



Submission to the Māori Affairs Select Committee Inquiry into Whānau Access to and Management of Tūpāpaku

20 June 2016

Contact Person:

Janet Anderson-Bidois

Chief Legal Adviser

Janetab@hrc.co.nz

NEW ZEALAND HUMAN RIGHTS COMMISSION SUBMISSION TO THE MĀORI AFFAIRS
SELECT COMMITTEE INQUIRY INTO WHĀNAU ACCESS TO AND MANAGEMENT OF
TŪPĀPAKU

Summary of Key Recommendations

1. The Human Rights Commission ('the Commission') welcomes the opportunity to participate in this important inquiry. The manner in which a community cares for deceased individuals, expresses grief and supports the bereaved is core to cultural identity and raises important human rights considerations. These issues affect all New Zealanders.
2. The Commission makes the following key recommendations to the Committee:
 - a. Individuals and communities should be supported to express their cultural, ethnic and religious beliefs in relation to death and bereavement in their preferred manner.***
 - b. Law, policy and practice should only interfere with the expression of beliefs at the time of death to the extent required to protect other clear interests, such as public health and safety.¹***
 - c. Government agencies should be flexible and inclusive in the manner in which they apply the relevant law, policy and practice in order to give full effect to the above principles. Relevant employees should receive appropriate training about cultural and religious differences in approaches to death.***
3. These matters are discussed further below.

The Relevant Human Rights

4. The period surrounding death engages a number of important human rights. The relevant human rights provisions are set out below in some detail to demonstrate the

¹ Note that this recommendation reflects the findings of the Law Commission in its October 2013 publication 'The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review'

significance of the human rights framework to the current inquiry and the importance of adopting a human rights consistent approach.

5. Section 15 of the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights') states that every person has the right to manifest their religion or belief in a number of ways. Section 20 of the Act provides that a person who belongs to an ethnic, religious or linguistic minority shall not be denied the rights, in community with other members of that minority, to enjoy that culture or profess or practice the religion. This would include the right to undertake funeral and burial activities consistently with their beliefs, subject to the usual 'reasonable limitation' provisions of the Bill of Rights.
6. Articles 18,19 and 27 of the International Covenant on Civil and Political Rights, to which New Zealand is a signatory, cover the freedom to manifest religion and belief, freedom of expression and the right of minorities to enjoy their own culture and profess or practice their own religion.
7. Importantly, these rights are also reflected in the United Nations Declaration on the Rights of Indigenous People ('UNDRIP'). Specific provisions of the UNDRIP go further. Article 12 recognises the importance of access to, and repatriation of, human remains through fair, transparent and effective mechanisms developed in conjunction with indigenous people. The partnership between the Crown and Māori, established through the Treaty of Waitangi is also essential when considering the adequacy of current law, policy and practice and any recommendation for change. The regulatory framework should recognise the rights of tangata whenua to exercise their cultural practices (which are seen as taonga) and their tikanga in relation to death and dying.
8. In a broader context, it is clear that cultural identification, and expression of this, is a core component of human dignity.² Respect for human dignity is the cornerstone of the Universal Declaration of Human Rights.
9. In practice, these requirements and expectations combine to provide a strong framework for respecting individual, family and community preferences at the time of death. This is of particular relevance to Māori and to members of the Muslim and Jewish communities who have established cultural and religious rites and customs associated with death.

² *Takamore v Clarke* [2012] NZSC 116 at para 12, per Elias CJ,

- 10. The Commission is of the view that individuals and communities should be supported to express their cultural, ethnic and religious beliefs in relation to death and bereavement in their preferred manner.**

Issues of Concern

11. The Commission's view is that representatives of cultural and ethnic communities who have direct experience of these matters are best placed to provide evidence of areas that are not currently working well. However, we highlight below a number of specific issues of concern that have been brought to our attention.
12. Delay in obtaining release of tūpāpaku can be a source of significant distress to whānau and friends. The requirement for someone to stay with the deceased after death and/or to complete funeral rites within a certain time is common to many cultures and religions. It is essential that the law supports the early release and return of tūpāpaku to family. Although there have been some legislative changes in this area, further refinement of the Coroner's Act and provision of sufficient resources to ensure that post mortems (where absolutely necessary) and other regulatory activities take place as quickly as possible are strongly supported by the Commission.
13. The ability to maintain proximity to the deceased and undertake traditional cultural activities is a core feature of many religions and ethnicities. Further practical steps are required to support and accommodate the observances, practices and traditions of the diverse range of religious and ethnic communities in this respect.
14. Delay in obtaining certification of death has also been identified to us as a cause of delay and distress. The Commission understands that the application of section 46 B of the Burial and Cremation Act 1964 can be particularly problematic. This provision relates to the issuing of death certificates by the attending doctor. If the attending doctor is unavailable, in certain circumstances another doctor can issue a death certificate. However, anecdotes suggest that medical practitioners can be extremely reluctant to exercise the ability to act in place of an "unavailable" attending doctor, leading to significant delays (sometimes days) in release of bodies back to family members or to funeral directors. Although it is accepted that regulations relating to certification of death must be sufficiently robust to deter wrongdoing, other options should be explored for dealing with these situations to prevent avoidable distress to family members. For example, the establishment of a general coronial medical

officer who can certify death (if appropriate) in the absence of the attending doctor would be an option to consider.

15. The Commission is also aware of significant concerns regarding the disposal of body fluids following embalming procedures and other related activities. For example, the disposal of body fluids into domestic wastewater systems following embalming procedures and the appropriate disposition of foetal tissue following miscarriage are areas of concern that have been raised with the Commission. The importance of understanding the distinction between 'tapu' and 'noa' has also been stressed. National guidelines would assist funeral directors and health practitioners to better understand the cultural imperatives in this area and lead to improved practices.
16. A further area of complexity is the appropriate disposal of human ashes following cremation. This is an area where different cultural traditions and expectations can clash. The Hindu tradition requires the release of ashes and tributes into waterways. This would be at odds with the Māori tikanga and the prohibition on mixing human remains with waterways. One way of addressing this issue might be to have dedicated areas set aside for the Hindu community to observe this practice.
17. **The Commission's view is that law, policy and practice should only interfere with the expression of beliefs at the time of death to the extent required to protect other clear interests, such as public health and safety.**³ There are a number of areas where practical improvements are required and sometimes it will be necessary to balance different cultural views and expectations.

Need for Government Agencies to be Flexible, Inclusive and Responsive

18. In addition to the specific legislative and policy framework, the extent to which human rights are respected and promoted will depend to a large degree on the knowledge and willingness of individual employees and agents of the state. Without a sound and robust understanding of the cultural imperatives behind certain requests or behaviour, the ability of agencies such as the police, the Coroner's office, District Health Board, hospices etc to give effect to these requirements will be limited. A high degree of cultural intelligence is required and an understanding of world views that

³ Note that this recommendation reflects the findings of the Law Commission in its October 2013 publication '*The Legal Framework for Burial and Cremation in New Zealand: A First Principles Review*'

might be quite different to those of the person 'on the front line' dealing with families and making decisions.

19. With the increasing diversity of the New Zealand community, it is important that employees in these key public agencies have sufficient skills and knowledge to carry out their responsibilities in an appropriate and culturally acceptable manner. This should also empower them to appropriately exercise discretion and common sense to ensure that the needs of bereaved families can be met to the greatest extent possible in the particular circumstances within the existing regulatory framework. Having access to a Taumata Kaumatua when Kaimahi are unsure of appropriate protocol/tikanga could also assist in this regard.

20. **The Commission believes that Government agencies should be flexible and inclusive in the manner in which they apply relevant law, policy and practice in order to accommodate religious and cultural preferences to the greatest extent possible. Relevant employees should receive appropriate training about cultural and religious differences in approaches to death.**

21. The Commission wishes to be heard by the Committee in relation to this submission.

Nga mihi

Karen Johansen
Indigenous Rights Commissioner
Kaihautū

Dame Susan Devoy
Race Relations Commissioner
Kaihautū Whakawhanaunga-ā-Iwi



