

**GOVERNMENT RESPONSE TO
LAW COMMISSION REPORT ON
BURIALS AND CREMATIONS**

Presented to the House of Representatives

INTRODUCTION

1. The Government has carefully considered the Law Commission's report on burials and cremations.
2. The Government responds to the report in accordance with Cabinet Office circular CO (09) 1, entitled Law Commission: Processes for Setting the Work Programme and Government Response to Reports.
3. The Government agrees with a number of the Law Commission's recommendations but has identified the need for further policy work on other recommendations. The Government priority for this further work, relative to other higher priorities, means that significant progress on this work is unlikely to be made before the end of 2016.

EXECUTIVE SUMMARY

4. The Law Commission submitted its report to Hon. Amy Adams, the Minister Responsible for the Law Commission, on 23 October 2015. The Law Commission made 127 recommendations to improve the law in four areas: cause of death certification, cemeteries and crematoria, the funeral sector, and burial decisions.
5. The Law Commission recommends replacing the outdated Burial and Cremation Act 1964 (the Act) with a new statute to modernise the law around deaths, burials and cremations; to improve the process for determining, certifying and notifying deaths; and to ensure the law around burials and cremations better reflects the wishes of New Zealanders.
6. The Government supports introducing a new statute in principle, particularly when viewed in light of the cross-over of some parts of the Act and the more modern Resource Management Act 1991 and the Local Government Act 2002. However, further policy work is required on the detail of any proposed legislation, particularly on its potential impact on local authorities, the funeral services sector and the jurisdiction of the courts.
7. Further work is required before a Government position can be reached on the report's recommendations to regulate the funeral services industry. The Government is not yet convinced that a sufficiently strong case has been made about the need for regulation, and the Government will therefore undertake further work to assess this.
8. Further work is required before a Government position can be reached on the report's recommendations to introduce new rules around the implementation of burial decisions and funeral arrangements, changing court jurisdictions to allow the Family Court and Maori Land Court to hear disputes rather than the High Court, and to create new offences relating to the disrespectful treatment of dead bodies and unlawful burial.

BACKGROUND

9. The Act provides a framework for the management of cemeteries, regulates the registration 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. In addition to the Act, the Resource Management Act 1991, the Local Government Act 2002 and case law provide the framework for managing deaths, burials and cremations in New Zealand.

LAW COMMISSION REVIEW

10. The Law Commission has undertaken a comprehensive review of the Act as well as looking more broadly at death, burial and cremation law in New Zealand. As part of its review, the Law Commission held a series of public meetings throughout New Zealand, including meetings in a number of provincial centres with a significant Māori population where the practices of traditional tangihanga are well adhered to by the Māori community. Overall, over 260 submissions were received from a range of groups, in addition to series of meetings with local government, religious and community groups.
11. The Law Commission concludes that the current legislative framework is out-of-date and does not reflect contemporary New Zealand. The report recommends replacing the Act with a new statute that would modernise the administration of burials and cremations, allowing the administration to better reflect the wishes of New Zealanders. The report also notes that a new statute would remove duplication between the Act and other legislation.
12. The report makes 127 recommendations across the broad areas of:
 - a. cause of death certification,
 - b. cemeteries and crematoria,
 - c. the funeral services sector, and
 - d. burial decisions.

GOVERNMENT RESPONSE

13. The Government wishes to thank the Law Commission for the report and for its work throughout its comprehensive review of burials and cremations law and the Act.
14. The Law Commission is to be congratulated for its thoughtful and thorough review. The importance of this work to many New Zealanders can be seen in the more than 250 submissions received from Government agencies, councils, industry members, organisations, religious groups and individuals.
15. The Government response on each group of recommendations is outlined below. In general, the Government has no major disagreements with the recommendations set out in the report. However, further policy work and consultation is required on specific elements of the recommendations to establish the scope and severity of the issues identified by the Law Commission before final positions can be reached on the extent and nature of the Government response to the recommendations.

New statute for burial, cremation and funerals

Law Commission Recommendations

16. The Law Commission concludes that the current legislative framework is out-of-date and does not reflect contemporary New Zealand. The report recommends that the Act should be replaced by a new statute for burial, cremations and funerals to be administered by the Department of Internal Affairs. However, provisions relating to the determination of the cause of death should be administered by the Ministry of Health.

Government Response

17. The Government agrees in principle with the Law Commission that the Act is outdated, overly prescriptive and overlaps with other legislation such as the Local Government Act 2002 and the Resource Management Act 1991.
18. The Government agrees that provisions relating to the determination of the cause of death could be transferred to a new statute administered by the Ministry of Health if the Act was repealed. Ministry of Health officials have been asked by Cabinet to report back in later in 2016 on options for implementing these recommendations.
19. However, further work is required to assess whether the Department of Internal Affairs (DIA) is the most appropriate agency to assume responsibility for the administration of burial and cremation legislation, and to assess whether a single new statute is the most appropriate mechanism to give effect to the recommendations. In addition, it may be possible to progress a number of the recommendations by amendment to existing legislation or by splitting the recommendations across multiple new statutes, each administered by different agencies. Officials from the Department of Internal Affairs and the Ministry of Health have been instructed to undertake further work on the feasibility of these recommendations and the potential implications of their implementation.

Death determination, cause of death certification and notification

Law Commission Recommendations

20. The report notes that the current process for determining the cause of death requires a plethora of documents to be submitted, some of which are unnecessary. The report recommends implementing a streamlined online process for death determination, certification and notification that would be managed by the Ministry of Health.
21. The Law Commission makes a number of recommendations to clarify and improve the process for determining the cause of death. The Law Commission notes that there is no system currently in place to address the high rate of error in the determinations of cause of death in New Zealand and therefore recommends establishing a national audit system, managed by the Ministry of Health, to address this issue.

Government Response

22. The Government agrees in principle that a new statute could be developed to streamline and clarify the processes for death determination, certification and notification.
23. The proposed changes to death determination, certification, and notification take a pragmatic approach to addressing issues in current practice. The Government supports the establishment of an online cause of death certification system and the introduction of cause of death auditing and training. The proposed changes would help improve the quality of the clinical information that is used to collate national cause of death statistics which are widely used in health research and for mortality review, as well as improving the speed and accuracy of death information provided to the Registrar General. They would also facilitate the monitoring of individual doctors' practices around cause of death certification, where criminal activity is suspected.

24. However, further policy work and consultation is required to confirm the detail of any potential legislation. Officials from the Ministry of Health have been requested to undertake this work and report back as Government priorities allow.

Cemeteries and crematoria

Law Commission Recommendations

25. The report recommends that all land in which bodies are buried should be deemed to be a cemetery. The report recommends placing new obligations on cemetery managers, who would either be the land owner, community managers, or the local authority. The report also recommends that local authorities be given a range of additional obligations and powers in relation to death and respectful disposal of bodies within their district. The proposed obligations on local authorities would include:
- providing facilities for the disposal of bodies (such as cemeteries or crematoria) if there is insufficient provision for disposal of bodies in the district
 - having a duty to dispose of a body (where there is no family member or other person to take responsibility of the deceased)
 - keeping a formal register of cemetery land
 - a power to inspect cemetery land where a manager may not be fulfilling obligations, and
 - an obligation to take over management of failing cemeteries.
26. The report also recommends allowing local authorities to approve the establishment of new crematoria through normal resource consent processes rather than requiring the separate authorisation of the Minister of Health that the current Act stipulates.
27. The Commission notes that the current burial framework does not adequately cater to New Zealand's increasingly diverse cultural needs and recommends that any person or group should be able to apply to the local authority to establish a cemetery. The report recommends requiring non-local authority cemetery managers to make covenants with local authorities to agree how the land would be managed, as well as recommending a mechanism to manage cemeteries run by a group of community volunteers. As part of these recommendations, the report proposes a process for updating the certificate of title to note there are bodies buried on the land and the details of the covenant.
28. There is currently a prohibition on burying a body in any land that is not a cemetery, a denominational burial ground, a private burial ground or Maori burial ground if there is such a place within 32 kilometres of the place of death where the body has been taken for burial. The Report recommends updating this by making it an offence to knowingly bury a body in any land that is not an approved cemetery. The report further recommends the introduction of a defence under which the defendant is not liable if they can show that it was impractical to transport the body to an approved cemetery and that the body was buried respectfully.
29. The Commission notes that the current burial framework does not adequately cater to New Zealand's increasingly diverse cultural needs and recommends that any person or group should be able to apply to the local authority to establish a cemetery.

30. The Commission recommends that the disinterment of a body remains an offence without appropriate consent, but recommends providing for cemetery managers (or, in certain cases, the Environment Court or High Court) to grant this consent instead of the Minister of Health.

Government Response

31. The Government agrees in principle that it may be appropriate for local authorities to manage local burial and cremation matters, as local authorities will understand, and be more responsive to, the needs of its community than the Ministry of Health. The Government also supports the simplification of matters such as approvals for disinterments and burials on private land.
32. However, the Government notes that these proposed changes will place new obligations on local authorities who have not been consulted on these changes outside of the Law Commission review and further consultation would be needed during the policy development process.
33. Further, the Government does not fully agree that the Environment Court is the appropriate body to make land use, disinterment, and other decisions in the case of local authority cemeteries (such as the removal of monuments). Further policy work would need to be undertaken to consider the development of an alternative decision-making/approval framework for disinterments and inconsistent uses of local authority cemetery land. There are concerns that the report's proposed approach would lead to discrepancies between the treatment of cemeteries operated by local authorities and those operated by others. There are inconsistencies between this proposed framework and the recommendations on decisions relating to non-local authority cemeteries, which would be a function of local authorities.
34. Regarding the Law Commission's recommendation that the Resource Management Act 1991 should not apply to applications for burial on private land, the Government notes that further consideration is required of the Law Commission's finding that the resource consent process would be too onerous for private land owners (cemetery managers). Resource consent is required for land uses of much lower public interest such as building fencing or decking on a private property, depending on District Plan rules, so the case for exempting private burial applications would need to be considered closely. A potential alternative approach could be to allow local authorities to make burials a discretionary or limited discretionary activity in their District Plans.
35. Officials from the Department of Internal Affairs have been requested to undertake further work on this area and to report back as Government priorities allow.

Regulation of the funeral sector

Law Commission Recommendations

36. The report recommends that the funeral services sector should be regulated through the proposed new statute for death, burial and cremation. The recommendations include requiring an applicant for registration to provide funeral services 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. The report also recommends that the statute impose a number of duties on the managers of funeral service businesses.

37. The report also notes that there was widespread concern about the communication of funeral costs and recommends that funeral service providers should be required to publish and make available a price list of all the funeral goods and services it provides.
38. The report also suggests creating new statutory duties with respect to the disposal of bodies; specifically that the new statute should create a duty on every person to treat any human body or human remains with respect, and a requirement to dispose of the body 'without undue delay, taking into account the mourning needs of the bereaved and any ceremonies to be performed'.

Government Response

39. More policy work is required before the Government can reach a position on the Law Commission's recommendations for the regulation of the funeral services sector. In particular, a thorough examination of the current situation would be required to assess whether there is a strong case for regulation in the sector, or whether other options such co-regulation or industry-led self-regulation could be more appropriate. The Law Commission indicates that limited evidence of widespread problems of abuse within the funeral sector was found during its review, noting that the majority of those acting within the funeral sector do so with integrity and high standards, but supports regulating the industry due to concerns uncovered during its review.
40. The Government notes that the imposition of an occupational regulation regime is a significant step that would impose additional costs on service providers and, ultimately, consumers. Further work is therefore required to ascertain the exact nature and extent of any problem and assess the options, both regulatory and non-regulatory, for addressing that problem. Officials have been requested to undertake further work and report back to Cabinet as Government priorities allow.

Burial Decisions

Law Commission Recommendations

41. There are a number of powers and duties relating to decision making after a death, but these are generally found in common law rather than statute. The report proposes introducing a new statutory framework for burial decisions that would explicitly consider the expressed wishes of the deceased, their religious and cultural beliefs (including specifically making provision for tikanga Maori practices), and legal certainty around burial decisions (as opposed to relying on case law).
42. To give effect to this, the Commission suggests that a proposed 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. The Commission recommends that the executor of the will would continue to have the power and duty to make decisions about the body and about funeral arrangements if the family does not agree, as well as administering the deceased person's property. However the Commission further recommends that this rule should be subject to the overriding right of any deceased's representative appointed by the deceased person before their death.
43. The report notes that, while the proposed statute may alleviate uncertainty and decrease the likelihood of disputes, the courts may still need to intervene. The report suggests that the Family Court and the Maori Land Court should be able to hear cases in addition to the High Court.

Government Response

44. More policy work is required before the Government can reach a position on the Law Commission recommendations about a new legislative framework for burial decisions. Legislation on how burial decisions are made and upheld would have implications for court jurisdictions and the impacts need to be carefully assessed before a final position can be reached.
45. Officials from the Ministry of Justice have been requested to undertake further work on this area and to report back as Government priorities allow.

Conclusion

46. The Government supports introducing a new statute governing death, burial and cremation in principle, particularly when viewed in light of the cross-over between the Act and the more modern Resource Management Act 1991 and the Local Government Act 2002. However, further policy work and consultation is required on the detail of any proposed legislation, particularly on its potential impact on local authorities, the funeral services sector and the jurisdiction of the courts.
47. Further policy work and consultation is required before a position can be reached on the report's recommendations to regulate the funeral services industry. There is limited evidence of abuses or issues that would indicate that the industry requires regulation and the Government will therefore undertake further work to assess this.
48. Further policy work and consultation is required before a position can be reached on the report's recommendations to introduce new rules around the implementation of burial decisions and funeral arrangements, changing court jurisdictions to allow the Family Court and Maori Land Court to hear disputes rather than the High Court, and to create new offences relating to the disrespectful treatment of dead bodies and unlawful burial.