all matters that come within a land owner's decision-making powers, unless limited by law. We do not consider that there is a public interest in limiting these matters by law, although in relation to local authority cemeteries, we describe below that, in the interests of transparency, some matters should be the subject of public consultation and recorded in a publicly available policy document.
- 12.55 Despite our conclusion that many of the existing powers do not need to be continued, a specific statutory power is still needed for cemetery managers to do things that may override the rights of other people but are required in the interests of good cemetery management. In light of this criterion, we have considered whether specific statutory powers are required in relation to:

215 Local Government Act, s 12(2).

216 Section 13.

217 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305; and *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588 (CA).

218 BV Harris "Recent Judicial Recognition of the Third Source of Authority for Government Action" (2014) 26 NZULR 60.

219 See the minority decision of Elias CJ in *Quake Outcasts v Minister for Canterbury Earthquake* Supreme Court.

220 Burial and Cremation Act, s 7.

221 Section 8.

222 Section 9.

223 Section 10.

224 Section 11.

225 Section 19.

226 Section 20.

- approving the disinterment of single graves;
- maintaining or removing unsafe graves; or
- granting limited tenure plots.

12.56 We also discuss below the need to recognise a power for cemetery managers to set aside separate areas for the burial of members of the armed forces.

Maintenance or removal of monuments

- 12.57 The maintenance or lack of maintenance of old cemeteries can produce heated public debate.²²⁷ We have described above the statutory standard of maintenance of cemeteries that should be met by all cemetery managers. However, a key aspect of that obligation is that the actual standards that should be achieved in each cemetery should be decided by local communities as part of their general decision-making about the priority of expenditure.
- 12.58 However, there is also some uncertainty about the power of cemetery managers to maintain, repair or remove broken or unsafe monuments. Most cemetery managers consider that responsibility for maintenance of the graves (as opposed to the cemetery) falls on the family of the deceased person and that cemetery managers lack the power to maintain or repair unless a grave is actually in a dangerous condition. The Act certainly supports the position that the successors of the deceased person have the right to maintain the grave.²²⁸ It is less clear to us that this means that the cemetery manager therefore lacks a power to maintain or repair when a grave cannot actually be described as dangerous.
- 12.59 This issue is a particular problem for some very old cemeteries that require significant investment to restore old and decaying graves.²²⁹ It can also be a problem for cemeteries of any age that have deteriorated due to land subsidence or earthquake.²³⁰
- 12.60 Currently, the Act gives local authorities a duty to make safe, take down or repair any monument or tablet that is, or in its opinion is, a danger to people frequenting or working in the cemetery.²³¹ Also, there is a power for cemetery managers to apply to the Minister of Health for authority to remove all or any of the monuments and tablets of a closed cemetery.²³²
- 12.61 We consider that the statute should make it clear that cemetery managers always have a power to maintain graves, despite any concurrent power or duty of maintenance falling on other people, including the relatives of the person buried (for example, under a contract for plot purchase or local authority bylaws). This should be a general power, not limited to when the grave is dangerous. Through the passage of time, it is common that graves eventually fail to be maintained by the relatives of the deceased. Cemetery managers should be able to step in to maintain a grave if it considers that is necessary to reach an acceptable standard.
- 12.62 We also consider that any cemetery manager should have a statutory power to apply for permission to remove monuments or tablets from a whole cemetery or a part of a cemetery

227 “Forgotten gardens of stone” (10 January 2015) Stuff < www.stuff.co.nz > ; Katasha McCullough “‘Terrible’ condition of Bayswater cemetery appalls resident” (31 May 2013) Stuff < www.stuff.co.nz > ; Hannah Spyksma “Grave neglect” (16 September 2011) Stuff < www.stuff.co.nz > .

228 Burial and Cremation Act, s 9.

229 Spyksma, above n 227; and McCullough, above n 227.

230 Olivia Carville “Damaged graves may not be repaired, expert says” (18 May 2011) Stuff < www.stuff.co.nz > ; Claire Connell “Steep slope of Picton cemetery a problem” (26 January 2011) Stuff < www.stuff.co.nz > .

231 Section 9(h).

232 Section 45. Such applications must follow public notice of the proposal to remove monuments or tablets and notice to Heritage New Zealand. When monuments or tablets are removed, the cemetery manager must compile a list of the people buried in the relevant graves and make that list available for inspection, clear and level the area and sow it in grass or plant it with trees and shrubs and erect a memorial inscribed with the names of the people buried there.

along similar lines to the power currently in section 45 of the Act. We can see no reason why this should not continue to be a legitimate method to manage older cemeteries in some limited circumstances.

- 12.63 However, it should be for the local authority (or the Environment Court in the case of local authority cemeteries) to grant permission to do so rather than the Minister of Health because the relevant considerations are not health matters and are not significant enough to warrant Ministerial-level consideration.²³³ The local authority or Environment Court should have a power to grant permission to the proposal if it is satisfied that the interests of the community in retaining the monuments and tablets and in maintaining them to an acceptable standard do not warrant the resources required to do that. Determining that question will require an examination of:
- the projected costs of maintenance;
 - the availability of resources to perform the maintenance; and
 - the reasons for any views of the community both for removal of the monuments and objecting to removal of the monuments.
- 12.64 An issue arises in relation to graves that pre-date 1900. Such graves are defined as “archaeological sites” under the Heritage New Zealand Pouhere Taonga Act 2014 (HNZPT Act) and may not be modified or destroyed unless authority is granted under that Act.²³⁴ In Issues Paper 34, we asked whether a power to remove unsafe monuments should override heritage protection provisions in the Historic Places Act (now found in the HNZPT Act).²³⁵ While submissions from local authorities and private individuals tended to favour protecting safety over heritage, the views of submitters representing the preservation of history held the opposite view.
- 12.65 Our view is that the HNZPT Act must be allowed to serve its purpose, which is to promote the identification, protection, preservation and conservation of the historical and cultural heritage of New Zealand but not at the expense of public safety.²³⁶ Unmaintained monuments can fall and hurt visitors to cemeteries.²³⁷
- 12.66 We recognise the difficulty here that a safety exception to the heritage protection provision could be used to circumvent the need for authority under the HNZPT Act in respect of a large number of old monuments around the country that have been slowly decaying for years. Ideally, cemetery managers should be aware of their obligations under the HNZPT Act and have long-term plans in place for the preservation of archaeological sites. In reality, there will be many older cemeteries that have not done this sort of planning. We consider that the statute should introduce an exception to section 42 of the HNZPT Act, such that cemetery managers may do work on a grave site for the purpose of ensuring that it is not a danger to any person working or visiting the cemetery but only to the extent that work is necessary for that purpose. That exception must also require cemetery managers to do the work in a way that minimises any negative effect on the historic value of the site.

233 Local authorities should manage the conflict of interest arising in respect of such applications for local authority-managed cemeteries.

234 Heritage New Zealand Pouhere Taonga Act, s 42.

235 The Historic Places Act 1993 was repealed and replaced by the Heritage New Zealand Pouhere Taonga Act.

236 Heritage New Zealand Pouhere Taonga Act, s 3.

237 “Gravestone falls on pre-schooler” (1 January 2009) Stuff < www.stuff.co.nz > .

RECOMMENDATIONS

- R40 A cemetery manager should have a statutory power to maintain any grave, memorial, vault or tablet, notwithstanding any power in any other person by virtue of a contract or bylaws.
- R41 A cemetery manager that is not a local authority should have a power to apply to the local authority (and a cemetery manager that is a local authority should have a power to apply to the Environment Court) for permission to remove monuments or tablets from a whole cemetery or a part of a cemetery. In determining whether to grant permission, the local authority or Environment Court, as the case may be, must consider:
- the projected costs of maintenance of the cemetery;
 - the availability of resources to perform the maintenance; and
 - the reasons for any views of the community both for removal of the monuments and objecting to removal of the monuments.
- R42 The statute should provide an exception to section 42 of the Heritage New Zealand Pouhere Taonga Act 2014, such that cemetery managers may do work on a grave site for the purpose of ensuring that it is not a danger to any person working or visiting the cemetery, but only to the extent that such work is necessary for that purpose and only in a way that minimises the negative effect of the work on the historic value of the site.

Limited tenure plots

- 12.67 We have also considered whether the statute should contain a power in cemetery managers to grant limited tenure plots. Currently, the Act allows a cemetery to sell burial plots “either in perpetuity or for a limited period”.²³⁸ Limited tenure plots are not uncommon in some overseas jurisdictions, but our survey of local authorities suggested that, in New Zealand, most cemeteries only offer contracts for perpetual interment. Limited tenure plots may become increasingly important as popular cemeteries face pressures on space and burial costs rise. They would allow a cemetery to offer plots at a lower price because they can be sold again in the future. In overseas countries where this occurs, one model of practice is to disinter the remains after 50 years and re-bury the bones at a greater depth, allowing for another interment above. While this idea might not appeal to some, others may consider it a good way to ensure that a full cemetery can maintain its currency and relevance to the community. We do not consider that the practice, by itself, would be disrespectful to the remains.
- 12.68 We consider that it is unnecessary for a new statute to provide a specific power for cemetery managers to permit limited tenure burials. This is a power that the manager has as part of their general powers of control and ownership of the land. The term of interment and what should happen at the end of the term are matters that should be covered by any contract for interment. If the contract is silent on the term of interment, the statute should provide a default provision that it is in perpetuity.

RECOMMENDATION

- R43 The statute should provide that, unless a contract for purchase of a burial plot provides otherwise, the term of interment is in perpetuity.

²³⁸ Burial and Cremation Act, s 10(1).

Separate areas for members of the armed forces

- 12.69 While we consider that cemetery managers have a power to set aside areas of a cemetery for the burial of specific groups of people, even without a specific statutory power, there is perhaps a special case for continuing the power to set aside areas for members of the armed forces. Many cemeteries have in fact set such areas aside as a mark of respect for the service of those people. The new statute should continue to recognise this special category.

RECOMMENDATION

- R44 The statute should provide a power in cemetery managers to permanently set aside a portion of a cemetery for the burial of members of the armed forces and their spouses.

EXISTING TRUSTEE CEMETERIES

- 12.70 We have described earlier that the legal status of some existing trustee cemeteries is unclear, and we have made proposals to improve that situation by recommending that:
- the statute designates the cemetery owner to be the manager of the cemetery holding the new powers and obligations of that position; but
 - when this provision comes into force, if the cemetery is being managed by a group of people who do not own the cemetery land but who are operating as community managers of the cemetery, they will be designated the cemetery manager.
- 12.71 One of the advantages of these proposals is that the new statute will no longer refer to “trustee cemeteries”, which is a confusing term, given that some of the management arrangements currently falling into that category are not trusts in the strict legal sense of that word. We have preferred the term “community cemeteries” because that reflects their public nature. Despite changing the name, our intention is that, generally speaking, current effective cemetery management systems should remain in place.
- 12.72 Part 3 of the Act currently provides a range of provisions to enable these cemeteries to operate effectively. Some of these provisions will need to be continued, although modernised. We consider that the new statute should provide some basic default provisions in a schedule to the statute. Those provisions should include powers to manage the cemetery that would be required by community managers that do not own the cemetery land and so do not have the rights of land owners. We have provided a suggested list of provisions at Appendix A.

EXTRA OBLIGATIONS ON LOCAL AUTHORITY CEMETERY MANAGERS

- 12.73 Despite our view that establishing new cemeteries should be open to more than just local authorities and denominational groups (we discuss this below in Chapter 13), local authorities will always be key providers of cemeteries because of the considerable impediments to establishing cemeteries, particularly the need for significant capital in land that will be tied up as burial land in perpetuity. While local authority-managed cemeteries should be subject to the general cemetery obligations described above—restrictions on the use of the land, record keeping and maintenance—we consider that their public nature means that there should be three additional obligations on them.

Duty to be open for the burial of any deceased person

- 12.74 Currently, the Act requires all local authority cemeteries and trustee cemeteries to be open for the interment of all deceased persons.²³⁹ We consider that this obligation should continue for all cemeteries that were required to be open to the public before the new statute comes into force. It is inherent in the role of local government that the services they provide are for everyone. Similarly, existing trustee cemeteries have always been inherently public facilities and subject to public accountability. It would be wrong and unnecessarily disruptive to change that requirement now.
- 12.75 However, this obligation should not extend to cemeteries where the local authority has taken over the management from another entity (unless that entity was also covered by this obligation). If the cemetery taken over had been established for the burial of a particular group of people, that should be able to continue under local authority management if that is considered appropriate by the local authority.

RECOMMENDATION

- R45 All cemeteries that were required before the commencement of the new statute to be open for the burial of all deceased persons should continue to be subject to that requirement, except when the cemetery management has determined that the cemetery has reached full capacity.

Duty to consider applications for separate areas

- 12.76 In Chapter 11 we described that there is currently limited legislative recognition of the diversity of cultural, ethnic and religious needs in relation to burial. Although the Act enables local authorities to set aside separate areas for different religious denominational groups, it is not required to do so, nor is it required to consider applications from other groups.
- 12.77 Despite the requirement on local authority cemeteries to be open to all people, we consider local authorities should be required to consider applications for separate areas within public cemeteries from any group of people with common burial requirements. While we recognise that local authorities will often have good reasons for declining such applications, they should be required to consider them in light of a number of statutory considerations.

RECOMMENDATION

- R46 The statute should require that local authority public cemetery managers must consider applications from denominational groups or any other group of people for a separate burial area within the cemetery. In considering such applications, managers must consider:
- costs to the cemetery of providing a separate area (including, where appropriate, the applicant's willingness to share those costs);
 - projected demand for the separate area; and
 - the effect of providing a separate area on the availability of land for burial within the cemetery and within the region.

²³⁹ Burial and Cremation Act, s 6. Section 6 applies to trustee cemeteries by virtue of the operation of s 25(2). Section 36 makes it clear that it does not apply to denominational burial grounds and private burial grounds.

Duty to create and maintain a cemetery policy

- 12.78 It is a key plank of our recommendations that decisions about important aspects of the management of local authority cemeteries should be decided in consultation with the community it serves. This fits with the principles of consultation underlying the reforms in the Local Government Act 2002. Two particular decisions requiring public consultation are maintenance standards and the provision of special areas as we have discussed above. Decisions about these and other significant aspects of the management of local authority cemeteries should be transparent and made after public consultation.
- 12.79 We consider that it is a logical extension that those decisions should be available to the public via a policy statement. In this document, the public should be able to read the current policies and the relative priorities given to the different needs of the community. Besides policies on maintenance and separate areas, this document should contain other information that impacts on users of the cemetery, such as:
- the opening hours of the cemetery and hours that burial services can be carried out;
 - the prices of plots and other fees for burial;
 - whether some plots may be sold for limited tenure; and
 - limitations on the rights of bereaved people to have memorials on the plot.
- 12.80 Currently, some cemeteries already have comprehensive policies on these matters, one example being the Wellington City Council “Cemeteries management plan” for Makara and Karori Cemeteries. However, many cemeteries have no clear policies or these are incomplete.

RECOMMENDATION

- R47 Local authority public cemetery managers should have a duty to create and maintain a policy for their cemetery, subject to public consultation, that covers at a minimum:
- maintenance standards;
 - the provision of separate burial areas within the cemetery;
 - the opening hours of the cemetery and hours that burial services can be carried out;
 - the prices of plots and other fees for burial;
 - whether some plots may be sold for limited tenure; and
 - limitations on the rights of bereaved people to have memorials on the plot.

LOCAL GOVERNMENT’S ROLE IN RELATION TO ALL CEMETERIES

- 12.81 In addition to their duties as managers of the cemeteries on local authority-owned land and of any other cemeteries they have assumed responsibility for, we consider that local authorities should have some general obligations in relation to all the cemeteries within their district and the management of dead bodies.

Duty to provide cemeteries or crematoria

- 12.82 Currently, local authorities have a duty to establish and maintain cemeteries where sufficient provision for burial is not otherwise made within its district.²⁴⁰ We consider that this is an

²⁴⁰ Burial and Cremation Act, s 4(1).

appropriate role for local authorities and should continue because there is obviously a strong public interest in ensuring that facilities are provided for dealing appropriately with dead bodies. Cemeteries and crematoria require large capital investment and can encounter challenges such as objections from neighbours. Consequently, it is unrealistic to consider that the supply of such facilities can be provided by the private sector alone.

- 12.83 However, we do not consider that the law should necessarily require local authorities to provide both cemeteries and crematoria. It may be that a community's need can be met by the provision of one of those methods. This should be determined by community consultation and normal local authority decision-making mechanisms. The public interest rests in the effective management of dead bodies rather than in disposal by one particular method.
- 12.84 It has been suggested to us that local authorities should be required to provide cemeteries in case they are needed in the event of a natural disaster. On balance, we do not think that this emergency need by itself justifies the provision of cemeteries because other public land could be made available for burial in the event of a natural disaster. Also, bodies buried after natural disasters may need to be later disinterred and reburied or cremated in any event.
- 12.85 Finally, we think it should be possible for local authorities to satisfy this requirement by negotiating to use the facilities of a neighbouring local authority. This is particularly relevant in regions where local authorities are closer and service higher-density populations.

RECOMMENDATION

- R48 The statute should provide that local authorities have a duty to provide facilities for the disposal of dead bodies if there are otherwise insufficient facilities available in its district.

Duty to dispose of the body

- 12.86 Currently, local authorities must allow the bodies of any poor person or person from a hospital, prison or other public institution to be buried in their cemeteries free of charge.²⁴¹ That obligation extends also to the free provision of cremation by any person who has control or management of a crematorium. We have been told that some privately operated crematoria have been asked by local authorities to provide cremation services free of charge under this provision. We consider that there should continue to be a residual duty on local authorities to take responsibility for the disposal of dead bodies where there is no other person available to do so. This duty should not extend to private operators of cemeteries or crematoria, but it would be open to local authorities to contract with private operators for the provision of this service.
- 12.87 In Part 4 we describe a new framework for determining who should make decisions about dead bodies. In particular, we propose that a person may appoint a trusted person to be their personal representative and make those decisions on their behalf. If a personal representative is not appointed, the executor should continue to have that role. In the absence of a personal representative or an executor, the duty should fall on the family.
- 12.88 However, there will sometimes be circumstances where there is no executor, personal representative or family member to make funeral arrangements and dispose of the body. In those circumstances, there is a public interest in someone stepping in to dispose of the body in a respectful manner. Local authorities are concerned that this provision could be over-used—that they could become the default provider where families do not wish to pay for the funeral. We consider this risk is small. The Police tell us that they go to considerable effort to identify family

241 Burial and Cremation Act, s 49.

or extended family members and that, in the vast majority of cases, someone steps up to organise a funeral, even if it is the most basic funeral covered by the funeral grant from Work and Income New Zealand. When the deceased person identified with a particular cultural or ethnic group, unrelated people from that group will often agree to organise a simple funeral if there is no local family. In addition, we recommend in Part 4 that the statute makes it clear that the family has a legal duty to dispose of the body where there is no executor or deceased's representative. While enforcement of that duty may be difficult, it is hoped that the statutory duty will send a clear message of this societal expectation.

- 12.89 When a local authority is performing this duty, it should not be considered to be acting as a personal representative with the obligations of that role (as we describe in Part 4). Rather, it is simply making such arrangements as it considers appropriate in the circumstances and as shows respect for the deceased person. As when family or friends make funeral arrangements, the reasonable costs incurred should be able to be recovered from the estate or, where appropriate, from the funeral grant from Work and Income New Zealand.

RECOMMENDATION

- R49 The statute should provide that local authorities have a duty to dispose of the body of any person for whom there is no other person available to do so. The reasonable costs of such arrangements should be recoverable from the estate of the deceased person or, where appropriate, from the funeral grant from Work and Income New Zealand.

Duty to keep records of cemeteries and burials

- 12.90 At present, most local authorities report having complete records of burials in their own cemeteries, but most said they did not have complete records of the trustee cemeteries and denominational burial grounds scattered throughout their region. We consider that local authorities should be required to maintain a register of all cemeteries and all burials in their region. This is an essential element of the new framework for burial because it is the means of identifying the land and people subject to the cemetery management powers and obligations.
- 12.91 Above, we propose a duty on all cemetery managers to keep records of all burials and to send those records to the local authority at least once a year. The local authority should be under a corresponding duty to maintain a register searchable by the public of all the cemeteries in their region and the names and contact details for the managers of those cemeteries. The registers should also contain the burial information provided by the cemetery managers, but local authorities should not be responsible for the accuracy of that information nor to fill any gaps in burial information for individual cemeteries.
- 12.92 Local authorities may find it efficient to establish electronic registers to ease the reporting requirements for cemetery managers and to make searching the register easier. However, given the range of sizes and resources for local authorities across New Zealand, we do not consider this should be a mandatory requirement. These registers will contribute to maintaining a coherent, durable, rational framework of all places of burial in New Zealand. They will facilitate access to and use of important historical, cultural and social information about burial locations and practices. They will also address the risk of records held by the cemetery itself being lost or damaged.

RECOMMENDATION

- R50 The statute should require local authorities to keep a register of all cemeteries in their region and to allow public searches of that register. That register should include the names and contact details of current cemetery managers and burial information forwarded by cemetery managers.

Inspections and oversight

- 12.93 We have described above a simplified framework of obligations on cemetery managers and have considered who should be responsible for ensuring the obligations of cemetery managers are fulfilled and how that should be done. Currently, the Act confers a power on health protection officers or other public service employees to inspect cemeteries, but we are told that is seldom done.
- 12.94 As we have described, the problems in this sector are largely confined to the way that the legislative requirements are structured, making it difficult to ascertain what rights and obligations apply in different circumstances. We have not encountered widespread problems with the standards of cemetery management itself. Consequently, we do not consider there is a need for an intensive or even proactive enforcement regime for cemetery management. Instead, the statute should provide a power that enables a public official to act on information or complaints it may receive. The statute should contain a power to enter and inspect cemeteries (both local authority cemeteries and non-local authority cemeteries) for the purpose of determining whether the requirements of the statute are being met.
- 12.95 This inspection power should include any buildings on the cemetery that are part of the business of the cemetery (including any crematorium). It should not extend to any dwelling house or marae unless the consent of an occupier or a warrant is obtained. Any inspection under these provisions should comply with the relevant provisions of the Search and Surveillance Act 2012.
- 12.96 This power should be able to be exercised by an authorised employee of the relevant local authority. We envisage that it will usually be the local authorities' environmental health officer (if one exists) who is best placed to exercise this power if required.

RECOMMENDATION

- R51 The statute should provide a power in an authorised employee of a local authority to enter and inspect any cemetery (including any building in the cemetery, but not a dwelling house or marae unless the occupier has consented or a warrant has been obtained), for the purpose of:
- determining whether the requirements of the statute are being met; or
 - obtaining evidence that those requirements are not being met.

Power to assume management responsibilities of a cemetery

- 12.97 Above, we recommend that cemetery managers that are struggling to effectively manage cemeteries should have powers to renounce, delegate or transfer the cemetery management functions to the local authority. However, there may be circumstances where cemetery managers are absent or unable to initiate transfer or where there is disagreement among the

managers as to whether there should be a transfer. In these circumstances, local authorities should have a power to assume management responsibilities for a cemetery, if that is in the public interest.

- 12.98 Consequently, the statute should provide that a local authority may provide notice to the cemetery manager of its intention to take over cemetery management if:
- it considers that the cemetery manager is failing to fulfil any or all of the statutory obligations of cemetery management in respect of a cemetery;
 - that failure is significant; and
 - it is in the public interest for the local authority to assume management of the cemetery.
- 12.99 If any or all of the obligations of cemetery management remain unfulfilled one year after notice was given, the local authority may designate itself as cemetery manager by giving notice of that fact to the previous cemetery manager and noting the change on its cemetery register.
- 12.100 However, if notice of the local authority's intention to take over management of the cemetery cannot be given because the cemetery manager is unable to be found or served with notice and reasonable attempts to provide notice have been made,²⁴² the local authority may designate itself manager of the cemetery without notice.
- 12.101 The statute should provide the local authority with powers it may need for the purpose of performing the powers and obligations of cemetery manager (that are not already provided in Part 8 of the Local Government Act 2002).

RECOMMENDATIONS

- R52 A local authority may provide notice to a cemetery manager of its intention to assume responsibility for the management of a cemetery if:
- it considers that the cemetery manager is failing to fulfil any or all of the obligations of cemetery management in respect of a cemetery;
 - that failure is significant; and
 - it is in the public interest for the local authority to assume management of the cemetery.
- R53 If the cemetery obligations remain unfulfilled one year after notice was given, the local authority may assume responsibility for the cemetery management by providing a second notice to that effect to the original cemetery manager and noting the change on its cemetery register. Notice is not required if the cemetery manager is unable to be found despite reasonable attempts or is unavailable due to death or incompetency.

DISINTERMENT

Offence

- 12.102 It is currently an offence to remove a body (or the remains of a body) buried in a cemetery, Māori burial ground or other burial ground or place of burial without the permission of the Minister of Health.²⁴³ We consider that this offence should be continued in a new statute. A cemetery owner will have rights in respect of a person who disinters a body without their permission (due to that being a disturbance of their ownership rights). However, we consider

²⁴² Reasonable attempts could include posting a notice at the cemetery gates.

²⁴³ Burial and Cremation Act, s 51.

there is a strong interest in sending a clear signal through legislation that digging up dead human bodies must be done in a controlled and limited way so as to respect the dignity of the deceased.

Who should provide permission for disinterment?

- 12.103 We do not consider that the Minister of Health is the appropriate person to provide permission for disinterment. Currently, when assessing applications for disinterment of single graves, Ministry of Health officers 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. Another relevant matter is whether it would have an adverse impact on cemetery management (for example, if it would cause subsidence or problems for the maintenance of surrounding graves). We are told that there may be health considerations in very rare cases, for example, where the body had been recently buried and the person died with a disease that remains contagious after death.²⁴⁴
- 12.104 In our view, the assessment of these matters does not justify Ministerial-level permission for disinterment. Neither should the assessment be made by a health entity because the health considerations are very small. The main considerations are land use matters and whether there is consensus amongst the family. We consider that, instead, cemetery managers are well placed to consider those matters and to provide the permission required by statute in relation to applications for disinterment of single graves.
- 12.105 However, the situation is different for small family cemeteries on private land. Under our proposed framework, the land owners of these small cemeteries are designated the managers of these cemeteries and are responsible for the cemetery management obligations. We consider that the local authority, rather than the cemetery manager, should be required to provide permission for the disinterment of single graves when the cemetery is very small. This is because there is potential for a cemetery manager of a very small cemetery to use the power to permit disinterment to circumvent the rules restricting the use of burial land. For example, multiple single disinterments could be carried out over a period of time so that, when all the bodies have been removed, the covenant over the certificate of title can be lifted and the land used for other purposes.
- 12.106 In addition, where a body has been buried other than in an approved cemetery, it should be for the local authority to grant permission for the disinterment, not the land owner.²⁴⁵ Also, we consider that it should be open for an applicant to apply directly to the court for permission to disinter a single grave. This would obviously be a more complex and expensive process but may be warranted where the applicant thought that the cemetery manager may not be impartial. This situation may arise where the body was buried against the instructions of the executor or deceased's representative in a family-managed cemetery or urupā.²⁴⁶
- 12.107 If disinterment of multiple graves is sought for the purposes of using the land for alternative purposes, the permission of the local authority must be obtained or, for local authority cemeteries, the permission of the Environment Court. We described above procedures for obtaining permission to use cemetery land for alternative purposes.

244 For example, the deceased person had Ebola. See "WHO | Ebola virus disease" WHO < www.who.int > .

245 We discuss the procedure where a body is buried illegally in Chapter 13.

246 A decision as to disinterment of a single grave is not a land use issue, so the relevant court is not the Environment Court. Rather, applications should be made to the High Court, Family Court or Māori Land Court as we describe in Chapter 24.

Matters that must be considered

- 12.108 We described above the matters that the local authority must consider before granting permission for the disinterment of multiple graves when the land owner wishes to use the land for other purposes.
- 12.109 In respect of disinterment of single graves, cemetery managers or the local authority (whichever applies) should be able to consider any matters that they consider appropriate, including whether there are any health risks in the disinterment that cannot be adequately moderated and whether the disinterment may create a cemetery management problem, for example, due to subsidence of the land or maintenance of surrounding graves. However, we also consider that there is also a public interest in ensuring that disinterment of single graves should only be permitted if all interested relatives and friends have been consulted and there are no objections expressed.
- 12.110 Currently, applications for disinterment are most commonly refused because there is no consensus between the relatives of the deceased person. We have considered the extent to which consensus should continue to be required for disinterment under a new statute. In Part 4, we propose a new framework for decisions about burial or cremation after a death. Under that framework, decisions about disposal of the body may be made by a personal representative, the executor or the family (depending upon the circumstances). While consensus is obviously ideal, it is not required under that framework.
- 12.111 We consider that disinterment applications are a different type of decision than those made immediately after death. They may be made many years after death, and so there will usually be no urgency. Close relatives may have died in the intervening period, and so the relative weight of views of different people may vary. Perhaps most importantly, there is a presumption that, once a person is buried, that person should remain undisturbed unless there is good reason. In our view, it would require a very significant reason for disinterment to be justified where there are objections raised amongst surviving relatives and friends.
- 12.112 Consequently, the statute should require the applicant for disinterment to provide documentation establishing the applicant's connection to the deceased person, the extent of consultation with interested relatives and friends and the existence of any objections to disinterment from them. A cemetery manager or local authority may only provide permission for disinterment of single graves if satisfied that there has been such consultation and no substantial objections are raised. If objections exist amongst the relatives, it should be open to the person to apply to a court for directions. We discuss the procedure for court determinations of burial decisions in Part 4.
- 12.113 Where a body has been buried illegally, the views of the family should be a relevant consideration for a local authority determining whether or not a body should be disinterred, but the existence of objections to disinterment should be balanced against the views of the land owner and any other matters the local authority considers are relevant.

Minimum standards for carrying out disinterments

- 12.114 We have received advice on practices that should be followed when disinterring a body to ensure the dignity of the body is maintained and any health risks are minimised. For example:
- all disinterments should be supervised by an appropriately trained health protection officer or environmental health officer;

- no disinterment should be carried out within one year of the interment unless a health protection officer or environmental health officer is satisfied that the disinterment can proceed based on all relevant considerations, including whether the deceased was embalmed, an assessment of the drainage of the site and the likely state of the casket;
- no disinterment should be carried out within one month of interment if the person died of certain infectious diseases; and
- all statutory requirements and all policies and guidelines that pertain to health and safety and excavation matters must be complied with when carrying out the disinterment.

12.115 These are matters of specific practice that are beyond the scope of this project. However, we propose that the new statute should enable regulations to be made for the purpose of providing procedures to be followed when disinterring a body; ensuring the dignity of the deceased person is maintained; and reducing or managing any health risks.

RECOMMENDATIONS

- R54 It should be an offence to remove a body or remains of a body buried in any cemetery or place of burial (including urupā) without the permission of the cemetery manager, the local authority or a court (as described below).
- R55 The permission of the Environment Court should be required for multiple disinterments from local authority cemeteries.
- R56 The permission of the local authority should be required:
- for multiple disinterment from cemeteries that are not local authority cemeteries;
 - when there are no more than 10 bodies buried in the cemetery (even if the application relates to fewer bodies); or
 - where the body has been buried illegally.
- R57 The permission of the cemetery manager should be required in all other cases. However, it should be open to a person to apply directly to the High Court, the Family Court or the Māori Land Court for permission, if they choose.
- R58 When deciding whether to grant permission for single disinterment, the cemetery manager, local authority or court (as applicable) may consider any relevant matter. However, except when the body was buried contrary to law or the burial was for a limited tenure that has reached its end, permission may not be granted for single disinterment unless the cemetery manager, the local authority or court (as applicable) is satisfied that all interested relatives have been consulted and there are no objections expressed.
- R59 Permission for disinterment may be granted subject to any conditions the cemetery manager, local authority or court (as applicable) considers are appropriate.
- R60 The statute should provide that no civil or criminal liability attaches to a cemetery manager or local authority who approves a disinterment in accordance with the statutory requirements.
- R61 The statute should provide that regulations may be made for the purpose of providing procedures to be followed when disinterring a body; ensuring the dignity of the body disinterred; and reducing or managing any health risks in the disinterment.

CLOSURE OF CEMETERIES

12.116 Currently, Part 6 of the Act contains many detailed provisions about the closure of cemeteries and burial grounds, the different obligations on managers after closure and the power to reopen closed cemeteries and burial grounds. We consider that these provisions are overly complicated and unnecessary under a new statute. As we have stated earlier, the status of the cemetery land and the obligations of the cemetery managers should be tied to the fact that bodies are buried in the land rather than to the legal category that the land happens to fall into, including whether the cemetery is open or closed. For example:

- it should be for the cemetery manager to determine when a cemetery has reached full capacity and can no longer accept burials;
- if a cemetery is no longer accepting burials, for whatever reason, it is up to the cemetery manager to continue maintaining that cemetery to the minimum standard required by the statute (or to delegate or transfer that role);
- if a cemetery that is no longer accepting burials is also operating a crematorium on the site, it should be up to the cemetery manager to determine whether or not the crematorium should continue to operate; and
- a cemetery that has reached full capacity should continue to have a contractual relationship with any plot holders for the duration provided for in the contract.

12.117 The same position would exist for any cemeteries or burial grounds that have been closed under the Act or earlier Acts, that is, if bodies are buried in the land, that land is deemed to be a cemetery, and the owner of the land is under the statutory obligations of cemetery manager unless those obligations are transferred. Given the minimalist nature of the obligations proposed, we do not consider this will provide any undue problem for the owners of currently closed cemeteries.

Chapter 13

Approval of new cemeteries

UNLAWFUL BURIAL

- 13.1 While the Burial and Cremation Act 1964 (the Act) recognises a range of existing types of cemeteries and burial grounds, it permits only new local authority cemeteries and denominational burial grounds.²⁴⁷ Currently, the Act provides that it is not lawful to bury a body in any land that is not a cemetery, a denominational burial ground, a private burial ground or a Māori burial ground if there is such a place within 32 kilometres of the place of death or place where the body has been taken for burial.²⁴⁸
- 13.2 We consider that the new statute should continue to prohibit burial in places that have not been approved. In theory, the statute could allow cemeteries to be developed without approval on the basis that it also deems such land to be cemetery land and the owners of it are automatically subject to cemetery management obligations. However, there is a strong public interest in the controlled development of cemetery land. Local authorities have legitimate reasons why some land is not suitable for development as a cemetery. We discuss this further below.
- 13.3 Consequently, we propose that the new statute provides that it is an offence to bury a body in any land that is not approved as a cemetery under the statute. We do not think that the distance exception should be continued.²⁴⁹ Instead, we consider that a person should have a defence if they can show that it was impractical to transport the body to an approved cemetery and the body was buried respectfully in another place.

RECOMMENDATIONS

- R62 It should be an offence to knowingly bury a body in any land that is not an approved cemetery.
- R63 It should be a defence to this offence if the defendant can show that it was impractical to transport the body to an approved cemetery and the body was buried respectfully in another place.

EXISTING CEMETERIES

- 13.4 The statute should define how cemeteries are approved under that statute. For cemeteries established before the commencement of the new statute, any cemetery or burial place recognised under the 1964 Act and that has been registered with the local authority should be an approved cemetery. This would capture existing local authority cemeteries, trustee cemeteries and denominational burial grounds. It would also capture the rarely used categories

²⁴⁷ Burial and Cremation Act, ss 4 and 31.

²⁴⁸ Section 46(1).

²⁴⁹ The 32 kilometre exception in s 46(1) was implemented during a time when transportation was less efficient. In the past, a person may have died in an isolated part of New Zealand from which transporting the body was impractical.

of private burial ground, private burial place and burial in a special place. Any burial outside of those places would be subject to the process for approval of new cemeteries described below.

RECOMMENDATION

- R64 The statute should provide that any cemetery recognised under the Burial and Cremation Act 1964 as a cemetery or other burial place and that is registered with the local authority should be an “approved cemetery” for the purposes of the offence of unlawful burial.

NEW CEMETERIES

- 13.5 We described in Chapter 11 that one of the key problems with the current legislative framework is that it fails to recognise the diversity of needs across the population in respect of requirements for burial and cremation. Also, the practice of local authorities in recognising that diversity of needs is patchy. By “diversity of needs”, we include the burial requirements of different religious groups and different ethnic groups, an increasing desire within many groups to have more control over the funeral and burial or cremation processes and simply a desire from some groups to do things that cannot be easily accommodated within local authority cemeteries, such as eco-burial.
- 13.6 To address this problem, we propose that a new statute should reduce the restrictions on two types of new cemetery—independent cemeteries and burial on private land.

Approval of independent cemeteries

- 13.7 Currently, only religious groups may establish private cemeteries, known as denominational burial grounds.²⁵⁰ In Issues Paper 34, we asked whether independent providers should be able to establish cemeteries. More than half of submitters were in favour of independent providers being able to provide cemeteries, although many qualified that support on the basis that there were adequate safeguards to ensure the cemetery was maintained in perpetuity. The reasons for support ranged from the need for choice in burial options to the need for competition to local authority cemeteries.
- 13.8 Only one-third of submissions from local authorities supported independent cemeteries. Of those opposed, most were concerned that the long-term responsibility for independent cemeteries would fall back on local authorities and that would be a financial burden on ratepayers. Some thought those concerns could be adequately mitigated through sufficient capitalisation or reserve funds prior to establishment. In contrast, 60 per cent of submissions from community organisations, 70 per cent of submissions from the funeral sector and 73 per cent of submissions from individuals were supportive of independent cemeteries.
- 13.9 A number of submitters appeared to oppose independent cemeteries on the basis that the current legislative framework is already confused enough. We consider that our proposals will significantly simplify the legislative framework for cemeteries by removing the different categories of cemetery, by reducing and clarifying the obligations on managers and by requiring local authorities to maintain a regional register of cemeteries.
- 13.10 Restricting new independent cemeteries to religious groups can no longer be justified. The law should not prevent a cemetery being established by a private person or entity if they have a piece of land that can be used in perpetuity for burial and if the local authority has no reason to object

²⁵⁰ Burial and Cremation Act, s 31.

- to the use of the land in that way. We envisage that this option may be taken up by proponents of eco-burial or groups that share religious or cultural burial needs.
- 13.11 We considered whether the provision of independent cemeteries should be restricted to not-for-profit organisations on the basis that the need to make a profit may jeopardise the long-term viability of a cemetery. In Issues Paper 34, we asked whether independent cemeteries should be limited to registered charities or to not-for-profit organisations. Only one-third of submitters answering this question thought that independent cemeteries should be limited to registered charities, although many of the submitters who were not in favour of independent cemeteries at all did not answer this question. There was a range of views on the question of whether independent cemeteries should be allowed to make a profit, with the strongest support from the funeral sector (90 per cent in support) and the weakest from community organisations (10 per cent in support).
- 13.12 On balance, we do not consider that independent cemeteries should be limited to registered charities or not-for-profit organisations. The concern about long-term protection is better dealt with in other ways, especially as there is no guarantee that a charitable entity would be able to maintain a cemetery in perpetuity more effectively than a for-profit business.
- 13.13 However, it is important that the approval process and controls for cemetery land facilitate sustainable long-term management of the land. We consider that it should be for the relevant local authority to provide approval for the establishment of an independent cemetery because, if the cemetery fails, it will be for the local authority to assume the management responsibility. Also, the local authority will already be considering the application through the resource consent process under the Resource Management Act 1991 (RMA).
- 13.14 The local authority must consider any such application and may reject it for good reasons. In making this determination, it should be able to consider a wider range of matters than it may consider under the RMA process. Three examples are:
- whether the land may be required in the future for a different use;
 - the relevant expertise and experience of the applicants; and
 - whether the financial management of the cemetery is likely to be able to be sustained in perpetuity.
- 13.15 If the local authority approves an application for an independent cemetery, it may attach any conditions it considers are desirable. An applicant may appeal the local authority's decision to the Environment Court.

Approval of burial on private land

- 13.16 The Act makes no provision for burial on private land other than in an existing private burial ground established under the Cemeteries Amendment Act 1912 or if the strict criteria for a "private burial place" or "burial in a special place" are met.²⁵¹ In Issues Paper 34 we asked whether it should be lawful to bury a body on private land with the appropriate consents. More than half of submissions supported burial on private land, and many submitters said that their support for burial on private land was their main motivation for submitting. As with independent cemeteries, many submitters qualified their support on the basis that adequate safeguards for the maintenance of the land were provided. 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. Many submitters considered that burial

251 We described these options under the current Act in Chapter 10.

on private land should be limited to rural land, and many suggested there needed to be robust systems to identify where the graves were. An overwhelming theme through these answers was that the land must remain a burial site in perpetuity.

- 13.17 We consider that a number of the concerns raised by those opposing burial on private land are either addressed by the proposed legislative framework or can be adequately addressed through the approval process. These concerns include, for example, the need for adequate records of the location of the grave; the potential for disinterment if the land is subsequently sold (and the risk that the disinterment may be done without informing authorities); the need to consult neighbours; the impact on surrounding land and waterways; the need for maintenance in perpetuity; concerns about public access to the cemetery; and the potential for burial on private land to put strain on local authority resources, particularly if they were required to be monitored.
- 13.18 Given the strong demand we found through our consultation process, we consider that the current restrictions on burial on private land cannot be justified. We also consider that applying the RMA process to certain applications for burial on private land would be too onerous. In particular, we consider that, when the private land in question is rural land and the total number of burials intended for the site is fewer than five, burial on that site should be approved solely under a process in the new statute and not be subject to RMA processes.
- 13.19 The local authority must approve an application under the new statute for burial on private land if it is satisfied that:
- 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.
- 13.20 It should be noted that, when burial occurs on private land, that land will be deemed by the new statute to be a “cemetery”, and the owner of the land will hold the obligations of cemetery manager in respect of that land.²⁵²

RECOMMENDATIONS

- R65 The statute should provide that any new cemetery is an approved cemetery if:
- it has been approved by the local authority;
 - it has been registered as a cemetery on the local authority register; and
 - in respect of non-local authority cemeteries (including burial on private land), the certificate of title for the cemetery land provides a covenant indicating that bodies are buried in the land and restricting the use of the land.
- R66 The statute should permit any person or entity to apply to the local authority for approval to establish a new cemetery on any land, subject to the granting of permissions under the Resource Management Act 1991. (The process for approving burial on private land is set out at R71.)

²⁵² These obligations were described in Chapter 12.

- R67 In considering whether to grant approval for the establishment of a new cemetery the local authority may consider any matter it considers relevant, including:
- the relevant expertise and experience of the applicants;
 - the likely effect of the proposed cemetery on neighbours;
 - the likelihood that the cemetery can be maintained as cemetery land in perpetuity; and
 - the extent to which any risks raised by the proposed cemetery can be adequately mitigated.
- R68 If a local authority decides to grant approval for the establishment of a new cemetery, it may impose any conditions it considers necessary, including:
- maintenance requirements in addition to those imposed by the statute;
 - the establishment of a fund (or a plan for the development of a fund) to provide for the maintenance of the cemetery land in perpetuity; and
 - the payment of a bond to cover the risk that the cemetery is not adequately managed into the future and the local authority would be required to take over management.
- R69 Any person may apply to the local authority for burial on private land if:
- the land in question is rural land; and
 - the cemetery is intended for the burial of no more than five bodies.
- R70 The Resource Management Act 1991 should not apply to such applications for burial on private land.
- R71 The local authority must approve any application for burial on private land if it is satisfied that:
- 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.
- R72 If a local authority decides to grant approval for burial on private land, it may impose any conditions on that approval as it considers desirable.

Chapter 14

Cremation

- 14.1 Most of the current legislative restrictions on the operation of crematoria are found in the Cremation Regulations 1973 (the Regulations) rather than the Burial and Cremation Act 1964 (the Act). It is our view that the Regulations are largely out of date and should be repealed and replaced by new statutory and regulatory provisions. Specifically:
- the offence of unlawful cremation should be in the statute;²⁵³
 - the prerequisites to cremation (including checking the identity of the deceased) and the record-keeping obligations should be the same as those for burial;²⁵⁴
 - the system of medical referees should be replaced by a national audit system;²⁵⁵
 - the obligations on crematoria in relation to the disposal of ashes should be updated;²⁵⁶ and
 - the procedure for applying for cremation other than in a crematorium should be modernised.²⁵⁷

UNLAWFUL CREMATION OR OTHER DISPOSAL

- 14.2 Currently, it is an offence under the Act to procure or take part in any cremation except in accordance with regulations made under the Act.²⁵⁸ The Regulations prohibit cremation elsewhere than in an approved crematorium, except with the permission of a medical officer of health.²⁵⁹
- 14.3 We consider that this offence should be continued but modernised under the new statute. The cremation of bodies involves a number of risks, and so it is appropriate that cremation occurs in an environment that adequately controls those risks. The risks of cremation include:
- exposure to fire and smoke;
 - the explosion of a medical device within a deceased body;
 - a small risk to health in the rare event that the person died with a disease that remains contagious after death; and
 - psychological stress occasioned by exposure to a burning body.
- 14.4 In addition, we are aware that a number of alternative methods of disposing of bodies by reducing them to an ash-like substance are being developed in other countries. These processes do not use fire so cannot be referred to as “cremation”. An example of this is alkaline hydrolysis.

²⁵³ Discussed below.

²⁵⁴ See Chapter 6 and further discuss below.

²⁵⁵ See Chapter 8.

²⁵⁶ See Chapter 18.

²⁵⁷ Discussed below.

²⁵⁸ Burial and Cremation Act, ss 37 and 56.

²⁵⁹ Cremation Regulations, reg 4(1).

A new statute should be flexible enough to provide for any such alternative methods that may reach New Zealand in the future.

- 14.5 Currently, it is the crematorium that must be approved. We propose that, instead, the new statute should require any cremation or other method of disposal in an approved cremator or approved other device. It is really the machine that is used for cremation that moderates most of the risks of cremation not the building within which it is housed. The statute should enable the term “approved cremator or other device” to be defined under regulations made under that statute. The use of regulations for this definition, rather than the statute, will enable new models of cremator to be approved as they come onto the market. In the future, it will also enable the department administering the Act to approve new methods of disposing of bodies.
- 14.6 Consistent with our other proposals, we recommend that it should be for the local authority to give permission for outdoor cremation rather than the medical officer of health as it is currently. We discuss cremations other than in approved cremators below.
- 14.7 It should be an offence to knowingly cremate a human body in any way other than in an approved cremator, subject to the exception in relation to outdoor cremation we discuss below. A person who breaches this offence should be liable upon conviction to a fine not exceeding \$5,000 or a term of imprisonment not exceeding two years. This term of imprisonment is the same as that for the offence of misconduct in respect of human remains under section 150 of the Crimes Act 1961. We have also included a fine because the prospect of a fine may deter low-level offending of this type better than the possibility of a prison term, which will only be imposed for the worst type of offending.

RECOMMENDATION

- R73 Unless the prior permission of the local authority is obtained, it should be an offence to knowingly cremate or otherwise dispose of a body except in an approved cremator or approved other device.

PREREQUISITES TO CREMATION

- 14.8 The Regulations impose two conditions before cremation may take place:
- The permission of a medical referee is obtained.²⁶⁰
 - The required application for cremation is made by the executor or near relative.²⁶¹
- 14.9 The Regulations provide extensive provisions on the appointment and functions of medical referees. The main role of medical referees is to ensure that deaths that should have been referred to the coroner are referred before cremation and that the application for cremation and certificate as to the cause of death have been completed in accordance with the Act. In Part 1, we described the problems with the current system of medical referees and proposed that it should be replaced by a national audit system of cause of death certification that did not necessarily occur before disposal of the body—whether by burial or cremation.
- 14.10 The consequence of this proposal is that there will be no independent check on the adequacy of the documentation prior to cremation. However, in Chapter 6, we proposed duties on a person before disposing of a body, including a requirement that no person may dispose of a body

²⁶⁰ Cremation Regulations, reg 4(2).

²⁶¹ Regulation 5(1).

by any means unless an application for disposal and the cause of death certificate have been completed. The cremation attendant will be responsible for checking that these forms have been completed but not for checking the adequacy of the cause of death determination. The adequacy will instead be the subject of the national audit.

SCATTERING OF ASHES

- 14.11 We have considered a number of options for regulating the scattering of ashes after cremation. In particular, we have considered whether regulations under the new statute should be used to provide guidance and national consistency to this practice. As we have described in Chapter 11, there are a number of competing interests affected by the scattering of ashes, including the interests of the family in scattering the ashes in a location significant to the deceased person, the impact of the ashes on plants and the soil and the interests of tikanga Māori when ashes are scattered near a sacred site.
- 14.12 In Issues Paper 34, we did not directly ask about the scattering of ashes by relatives. Nonetheless, many submitters took the opportunity to suggest that there was a need for greater guidance on this matter. We agree that guidance is needed on the appropriate locations for the scattering of ashes so as to minimise problems, including offence to other people and cultures. However, we do not consider that this is a matter that can be controlled nationally. Appropriate limits on scattering ashes will differ from region to region and should be for individual local authorities to determine after consultation with iwi.
- 14.13 This means that the scattering of ashes should not be the subject of a statutory offence. While great weight should be given to iwi restrictions on the scattering of ashes, given the competing interests at play and the impracticality of enforcing a restriction, this is more appropriately a matter for greater education of the public.
- 14.14 We propose that local authorities should develop guidelines for the scattering of ashes in their region. Local iwi groups must be consulted in this process. Auckland Council's recent guidelines provide a good example.²⁶² The guidelines should be the basis for greater education of the public and should be distributed through local funeral homes. However, nothing in this proposal would prevent a local authority from implementing a bylaw within its region, enforced by an offence and a fine.

RECOMMENDATION

R74 The scattering of ashes should not be restricted under the statute.

ESTABLISHING NEW CREMATORIA

- 14.15 In Chapter 11, we described the cumbersome approvals processes for establishing crematoria. We described that the two approvals required from the Minister of Health—under the Act to begin construction, and under the Regulations to begin operation—are largely redundant because the only relevant matters for consideration are land use matters rather than health matters. As such, they are better dealt with by local authorities under the Resource Management Act 1991.

²⁶² Auckland Council, above n 166.

- 14.16 Consequently, we consider that the new statute should not require any separate consent for the establishment of crematoria. Local authorities should deal with this through the ordinary planning process.

RECOMMENDATION

- R75 The statute should not require approval before the construction or use of a new crematorium. Rather, relevant considerations should be addressed through processes under the Resource Management Act 1991.

OUTDOOR CREMATIONS

- 14.17 Providing for outdoor cremations is an important aspect of recognising the diversity of rituals for farewelling the deceased in New Zealand. Currently, there are occasional applications for cremation on an outdoor pyre. This is the traditional method of cremation in some forms of the Buddhist faith and some other religions. A medical officer of health may currently give permission for cremation elsewhere than in a crematorium if the applicant belongs to a religious denomination whose tenets require the burning of the body to be carried out as a religious rite elsewhere than in an approved crematorium.²⁶³
- 14.18 In assessing an application under this provision, a medical officer of health currently follows a set of guidelines drafted by the Ministry of Health designed to determine whether the proposed cremation adequately mitigates the risks.²⁶⁴ Those risks include:
- offence to any members of the public that might see it;
 - effect of smoke or smell 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; and
 - failure to reconstruct the site after cremation.
- 14.19 We consider that the ability to have outdoor cremation under strictly controlled conditions is an important aspect of recognising cultural diversity and should be continued under the new statute albeit with several changes from the current system.
- 14.20 First, we do not consider that applications for cremation other than in an approved cremator should be restricted to religious denominations. It should be the sincerity of the application that is relevant rather than whether the motivation is religious in nature.
- 14.21 Second, we do not consider that the majority of risks in such cremations are health risks. Therefore, we propose that the local authority should give consent for such cremation rather than a medical officer of health because the land use concerns are greater than the health concerns. To the extent that health risks need to be addressed, the local authority can take advice from a medical officer of health or its own environmental health officer. This fits with the local authority's role in controlling the use of land in its region.

²⁶³ Cremation Regulations, reg 11.

²⁶⁴ Ministry of Health, above n 128, see paragraph 7.5.4.

- 14.22 Third, there should be greater transparency of the relevant matters for consideration when assessing these applications by including the relevant considerations in the new statute rather than in a document published by the Ministry of Health. We consider the mandatory considerations should be as we describe below. This would not prevent the development of a document to inform local authorities about outdoor cremation, providing detail on outdoor cremation as a cultural practice and the risks that should be assessed in each case.
- 14.23 If it is satisfied that any risks associated with the proposed cremation are small or can be adequately mitigated, the local authority may provide permission. It may make the permission subject to any conditions it thinks necessary.

RECOMMENDATIONS

- R76 Any person should be able to apply to the local authority for permission to cremate or otherwise dispose of a body other than in an approved cremator or approved other device.
- R77 The statute should provide that, when determining whether to grant permission to cremate or otherwise dispose of a body other than in an approved cremator or approved other device, the local authority may consider any matter it considers appropriate, but it must consider:
- the reasons for applying for cremation other than in an approved cremator or approved other device;
 - 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); and
 - the views of any neighbours who may be adversely affected.
- R78 The local authority may grant permission for cremation or other disposal other than in an approved cremator or other approved device if it is satisfied that any risks are small or can be adequately mitigated. It may grant permission subject to any conditions it considers is appropriate.

Chapter 15

Statutory duties in respect of the disposal of bodies

- 15.1 Previously in this part of the Report, we have described three general obligations in respect of handling the disposal of deceased bodies that should be included in a new statute:
- Bodies must not be buried in land that has not been approved as a cemetery under the statute.
 - Cremation or other disposal must only occur in an approved cremator or approved other device, except with the permission of the local authority.
 - Human bodies or their remains buried in any cemetery must not be disinterred without the permission of the cemetery manager, local authority or court (as applicable).
- 15.2 In this section, we describe a number of other general obligations in respect of the disposal of bodies. Many of these currently exist in the Burial and Cremation Act 1964 (the Act) but require modernisation. Several are new.

TREATING BODIES WITH RESPECT

- 15.3 As we have mentioned, 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. Our research has turned up only a small number of prosecutions under this section. Examples are:
- disposing of a body in a river;²⁶⁵
 - burying a body in a shallow grave and concealing the fact;²⁶⁶
 - cremating a child's body along with that of an unrelated adult;²⁶⁷
 - breaking into a tomb in a cemetery and removing the remains of a baby;²⁶⁸ and
 - disinterring a grave, removing the skull and brass nameplate for use at a fancy dress party, then disposing of the skull in another cemetery.²⁶⁹
- 15.4 We consider that there are a range of behaviours that should justify prosecutorial action but might not be prosecuted under section 150 of the Crimes Act due to the fact that the only punishment available is imprisonment. A specific offence under the new statute targeting disrespectful behaviour and carrying the alternatives of a fine or imprisonment would provide effective enforcement options for lower-level offending. For people who are in the business of providing funeral services, such behaviour might include the inappropriate storage of bodies,

265 *R v Proude* HC Auckland CRI-2008-092-1926, 25 November 2009.

266 *R v Lloyd* HC Auckland CRI-1995-088-808007, 17 June 2005.

267 *R v Young* (1984) 1 CRNZ 568 (HC).

268 *Hazelton v Police* HC Wellington AP66/02, 28 March 2002.

269 *Stuthridge-Harding v Police* HC Christchurch A91/02, 11 September 2002.

not disposing of a body within a reasonable time or failing to properly embalm a body (to the extent agreed with the family). For other people who may come into contact with a deceased body, examples of such behaviour include treating a body in a way that is designed to cause significant cultural offence or stealing an item from a coffin.

- 15.5 Unlike section 150 of the Crimes Act, a new obligation under the burial and cremation legislation should be phrased as a positive obligation as follows:

Every person must treat any dead human body or human remains with respect.

- 15.6 Knowingly breaching this obligation should be an offence punishable upon conviction by a fine. We analyse the maximum penalty for this and other proposed offences in Appendix B. Particularly offensive behaviour in respect of bodies, such as sexual conduct with a deceased body, should still be subject to the greater penalty under section 150 of the Crimes Act.

RECOMMENDATION

R79 The statute should provide that every person must treat any dead human body or human remains with respect. The breach of this requirement should be an offence.

DISPOSING OF A BODY WITHIN A REASONABLE TIME

- 15.7 Currently, 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; or transfer it to another person for disposal (or removal for anatomical examination under the Human Tissues Act 2008 or removal from New Zealand for disposal outside of New Zealand).²⁷⁰
- 15.8 We consider that this requirement should be continued in the new statute. However, there are two aspects of the current requirement that lack sufficient certainty—what amounts to “a reasonable time” and who the person in charge of the body is.
- 15.9 In relation to the “reasonable time” requirement, there is no guidance in the Act on what a reasonable time would be. It would depend upon the circumstances, as it should. Relevant considerations may be whether opportunities to dispose of the body were not taken and whether factors that caused delay were not actively managed. We consider that a test of “without undue delay, taking into account the mourning needs of the bereaved and any ceremonies to be performed” would be more certain and would give greater guidance than the current formulation of words.
- 15.10 In relation to the person who is “in charge of the body”, this concept is unclear because it could refer to having physical custody of the body or it could refer to the person who has the rights of decision over the body. It will often be the case that those two people will be different, particularly when the services of a funeral director are employed.
- 15.11 In making a recommendation for change on this issue, we have considered both that the policy driver behind this requirement is the public interest in bodies being appropriately disposed of without delay and our proposed new framework for burial decisions in Part 4. There, we propose that the decision-maker should have both the power and the duty to dispose of the body.
- 15.12 However, we also consider that 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 there is no family member immediately stepping forward to take responsibility

²⁷⁰ Burial and Cremation Act, s 46E.

for it or the funeral director has received instructions but is failing to act on them. In those cases, the funeral director, as the person who has custody of the body (even if that is a delegated right to custody), should have a duty to take actions to dispose of the body. We recommend in Chapter 22 that any person should have the power to make these decisions about the disposal of a body if the deceased person has not appointed a decision-maker and there is no family member stepping forward to make these decisions.

RECOMMENDATION

- R80 The statute should provide that the person who has the duty to dispose of the body must do so without undue delay, taking into account the mourning needs of the bereaved and any ceremonies to be performed. Knowingly breaching this requirement without reasonable excuse should be an offence.

SENDING THE CAUSE OF DEATH INFORMATION TO THE MINISTRY OF HEALTH

- 15.13 Currently, under the Act, the person in charge of the disposal of a body must send a copy of the doctor's certificate or the coroner's authorisation to the Ministry of Health.²⁷¹ We consider that this provision does not need to be continued in the new statute. As mentioned, in Chapter 5, we proposed that the cause of death certification is completed under an online process. Such a system should have a facility for the doctor to automatically send the information to the Ministry of Health when it is completed. This does not require statutory provisions but should be done administratively.

²⁷¹ Burial and Cremation Act, s 46AA.

Part 3

THE FUNERAL SECTOR



Chapter 16

The funeral sector

INTRODUCTION

- 16.1 The funeral service industry has changed considerably over the past century. While 100 years ago it consisted of fairly limited services provided by an undertaker, these days, there are a myriad of services performed by a variety of people, including:
- funeral directors;
 - embalmers;
 - cremator operators; and
 - cemetery managers and employees.
- 16.2 In the context of this change, our terms of reference require us to consider the regulation of funeral directors—specifically whether the current system of self-regulation should be retained or an alternative system instituted.
- 16.3 The regulatory obligations specific to funeral service providers are found across a variety of Acts and regulations, particularly the following:
- The Burial and Cremation Act 1964. While this Act is central to our analysis in much of the rest of this Report, it has very little to say about funeral services other than empowering the making of cremation regulations.
 - The Health Act 1956. This Act contains a number of provisions related to infectious and notifiable diseases. Some of these are applicable to funeral service providers when a person had such a disease before dying.
 - The Health (Burial) Regulations 1946. These regulations are made under the Health Act 1920 and provide general requirements to reduce the damage and risk of nuisance from the handling and transporting of dead bodies;²⁷² require funeral directors to be registered; and provide requirements for mortuaries.
 - The Cremation Regulations 1973. These regulations are designed to ensure that bodies are not cremated until all legislative requirements have been met.
- 16.4 By far the most detailed provisions are found in the two sets of regulations. We have found that both sets of regulations are out of date and are no longer fit for purpose. In many respects, they are overly prescriptive, difficult to understand and of limited relevance.
- 16.5 In addition to these provisions, which are specific to the funeral service industry, there are a number of legislative obligations in respect of dead bodies that apply to everyone, including funeral service providers. Specifically, it is an offence under the Crimes Act 1961 to improperly or indecently interfere with or offer an indignity to any dead human body or human remains,

²⁷² The handling and transportation requirements are particularly concerned with preventing nuisances and dangers caused by decomposing bodies through leaking or communicable diseases.

whether buried or not.²⁷³ The Burial and Cremation Act requires a person who has charge of a body to dispose of it within a reasonable time.²⁷⁴ That Act also makes it an offence to:

- bury a body in a place that is not a place permitted under that Act;²⁷⁵
- dispose of a body without obtaining a doctor's certificate or coroner's authorisation;²⁷⁶ or
- unlawfully disinter a body.²⁷⁷

16.6 In this part of the Report, we begin by describing the roles of the various participants in the funeral service industry, the statutory and regulatory obligations they are currently subject to and how those roles have changed and continue to change since that system of regulation was introduced. We then analyse whether that current system adequately protects against the risks and problems we found through our consultation. We conclude by proposing amendments to two aspects of the current regulatory system.

FUNERAL DIRECTORS

- 16.7 Funeral directors are the public face of the funeral sector and the people that bereaved families typically interact with the most. They help to guide the bereaved through the rituals and processes around death, including burial or cremation. However, the way that New Zealanders engage with funeral directors has changed over time, resulting in higher expectations of accountability.
- 16.8 One hundred years ago, the process of dying and the rituals of death centred on the home. Family and close friends took responsibility for preparing the deceased for burial. Once the body was laid out, family, whānau, friends and acquaintances would come to the home or the marae to pay their respects to the deceased person and the whānau and to grieve. For Pākehā, the funeral was generally held within three days of death, with a minister of religion reading the service prior to burial in the church graveyard. For Māori, a death would trigger a tangihanga of several days' length, after which the body would be buried in the deceased person's ancestral urupā. The role of funeral directors, known then as undertakers, was primarily to provide coffins and transportation of the deceased from the home to the place of burial.
- 16.9 The 20th century saw society become more urbanised and death increasingly medicalised, particularly in Pākehā culture. As death moved from home to hospital, dying and the burial or cremation of bodies became the domain of the specialist funeral director who managed all the funeral arrangements, including preparation and disposal of the body.²⁷⁸
- 16.10 Funeral directors, in seeking to become professionalised and to shed the dour undertaker image, set up the New Zealand Federation of Funeral Directors in 1937 and lobbied Parliament for regulation.²⁷⁹ In the 1950s through to the 1970s, there was a substantial uptake of knowledge and skills from the United States, including first an emphasis on service and later the understanding and treatment of grief.²⁸⁰

273 Crimes Act 1961, s 150.

274 Burial and Cremation Act, s 46E.

275 Section 54.

276 Section 54AA.

277 Section 55.

278 C Schafer "Dead serious? Funeral directing in New Zealand" (2008) 4 Sites Journal of Social Anthropology and Cultural Studies at 99.

279 At 100.

280 At 103–105.

- 16.11 Today, most funeral directors offer a wide range of services. These may include:
- collecting the body from the place of death;
 - meeting with the family to discuss funeral arrangements;
 - embalming and preparing the body for viewing;
 - organising a death notice;
 - arranging the funeral service, which may include music, flowers, a memorial booklet, video or PowerPoint show and catering;
 - conducting the funeral service or arranging for a celebrant or religious minister to do so;
 - liaising with cemetery managers for the purchase of a burial plot;
 - cremating the deceased body or arranging for cremation at a separate facility;
 - transporting the body to the crematorium or cemetery;
 - offering counselling or bereavement services;
 - selling coffins and urns and referring consumers to memorial stone providers; and
 - completing the legal documentation.
- 16.12 It is now possible for funeral services to be conducted entirely within a funeral director's premises, particularly when they also offer embalming services, a chapel and a crematorium.

Legislative obligations on funeral directors

- 16.13 The Health (Burial) Regulations 1946 provide general requirements about the handling and transportation of dead bodies. They also require any person carrying on the business of a funeral director to be registered annually in the district in which they are operating.²⁸¹ Registration is a straightforward process. The application to the relevant local authority must include only the person's name; the funeral business's name and address; and the requisite fee.²⁸² There are no other prerequisite conditions to operating as a funeral director. If the business address is to be used as a mortuary, the applicant must indicate this on the application and provide a certificate of fitness from a health protection officer or environmental health officer.²⁸³ A separate registration certificate is issued by the local authority for each premises in which a funeral director conducts business within its district.²⁸⁴ Registration to carry on business as a funeral director in another district will require a separate application to the relevant local authority.²⁸⁵
- 16.14 There is no requirement that a funeral director must actually have premises to carry out the business. A funeral director can arrange for burial or cremation, transport a body that has already been prepared for burial by someone else (such as family, a hospital or another funeral director) to a mortuary or place of burial and arrange a funeral ceremony without having their

281 Health (Burial) Regulations 1946, reg 4.

282 Regulations 11 and 13.

283 Regulation 15. "Mortuary" is defined in reg 3 as "a room regularly used or intended to be regularly used for the preparation of dead bodies for burial or for the embalming of dead bodies or the examination or treatment of dead bodies prior to burial" but excludes mortuaries in hospitals and schools of anatomy.

284 Health (Burial) Regulations, regs 17 and 19.

285 This is implied from regs 4, 7, 10 and 11.

own premises. However, if a funeral director keeps or stores bodies, the funeral director must do so in a mortuary or a reception room.²⁸⁶

Industry organisations

- 16.15 Some funeral directors are members of industry organisations which have their own standards, rules and disciplinary procedures. There are two organisations for funeral directors—the Funeral Directors Association of New Zealand (FDANZ) and New Zealand Independent Funeral Homes (NZIFH).
- 16.16 FDANZ reports that approximately 60 per cent of funeral directors belong to their organisation, NZIFH has 21 member firms and 10 businesses are members of both organisations. Members accept a measure of regulation by these bodies in relation to requirements for training, qualifications, inspections and the provision of a process for dealing with complaints from consumers.
- 16.17 FDANZ has a Code of Ethics and a Code of Professional Conduct governing the conduct of members. Member firms are required to:²⁸⁷
- be registered with the local authority as a funeral director;
 - be directly engaged in practice as a funeral director;
 - have at least one staff member who holds a practising certificate issued by FDANZ (which includes having obtained the prescribed number of training hours);
 - participate in continuing education and ensure all staff are appropriately trained;
 - have access to, and the supervision of, a person who holds a current embalming qualification;
 - have the use of facilities as set out in the FDANZ rules and be subject to a three-yearly inspection of premises; and
 - be subject to a complaints and disciplinary process.
- 16.18 NZIFH requires its members to:²⁸⁸
- uphold the NZIFH mission statement;²⁸⁹
 - have principals who are recognised as having many years of experience in funeral service and are acknowledged by their peers as leaders in their profession;
 - have personnel that are well trained, professional and experienced and are encouraged to pursue continuing education;
 - demonstrate high standards of professionalism, integrity and ethics;
 - have a reputation for providing a caring, personal service; and
 - have funeral home buildings and facilities that are recognised as being of a superior standard.
- 16.19 Some funeral service providers have advised us that they do not belong to an industry body because their business model does not fit the traditional funeral services model. This sometimes includes providers specialising in natural or alternative burial practices. Others told us that they

286 Health (Burial) Regulations, reg 32. “Reception room” is defined in reg 3 as “a place other than a mortuary used for the reception of dead bodies pending burial”.

287 Funeral Directors Association of New Zealand “Professional Codes” < www.fdanz.org/professional-codes > .

288 NZIFH Independent Funeral Homes “Home” (2015) < www.nzifh.org.nz > .

289 The NZIFH website states its mission is: “To promote amongst its members the highest standards of professionalism, integrity and ethics, a spirit of co-operation and support, and service excellence through ongoing education, to benefit the communities they serve”.

do not belong because they believe their own standards are higher than those of the industry bodies or they do not like the traditional nature of the main industry body FDANZ.

Training

- 16.20 Professional qualifications are available, although currently they are not compulsory. The Funeral Services Training Trust (FSTT) is the Industry Training Organisation recognised by government for the training of funeral directors. Training is run through Wellington Institute of Technology (WelTec). The qualification is a Level 5 NZQA-accredited diploma, which takes 12 months to complete.²⁹⁰ The training combines on-the-job learning in a funeral home under an approved supervisor with modular courses taught at WelTec. Candidates are only accepted for training if they have worked for one year in a funeral home. FSTT advised us that, in 2014, 16 funeral directors graduated from its courses.

EMBALMERS

- 16.21 Embalming is the process of preservation of the body by the injection of disinfecting and preserving fluids into the arteries.²⁹¹ This acts to delay decomposition of the body. Initially when embalming was offered in the late 19th century, it was promoted as a public health measure to prevent the “obnoxious odours” of death and reduce the effect of that on grief. Funeral directors quickly embraced embalming, seeing it as a way to further professionalise their industry.²⁹²
- 16.22 However, embalming is now promoted as a means of sanitising, preserving and presenting the body so that family and friends can spend time saying goodbye to the deceased person.²⁹³ Embalming is particularly used when the deceased person is Māori and the body will lie for several days on a marae as part of the tangihanga.
- 16.23 The practice of embalming became widespread in New Zealand from the 1970s after the establishment of the New Zealand Embalmers Association (NZEA) in 1971. Initially, embalming was reserved for bodies that required transportation between towns and cities.²⁹⁴ **Today, around 90 per cent of deceased bodies are embalmed.** It is noteworthy that embalming is a requirement of airlines if the body is to be repatriated overseas for burial.²⁹⁵
- 16.24 However, there is also some indication of an emerging trend away from embalming. People who are motivated by environmental principles may choose not to preserve the body or to use alternative preservation techniques, such as dry ice.²⁹⁶

Legislative obligations on embalmers

- 16.25 The Health (Burial) Regulations 1946 are the main requirements specific to embalmers. In addition to general requirements about the handling of dead bodies, the Health (Burial) Regulations provide some very specific requirements covering minimum standards and inspections for mortuaries.

290 FSTT have advised us that, if candidates want to complete both training courses, it would take three years as there is a nine-month wait between one course finishing and the next one starting.

291 New Zealand Embalmers Association NZEA *Embalming Brochure* (2014).

292 Schafer, above n 278, at 105–106.

293 New Zealand Embalmers Association, above n 291.

294 Schafer, above n 278, at 105.

295 New Zealand Ministry for Culture and Heritage Te Manatu Taonga, Rosemary Du Plessis and Ruth McManus “Death and Dying – Cremation” < <http://www.teara.govt.nz/en/death-and-dying/page-5> > .

296 Submissions revealed some individuals and natural burial proponents are concerned embalming chemicals are harmful to the environment. However, submissions from funeral directors and embalmers contended the opposite – that the embalming fluid actually assists in containing any possible infectious disease elements in a body and that natural burial poses more risk through the decomposition and leaching into the soil.

- 16.26 Another key piece of legislation is the Hazardous Substances and New Organisms Act 1996. That Act controls the handling and storage of hazardous substances, including many of the chemicals used for embalming, which can be flammable, toxic and corrosive.

Industry organisations

- 16.27 Membership of the NZEA is open to individuals who hold a recognised qualification in embalming practices or equivalent experience. The Association focuses on training and professional support for embalmers. Members' conduct is governed by the Code of Ethics and the Code of Professional Conduct.²⁹⁷

Training

- 16.28 Similar to funeral directors, a Level 5 NZQA-accredited diploma is available for embalming, despite it not being compulsory to hold a qualification. This qualification is also conducted by FSTT, takes 12 months to complete and requires the applicant to be employed as an embalmer before undertaking the course. Thirteen embalmers graduated from the course in 2014.

CREMATOR OPERATORS

- 16.29 Cremation is a process whereby the body is reduced to ashes and cremains (larger pieces of bone that do not fully burn) through a high-temperature combustion process within a cremator unit, which is essentially a furnace. Bodies are cremated one at a time with the process taking between two to four hours. The casket is also cremated. The cremains are crushed to uniform size in a cremulator and are then known as "ashes". The ashes are given to family members or held by the cremator operator and then interred or scattered if unclaimed for a reasonable period.
- 16.30 In his article on the history of funeral directing in New Zealand, Cyril Schaefer states that funeral directors perceived their role to be threatened by the development of crematoria in the 1960s by city councils. Funeral directors found they had no control of the timing of cremation services at council-run facilities. This sometimes meant a funeral service had to be truncated, or conversely, significant time was spent waiting around.²⁹⁸ As a consequence, from the 1980s, when cremator units became smaller and more affordable, funeral directors began setting them up in their own funeral homes. Many also built catering facilities and chapels in order to offer a complete service.²⁹⁹ For every crematorium owned by a local authority, there are three to four that are privately owned and operated.
- 16.31 Although national cremation statistics are not collected, the funeral industry estimates that about 70 per cent of deceased New Zealanders are cremated each year. The rates of cremation vary significantly from region to region and amongst demographic groups.³⁰⁰ Cost appears to be a major factor in why people choose cremation because it is significantly cheaper than burial. Cultural or religious reasons may also influence preferences about burial or cremation.

297 New Zealand Embalmers Association "Resources" (2015) < www.nzembalmers.org.nz/members/resources/ >. See Rules and Bylaws of the New Zealand Embalmers Association (Inc).

298 Schafer, above n 278, at 108.

299 At 110.

300 Law Commission, above n 7, at 30.

Legislative obligations on cremator operators

16.32 The main legislative provisions for the operation of crematoria are in the Cremation Regulations 1973. Those regulations are designed to ensure that there are checks and accountability around the cremation of bodies. This includes requirements to:

- keep records;³⁰¹
- maintain the crematorium in good working order and clean condition;³⁰²
- appoint competent attendants;³⁰³
- ensure an application form has been completed;³⁰⁴
- not cremate unless a medical referee has certified that the legislative requirements have been complied with;³⁰⁵ and
- retain and deal with ashes that have not been delivered to the bereaved family.³⁰⁶

16.33 We discussed the current medical referee system in Chapter 3. We conclude there that the system does not provide the checks and accountability that it is intended to provide and should be replaced by a national audit system for cause of death determinations.

Industry organisations

16.34 Many cremator operators will also be funeral directors and, in that capacity, members of FDANZ or NZIFH. FDANZ members who operate crematoria are required by the FDANZ Code of Professional Conduct to have a set of protocols and procedures for the operation of a cremator and a policy regarding the storage and disposal of ashes.³⁰⁷ FDANZ has also recently issued guidance to funeral directors who deal with ashes of deceased persons.

16.35 Local authorities that operate crematoria may become members of the newly established New Zealand Cemeteries and Crematoria Collective (NZCCC). That organisation was established in 2012 as a support and advisory group for cemeteries and crematoria. Its objectives include developing and promoting industry standards in the operation of cemeteries and crematoria.³⁰⁸

Training

16.36 Training in how to operate cremator units is usually conducted by the manufacturer of the cremator unit. Currently, there is no formal qualification specifically for operating a cremator, although we are advised that NZQA-accredited training units in cremator operation are being developed by the Primary Industry Training Organisation.³⁰⁹

CEMETERY MANAGERS AND EMPLOYEES

16.37 In Issues Paper 34, we did not include cemetery managers and employees in the discussion of the need for regulation of the people operating in this industry. Generally, the role of cemetery

301 Cremation Regulations, reg 9.

302 Regulation 3(4).

303 Regulation 10.

304 Regulation 9.

305 Regulation 4(2).

306 Regulation 8.

307 Funeral Directors Association of New Zealand, above n 287.

308 New Zealand Recreation Association “Cemeteries and Crematoria” < www.nzrecreation.org.nz > .

309 The Primary Industry Training Organisation normally offers qualifications in horticulture and agriculture but also currently offers a course in cemetery management. The cremation units will be part of their cemetery management qualification but, with approval, could be taken up by another training provider.

managers was discussed from the perspective of the management of cemeteries. In Chapter 12, we proposed a new set of obligations on cemetery managers in relation to the management of cemeteries.

- 16.38 However, it has come to our notice that some cemetery employees do in fact have a role in relation to the deceased body, albeit a limited role. While the bereaved family will often be present at the grave site as the coffin is lowered into the ground, they will normally leave the site before the grave is filled in. In theory, this means that some of the issues we discuss below in relation to behaviour in respect of the deceased body may be relevant to cemetery employees.
- 16.39 There are currently no statutory or regulatory provisions specifically controlling the behaviour of cemetery employees in relation to dead bodies, except the general provisions in the Crimes Act not to improperly or indecently interfere with or offer an indignity to a human body or human remains.³¹⁰ Cemetery managers may join the NZCCC, which will be developing standards for the operation of cemeteries. Those provisions may include the handling of bodies. The Primary Industry Training Organisation currently offers a qualification in cemetery management, which includes the legal obligations on cemetery managers.

OTHER RELEVANT STATUTES

- 16.40 The legislative obligations described above control the behaviour of funeral service providers in relation to dead bodies. However, in our consultation, we also encountered concern about the commercial activities of funeral service providers. There are currently no statutory obligations specifically relating to commercial activity in this sector, but of course, there are a number of general statutes. We describe some of the key statutes here:
- Fair Trading Act 1986—under this Act, funeral service providers are prohibited from engaging in misleading or deceptive conduct or unfair practices in advertising or representing services or goods.
 - Consumer Guarantees Act 1993—under this Act, consumers have certain guarantees when acquiring goods and services from funeral service providers, including that any good supplied is reasonably safe, fit for purpose and otherwise of acceptable quality; and that services are carried out with reasonable care and skill. The Act also provides certain rights of redress for consumers, including a right to cancel the contract.
 - Credit Contracts and Consumer Finance Act 2003—where the supply of funeral services fits the description of a credit contract, this Act provides a range of disclosure and other obligations. For example, the lender must disclose the total interest charged under the contract, the annual interest rate and full disclosure of any fees.³¹¹ Consumers have the right to cancel a contract within three days of initial disclosure being made to the consumer.³¹² Under recent changes, lenders have to comply with lender responsibility principles, which include making reasonable inquiries to satisfy themselves that borrowers can make repayments without suffering substantial hardship.³¹³
 - Financial Service Providers (Registration and Dispute Resolution) Act 2008—funeral service providers must be registered as a financial service provider if they offer payment by credit contract; some forms of pre-paid funerals or funeral insurance; or if the funeral service

310 Crimes Act, s 150.

311 Credit Contracts and Consumer Finance Act 2003, s 17.

312 Section 27.

313 Section 9C.

provider gives financial advice.³¹⁴ Such funeral service providers must also belong to a dispute resolution scheme.³¹⁵

- Financial Advisers Act 2008—funeral service providers giving financial advice including investment planning or advice about acquiring financial products, such as funeral insurance, may need to be authorised to do so by the Financial Markets Authority, depending on exactly what services they were offering.³¹⁶ This Act provides a range of obligations for these circumstances, such as acting with due care and diligence and not misleading or deceiving the client. There are also disclosure obligations about the product or advice; how the adviser is being paid; and whether the adviser has criminal convictions.³¹⁷
- Disputes Tribunal Act 1988—financial disputes with a funeral service provider up to the amount of \$15,000 may be dealt with by the Disputes Tribunal under this Act.
- Commerce Act 1986—this Act prevents funeral service providers from engaging in certain behaviour that may substantially lessen competition in the funeral service market. This may have a particular impact on funeral service providers in regions where there are few competitors.

RECENT AND EMERGING TRENDS IN THE FUNERAL INDUSTRY

- 16.41 The funeral industry has changed significantly over the past 100 years, and that change continues. Through our consultation, we have noted a number of significant recent and emerging trends in this industry that are relevant to our consideration as to whether the current regulatory environment is adequate.

Increasing direct involvement by the family

- 16.42 Having moved during the last century from providing a basic service to a comprehensive service, funeral directors are now noting an increasing desire by bereaved families to have greater direct involvement in preparing the funeral or even preparing the body. This may include washing or dressing the body, preparing the casket, digging the plot or lowering the body into the ground.
- 16.43 The desire for more direct involvement can be motivated by religious and cultural practices or by cost. Some ethnic and religious groups, such as Jewish and Muslim groups, prefer to prepare a body for burial themselves. Some families are becoming more selective in choosing which parts of professional funeral services they wish to pay for. For example, some families may only wish to engage a funeral director for the provision of transport and the supply of a coffin.
- 16.44 Many families that desire greater involvement will still wish to engage a funeral director. They see value in having the funeral director's guidance through the processes and decisions following death. However, there is a small but increasing trend to bypass the services of a funeral director altogether.

314 Financial Service Providers (Registration and Dispute Resolution) Act 2008, ss 5 and 13–16; Financial Advisers Act 2008, ss 8–12. Some pre-paid funeral arrangements may not fall under the definition of “financial services” as the client is paying for a funeral service in advance and is not investing money with the funeral service provider. However, whether this is the case will depend on the actual facts of the situation and the manner in which the money is taken and held by the funeral director.

315 Financial Service Providers (Registration and Dispute Resolution) Act, s 48.

316 Financial Advisers Act, pt 3.

317 Sections 21–49.

Increasing interest in environmentally friendly options

- 16.45 Environmental concerns are driving a number of changes in funerals in recent years. You can now buy eco-coffins or forgo the coffin altogether and replace it with a shroud. Concerns about the chemicals used in embalming mean that many people are opting to do without embalming or have less embalming.
- 16.46 Our survey of local authorities revealed a growing public interest in natural burials. Typically, this involves the burial of an unembalmed 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.³¹⁸ In Issues Paper 34, we reported two surveys that showed significant support for natural burial.³¹⁹ A number of local authorities have either established or are planning to establish natural burial sites in their cemeteries, and our consultation revealed interest in the establishment of stand-alone natural burial cemeteries.
- 16.47 Finally, there are a number of alternatives to cremation being promoted in other countries as a more environmentally friendly option than cremation. For example, resomation reduces a dead body to a liquid and a white dust by means of alkaline hydrolysis, and cryomation does something similar using liquid nitrogen. These alternatives are being increasingly accepted in other countries and may be introduced in New Zealand in the future.³²⁰

Changes to the structure of funeral service businesses

- 16.48 While the funeral sector remains dominated by small to medium-sized owner-operated businesses, often with close connections to the community, the sector is seeing divergent trends. There has been an increase in both one or two-person businesses (often with little or no training and focused on a niche market) and large parent company corporations providing a range of services through subsidiaries.
- 16.49 In relation to cremation, with the advent of smaller, cheaper cremators, there has been a significant increase in the number of crematoria and the private ownership of crematoria. For every crematorium owned by a local authority, there are now three to four that are privately owned and operated, usually by funeral directors. Both these trends are likely to have driven the significant increase in rates of cremation over recent decades.
- 16.50 In recent years, there has also been entry into the New Zealand funeral service market of funeral consultants or arrangers who contract with the consumer to provide funeral services but do not perform any of the services themselves, rather coordinating different funeral service providers to do so. During our consultation, there was some concern, both within the industry and among consumers, about the quality of service offered by some of these providers.

318 Law Commission, above n 8, at 532.

319 At 533.

320 See Parrott, above n 157; Funeral Inspirations “Cryomation” (July 2010) < www.funeralinspirations.co.uk/information/Cryomation.html > .

Chapter 17

The case for reform

INTRODUCTION

- 17.1 Our consultation and research has not revealed evidence of widespread problems or abuses in the funeral services sector. On the contrary, the majority of those operating within the funeral sector do so with integrity and to high standards. We are only aware of one reported prosecution against a funeral director, which occurred in 1984. In that case, a number of charges were laid for breaching section 150 of the Crimes Act 1961, which relates to offering an indignity to a body.³²¹
- 17.2 However, throughout the project, we have heard reports of occasional deficiencies in professional practice that have resulted in distress being caused to family members. These were most often caused by unqualified funeral service providers or those offering DIY help. However, there were also complaints about people who were either qualified or members of an industry organisation.
- 17.3 Over this time, there has also been a number of media reports of funeral service providers being involved in disrespectful practices and also some instances of bodies having been mixed up, causing distress to families.³²²
- 17.4 Our consultation and feedback process also revealed quite a number of instances where consumers have felt they have been overcharged or have received unexpected charges for services from a funeral service provider. Again, throughout the duration of this project, there have been regular stories in the media along these lines.
- 17.5 This feedback, together with our research, has highlighted two main concerns that we consider are inadequately addressed under the current regulatory system:
- A lack of regulation over funeral service providers.
 - A lack of consumer information about pricing of services.

LACK OF REGULATION OVER FUNERAL SERVICE PROVIDERS

- 17.6 As we noted in Issues Paper 34, the most important underlying principle informing the law of burial, cremation and funeral service provision is that of human dignity. Derived from that principle is a requirement that the body of the deceased person is respected.³²³ This principle is reflected in both the idea of a right to a decent burial and in specific duties under tikanga Māori that the living have to the tūpāpaku, the recently deceased.³²⁴ It is also explicitly recognised in legislation under section 150 of the Crimes Act:

³²¹ *R v Young*, above n 267. In that case the director was charged pursuant to s 150.

³²² These are detailed in our Issues Paper Law Commission, above n 8 at [8.53].

³²³ Law Commission, above n 8, at 1.18–1.22.

³²⁴ Law Commission, above n 8, at [1.18].

Everyone is liable to imprisonment for a term not exceeding 2 years who [...] (b) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

- 17.7 The principle of respect for human remains is confirmed in various sections of the Burial and Cremation Act 1964 (the Act). The two most important provisions are section 51, in which it is an offence to remove any body or remains of a body from a burial place without a licence from the Minister of Health, and section 46E, in which bodies must be disposed of within a reasonable time.
- 17.8 It was apparent to us during our consultation that respect for the body of the deceased person is a key principle of the practice of every funeral director we have met. However, it was also apparent that occasional problems arise due to lack of knowledge or lack of experience. Also, it is likely that, when problems arise, they go largely undetected because most of these services occur out of sight of the public or the consumer.
- 17.9 Examples of inappropriate treatment of a deceased body could include:
- inappropriate or disrespectful transportation, handling or storage of the body by a funeral director;
 - incomplete or improper embalming resulting in body leakage;
 - theft from coffins;
 - cremating more than one body at a time (or parts of a body with another body) without the consent of the family;³²⁵
 - intermingling of the ashes of different people after cremation;
 - storing multiple unidentified bodies in an inappropriate manner;³²⁶ or
 - indecent acts with a body.
- 17.10 At the extreme end of the scale, a crematorium could be used to dispose of bodies in order to cover up criminal wrongdoing. This may be possible through unrecorded firings of the cremator or, in some older cremator units, two bodies being cremated together but recording only one.
- 17.11 The legislation currently provides a number of protections against inappropriate treatment of bodies by funeral service providers, although we conclude that they are insufficient and reform is needed.

Prerequisites to being allowed to provide funeral services

- 17.12 As we mentioned earlier, funeral directors must be registered annually, but that is a straightforward process, and an applicant does not need to provide any evidence of training, experience or competence.³²⁷ Registration does not apply to some people in the industry, such as cremator operators, embalmers, cemetery managers or sextons, if they are not also “carrying on the business of funeral directors”.

³²⁵ See *R v Young*, above n 267.

³²⁶ Andrea Bolieiro “The ‘Dead Body’ Offence in Canada: How Courts Interpret and Apply Section 182 of the Criminal Code” (2010) 35 Canadian Law Library Review 125 at 127.

³²⁷ Health (Burial) Regulations, reg 4.

Guidance for providers of funeral services

- 17.13 Disrespectful behaviour may occur without intent but through negligence or lack of training or experience. Guidance through regulations can help in this regard on the basis that compliance with the regulations may go some way to avoiding unintentional disrespectful behaviour. For example, the Health (Burial) Regulations 1946 require that:³²⁸
- mortuaries be kept in good repair, clean condition and well ventilated;³²⁹
 - mortuaries and reception rooms may not be used for other purposes;³³⁰
 - funeral directors may not keep bodies in any place other than a mortuary or reception room;³³¹
 - bodies must be dealt with in specific ways before a nuisance is created by decomposition;³³² and
 - no person may remove a dead body from a mortuary except in a coffin or other suitable receptacle.³³³
- 17.14 There is some similar guidance in the Cremation Regulations 1973 in respect of the operation of crematoria. For example, those regulations require that:³³⁴
- crematoria be kept in good working order and in a clean and orderly condition;³³⁵
 - cremation must not be carried out without a completed application in the prescribed form and the permission of a medical referee;³³⁶
 - ashes that are not delivered to the family must be retained by the crematorium manager and dealt with in accordance with the regulations;³³⁷ and
 - records must be kept of each cremation.³³⁸
- 17.15 While the guidance provided in these regulations offers some protection against inappropriate and disrespectful behaviour, it is very limited and does not address deliberately inappropriate behaviour.

Inspection and other scrutiny

- 17.16 While local authorities have no specific powers of inspection in respect of funeral director premises, they do have the power to inspect any premises for the purpose of ascertaining whether there are any nuisances or conditions likely to be offensive or injurious to health.³³⁹ That power could, in theory, be used to find evidence of inappropriate or disrespectful behaviour in respect of bodies on the basis of it being offensive. However, in reality, this power will only be used if the local authority receives specific information of offensive behaviour, and

³²⁸ Any person who breaches these regulations is liable to a fine of \$100: reg 40.

³²⁹ Regulation 25.

³³⁰ Regulations 28 and 34.

³³¹ Regulation 32.

³³² Regulation 35.

³³³ Health (Burial) Regulations, reg 38.

³³⁴ A breach of these regulations is an offence under section 56(1) of the Burial and Cremation Act and makes the person liable to a fine not exceeding 500 pounds or a term of imprisonment not exceeding 12 months.

³³⁵ Cremation Regulations, reg 3(4).

³³⁶ Regulations 5(1) and 4(2)

³³⁷ Regulation 8.

³³⁸ Regulation 9.

³³⁹ Health Act 1956, s 23(b).

many forms of that can be hidden from such inspections. We are told that, in practice, these inspections rarely occur, if ever.

- 17.17 There are also broad powers in the Cremation Regulations for health officials to inspect crematoria and cremation records.³⁴⁰ This power suffers similar limitations to the first inspection power in that it is rarely used, probably because officials will be inclined to wait until they receive complaints, and disrespectful behaviour may occur without the knowledge of other people.
- 17.18 The one funeral facility that is routinely inspected is mortuaries. They are inspected for the purpose of granting a certificate of fitness.³⁴¹ Inspection is conducted annually because it is tied to the annual registration of the funeral service business. In addition, if asked to do so, embalmers are required to give details to a medical officer of health of the embalming process carried out. They must also carry out any further treatment of the body that the officer directs.³⁴² This power could be used to rectify any embalming process that was negligently or inadequately carried out.

Sanctions and offences

- 17.19 There are a number of offences that can be used to prosecute people in respect of inappropriate or disrespectful behaviour. At the top of the list is the offence under the Crimes Act of improperly or indecently interfering with or offering an indignity to any dead human body or human remains, whether buried or not.³⁴³ In Chapter 15, we discussed that obligation together with other general duties in respect of the disposal of dead bodies. We proposed there that the new statute should include a new offence of failing to treat a dead human body with respect. That new offence would capture lower-level disrespectful behaviour that would not be prosecuted under the Crimes Act provision because it carries a potential term of imprisonment of two years.
- 17.20 The Act provides a range of offences including:
- disinterring a body or human remains without licence;³⁴⁴
 - procuring or attempting to procure a cremation with the intent to conceal an offence or impede the prosecution of a person for an offence;³⁴⁵ and
 - breaching the Cremation Regulations.³⁴⁶
- 17.21 Disrespectful or inappropriate treatment of bodies may give the Minister reason to close a crematorium. This can be done if the crematorium's management or an employee is convicted of an offence under the Act in respect of the operation of the crematorium or the local authority is satisfied that closure is expedient in the interests of health.³⁴⁷
- 17.22 These offences and sanctions offer very limited protection because, in practice, they are rarely used and only for the most serious of behaviour.

340 Cremation Regulations, regs 3(6) and 9(3).

341 Health (Burial) Regulations, reg 15.

342 Regulation 29.

343 Crimes Act, s 150.

344 Burial and Cremation Act, s 55.

345 Section 56(3).

346 Section 56(1).

347 Cremation Regulations, reg 3(3).

Submissions

- 17.23 In Issues Paper 34, we asked a number of questions designed to elicit whether submitters thought that the current regulatory scheme was sufficient. In particular, we asked whether funeral directors should be required to:³⁴⁸
- disclose their qualifications or affiliation to an industry body;
 - demonstrate that they understand legislative requirements for handling human remains; and
 - be subject to a code of conduct and complaints mechanism.
- 17.24 The overwhelming majority of submissions from individuals, community organisations, central government and local authorities thought that funeral directors should be required to demonstrate an understanding of the law relating to handling human remains. In fact, the public were often surprised to learn that funeral service providers did not currently need to be qualified and were not regulated. It was acknowledged that, although problems in the funeral sector were relatively rare and the standards normally high, the public expect that there will be appropriate safeguards and regulatory protections. Some submitters thought this could be provided by licensing funeral directors. A significant number of submitters suggested that providers should be required to have appropriate qualifications. A number thought it important that funeral service providers should be assessed for their cultural understanding, which could be achieved through the appropriate qualifications.
- 17.25 Most submissions from funeral directors thought they could demonstrate the required skills through compulsory qualifications and affiliation to an industry body rather than by licensing. One funeral service provider said it was too late to ask if the person was qualified once a funeral service provider arrived at your door. Therefore, they said the best protection would be compulsory qualification and compulsory industry body membership. This was supported by many in the funeral sector.
- 17.26 The Funeral Directors Association of New Zealand (FDANZ) and New Zealand Embalmers Association (NZEa) favoured self-regulation over a licensing option. New Zealand Independent Funeral Homes (NZIFH) proposed an industry structure loosely based on the Real Estate (Licensing) Regulations 2009. Under that structure, all employees would be required to be qualified to a certain level or under the oversight of a more qualified person.
- 17.27 Most submitters (including funeral service providers) supported a mandatory code of conduct and complaints mechanism, although those outside the funeral sector thought this should be independent of the funeral sector. Several submitters from community organisations and local government thought there should be an industry ombudsman. Submissions from funeral service providers were divided fairly equally between whether the complaints body should be an existing industry body or an outside body. Some were quite clear that FDANZ was not the right body, whereas others believed it was.
- 17.28 Consumer New Zealand commented in its submission:
- In addition to any licensing regime, our view is that consumers need access to an independent complaints process. While we agree that funeral services are unlike other services in that there may be little scope to “put things right”, an avenue for redress is essential for effective consumer protection. In our experience, one of the reasons consumers are often reluctant to complain is the lack of effective avenues to pursue a complaint. They are often uncomfortable about approaching the provider directly. They may also be reluctant to complain to an industry association, which may not

³⁴⁸ Law Commission, above n 8, at 173.

be seen as independent or impartial. Further, not all providers belong to an industry body. Of the options presented in the issues paper, our preference would be for complaints to be dealt with by an independent complaints body. The Electricity and Gas Complaints Authority model may be a useful model to consider in respect of the funeral industry.

17.29 The New Zealand Law Society submitted:

The main issue from a health law perspective is ensuring public health and safety and ensuring the provision of services that respect the dignity of the deceased and their families. This can be addressed through a licensing regime as noted above... The code of conduct could be voluntary if the licensing regime were in place. A complaints mechanism should be an integral part of the licensing regime.

17.30 In Issues Paper 34, we also sought feedback on whether there should be stronger regulatory controls over the operation of crematoria, including the handling of human ashes and whether those who operate crematoria should be licensed.³⁴⁹

17.31 Submissions were strongly in favour of licensing for cremator operators.³⁵⁰ This support was based on the need for public assurance and accountability, respect for the deceased and ensuring that criminal conduct does not occur. The Law Society responded:

A licensing regime for those who operate crematoria may be preferable to an inspection and audit regime. It could involve education and training, and be aligned with the licensing of funeral services providers. An inspection regime is less likely to be able to monitor all eventualities, whereas licensing may give the public confidence that operators/providers are to some extent self-monitoring, having been background checked, trained and regulated to operate crematoria and provide funeral services with a level of professionalism linked to the licensing regime.... A licensing regime should include provision for review, suspension and cancellation of licences.

17.32 A significant majority of the funeral sector, including FDANZ, were in support of licensing for cremator operators (in contrast to licensing for funeral directors) in order to ensure standards were kept high with the public being protected and the deceased being respected. However, there was a concern about local authorities fulfilling any regulatory role since local authorities were perceived to have a conflict of interest, given that some of them operate their own crematoria.

17.33 Local authorities, although largely in support of licensing cremator operators, did not wish to be the ones to operate the regulatory system, due to resource concerns. Local Government New Zealand argued this added a completely new duty and process to local authorities' responsibilities and submitted that licensing would need further consideration, clarification and discussion with all parties.

17.34 As regards stricter regulatory controls over crematoria, 103 submitters out of the 125 who answered this question were in favour of stricter controls. The Ministry of Health was in support due to:

[T]he proliferation of non-Council operated crematoria. Officials are receiving small, but increasing numbers of complaints about crematoria including anecdotal reports and allegations of visible smoke emitted, substandard coffins, re-use of coffins without clients' permission, co-mingling of ash, ash not being appropriately identified, deceased effects being stolen, animals being cremated.

17.35 It considered that more explicit controls would help reassure the public of the standards that are expected and enable complaints to be investigated and enforcement action taken if necessary.

³⁴⁹ Law Commission, above n 8, at 145.

³⁵⁰ 139 submitters out of 143 who answered the question responded positively.

- 17.36 However, the New Zealand Law Society cautioned against excessive regulation and suggested that it must be proportionate to the risks. It did, however, acknowledge that some regulation may be needed to foster public confidence, recognising that it is difficult for people to raise or identify problems involving crematoria.

Conclusion

- 17.37 We consider that the funeral services sector has particular features that result in a public expectation that high standards will always be maintained. People entrust funeral service providers with the care of a very precious thing—the body of their deceased family member or friend. In most cases, there is a lot of spiritual and emotional sentiment attached to the processes of disposing of the body.

- 17.38 If things do go wrong, the harm suffered cannot easily be put right. A funeral service cannot be re-run, and distressing experiences cannot be reversed. Neither is compensation a sufficient response. As we noted in Issues Paper 34:³⁵¹

Existing consumer protection law rests on the premise that poor service is occasionally inevitable but can be remedied. This is not an accurate assumption for the funeral sector. Poor service is likely to cause significant emotional distress, and there is very little scope for it to be corrected. While reduced fees may go some way to ameliorating distress occasioned by poor service, it is clearly not likely to be an adequate substitute for receiving good service at the outset.

- 17.39 Work undertaken to prepare the body for the funeral usually occurs behind closed doors, which makes it difficult to detect disrespectful or inappropriate behaviour. For this reason, it is important that the public feel they can trust that funeral service providers will treat deceased bodies with due care and respect.
- 17.40 It was clear from our consultation and the submissions received during the course of this project that the general public inaccurately believe that funeral service providers must currently be qualified or regulated. That is not the case, and we have concluded that the current legislative protections provide very limited assurance of high standards of practice in this industry.
- 17.41 While we have not found low standards of practice to be prevalent in this industry, we have found that the public expects the legislation to provide assurances of high standards, and that is not currently the case. The current inaccurate belief that the system already provides that assurance adds to the vulnerability of consumers because it may make them less cautious about who they engage or less likely to check and compare the experience and qualifications of different providers.

LACK OF TRANSPARENCY IN FUNERAL SERVICE PRICING

- 17.42 During our consultation, the greatest number of complaints we heard from the public about funeral directors related to their methods of communicating the costs of funeral services. Many funeral directors do not advertise funeral prices on their websites or in advertising material but rather will advise on costs after meeting with a client to discuss their needs. Some will provide a quote, but many provide an estimate.
- 17.43 Those funeral directors who advertise pricing on their websites or in other promotional material usually provide the price for various funeral packages. The individual components of these packages are described but not the price of each individual component. Within an estimate

³⁵¹ Law Commission, above n 8, at 161.

- or a quote, some funeral directors will provide a breakdown of the costs of each component of the funeral service offered, but many only partially do so or do not do so at all.
- 17.44 Most funeral directors incorporate a significant portion of their charges into a generic service fee or professional services charge. This usually encapsulates things such as the time spent by the funeral director and other staff collecting and transporting the deceased; meeting with the family to discuss the funeral service; arranging and attending at the funeral service; arranging the death notice; and completing and registering documentation for the Registrar-General of Births, Deaths and Marriages. It also includes overheads such as vehicles, buildings and equipment and the fact that funeral directors are on call 24 hours a day.
- 17.45 The complaints we heard about the lack of specification of component prices included that:
- it is not always clear exactly what is included in the cost of a funeral and therefore there can be different expectations as to what is included and what is an additional cost;
 - it is hard to compare providers before engaging a funeral director; and
 - it is difficult to negotiate to have only some of the elements of a package.
- 17.46 Many consumers are very unhappy with the generic “professional service fee” commonly charged by funeral directors. A number of people believed that extra charges or unwanted work (for example, embalming of the body when this was not requested) were hidden in this fee. Instances have been cited to us of extra costs being included in the professional services fee without itemisation or approval, including in a submission from the Citizens Advice Bureau. One example mentioned was of a funeral that cost almost double the estimated price. It transpired that the cost of employees serving the catered food was the source of the extra cost. However, the funeral director had not informed the client of this cost beforehand and nor was it itemised in the invoice.
- 17.47 Another common complaint was that sometimes funeral service providers were charging a mark-up on disbursements (goods or services provided by a third party and then claimed back from the consumer) without disclosing that they were doing so. Some consumers felt that this practice was unfair.
- 17.48 Through our consultation, we tried to gauge the extent of this problem. We concluded that, while the number of reported problems with funeral sector pricing is low, they were still significant and are likely to be under reported. Consumer New Zealand advised that it receives about one complaint a month from its membership regarding funeral directors, with complaints generally related to costs and invoicing.³⁵² The Citizens Advice Bureau estimates that approximately one or two complaints a month relate specifically to funeral directors. Most of these complaints are related to costs. Some community law centres told us they have sporadic cases relating to funeral directors’ costs, but most cases concerned problems with paying funeral invoices.
- 17.49 These groups indicated that the number of known cases probably did not reflect the extent of the problem because consumers reported that it was difficult to complain when they were grieving. It is also likely that the relatively low levels of reporting could be due to the absence of a comprehensive and accessible complaints process. We note that FDANZ does not deal with cost complaints as part of its internal disputes process. This leaves the Disputes Tribunal as the only forum for resolving complaints of a cost nature. The Ministry of Justice does not record whether complaints filed with the Disputes Tribunal relate to funeral services.

³⁵² Consumer NZ membership comprises over 80,000 people: Consumer NZ “Learn more” Consumer < www.consumer.org.nz/general/learn-more-2 > .

- 17.50 Currently there is no legislation specifically regulating contracts for funeral services. Therefore, the price the consumer pays for a funeral is governed by general contract law and other generic consumer protection statutes as we described above, such as prohibitions on providing misleading information or engaging in anticompetitive behaviour.

Submissions

- 17.51 In Issues Paper 34 we asked whether funeral service providers should be required to proactively disclose the costs of different components of their services.³⁵³ Apart from those in the funeral sector, the overwhelming majority of submitters were in favour of component price disclosure. They cited reasons of transparency, consumer options (being able to pick and choose the services required) and consumer protection. Many submitters wanted funeral service providers to disclose which parts of a funeral service package were required by law and which were not so that they had more information to inform a choice to have only some component parts of a funeral service.
- 17.52 Of the 39 submissions from the funeral sector to this question, the responses were equally divided for and against disclosure of prices for the components of a funeral. Many interpreted the question to mean that they would need to provide a fixed quote, which they believed would be too difficult since each funeral is individualised and is specifically based on what the family wants. Even those who were in favour of disclosure noted that people changed their minds, often with little notice, and it was therefore difficult to give a fixed cost. Most funeral service providers in the industry, including the organisations NZIFH, FDANZ and NZEA, suggested instead that a firm estimate should be given to people once the funeral service provider had met with the family and become aware of what they wanted. Most funeral sector submitters said they already did this.

Conclusion

- 17.53 Currently, the lack of legislation concerning commercial aspects of the funeral industry indicates an assumption that consumers in this industry will have sufficient information and bargaining power to contract for the services they want at a fair price. However, we have concluded that this market has some unique characteristics that make consumers particularly vulnerable. That vulnerability means that the balance of power and information is tilted away from the consumer and warrants some form of legislative control.
- 17.54 Consumers of funeral services may be particularly vulnerable for the following reasons:
- Emotional distress—obviously consumers of funeral services are recently bereaved. Grief makes it particularly difficult to research funeral options, to ask questions, to make informed decisions and to complain if necessary. Also, it is sometimes considered to be culturally inappropriate to discuss costs at a time of death.
 - Time pressure—this is particularly a problem when the death was unexpected. In New Zealand, most funerals occur within a few days of the death.

³⁵³ Law Commission, above n 8, at 173, q 11.

- Expense—FDANZ estimated that the average cost of a funeral was over \$8,000. American research indicates that funeral costs are the third most expensive consumer purchase (after the home and the car).³⁵⁴ Funeral costs have also been cited as a reason that some families seek credit from finance companies.³⁵⁵
 - Inexperience—most people will only arrange one or two funerals during their lifetime. Generally, people lack an understanding of what the funeral director’s role is and what must legally occur when someone has died. Consumers rely on funeral directors to provide information about this and about the conduct of the funeral more generally.
 - Lack of choice—New Zealand’s geography and population distribution mean that, in some smaller towns and in rural areas, there is often only one funeral service provider. This results in consumers in these areas being unable to shop around between providers.
- 17.55 Research commissioned by the Office of Fair Trading in the United Kingdom concluded that buying a funeral is a classic “distress purchase”.³⁵⁶ Jessica Mitford, a United States author, calls it an impulse purchase due to necessity.³⁵⁷ We agree with these researchers that consumers of funeral services are different to those in other markets and therefore need specific protections.³⁵⁸

354 Mark Lino “The \$3,800 Funeral” *American Demographics* (New York, July 1990) as cited in Terrance G Gabel, Phylis Mansfield and Kevin Westbrook “The Disposal of Consumers: an Exploratory Analysis of Death-Related Consumption by Terrance G Gabel, Phylis Mansfield, and Kevin Westbrook” (1996) 23 *Advances in Consumer Research* 361. “Direct disposal,” which typically means a cremation without any additional services, may be available in some areas for \$2,000 to \$3,000. A Work and Income New Zealand funeral grant of about \$1,900 is sometimes available. In 2011/12, the grant was provided in respect of one in every 5.5 deaths.

355 Expert Advisory Group on Solutions to Child Poverty *Problem Debt and Poverty* (Children’s Commissioner, Working Paper no 13, August 2012) at [22].

356 Office of Fair Trading *Funerals: A report of the OFT inquiry into the funerals industry* (Government of the United Kingdom, OFT346, July 2001) at 43 and 50. Research conducted by the International Institute of Health and Ageing, University of Bristol.

357 Jessica Mitford “The Undertaker’s Racket” *The Atlantic* (online ed, Washington (DC), June 1963).

358 Jessica Mitford *The American Way of Death Revisited* (Vintage, New York, 2000) as cited in Victorian Government *National Competition Policy Review of the Cemeteries Act 1958* (31 December 2000) at 11; Office of Fair Trading, above n 356; and Family and Community Development Committee *Inquiry into Regulation of the Funeral Industry* (Parliament of Victoria, Parliamentary Paper 175, November 2005).

Chapter 18

Recommendations for reform

INTRODUCTION

- 18.1 We have concluded above that there is a need for legislative reform to serve the two purposes of:
- providing assurance of a high standard of practice by people providing funeral services; and
 - providing transparency in the pricing of funeral services.
- 18.2 We have considered what form this new regulation should take. The Policy Framework for Occupational Regulation endorsed by Cabinet in 1999 states that legislative intervention in an industry could be justified when “incompetent service by a member of an occupational group could result in significant harm to the consumer or a third party”.³⁵⁹ The potential harm should be significant because otherwise the compliance costs of intervening may outweigh the harm done. A “significant harm” may be either a significant harm to one person or a moderate harm to a large number. If the harm is irreversible, it is more likely to justify intervention.
- 18.3 We consider that some low-level regulation directed at the funeral industry is justified given the importance of funeral services and the need to promote high standards in the industry. There is a risk of significant harm if things go wrong in this industry, due to the large financial cost of funerals and the emotional and spiritual importance given to funeral arrangements across all sectors of New Zealand society. That harm is compounded by the fact that any emotional distress cannot be easily rectified or financially compensated. In addition, consumers are uniquely vulnerable, and common industry practices make it difficult for them to negotiate for goods and services.
- 18.4 While intervention in the industry may be justified, the costs of compliance and administration of any new regulatory regime should be kept as low as possible. This is not an industry plagued by problems that justify heavy-handed intervention. Rather, it is an industry in which there are vulnerable consumers who deserve robust protection.
- 18.5 We consider that the problems that exist in the sector are not so severe that a completely new regulatory regime is required, such as the licensing systems found in the Lawyers and Conveyancers Act 2006 or the Health Practitioners Competence Assurance Act 2003. Such high-end occupational regulatory reforms require significant investment and are not justified in this industry. Instead, an enhancement of the existing protections is a more appropriate response. This should provide greater public assurance about the delivery of funeral services and provide consumers with more information to strengthen their ability to negotiate for funeral services. Any recommendations should not impose significant regulatory costs on the sector.

359 Cabinet Office Circular “Policy Framework for Occupational Regulation” (8 June 1999) CO 99/6 at [6].

- 18.6 In this chapter, we outline two main proposals for reform. The first set of proposals relates to improvements to the registration system, including the provision of clear statutory duties. The second set of proposals relates to the mandatory disclosure of component prices of services provided by the funeral sector.
- 18.7 The principal objectives of reform are to ensure that:
- people operating in this industry meet their obligations; and
 - consumers have sufficient information to negotiate effectively with service providers in the industry.

ENHANCING THE REGISTRATION SYSTEM

- 18.8 Our first proposal is for an enhanced registration process with clear prerequisite conditions to registration and very limited discretion required of the registration authority. The registration system should be administered nationally rather than regionally as it is currently. It should apply to a slightly wider group of people than just funeral directors (to better capture people who may pose a risk of inappropriate or disrespectful treatment of a deceased body) but should not apply to people who provide funeral services under the supervision of a registered person.

Prerequisite conditions to registration

- 18.9 While currently there are no prerequisites to registration, we recommend that a new statute introduces a simple system of prerequisite conditions to ensure that unsuitable people are not operating in the industry. The legislative conditions to operating in this industry should be at the lower end of options for occupational regulation, namely the:
- absence of certain criminal convictions;
 - absence of other disqualifying circumstances; and
 - holding a relevant qualification or passing an examination demonstrating requisite knowledge.
- 18.10 In addition to being prerequisite conditions to registration, if either of the first two conditions cease to apply after registration, the registration authority should have the power to cancel the registration. There should be a natural justice process before any cancellation under which notice of the reasons for the proposed cancellation are provided to the registered person together with an adequate opportunity to make submissions. There should be a right to appeal any registration decision to the District Court. We suggest that rights of appeal from the District Court be on questions of law only.
- 18.11 We discuss each of the prerequisite conditions in turn.

Absence of certain criminal convictions

- 18.12 We have considered the types of offences that should prevent a person from being registered. These offences should be specified or described in the new statute. We have kept in mind the objective of ensuring that people entering the funeral service industry are those who have integrity and are honest, trustworthy, non-violent and not inclined to take advantage of vulnerable people.

- 18.13 We have considered the variety of ways in which disqualifying convictions are dealt with in other statutory registration and licensing regimes, for example:
- specific offences can be listed;³⁶⁰
 - offences can be described by a category (for example, “serious criminal activity” or “a crime involving dishonesty”);³⁶¹
 - offences can be limited by their maximum penalty;³⁶² or
 - convictions can be limited in time, for example, only convictions within the previous three years.³⁶³
- 18.14 In addition, some statutes provide an overriding discretion in the registration authority to decide that a particular conviction does not present an undue risk in the industry.³⁶⁴ Others provide no discretion.³⁶⁵ An analysis of these regimes shows that regimes with a broad overriding discretion tend to also have broader descriptions of relevant convictions. This method tends to be used when there is a broader range of relevant convictions. Specific lists of relevant offences with no discretion in the registration authority are methods used when there is a very confined set of relevant offences.
- 18.15 Keeping in mind that only relatively low-level intervention is justified in the funeral industry, we consider both that the list of relevant offences should be tightly confined and there should not be an overriding discretion. Such discretion is more appropriate for a full licensing regime.
- 18.16 The specific relevant offences should be:
- an offence under the Burial and Cremation Act 1964 (the Act) or the new statute;
 - section 150 of the Crimes Act 1961—neglecting to perform a duty imposed by law relating to the burial or cremation of a dead human body or human remains or improperly or indecently interfering with or offering any indignity to a dead human body or human remains;
 - crimes involving dishonesty (as defined in the Crimes Act);³⁶⁶ and
 - an offence under Part 1 (relating to unfair conduct) or subparts 1 or 2 of Part 4 (relating to layby sales and uninvited direct sales) of the Fair Trading Act 1986.
- 18.17 A conviction under the Crimes Act for misconduct in respect of human remains is an offence so inherently tied to the provision of funeral services that we consider there should be no time limit on previous offending. However, a time limit is appropriate in respect of the offences involving dishonesty and under the Fair Trading Act because those are offences that may have occurred in very different circumstances and may be less relevant when significant time has passed. We consider that 10 years would be an appropriate timeframe for those convictions.
- 18.18 In addition, there is a need to capture other types of serious offending, particularly violent offending. This is best achieved by reference to the penalty that was imposed on the applicant.

360 Auctioneers Act 2013, s 6.

361 See, for example, the assessment of managers under the provisions for the registration of private schools in the Education Act 1989, ss 2, 35A, 35C and 35G and the Immigration Advisers Licensing Act 2007, s 16.

362 For example, the Immigration Advisers Licensing Act, s 16, includes offences resulting in a term of imprisonment.

363 Under the Health Practitioners Competence Assurance Act 2003, s 16, a person must not be registered as a health practitioner if he or she has been convicted of an offence punishable by imprisonment for a term of three months or longer and does not satisfy the registering authority that the offence does not reflect adversely on his or her fitness to practise. A similar provision is found in the Veterinarians Act 2005, s 9.

364 See, for example, the broad discretion in the registration of lawyers in Lawyers and Conveyancers Act 2006, ss 49 and 55(1)(c).

365 See Real Estate Agents Act 2008, s 37 and Auctioneers Act, s 6.

366 Section 2.

The harsher the penalty imposed, the longer the timeframe in which that offending can be taken to still pose a risk in the industry. Consequently, we propose that disqualifying convictions should also include:

- convictions resulting in the imposition of a term of imprisonment of three years or more; and
- convictions within the previous five years resulting in the imposition of a term of imprisonment of six months or more.

18.19 The provisions defining disqualifying convictions should be subject to the Criminal Records (Clean Slate) Act 2004 (the Clean Slate Act). Under that legislation, a person does not have to reveal their convictions (and government departments must not reveal convictions) if the person:

- has never been convicted of a specified offence (generally referring to sexual offences);
- has not had any convictions in the last seven years;
- has never been sentenced to a term of imprisonment nor alternatively been given a mental health order instead of a sentence;
- has paid all fines, reparations and compensation; and
- has not been indefinitely disqualified from driving.

18.20 This legislation means that there will be a small number of individuals who fit these criteria but who will have older convictions that fall within the offences that would prevent registration. The Clean Slate Act is a policy choice made by Parliament to give those individuals opportunities that would not be possible when older convictions must be revealed. We consider that, for the most part, the operation of that Act would not substantially affect the risk of unsuitable people operating in the funeral industry.

Absence of other disqualifying conditions

18.21 The second prerequisite for registration should be the absence of other disqualifying conditions. These are matters that would automatically make a person unfit to provide funeral services. In determining these disqualifying conditions, we have considered other analogous statutory licensing and registration regimes. Across those regimes, we have found a fairly consistent set of circumstances that make a person ineligible for or disqualified from registration that we think is also applicable to the funeral industry.³⁶⁷ Thus, a person could not be registered if they:

- are under 18 years of age;
- are an undischarged bankrupt;
- have already had their registration cancelled under the Act;
- have been prohibited from being a director, promoter or manager of a company; or
- are subject to a property order under the Protection of Personal and Property Rights Act 1988.

18.22 We consider that all these conditions provide an objective assessment that the person lacks competence for the time being in the management of money or property. However, we recommend below that an unregistered person may provide funeral services under the

³⁶⁷ Real Estate Agents Act, s 37; Auctioneers Act, s 6; Motor Vehicle Sales Act 2003, s 24, and Immigration Advisers Licensing Act, s 16. Other statutory licensing and registration schemes had the same disqualifying conditions.

supervision of a registered person. In theory, that would apply equally to a person who has one of the disqualifying conditions.

- 18.23 We also suggest that two further disqualifying conditions should be added on the basis that they demonstrate objective evidence that the person lacks the requisite level of competence for this role:
- The person is a person in respect of whom an order has been made appointing a welfare guardian under the Protection of Personal and Property Rights Act 1988.
 - The person is subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Qualifications

- 18.24 The third prerequisite for registration should be that the applicant must demonstrate the requisite level of knowledge of:
- the process of treating a body after death, including any health risks involved and how to deal with these;
 - legal obligations and how to fulfil these in practice; and
 - different cultural perspectives on how to put these matters into practice.
- 18.25 This knowledge could be demonstrated by holding a relevant qualification prescribed by regulations made under the statute. As noted previously, qualifications are currently available in both funeral directing and embalming. Currently, there is no formal qualification specifically for operating a cremator, although NZQA-accredited training units in cremator operation are in development. When the cremation training units become available, they could be included in regulations.
- 18.26 However, we have some concern that, because the current qualifications for funeral directing and embalming require applicants to be employed in the industry already, making those qualifications compulsory for registration will give some control to existing industry participants over new participants in the industry. That is an undesirable situation because it may encourage anti-competitive behaviour and stymie innovation or alternative methods of providing funeral services.
- 18.27 The purpose of the qualification prerequisite condition is to ensure that industry participants have the requisite levels of knowledge (or are operating under the supervision of someone with that knowledge). One alternative option to demonstrate that knowledge would be to sit an examination (similar to a person passing the theory test before being permitted to learn to drive a car). This option would enable people to enter the industry without first having to be employed by an existing participant.
- 18.28 We have considered who would be best placed to set this examination. The existing training provider would have the expertise but also a conflict of interest. Alternatively, the registration authority could administer the examination, but that would require some expenditure and a different set of skills than is required merely for the registration process. It may be that the most effective solution is for the examination to be provided by the existing training provider under the registration authority's supervision to ensure that there are adequate protections against the conflict of interest.
- 18.29 We also consider that the statute should provide a grandparent provision to recognise those people who have been working as funeral service providers for a long time and who have

plenty of experience but no formal qualifications. We have been told that there are many older, long-serving funeral service providers who have learned their vocation on the job and operate to a fully acceptable standard. The statute should provide that people who have worked as funeral service providers for five years (full-time equivalent) are deemed to be qualified for the purposes of registration. Our consultation with industry experts suggests that five years would be sufficient to ensure an adequate level of experience to mitigate risk and operate independently.

The registration authority

- 18.30 At present, territorial local authorities have the responsibility to register funeral directors. We have considered who the new registration authority should be, given the new purpose of registration. We have considered whether the function should remain with local authorities or whether it should become a function of central government. While local authorities are better placed to determine whether their local service providers are meeting their obligations, some told us they had concerns that this function went beyond their core functions.
- 18.31 We have concluded that the registration of funeral service providers should be the function of central government. A key reason is that this would enable a central register of funeral directors that could then be easily checked by any person with a concern about a particular provider of funeral services. It would also enable the administration of a nationally consistent examination as an alternative to the qualification prerequisite for registration as we outline above. If the registers were localised, either funeral directors would need to register separately for each area they operated in or a person would need to check with many local authorities to determine whether the person was registered. Neither option is satisfactory.
- 18.32 Other advantages of central government operating the registry include:
- national consistency in the application of the rules;
 - overall efficiency—since some local authorities only have a small number of funeral directors in their region, developing a registration system and acquiring the experience to operate it would require a significant resource for a limited benefit; and
 - avoiding any potential conflict of interest for local authorities that also operate crematoria and cemeteries.
- 18.33 The registration authority should be under a statutory obligation to maintain and update a register of all funeral service providers who apply for and are granted registration as a provider of funeral services in a particular specialty. The registration body should also have an obligation to issue certificates upon registration as evidence of the provider's registration.
- 18.34 We envisage that the registration function should be carried out by the Department of Internal Affairs. This would be part of the Department's responsibilities in their overall administration of the new statute.

Who must be registered?

- 18.35 Currently, every person who carries on the business of funeral director must be registered.³⁶⁸ This has been interpreted by most local authorities to mean that the business itself or the owners of the business must be registered rather than the individuals employed by that business. We propose that, in order to ensure unsuitable people are not practising in the industry, the scope of the registration requirement should capture some employees also.

368 Health (Burial) Regulations, reg 4.

Specifically, as we discuss in more detail below, the statute should require that every person carrying on the business of providing funeral services must be registered unless they are directly supervised by a registered person when providing the service.

- 18.36 The qualifying words “carrying on the business of” is intended to ensure that the requirement does not capture people who do these services voluntarily or who prepare their own deceased family members for the funeral.³⁶⁹ We recognise that, in some situations, a person may volunteer to prepare a body for the funeral and receive a “koha” in return. Whether or not this is captured within the requirement will depend upon the extent to which that person could be said to be in the business of providing funeral services.

The scope of “funeral services”

- 18.37 Currently, the registration requirement captures funeral services that fall within the phrase “burial and matters incidental thereto”.³⁷⁰ This phrase is vague and will need to be defined more clearly in the proposed new statute to ensure that all the areas of practice are included where there is a risk of harm.
- 18.38 We consider that the registration requirement should capture the services that involve the possibility of contact with the deceased body. It should include funeral directing, embalming, burial (cemeteries) and cremation (or alternative method of disposal). It should also capture those people who are in the business of facilitating or arranging for others to carry out funeral services or the disposal of the deceased body.
- 18.39 The definition of funeral services should not include the mere provision of accessories or equipment required in the provision of funeral services (such as caskets or coffins, urns, embalming materials, cremation units, headstones or grave markers, memorabilia, flowers or catering), nor should it include funeral celebrants, ministers of religion or anyone whose role was limited to planning and conducting a funeral service.

Registration of employees

- 18.40 We have specifically considered the position of employees within funeral service businesses. We consider that excluding people who are directly supervised by a registered person from the registration requirement recognises that the funeral industry operates on the basis that new employees will work under the supervision of experienced people for a certain period of time until they gain the necessary experience or qualifications themselves. We consider that the risks presented by an unregistered employee are properly mitigated if that person is proactively supervised by a registered person.
- 18.41 The effect of this exception is that people can enter the funeral services industry and learn the profession without first having to be registered. New entrants will be able to learn under supervision. They will then be able to gain professional qualifications and become registered themselves.
- 18.42 In theory, it should be possible for the manager of a funeral service business to not be registered so long as the manager employs a registered person who supervises all unregistered people providing funeral services, including the unregistered manager.

³⁶⁹ Although people who voluntarily perform funeral services will still be subject to the general duties on every person in respect of the burial or cremation of bodies. We discussed these duties in Chapter 15.

³⁷⁰ Health (Burial) Regulations, reg 3. See the meaning of “funeral director”.

Renewal of registration

- 18.43 The new statute should require registration to be renewed periodically. Since the qualification prerequisite is already established, re-registration would simply require the applicant to confirm that he or she remains eligible to be registered. That would mean simply confirming that they have not committed any offences in the intervening period nor have become otherwise disqualified from being registered. Our preference is for the renewal period to be every three years. If re-registration was more frequent than this, it would become a purely administrative exercise as it is unlikely that the applicant's circumstances would have changed significantly over the course of the year, whereas his or her circumstances could well have changed over a two or three-year period.
- 18.44 The statute should also provide a transition provision that recognises registration under the existing legislation for five years to enable the new system to be established.

Offence of not being registered

- 18.45 We think that the potential for a conviction and fine would provide the appropriate level of incentive to comply with the requirement to be registered, and so the new statute should provide an offence of carrying on the business of providing funeral services without being registered or without acting under the direct supervision of a registered person. This should be a strict liability offence—that is, the prosecution does not have to prove a mens rea element of the offence (for example, that the person knowingly, recklessly or intentionally did the action). However, the accused person has a defence if he or she can show total absence of fault on the balance of probabilities.
- 18.46 The Legislation Advisory Committee Guidelines state that a strict liability offence may be appropriate if the offence involves protecting the public from risk-creating activities; the threat of criminal liability supplies a motive for people in the relevant occupations to take precautions; and the defendant is best placed to establish absence of fault because the relevant matters are primarily within the defendant's knowledge.³⁷¹ We consider that the requirement for people providing funeral services to be registered fits these conditions. The purpose of the requirement is to protect the public from risky practices, and funeral service providers are likely to be motivated by the threat of criminal liability.
- 18.47 A defendant should be able to avoid conviction for the offence if he or she can prove that providing the funeral services without being registered (and without supervision by a registered person) was due to the act or omission of another person or some other cause outside the defendant's control and that the defendant took all reasonable steps to avoid the commission of the offence. These matters of defence are all things that are particularly within the knowledge of the defendant. For example, an unregistered employee of a funeral service business may be able to prove that the person supervising him or her is normally registered, but that person's failure to renew the registration is not something that the employee could or should have known.
- 18.48 The statute should also provide other offences to support the registration system, namely:
- supplying false or misleading information for the purpose of an application for registration;
 - holding out that any person (including himself or herself) is registered while not being registered; and
 - failing to deliver the certificate of registration to the registration authority after receiving notice that it has been cancelled.

³⁷¹ Legislation Advisory Committee *Legislation Advisory Committee Guidelines* (Ministry of Justice, 2001) at [12.2.3].

- 18.49 Finally, the statute should provide the registration authority powers to investigate and prosecute any breach of the registration requirements, including fraudulent declarations and practising without registration.

RECOMMENDATIONS

- R81 The statute should require that no person may carry on the business of providing funeral services unless that person is registered or is acting under the direct supervision of a registered person.
- R82 Registration should be a function of central government.
- R83 An applicant for registration must be registered if they pay the prescribed fee and demonstrate:
- the absence of convictions for offences described at R84;
 - the absence of disqualifying conditions described at R85; and
 - that the person holds the qualification required by regulations made under the statute to be held for the relevant type of funeral service or passes an approved examination.
- R84 The criminal convictions that should preclude a person from registration are:
- a conviction for an offence under the Burial and Cremation Act 1964 or the new statute;
 - a conviction for an offence against section 150 of the Crimes Act 1961;
 - a conviction for dishonesty (as defined in the Crimes Act 1961) within the previous 10 years;
 - a conviction for an offence under Part 1 (relating to unfair conduct) or subparts 1 or 2 of Part 4 (relating to layby sales and uninvited direct sales) of the Fair Trading Act 1986 within the previous 10 years;
 - a conviction resulting in the imposition of a term of imprisonment of three years or more; or
 - a conviction within the previous five years resulting in the imposition of a term of imprisonment of six months or more.
- R85 The conditions that would disqualify a person from registration should be that the person:
- is under 18 years of age;
 - is an undischarged bankrupt;
 - has already had their licence cancelled under the Burial and Cremation Act 1964 or the new statute;
 - has been prohibited from being a director, promoter or manager of a company;
 - is subject to a property order under the Protection of Personal and Property Rights Act 1988;
 - is a person in respect of whom a personal order has been made under the Protection of Personal and Property Rights Act 1988; or
 - is subject to a compulsory treatment order under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

- R86 The statute should provide that a person is deemed to hold the relevant qualification if that person has been providing the relevant funeral service for a period of five years prior to the application for registration.
- R87 Registration should be renewed every three years.
- R88 The registration authority should have the power to investigate and prosecute any breach of the registration requirements and to cancel the registration of a person if it is satisfied that one of the conditions for registration ceases to exist.
- R89 A person may appeal any decision of the registration authority to the District Court. Any appeal from such a decision of the District Court should be on questions of law only.
- R90 The statute should provide that carrying on business as a funeral director in breach of the requirement in R81 is an offence.

DUTIES ON PROVIDERS OF FUNERAL SERVICES

- 18.50 In Chapter 15 on burial and cremation, we proposed an updated set of obligations in respect of the disposal of bodies, such as an obligation to treat dead bodies with respect. Those obligations would apply to the public generally but will be particularly relevant to people providing funeral services.
- 18.51 In this section, we describe a number of obligations that should fall specifically on the managers of funeral service businesses. It is appropriate that the managers of funeral businesses are responsible for these duties because they depend upon strong business processes that an individual employee may have limited ability to control. If these duties are breached, we think it should be the owners or managers or the business itself that is liable.

Record keeping

- 18.52 Currently, all burials within any type of cemetery or burial ground must be registered with the local authority.³⁷² There is also a duty on managers of crematoria to register all cremations.³⁷³ Burial registers must be open to public inspection, and cremation registers must be available for official inspection. However, there is no legislative obligation on funeral directors, embalmers or any other funeral service providers to keep records of the handling and disposal of human bodies.
- 18.53 We propose that the statute should require that every manager of a funeral service business must keep records in respect of every human dead body in its custody. Those records should include at a minimum:
- the identity of the body;
 - the nature of the funeral services provided;
 - the person or entity from whom custody of the body was taken;
 - any person or entity to whom custody of the body is transferred;

³⁷² Burial and Cremation Act, s 50.

³⁷³ Cremation Regulations, reg 9.

- when, where and how disposal of the body occurred;
- the person authorising funeral services; and
- any specific consents given (for example, if more than one body is disposed of in the same casket).

18.54 In addition, the statute should require that every manager of a funeral service business must ensure that the identity of a body is maintained while it is in the custody of that business. This will generally involve the development of sound processes and protocols for maintaining the identity of bodies.

18.55 Specific processes or procedures as to how to comply with these obligations (and that many funeral service providers will already be using) could be set out in regulations, including:

- creating a nameplate for the coffin in which the deceased is placed immediately after it arrives at the premises after being collected;
- requiring the embalmer to place an identity bracelet on a body removed from a coffin until it is replaced in the coffin;
- removing the coffin nameplate when the body is placed in the cremator unit and placing it with the paperwork regarding the application for cremation; and
- ensuring the nameplate and documentation follows the physical remains as they are reduced to ashes for storage or disposal.

Supervision of unregistered employees

18.56 We have proposed above that every person carrying on the business of providing funeral services must be registered unless that person is supervised by a registered person. The statute should provide that owners and managers of funeral service businesses must ensure that unregistered employees are directly supervised and are not left in sole charge.

Custody and disposal of ashes

18.57 Currently, the Cremation Regulations 1973 (the Regulations) provide some very specific instructions for cremator operators as to the retention and disposal of ashes. While in our view the level of prescription is unnecessary, some legislative provision is required. The common law is clear that there are no property rights in a human body. Whether or not that rule extends to the ashes from cremation of a body, we consider the statute should provide some clear guidance about custody and disposal of ashes after cremation.

18.58 We have been advised by funeral directors that they often hold ashes for many years before family members claim them. Some are never claimed. The Regulations currently provide that the crematorium manager may deliver the ashes to the person who applied for 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 registered letter to the person who applied for cremation. If a different person applies for custody of the ashes, the crematorium must satisfy itself of the propriety of any delivery of ashes and act accordingly.³⁷⁴

³⁷⁴ Cremation Regulations, reg 8.

- 18.59 Unclaimed ashes can become a significant problem for some crematoria.³⁷⁵ Current practice appears to be that, from time to time, funeral directors advertise that they will dispose of the ashes if they are not claimed. The disposal typically consists of an interment at a cemetery or scattering in a suitable setting such as a public garden.
- 18.60 In Part 4 we describe a proposed framework for making decisions after death about the body of the deceased person. In light of that framework, we consider that the new statute should contain specific provisions about custody and disposal of ashes that are consistent with that proposal. Specifically, it should state that:
- if a deceased's representative has been appointed by the deceased person, that person has the right to custody of the ashes after the body has been cremated and to decide how they will be dealt with; and
 - if a deceased's representative has not been appointed, the family (as is defined in Part 4) has the right to custody of the ashes.
- 18.61 In Chapter 22 we also recommend that funeral service providers should be protected from civil or criminal liability for acting on the instructions of the person who they have reasonable grounds to believe has authority to make decisions in respect of the deceased body. That protection should extend to transferring the custody of ashes. If there is a dispute over who has authority to take custody of the ashes, the cremator operator should retain those ashes until the dispute is resolved.
- 18.62 We also consider that the statute should provide clear guidance as to how long a cremator operator must retain unclaimed or disputed ashes before disposing of them. The Regulations currently provide a power to dispose of them after "a reasonable time".³⁷⁶ A new statute should state a time period to provide clarity on this issue. After consultation, we consider that a cremator operator should be required to hold unclaimed or disputed ashes for 10 years. It is apparently not uncommon for family members to "remember" about the ashes and make inquiries about their whereabouts many years after the cremation. After 10 years have elapsed, notice should be sent to the last known address of the applicant for cremation that the ashes will be disposed of if they remain unclaimed six months later. If the ashes remain unclaimed after that time, the cremator operator may inter or scatter the ashes in an appropriate location.

Offence of breaching management obligations

- 18.63 We consider that a conviction and fine are appropriate enforcement mechanisms for a breach of these management obligations. Due to the nature of the offences, a prosecutor should have to prove that the defendant knowingly breached an obligation. This offence is not suitable for strict liability because there are a broad range of circumstances in which the obligation could be breached, so there is a more nuanced picture of culpability.

Inspection

- 18.64 In Chapter 17 and earlier, we described the various statutory powers of inspection of cemeteries, crematoria and other facilities where funeral services are provided. We also noted that, despite these statutory powers, such inspections occur rarely or, in some cases, not at all. Consequently, we have considered whether the new statute should provide an obligation of inspection, and if so, on whom.

375 Anna Leask "Funeral firm to bury unclaimed ashes" *New Zealand Herald* (7 March 2014) <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11215340> .

376 Cremation Regulations, reg 8.

- 18.65 It is clear that, despite recommending that the new registration system should be a function of central government, a centralised system of inspection is not likely to be effective, given the lack of local knowledge. Local authorities are better placed to conduct inspections of facilities for the provision of funeral services because they are local, are likely to receive anecdotal reports of problems and are likely to understand the local operating conditions.
- 18.66 However, we do not think that local authorities should be under any specific obligations to regularly inspect these facilities to ensure compliance with legislative requirements. Such a function would be onerous. In order to be effective, it would require the development of expertise in the provision of funeral services that would be beyond the ability of many local authorities to maintain. This cannot be justified given the low level of problems encountered in this industry.
- 18.67 Therefore, we propose that the statute provides a power in (rather than a duty on) local or national officials to inspect facilities in order to determine whether the providers of funeral services are complying with their legislative obligations. The power to inspect should include a power to seize records. We expect that the power would be utilised only occasionally, usually when officials receive information that gives them significant cause for concern. However, this power would enable a proactive inspection if the local authority considered that was required.

RECOMMENDATIONS

- R91 The statute should provide that every owner or manager of a funeral service business is under a duty to ensure that:
- records are kept in respect of 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; and
 - unclaimed or disputed ashes are held for at least 10 years.
- R92 A funeral service business should have a power to inter or scatter ashes in an appropriate location if:
- at least 10 years have elapsed since cremation;
 - the ashes remain unclaimed;
 - notice has been sent to the last known address of the applicant for cremation; and
 - the ashes remain unclaimed or in dispute six months after the date of the notice.
- R93 The statute should provide that:
- if a deceased person appointed a deceased's representative, that person has the right to custody of the ashes after the body has been cremated and to decide how they will be dealt with; and
 - if a deceased's representative has not been appointed, the family (as is defined in Part 4) has the right to custody of the ashes.
- R94 The statute should provide that a breach of the duties in R91 is an offence for which the owner, manager or the business itself may be liable.

- R95 The statute should provide that any authorised employee of a local authority or Police officer may at all reasonable times enter and inspect any land or building used for the provision of funeral services and seize records for the purpose of determining compliance with the statute or any regulations made under the statute.

MANDATORY DISCLOSURE OF COMPONENT PRICES

18.68 Our second proposal is for a new set of requirements designed to ensure consumers have sufficient information to negotiate effectively with funeral service providers. We note that both Victoria and New South Wales have enacted legislation requiring disclosure of funeral price information to consumers. The New South Wales regulations describes three occasions in which a consumer must be provided with a written breakdown of the cost of goods and services, including necessary and likely disbursements. Those occasions are:³⁷⁷

- within 48 hours of the consumer requesting information about funeral goods and services;
- before entering into an agreement for the supply of good or services; and
- before accepting final payment for that agreement.

The regulations envisage a limited level of information to be given for basic funerals, thereby keeping the compliance costs for basic funerals as low as possible.

18.69 The Victorian legislation requires that funeral directors provide a price list of the funeral goods and services it offers to any person who asks for it.³⁷⁸ The price list must itemise prices and include service fees and a description of maximum prices. Consumers must also be provided with a written itemised statement of costs before entering into an agreement. That statement of costs must include a description of how the consumer may make a complaint.

18.70 Our recommendations will cover three separate areas of disclosure and are broadly based on the Australian reforms. The first is directed at the department that is administering the new statute. The second two relate directly to the providers of funeral services and will involve direct disclosure to consumers.

Publicly accessible general consumer information

18.71 The department administering the new statute (we recommended earlier that this is the Department of Internal Affairs) should develop and maintain a website providing consumer information to assist consumers making decisions after a death, particularly decisions about purchasing funeral services.

18.72 In its role as the department responsible for the office of Births, Deaths and Marriages, the Department of Internal Affairs has already produced a pamphlet entitled “Before Burial or Cremation”. That pamphlet sets out the legal obligations, processes and documentation required before and after a body is buried or cremated in New Zealand or transported to another country. It also deals with situations where the coroner is involved and provides a checklist of documents for registration of the death.

³⁷⁷ Fair Trading Regulation 2012 (NSW), reg 19.

³⁷⁸ Funerals Act 2006 (Vic), s 21.

- 18.73 We consider that information published by the Department of Internal Affairs should be extended to other types of consumer information designed to ensure that consumers understand their options in relation to funerals, burial and cremation. Significant advances in the level of public understanding of funeral decisions could be made by providing publicly accessible general information about consumer options and rights in dealing with funeral directors. The consumer information published by the administering department should include detail about:
- the handling of dead bodies, including information about the health risks from infectious diseases, particularly for people who wish to handle the disposal of bodies themselves;
 - the general legal requirements post-death in relation to disposal of bodies, including certification requirements and who needs to fulfil these, that is, the funeral director if one is engaged or the consumer if handling the disposal themselves;
 - disposal options and the legal requirements related to each of these (for example, traditional burial, eco-burial, cremation, alternative disposal methods or burial at sea);
 - the importation or exportation of bodies;
 - the role of providers of funeral services including descriptions of the different elements of the service and advice on how to choose a funeral director;
 - how the funeral sector is regulated and the role of industry organisations;
 - consumer rights and redress for complaints or issues regarding funeral services;
 - how to resolve disputes arising after death, including descriptions of the role of the deceased's representative (as recommended in Part 4); and
 - links to other sources of information.
- 18.74 We believe this proposal would help to address some of the public misunderstanding about the funeral sector caused by the current lack of publicly available information. This, in turn, is likely to empower consumers in their dealings with funeral directors. They could ask better questions about the elements of the service. They will be able to negotiate more effectively on certain aspects of the service, such as reduced prices for reduced services, and be able to make comparisons between service providers including whether a provider is connected to an industry body. It may also enable bereaved families to more effectively reflect their own cultural, ethnic or religious customs after death.

RECOMMENDATION

R96 The department administering the new statute should develop and maintain a website providing consumer information to assist consumers making decisions after a death, particularly decisions about purchasing funeral services.

Published price list

- 18.75 The new statute should require funeral service providers to publish a clear price list of all the funeral goods and services they provide, either on a website or in a written form to be provided to any person who asks for it. The list must:
- include a description and total price of all the funeral goods and services it provides;
 - include a list of any service fees charged by the funeral service provider (including fees and disbursements passed on to the consumer by the service provider, such as burial plot fees);

- reflect the maximum price that a funeral service provider charges for funeral goods and services; and
 - include any particular items required by regulations made under the new statute.
- 18.76 In relation to funeral goods, the list must provide either a description of the full range of a particular good (for example, the range of coffins or caskets available from that service provider) or a description of the price range of the goods on offer. If the funeral service provider offers packages of goods and services, the price list must itemise the goods and services provided in each package and the total cost of the package.
- 18.77 This recommendation addresses the difficulties consumers face in obtaining information to compare the services and prices offered by different funeral service providers. We consider that it will not only enable consumers to make such comparisons, it will also give them information to negotiate for only certain elements of a service rather than an entire package.
- 18.78 This requirement should apply to any person who carries on the business of providing funeral services, including any person who coordinates or arranges funeral services where the actual goods or services are provided by someone else. Funeral consultants or arrangers are common in other countries but, as yet, not so common in New Zealand. They do not provide services directly themselves but coordinate the services of others. Under this proposal, such consultants or arrangers would need to disclose the component pricing of those providers they primarily contract with together with a disclosure of the consultant or arranger's own fee or mark-up on the contracted services.

RECOMMENDATION

- R97 The statute should require that funeral service providers must publish and make available a price list of all the funeral goods and services it provides, including:
- a description and total price of funeral goods and services offered;
 - a list of any service fees charged by the funeral service provider;
 - the maximum price that a funeral service provider charges for funeral goods and services; and
 - any particular items required by regulations made under the new statute.

Statement of costs

- 18.79 The statute should also require that, before entering into an agreement for the supply of funeral goods or services, a funeral service provider must give the consumer a statement setting out an itemised list of the cost of the goods and services to be supplied. Regulations should establish a basic list of the items that must be itemised when they apply. That list should at least include the cost of:
- embalming;
 - the coffin or casket;
 - storage of the body;
 - transportation of the body;
 - hire of chapel or other place of the funeral service;
 - flowers;

- clergy or celebrant;
- organist or other services provided for the funeral;
- catering;
- cremation;
- burial;
- newspaper notice of death; and
- completing and processing documentation.

- 18.80 In addition, any other costs that can be itemised and ascertained at the time of providing the statement of costs should be itemised. Those costs must correspond to the costs on the funeral goods and services price list. If the item to be supplied is a funeral package, the statement of costs must itemise each good or service provided in the package. If the funeral service provider does not know the cost of any disbursement at the time of providing the statement of costs, the funeral service provider must provide a reasonable estimation of the cost and a statement of the actual disbursement cost with the final invoice.
- 18.81 Finally, the statement of costs must also describe how the consumer may make a complaint about the provision of the funeral goods or services. As we described above, we found that this is not well understood currently. If the funeral service provider is affiliated to an industry body with a complaints process, the funeral service provider may describe that process. If it is not so affiliated, it must describe an alternative, such as the Disputes Tribunal.
- 18.82 These disclosure requirements will provide consumers of funeral services with more and clearer information than many receive currently. It will provide the necessary element of reassurance to consumers at a time when they are particularly vulnerable. It will also provide the information necessary to enable them to make informed decisions and to negotiate for only certain elements of a service, rather than an entire package, if they wish.

Offence of breaching disclosure requirements

- 18.83 We consider that breaching the disclosure requirements recommended here should be an offence. We analyse the maximum penalties for this and each of the offences proposed in this Report in Appendix B.

RECOMMENDATIONS

- R98 The statute should require that, prior to entering an agreement for the supply of funeral goods or services, the funeral service provider must give the consumer a statement of the costs of the funeral. A breach of this requirement should be an offence.
- R99 That statement of costs must set out:
- the cost of each of the goods and services to be supplied;
 - the cost of any disbursements;
 - the cost of any service fees;
 - if the goods and services to be supplied is a package, the description of each item in the package and a total cost of the package; and
 - how the consumer may make a complaint.
- R100 Each item on the statement of costs (except disbursements) must correspond with an item on the published price list.
- R101 If the funeral service provider does not know the cost of any disbursements at the time of providing the statement of costs, the funeral service provider must provide a reasonable estimation of the cost and a statement of the actual disbursement cost with the final invoice.
- R102 A service fee may only cover services for which the cost is not able to be ascertained at the time of providing the statement of costs.
- R103 The statute should provide that a breach of these requirements is an offence.

Part 4

BURIAL DECISIONS



Chapter 19

Introduction

- 19.1 After death, there are important decisions to be made about what should happen to the body of the deceased.³⁷⁹ The deceased may have left detailed instructions, reflecting strong feelings about what should happen to their body upon death. Survivors, as the people who are mourning a loss, have an interest in how the body is handled and what rituals or practices will be followed. Decisions most often need to be made quickly and under stress. In this context, it becomes important that disagreement is managed in such a way that it does not prevent the prompt and respectful burial or cremation of the body.
- 19.2 In this part of the Report, we examine decision-making in the post-death period and propose a new statutory framework within which decisions about burial and cremation of a deceased may be made.

CONTEXT TO REFORM

Decision making and disputes

- 19.3 In any decision-making process, there is a possibility for dispute, either about who should be the decision-maker or about the substance of the decision. This risk is present when decisions must be made upon the death of a person. Disputes may concern the funeral arrangements, where or how disposal of the body is carried out (burial or cremation) or how ashes are dealt with. These decisions may involve strong family emotions, leading to conflict over the choices that have been made.
- 19.4 There is evidence that disputes in respect of funerals, burials and cremation have been increasing in recent years. The Funeral Directors Association of New Zealand told us that there are many more disputes among families than was the case in the past. Generally, these disputes are resolved without recourse to lawyers and the courts. However, there has been a noticeable increase in the number of such cases going to court. Virtually all the New Zealand decisions in this area have occurred in the last 20 years.

Takamore v Clarke

- 19.5 Some of these disputes have a bicultural aspect where the values of tikanga Māori are significant. The most notable case in this respect is the lengthy legal proceedings arising from the burial dispute over the body of James Takamore. This case has been a key piece of the context to this review.
- 19.6 Mr Takamore lived in Christchurch for over 20 years with his partner Ms Clarke, who is Pākehā, and their children. He was originally from the Bay of Plenty and was of Ngāi Tūhoe and Whakatōhea descent. He died unexpectedly in 2007. His partner and children decided to bury his body in a Christchurch cemetery.

³⁷⁹ In this part of the Report, we sometimes use the term “burial decisions” to refer to the decisions that must be made after a death about the deceased body, including whether the body should be buried or cremated.

- 19.7 Members of Mr Takamore's whānau, who still lived in the Bay of Plenty, travelled to Christchurch to argue for the right to take his body back to be buried in their family urupā in the Bay of Plenty. The process of arguing for this right is called *tono* and is a traditional part of *tikanga* in relation to death.
- 19.8 The two families unsuccessfully discussed what should happen. One night, after Mr Takamore's partner and children left the marae where the body was lying in state, the Bay of Plenty whānau took the body of Mr Takamore back to the Bay of Plenty. There, they buried it in the urupā in accordance with the *tikanga* observed by their hapū.
- 19.9 Ms Clarke brought proceedings in the High Court for an order recognising her right to determine the burial location as she was the executor of Mr Takamore's will. Mr Takamore's sister, mother and brother defended the proceedings on the basis that Māori customary law should apply. Under Māori customary law, the decision as to burial was for the whānau *pani* (close family) and hapū (tribal sub-group) of the deceased.
- 19.10 In the High Court, Fogarty J held that Ms Clarke, as executor of the will, had the right recognised under common law to choose the burial location of Mr Takamore's body.³⁸⁰ Members of the Takamore whānau then appealed to the Court of Appeal, where three Court of Appeal judges unanimously dismissed the appeal and returned the matter to the High Court to deal with the question of remedy.³⁸¹ Proceedings were then filed in the Supreme Court and were heard in 2012.³⁸² The Supreme Court held, by a three to two majority, that if the deceased nominated an executor in their will, the named executor has the right to decide the deceased's burial arrangements.³⁸³ When making that decision, the executor is required to take the views of the survivors and other relevant considerations into account.³⁸⁴
- 19.11 It was reported in June 2015 that resolution of this dispute was imminent, following successful mediation between the two families.³⁸⁵ The details of the resolution have not yet been made public.
- 19.12 The case attracted significant media attention and public interest because Mr Takamore's body was removed contrary to the wishes of his partner and children, and the case raised some very difficult cultural issues. It threw light on a number of issues with the law governing how decisions are made post-death, both in relation to the decision-maker and the factors that should be taken into account.³⁸⁶ It raised questions about the appropriateness of the executor rule (the rule that the deceased's executor decides the burial arrangements); the legal status of the deceased's own wishes for burial; the effect of *tikanga* Māori on the law of burial and the law more generally; and the role of the court in determining burial disputes. It also revealed a number of uncertainties in the law in this area. We discuss the findings of the courts in more detail in Chapter 20.

380 *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [9].

381 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [200].

382 *Takamore v Clarke* (NZSC), above n 5.

383 At [152] per Tipping, McGrath and Blanchard JJ. See also *Williams v Williams* (1882) 20 Ch D 659; *Murdoch v Rhind* [1945] NZLR 425 (SC).

384 *Takamore v Clarke* (SC), above n 5, at [152] per Tipping, McGrath and Blanchard JJ.

385 Shane Cowlishaw and Deidre Mussen "James Takamore body-snatching resolution hopeful after successful mediation" (4 June 2015) Stuff < www.stuff.co.nz > .

386 *Takamore v Clarke* (SC), above n 5.

- 19.13 Aside from *Takamore v Clarke*, there have been very few court cases on burial disputes in New Zealand.³⁸⁷ Disputes over burial decisions are sporadically reported in the news media, including, for instance, the case of the pre-burial arrangements for the comedian Billy T James in 1993.³⁸⁸ However, of the 30,000 people who die each year, in the vast majority of cases, decisions are reached and disagreements resolved without the need for court intervention.
- 19.14 However, the fact that only a small number of cases become public does not mean that the current law is providing the best guidance for how decisions should be made and disputes resolved. During this review, we were surprised by the number of personal stories conveyed to us concerning burial disputes that, while never taken before a court, caused significant difficulties for the parties involved. We received inquiries from members of the public who wanted advice on the law in this area. This and the lengthy and complex case of *Takamore v Clarke* suggest there are good grounds for examining whether the law governing post-death decisions about the body is serving its purposes.

Potential for future disputes

- 19.15 We consider that disputes over these types of decisions are likely to become more common. Increasing cultural diversity, changing family dynamics and the complexity of these decisions mean that there is significant potential for family disagreement. The cultural, religious and ethnic demographics of New Zealand are changing, and there has been an increase in the number of inter-cultural partnerships and marriages. Different cultural norms and expectations may lead to different views about how the body should be treated after death.³⁸⁹
- 19.16 In addition, social and family relationships are increasingly complex. Since 1983, roughly one-third of all marriages in New Zealand have been remarriages,³⁹⁰ and one of the key areas where one might expect to see disputes is between the deceased's children from earlier and later relationships or the children from an earlier relationship and the surviving spouse. All this being the case, the law in this area must be clear, certain and fit for purpose.

A desire for increased individual control

- 19.17 Another reason to review the law in this area is the increasing value placed by our society on individual autonomy. Some people express a strong desire to determine how their body will be handled after death and have an expectation that these wishes will be given effect. American commentator Tanya Hernandez has described a “modern autonomy trajectory” with respect to decisions over the body.³⁹¹ Advances in medical care mean that people have a greater say in the treatments and care they wish to receive when ill or dying. These technological and legal

387 In only seven cases have the courts been asked to make orders for the burial arrangements of a deceased: *Murdoch v Rhind*, above n 383; *Watene v Vercoe* [1996] NZFLR 193 (FC); *Tapora v Tapora* CA206/96, 28 August 1996; *Pauling v Williams* CA69/00, 18 August 2000; *Re JSB (A Child)* [2010] 2 NZLR 236 (HC); *Clarke v Takamore*, above n 380; *Waldron v Howick Funeral Home* HC Auckland CIV-2010-404-005369, 17 August 2010. This does not include cases over other matters post-death, such as whether a body should be disinterred from its place of burial.

388 For the Billy T James case, see Nin Tomas “Ownership of tupapaku” [2008] NZLJ 233; *Awa v Independent News Auckland* [1995] 3 NZLR 701 (HC). See also the discussion over the burial location of Prince Tui Teke in 1985, referred to in Tomas. See also various disputes reported in the media between 2007 and 2009: James Ihaka, Andrew Koubaridis and Juliet Rowan “Family say exhumation order never arrived” *The New Zealand Herald* (online ed, Gisborne, 15 December 2007); Waikato Times “‘Snatched’ body buried by family” *Waikato Times* (online ed, Waikato, 6 March 2008); Martin Van Beynen “Families settle row over final rites” (24 December 2009) Stuff < www.stuff.co.nz >; Southland Times “We’re not body snatchers: family” *Southland Times* (online ed, New Zealand, 14 March 2008).

389 One of the key findings from the 2013 Census was that New Zealand’s population is becoming more ethnically diverse. Almost one in four people living in the Auckland region identified with one or more Asian ethnic groups. The Filipino population in New Zealand has more than tripled in size since 2001. The number of people who affiliate with a Christian religion has dropped since 2006, while the number of those affiliating with the Sikh religion has more than doubled. There has also been a large increase in the number of those who affiliate with the Hindu and Islam/Muslim religions. See Statistics New Zealand “2013 Census QuickStats about culture and identity” (15 April 2014) < www.stats.govt.nz/Census >.

390 Statistics New Zealand “Demographic Trends: 2012” (2012) < www.stats.govt.nz >.

391 Tanya Hernandez “The Property of death” (1999) 60 U Pitt L Rev 971 at 1022.

developments lend themselves towards an expectation of having individual control over one's burial arrangements in a way that has not always been present in the law up to this point.

Tikanga Māori

- 19.18 One of the issues in *Takamore v Clarke* was how tikanga Māori should be given effect in burial decisions. Just as the common law has rules governing the treatment of a body after death, tikanga Māori also contains a set of norms and practices that regulate conduct towards a tūpāpaku in accordance with the custom of a particular iwi or hapū. Ultimately, the Supreme Court held that tikanga Māori is a value that should be taken into account where relevant to the burial decision. The Court also acknowledged the role of Māori customary law within the fabric of the common law.
- 19.19 For the purposes of this review, we have considered whether a statute should affirm the position in the Supreme Court decision or whether an alternative approach should be adopted in relation to the role of tikanga in burial decisions. This is a particularly important area of the review because of the great significance placed on burial decisions in Māori customary law.

The position overseas

- 19.20 Australia and the United States have both seen a much larger number of burial dispute cases go before the courts.³⁹² A significant number of burial dispute cases have also been reported in Canada and England.³⁹³ Some of these countries have passed or have considered passing legislation to cover the making of burial decisions, raising the question of whether New Zealand should do the same.³⁹⁴

AN OVERVIEW OF OUR RECOMMENDATIONS

- 19.21 Before analysing the issues arising in relation to decisions about the body after death, it is perhaps helpful to set out an overview of our recommendations so that the following chapters are not read in isolation. We are proposing some significant changes to the common law in this area. It is important that the implications of those changes are well understood.
- 19.22 We consider that, currently, the common law is inadequate in two respects. First, it does not require instructions expressed by the deceased person before their death to be carried out despite that generally being the public expectation. Second, the common law holds that, if there is a dispute within the bereaved family, the executor of the will has the right to make the decisions. We have found that this also does not meet public expectations for how these decisions should be made.
- 19.23 Consequently, we have recommended that there should be new statutory provisions on this matter. Those provisions should require that, where a deceased person has expressed in writing their wishes relating to funeral arrangements, disposal of their body or the handling of their remains, the person making the decision about those matters *must give effect to those wishes unless satisfied that there is a compelling reason not to do so*. Where a deceased person has expressed such wishes but not in writing, they *must be taken into account* by the person making the relevant decisions.

392 For an overview of Australian litigation up to 2009, see Ian Freckleton "Disputed family claims to bury or cremate the dead" (2009) 17 JLM 178. For an idea of the range of cases in the United States, see Frances H Foster "Individualized justice in disputes over dead bodies" (2008) 61 V and L Rev 1351.

393 For an older overview of Canadian law focusing on Ontario, see Zwicker and Sweatman "Who has the right to choose the deceased's final resting place?" (2002) 22 Estates, Trusts and Pensions Journal 43. For the United Kingdom, see the discussion of the case law up to 2008 in *Burrows v HM Coroner for Preston* [2008] EWHC 1387, [2008] 2 FLR 1125 (QB).

394 For a more detailed overview of the position in these other countries, see Law Commission, above n 8 from [14.49].

- 19.24 We consider that this new requirement will increase certainty after a death and decrease the likelihood of disputes arising. Perhaps most importantly, it will provide some assurance to a person that their wishes will be carried out. However, we also recognise that sometimes the wishes will not be carried out because they are impractical or irrational or there are countervailing considerations. In order to provide even greater assurance, we have also recommended that a person should be able to appoint a trusted “deceased’s representative” to make these decisions after their death. Because that person is trusted, when any countervailing considerations must be considered, they are more likely to prioritise the deceased person’s wishes.
- 19.25 Despite these proposals to increase certainty after a death and decrease the likelihood of disputes, the possibility of irreconcilable disputes will remain. In those cases, the parties can currently ask the High Court to resolve the dispute. A third significant change proposed in this part of the Report is that, in future, the parties should be able to apply to the Family Court, the Māori Land Court or the High Court to resolve the dispute. Which court they choose will depend upon the nature of the issue and prevailing circumstances, including timeframes and financial considerations.

Chapter 20

Current law and issues

- 20.1 In this chapter, we set out New Zealand’s current law on burial decisions and its main issues, as we see them, following our research and consultation.³⁹⁵ We also explain the *Takamore v Clarke* case in more depth.
- 20.2 At present, much of the law governing post-death decisions is found in the common law—law made by the courts. The courts have established rules governing who should make post-death decisions and what matters they must take into account.³⁹⁶ The common law changes and develops as cases come before the courts to be decided. As we described earlier, the most recent common law development in New Zealand relating to the deceased and their executor is the Supreme Court decision in *Takamore v Clarke*.³⁹⁷ The Court, in that case, both confirmed and developed the law in this area.

THE EXECUTOR RULE

- 20.3 The executor is the person named in the deceased’s will to administer the deceased’s property. The executor pays any debts of the deceased and distributes the rest of their property according to the directions in the will. The executor’s duties towards the deceased’s property are set out in legislation.³⁹⁸ However, alongside this, the executor also has the role of organising the disposal arrangements for the deceased body. We refer to this as the “executor rule”.
- 20.4 The majority decision in *Takamore v Clarke* contains the most recent and most significant development of the executor rule in New Zealand. The effect of the judgment is that, in New Zealand:
- the executor has both a duty and a right to decide the manner and place of disposal of the deceased;³⁹⁹
 - the executor’s right only becomes operative when parties disagree over burial arrangements;⁴⁰⁰
 - when exercising the right, the executor must take into account the deceased’s wishes, the wishes of those close to the deceased, tikanga Māori, if relevant, and customary, cultural or religious preferences if these are raised by the deceased’s family or if they form part of the deceased’s heritage;⁴⁰¹ and
 - the executor is not required to seek out the views of others but must take them into account if communicated to him or her.⁴⁰²

395 For a more in-depth review, see chapter 14 of Law Commission, above n 8.

396 However, some specific matters relating to the administration of the deceased’s property are prescribed in the Administration Act 1969.

397 *Takamore v Clarke* (SC), above n 5.

398 Administration Act, s 30.

399 *Takamore v Clarke* (SC), above n 5, at [153] per Tipping, McGrath and Blanchard JJ.

400 At [154] per Tipping, McGrath and Blanchard JJ.

401 At [156] per Tipping, McGrath and Blanchard JJ.

402 At [156] per Tipping, McGrath and Blanchard JJ.

- 20.5 The executor rule operates whether or not the executor is a family member of the deceased or had any kind of personal relationship with the deceased. In principle, then, a solicitor or other professional executor would have the duty and the right to decide the burial arrangements in a dispute over their deceased client. In practice, however, they may leave it to the family to decide.
- 20.6 Interestingly, Elias CJ and William Young J, in separate minority opinions, differed on the role of the executor rule. They rejected the suggestion that the executor rule forms part of New Zealand law. They argued that, in a burial dispute, the executor has no greater right to decide than any other person who has an interest in the burial of the deceased. Rather, “the responsibility of burial is a shared responsibility and falls to be exercised according to the circumstances”.⁴⁰³ Elias CJ said that the High Court should be available to resolve disputes where necessary under its inherent jurisdiction.⁴⁰⁴
- 20.7 Having reached conflicting conclusions as to the existence of the executor rule at law, the Supreme Court judges went on to examine the facts of the case before them and determine whether Ms Clarke or Mr Takamore’s whānau were the appropriate ones to make the burial decision. Though Mr Takamore had named Ms Clarke as his executor, he had not set out any burial wishes in his will, and there was conflicting evidence as to his wishes.
- 20.8 McGrath J recognised Ms Clarke’s legal right to decide, as executor, and went on to determine whether her decision to bury in Christchurch was appropriate.⁴⁰⁵ He assessed a range of relevant matters⁴⁰⁶ before concluding that Mr Takamore’s life choices, including living in Christchurch with his partner and children, carried the greatest weight and were determinative.⁴⁰⁷ Ms Clarke’s decision to bury in Christchurch reflected her own view and those of her children and was therefore appropriate and should be upheld.
- 20.9 In contrast to the majority view, Elias CJ did not accept that Ms Clarke, as executor, had a prior legal right to decide, although she did find that, in this instance, Ms Clarke should determine where Mr Takamore was to be buried.⁴⁰⁸ She said:⁴⁰⁹

Ms Clarke should be given the right to determine where Mr Takamore is to be. He made his life with her for more than twenty years and they have two children together. During their time together Kutarere was left behind. That may not have been Mr Takamore’s personal preference – it is impossible to know – but it was the choice he made in his life out of commitment to Ms Clarke and his children ... [Ms Clarke’s] reluctance to agree to the burial at Kutarere is not therefore mere preference at the point of decision; it follows a course set by the way the couple lived.

THE WISHES OF THE DECEASED

- 20.10 When making the burial decision, the executor is under a duty to take into account any views expressed by the deceased as far as they are known. Under New Zealand law, it is not possible for the deceased’s burial directions to legally bind any surviving person, even if they have set their directions out in their will,⁴¹⁰ but the executor may be expected to give significant weight to a deceased’s clearly expressed wishes.

403 At [90] per Elias CJ.

404 At [7], [11] and [86].

405 At [166].

406 At [166]–[168].

407 At [169].

408 At [101]–[107]. See also William Young J at [175].

409 At [103].

410 This is because of the common law rule that there is no “property” in a dead body: see Law Commission, above n 8, at [14.72]–[14.74].

WHERE THERE IS NO EXECUTOR

- 20.11 Of the small number of cases in which the courts have been asked to determine who has the right to decide the manner or location of disposal of the deceased body, all have involved a clearly nominated executor.⁴¹¹ None have concerned a deceased person who failed to nominate an executor or died without a will. Therefore, the law on this is unclear in New Zealand.
- 20.12 However, the Court in *Takamore v Clarke* considered what the legal position should be if a dispute comes before the High Court in which the deceased did not leave a will that named an executor. McGrath J suggested that, in such cases, the court should recognise the rights of the person who has the best claim to administer the deceased's estate under the rules of succession law.⁴¹² No cases have been heard since *Takamore v Clarke*, so it is unclear how the High Court will actually apply this approach. However, it reflects the existing English common law.⁴¹³

THE ROLE OF THE HIGH COURT

- 20.13 If a person seeks a court order to uphold or to challenge an executor's right to decide, the proceedings are heard by the High Court as the court with jurisdiction over burial disputes.⁴¹⁴
- 20.14 The Court in *Takamore v Clarke* developed the High Court's jurisdiction over burial disputes. It said that, if an executor makes a decision that an interested person is unhappy with, that person can appeal the decision to the High Court. In such cases, the High Court's task is to assess the relevant viewpoints and circumstances and make its own decision as to "whether an applicant has established that the decision taken was not appropriate".⁴¹⁵ The implication is that, if the High Court concludes the executor's decision was not the correct one, it could override it.⁴¹⁶
- 20.15 This is a departure from the accepted role of the courts prior to *Takamore v Clarke*. Up until then, courts had tended to accept that an executor who was available and willing to decide should be left to make the decision however they saw fit, and courts would usually not interfere with it.⁴¹⁷
- 20.16 Again, however, because no cases have since been heard in the High Court, it is unclear how the High Court will actually apply this new approach.

ISSUES RAISED BY THE CURRENT LAW

- 20.17 In this section, we set out the issues with the current law, drawing on views expressed to us in consultation.

411 In *Murdoch v Rhind*, above n 383, the executor was the deceased's brother; in *Takamore v Clarke* (SC), above n 5, the executor was Mr Takamore's partner Denise Clarke.

412 *Takamore v Clarke* (SC), above n 5, at [145].

413 *Burrows*, above n 393, at [13]–[14].

414 *Takamore v Clarke* (SC), above n 5, at [7] per Elias CJ and [160] per McGrath J.

415 At [162].

416 At [171]–[172] per William Young J referring to this as a development of the "weak form version" of the executor rule. This contrasts with the "strong form" version of the rule in which the right is absolute and "it is not within the power of the court to control the means of disposition": *Privet v Vovk* [2003] NSWSC 1038 (7 November 2003) at [17] per Bryson J, cited in Heather Conway and John Stannard "The honours of Hades: death, emotion and the law of burial disputes" (2011) 34(3) UNSWLJ 860 at 884.

417 The "strong form version" of the rule was applied in New Zealand by Northcroft J in *Murdoch v Rhind*, above n 383, at 427: "It is not the function of the Court to say how the body is to be disposed of. I do no more than pronounce, as I think it is my duty in law to pronounce, that it is for the executor to decide that question."

The role of the executor

- 20.18 One of the most significant issues with the law is the role played by the executor in the disposal arrangements. The executor's core role is foremost to administer the deceased's property. It can be argued that tying the executor role to the making of burial decisions adds unnecessary complexity.⁴¹⁸
- 20.19 The office of executor is mainly an administrative one, and for that reason, a person might appoint a solicitor as their executor or someone chosen for their business acumen. Thus, there will be times when the executor is not related to or close to the deceased but has the legal right to decide the burial arrangements. Many people we spoke to found this odd or were surprised that someone who did not necessarily know the deceased well should be in that position as a matter of law. An executor that is not a family member will not necessarily be in a good position to take into account family dynamics, family relationships and family-based discussion.
- 20.20 The identity of the executor may not be known at the time of burial because it usually takes time to find the latest copy of the will, and there may be legal questions about probate that need to be resolved in court. The executor may not be known until days or even weeks after burial has taken place. This scenario undermines the executor rule and exposes the burial arrangements of the deceased to a challenge by the executor after the fact.
- 20.21 Another difficulty is that many New Zealanders die without ever having nominated an executor. That will be the case for children but also for younger generations who have few assets and see no need for a will. The executor rule cannot apply in those situations, a point noted by the New Zealand Law Society in its submission.⁴¹⁹
- 20.22 Some of the funeral directors we consulted supported the executor rule because it gives them certainty that they are dealing with the person who has legal authority to make the decision and who is also financially liable for covering the arrangements.⁴²⁰ However, it is not clear whether funeral directors ask to see evidence of the executorship from those they deal with or whether they are under an obligation to do so. According to the joint submission of the Funeral Directors Association of New Zealand and the New Zealand Embalmers Association, the executor is often not known at the time of making the funeral arrangements even though, legally, the executor is the appropriate person for the funeral director to deal with.
- 20.23 Nor is the law as to the executor's liability for funeral arrangements particularly clear. It is accepted and well established that an executor who organises the burial arrangements is liable and can be reimbursed from the estate,⁴²¹ but it is unclear whether an executor is liable where he or she did not arrange the burial, particularly where there are no assets in the estate to cover the costs.⁴²²

The right to decide

- 20.24 In Issues Paper 34, we asked whether it is artificial or inappropriate for only one person to have a right to decide burial arrangements, as is currently the position under common law. It is more likely that the role of making burial decisions will fall on several family members and

418 Law Commission, above n 8, at [15.13]–[15.18].

419 The common law has developed an approach for dealing with these kinds of disputes, which is to identify the person who has the best right to administer the estate under statutory succession laws and to treat that person as having the right to dispose of the body: see Law Commission, above n 8, at [14.67]–[14.71]. This approach was supported by the majority in *Takamore v Clarke* (SC), above n 5, at [143]–[148], but it has not yet been applied in New Zealand common law.

420 The executor can then reimburse themselves from the estate: see *Public Trustee v Loashy* (1908) 27 NZLR 801 (SC).

421 *Loashy*, above n 420.

422 See *Public Trustee v Kapiti Coast Funeral Home Ltd* [2004] 3 NZLR 560 (HC).

will be done in a way that suits each particular family group, informed by family dynamics and practicalities, including the cost of the arrangements. An individually exercisable right of decision over burial arrangements may not reflect reality.

- 20.25 During our consultation, we encountered some division of views on these points. Many people we spoke to strongly supported a decision-making right that can be exercised by a specific person, and often they said this should be the spouse or partner of the deceased. It was also noted that having a single decision-maker will increase legal certainty.
- 20.26 Others took a broader view. Some submitters, including from the funeral sector, focused on the family's need to grieve and said that "families need to negotiate" to reach a decision.
- 20.27 Some submitters made the point that a law by which a single person has a right to make the burial decisions is directly contrary to tikanga. In Māori thinking, the decision is normally reached by way of discussion and debate among the members of the deceased's hapū.

Binding burial directions

- 20.28 Issues Paper 34 also asked whether the law should provide for an individual to leave binding burial directions. At present, the executor represents the deceased's interests when making the decisions, but the deceased does not have a right to decide.⁴²³ We asked whether this should be replaced by a rule in which the deceased's burial directions are binding.⁴²⁴ Some legal scholars have argued in favour of a binding burial directions approach on the basis that it recognises the deceased's autonomy.⁴²⁵
- 20.29 Again, opinions on this point were divided. Many submitters singled out the deceased's autonomy as an important value that should be respected in the law, but most also recognised that it will sometimes be appropriate for the deceased's wishes to give way to or at least accommodate other, stronger interests. As one submitter from the funeral sector said, it should be everyone's right to have their clearly expressed wishes respected, but it will not always be possible to follow those wishes completely. A possible example is where the amount of money required to carry out the deceased's burial wishes will exhaust the estate and leave no money for dependent survivors of the deceased.

Clarity and accessibility of the law

- 20.30 The law on this issue is difficult for the general public to access. The rules are found in judicial decisions from a range of different common law countries, some of which date back to the 19th century.⁴²⁶ Many people we met in public meetings did not know that the executor rule exists, for example. Most people expected that, if they had included burial directions in their will, these had some kind of formal legal status in and of themselves.
- 20.31 There is also an issue of clarity. *Takamore v Clarke* has clarified many aspects of New Zealand common law on post-death decision-making. Equally, however, many aspects remain unclear. The High Court has not yet applied the new approach set down by the Supreme Court. It is unclear how the executor will take into account the views of the family and, where appropriate, the role of tikanga. All five judges dealt with these issues, with considerable overlap. The effect

423 Rosalind Atherton "Who owns your body?" (2003) 77 ALJ 178 at 188.

424 Law Commission, above n 8, at [16.58]–[16.75].

425 Heather Conway "Burial instructions and the governance of death" (2012) 12 OUCJLJ 59; Remigius Nmadi Nwabueze "Legal control of burial rights" (2013) 2 CJICL 196.

426 For example, *Williams v Williams*, above n 383, said to be the source of the executor's common law rights, was decided in 1882. The origin case for the principle that there is no property in a body is *Hayne's Case* (1614) 17 ER 1389.

is that there will be some uncertainty over exactly how that approach will be applied, a point observed by the New Zealand Law Society in its submission.

The High Court's role

- 20.32 The role of the High Court is to assess whether an executor's decision is appropriate. In doing so, it will need to consider evidence of a cultural, religious and personal nature, such as the choices the deceased person made in life and the closeness of his or her relationships with others. The Court will be asked to make orders not only as to who should control burial but also how it should be carried out.⁴²⁷
- 20.33 It has been suggested that, in burial dispute cases, these kinds of decisions fall outside the "judicial comfort zone" of most common law judges.⁴²⁸ Like all traditional common law courts, the High Court relies on an adversarial approach in which the two sides essentially argue in front of the Court to demonstrate the strength of their case. The Court does not generally make decisions on behalf of people but rather states how the law applies to the decisions people make and to their conduct.⁴²⁹
- 20.34 In addition, the High Court proceedings are quite expensive and will not be affordable for many families. However, the High Court does have the capacity to deal quickly with issues, particularly where injunctive relief is sought. This is a valuable attribute, particularly if there is a need to store a body while awaiting court orders.
- 20.35 Burial decisions are of such import and have such significance that there will be times when the parties will need to argue their case in a judicial forum before an impartial adjudicator.⁴³⁰ However, the High Court may not always be the best place for that. We raised this matter in Issues Paper 34 and asked whether submitters would support the Family Court being the primary court with jurisdiction over burial decisions.⁴³¹ Of all the proposals suggested in that Issues Paper, this proposal received the strongest support from submitters.

CONCLUSION

- 20.36 At present, New Zealand legislation does not set out who should be making decisions in respect of the final arrangements for the body of the deceased. Similarly, there is no legislative guidance on how to deal with disputes that might arise. These issues are instead governed by the common law.
- 20.37 We think that there is a case for a new statutory framework to operate in this area. Legislation can provide greater certainty and accessibility than the common law and is therefore more useful for those seeking to understand their legal rights and obligations after the death of a loved one. It can also provide new solutions that are beyond the reach of judges. New statutory provisions can be created to help resolve disputes in a way that gives effect to values deemed to be important in our society and to allow different interests to be taken into account.

427 *Takamore v Clarke* (SC), above n 5, at [91] per Elias CJ.

428 *Conway and Stannard*, above n 416, at 889.

429 See the approach of Northcroft J in *Murdoch v Rhind*, above n 383, at 427: "It is not the function of the Court to say how the body is to be disposed of. I do no more than pronounce, as I think it is my duty in law to pronounce, that it is for the executor to decide that question."

430 *Takamore v Clarke* (SC), above n 5, at [84]–[86] per Elias CJ.

431 Law Commission, above n 8, at 227.

Chapter 21

A statutory framework for burial decisions

- 21.1 We are satisfied that there is a strong case for a new statutory framework. The common law is ill suited to the task of delivering certainty and clarity to people making burial decisions. People are understandably reluctant to litigate questions about burial decisions in court, and common law judges have tended to be reticent about developing the law in this area.⁴³² The common law is not generally well equipped to deal with matters that have far-reaching social implications.⁴³³ As a result, the law governing burial decisions reflects 19th century conditions, a point expressed by many submitters on Issues Paper 34.
- 21.2 Legislation, in contrast, can create new remedies and new forms of enforcement and dispute resolution mechanisms. Democratic processes allow the public to have a say in developing legislation.⁴³⁴ Of 66 submitters who answered our question of whether the common law should be replaced by legislation, 64 were in favour. The main reason given in support was that it would make it clear to the public and those working in the sector what the law is.
- 21.3 However, a number of those who supported statutory reform did so on the condition that the statute properly reflects a range of values. We discuss this further in the following paragraphs.

VALUES UNDERPINNING THE NEW FRAMEWORK

- 21.4 Death is universal, and new legislation in this area will have wide-ranging effects. We sought to get a sense of the values people think should be reflected in the law and, as far as possible, to work these into the design of a new statutory framework.
- 21.5 In Issues Paper 34, we set out a range of relevant values, including:
- meeting the wishes of the deceased;
 - recognising the role of the spouse or partner and of wider family members and others with an interest in the burial;
 - culture and religion; and
 - legal certainty.
- 21.6 We asked submitters to comment on these values and, if possible, to rank them in order of importance. We also discussed them in public meetings with a range of different stakeholders. Some submitters said that it was not possible to rank the values. Some said all were equally important, while others said it depended on context or that each case is best taken on its own merits. For instance, the Palmerston North Women's Health Collective said

⁴³² Conway and Stannard, above n 416, at 862–863.

⁴³³ JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 531.

⁴³⁴ At 532.

[...] each family situation is different. A child or grandchild may be as significant as a surviving partner in decision-making.

- 21.7 Some of those who ranked the values observed that they were influenced by their personal perspectives. The Tauranga Wesley Methodist Church Committee said that, “as a group of Pākehā”, they would rank three values as having equal importance: the needs of the surviving partner; the close relatives; and the wishes of the deceased. They noted that “other cultural or religious groups may rank this in a different order”.

The wishes of the deceased

- 21.8 This value was often commented on and discussed by submitters. In particular, a number of individual submissions ranked this value highly, and a number of people in public meetings assumed or desired that they would have the final say over their burial arrangements. We think it is particularly significant that a large proportion of people currently expect that their wishes about how their body is to be handled after death will be given legal effect, though this is not the case.
- 21.9 However, many submitters also acknowledged that there were times when it would be appropriate to depart from the wishes of the deceased. The New Zealand Law Society said that, if the deceased has given prior thought to conflict and has left clear wishes, these should be given more weight than the views of family members who wish to do otherwise. However, the deceased’s wishes should not be binding if, at the time of death, carrying out those wishes would be excessively costly or impractical. In consultation meetings, it was also noted that the passage of time and change in circumstances can affect whether the deceased’s wishes should be binding. The Federation of Islamic Associations of New Zealand (FIANZ) said that, in an Islamic context, the deceased’s wishes should be paramount “unless in breach of Islamic requirements”. A large proportion of submissions from the funeral sector gave a high ranking to the wishes of the deceased. However, others focused more on the needs of family at this time.
- 21.10 One submitter commented on the place of the individual’s wishes in a tikanga context. They said there is an important distinction between the wishes of the individual as expressed before death and the desire of the wairua (spirit) of the individual after that person has died. While the living person may express a certain view, the wairua will always seek to rest in its ancestral lands.

Family and survivors of the deceased

- 21.11 A significant number of submitters commented on the role of family and survivors. Submitters from the funeral sector in particular commented on the role of the burial arrangements in helping the survivors through their grief:
- A funeral service is ultimately a means for those left behind to honour the life of the deceased. It provides a focus for grieving, and allows family and friends to transition through those stages in a manner most fitting to them.
- 21.12 One submitter from the funeral sector said that the needs of the bereaved were, in their view, more important than those of the deceased, although the needs of the bereaved and the dignity of the deceased cannot be separated because the process by which the bereaved make sense of the death is itself a form of honouring the deceased.
- 21.13 One submitter made a distinction between mourning and burial in tikanga Māori. Mourning ceremonies are for the individual and for the whānau, but burial is for the ancestors of the deceased who require the deceased to be buried in ancestral land. Submitters from the Tangi Research Unit based in Waikato University suggested that burial disputes should be

resolved not only with the immediate conflict in mind but also considering the long-term, inter-generational effects of the burial location on people, place and culture. The Māori Party and Te Rūnanga o Ngāti Whātua noted the primacy of the whānau unit, but they also said that, where an individual has specifically chosen someone to make decisions on their behalf, that choice should be given weight in the decision-making process.

Religious and cultural beliefs

- 21.14 Culture exerts considerable influence over the way in which people respond to death and ascribe meaning to the process. Ruth McManus, a writer in the field, observes that cultural identity is always in the making and “never more so than in death”.⁴³⁵ Cultural and religious beliefs shape people’s views and are often taken for granted, forming a basis for views about what feels right. People may tend to see their own practices as simply “the way things are done” rather than as reflecting a particular set of cultural beliefs that are not universally held.
- 21.15 In general, submitters did not emphasise the importance of culture. However, on the other hand, the way other values are discussed (such as the desire to carry out the wishes of the deceased) is itself influenced by culture. It is important to note that mainstream practices are influenced by a set of cultural norms, just as minority practices are. For example, in New Zealand, there is a strong norm that the funeral should be held within a few days of death, and it is rare for the funeral to be more than a week after death. This is not a universal norm across the globe, and in parts of Europe, it is considered appropriate to wait for weeks or even months if that is how long it takes for all the family to gather. Other examples of burial decisions that are likely to be influenced by cultural norms include the decisions of whether to embalm and whether to have an open casket and the choice between burial or cremation.
- 21.16 Some submitters recognised that “culture” infuses this area. The New Zealand Nurses Organisation noted that cultural competence is part of health professional training and important when dealing with bereaved families.
- 21.17 A handful of organisations rated cultural and religious beliefs very highly, such as FIANZ and the Muslim Working Together Group (MWTG). The MWTG provided us with a copy of the Islamic Code of Conduct for burial, a comprehensive document that provides that washing, shrouding and burial of the deceased is the responsibility of the family or, in their absence, the Muslim community. The MWTG also set out the three principles that inform how it approaches burial decisions: accommodating with consideration; communicating with respect; and exercising obligation with dignity.

Legal certainty

- 21.18 A number of submitters commented on the value of legal certainty—that is, the value of knowing what the law says so that people can arrange their affairs accordingly. A number of individual submitters said they wanted the law to be clearer. The desire for legal certainty was also particularly raised by submitters from the funeral sector for whom the question of authority to make burial decisions is central to the carrying out of their profession. For instance, funeral directors noted that it is difficult to know who has the authority to give them instructions if there is a dispute. If the law were clear on this point, it would make it easier for the funeral directors to know when it is appropriate to go ahead with burial arrangements. New Zealand Independent Funeral Homes submitted that legal clarification would help guide its members when they are dealing with disputes.

435 Ruth McManus *Death in a global age* (Palgrave Macmillan, Houndmills, Basingstoke, Hampshire: New York, 2013) at 122.

Conclusions

21.19 In light of this consultation and our own research, we have concluded that the new statutory framework should have the following features:

- **It must increase legal certainty.** People need some certainty about their legal position when navigating these decisions.
- **It must provide flexibility.** Every death will raise different values and interests. We suggest that the statute should provide a clear process but should not dictate a particular outcome and should allow for different cultural values to be taken into account as appropriate.
- **It should facilitate consensus decision-making by family or whānau wherever possible.** It has been emphasised to us throughout that the law must recognise that burial decisions are appropriately treated as personal, family matters.

TIKANGA MĀORI AND THE NEW FRAMEWORK

21.20 We have also noted that this review requires consideration of how the proposed new statutory framework will affect the practice of tikanga Māori. Tikanga in relation to burial varies depending on locality, but some common principles and practices apply. In particular, it is important that the tūpāpaku be accompanied by relatives to a marae or family home and that it not remain alone. If a tangi is held on a traditional marae, it may last several days, and people will come from far away to pay their respects to the deceased and the whānau and hapū.

21.21 The tangi also provides a process for visitors to make a tonono, or a challenge, for the right to bury the deceased body in a desired location. The tonono allows different members of the deceased's hapū, or multiple hapū if the deceased belonged to many hapū, to make a claim for the deceased to be buried in their home territory. This upholds whakapapa lines with the deceased, strengthens the family group and recognises the mana of the deceased and their family. Challenging for the right to bury the body is considered a tribute and a mark of respect. In rare cases, those making the tonono may remove the body from the marae and take it elsewhere.

Submitters' views

21.22 A number of submitters commented on the need for tikanga to be considered within the design of the law. Te Rūnanga o Ngāi Tahu submitted that tikanga Māori should be a relevant and weighty consideration in any case involving Māori customary law and that dispute resolution processes should be as fair and sympathetic to the values of tikanga Māori as possible.

21.23 It was emphasised at one of our public meetings that burial and cremation law must not be considered in isolation of wider issues to do with fulfilment of obligations under the Treaty of Waitangi and the expression of tino rangatiratanga. The Public Issues Network of the Methodist Church of New Zealand submitted that the Treaty provides "a plumbline for values and respect for tikanga Māori" and should provide the basis of the framework. Researchers based within the Tangi Research Programme at Waikato University said that the Treaty of Waitangi gives a voice to Māori interests within the social and legal landscape and should be applied here "with deep thought and concern".

21.24 Some submissions, such as the Ngāi Tahu Māori Law Centre and the Ōtautahi Māori Women's Welfare League, strongly supported legislative reform because they felt that it would be a means to ensure tikanga is better reflected in the law than it is now, but some submitters were also concerned that statutory reform would have a harmful effect on tikanga—that it would stifle it and prevent it from operating.

Our approach

- 21.25 There is ongoing discussion about how tikanga values and practices are or should be expressed in the law.⁴³⁶ It is clear that tikanga must be recognised in New Zealand’s law on burial, and we recommend it be expressly referred to in the statutory framework. We have sought to design a framework that, to the greatest extent practicable, enables whānau, hapū and iwi to make decisions in accordance with tikanga wherever this is appropriate in the circumstances.
- 21.26 In the following chapters, we set out how we propose to reconcile the need for legal certainty with flexibility and cultural responsiveness, including a particular recognition of tikanga Māori.

SUMMARY OF THE FRAMEWORK

- 21.27 We have developed the proposed framework for burial decisions around three key questions. Each is summarised here and addressed in more detail in subsequent chapters.

Who makes the decision?

- 21.28 The framework provides for a person to appoint a decision-maker to make decisions after their death about funeral arrangements, disposal of their body or how any remains should be dealt with. The appointed decision-maker is either an executor of the will or a new role of “deceased’s representative”.⁴³⁷ That person should have a statutory right to make these decisions and a duty to dispose of the body.
- 21.29 If a deceased’s representative is appointed, that person will make decisions relating to the funeral, body and remains, leaving any executor to administer the estate.
- 21.30 If a decision-maker is not appointed, every member of the deceased person’s family should have the power to make decisions about funeral arrangements, disposal of the body or how to deal with any remains. They should also have a duty to dispose of the body of the deceased person in certain circumstances.

What factors should they take into account?

- 21.31 In making these post-death decisions, any of these decision-makers must give effect to any wishes the deceased person expressed in writing, unless the decision-maker is satisfied that there is a compelling reason not to do so. If the deceased person expressed their wishes but not in writing, they must be taken into account by the person making the relevant decisions.
- 21.32 Decision-makers must take account of any views of the family when making these decisions. In particular, they must seek out the views of family members to the extent they consider practicable in the time available, giving particular priority to obtaining the view of any spouse. They must give preference to the views of those people closest to the deceased person, particularly any spouse.
- 21.33 Decision-makers must also take account (where appropriate) of tikanga Māori and any religious, cultural and ethical beliefs or practices of the deceased or their family; and the likely size of the estate and its ability to cover the costs of the decisions relating to funeral arrangements, disposal of the body and dealing with any remains.

⁴³⁶ See, for instance, Natalie Coates “What does Takamore mean for tikanga? – *Takamore v Clarke* [2012] NZSC 116” (2013) February Māori LR; and Nin Tomas “Recognizing Collective Cultural Property Rights in a Deceased – *Clarke v Takamore*” (2013) 20 International Journal of Cultural Property 333.

⁴³⁷ We have called this new role the “deceased’s representative”, but a better term, perhaps a Māori term, may be preferred. “Representative” is a general term, also in use in other contexts, and so may give rise to confusion. We have tried other terms such as “burial nominee” or “kaitiaki”, but neither term accurately reflects the role.

What court processes should be available to resolve disputes?

- 21.34 We consider that burial disputes should be settled without court intervention wherever possible. This should be encouraged by supplying more information and training on burial disputes to community groups who are well placed to provide resolution services. It should be motivated by a statutory requirement to file a “genuine steps” statement before any court proceedings for burial disputes are commenced. That statement should outline the steps that have been taken to resolve the dispute and may be taken into account by the court when making orders.
- 21.35 When it is necessary to resort to court resolution for burial disputes, application should be able to be made to the High Court, the Family Court or the Māori Land Court. The nature of the issues and other circumstances will determine which court is chosen. If the parties cannot agree on the court, the matter should be heard in the High Court.
- 21.36 Courts should be required to deal with burial disputes with expediency. In making decisions, the courts must take account of any wishes of the deceased person; the views of the family; and tikanga or other cultural considerations.

Chapter 22

Who makes the decisions?

- 22.1 The current law, as affirmed by the Supreme Court in *Takamore v Clarke*, is that the executor makes the decisions after death in respect to the body. We consider that the law could be improved in three key ways. First, it should be possible for a person to appoint someone to make the arrangements for their body and their funeral after death, leaving property arrangements to be dealt with by the executor. We refer to this role as the “deceased’s representative”. If the deceased has a will and has *not* appointed a representative, the executor will make these decisions. However, if the deceased has appointed a representative, whether or not they have a will, the representative will make the decisions. The role of the deceased’s representative will provide a new choice for people who wish to provide explicit direction about their funeral arrangements. In the event that the deceased has appointed a deceased’s representative, that person will take priority over others, including the executor, in making decisions after death about funeral arrangements, disposal of the body and how to deal with any remains.
- 22.2 Our second change is to provide that, when there is neither a representative nor an executor, decisions should be made by members of the family, but there should be no legislated hierarchy of decision-making. Instead, the law should provide that a funeral service provider is able to act upon the instructions of any member of the family in the absence of knowledge of a challenge to those instructions from another family member.
- 22.3 Our third change, outlined in the next chapter, is to provide for factors that the decision-maker must take into account. These will include the deceased’s wishes (a paramount consideration), the views of the family and tikanga Māori or other cultural factors personal to the deceased.

THE ROLE OF THE EXECUTOR

- 22.4 As set out in the previous chapter, the common law position in many Commonwealth jurisdictions and the United States is that the executor has the right and duty to make decisions in respect to the funeral arrangements, burial or cremation and other related matters.
- 22.5 In the section above, we suggested that there should be a new role of “deceased’s representative” who is appointed for the sole purpose of making decisions after death about funeral arrangements, disposal of the body and how to deal with any remains. However, this appointment will be optional. If the deceased has a will and does not take the additional step of appointing a representative, the executor will have the decision-making role. This is substantially similar to the status quo, although as explored in the next chapter, the executor will be exercising this decision-making power under a statutory power and must take account of the same factors as the deceased’s representative.
- 22.6 In practice, the executor generally has no significant role in making decisions after death as these are usually made by the deceased’s loved ones by consensus. The executor is able to defer to the collective decision of the family and need not step in unless called upon to do so. It is only where consensus fails that an executor may be called upon.
- 22.7 This means that, in practice, the role of the executor in making funeral, burial and other related decisions will only be invoked if the family is unable to agree on such arrangements.

We consider that this is appropriate and should be reflected in the statute given the executor is appointed primarily for the purpose of administering the will and, in most cases, there is no reason to interfere with the family making decisions and arrangements after death. However, there is a strong rationale in preserving this function in relation to arrangements for the body as it ultimately provides certainty as to who the decision-maker is in the event that the family is unable to make the funeral decisions and other decisions. Third parties such as funeral directors can also rely on the fact that they have recourse to an identified person who has the ultimate responsibility to make funeral decisions.

- 22.8 This statutory affirmation of the executor rule combined with the introduction of a deceased's representative will ensure that there is certainty around decision-making. This was a key concern of many submitters, particularly within the funeral industry. The proposals will make it clear who the decision-maker is in the event that funeral and burial decisions are not being made or when there is conflict over who has the right to make these decisions.

RECOMMENDATION

R104 The statute should provide that, in the event that the family is unable to agree on the funeral arrangements or disposal of the body or any remains, the executor should have the right to make these decisions and should have a duty to dispose of the body. This right and duty is subject to the right and duty of the deceased's representative, if one is appointed.

THE DECEASED'S REPRESENTATIVE

Scope of the role

- 22.9 We propose that the new statute should enable a person to appoint someone as their "deceased's representative". The appointed deceased's representative should have the right to make the decisions about funeral arrangements, disposal of the body and how any remains should be dealt with and should be under a duty to dispose of the body. In the case of the deceased also having a will and thus an executor, the deceased's representative will have the right to make these decisions, while the executor will be responsible for decisions about property.
- 22.10 Unlike the executor, the deceased's representative will be the decision-maker of first resort, and their role will be engaged immediately at the time of death. The authority of the representative would depend upon written proof of the appointment in the appropriate form.
- 22.11 We consider that this is the most practical mechanism by which the law can enable the wishes of the deceased person to be implemented. It may be particularly useful to a person who foresees a dispute arising after their death. While the law should state that the deceased's representative must consider any wishes expressed in writing by the deceased,⁴³⁸ this proposal goes further by enabling the deceased person to appoint a trusted person to implement their wishes. This proposal also deals pragmatically with any aspects of the deceased's wishes that are unreasonable or impractical. In such a case, a trusted representative would be likely to do their best to ensure that the spirit of the deceased's wishes is implemented.
- 22.12 Another advantage of the creation of this role is that it enables a person to ensure that burial decisions after their death are made according to the principles of tikanga. While we have concluded that it is not possible to require as a matter of law that decisions must be made in accordance with tikanga, under this proposal, a person could appoint a kaumātua as their

⁴³⁸ We discuss this further in Chapter 23.

deceased's representative, knowing that the person will enable a tikanga-based decision-making process.

- 22.13 There is precedent in New Zealand law for separating the roles of dealing with property and dealing with personal matters. Under the Protection of Personal and Property Rights Act 1988, a person is able to choose to appoint one attorney in relation to their property and another attorney in relation to their care and welfare. The two attorneys are required to consult with each other regularly, but their roles are distinct.⁴³⁹
- 22.14 The appointment of a deceased's representative would effectively create a similar model for decisions to be made after death. The deceased's executor would be responsible for their property after death, while the deceased's representative would be responsible for their body. A person could appoint a different person to each role or the same person to both,⁴⁴⁰ for example, someone could appoint the family lawyer as an executor and appoint their spouse as a representative.
- 22.15 The deceased's representative should be required to consult with the executor (if one is appointed) in respect of arrangements for the funeral and disposal of the body, given that the costs of burial are usually taken from the deceased's estate.⁴⁴¹

Process and requirements of appointment

- 22.16 In the interests of certainty, we think that the statute should require the appointment of the deceased's representative to be undertaken in writing and with the consent of the selected representative. We have considered whether further formalities should be required, such as a witness signature. On balance, we have decided that, as the associated risks are relatively low given that this role does not concern money and property, the process and requirements for appointing a representative should be kept as straightforward as possible. The signature of the deceased and the chosen representative should be sufficient.
- 22.17 It would be prudent for the deceased's representative to retain a copy of the appointment, and duplicates can be lodged with a family solicitor or other person if desired. While an appointment could be made within a person's will (provided the representative also signed their consent in that document), in either case, the deceased's representative should retain a copy so that they can demonstrate authority to begin making burial arrangements immediately following the death.

Stepping forward to make decisions after death

- 22.18 The deceased's representative's role would formally commence following the death of the appointer, though there would be nothing to stop that person from making preliminary preparations to exercise the role, as appropriate, if the appointer's death is imminent.
- 22.19 Upon death, the onus is on the deceased's representative to come forward with the form of appointment that authorises them to act. In most cases, it will be obvious to the family and any other interested people who the deceased's representative is and that they will be involved from the beginning in making the funeral and burial arrangements.

439 Protection of Personal and Property Rights Act 1988, s 99A(7).

440 For similar models, see the NY PBH LAW § 4201 under which a person can appoint, in writing, an agent to make decisions regarding the disposition of remains upon death. See also NH Rev Stat § 290.17 (2014). See also proposals made in England for a "Deceased Citizen's Charter" under which a person can appoint a "funeral advocate" to procure and manage their funeral.

441 We further discuss the responsibility for costs below.

- 22.20 In a small number of cases, the deceased's representative may not be available immediately, and others may have already begun to make decisions. The deceased's representative should be required to make their position known to those who are involved in making the arrangements as soon as reasonably practicable. If the deceased considers that there is a risk that their representative might be unavailable to make decisions at the crucial time, perhaps because they will be overseas, the deceased could also appoint a substitute deceased's representative in the same way.
- 22.21 If a deceased's representative is unavailable or unknown to the family or executor, they should be able to proceed with the arrangements. In other words, in order to exercise the rights attached to the role, the deceased's representative must act with a reasonable degree of speed. The onus is on the representative to ensure that they make themselves known and fulfil the decision-making role. If the representative does not fulfil that role, the executor (if there is a will) or members of the family (as we discuss below) may make these decisions. However, if there is no-one able and willing to act, the deceased's representative remains liable for the duty to dispose of the body.
- 22.22 A person appointed as a deceased's representative should be able to reject the role if they are no longer willing or able to fill it. However, that must be done in advance of the death of the appointer. Because of the personal nature of the role of representative, the appointer is likely to have chosen someone they trust to fulfil the role and on the basis of their personal qualities and relationship. If the representative is no longer willing to act, they should notify the appointer and revoke the form of appointment. In doing so, the deceased's representative would thus give up all rights and duties associated with the role. The appointer would also be able to revoke an appointment at any time.

Rights and duties of the deceased's representative

- 22.23 We recommend that the following rights and duties should attach to the deceased's representative:
- The right to make decisions about:
 - funeral arrangements;
 - how the body should be disposed of; and
 - how any remains of the body should be dealt with.
 - The duty to dispose of the body of the deceased.
 - The right to custody of the body (or to delegate that right, as appropriate) for the purposes of exercising the rights and duties.

The right to make decisions

- 22.24 A deceased's representative would have the right to make the decisions as to the funeral arrangements, burial or cremation and other incidental arrangements. This confers on them an ability to make the decision as to burial or cremation, and the location of burial if applicable, and to do so in priority to any other person and without being inhibited from exercising that right.
- 22.25 This right must be exercised having regard to the valid interests of others in accordance with the factors we propose will be set out in statute (discussed below in Chapter 23).

The duty to dispose of the body

- 22.26 A deceased's representative should be under a legal duty to dispose of the body. This is currently one of the duties of the executor and reflects the public interest in treating deceased bodies with respect and disposing of them within a reasonable period of time. To be clear, "disposing of the body" should mean burying or cremating the body or such similar method of permanently dealing with the body so that it does not become a nuisance. It does not extend to dealing with the remains after cremation.
- 22.27 If a deceased's representative fails to dispose of the body, they would be in breach of a legal duty and could be prosecuted under section 150(1) of the Crimes Act 1960. In addition, the deceased's representative should be liable for the costs of burial but with a right to recover reasonable costs from the deceased's estate.⁴⁴²

Custodial rights

- 22.28 We also recommend that the deceased's representative should have a right to the custody of the body.⁴⁴³ This is a right currently vested in the executor as a right of "possession". We think the right should be retained and modernised to remove proprietary concepts that might be offensive to some. The custodial right would be subject to the right of Police and coroners to take custody of the body under the Coroners Act 2006.⁴⁴⁴
- 22.29 The purpose of a custodial right is to give the deceased's representative (or indeed the executor if there is no deceased's representative) the ability to exercise his or her right of decision. There may be times when the decision is at risk of being pre-empted by the actions of another who may take the body away to prevent the deceased's representative from making the arrangements that he or she is lawfully entitled to make. If that is the case, a deceased's representative can insist on his or her legal right to custody of the body and can seek urgent court orders to enforce custodial rights. In Chapter 24, we suggest that the court should have the power to issue a warrant, under urgency, for Police to take custody of a body. The Police could then return the body to the custody of the deceased's representative (or executor) or to a location chosen by him or her (such as a funeral home).

Need for public education

- 22.30 Our consultation suggests that many people would support the ability to appoint a personal representative to make decisions about their body after death. Advance planning of end-of-life decisions is usually seen as beneficial for a number of reasons. For instance, having an awareness of what people expect or want to happen upon a death will put people in a better position to manage differences at an early stage.⁴⁴⁵ However, under the current law, there is a limit to how much an individual can plan what happens to their body after death. As mentioned above, an executor is usually chosen for their expertise in managing property and is not required to give effect to the deceased's wishes about bodily disposal. The use of a deceased's representative will enable individuals to exercise greater autonomy about burial decisions.
- 22.31 We suggest that it will be necessary for the department administering the new legislation to undertake a public education campaign about the option of appointing a deceased's

442 We further discuss the responsibility for costs below.

443 At present, the executor has a transitory possessory right to the body of the deceased. It is a limited exception to the principle that there is no property in a body and exists only for the purpose of ensuring proper disposal of the body. See *Williams v Williams*, above n 383.

444 We further discuss coronial investigations below.

445 Kristin Smith suggests that the custom of *kawe mate* ("carrying the death" to neighbouring *tangihanga*) could be one means of including *tikanga Māori* in the burial process while still respecting the wishes of next of kin: Kristin Smith "Finding a place to rest: perspectives on *kiri mate*, *kawe mate* and *hahunga* in the context of the 'bodysnatching' debate" [2010] *Te Kāhui Kura Māori* < www.nzetc.victoria.ac.nz > . See also Anne Salmond *Hui* (AH & AW Reed, Wellington, 1975) at 188.

representative. We also suggest that the Public Trust should be required to include information on its website about how to appoint a deceased's representative and the desirability of making post-death arrangements for one's body as well as one's estate.⁴⁴⁶ In Chapter 18, we proposed that the department administering the new statute provide online information about consumer rights in relation to funeral services. That website could also include information on deceased's representatives.

- 22.32 Because not everyone will appoint a deceased's representative, we will consider what happens when there is no deceased's representative.

RECOMMENDATIONS

- R105 The statute should provide that, before their death, a person may appoint a deceased's representative.
- R106 Upon the death of the appointer, a deceased's representative should have a power to make decisions, in preference to all others including the executor, as to:
- funeral arrangements;
 - how the body will be disposed of; and
 - how any remains of the body should be dealt with.
- R107 A deceased's representative should have a duty to dispose of the body of the appointer after death.
- R108 A deceased's representative (or the executor if there is no such representative or if the representative fails to act) should have a right to custody of the body of the appointer when he or she dies. That right can be exercised for the limited purposes of exercising the rights and duties in respect of funeral arrangements and disposal of the body. The right to custody of the body must be subject to other applicable laws, such as the right of Police to take custody of a body under the Coroners Act 2006.

THE ROLE OF THE FAMILY

- 22.33 Family participation in the post-death arrangements is important for a number of reasons. A death breaks the living social ties between the deceased and their family. In making burial decisions, a family can lay claim to the identity of the deceased and, by doing so, can also reinforce its own identity. In *tikanga Māori*, burial decisions are decisions that affect not only the deceased's survivors but also their ancestors and descendants. Many consider that meaningful involvement by the family in decision-making after death is an important part of mourning.⁴⁴⁷
- 22.34 The appointment of a deceased's representative and an executor are both voluntary. There will therefore be some cases where no-one has been appointed in a decision-making role, and the statute will need to provide a default mechanism for decisions to be made in these cases. We consider that, in such cases, decisions should be made by the family of the deceased. In practice, families make decisions in different ways depending on the relationship dynamics within the family, cultural background and pragmatic considerations such as who is most able to begin funeral arrangements. For example, in many families, the surviving spouse and adult children

⁴⁴⁶ See www.publictrust.co.nz, which includes information about enduring powers of attorney and making wills.

⁴⁴⁷ McManus, above n 435.

will have the primary role. For other families, including Māori, the decision is made collectively by a larger group. In some families, the deceased will have made their wishes known to the family before death (for example, by pre-purchasing a plot at a preferred cemetery), and the family will proceed to carry these out in a straightforward manner.

- 22.35 The challenge in this review is to frame the statutory obligation to make decisions after death in a way that recognises the variety of ways New Zealand families are arranged and the variety of cultural expectations. We seek to create a reform that provides legal clarity without imposing a “one-size-fits-all” approach. Our proposal is to create a non-exclusive duty applicable to all relevant members of the family. This reflects the current practice whereby usually a particular person or a group of people will have primary responsibility for making arrangements after death. As discussed in the next chapter, decision-makers from within the family will be required to take account of certain matters, including the wishes of the deceased and the views of other family members as well as cultural factors including tikanga Māori. This means that the decision of family members, like the decision of representatives appointed by the deceased, is not unfettered. We expect that the non-exclusive duty provides the closest possible statutory reflection of how things currently operate in practice across New Zealand’s diverse family types.
- 22.36 For completeness, we discuss two other options we considered but ultimately rejected. These are:
- a statutory hierarchy of decision-makers; or
 - a general duty on the family as a collective group.
- 22.37 These options reflect the different ways in which families make decisions. They also reflect the range of options that existing statutes use in relation to family decision-making. After exploring these options below, we then set out our preferred option (non-exclusive duty on all family members) in greater detail.

Statutory hierarchy setting out the priority of rights

- 22.38 One option, discussed in Issues Paper 34, is a hierarchy of family members authorised to make the decisions. This involves setting out a list of family members in statute, ranked in order of priority according to who can make burial arrangements in the absence of an executor or deceased’s representative. The highest-ranked person on the list has the first right to decide. If they are not willing or available, the right passes to the next person on the list and so on. Some overseas jurisdictions have applied this approach as a means of identifying a priority decision-maker as a matter of law.⁴⁴⁸ The highest ranking on the list is usually the spouse or partner of the deceased, followed by an adult child of the deceased, followed by the parents and then siblings.⁴⁴⁹
- 22.39 A statutory hierarchy explicitly sets out the legal entitlements of different family members in a burial dispute. It makes it relatively simple to identify who has the highest priority right to decide, though there will still be frequent cases where more than one person has an equal claim to decide, such as two or more adult children of a deceased or two or more siblings. In *Takamore v Clarke*, the Court considered that, in the absence of an executor, the person with the best claim to administer the estate would be treated as the decision-maker.⁴⁵⁰ This is a form of statutory hierarchy.

448 See the legislation of Alberta, British Columbia, Saskatchewan, and the legislation of numerous American states. No Australian states have codified burial decision rights into statute, although the Queensland Law Reform Commission recommended Queensland should do so in 2011: Queensland Law Reform Commission *A Review of the Law in Relation to the Final Disposal of a Dead Body* (QLRC R69, 2011).

449 After that, the order varies slightly between jurisdictions but follows a broadly similar pattern that is based on strength of kinship links with the deceased.

450 *Takamore v Clarke* (SC), above n 5, at [145]–[146].

- 22.40 A statutory hierarchy will not necessarily suit all disputes. It will not assist where the dispute is between people who have an equal ranking on the hierarchy, such as siblings.⁴⁵¹ Some overseas statutory hierarchies contain quite detailed rules to address these situations. For example, some Canadian hierarchies provide that, where siblings are in dispute, the eldest has the right to decide.⁴⁵²
- 22.41 There is a risk that a statutory hierarchy, while certain, is arbitrary and does not address the particular circumstances of the deceased, including cultural values. We note that this approach is not favoured in either the Human Tissue Act 2008 or the Coroners Act. The value of legal certainty must be balanced against the need for the law to respond to individual circumstances. Every burial dispute will raise unique facts and circumstances, some of which will require a more nuanced approach. A statutory hierarchy may lack the flexibility to address this. A hierarchy relies on a fixed ranking of relationships that may not reflect the relationships the deceased had in real life.⁴⁵³

A collective duty on the family as a whole

- 22.42 There is no definitive practice in New Zealand under which one family member will always make the burial arrangements. Certain people may play a particular role or occupy a special status, but that will differ depending on the family.⁴⁵⁴
- 22.43 Under tikanga Māori, the decisions to be made after death are considered a matter for whānau and hapū rather than one particular person. The decisions are made collectively with a strong focus on consensus. There may be competing claims by different hapū with which the deceased was affiliated. The decision as to where the tūpāpaku should be buried provides an opportunity to strengthen ties of whakapapa, and the process of making a decision allows different claims to be considered.
- 22.44 The submission of Te Rūnanga o Ngāti Whātua was strongly against the statutory hierarchy approach, describing it as:⁴⁵⁵
- [A]bhorrent, not only to the principle of whakapapa, but to the universal need for surviving whānau members to find peace.
- 22.45 Submitters from the Tangi Research Programme said the following about the use of a hierarchy:⁴⁵⁶

Concepts and processes such as relationships, family, decision-making and authority are culturally imbued and meanings can differ significantly across individuals, familial groups and cultures. As such the compilation or proposed reliance upon a pre-determined hierarchy of individuals is extremely problematic ... it is appropriate such matters are considered on a case-by-case basis.

451 See, for example, *Leeburn v Derndorfer* [2004] VSC 172, (2004) 14 VR 100.

452 See, for example, General Regulation to Funeral Services Act, Alberta Regulation 226/98, reg 36(2). In contrast, the proposal of the Queensland Law Reform Commission was that, if the right to control disposal is held by more than one person, they must exercise it jointly: Queensland Law Reform Commission, above n 448, at [6]–[13].

453 Foster, above n 392, at 1369.

454 Ruth McManus notes that grief is “historically specific and culturally patterned” and will be experienced uniquely and intensely by each individual within a given culture: McManus, above n 435, at 129. Some New Zealand case studies give an idea of the diversity in how decisions are made – see, for example, the case study of Rose and her whānau in Nikora et al “Final arrangements following Death: Māori Indigenous Decision Making and Tangi” and the case study in Ministry of Justice He Hinatore ki te Ao Māori: A glimpse into the Māori world (Ministry of Justice, Wellington, 2001) at 93.

455 Te Rūnanga o Ngāti Whātua is the representative body for Ngāti Whātua.

456 The Tangi Research Programme is being undertaken by a group of researchers at the University of Waikato. The work concerns all aspects of traditional and contemporary death practices that involve Māori. They are funded by Royal Society of New Zealand’s Marsden Fund and Ngā Pae o Te Māramatanga, the Māori Centre of Research Excellence.

- 22.46 We considered whether the statute should provide for the family of the deceased person, as a family unit, to have a collective decision-making duty. This would be the option that most closely reflects tikanga Māori. However, we are of the view that it would be too onerous for families from other cultural backgrounds to be required to make decisions in this manner.

A non-exclusive duty on family members

- 22.47 We consider that there is an alternative under which the statute provides a role for family decision-making with neither a hierarchy nor an obligation for the decision to be made collectively and by consensus. Under this approach, no family member would have priority rights, but all members of a deceased's family would have a power to act either on their own or by consensus with other family members. The statute would set down some minimum requirements as to how the power should be exercised.
- 22.48 We propose that every family member of a deceased person should individually have all powers necessary to make decisions about funeral arrangements, disposal of the body or how to deal with any remains and should have a duty to dispose of the body of the deceased person in the following circumstances:
- There is no deceased's representative or executor or that person fails to fulfil their role.
 - It is reasonably practicable for that family member to do so.
 - It is appropriate with regard to the relationship between the deceased and that family member.
 - There is no other reason why that family member should be exempt from the duty.
- 22.49 We consider that this approach best enables the common practice under which the spouse or adult children step forward and make the decisions. Under this approach, if the deceased person has not appointed a decision-maker, the spouse or adult children may step forward, make decisions and instruct funeral service providers. The funeral service provider can rely on those instructions in the absence of knowledge of any challenge to those instructions from other family members.⁴⁵⁷ If the spouse or adult children do not undertake this role, other family members also have the right and duty to do so.
- 22.50 We suggest that a broad definition of family that is inclusive of the range of family relationships is appropriate. A broad definition also leaves space for a conception of family that aligns with Māori thinking.
- 22.51 The definition should encompass a biological, legal or psychological relationship, and it must also acknowledge a culturally recognised family group. This is consistent with the approach taken by existing statutes, including the Children, Young Persons and Their Families Act 1989 and the Human Tissues Act 2008. We suggest that burials legislation adopt a similar approach and define "family member" in such a way as to include:
- someone having a close personal relationship with the deceased, whether characterised by kin, marriage or some other relationship; or
 - someone who forms part of the deceased's whānau or other culturally recognised group of which the deceased forms part.
- 22.52 With reference to tikanga, the effect of this proposed framework will be that, if a Māori person wishes that decisions after their death be made according to tikanga, that person may

⁴⁵⁷ We further discuss the funeral service provider's liability in accepting instructions below.

appoint a deceased's representative that they trust to ensure decisions are made in that way. Alternatively, they may express their wishes in writing. However, if they do neither of these things, decisions will be made by their family (which is broadly defined) with tikanga being one relevant factor and with particular significance being given to the views of any spouse. We acknowledge that this framework does not expressly recognise burial decisions based on tikanga in the sense that those principles should operate independently of any individual's expressed desire. We have instead created a space for an individual to express their wish that decisions be made in accordance with tikanga. We consider that, while this proposal may not satisfy everyone, it is a workable accommodation between legal certainty, individual autonomy and the ongoing role of tikanga in burial decisions.

RECOMMENDATION

R109 The statute should provide that every member of the deceased person's family should have all powers necessary to make decisions about funeral arrangements, disposal of the body or how to deal with any remains and should have a duty to dispose of the body of the deceased person in the event that:

- there is no deceased's representative or executor or that person fails to fulfil their role;
- it is reasonably practicable for that family member to do so;
- it is appropriate with regard to the relationship between the deceased and that family member; and
- there is no other reason why that family member should be exempt from the duty.

OTHER ISSUES FOR DECISION-MAKERS

Enforcement of the duties to dispose of the body

- 22.53 We have described above that the executor, deceased's representative and family members should all have a duty under the statute to dispose of the body. Any proposal to impose a duty raises the question of how that duty should be enforced if or when it is breached.
- 22.54 Currently, the Burial and Cremation Act 1964 establishes an offence if any person "who has charge of a body" does not dispose of it within a reasonable time. In Chapter 15, we proposed that this should be amended to make it clearer who is liable for this offence. We recommend that it should fall on a person who has a duty to dispose of the body—that is, the executor, deceased's representative or family member. We also recommend that the timeframe should be amended to be "without undue delay, taking into account the mourning needs of the bereaved and any ceremonies to be performed".
- 22.55 There is also an offence in the Crimes Act 1961 carrying a maximum term of imprisonment that could be used to enforce the duty to dispose of the body.⁴⁵⁸ However, that offence tends to be prosecuted only for the most egregious behaviour.
- 22.56 Of course, there is some difficulty in thinking about the imposition of an offence in relation to people who have voluntarily taken on a role in recognition of their relationship with the deceased person. There may be many valid reasons why an appointed decision-maker or family member cannot fulfil this duty. For this reason, the offence provision provides a full defence if the person has a reasonable excuse.

⁴⁵⁸ Crimes Act, s 150A: "Every one is liable to imprisonment for a term not exceeding 2 years who—(a) neglects to perform any duty imposed on him or her by law or undertaken by him or her with reference to the burial or cremation of any dead human body or human remains".

- 22.57 In practice, there is considerable value in the law clearly establishing a duty on a range of people. This is particularly valuable in relation to family if the deceased person has not appointed a decision-maker. We have been told that Police sometimes have to go to considerable effort to find someone to step in and take responsibility for family members who have perhaps become estranged in the later years of their lives. In those circumstances, the statutory duty will send a clear message to family that, despite any estrangement, if there are no appointed decision-makers, society expects that family should take on this responsibility. This is particularly important in respect of responsibility for the costs of the funeral and disposal of the body.

A power of others to act in the absence of family

- 22.58 There may be times when no family member is available to carry out their duty but a third party who is not a member of the deceased's family steps forward and is willing to carry out that duty, such as friends or neighbours or staff at a retirement home. We have come across examples of this during our review. It also sometimes happens that a body is unclaimed and lies in a funeral home or with the coroner until eventually it is buried or, more often, cremated.⁴⁵⁹
- 22.59 The ability of persons other than family, the executor or the deceased's representative to make the funeral arrangements serves the public interest and should be possible under law. To cover cases of unclaimed bodies, we recommend that the statute confers a power on a person who is not a member of the deceased's family but who is willing and able to carry out funeral arrangements and dispose of the body in circumstances when no other person is available to do so.

RECOMMENDATION

R110 The statute should provide that any person has the power to make decisions about funeral arrangements, disposal of the body or how remains of the body should be dealt with if there is no executor, deceased's representative or family member who is doing so.

A residual duty on the local authority in the absence of any other person carrying out the duty to dispose of a body

- 22.60 We also think there remains a need for a residual duty to lie on the relevant local authority to ensure that the body of a deceased person is buried or cremated where no other person is available to fulfil that duty. Section 86 of the Health Act 1956 currently provides for this. It sets out "duties of local authorities as to burials" and imposes a residual duty on a local authority to bury any dead body that is "in such a state as to be dangerous to health". Section 49 of the Burial and Cremation Act provides a similar duty. We propose a new burial and cremation statute should continue to provide such a duty because local authorities are best placed to undertake disposal of bodies through council cemeteries and crematoria.

Funeral service providers' reliance on instructions

- 22.61 Some funeral directors have told us that one of the advantages for them of the executor rule is that they know they can rely on the instructions of the executor if there appears to be a dispute within the family. While the proposed burial decision framework provides for a greater number of potential decision-makers, to better reflect the way that these decisions are made in practice, it must also provide some protection for funeral service providers in the event of a dispute within the family as to who may make the decisions.

459 Michael Fox "Auckland's dead and forgotten" (15 March 2012) Stuff < www.stuff.co.nz >.

- 22.62 We consider that the statute should provide that funeral service providers are not liable for any deficiency in the authority of the person with whom they are contracting for the provision of funeral services if they have no reason to consider that there is a deficiency in that authority. This means that, if the spouse or adult children of the deceased person give a funeral director instructions, the funeral director may rely on those instructions unless he or she has reason to believe that a different person has been appointed as the deceased's representative or that there are other family members actively challenging the instructions.
- 22.63 We do not think that the law should require a funeral director to undertake inquiries as to the extent of the authority of the person instructing them. That would be too onerous. Interestingly, we have been told of one case where the funeral director received instructions from the neighbour of a Māori man who had been estranged from his family for some time. Before acting on the instructions, the funeral director undertook his own inquiries and identified siblings of the man who lived in a different region and who, despite the estrangement, wished to take responsibility for the body and dispose of it in accordance with tikanga. While this was a good outcome in the circumstances, we think it is too onerous to impose a duty to undertake inquiries when usually the instructing person will have adequate authority.
- 22.64 If a funeral director is aware of a challenge to the authority of the person providing instructions or the substance of those instructions, the funeral director should not act further on those instructions until the matter is resolved. We expect that such disputes will be very rare. However, we acknowledge that, when they occur, funeral directors can find themselves in a difficult position. They may have custody of a body without certainty as to what should happen or who will pay their expenses. However, these situations arise now, and we do not think these proposals will place funeral directors in a worse position than currently.

RECOMMENDATION

R111 The statute should provide that funeral service providers should not be liable for any deficiency in the authority of the person with whom they are contracting for the provision of funeral services if they have no reason to consider that there is a deficiency in that authority.

Responsibility for costs

- 22.65 One of the advantages of the executor rule was that the same person made the decisions about the funeral and disposal of the body as administered the estate so was easily able to pay the costs incurred by those decisions. Of course, in practice, usually the family make the funeral and disposal arrangements and recoup the costs from the estate.
- 22.66 By proposing that the law recognises a greater range of potential decision-makers, it has been suggested that tension may arise over payment of costs where the decision-maker is not the executor. We acknowledge this possibility but consider that this tension already exists when a family member who is not the executor makes the decisions. Also, problems can arise now even when the decision-maker consults the executor because the executor is unlikely to have a strong understanding of the deceased's financial position immediately after death when funeral arrangements are being made.

22.67 Nonetheless, it is important that the law clearly sets out expectations about the payment of costs. We consider the following:

- The estate should be liable for the reasonable costs of funeral arrangements and disposal of the body, as it is at present,⁴⁶⁰ no matter who is making the decisions and arrangements. If, for example, there is no family and an altruistic stranger makes the decisions, the estate of the deceased person should cover those costs if possible.
- The decision-maker should be required to consider the likely size of the estate and its ability to cover the costs of the funeral and disposal of the body when making decisions.⁴⁶¹ They should be encouraged to consult with the executor if appropriate.
- What is “reasonable” should depend upon the size of the estate left by the deceased and the deceased’s position and circumstances in life.⁴⁶²
- The onus should be on the person administering the estate to show that the funeral expenses were unreasonable rather than on the deceased’s representative to show that they were reasonable.
- Decision-makers should be liable for any costs incurred by them to the extent that they are not reasonable or cannot be covered by the estate. In some cases, the deceased may be eligible for a grant for funeral costs from Work and Income New Zealand.

RECOMMENDATIONS

R112 The statute should provide that the estate of the deceased person should be liable for the reasonable costs of funeral arrangements and disposal of the body. What is “reasonable” should depend upon the size of the estate left by the deceased and the deceased’s position and circumstances in life.

R113 Decision-makers should be liable for any costs incurred by them in relation to funeral arrangements and disposal of the body to the extent that the costs are not reasonable or cannot be covered by the estate.

Coronial investigations

22.68 The Coroners Act provides for a coroner to investigate sudden, suspicious or violent deaths or some other deaths that are not due to natural causes. Because that Act is also dealing with deceased bodies in the period immediately after death, it is clear that any rights of executors or deceased’s representatives in relation to the body of a deceased person must be subject to the specific rights under that Act. Specifically, the executor or deceased’s representative’s right to custody of the body must be subject to the coroner’s right to custody for the purposes of that Act. Also, the coroner’s right to decide that a post-mortem is required may have implications for funeral arrangements, although we note that any family member can object to that decision.⁴⁶³

22.69 However, we have been told that there is occasionally doubt as to whom the coroner should return the body after a post-mortem has been completed. This could be problematic where there is likely to be a dispute within a family about funeral arrangements or disposal of the

460 *Rees v Hughes* [1946] KB 517; [1946] 2 All ER 47.

461 We further discuss this and other factors decision-makers must consider in Chapter 23.

462 *Rees v Hughes*, above n 460, at 528 per Tucker LJ. See also *Re Clarke (Deceased)* [1965] NZLR 182 (SC). In *Loasby*, above n 420, Cooper J held that the costs of a tangi held for a high-ranking Māori chief were not excessive, having regard to the rank and influence of the chief and should be met by the estate.

463 Coroners Act, s 33(2).

body. There has been no judicial consideration of this issue in New Zealand to our knowledge, although there has been overseas.⁴⁶⁴

- 22.70 We consider that coronial practice should reflect our proposals above to expand legal recognition of the people authorised to make decisions about funeral arrangements and disposal of the body, that is, if it is known that the deceased person appointed decision-makers, the body should be returned to the custody of that person (the executor, unless a deceased's representative was also appointed). If decision-makers were not appointed, the body should be returned to the family or other person who is making the funeral and disposal decisions. This can be achieved by a practice note and education for coroners rather than via statutory amendment.

Organ donation

- 22.71 The Human Tissue Act (HTA) contains some similar concepts to our proposals. That Act governs the collection and use of human tissue. This is particularly relevant to collection and use after death, for example, for organ transplantation. Under that Act, a person can appoint a representative to consent or object to the donation of their organs or the collection of tissue for a range of purposes when they die.⁴⁶⁵ The representative does not have any recognised custodial right to the person's body. When no representative is appointed, there is a mechanism for determining who is entitled to consent or object. That mechanism depends on concepts of "next of kin" and "immediate family".
- 22.72 For the most part, we see no conflict between the HTA and our proposals. A person may appoint the same person to both roles or different people. There is a very small theoretical possibility that a decision-maker under our proposals could undermine the ability of a representative under the HTA to consent to the collection and use of tissue by asserting their right to custody of the body. In practice, this is unlikely to occur because decisions about organ donation are addressed when the person is on life support systems prior to the determination of death. However, the risk could be covered by a statutory provision asserting that funeral and disposal decisions are subject to decisions made under the HTA.

CONCLUDING COMMENTS

- 22.73 The framework of decision-making that we have proposed is intended to retain the certainty of the existing common law while providing a new and flexible option for people to express their wishes.
- 22.74 In doing so, we have given thought to whether our proposal for a new role of deceased's representative is likely to make people more inclined to disagree on burial arrangements for a deceased. Some have suggested that, if people are provided with a mechanism to express their burial wishes, clashes with family members will inevitably result. If someone wants to use a deceased's representative to override their family's wishes, the result may be that the family will be more insistent on their views and more inclined to resist and challenge the representative's proposed course of action.
- 22.75 To this we would state that the proposal for a deceased's representative is not intended to serve solely as a dispute resolution mechanism. It may be particularly advantageous for those who have close relationships not following usual "family" lines or for those who want to move away from family traditions that would otherwise apply, but it should not be seen as limited to those

⁴⁶⁴ See *Haqq v Coroner for Inner West London* [2003] EWHC 3366.

⁴⁶⁵ Section 19.

instances. It will benefit those who want certainty and who want to exercise some control over their burial arrangements. It reflects a common human interest in what happens to dead bodies and forms part of a wider trend towards demystifying death and encouraging advance care planning and end-of-life decision-making.

- 22.76 We do not think that the deceased's representative proposal will make burial disputes more likely. The goal should be to address the causes of disagreements rather than to retain law that does not provide a level of choice that is expected in contemporary society.
- 22.77 It cannot be said with certainty that the deceased's representative mechanism will resolve all disagreements before they arise. Often, disagreement over burial matters reflects underlying family tensions that will arise at the point of death no matter what. However, if a deceased's representative has been appointed, this will provide a pathway for ensuring that decisions are more likely to be adhered to.

Chapter 23

Factors to be taken into account

- 23.1 In the preceding chapter, we proposed that the law should recognise a wider range of people to make decisions about funeral arrangements, disposal of the body and dealing with remains. The purpose of this chapter is to consider how those decisions should be made, that is, what factors must be taken into account by the decision-maker and to what extent must they consult other people. These are important questions to answer.
- 23.2 We have come to the view that factors to be taken into account generally fall into one of three categories. The first category is the autonomy of the deceased. It was strongly emphasised to us in consultation meetings that many people assume their views will be binding on their estate. The second category is family or the connections the deceased had with loved ones. While there is broad agreement that the views of family and loved ones should be taken into account, it is less clear how this should proceed where there is a difference of opinion among family members—for example, if the adult children want the deceased to be buried in the same plot as their first spouse while the surviving spouse disagrees. The third category relates to culture, religion and other contextual matters that influence the deceased's connections in the world. For example, if a deceased person was involved with a particular religion it might be expected that they would want a funeral service and a burial consistent with that religion. However, there may also be a clash between culture (conceived broadly) and individual autonomy when people live their lives in accordance with a set of cultural or religious norms that differ from those in their family of origin. In this context, we consider it particularly important to address the role of tikanga Māori.
- 23.3 Consequently, we have framed this discussion around the values of autonomy, family and culture. In this section, we explore how they should be taken into account by decision-makers—whether that is the executor, the deceased's representative or a family member. Ultimately, we reach the view that the statute should not be too prescriptive, instead providing for the decision-maker to take account of all relevant factors and give the appropriate weighting in the circumstances. It is our view that the circumstances of each deceased person may be different, and the legal framework should therefore focus on *how* decisions are made rather than directing a particular outcome.

AUTONOMY: THE VIEWS OF THE DECEASED

- 23.4 The current legal position is that the wishes of the deceased have no binding value but may be taken into account by the decision-maker to guide their actions. This means that, if the family members disagree with the deceased's wishes, they can be easily overridden.
- 23.5 Our proposal to allow a person to appoint a deceased's representative provides scope for the deceased's wishes to be given greater effect, as they are able to choose someone they trust to make the decision. Within this framework, it now falls to us to consider whether the decision-maker should be obliged to follow the deceased's wishes as a matter of course and the limitations on following those wishes.

- 23.6 Contemporary understanding of the importance of personal autonomy suggests that the deceased's wishes should strongly influence the decision and that it should be rare for them to be departed from. A person should be able to express their autonomy in making decisions about how their death should be commemorated and where their body should be buried or cremated.
- 23.7 Modern case law is increasingly giving greater weight and importance to the wishes of the testator. The effect is that the testator's wishes should be given effect to unless there is a compelling reason not to do so. This approach accords with contemporary understanding of the autonomy of the individual. Legal scholars such as Conway and Nwabueze argue that burial directions should have binding force on the basis that this reflects the importance that is placed on individual autonomy.⁴⁶⁶
- 23.8 In a number of cases and also in written commentary, Munby LJ has considered the importance of the wishes of the individual. In a widely cited case *Re M*,⁴⁶⁷ relating to mental incapacity, Munby J, as he then was, noted the importance of individual autonomy:⁴⁶⁸
- [T]he weight to be attached to P's wishes... will always be case-specific and fact-specific. In some cases, in some situations, they carry much, even on occasions, preponderant weight...the nearer to the borderline [of capacity] the more weight must in principle be attached to P's wishes and feelings.
- 23.9 In the same case, Munby J referred to a person's interests following death:⁴⁶⁹
- Best interests do not cease at the moment of death. We have an interest in how our bodies are disposed of after death, whether by burial, cremation or donation for medical research.
- 23.10 This passage has been widely cited by scholars in support of the proposition that a person ought to be able to determine the nature of their funeral arrangements and where the disposal of their body is to be undertaken.⁴⁷⁰
- 23.11 In *D v R*, Henderson J referred to the rights of testators "to make testamentary dispositions which are unreasonable, foolish or contrary to generally accepted standards of morality".⁴⁷¹ This was seen by the Judge to be as "basic human right".⁴⁷²
- 23.12 There is clearly a greater expectation now than previously that a person ought to have a greater control than the law presently allows in how they are to be commemorated after death and how their body shall be disposed of. The present law is out of step with that expectation.
- 23.13 We consider that, where the deceased person has expressed their wishes in writing, the statute should require the decision maker to give effect to the wishes of the deceased unless they are satisfied that there is a compelling reason not to do so. If the deceased person has expressed their wishes but not in writing, the decision maker must still take these into account but is not bound to give them effect.
- 23.14 The intent of our recommendation is that the law should give more authority to the wishes of the deceased expressed in writing before death, whether through a will or otherwise. A person ought to have a reasonable expectation that their wishes as to what should happen on their death in respect of their funeral and the disposition of their body will be followed. Provided such directions are not unreasonable and will not impose an unreasonable cost relative to the

466 Conway, above n 425; Nwabueze, above n 425.

467 *Re M (Statutory Will)* [2009] EWHC 2525 (Fam); [2011] 1 WLR 344.

468 At 352.

469 At 353.

470 See AJ McGee and BP White "Is providing elective ventilation in the best interests of potential donors?" (2013) 39 J Med Ethics 135.

471 *D v R* [2010] EWHC 2405 (Fam); [2011] WTLR 449 at [39].

472 At [39].

size of the person's estate, the executor, deceased's representative or family member assuming responsibility for post-death decisions would be expected to carry them out.

RECOMMENDATIONS

R114 The statute should require that, where a deceased person has expressed in writing his or her wishes relating to funeral arrangements, disposal of their body or handling of their remains, the person making the decisions about those matters must give effect to those wishes unless satisfied that there is a compelling reason not to do so.

R115 Where a deceased person has expressed such wishes but not in writing, they must be taken into account by the person making the relevant decisions.

THE VIEWS OF THE FAMILY

- 23.15 As we described above, it is important for the grieving process for families to have a central role in post-death decisions even if the deceased person has appointed a decision-maker. We described a role for family members as decision-makers in Chapter 22. Here, we analyse whether and how the views of family members other than the decision-maker should be taken into consideration.
- 23.16 We have particularly considered whether there is a special role for the views of the spouse of the deceased person.⁴⁷³ A number of submissions on Issues Paper 34 identified the spouse as culturally significant for many New Zealanders. The question is how best to reflect that within the law. In practice, the spouse and children will be the most likely people to make the funeral arrangements, and other family members will defer to the strength of their connection. The spouse or adult children are also likely to have the best understanding of the deceased's wishes and the dynamics of the wider family group.
- 23.17 When the decisions are made by the deceased's representative, executor or family member, we propose that there should be a statutory obligation to take account of the views of the family and to give preference to the views of those closest to the deceased.⁴⁷⁴ This will usually be the spouse and adult children of the deceased. The statute should require the decision-maker to give particular weight to their views unless there is a reason to prefer the views of other family members in the circumstances. Of course, when there is disagreement between family members (for example, between adult children from an earlier relationship and the surviving spouse), the decision framework described above will govern how the decision is made.
- 23.18 This applies to all decision-makers such that, if a particular family member assumes responsibility for the funeral arrangements, that person should be required to take account of the preferences of other family members who also wish to be involved in making decisions (with relative weight depending on the strength of the relationship).
- 23.19 We have considered whether a representative should be under an active obligation to seek out family members' views in order to take them into account or under a passive obligation to consider views that are expressed to him or her. While it seems reasonable to require a representative to get as many views as possible prior to exercising the decision, on the other hand, that can be an onerous time-consuming responsibility, and in any event, family members

⁴⁷³ We intend the term "spouse" to include de facto and civil union partners.

⁴⁷⁴ "Family" should be broadly defined as we have described in Chapter 22.

can be expected to come forward with their views on the matter. The major concern with an active duty to seek out family members' views is delay.

- 23.20 We consider a middle ground is possible. The deceased's representative should be under a duty to seek out the views of family members to the extent that he or she judges to be reasonably practicable in the time available. Particular priority should be given to obtaining the views of any spouse.
- 23.21 If the deceased's representative is a family member of the deceased, he or she is entitled to take his or her own wishes into account as well as those of the wider family but must do so within his or her capacity as an appointee who is exercising specific statutory rights and duties. We recommend below that guidance be made available to people acting in this role, and it could address how to balance one's personal interests against the demands of the role.

RECOMMENDATION

R116 A person making decisions relating to funeral arrangements, disposal of the body or how any remains should be dealt with must take account of any views of the family. In particular, that person must seek out the views of family members to the extent that he or she considers is practicable in the time available, giving particular priority to obtaining the view of any spouse. That person must give preference to the views of those people closest to the deceased person, particularly any spouse.

TIKANGA MĀORI AND OTHER CULTURAL FACTORS

- 23.22 There is a third set of factors that need to be addressed. These are the factors that influence how the deceased and their family form beliefs about what should happen to a body after death. These may be influenced by religion, by the deceased's personal ethical outlook or by the culture of which the deceased and his or her family are part. Cultural factors lead some people to see a particular way of handling the body as necessary, appropriate or right for their circumstances. This is something that should be respected so far as possible as an element of treating the body with dignity.
- 23.23 Of particular relevance in the New Zealand context is the role of tikanga Māori. In *Takamore v Clarke*, it was affirmed that the executor must take account of cultural factors, including tikanga.⁴⁷⁵

The common law rule has accordingly been built on experience over many years with regard to perceived social necessities and changing public policies. In particular it has been developed by requiring the personal representative to take into account different cultural, religious and spiritual practices as well as the views of the immediate and wider family. Such development is consistent with the relevant statutory context in New Zealand. It ensures that due weight is given by the common law to tikanga concerning Māori burial practices, where they arise and are brought to the attention of decision-makers. In New Zealand the existence of a common law rule in this form is well-established.

- 23.24 Significantly, under tikanga Māori, the spouse's interest lasts for the life of the deceased, but upon death, the body reverts back to the hapū. This means that it is not appropriate for the spouse to be given preference ahead of the hapū.

⁴⁷⁵ *Takamore v Clarke* (SC), above n 5, at [152] per Tipping, McGrath and Blanchard JJ.

- 23.25 It is clear to us that there will sometimes be conflict between the deceased's own wishes, the wishes of the family, cultural considerations of the family of origin and cultural identifications formed by the deceased during their lifetime (including through marriage). If the deceased person has expressed wishes as to funeral arrangements, disposal of their body or otherwise dealing with their remains, those wishes should take precedence over other cultural considerations unless there is a compelling reason not to do so.
- 23.26 However, if the deceased has not expressed their wishes, the decision-maker should be required to take account of cultural, religious and ethical factors as well as the views of the family. We suggest that this will provide guidance to a deceased's representative, executor or family member making the post-death decisions in cases where the deceased has a clear cultural affiliation. In cases where the deceased's family members are from different cultural backgrounds and there are disputed cultural imperatives, we suggest that the decision-maker should have a broad discretion as to the most appropriate course of action in all the circumstances. Decisions about death are both highly personal and culturally significant such that the law cannot set out with too great a specificity what is to happen in the case of a difference in views or different cultural imperatives. It is essentially a judgement to be made.

RECOMMENDATION

R117 A person making decisions relating to funeral arrangements, disposal of the body or how any remains should be dealt with must take account (where appropriate) of tikanga Māori and any religious, cultural and ethical beliefs or practices of the deceased or their family.

OTHER FACTORS

- 23.27 Apart from the matters described above, the decision-maker should be free to take account of any other matters he or she considers relevant but must, finally, consider the likely size of the estate and its ability to cover the costs of the funeral and disposal decisions being made. As we described above, the estate should bear the reasonable costs of these matters, and so that should be considered by any decision-maker.

RECOMMENDATION

R118 A person making decisions relating to funeral arrangements, disposal of the body or how any remains should be dealt with must take account of the likely size of the estate and its ability to cover the costs of the decisions relating to funeral arrangements, disposal of the body and dealing with any remains.

Chapter 24

The role of the courts

- 24.1 Despite a family's best efforts to resolve a dispute and even if the deceased appointed a deceased's representative or executor, the court may still be required to make the ultimate decision. In this chapter, we explore the role of the courts in this regard.
- 24.2 People we consulted with said that the focus should be placed on reducing the need for court involvement by preventing conflict in the first place. We agree. In this chapter, we make recommendations designed to encourage people to resolve disputes outside of court. We note, however, that the High Court already has jurisdiction over burial disputes and that the well established function of the courts is to exercise an oversight and determination function where disputing parties are unable to reach resolution. The question is not therefore whether the courts should have a role in burial disputes but rather when is it appropriate for them to become involved, which court or courts should become involved and how should they do so.
- 24.3 At present, the High Court is the only court with jurisdiction to hear burial disputes, by virtue of its inherent jurisdiction over such matters as confirmed and discussed in *Takamore v Clarke*.⁴⁷⁶ We have reached the view that the court jurisdiction for resolving burial disputes should be set out in statute. We set out that proposed statutory jurisdiction in this part of the Report. First, however, we deal with the question of which courts should be given statutory jurisdiction to hear these kinds of disputes.

WHICH COURTS SHOULD EXERCISE JURISDICTION?

- 24.4 For the reasons set out in the following paragraphs, we recommend that the High Court, the Family Court and the Māori Land Court should each have statutory jurisdiction to hear burial disputes.
- 24.5 Each court has particular attributes that will suit particular disputes. The High Court has the ability to deal quickly with legal questions and can provide injunctive relief. The Family Court can apply a less formal approach that, in many cases, will be better suited to burial disputes. The Māori Land Court can deal with those burial disputes that require a deep understanding of tikanga.
- 24.6 Our recommendations therefore do not remove the High Court's jurisdiction to hear burial disputes. Rather, they clarify that jurisdiction in statute, and they confer concurrent statutory jurisdiction on other courts in order to provide a greater range of options for court-based dispute resolution to the general public.
- 24.7 We do not expect that these proposed changes will increase the number of court applications. Our proposed statutory provisions concerning deceased's representatives and executors should reduce disputes by clarifying who has rights to make decisions and who has obligations to dispose of the body, by providing for the deceased person to appoint a decision-maker before their death and by establishing the matters that must be considered when making post-death decisions. Bereaved families will continue to treat the courts as a measure of last resort. The

⁴⁷⁶ *Takamore v Clarke* (SC), above n 5, at [7] and [90]–[91].

court will have discretion to refuse to hear proceedings that are brought for frivolous or vexatious reasons. We think it extremely unlikely that any of the courts would face a significant increase in workload as a result of our proposed changes.

The High Court

- 24.8 The High Court currently exercises jurisdiction over burial disputes under its inherent jurisdiction.⁴⁷⁷ We make no recommendations for change to that position except to set out the jurisdiction of the High Court in statute and clarify the matters that the Court should take into account when hearing civil proceedings of this kind.

The Family Court

- 24.9 We noted in Issues Paper 34 that family matters lie at the heart of most burial disputes and that, in many respects, the Family Court seems an obvious forum to hear many of these disputes. Family Court judges are used to hearing matters of a highly personal nature that may also have significant implications, such as child custody orders. Sometimes, these require speedy decisions, for instance, where there is a risk of child abduction.⁴⁷⁸
- 24.10 The Family Court's existing work provides a good model for determining who should make funeral, burial and cremation decisions or for reviewing a decision that has been made. The rules by which the Family Court operate and the ability of Family Court judges to ask questions directly of the parties are likely to align with the way that many people might choose to deal with a burial dispute. For many people, the process is likely to be important, and the main concern for someone may be that his or her voice is heard within the decision-making process.
- 24.11 In our view, therefore, the Family Court should have statutory jurisdiction over burial disputes. Roughly 90 per cent of submitters who answered this question in Issues Paper 34 supported this proposal.
- 24.12 We note that some aspects of Family Court processes have recently been reformed. The review, initiated by the Minister of Justice in 2011, sought to return judges of the Court to a more judicial rather than therapeutic function, in other words, making decisions rather than attempting to reconcile the parties.⁴⁷⁹ The Cabinet paper said that "reconciliation services have a place in resolving family disputes for those who choose them, but that place is in the community, not in the Court".⁴⁸⁰
- 24.13 We have sought to make our proposal for Family Court jurisdiction consistent with this approach. We make recommendations that may help disputes to be resolved outside of court as far as possible. If parties choose to undertake private dispute resolution before initiating court proceedings, this will be at their own expense and not undertaken by judges. The role of the Family Court judge would be limited to giving a decision if none has otherwise been reached. This is an obligation of the State, as noted by then Principal Family Court Judge, Peter Boshier—it reflects the right of all people in a civilised society to have civil disputes heard and resolved by an official arm of the State's government.⁴⁸¹

477 *Takamore v Clarke* (SC), above n 5, at [7] and [90]–[91].

478 Care of Children Act 2004, s 77.

479 Cabinet Social Policy Committee *Family Court Review – Proposals for Reform* (July 2012) at [28]–[30].

480 At [30].

481 Peter Boshier "The Role of the State in Family Law" (2012) 7 NZFLJ 199. At the time of publishing this Report, we note that Peter Boshier was a Commissioner with the Law Commission but was not directly involved in this project.

The Māori Land Court

- 24.14 In Chapter 21, we noted that, in Māori communities, questions about burial are resolved by the application of established rules and principles based on tikanga. This suggests that court jurisdiction is unnecessary to help resolve disputes of that kind—there is already an established dispute resolution process that is, as is appropriate for matters of tikanga, exercised on the marae.
- 24.15 Despite that, we have considered whether there remains scope for court-based resolution of disputes involving tikanga, for example, concerning which hapū or family group should determine the burial location of a deceased Māori person. Some Māori may wish to make use of a court-based jurisdiction in cases where application of tikanga by the parties themselves has failed to bring about a result.
- 24.16 One might not expect such court jurisdiction to be heavily used, since tikanga has well developed rules for determining burial location of a Māori deceased, which have been applied throughout history. Nonetheless, the Māori Land Court is highly skilled at dealing with tikanga matters and already deals in questions concerning Māori land. Therefore, it seems appropriate that people should have the option of applying to that Court to help determine tikanga-based burial disputes if they choose.
- 24.17 We have therefore considered whether the statutory jurisdiction of the Māori Land Court should be extended to hear questions about the funeral, burial or cremation of a deceased Māori person. At present, the Māori Land Court's jurisdiction is limited mainly to matters concerning how Māori land is dealt with under the Te Ture Whenua Māori Act 1993, but it would not be inconsistent with the Court's existing jurisdiction to enable it to hear questions of burial of deceased people since, in Māori thinking, the burial of a deceased is an expression of connections to the land.
- 24.18 The Māori Land Court supported this extension of its jurisdiction in its submission on Issues Paper 34. It noted that its judges are accustomed to dealing with questions of tikanga and its interplay with legal issues, they are familiar with the Māori communities in their respective districts and they have regular dealings with trustees responsible for urupā. This existing skillset of Māori Land Court judges could be particularly relevant to questions about the burial of a deceased Māori person.
- 24.19 Among other submitters who commented on this question, there was also general support. One submitter, however, opposed the idea of the Māori Land Court having jurisdiction over these matters. They noted that holding the remains of the deceased person pending an outcome from that Court would be expensive and that it would be a cumbersome judicial process rather than a marae-based process.
- 24.20 We understand that this proposal might raise deeper questions about whether tikanga, as a body of rules and principles, should be developed on the marae as has traditionally been the case or whether it can or should be applied and developed by a court exercising judicial functions. We think that this is a question that could arise in broader circumstances than burial disputes.
- 24.21 We also note that there could be delays and loss of control in taking a burial dispute to the Māori Land Court. Many people will choose not to, and where people can resolve matters themselves in accordance with tikanga, they should do so. However, we support people being given more options for resolution, and therefore, on balance, we support the Māori Land Court being given jurisdiction to determine burial and related matters.

DISPUTES OVER JURISDICTION

- 24.22 Thus far, we have recommended that the High Court, the Family Court and the Māori Land Court have concurrent jurisdiction. Some disputes will clearly fall into one or the other category, and the claimants can be expected to make their application to the appropriate Court. For example, if the issue in question is a matter of complicated legal principle, the applicant will likely apply to the High Court for a determination. If the problem concerns tricky relationships within a family, the applicant will identify that the Family Court is better placed to determine the issue. If questions of tikanga are central to the issue, the Māori Land Court will be the obvious choice. Other matters such as cost, timeliness and accessibility may also determine the choice of court.
- 24.23 However, there will be cases where one party wants the dispute heard in one court, and the other party wants it heard in a different court. There are a few different options for dealing with this situation. The legislation could provide specific criteria for which cases go to which court. For instance, the Māori Land Court submitted that disputes involving a Māori deceased or a burial site on Māori land should be heard in the Māori Land Court. This could be provided in statute. However, determining who is a “Māori” deceased for that purpose is not able to be governed by a bright line rule and may give rise to legal uncertainty.
- 24.24 A second option is that the proceedings could be heard in the court where they are filed and that, if the opposing party disagrees with the proceedings being heard in that forum, they could make a special application for a judge of another court to sit together with the presiding judge in the court where the proceedings were filed.
- 24.25 In Issues Paper 34, we suggested this might be impracticable and cause difficult jurisdictional questions (for example, if the judges disagree). However, some submitters favoured it. It might be achievable through the cross-warranting of judges.⁴⁸²
- 24.26 However, our preferred option is that, if there is disagreement between the parties on which court hears the case, it should be heard by the High Court by default. This is the most straightforward option and will encourage parties to resolve any pre-trial forum issues or to go straight to the High Court if they cannot.

HOW THE JURISDICTION SHOULD OPERATE

- 24.27 In the following sections, we outline how we think the jurisdiction should operate in the courts.
- 24.28 We deal with the following:
- The ambit of the court’s jurisdiction.
 - The statutory criteria that the court must take into account when making any decision about what should happen in a burial dispute.
 - The priority that should be given to these disputes.
 - Securing the position where urgency is required.
 - Court orders and remedies.
 - The right to appeal the court’s decisions.

⁴⁸² In its 2004 Report examining the structure of New Zealand courts and tribunals, the Law Commission recommended cross-warranting of judges to enable some Māori Land Court judges to sit in its proposed new Community Court so that their expertise and knowledge of tikanga would be available. See Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at [330].

24.29 We also consider cultural advisers to assist the court.

24.30 We do not support imposing strict preconditions on a person's standing to bring proceedings in this jurisdiction. A wide range of people could be interested in and affected by the burial arrangements of a deceased person. However, the courts should have the ability to dismiss proceedings that are frivolous, vexatious or an abuse of procedure as the Family Court is currently able to do under section 140(b) of the Care of Children Act 2004.

Ambit of the court's jurisdiction

24.31 In Chapter 22 we proposed that a person may appoint a decision-maker to make decisions about funeral arrangements after the appointer has died; whether and how the body should be buried or cremated; and how any remains of the body should be dealt with. We consider that the statute should provide for the courts to have jurisdiction to consider any dispute that may arise in relation to those decisions. In particular, it should have jurisdiction to determine who should make these decisions or, if they have already been made, whether the decisions are reasonable in the circumstances. Alternatively, a person may ask the court to make the particular decision itself.

How the court should make its decision: relevant statutory criteria

24.32 Whichever type of decision the court is being asked to determine and whichever court is exercising the jurisdiction, we propose that, in making its determination, the court should have regard to a list of statutory criteria to help guide their decisions.⁴⁸³ These criteria should be the same as the matters that must be taken into account by the deceased's appointed decision-makers when making decisions, as we described above in Chapter 23. In summary, those criteria are:

- the deceased's wishes;
- the views of members of the deceased's family group (with the specific weighting we described above); and
- relevant cultural considerations including tikanga Māori.

24.33 In relation to cultural considerations, we note that, under some statutes, judges can request cultural reports to be completed to provide information that may better inform their decisions.⁴⁸⁴ That information may include the cultural ties and values of the people concerned. Access to such reports may be beneficial when culture is a key issue in the proceedings, although we acknowledge that they may be costly and difficult to obtain. Consideration should be given to other methods of obtaining this advice, such as allowing cultural advisers or, in the Māori context, kaumātua to advise the court.

24.34 In addition to the criteria above, the court should also be required to consider the practicality, cost and timeliness of any proposed burial arrangements, having regard both to the need to uphold the dignity of the deceased and the interests of those who had a relationship with the deceased. These may be useful factors particularly in cases where the competing interests are very finely balanced. For instance, the court may ultimately favour a burial location that most people can visit easily, or it may take into account whether certain arrangements would exhaust the estate, particularly where there are contemporaneous family maintenance claims.

⁴⁸³ See Queensland Law Reform Commission, above n 448.

⁴⁸⁴ See Children, Young Persons and Their Families Act 1989, s 187.

The priority that should be given to these disputes

- 24.35 It has been emphasised to us that the court jurisdiction serves little purpose if people have acted pre-emptively to take the body and bury or cremate it before court proceedings can be instigated. For instance, we were told that, sometimes, substantive Family Court proceedings (those not concerning vulnerable parties) are not finally determined until several months after they first go before the Court. Obviously, this will not be appropriate for burial disputes where the burial or cremation of the deceased is in question.
- 24.36 We believe there is sufficient justification for the courts to prioritise burial dispute proceedings. These concern deeply significant decisions for those involved and turn on questions of culture and belief. They should not be prioritised ahead of matters where personal safety is at risk (for instance, domestic violence order applications), but they do have a special character that warrants a speedy process. We therefore recommend that, where the Court receives an application in this jurisdiction, it should be required to determine the case within 10 working days.
- 24.37 In Issues Paper 34, we suggested that parties coming before the Māori Land Court might need to be comfortable with lengthier timeframes, but the Māori Land Court submission said that, in its opinion, it is well placed to deal with substantive proceedings in an efficient and timely manner.

Securing the position where urgency is required: urgent injunctions

Imminent risk of a body being taken

- 24.38 If the Court is satisfied that there is an imminent risk of a body being taken, it should have the power to make an order appointing someone to exercise control and custody over the body in the interim period. The person appointed should depend on the circumstances of the case, having regard to who is available and the level of risk involved. It could be the deceased's representative or executor, if there is one, a coroner who is willing to be involved, a funeral director, a kaumātua or Police.⁴⁸⁵
- 24.39 The scope of the powers attaching to that order would also be for the judge to decide. For example, they may include a power to shift the body to a secure location or to remain with the body.

Imminent risk of a body being buried or cremated

- 24.40 A small number of submitters suggested that Police should have statutory powers to seize a body so as to prevent people from burying or cremating it before the court can hear the proceeding. At present, if a body is taken, Police legally have no power to seize custody of the body and tend to be wary of intervening in case of exacerbating the dispute.
- 24.41 We do not support conferring a specific statutory power on Police to seize a body. We think that, if such a power is necessary in a certain case, a court application must first be made. Therefore, if a body is in someone's custody and the court is satisfied there is an imminent risk of it being buried or cremated before the court can deal with the substance of the proceedings, the court should have the power to issue a warrant allowing Police to take custody of the body for the purpose of returning it to the legal decision-maker or for the purpose of enforcing the court's orders.

⁴⁸⁵ The Court could have access to a list of people who are willing and appropriate to act as interim custodians where required and could appoint someone from that list.

Disinterment orders

- 24.42 We consider that, if a body has been buried in breach of the rights of a deceased's representative or executor, the court should have a statutory power to order its disinterment. In Chapter 12, we discussed disinterment in other circumstances—where the family are not in dispute but wish to move the body closer to other relatives; or where a property developer wishes to use the burial land for other purposes. In that section, we emphasised the strong public view expressed in submissions on Issues Paper 34 that a body, once buried, should not be disinterred without significant reasons. We proposed there that the cemetery manager should have the power to grant permission for a single disinterment if satisfied that all interested relatives have been consulted and there are no objections expressed.
- 24.43 In contrast, where a body has been buried in breach of the rights of the deceased's representative or executor and a court has been asked to determine questions in relation to the body, it should have a power to order the disinterment of the body. In making that decision, it must consider the standard matters described above for its burial jurisdiction. If it orders disinterment, it would also consider alternative disposal of the body or how that decision should be made.

Right of appeal

- 24.44 Given the significance and potential finality of these decisions, a right to appeal is important to correct error and to supervise and improve decision-making. However, this needs to be balanced against the need for speed and certainty.
- 24.45 We have concluded that claimants in the Family Court should be able to bring an appeal as of right to the High Court, and the appeal should be conducted by way of rehearing. After considering the matter, we have concluded that appeals should be limited to questions of law. Allowing an appeal on both fact and law increases the risk of delay caused by re-litigating factual decisions made in the court below. However, we are satisfied that a person should be able to appeal if they are of the view that errors were made in how the law was applied to their particular situation.
- 24.46 Claimants in the Māori Land Court should be able to appeal to the Māori Appellate Court under the existing appeal procedure in the Te Ture Whenua Māori Act 1993.

RECOMMENDATIONS

- R119 The statute should enable applications to be made to the High Court, the Family Court or the Māori Land Court for determination of post-death disputes in relation to funeral arrangements, disposal of the body or how any remains should be dealt with.
- R120 If the parties cannot agree on which court should hear the proceedings, the matter should be heard in the High Court.

R121 In relation to such an application, the court should have power to:

- appoint a person to make a decision;
- determine whether a decision that has been made is reasonable in the circumstances;
- make a decision about funeral arrangements, disposal of the body or how any remains should be dealt with;
- make an interim order to secure the position of the body, including a power to order that the body be moved to a new location and a power to appoint someone to act as custodian of the body; and
- order disinterment of a body buried in breach of the rights of an executor or deceased's representative.

R122 When exercising this jurisdiction, a court should be required to take account of:

- the deceased's wishes;
- the views of members of the deceased's family group (with the specific weighting we describe in R116);
- relevant cultural considerations, including tikanga Māori;
- the practicality, cost and timeliness of any proposed burial arrangements; and
- any other factors the court thinks are relevant.

R123 The statute should require the court to determine applications in this jurisdiction with expediency.

R124 A court order made by the Family Court should be able to be appealed as of right to the High Court and should be heard by way of rehearing on matters of law only.

R125 A court order made by the Māori Land Court should be subject to existing appeal processes to the Māori Appellate Court as set down in the Te Ture Whenua Māori Act 1993.

ENCOURAGING OUT-OF-COURT RESOLUTION

24.47 As we noted above, while there will always be a role for the courts in helping to determine disputes, attention should also be paid to the methods of resolving disputes without the need for court intervention. Resorting to court can be expensive, time consuming and damaging to relationships. On the other hand, various methods of alternative resolution can be cheaper, quicker and less acrimonious. We consider that burial disputes are particularly well suited to efforts to resolve them outside of court because the disputing parties usually have an ongoing interest in maintaining a good relationship. Consequently, we have considered legislative and non-legislative methods of promoting and motivating out-of-court resolution of burial disputes.

Legislative mechanisms

24.48 In considering legislative mechanisms for motivating out-of-court resolution of burial disputes, we particularly focused on mandatory alternative dispute resolution (ADR) or a “genuine steps” mechanism adopted under Australian Federal legislation in respect of civil disputes.

24.49 We have concluded that mandatory ADR is not appropriate for burial disputes. The main reason is that some burial disputes will not be appropriate for ADR, perhaps because they require a rapid and simple decision from a court; they clearly involve an uncertain point of law

that can only be determined by a court; or the relationships have broken down to such an extent that a mediated resolution is extremely unlikely. A compelling reason should be present before introducing mandatory mediation into a court regime.

24.50 Despite rejecting mandatory ADR, we consider that a middle way is possible in which the statute sends a strong message to litigants that out-of-court resolution is preferable and motivates that behaviour with negative consequences for parties that have not attempted to resolve their disputes out of court. An example is provided by the Australian Civil Disputes Resolution Act 2011 (Cth). Under that Act, before commencing proceedings, parties in civil disputes must file a statement saying what steps they have taken to resolve their dispute. If they have not taken any steps, they must provide the reasons why. Lawyers are required by the Act to advise their clients of this requirement. The Act provides examples of genuine steps that could be taken, such as:⁴⁸⁶

- notifying the other person of the issues and offering to discuss them;
- providing relevant information to the other person to enable them to understand the issues;
- considering a facilitated resolution;
- attending a facilitated resolution; or
- attempting to negotiate with the other person.

24.51 While a failure to take genuine steps or file the genuine steps statement does not invalidate the proceedings, the court may take a failure into account when making decisions about case management and directions as to costs. An example was provided in a 2012 case in which neither party filed a genuine steps statement, and the lawyers conceded that no attempts had been made to settle the matter before court despite the dispute concerning just \$10,706.33—half the likely legal fees of the two parties.⁴⁸⁷ In that case, the judge severely criticised the lack of attempts at out-of-court resolution, refused to make a costs order and referred the lawyers to the relevant Law Society, Bar Association and Legal Services Commission.

24.52 We consider that this is a simple mechanism that sends a strong message about ADR and motivates the desired behaviour while avoiding the potential negative consequences of mandatory ADR. It is particularly well suited to burial disputes because it is flexible enough to accommodate the wide range of circumstances that may arise in those cases.

RECOMMENDATIONS

R126 The statute should require that, before proceedings are commenced under the burial dispute jurisdiction, the parties must file a genuine steps statement, outlining the steps they have taken, if any, to resolve the issues.

R127 The court may take account of the genuine steps statement or any failure to file a genuine steps statement when exercising any of its powers or functions under the burial disputes jurisdiction and when considering costs.

486 Civil Disputes Resolution Act 2011 (Cth), s 4.

487 *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys* [2012] FCA 282 (Cth).

Non-legislative promotion of ADR

- 24.53 Through our consultation on Issues Paper 34, we encountered a strong desire for mechanisms to enable parties to resolve burial disputes without the need for court intervention. We also found that there are a wide range of community groups already engaging in or promoting ADR for burial disputes, including the Muslim Working Together Group; the Federation of Islamic Associations of New Zealand; the New Zealand Nurses Organisation; Māori wardens; funeral directors;⁴⁸⁸ kaumātua; and lawyers.
- 24.54 Police iwi liaison officers and ethnic liaison officers are often involved in their capacity as the liaison point between Police and the community. These officers rely on their cultural knowledge, strong community relationships and professional judgement to diffuse or manage a burial dispute.⁴⁸⁹
- 24.55 Support has been expressed for coroners being given power to intervene in burial disputes.⁴⁹⁰ It has been suggested that coroners could be given legal jurisdiction to mediate burial disputes. Although there are examples of people who have had positive experiences with particular coroners acting in their personal capacity, resolving burial disputes is outside the normal coronial role, and so we cannot make such a recommendation.⁴⁹¹ While some coroners have significant experience and expertise in dealing with bereaved families, mediating disputes about funeral arrangements, burial, cremation or disposal of the remains is a very different function.
- 24.56 We concluded from our consultation that there are a wide range of people in the community that are well placed to step in and help to resolve burial disputes before they escalate but that these people would benefit from clear information about the law, different cultural practices and other people with greater expertise to assist.
- 24.57 Consequently, we would encourage the Ministry of Justice or Department of Internal Affairs to consider publishing this information via pamphlets and a website. That information could be made available at funeral businesses and Citizens Advice Bureaus. It could be useful in training people who may find themselves in a strong position to support the resolution of burial disputes, such as funeral directors, Police, lawyers, doctors and kaumātua.

488 According to FDANZ, there are a number of ways funeral homes try to assist: encouraging the family to find a compromise or seek legal advice or mediation; requesting the executor's assistance; and providing advice on the Administration Act 1969 and relevant High Court Rules. In general, though, we are told that they try to stay out of the conflict and encourage families to find a solution.

489 See New Zealand Police Association "A day in the life of a Police iwi liaison officer" (31 March 2013) < www.policeassn.org.nz > .

490 Mike Watson "Coroner urges 'body snatching' mediation" (11 June 2010) Stuff < www.stuff.co.nz > .

491 Coroners Act, s 4.

Appendix A

Suggested default provisions for community managers of cemeteries

In Chapter 12, we proposed that the new statute should contain basic default provisions in a schedule to the statute providing powers and obligations for community managers of cemeteries. The following is a suggested list of those provisions.

Application

- 1 These default provisions apply to any group of people who, when this provision comes into force, are operating as community managers of a cemetery. “Community manager” in this Schedule means a person who makes most of the day-to-day decisions in respect of a cemetery such as the provision of burial plots, maintenance of the grounds and the keeping of burial records, whether under a formal or de facto delegation from the cemetery owner.

Function

- 2 It is the function of community managers to control and manage the cemetery in respect of which the manager was appointed.

Powers and duties

- 3 Community managers have the powers and obligations of cemetery managers under the new statute.
- 4 In addition, community managers have all the powers necessary to fulfil their function. Those powers include the power to:
 - enter into contracts for the sale of plots for burial, either in perpetuity or for a limited tenure;
 - dig graves, establish monuments and undertake landscaping and maintenance; and
 - make rules binding on the public for the management of the cemetery, including the terms of any contract to purchase a plot, control of access to the cemetery and limits on memorialisation around graves.
- 5 Community managers must exercise all powers under the new statute for the purpose of the management, administration or improvement of the cemetery.

Consequences of a breach of duty

- 6 Any person who is a community manager and who exercises a power for a purpose other than the management, administration or improvement of the cemetery commits an offence.

Appointment and removal

- 7 At all times, there should be at least three community managers in respect of a cemetery.
- 8 A community manager may resign by providing notice to that effect to the relevant local authority.

- 9 If a community manager dies, resigns, is removed, is absent from New Zealand for a period of at least one year or is otherwise unable or unwilling to fulfil the role of community manager, the relevant local authority may appoint a new community manager.
- 10 Local authorities may determine any limit to the term of the appointment.
- 11 An appointment of a community manager is not valid unless the person has consented to his or her appointment.
- 12 The name and contact details of all community managers must be noted on the local authority's cemetery register.
- 13 Upon the appointment of a new community manager, all property held by any departing or previous manager automatically vests in the new manager. Community managers hold all cemetery property as joint tenants. The District Land Registrar should have a power to amend the certificate of title of any land held as cemetery property upon receipt of notice of the appointment.
- 14 The local authority may revoke a community manager's appointment if:
 - the manager has exercised any of the powers of a community manager for a purpose other than the management, administration or improvement of the cemetery; or
 - the manager has failed to fulfil any of the cemetery obligations.
- 15 However, before any local authority revokes an appointment, it must:
 - give notice to the manager of its intention to revoke the appointment and the grounds for doing so;
 - give the manager adequate opportunity to be heard on the matter; and
 - consider any submissions made by the manager.

Decision-making

- 16 Community managers must make all significant decisions by a majority.
- 17 Community managers have no legal capacity as a group. All actions of a community manager are undertaken as an individual in his or her own name.

Transparency

- 18 Community managers must ensure that accurate financial records are kept in respect of cemetery property and money received and that those records are available for inspection on the request of the local authority.⁴⁹²

⁴⁹² The Public Audit Act 2001 should no longer apply to these cemeteries.

Appendix B

Maximum penalties for offences

- 1 In this Report, we have recommended the creation of a number of new offences and the continuation of some existing offences. We now provide some analysis for setting the maximum penalties for each of these offences. It is helpful to do this analysis across all the new and continued offences together to ensure there is consistency both between offences and with offences in other analogous legislation.

Principles for setting maximum penalties

- 2 Unfortunately, there is no agreed methodology for setting maximum penalties in New Zealand legislation. This creates a risk that maximum penalties are based on intuition and produce unintended irrational results across the statute book. To minimise this risk for the offences proposed in this Report, we have applied a number of principles to guide our analysis.
- 3 The Sentencing Act 2002 establishes the purposes of sentencing. Most of those purposes (particularly to hold the offender accountable and to denounce the offender's conduct) require an assessment of the seriousness of the offending. Therefore, assessing the seriousness of the worst class of behaviour that would breach an offence is the first step in establishing what the maximum penalty for that offence should be.
- 4 The Law Commission published a Study Paper in 2013 on Maximum Penalties in Criminal Offences.⁴⁹³ It suggested a methodology for determining the seriousness of offences in order to rationalise maximum penalties across the statute book. It suggested that there are two elements to assessing seriousness—harm and culpability.⁴⁹⁴ The harm is the injury to an interest. That injury can range from physical injury or damage to property; to breach of privacy, causing humiliation or offensive behaviour. Sometimes, offending causes injury to the State (for example, tax evasion) or injury to the collective public interest (for example, breaching health and safety laws) rather than to an individual private interest.
- 5 The type of culpability considerations that are relevant to setting maximum penalties are the mental elements of an offence—that is, whether the relevant action must be purposeful, knowing, reckless or negligent. Each of these may alter the seriousness of the offending in a different way.
- 6 Most offences encapsulate a wide variety of behaviour of varying degrees of seriousness. The maximum penalty should be designed to reflect the worst class of offending within that offence.⁴⁹⁵ This is reflected in the Sentencing Act, which states that the court must impose the maximum penalty if the offending falls within the most serious of cases for which the penalty is prescribed (unless circumstances relating to the offender make that inappropriate).⁴⁹⁶ It follows that most penalties actually imposed for an offence will fall well below the maximum.

493 *Maximum Penalties for Criminal Offences* (NZLC SP21, 2013 Law Commission 2013).

494 At 4.17.

495 It should be noted that that is the worst class of case, not the worst case imaginable, because it will always be possible to imagine a more serious case.

496 Sentencing Act 2002, s 8(c).

- 7 The second step in our analysis involved an assessment of analogous offences already on the statute book. In assessing analogous offences, we found a wide variety of maximum penalties, which probably reflects the lack of methodology for setting maximum penalties. Consequently, this step was not determinative but is used merely as a guide.

Categories of offences

- 8 The table below lists each of the 11 offences proposed in this Report. For the purposes of assessing their seriousness, we consider that they tend to fall into four categories according to the circumstances in which they could be committed:

Category 1. Offences that could only be committed by providers of funeral services in the course of providing those services.

Category 2. Offences that most usually could be committed by funeral service providers but could be committed by the public when a funeral service provider is not engaged.

Category 3. Offences that apply generally to the public, including funeral directors.

Category 4. An offence that could only be committed by managers of community cemeteries.

PROPOSED OFFENCES	
1. Offences that could only be committed by providers of funeral services in the course of providing those services	
Rec 90	Carrying on business as a funeral service provider in breach of requirement to be registered
Rec 94	Knowingly breaching a duty of an owner or manager of a funeral service business
Rec 103	Breaching the disclosure requirements for funeral service businesses
2. Offences that most usually could be committed by funeral service providers but could be committed by the public when a funeral service provider is not engaged	
Rec 14	Disposing of or embalming a body before cause of death is determined
Rec 73	Knowingly cremating or otherwise disposing of a body except in an approved cremator or other approved device, unless prior permission of the local authority is obtained
3. Offences that apply generally to the public, including funeral directors	
Rec 54	Knowingly removing a body or remains of a body buried in any cemetery or place of burial without the permission of the cemetery manager or the local authority
Rec 62	Knowingly burying a body in any land that is not an approved cemetery or burial ground
Rec 79	Breaching the obligation to treat any dead human body with respect
Rec 80	Failing to dispose of a body without undue delay
4. An offence that could only be committed by managers of community cemeteries	
Appendix A	Being a community manager of a cemetery and exercising a power for a purpose other than the management, administration or improvement of the cemetery

Imprisonment

- 9 We consider that none of these offences should carry a term of imprisonment. Prison should be reserved for the most serious offending and when other penalties would not achieve adequate accountability. None of the offences we propose in this Report meet this threshold.
- The category 1 offences are committed in the course of operating a funeral business and so are administrative or regulatory in nature. A fine would provide adequate deterrence, denunciation and accountability.
 - For category 2 and 3 offences, in the worst cases of offending, behaviour that breaches the offences might justify a prison term. However, in those cases, the offending could be prosecuted under section 150 of the Crimes Act 1961.⁴⁹⁷ That offence carries a maximum term of two years imprisonment. As we discussed in Chapter 15, the advantage of the proposed new offences with lower penalties is that they fill the gap in which lower-level (yet still significant) offending is not currently prosecuted because the term of imprisonment attached to section 150 indicates that it should be reserved for very significant offending.
 - For the category 4 offence, if the behaviour justified imprisonment, it could be prosecuted as a fraud offence.

Fines

- 10 As we demonstrate below, we have reached the conclusion that an appropriate maximum fine for all but one of the offences would be \$10,000 for an individual and \$30,000 for a body corporate. We consider there are good reasons to justify a higher penalty for the offence in Recommendation 83 of failing to be registered.

Category 1 offences

- 11 These offences (failing to be registered; breaching the duties of managers; and breaching the disclosure requirements) can only be committed by providers of funeral services in the course of providing that service. The purpose of these offences is to provide assurance to the public that people providing funeral services are likely to be trustworthy and maintain high standards of practice. The harm that is likely to result from this offending may be individual financial losses (for example, a failure to provide a statement of costs may result in a consumer paying for services he or she did not want or understand) or individual emotional costs (such as distress caused by mismanaging the custody of ashes or failing to keep adequate records). There may also be more general harm to the collective public interest by eroding the level of trust in the funeral industry.
- 12 While these harms can be distressing for individuals, they are not significantly serious harms in the broader context. They are likely to be caused by a failure to maintain good business practices.
- 13 In relation to culpability, we have recommended that failing to be registered should be a strict liability offence. That means that the prosecution does not need to prove that the person knowingly operated without being registered. While this may reduce the level of culpability in some cases, for the purposes of maximum penalties, we are examining the worst class of

⁴⁹⁷ Crimes Act, s 150 “Everyone is liable to imprisonment for a term not exceeding 2 years who—(a) neglects to perform any duty imposed on him or her by law or undertaken by him or her with reference to the burial or cremation of any dead human body or human remains; or (b) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.”

offending behaviour. That could be, for example, a person who deliberately avoided registration because they knew that they would not reach the standards required.

- 14 We examined offences in analogous Acts of failing to be registered or licensed. We found a number of analogous offences, although there is considerable variation in their maximum penalties.

OFFENCES OF FAILING TO BE REGISTERED OR LICENSED		
Act	Provision	Maximum penalty
Immigration Advisers Licensing Act 2007, s 63	Providing immigration advice without being licensed	\$100,000 ⁴⁹⁸
Motor Vehicle Sales Act 2003, s 95	Carrying on business of motor vehicle trading without being registered	\$50,000 (individual) \$200,000 (company)
Real Estate Agents Act 2008, s 141	Carrying out real estate agency work without being licensed or exempt	\$40,000 (individual) \$100,000 (company)
Private Security Personnel and Private Investigators Act 2010, s 23	Not holding a licence while being one of the people who must hold a licence	\$40,000 (individual) \$60,000 (body corporate)
Secondhand Dealers and Pawnbrokers Act 2004, s 6(6)	Carrying on business as a secondhand dealer without holding a licence	\$20,000
Auctioneers Act 2013, s 24	Carrying on business as an auctioneer without being registered	\$10,000 (individual) \$30,000 (any other case)

- 15 We consider that the offence of failing to be registered as a funeral service provider is the key requirement of the proposed statutory regime for the funeral sector. This significance and the comparative level of maximum penalties found in similar statutes justify higher maximum penalties than we are suggesting for the other offences. We are suggesting that maximum fines of \$40,000 for an individual and \$60,000 for a body corporate would be appropriate. Of course, these penalties would be reserved for the most culpable offending producing the worst levels of harm.
- 16 In contrast, the other category 1 offences of breaching a duty and breaching the disclosure requirements should not be strict liability. We found the following analogous offences:

OFFENCES ANALOGOUS TO THE OTHER CATEGORY 1 OFFENCES		
Act	Provision	Maximum penalty
Food Act 2014, s 240	Breach of duty of operators of food businesses subject to national programme	\$50,000 (individual) \$200,000 (body corporate)
Motor Vehicle Sales Act 2003, s 116(d)	Failure to keep records of sale - infringement offence	\$2,000
Private Security Personnel and Private Investigators Act 2010, s 69	Employing a repossession employee or crowd controller without keeping the prescribed records	\$2,000
Secondhand Dealers and Pawnbrokers Act 2004, s 37	Failing to keep employee records	\$10,000
Auctioneers Act 2013, s 24(2)	Failing to comply with record-keeping obligations	\$10,000 (individual) \$30,000 (any other case)
Fair Trading Act 1986, s 40	Failure to comply with a consumer information standard	\$10,000 (individual) \$30,000 (body corporate)

- 17 These analogous offences provide a wide variety of fines, which may reflect varying levels of harm. Within these other category 1 offences, there is also a wide range of levels of harm. However, at the most significant end of the spectrum, a breach of these other offences could result in financial loss or significant distress to consumers. Maximum penalties of \$10,000 for individuals and \$30,000 for bodies corporate appear to be appropriate.

⁴⁹⁸ Alternatively, a maximum term of imprisonment of seven years can be imposed if the defendant knew he or she was required to be licensed.

Category 2 offences

- 18 Similar to the offences above, category 2 offences (disposing of or embalming a body before the cause of death is determined and cremating a body other than in an approved cremator) would usually only be committed by funeral directors. However, they could be committed by members of the public if a funeral director was not engaged. These offences are most likely to be the result of poor business practices when committed by funeral directors and of ignorance of the law when committed by the family of a bereaved person. However, the worst class of offending against this requirement would be the person who deliberately disposes of the body prior to determining the cause of death so as to cover up their responsibility for the death.
- 19 These offences may involve different levels of culpability and produce different levels of harm. The most serious offending could result in the concealing of responsibility for homicide. However, that level offending could be dealt with more appropriately under other criminal offences including section 150 of the Crimes Act. These category 2 offences, in contrast, are designed to capture less serious offending such as may result from poor business practices.
- 20 We did not find analogous offences in other New Zealand statutes, although we note that currently:
- a person who disposes of a body before the cause of death is determined is liable to a maximum fine of \$1,000;⁴⁹⁹ and
 - a person who cremates a body other than in a crematorium breaches the Cremation Regulations 1973 and so is liable to a maximum fine of \$1,000 or a maximum term of imprisonment of 12 months.⁵⁰⁰
- 21 We consider that these existing penalties are out of date and should be brought into line with the other maximum penalties in this Report, namely \$10,000 for an individual and \$30,000 for a body corporate.

Category 3 offences

- 22 The category 3 offences (removing a buried body without permission; burying a body other than in an approved cemetery; not treating a dead body with respect and failing to dispose of a body without undue delay) are all concerned with treating dead bodies with dignity. Similar to category 2 offences, the seriousness of this offending ranges from very significant criminal behaviour (surreptitiously disinterring a body from a cemetery for entertainment) to much lesser wrongful behaviour (for example, burying a body on private farmland without obtaining the necessary approvals). Again, the most significant offending could be prosecuted under section 150 of the Crimes Act. These offences, in contrast, are designed to capture lower-level offending that might not warrant a prison term, for example, burying a body on one's own farmland without obtaining the necessary approvals or storing a body for so long that it becomes offensive.
- 23 The harm captured by these offences may be emotional distress caused to the bereaved relatives of the deceased person or harm to the collective public interest in controlling the treatment of dead bodies.

⁴⁹⁹ Burial and Cremation Act, s 54AA.

⁵⁰⁰ Section 56. We note that, under that section, a breach of the Cremation Regulations 1973 makes a person liable to a fine not exceeding 500 pounds. That fine has not been updated to decimal currency, and therefore s 7 of the Decimal Currency Act 1964 applies.

- 24 There are no directly analogous offences on the statute book, although we note that there is an offence under the Human Tissues Act 2008 of collecting human tissue from a body without consent that carries a maximum fine of \$50,000 or one year's imprisonment.⁵⁰¹
- 25 Given that very serious behaviour captured by these offences should be prosecuted under section 150 of the Crimes Act and that these lower-level offences are designed to target people who are merely ignoring their legal obligations or being negligent about them, we consider that these new offences should only carry lower-level penalties so as to encourage prosecutions of this type of behaviour. Maximum penalties of \$10,000 for an individual and \$30,000 for a body corporate would provide adequate accountability and denunciation.

The category 4 offence

- 26 The category 4 offence (of exercising a power of a manager of a community cemetery for a purpose other than the management, administration or improvement of the cemetery) is specific to people who are managing community cemeteries (currently known as trustee cemeteries). These people are managing a cemetery for a community or public benefit. Community cemeteries are not private entities. Therefore, we have recommended in Appendix A that the new statute provides that community managers have a duty to exercise their management powers for the purpose of the management, administration or improvement of the cemetery. This makes it clear that managers of community cemeteries cannot use their position to their own advantage.
- 27 The harm that might arise from this type of offending is financial loss to the cemetery or unspecified harm to the public interest through a person obtaining an unfair advantage. Most community cemeteries do not deal in large sums of money, so any financial loss may be relatively small in real terms but have a significant impact on the future viability of the cemetery.
- 28 Similar to category 3 offences above, there are other offences on the statute book that might capture some of this behaviour, for example, theft by a person in a special relationship under the Crimes Act.⁵⁰² However, a conviction for that offence makes a person liable to imprisonment.⁵⁰³ We consider there is value in providing a lower-level offence carrying only a maximum fine of \$10,000.

501 Human Tissues Act 2008, s 22.

502 Crimes Act, s 220.

503 Section 223. Seven years' imprisonment if the value of the property exceeds \$1,000,; one year if the value is between \$500 and \$1,000; and three months if the value is less than \$500.

Appendix C

List of submitters

FINAL WORDS: DEATH AND CREMATION CERTIFICATION IN NEW ZEALAND NZLC IP23, 2011

Auckland Regional Public Health Service	Funeral Directors Association of New Zealand
Department of Internal Affairs: Births, Deaths and Marriages Policy Group	New Zealand Embalmers Association
Health Quality and Safety Commission New Zealand	Dunedin Community Law Centre
National Collections and Reporting, National Health Board: Ministry of Health	Judge A N MacLean, Chief Coroner
New Plymouth District Council	Ministry of Justice
New Zealand Police	Michael Chapman
Statistics New Zealand	Mary Dally
Regional Public Health, Greater Wellington	Pauline Exton
College of Intensive Care Medicine of Australia and New Zealand	Ingrid Lindsay
Department of Critical Care Medicine, Auckland City Hospital	Sally Raudon
Medical Council of New Zealand	Rosaleen Robertson
Medical Practitioners: Mercy Hospice Auckland	Shiva Sami
New Zealand Medical Association	Shyrrel Sischer-Saldivar
New Zealand Nurses Organisation	Dr Bob Anderson
Nursing Council of New Zealand	Dr John Armstrong
Nurse Maude Hospice and Palliative Care Service	Dr Roger Deacon
Palmerston North Women's Health Collective	Dr Ian Fulton
Sands New Zealand	Dr R L Graham
Royal New Zealand College of General Practitioners	Dr D Maplesden
Brethren Funeral Services	Dr Roderick Mulgan
Cremation Society of Canterbury	Michael Naera
	Dr Martin Sage
	Martin Searle
	Dr Branko Sijnja

THE LEGAL FRAMEWORK FOR BURIAL AND CREMATION IN NEW ZEALAND: A FIRST PRINCIPLES REVIEW NZLC IP34, 2013

The Office of Ethnic Affairs	Dannevirke Cancer Support Group
Isaac Wilson, Chief Judge of the Māori Land Court	Islamic Education and Dawah Trust
Human Rights Commission	Al Madinah School
Department of Internal Affairs	Al-Ikhlās Trust
Controller and Auditor-General	Ngāi Tahu Māori Law Centre
Ministry of Health	Consumer NZ
Ministry for Culture and Heritage	Māori Party
New Zealand Federation of Multicultural Councils Inc	Law for Change Waikato
Kia Piki Te Ora (Te Ao Hou Trust) Māori Suicide Prevention	International Centre for Children: Working Together Group
Tauranga Wesley Methodist Church Committee	Waitakere Indian Association
Historic Cemeteries Conservation Trust of New Zealand	Dunedin Community Law Centre/Dunedin Change
Palmerston North Women's Health Collective	Green Pet Burial Society
Rural Women New Zealand	New Zealand Nurses Organisation
Federation of Islamic Associations of New Zealand	New Zealand Archaeological Association
New Zealand Law Society	National Council of Women of New Zealand
Working Together Group (Muslim Funeral Service)	Ōtautahi Māori Women's Welfare League
Waikato Muslim Association	Bait-ul SadaQah's
Dannemora Al-Falah Trust	Sri Lankan Society of New Zealand
Al Hoda Islamic Trust	Umma Trust
Albanian Community	Christchurch Multicultural Council
New Lynn Islamic Trust	Kiwi Muslim Directory
Al-Manar Trust	Manawatu Muslims Association
Young Muslim Women's Association	Awqaf New Zealand
The Chinese Muslim Family Community	Public Issues Network of the Methodist Church of New Zealand
Haroun al Rashid Trust	The Society of Saint Pius X
Counties Manukau Grey Power	Waikato Indian Association Incorporated
	New Zealand Catholic Bishops Conference
	Community and Public Health (CDHB)

Te Whare Roimata Trust on behalf of the
Inner City East Older Persons' Project and the
Inner City East Older Persons' Network

Celebrants' Association of New Zealand Inc –
Tangata Kai Ārahi te Ture o Aotearoa

Heartheld.com

Grey Power NZ Federation Inc

Ny Sjaelland Fyrnsidu

Celebrant School

Fairway Resolution

Motueka Anglican Parish

Te Taha Māori o Te Haahi Weteriana o
Aotearoa

150 Memorial Wall Trust

National Spiritual Assembly of the Baha'is of
New Zealand

Anglican Church in Aotearoa

Tangi Research

New Zealand Master Monumental Masons
Association

Freda Taylor

John Squire

Newberrys Funeral Home

Evans Funeral Services Ltd

David Parker

Tararua Funeral Services Ltd

IC Mark Ltd

Go Willow!

The Natural Funeral Company

Janine Howard

With Our Loved Ones

Lamb & Hayward

Gillions Funeral Services

Dil's Funeral Services

New Zealand Independent Funeral Homes Ltd

Natural Burials

Abraham's Funeral Home

Battersby Funeral Services Ltd

Funeral Directors Association of New Zealand

Brethren Funeral Services

Pamela Lane-Parr

Campbell and Sons Funeral Services

Andrew Malcolm

Heritage Funeral Services Ltd

Living Legacies Ltd

Harbour City Funeral Home

Hope and Sons Ltd

Brad McAneney

Legacy Funeral Homes Ltd

Pellows Funeral Directors

Twentymans Funeral Services Ltd

Danny Langstraat

South Waikato Funeral Services Ltd

Cremation Society of Canterbury Ltd

Trent Barton

Peter Williams

Hamish Batchelor

New Zealand Embalmers Association

J Ngarewa Funeral Services

Bledisloe New Zealand Ltd

New Zealand Cemeteries and Crematoria
Collective

Te Rūnanga o Ngāi Tahu

Te Rūnanga Ngāti Whātua

Whanganui Tamaūpoko Link

Waipa District Council

Hamilton City Council

Southland District Council

Taupo District Council	Population Health/Waikato District Health Board
Upper Hutt City Council	
Environment Southland	New Plymouth District Council
Matamata Piako District Council	Ruapehu District Council
Public Health South, Southern District Health Board	Manawatu District Council
Rangitikei District Council	Tauranga City Council
Whakatane District Council	Sean O'Shea
Hauraki District Council	John De la Bere
Dunedin City Council	Sharon Evans
Whangarei District Council	Jan Ellis
Thames-Coromandel District Council	Edward Ashby
Kapiti Coast District Council	John Adam
Tasman District Council	Diane & Colin Sandbrook
Buller District Council	Dana Bradley
Chatham Islands Council	G & J Shirley
Horowhenua District Council	Hugh Mawson
Central Hawke's Bay District Council	Brian Clark
Auckland Council	Roger Youmans
Ashburton District Council	Paul Briggs
Central Otago District Council	Donald N Dempsey
Masterton District Council	Philip & Dorothy Tomlinson
Gisborne District Council	Barbara Mary Morris
Christchurch City Council	Fiona Mackay
South Waikato District Council	Francis Henry Day
Opotiki District Council	Henry John Hancock
Waimakariri District Council	Kathie Roberts
Porirua City Council	Robert Radley
Local Government New Zealand	Trevor Taurima
Wanganui District Council	Peter J Fahy
Auckland Regional Public Health Service	Ngāti Wharekokowai
Toi Te Ora – Public Health Service	Keith & Linda Askin
Regional Public Health	43A Tauranga Bucket Group
	Mal Ouston

Jo Morris
Sheila Neilson
Erin Whooley
Phillip Cottingham
Sharron Wooler
Rica Salamat
Robert Joseph Wehipeihana
Anthony Tele
Meg Christie
Leah McCurdy
William Miller
Jane Wickham
Charl Hirschfeld
Jacob Mcleay
Averil Martin
George Montgomery
Warwick Blair
Valletta Angela Tawhai
Doreen Anderson
Jenny Baker
Geoff Botherway
Stuart Batty
Barbara Grant
Viola Palmer
Karen Tilley
Hayley Latta
Michael Wolfram
Greg Brownless
Lynne Pope
Danuta Glendenning
Zela Charlton
Cherrie Wainui

Peter Laufkotter
Kit Howden
Michael Borden
Joanna Santa Barbara
Rhonwen Seager
Ken West MBE
Jane Stevens
Gerard Hulst
Jill Needham
Rosalie Wainwright
Mary Hayton
Julie Stewart
Richard Leney
Leigh Kennaway
Tim Jewell
Margaret Sagar
Ken Rose
Leigh Minards
Terry Snow
Johanna Kinvig
Broadbent & May Ltd
Anna Wiles
Toni Welsh
Colin Adams
Hazel Simpkin
Jake Overton
Tracy Collins
Dorothy Macedo
Lloyd Gleeson
Andrew Broughton
Benjamin Basevi
Enid Ellis

Kaye Shannon
Carolyn Bond
Warwick Blair
Lance Gravatt
Michelle Mclean
Marta Swanepoel
Yvette Rigby
Hugh Cave
David Philps Eade
David Chilvers
Alan and Lorraine Mckenzie
Geoff Canham
Katerina Seligman
Linda Morley
Alan McArdle
Kevin Hague
Rob Nannestad
Solomon Tipene
Torere Reserves Trust
Jim Consedine
Stewart Lindsay
Gail McJorow
Jill Schroeder
June Foster-Campbell

