

Government Response to Reports of the Law Commission: *Presentation of New Zealand Statute Law and Review of the Statutes Drafting and Compilation Act 1920*

Introduction

1. The Government welcomes the Law Commission's reports: *Presentation of New Zealand Statute Law* (the statutes report) and *Review of the Statutes Drafting and Compilation Act 1920* (the 1920 Act report). They are balanced, thorough, and comprehensive reviews of the accessibility of New Zealand statute law and the structure and functions of the Parliamentary Counsel Office (PCO).
2. The Government makes a combined response to the reports in accordance with Cabinet Office Circular CO (09) 1.

Background

3. In 2006, the Law Commission agreed to undertake a project, jointly with PCO, to investigate and recommend methods for making New Zealand statute law more accessible. The terms of reference for the project required the Law Commission, in conjunction with PCO, to investigate and recommend methods of making New Zealand statute law more accessible by the introduction of a more systematic method of classifying or indexing Acts of Parliament, or doing both. This included investigating statutory classification or indexing initiatives in other jurisdictions, and reviewing electronic subject-based indexing and searching methods. The statutes report was tabled in Parliament on 16 December 2008. It makes 23 recommendations in total.
4. In October 2007, the Law Commission also began a review of the Statutes Drafting and Compilation Act 1920, which establishes PCO and sets out its structure and functions. The 1920 Act report was tabled in the House of Representatives on 4 June 2009. It contains 13 recommendations.
5. Cabinet Office Circular CO (09) 1 requires the Government to respond to a Law Commission report within 120 days of the presentation of the report to the House. The Government presented an interim response to the statutes report to Parliament on 29 July 2009, which confirmed that it would respond in full to that report and the 1920 Act report by 20 November 2009.

Law Commission Reports and Government Response

The statutes report

6. The report deals with access to statute law, focusing on availability, navigability, and clarity. The recommendations are summarised on pages 10 and 11 of the report.

Recommendation 1: hard copies of Acts

7. The Law Commission recommends that hard copy versions of Acts should continue to be produced and made available to the public at a reasonable cost.

Response

8. The Government agrees that hard copies of Acts should continue to be produced, and that the State subsidy, which allows them to be made available at a reasonable cost, should also continue. This should be the case until the content of the New Zealand Legislation website acquires official status, thereby placing it on an equal footing with hard copies of legislation. This will occur once the accuracy of the entire legislative database has been checked or “officialised”, a process that is expected to be completed by the end of 2012. At that point, the need for a continued State subsidy for hard copy versions should be reviewed.

Recommendations 2 to 4: digital capture of repealed statutes

9. The Law Commission recommends that all repealed Acts back to 1841 should be captured digitally as soon as possible and made publicly available online, with consideration being given to capturing the statutes in a searchable format that can be integrated into the New Zealand Legislation website.

Response

10. The repealed statutes are an important component of New Zealand’s history and are used in legal argument in court and before the Waitangi Tribunal. PCO has recently scanned, into PDF format, the most vulnerable statute books of the 19th century, the so-called “shattering statutes” of 1888-1894 (of which 6 public, 42 local and 4 private Acts are still in force). These statutes, which in hard copy extend over 2976 pages, can now be consulted on the Internet, on a website separate from the New Zealand Legislation website.
11. The Government notes that there are a number of options for implementing the Law Commission’s recommendations, either in whole or in part, and that some options are more costly than others.
12. The Government agrees that all of the repealed statutes should be preserved in electronic format, and authorises PCO to seek funding for a project that will allow PCO to outsource conversion and digitisation into PDF format, and to host the content on a website that is linked to the New Zealand Legislation website.

Recommendations 5 to 9: subject index

13. The Law Commission proposes that the Government should arrange for an index to New Zealand’s Acts to be produced in both paper and electronic forms. The index should be continually updated in electronic format, and a hard copy version produced every two years. The Law Commission suggests

that the Government consider PCO producing an index, or tendering and contracting the project out.

Response

14. The Government does not agree with this recommendation.
15. The New Zealand Legislation website is updated on a daily basis and is fully searchable. PCO has an ongoing programme aimed at maintaining and improving the systems underlying the Legislation website. PCO is currently consulting with users of the website to improve the search functions and the access provided by the website to the legislation it contains. Electronic searching technology is constantly improving. All the advantages provided by electronic access to legislation apply equally to the on-demand creation of an electronic index by a search engine. A good search engine on an Internet site with data that is properly cross-referenced can provide a more complete set of results that are up to date and can be printed by the searcher if desired.
16. There is no evidence of significant public demand for a subject index. Hard copy indexes are out of date before they are published because of the rate of production of new and amending legislation.
17. The cost implications of implementing the Law Commission's proposal are significant, depending on the nature of the method chosen.
18. As an alternative, the Government proposes to instruct PCO to continue to incrementally enhance the search and browsing capability of the New Zealand Legislation website as part of its already funded maintenance programme of work for the New Zealand Legislation system.
19. The provision of an index could be re-examined at a future date if there is an improvement in the Government's fiscal position. Any recommendation would take into account the improvements made to the search and browsing capabilities of the New Zealand Legislation website, any evidence of significant public demand, and the willingness of private sector providers to enter into satisfactory arrangements.

Recommendations 10 to 14: reprints

20. PCO currently undertakes an annual programme of reprinting New Zealand statutes in hard copy with all amendments incorporated. The Law Commission proposes that PCO should continue to reprint individual statutes in hard copy and make the reprinted statutes available on a print-on-demand basis without State subsidy.
21. When reprinting statutes, in both electronic format and hard copy, PCO should have enhanced powers to correct errors and make editorial changes. These changes should include replacement of gender-specific language, renumbering of provisions, and the correction of typographical and other similar errors.

Response

22. The Government agrees that until the New Zealand Legislation website is accorded official status, hard copy versions of reprints should continue to be available on a subsidised basis. However, once the New Zealand Legislation website acquires official status, State subsidy should cease and hard copy reprints should be made available to those who want them on a user-pays, print-on-demand basis.
23. The Government also agrees that the enhanced editorial powers recommended by the Law Commission should be available to PCO when compiling reprints, as this will contribute to the comprehensibility of statutes. The current process used to correct minor errors (the Statutes Amendment Bill) is resource and time intensive for Ministers, departments, and Parliament. There are precedents for introducing reprinting powers of this kind in the Australian States of Queensland, South Australia, and Tasmania, and also in Ontario, without adverse consequences.

Recommendations 15 to 20: revision

24. Revision is the term used by the Law Commission to describe the process of re-enactment of earlier law. The process involves redrafting either a single Act, or a combination of several Acts, the aim being to make the law more accessible. It is the Law Commission's view that PCO should undertake a triennial programme of statute revision, the aim of which is to make the statutes more accessible without changing their substance. PCO should have statutory powers to alter the wording, order, and placement of the provisions subject to revision. When a revision is complete, it should be certified by a committee of senior legal office holders as changing only the presentation of the law, and not its meaning or spirit. The revision Bill, once certified, should be presented to Parliament by the Attorney-General and passed by a streamlined parliamentary process. The duty to undertake the programme, and the process for passing revision Bills, should be set out in statute.

Response

25. The Government agrees in part with the Law Commission's recommendations. There should be a statutory requirement to carry out a programme of revision. The contents of the programme would be settled by Ministers. The size of the programme would depend on the availability of resources to PCO and the administering departments. The Attorney-General would then have discretion as to whether the certified revision Bill should be introduced, rather than a duty, as recommended in the statutes report. While there should be statutory provision for a revision programme, the way in which revision Bills progress through Parliament should not be set out in statute. The changes to the House of Representatives' legislative procedures can be achieved by amending Standing Orders. This will allow for a more flexible approach to the timing of the passage of Bills and amendments that involve small policy changes (which would not be possible if the Law Commission's recommendation was accepted in full).

Recommendation 21: replacement of amended Acts

26. The Law Commission invites those responsible for the preparation of legislation to note that it is desirable that, if a proposal for amending an Act makes substantial and far-reaching changes to the Act, the Act should generally be repealed and completely replaced.

Response

27. The Government agrees that the replacement of an Act may be desirable in cases where there have been numerous amendments or where they are proposed. However, this is resource intensive and, as a result, may not be possible in every case where it would be desirable.

Recommendation 22: codification

28. The Law Commission notes that the prospect of codification should be considered at such time as a programme of revision has been completed or nearly completed.

Response

29. The Government agrees that codification would have to wait until there had been a complete, or near complete, programme of revision of the whole statute book.

Recommendation 23: Legislation Act

30. The Law Commission recommends that there should be a new Legislation Act combining the provisions of the Interpretation Act 1999, the Acts and Regulations Publication Act 1989, the Regulations (Disallowance) Act 1989, and the Statutes Drafting and Compilation Act 1920 (or its modern equivalent), and containing new provisions to give effect to any remaining recommendations contained in the report that require legislative change.

Response

31. The Government proposes that a new Legislation Bill should replace and amend all of the Acts mentioned above, except for the Interpretation Act 1999, and implement those changes recommended above that require further legislation.
32. The Government does not agree that the Interpretation Act 1999 should be re-enacted. It is the Government's view that that Act is not capable of a simple re-enactment, and should be subject to a review of the underlying policy. There is a growing body of case law on the Act, and the Act should be reviewed in light of that case law with a view to making any necessary

improvements. Changes should only be made after full consultation with legal practitioners and Judges.

33. The Government notes that the Interpretation Act 1999 is of a somewhat different character from the other Acts mentioned above (as its primary emphasis is the interpretation of legislation, rather than procedural or publishing requirements).

The 1920 Act report

34. This report reviews the statute that establishes PCO and sets out its functions. It considers questions such as the legal status and functions of PCO, and whether it should remain under the Attorney-General's control. The recommendations are summarised on pages 28 and 29 of the report.
35. The recommendations can be summarised as follows:
 - (a) PCO should remain under the control of the Attorney-General:
 - (b) PCO should remain outside the core public service:
 - (c) the Chief Parliamentary Counsel should be appointed by the Governor-General for a fixed term:
 - (d) other Parliamentary Counsel should be appointed by the Chief Parliamentary Counsel:
 - (e) the legislation should list the functions of PCO:
 - (f) one of the stated purposes of the legislation should be to facilitate legislation of high quality:
 - (g) the Government should consider moving the responsibility for tax law drafting to PCO (from IRD, where it is currently).
36. The Government accepts all of the Law Commission's recommendations as summarised above, but records the outcome of its consideration of the recommendation mentioned in paragraph 35(g) in paragraph 38.
37. IRD has its own tax law drafting unit.
38. Rather than leaving things as they are, or moving tax law drafting to PCO, the Government favours a third option. This is to retain a separate tax drafting unit within the IRD at least for the foreseeable future, while encouraging closer interaction between PCO and the IRD drafting unit, and providing more diverse and shared work experiences for drafters. In the Government's view, this option is most likely to ensure that tax drafting arrangements are consistent with achieving whole of Government objectives, minimising fiscal and other risks to the Crown, and it builds on, rather than undermines, the strength of the existing arrangements.