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LAW·COMMISSION  
TE·AKA·MATUA·O·TE·TURE

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**BRIEFING PAPER**  
**FOR THE MINISTER RESPONSIBLE**  
**FOR THE LAW COMMISSION**

**NOVEMBER 2008**

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## **A. Summary**

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1. This briefing paper outlines what the Law Commission does and why it exists, introduces the Commissioners and staff, and describes the Commission's current activities. It also identifies those issues that would benefit from early consideration by government, namely:
  - Law Commission reports awaiting Cabinet consideration;
  - Revival of other Parliamentary business; and
  - Sentencing and parole reforms.
  
2. It is envisaged the Minister will require more detailed briefing on aspects of the Commission's work. Some of the detail is contained in Appendices to this paper. The Commission has a large number of projects and the features of each can be dealt with only briefly in a paper of this sort. The Commission stands ready to brief the Minister in detail on any aspects of its work whenever and in whatever depth is required.

## **B. Introduction to the Law Commission**

### **What the Law Commission does**

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3. The Law Commission is an independent Crown Entity governed by the Law Commission Act 1985 and the Crown Entities Act 2004.
4. The purpose of the Law Commission is to promote the systematic review, reform and development of the law of New Zealand. The functions of the Commission are set out in section 5 of the Law Commission Act 1985:
  - (1) The principal functions of the Commission are—
    - (a) To take and keep under review in a systematic way the law of New Zealand;
    - (b) To make recommendations for the reform and development of the law of New Zealand;
    - (c) To advise on the review of any aspect of the law of New Zealand conducted by any Government department or organisation (as defined in section 8(2) of this Act) and on proposals made as a result of the review;
    - (d) To advise the Minister of Justice and the responsible Minister on ways in which the law of New Zealand can be made as understandable and accessible as is practicable.
  - (2) In making its recommendations, the Commission—
    - (a) Shall take into account te ao Māori (the Māori dimension) and shall also give consideration to the multicultural character of New Zealand society; and
    - (b) Shall have regard to the desirability of simplifying the expression and content of the law, as far as that is practicable.
  - (3) Except as expressly provided otherwise in this or any other Act, the Commission must act independently in performing its statutory functions and duties, and exercising its statutory powers under—
    - (a) this Act; and
    - (b) any other Act that expressly provides for the functions, powers, or duties of the Commission (other than the Crown Entities Act 2004).
5. The Commission's core task lies in providing law reform advice to Government. As Sir Ivor Richardson, the retired President of the Court of Appeal, once said,

the Law Commission "... is the statutory equivalent of a semi-permanent Royal Commission with a roving function ...".<sup>1</sup>

6. The Commission's statutory functions can be divided into *project work* (sections 5(1)(a) and (b)), and short-term *advisory work* (sections 5(1)(c) and (d)). As is discussed later in this paper, the advisory work has assumed greater importance in recent years, with the Commission being asked to provide advice on a range of legal matters to Ministers, government departments and agencies, and select committees. It also includes servicing two important executive government committees that are aimed at improving the quality of legislation – the Legislation Advisory Committee and the Legislation Design Committee. The work of these bodies is described in detail later in the paper.
7. The Law Commission falls within the purview of the Ministry of Justice, with which it enjoys excellent collaborative relationships.

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<sup>1</sup> Sir Ivor Richardson, "*Commissions of Inquiry*" (1989) 7 Otago Law Review 3.

## The Value and Contribution of the Law Commission

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### Background

8. It may be worth reflecting on why the Law Commission came into existence and what it has added to the work of government in the years since its establishment. Before 1985 there existed in New Zealand a Law Revision Commission formed in 1966 and with similar progenitors going back to 1937.
9. The work was actually done by part-time law reform committees consisting of practising, academic and government lawyers. They achieved a good deal and had excellent people. However, the structure was unsystematic, the members part-time, and the results unsatisfactory when judged against the whole range of New Zealand law.
10. In particular, big projects cutting across many departmental responsibilities were not attempted in that structure. Nor would they have been possible. Essentially the part-time committees were confined to projects arising within the Justice portfolio. They could not engage with the legal interests of the Government as a whole. Nor could they undertake sustained public consultation.
11. The Law Commission, when it was established, was able to tackle much larger projects with a deeper impact on New Zealand law and institutions. The restructuring of New Zealand company law, a project the Commission undertook in its early days, is a signal example. Not all these reforms were confined to the content of the law itself. For example, in collaboration with the Parliamentary Counsel Office, the Commission's reports on plain English drafting and the form of New Zealand statute law brought big changes to our statute book.

## Current perspective

12. The Commission's services, in terms of both project work and short-term advisory work, have been under increasing demand in recent years, both from Ministers and from government agencies. The Commission, whilst retaining its necessary independence from direct governmental control, is now more integrated into the policy and legislative framework. As a result, its output is now more likely to be acted upon and to contribute in a more immediate way to government outcomes.
  
13. The Commission has as its Commissioners highly experienced and skilled lawyers from the judiciary, the public sector, the private sector, and the universities. The Commission's research and legal staff are also highly qualified experts in their own right. The Commission therefore has significant and developed legal expertise in a number of areas that various parts of government are keen to tap into. These areas include:
  - Criminal law, criminal procedure, and criminology;
  - Statute law, statutory interpretation, and legislative drafting;
  - Constitutional law, administrative law, and public law generally;
  - Contract and tort law;
  - Media law;
  - Trusts;
  - Resource management and environmental law;
  - The law and custom of Parliament; and
  - International law.
  
14. In addition to a recognition of the quality and calibre of Commission staff, the increasing demands on the Commission recognise that the Commission is well-placed to provide high quality law reform advice that cannot adequately be

provided elsewhere in the government sector. That need particularly arises in relation to areas of law reform where:

- (a) Issues are apolitical and require a long-term and substantial law reform effort that would be unlikely to receive sufficient priority or resources to be done within a government agency. Examples on the Commission's current work programme include the review of the law of privacy and the review of the Land Transfer Act 1952.
  - (b) Issues straddle departmental boundaries or give rise to significant differences of views or interests between agencies, so that it is best for the matter to be considered by an independent agency. A recent example is the Search and Surveillance project that led to the introduction of a Bill in 2008. This project is a good illustration of the Commission's ability to secure consensus and produce proposals for a coherent law that touches many different law enforcement agencies and different statutes. It is hard to see how a single department could devote sufficient sustained effort to achieve an outcome of that nature.
  - (c) Issues require public consultation or a public debate that can most effectively be undertaken through proposals or discussion papers generated by an agency that is independent of government, and that enables ministers to gauge public sentiment before reaching a view as to the direction they wish to take. Examples on the Commission's current work programme include the review of the Misuse of Drugs Act 1975 and the review of maximum penalties.
15. Recent projects undertaken by the Commission demonstrate a belief that the Commission, with its unique research and public consultation methods, can make a contribution to the production of statutes with wider social and community consequences than what is sometimes called lawyers' law. The references to the Commission to review the war pensions system and the Sale of Liquor Act are such examples.



## Current Commissioners and Staff

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16. The following are the Commissioners of the Law Commission:
  1. President – Rt Hon Sir Geoffrey Palmer (Appointment expires 1 December 2010).
  2. Deputy President – Dr Warren Young (Appointment expires 14 June 2012).
  3. Commissioner – Emeritus Professor John Burrows QC (Appointment expires 1 February 2012).
  4. Commissioner – Val Sim (Appointment expires 8 October 2010).
  5. Commissioner – George Tanner QC (Appointment expires 30 September 2012).
17. The Law Commission Act 1985 provides for a minimum of three and a maximum of six Commissioners. Commissioners are remunerated in accordance with determinations of the Remuneration Authority.
18. The Commissioners are primarily experts; they are not selected for management skills. Management is provided by the Commissioner's professional manager Brigid Corcoran. She reports directly to the President who is, under the law, the Commission's Chief Executive.
19. The Commission also has 18 full-time equivalent policy and legal research staff. The Commission's current policy is to recruit the best young graduates on the market along with people with more experience and developed expertise in the senior ranks. The names of the professional staff are set out in Appendix 2. The Commission also makes use of consultants with expertise in specialist areas for particular projects.
20. As a general guide, the Commission endeavours to maintain the ratio of Commissioners to research/policy staff at 1:3.5. Experience has demonstrated that this ratio maximises the efficiency and effectiveness of Commissioners and

staff. The nature of the Commission's work requires not only that the Commissioners manage projects but also that they be engaged fully in all the detailed research, presentational, and drafting issues.

21. The number of projects that any Commissioner can personally supervise, and the number of policy and legal staff that can report to a Commissioner, effectively acts as a constraint on the number of staff. The research culture that has developed in the Law Commission is rather different from the management culture that has developed in the public service where departments have many more projects than the Commission, coupled with operational responsibilities. This means that the management techniques and work methods within the Commission are quite different from those of the public service. The Law Commission is more in the nature of a "think tank" than is a government department.

## **C. Current Activities**

### **Current Law Reform Projects**

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22. The Law Commission currently has 23 major projects. Its resources are fully committed. The addition of further projects at present would require additional resources.
  
23. The Commission's references for projects fall into two categories: those referred by the Government to the Commission under section 7 of the Law Commission Act; and those that it embarks on upon its own motion under section 6 of the Act. In recent years, the Commission has not carried out any self-referred projects as the weight of government references has been very heavy. Furthermore, serious questions need to be asked about embarking on a reference and devoting scarce resources to a project in which the government of the day has no interest. That is not to say the Commission will never undertake a self-referred project, but such occasions are likely to be rare.
  
24. A brief summary of the Law Commission's current projects is set out in Appendix 3. The Commission is happy to provide detailed briefings on all or any of the projects to the Minister or colleagues whenever it is desired. It would be beneficial to the Commission to know ministerial views of the current projects. If Ministers can provide the time for briefings it would be greatly appreciated.

### **Process for preparing major reports**

25. The pattern of handling a major project at the Law Commission is to:
  1. Carry out preliminary research;
  2. Have a discussion with the relevant stakeholders;
  3. Produce an Issues Paper and take submissions on it; and

4. Produce a final Report, occasionally with a draft Bill attached when that is necessary.
  
26. With important and complicated new statutes, the Law Commission's method is likely to produce sounder and more enduring legislation and policy than the departmental method. Yet the Government through its Cabinet still has the capacity to accept, reject, or adjust the recommendations of the Commission as it does with departmental ones. It is just that the platform for consideration has been prepared by a different method.
  
27. In complicated areas of the law, the Commission sometimes provides a draft Bill with its report to enable the forming of precise judgments about what is being proposed. This in turn facilitates consultation and discussion when Government is deciding whether it should accept a report. This is a different way of preparing legislation than the standard practice in government departments. There policy is approved by Cabinet first, and the bill is then drafted and sometimes is being adjusted under pressure right up to the point of introduction.

#### **Recent successes and highlights**

28. As illustrated in Appendix 3, the Commission's current projects span a wide range of areas. Many relate to complex or contentious matters that the Law Commission is well-placed to consider.
  
29. The Commission continues to have substantial involvement in the criminal justice area including the simplification of criminal procedure, reform of the defences of infanticide and insanity, and the review of maximum penalties.
  
30. There are an increasing number of projects that involve the Commission in joint or collaborative work with other agencies. Notable examples include the review of the Sale of Liquor Act 1989, work on a unified tribunals framework, and the review of the Misuse of Drugs Act 1975. Some of these projects also involve secondment of staff to the Law Commission from relevant agencies. For example, staff are being seconded from the Ministry of Justice, the Alcohol

Advisory Council, and the New Zealand Police to work on the review of the Sale of Liquor Act 1989.

31. In 2007, the previous Government agreed to a new process for engaging with the Law Commission and for considering Law Commission reports. This has led to the Commission having a much greater impact on government outputs and outcomes than was possible in the past.
  
32. A significant achievement in recent years is the implementation of past reports that had languished due to other government priorities. Many of these reports dealt with issues that were technical in nature but had the ability to impact on the lives of many New Zealanders. Implementation of these reports has resulted in the passage of the Property Law Act 2007, Wills Act 2007, Succession (Homicide) Act 2007, Companies (Minority Buy-Out Rights) Amendment Act 2008, Arbitration Amendment Act 2007, and Protection of Personal and Property Rights Amendment Act 2007.

## Methods for Dealing with Law Commission Reports

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33. Every Law Commission in the Commonwealth has been afflicted with the same malady. It was best put by the Hon Justice Michael Kirby at the conference held on the occasion of the 20<sup>th</sup> Anniversary of the New Zealand Law Commission when he complained of the “inattention and inactivity” of lawmakers to Law Commission reports. He went on to say:<sup>2</sup>

People with relevant power just do not appear to care enough. The subjects are not political. They will win no votes. They are not part of a government’s election winning agenda. The Opposition is indifferent. The officials are not pressing for change. Nothing is done.

34. The discussion at this conference led the Law Commission to take up the issue to see whether a better method could be devised for considering Law Commission reports. The Property Law Act 2007, for example, was originally proposed by the Law Commission in a Report<sup>3</sup> published 12 years prior to the Act’s eventual enactment. No-one thought it worthwhile doing anything about the recommendations in the Report despite the fact that the Report dealt with a vital part of New Zealand’s basic legal infrastructure – property law.
35. After much effort, in 2007 the previous Government agreed to a new method for considering Law Commission reports and this is set out in a Cabinet Office Circular,<sup>4</sup> attached as Appendix 1. The essence of the new method is that government departments must engage with the Commission during its consideration of the issues. When a report is tabled in Parliament it must be considered by Cabinet promptly. It cannot be ignored.
36. Obviously Cabinet is not obliged to accept the Law Commission’s recommendations, but it is obliged to consider them.

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<sup>2</sup> Hon Justice Michael Kirby, “Reforming Thoughts from Across the Tasman” in Geoffrey Palmer (ed) *Reflections on the New Zealand Law Commission: Papers from the 20th Anniversary Seminar* (Lexis Nexis, Wellington, 2007), 24-25.

<sup>3</sup> New Zealand Law Commission *A New Property Law Act* (NZLC R29, Wellington, 1994).

<sup>4</sup> Cabinet Office Circular “Law Commission: Processes for Project Selection and Government Response to Reports” (2 August 2007) CO 07/4.

37. So far this new procedure has worked well and some major measures have been introduced to Parliament as a result. The Public Inquiries Bill and the Search and Surveillance Powers Bill were both dealt with under the new procedure.

## **The Legislation Advisory Committee and the Legislation Design Committee**

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38. The Law Commission provides advice and support to the Legislation Advisory Committee (LAC) and the Legislation Design Committee (LDC). The Commission receives an appropriation for this work. This important work has developed rapidly in recent years and is aimed at improving the quality of legislation.
39. For further information on these two Committees, see the article by the President of the Commission contained in the *Waikato Law Review* attached as Appendix 4.

### **Legislation Advisory Committee**

40. The LAC was established in 1986 and is currently chaired by the President of the Law Commission. Its members include a former President of the Court of Appeal, a serving Judge of the Court of Appeal, practising lawyers, senior government lawyers, academic lawyers, the Chief Parliamentary Counsel, two economists, and Dr Warren Young, Professor J F Burrows QC, and George Tanner QC who are also Law Commissioners. The LAC is appointed by, and responsible to, the Attorney-General.
41. The functions of the LAC are to:
1. Provide advice to departments on legislative proposals and on providing instructions to Parliamentary Counsel Office;
  2. Report to the Attorney-General and the Cabinet Legislation Committee on public law aspects of legislative proposals;
  3. Advise the Attorney-General on any topics and matters in the field of public law referred to it;



4. Make submissions to the appropriate body or person on Bills introduced into Parliament that affect public law or raise public law issues; and
  5. Help ensure the quality of law making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform to the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
42. The LAC reviews all Government Bills after introduction for compliance with the LAC Guidelines. The Guidelines, which the LAC publishes, cover a broad range of matters designed to assist policy advisers and lawyers involved in the design and development of legislation.
43. The issues addressed by the LAC range from instances where individual provisions in Bills are unclear through to more substantial issues such as the use of regulation-making powers to deal with matters that ought to be contained in statute, or the use of amending Bills that propose wholesale changes to existing statutes that would be better rewritten from scratch.
44. If the LAC considers that a Bill raises issues that ought to be addressed, it may:
1. Take up the matter with the relevant department;
  2. Take up the matter with Parliamentary Counsel;
  3. Write to the Minister responsible for the Bill or discuss the matter directly with the Minister;
  4. Make a submission to the relevant select committee and, if the matter is significant, appear before the select committee.
45. Notable examples of recent Bills which, in the LAC's view, raised significant issues that required further consideration include the:
1. Reserve Bank of New Zealand Amendment Bill (No. 3) 2008;

2. Public Transport Management Bill 2008;
  3. Commerce Amendment Bill 2008;
  4. Policing Bill 2008;
  5. Financial Advisers Bill 2008;
  6. Land Transport Management Amendment Bill 2008;
  7. Public Health Bill 2007;
  8. Regulatory Responsibility Bill 2007;
  9. Wanganui District Council (Prohibition of Gang Insignia) Bill 2008.
46. The LAC also makes submissions to select committees on inquiries and reviews, either at the LAC's instigation or at the select committee's request. Recent examples are the inquiries carried out by the Regulations Review Committee into the use of exemption powers in statutes and the incorporation of material by reference in legislation, and the review of Standing Orders carried out by the Standing Orders Committee.
47. The Commission makes a significant contribution to the work of the LAC. It prepares reports for the LAC on Bills that might raise issues of compliance with the LAC guidelines. The President of the Commission in his capacity as chair of the LAC and the members of the LAC who are also Commissioners often take responsibility on behalf of the LAC for taking whatever steps the LAC considers appropriate in response to these reports. This may include meetings with departments, meeting directly with a Minister, or making submissions to a select committee. Professor Burrows chairs the subcommittee of the LAC responsible for updating the LAC guidelines. Other Commissioners and Commission staff also assist with this work.
48. The LAC provides seminars for departments and law societies on the LAC Guidelines and the legislative and parliamentary processes. The President of the

Commission in his capacity as chair of the LAC chairs these seminars and Commissioners give presentations at them.

### **Legislation Design Committee**

49. The experience of the LAC and other agencies engaged in the legislative process led to a belief that a new body was required to identify legal and constitutional problems with proposed legislation at an earlier stage. The objective in establishing the LDC was to provide for expert advice in the initial stages of developing legislation before final policy and design issues are set in concrete and a Bill finalised.
50. The LDC's principal focus is on significant or complicated legislative proposals, basic design issues, instrument choice, and impact on the coherence of the statute book. It looks at similar issues to the LAC but at a much earlier stage.
51. The LDC is not involved in policy formulation and its work does not cut across existing governmental accountabilities. Its role is purely advisory and departments are free to accept or reject the advice and suggestions it gives.
52. Like the LAC, the LDC is also chaired by the President of the Commission. However, unlike the LAC, the remainder of the LDC's membership is limited to senior officials from core government agencies. The other members are the chief executive of the Department of the Prime Minister and Cabinet, the Secretary for Justice, the Secretary to the Treasury, the Solicitor-General, and the Chief Parliamentary Counsel (or their nominees). Three Commissioners, Dr Warren Young, Professor John Burrows QC, and George Tanner QC advise the LDC on specific items of business.
53. The Commission provides administrative support and research assistance to the LDC. Commissioners and staff of the Commission are also involved on behalf of the LDC in follow-up meetings with departments.

54. The LDC was initially established as a voluntary process that was available to agencies at their instigation. The LDC carried out an evaluation of its work in late 2007. That evaluation, which was based on a survey of departments, indicated that the LDC had added value and that there was considerable demand for its services. The previous Government subsequently agreed that the LDC be retained and also agreed to a more formalised procedure for LDC consideration of Bills.
55. Under the new procedure, the legal advisor from the Department of the Prime Minister and Cabinet, the Legislation Programme co-ordinator in the Cabinet Office, and the Chief Parliamentary Counsel identify 15 or so Bills on the legislation programme for the year that might benefit from LDC consideration. The LDC then approaches relevant departments. New Bills added to the programme will be considered in the same way. Ministers and departments can also approach the LDC and request assistance.
56. Major matters that have been considered by the LDC include:
1. The Major Events Management Bill 2006;
  2. Proposals for a new Social Security Act;
  3. The Commerce Commission (International Cooperation and Fees) Bill 2008;
  4. Proposals to add significant new enforcement powers to the Fair Trading Act 1986;
  5. The Affordable Housing (Enabling Territorial Authorities) Bill 2007;
  6. The Unit Titles Bill 2008;
  7. The Cultural Property (Protection in Armed Conflict) Bill 2008;
  8. The Public Health Bill 2007.

57. The LDC has worked well under the new procedure, and has benefited from the involvement of senior officials and the opportunity to have a discussion with relevant agencies about legislative design at an early stage. However, it is still only operating on a partial basis. There is potential for its activity (and the activity of the LAC) to be expanded further, supplemented by other strategies to enhance the quality of legislation (see Appendix 5 headed “Problems of Legislative Quality”).

## Other Advisory Activities

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58. The Law Commission has a statutory function to provide advice and assistance to any government department or organisation on “the review of any aspect of the law of New Zealand” that the department or organisation may be undertaking and “on proposals made as a result of the review”.<sup>5</sup> This is a wide power and in essence it is up to the government of the day to decide what use to make of it.
59. Ministers, departments, and select committees often seek advice on particular legal matters that arise, particularly those of a legislative character or those that involve particularly difficult legal or constitutional issues. The time Commissioners devote to these activities has gone up in recent years. It is currently about 20 percent of Commissioner time.
60. The Commission has available legal expertise that particularly relates to legislative proposals and the preparation of government Bills. It has an overview of the entire statute book and can often provide advice that places particular legislative proposals in a wider context that departmental advisers sometimes do not see. Such advice, experience shows, is particularly useful when departments have different views on legal or legislative issues and matters reach something of an impasse.
61. The Commission frequently collaborates with departments who are considering policy changes and improving ways of dealing with issues. For example, it is collaborating at present with the Ministry of Economic Development in considering the issues that arose out of Rodney Hide MP’s Members Bill on regulatory responsibility.<sup>6</sup> This project is a good example of a situation in which the Commission has expended considerable resources providing advice and submissions to a select committee considering a Bill.
62. The Law Commission also often advises the Regulations Review Select Committee. For example, the Law Commission produced an extensive and

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<sup>5</sup> Law Commission Act 1985, s 5(1)(c).

<sup>6</sup> Regulatory Responsibility Bill 2006, no 71-1.

influential submission from the Legislation Advisory Committee and the Law Commission<sup>7</sup> to the Regulation Review Committee on the latter committee's "Inquiry into the ongoing requirement for individual regulations and their impact"<sup>8</sup> and the 2008 Report "Inquiry into the Use of Instruments of Exemption in Primary Legislation."

63. From time to time, Ministers request advice on specialised aspects of legislative issues they are considering. This advice is covered by legal professional privilege.

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<sup>7</sup> Legislation Advisory Committee Submission to the Regulations Review Select Committee (Wellington, October 2007).

<sup>8</sup> Regulations Review Committee "Inquiry into the Ongoing Requirement for Individual Regulations, and their Impact" [12 December 2007] AJHR I.16L.

## **D. Issues Requiring Early Consideration by Government**

### **Law Commission Reports Awaiting Cabinet Consideration**

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64. There are a number of reports and Bills that have been completed by the Commission and await Cabinet consideration. These are:
1. Costs in Criminal Cases (NZLC R60, 2000).
  2. Aspects of Damages: The Award of Interest of Money Claims (NZLC R28, 1994). A Bill has been drafted.
  3. Habeas Corpus: Refining the Procedure (NZLC R100, 2008). A Bill has been drafted.
  4. The Partial Defence of Provocation (NZLC R98, 2007).
  5. Presentation of New Zealand Statute Law (NZLC R104, 2008).
  6. Limitation Defences Bill (NZLC L1, 2007).
65. The Law Commission would like to meet with you and the relevant Minister to discuss how these reports can be progressed.



## Revival of other Parliamentary Business

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66. All parliamentary business before the House or its committees lapsed on the dissolution of Parliament. It is for the new Parliament to decide what parliamentary business should be reinstated. Two Bills that resulted from Law Commission reports were introduced into the House in the months prior to Parliament's dissolution:
- The Search and Surveillance Powers Bill, which was introduced into Parliament on 10 September 2008. The Bill rationalises and codifies present law relating to the search and surveillance powers of law enforcement agencies.
  - The Public Inquiries Bill, which was introduced into Parliament on 29 September 2008. The Bill reforms and modernises the law relating to public inquiries.
67. We are happy to provide a briefing on the purpose and detail of the above two Bills, if that would be useful.
68. The Commission and the Ministry of Justice are jointly having discussions with regulatory agencies about the extent to which their regulatory inspection and monitoring powers ought to be subject to the generic procedural provisions in the Search and Surveillance Powers Bill. It is intended that these discussions will result in a Supplementary Order Paper. In the event that Parliament decides to reinstate this Bill, it may be desirable for this SOP to be prepared and tabled before the Select Committee invites public submissions on the Bill.
69. There are another two Bills arising from Law Commission reports that are currently before the House. These are:
- The Trustee Amendment Bill, which was reported back by the Justice and Electoral Committee on 9 July 2008. The Bill deals with a range of miscellaneous matters related to the law of trusts.

- The Waka Umaga (Maori Corporations) Bill, which was reported back by the Maori Affairs Committee on 8 September 2008. The Bill provides for the formation, registration, and governance of new legal entities (“waka umaga”) by tribal groups or Maori associations.
70. Both Bills were reported back with very substantial amendments. In each case, the select committee report included a National Party view opposing the amended Bills. As noted in Appendix 3, in relation to the Trustee Amendment Bill, the Law Commission now has a broader reference to review all of the law relating to trusts.
71. In response to the Law Commission’s report on Access to Court Records,<sup>9</sup> the previous Government referred questions about the policy in that report to the Law and Order Committee for further consideration. This consideration has not yet occurred.

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<sup>9</sup> New Zealand Law Commission *Access To Court Records* (NZLC R93, Wellington, 2006).

## Sentencing and Parole Reforms

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72. The sentencing and parole reforms are reflected in two pieces of legislation:
- (a) The Sentencing Council Act 2007 establishes a Sentencing Council to issue sentencing and parole guidelines and, more broadly, provide public education and information on sentencing and parole matters. This Act has come into force, but the Council has not yet been established.
  - (b) The Parole Amendment Act 2007 changes parole eligibility so that offenders sentenced to short-term sentences of imprisonment (defined in the Parole Amendment Act as 12 months or less) will serve their whole sentence. All other offenders sentenced to imprisonment will be eligible for parole when they have served two-thirds of their sentence. This Act is to come into force by Order-in-Council.
73. A decision is required about the extent to which the Government wishes to progress these matters.
74. The Law Commission hosted a small unit (the Sentencing Establishment Unit) to draft a package of sentencing and parole guidelines for consideration by the proposed Sentencing Council. The Sentencing Establishment Unit (SEU) comprised a mixture of policy and legal advisers, and one High Court judge and three District Court judges seconded part-time for this purpose.
75. The SEU completed a large body of work for the proposed Council's consideration. This includes approximately 60 draft sentencing guidelines, covering all major offence types (for example, assaults, sexual offences, driving offences, burglary, and other dishonesty offences), as well as those significant generic issues that apply across offence types (for example, an offender's criminal history, or the entry of a guilty plea).
76. The SEU also conducted a limited consultation process on draft guidelines with relevant government and non-government agencies, the judiciary, and law

practitioners. The overall reaction to the draft guidelines from this consultation process was positive.

77. Budget 2008 provided funding of \$5.88m over four years (\$5.7m operating and \$0.18m capital) for the Sentencing Council's activities. This funding also covered the establishment of a small secretariat to support the Council (approximately six staff) that would be attached to the Law Commission.
78. The Sentencing Council would have 10 members – four would be sitting judges, one would be the Chair of the Parole Board, and five would be “lay members” with relevant expertise in matters such as criminal justice, the promotion of the rights and welfare of victims of crime, and public policy. Except for the Chair of the Parole Board, the judicial members would be appointed by the Chief Justice, in consultation with the respective Heads of Bench. The Chief Justice must appoint one of the judges as the chair of the Council. Subject to final confirmation, the Commission understands that the Chair-designate of the Council is the President of the Court of Appeal, Justice William Young.
79. Establishment of the Sentencing Council depends on the appointment of the Council's lay members (to be appointed by the Governor-General on the recommendation of the House of Representatives). A Notice of Motion to appoint the lay members was lodged in Parliament on 2 September 2008, but was unable to be progressed prior to the general election. The lay members included on the Notice of Motion were Paul East (Deputy Chair of the Council), Sir Barry Curtis, Jacqui Te Kani, Dr Warren Young, and Heather Smyth.
80. At the time the parole reforms were proposed, it was estimated that they would lead to the average time served increasing from around 62% to 80% of the “nominal sentence” (the sentence imposed by the judge). The sentencing guidelines provided a mechanism under which nominal sentences could be reliably and consistently reduced to compensate for the parole reforms, therefore

avoiding a substantial and unsustainable increase in the prison population.<sup>10</sup>

The sentencing and parole reforms are, to that extent, interdependent.

81. In theory, it would be possible to implement either of the sentencing or parole reforms without the other. However, if the parole reforms were implemented without any changes being made to nominal sentences through the guidelines, substantial increases in the prison population that would far exceed current or planned capacity could not be avoided. Ministry of Justice analysis estimates that the implementation of the parole changes would increase the prison population by 2200 above forecast by August 2010 and by 3108 above forecast by August 2014.

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<sup>10</sup> It is proposed that the adjustment to nominal sentences will be made on a guideline-by-guideline basis and informed by data about current time served for the offences included within each individual guideline. The adjustment to nominal sentences will therefore differ from offence to offence.

## E. Funding

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82. The Law Commission's baseline funding for the 2008/09 financial year is \$4.12 million. This includes one-off funding of \$0.175 million for the review of the War Pensions Act 1954. In addition, the Commission expects to receive \$0.189 million under an agreement with the Sentencing Council for the provision of corporate support services to the Sentencing Council secretariat, and \$0.573 million in 2008/09 for the review of the regulatory framework for the supply and sale of liquor.
83. From 2009/10, the Commission's ongoing baseline funding is \$3.84 million with additional revenue as follows:

**Table 1: Law Commission Funding**

	2008/09	2009/10	2010/11	2011/12
Government Grant	\$ 3.951	\$ 3.842	\$ 3.842	\$ 3.842
Review of War Pensions Act 1954	\$ .175			
SC Agreement	\$ .189	\$ .189	\$ .200	\$ .200
Liquor Review	\$ .573	\$ .942	\$ .881	\$ .278
<b>Total Revenue</b>	<b>\$ 4.888</b>	<b>\$ 4.989</b>	<b>\$ 4.923</b>	<b>\$ 4.321</b>

84. Table 2 below demonstrates that in recent years the Law Commission has significantly increased the number of projects on its work programme and the number of reports published. There has also been a marked increase in demand for advisory work from the Commission. The Commission's responsibilities have also been increased by the obligation to prepare cabinet papers and be involved in the work leading to implementation of its reports.

**Table 2: Changes in Law Commission workload**

	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09
Work Programme Projects	14	11	8	12	13	24
Number of Publications	4	4	6	11	13	19
Advisory Work	\$37,431	\$46,521	\$135,300	\$153,641	\$224,429	\$220,000*

\* Projected expenditure

85. The Commission has only been able to meet the substantial new demands placed on it over the past two years, and markedly increase its output, by running an operational deficit and drawing on its accumulated cash reserves to meet that deficit.
86. It is predicting an operational deficit of \$0.539 million this financial year. In its latest Statement of Intent, it has also forecast operating deficits of \$0.620 million and \$0.230 million, in 2009/10 and 2010/11 respectively, which will exhaust its reserves. Even when the Commission is running deficits at these levels, it will need to make significant reductions in productivity and staffing resources to remain within its budget.
87. In order to live within its means, therefore, the Commission has budgeted on the basis of an attrition rate of one senior policy adviser in the 2008/09 year, two policy staff each year in 2009/10 and 2010/11, and that a Commissioner would not be replaced when one of the existing Commissioners leaves. Given the Commission's low turnover rate, it will be difficult to manage this level of attrition. Moreover, this reduction in staff and Commissioner resources will have a direct impact on the Commission's level of output.
88. In order to maintain the level of output that the Commission has sustained over the past two years, it will require an increase in its baseline funding from 1 July 2009.

## **Technology infrastructure**

89. The Commission has recently commissioned an information, communications and technology strategy to prioritise its investment in infrastructure improvements over the next few years. The number one priority is the introduction of a document management system. This will allow the Commission to meet the requirements of the Public Records Act 2007. But more importantly, in the context of a research/policy organisation where knowledge management is the most critical business process, it will deliver increased efficiency in document filing, searching, and retrieval, which in turn increases the potential for output improvements.
  
90. Cost savings and further efficiencies are available through moving the Commission's publication policy to an online focus. Reports will be made available in a print friendly version and downloadable from its internet site. This will be a change to the current approach of large hard copy print runs. A rebuild of the Commission's internet will be required including the introduction of an online purchase facility.