



NEW ZEALAND LAW LIBRARIANS' ASSOC.

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Support for the NZLLA's Rubacki Report

From the **Waitangi Tribunal** Acting Chief Historian Richard Moorsom to Ann Parsonson, used with permission

Ann

I have reviewed the project proposal, which is strong, thorough and persuasive. The project concept, and the need for the project, is excellent and would provide a landmark contribution well beyond the ambit of the overall PAL scheme. This is in the main because it connects to a great swathe of historical research interests and sub-disciplines. I cannot imagine too many branches that would not find it of practical use.

For Tribunal purposes, the creation of a resource to this specification would probably be the most important single electronic information initiative to have been either conceived or implemented to date. This applies both to researchers, who would be the principal volume users, and members and their supporting writers, when preparing Tribunal reports. It is not merely the speeding up of research processes through searchable access to key material, but also the considerable quality improvement in the efficiency and scope of searching across a vast body of structured, interconnected information. Better as well as faster research should result.

Tribunal research focuses quite heavily on historical legislation, and will continue to do so through the lifetime of the historical inquiry programme. Users would extend well beyond the Tribunal staff research team to Treaty sector researchers generally, especially Crown Forestry Rental Trust and Office of Treaty Settlements contractors. The accessibility of the online resource will also assist many claimants and their local researchers, improving their ability to prepare their cases.

Turning to the proposal itself, I have one general anxiety: that it is so ambitious in scope that it will take years to implement, coming in only towards the end of historical inquiries. I may not understand the technical analysis fully but the strategy appears to be to recapture the entire body of material into digital form, which means OCR and laborious QA to 'official' record standard. This would be a fine end result. However, researchers can live with something rougher and available much more quickly. A preliminary scanning of the originals into PDF would be quick and would deliver a very valuable research resource probably years ahead of the final product. This is not an alternative, but a preliminary supplement that would add considerable value simply by being quickly available. End user institutions such as ourselves could then set up our own basic indexing tools, and we already have the CFRT legislative index database compiled in the late 1990s.

As to the scope of the resource, I would endorse a number of Cathy Marr's useful suggestions, especially including:

* schedules to statutes

* draft bills at first and second reading (kept at PCO), as well as bills not passed (published series)

* provincial statutes

* imperial legislation

* amendment histories

* full text or keyword searches on the text as well as titles

* links to regulations promulgated under particular statutes

* retention or internal marking of original page numbers for text referencing and for cross-referencing with other printed material and citations

I hope these comments are of some use. I certainly hope this project acquires early and generous backing, as the potential benefits will be immediate and substantial.

Richard

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On 26 June, 2006, the **Council of the Auckland District Law Society** passed the following resolution :

"The ADLS Council confirms the vital importance of the New Zealand Statutes - not only those which are in force, but all of our statutes, including the Imperial Statutes which were enacted and became part of New Zealand law.

The Council notes with great concern that complete sets of statutes are no longer readily available to the legal profession and the New Zealand public, and that the cause is irreversible paper degradation which results in darkening and shattering of pages, such that many volumes are unusable.

The Council has received the "Rubacki Report" commissioned by the NZ Law Librarians' Association, which recommends further investigation of a digitisation project whose objective is that all of New Zealand's Statutes become part of the Parliamentary Counsel Office's PAL project, and freely available on the Internet.

The Council is not able to evaluate the technical aspects of the proposal, but strongly endorses the need for fast, practical access to all of New Zealand's statutes. Council supports the application by the NZLLA for funding for further work on the second stage of this project".

Email from **Justice Fogarty**, 26 June 2006, used with permission.

From: Justice Fogarty
Sent: Monday, 26 June 2006 12:22 p.m.
To: Helga Arlington
Subject: Re: NZ statutes-Rubacki report

Dear Helga

It is very important to preserve the early statutes if only to preserve our constitutional history. For example some early statutes record in preambles the inherent jurisdiction of the courts inherited from the UK.

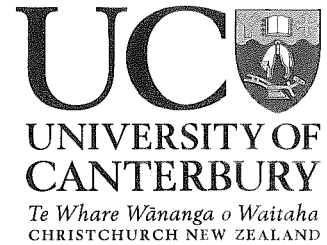
As a second example I am considering a case right now on the ownership of mudflats whether by Maori or the Crown and as part of that have to construe some early Native Land Court acts, and as part of that have gone into the statutory history of Maori land tenure.

I am surprised that the content has not already been copied, microfiched, or digitalised, or scanned and printed on durable paper, preferably all three ways, as who knows whether digital data will be readable in the next century?

Regards
John Fogarty
High Court
Christchurch

School of Law

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28 June 2006

Ms Margaret Greville
Librarian
Law Library
University of Canterbury

Dear Margaret

Historical Statutes

I write to express my support in the strongest possible terms for the project to preserve our historical statutes. If we lose them we do not just lose part of our history, we lose an essential lawyers' working tool.

Today when courts interpret ambiguous statutes they look at the whole context, including the historical one. They sometimes trace a modern statute right back to its origins and find assistance in the first enactment of the provision, differences in wording from the current version, and the reasons for those changes. A good example, just one of a large number, is Registrar-General of Land v NZ Law Society [2001] 2 NZLR 745, where the law was traced right back to the original Conveyancing Ordinance 1842. I cannot conceive of a system where those originals were not available. They contribute to a proper understanding of the modern law.

Another use of the old statutes is so that one can track changes in styles of drafting and format. I very often compare a new statute with its predecessors, and often gain enlightenment as to the best ways of expressing something. It is not always the modern way, although it often is.

So it is my deeply held belief that these old statutes must be preserved, and that electronic preservation is the best way to do it. They should be readily available as one uses the modern statutes. That would be best done by linking them to the PAL project.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Burrows'.

John Burrows
Professor of Law



New Zealand Law Society

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10 July 2006

Helga Arlington
President
New Zealand Law Librarians' Association
c/- Auckland District Law Society
PO Box 58
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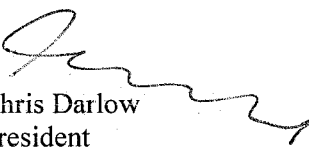
Dear Helga

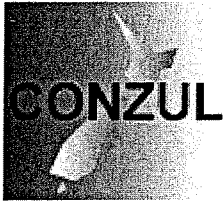
New Zealand's 'historical' statutes

Thank you very much for the copy of the Rubacki Report. I have read it with interest and concern and I look forward to keeping in touch with developments.

Kind regards

Yours sincerely


Chris Darlow
President



Council of New Zealand University Librarians

Kaunihera o ngā Kaimahi Whare Pukapuka i ngā Whare Wānanga o Aotearoa

Penny Carnaby
Chief Executive and National Librarian
National Library of New Zealand
PO Box 1467
WELLINGTON

21 July 2006

Dear Penny

Re: New Zealand historical legislation: electronic capture, preservation and publication.

The Council of New Zealand University Librarians (CONZUL) endorses the initiative undertaken by the New Zealand Law Librarians' Association (NZLLA) to investigate the electronic preservation of New Zealand's statutes.

The background paper by Michael Rubacki (9 March 2006) and commissioned by NZLLA presents a cogent case for this project to be one of the digitisation projects funded through the Digital Strategy Content funding stream, particularly if it can also be linked into the PAL project work that is also going on. New Zealand legislation must be the most significant content for all New Zealanders to have access to and the need to use this resource is shared over a very broad spectrum of researchers including the sciences, arts and humanities, engineering, as well as law itself.

CONZUL shares the very real concerns of NZLLA as to the rapidly deteriorating condition of the print versions of this material and sees the capturing of them in digital format as the most effective archiving and preservation option for their use by future generations.

CONZUL would be very happy for you to use this letter as supporting documentation should you need it to further the historical legislation digitisation project as championed by NZLLA.

Yours sincerely

Gail Pattie
Chairperson, CONZUL
University Librarian, University of Canterbury

Cc Helga Arlington, President, NZLLA

"Our NZ legal materials are a touchstone of our national identity – without the preservation of, and easy access to, our legal heritage we face the calamity of losing sight of our past and the light that it shines on future developments"

Professor Mike Taggart, holder of the Alexander Turner Chair of Law at the University of Auckland

"Good law is law informed by the past. Without access to the collected materials of our New Zealand legal heritage we jeopardise our ability to make good law and to develop as an informed society"

The Rt Hon EW Thomas DCNZM

Memo to : Penny Carnaby, Chief Executive and National Librarian
National Library of New Zealand

From : New Zealand Law Librarians Inc.

Re : Proposal for New Zealand Statutes project

4 August, 2005

"Shattering statutes" : preservation and access project for historical NZ Statutes

Scope of the project

As requested by you, we have investigated the historical statutes further, and now propose that the preservation and access project for them should be undertaken in four stages, according to the fragility and/or relative rarity of the materials:

The first should include all Acts as enacted from 1854 to 1908, and including the Ordinances of the Legislative Council and of the Province of New Munster 1841 – 1853 (this adds only a single volume to the sum).

Physical size of this collection: 1.6 lineal meters; 27 X 20 cm

The second phase should be the **annual volumes** covering **1909 – 1931**

Physical size of this collection: 0.85 lineal meters; 27 X 20 cm

The third should be the **1908 Consolidation**.

Physical size of this collection: 0.30 lineal meters; 25 X 15 cm

The fourth should be the **1931 Reprint**.

Physical size of this collection: 0.65 lineal meters; 25 X 15 cm

The most desirable outcome would be to have **all** New Zealand legislation captured electronically, and available in the same format and on the same platform as the final PAL product, and providing the same data for use by commercial publishers to add value. This should remain our ultimate goal.

Background

A knowledge society needs ready access to the roots of its being, and it is clear that New Zealanders as a whole are serious about understanding their roots. It is not insignificant that the home-grown best-seller of our time should be a history book.

However, for the legal profession, the demand for access to historical legislation is immediate, to inform the practice of law **now**, and the information is frequently required very quickly. For this

group, the entire body of New Zealand law, including past law, needs to be available as a part of the commercial databases they use every day in practice.

While the recently resumed PAL project offers all citizens of New Zealand the renewed promise of online access to an authorized version of the statutes, it does not pretend to offer scholars, independent researchers, and legal practitioners access to all the legislation passed by the New Zealand Parliament. Its aim has always been to “use modern technology to provide the public with access to up-to-date legislation”¹. The Parliamentary Counsel Office has been concerned to ensure that the public should have easy access to **that legislation by which they are bound** – and that is the legislation which is in force today. It does *not* include older legislation that is no longer in force. Geoff Lawn, Deputy Parliamentary Counsel, was able to confirm that this is the Government’s mandate for PAL at the NZLL Retreat (Wellington: 10 – 11 June 2005) in answer to a question from the floor: his advice was that any project to capture historical legislation would be a matter for the National Library and possibly Archives. Later in conversation, however, he did indicate some willingness to be involved in such a project should it eventuate, perhaps in an advisory capacity, and possibly as a host, but not as a funder. Again, in a subsequent conversation, Moira Fraser, the Parliamentary Librarian, strongly advised seeking the cooperation of the PCO in order to draw on the expertise they have already gained.

Legislation that is repealed does not lie quietly dead. It lives on through new substituting legislation which frequently incorporates sections of older statutes into the contemporary Act. Clusters of sections that once lived together under the umbrella of an older statute not infrequently relocate to a newer Act with a completely different title, and with a totally different main purpose and intent. Anyone wishing to understand a modern Act often needs to consult the older legislation in order to make sense of the new, and lawyers regularly need to do this urgently, as a part of the daily practice of law. They may also need to locate cases that consider sections of older repealed legislation, because they may equally be relevant to the interpretation of the new. The whole of our legal history as expressed by the Parliament and the Courts is an interwoven living entity. It is equally important to scholars, lawyers, and the public that this fabric should be maintained in its entirety. It cannot readily be divided up into the old and the new, the relevant and the irrelevant.

Lawyers typically use legislation side-by-side with the case law that seeks to interpret it when the intent of Parliament is unclear. So in contemplating the task of preservation, we need to be mindful of the fact that people working with the law – and these are not always lawyers, but often accountants, planners, and researchers from many other disciplines – do not seek to look at a section of a statute in isolation. They will want to look at the historical origins of the section – frequently through a number of iterations, and to any relevant regulations and case law. Commercial legal publishers have been quick to seize upon the advantages of using the online environment to allow easy movement amongst these tools, using hypertext linking. The verbal indication from Geoff Lawn (see letter from Helga Arlington to Penny Carnaby, 23 June 2005) that he was at least open to discussion about the possible involvement of the PCO in a digitisation project is reassuring, because it leaves open the possibility of making sure that future use of the collection will not be limited by considerations of preservation alone, but also take account of the access needs of those most likely to use it.

Scholars in numerous disciplines other than law require access to our historical statutes for a variety of reasons. Political scientists, Maori studies scholars and students, engineers, and historians are only a few interest groups that come immediately to mind. And we should not overlook the phenomenon of the ‘independent scholar’, who is really a particularly curious and persistent member of the public who just likes to know things – and sometimes writes about them. Early legislation tells us a great deal about the social context in which it was passed, as well as informing lawyers about the significance of particular sections of current legislation that may

¹ Public Access to Legislation: summary of business case, <http://www.pco.parliament.govt.nz/pal/ipal/sumbuscase.pdf>

derive from an older source. Contemporary legislation likewise will tell future lawyers, scholars, and the public much about New Zealand life and times of today.

Our heritage statutes are badly in need of rescuing from a fate they do not deserve. Those printed from the mid- to late- nineteenth century are on acid paper that is rapidly crumbling away². There are few libraries in the country that can offer reliable paper access to all enacted New Zealand legislation for this reason. Some libraries do not offer public access to historical statutes at all, because they are too fragile. It is clear that they are in urgent need of a preservation project. Along with preservation – which could be accomplished most simply by microfilming – goes the need for access.

Legislation in New Zealand did not begin with the first Act passed by the colonial Parliament in 1854. Prior to that, the Legislative Council and the Council of New Munster had from 1841 both passed ordinances that had general application. Many later enactments of the General Assembly have their origins in these ordinances. They are, in fact, part of the fabric of the history of our legislation. Any attempt to capture a complete picture of our legislative history must include these. Fortunately, the number is not large.

The first issue to be faced in coming to terms with preservation of and access to our historical legislation is the decision at just which point in time we should capture an Act. Should we capture each Act as it stood at the time of enactment? Or should it be captured in its most recent Reprinted form at the time when it was repealed? (This question would only apply to Acts passed after 1908.) Or should we aim to capture every version of each Act?

The deceptively simple answer would be to limit the exercise to the Assent version of each Act, and leave it at that. However, a not inconsiderable number of errors on the face of the legislation crept in from time to time, and if an electronic version were to be produced of the earliest enacted version without more, searchers could miss the very sections they are looking for.

When a decision is made on the scope of the exercise, it has to be determined whether all that is required is to preserve the collection, in which case a microfilm would be an attractive option. However, remembering that this body of legislation is but a part of an integrated whole, consideration must be given to the needs of the many varieties of potential users. The legal profession and law librarians are no less members of the public than anyone else, legal academics have always been generous with the time they give in advising government, and the work of lawyers in general is to serve their clients, who are of course the public.

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² Acid Paper Time Bomb Threatens NZ Statutes,
<http://www.adls.org.nz/profession/lawnews/2004/issue06/march37.asp>

NZ Law Librarians' Inc. National Legal Information Panel (NLIP)
Notes for meeting with National Librarian, 9 June 2005

NLIP is concerned about the preservation of, and access to legal information, on two fronts:

- a. Historical legal information
- b. Digital information
 - i. Tertiary legislation (regulations and other)
 - ii. E-government policy ('digital amnesia')

This document focuses upon the first of these concerns. NLIP hopes also to devote attention to the second, however, and towards that end has arranged Keitha Booth to report to the NZLL Retreat on June 10, on the Digital Amnesia summit recently held in Canberra.

Historical legal information

Note : this analysis uses the New Zealand Statutes as an example. Part of the problem faced by NLIP in attempting to articulate the issues is that there are differing preservation and access issues relating to the various resources which concern us. However, the underlying argument remains the same for all.

1. Both the public and the legal profession have an interest in the preservation of, and access to, NZ Statutes prior to those available digitally via the PAL project (the public), and commercial statute databases (legal profession).
2. The doctrine of precedent which is the basis of our legal system, requires 'backwards looking' so that the law develops consistently. This gives historical information a very particular significance in law, over and above an historical preservation interest.
3. New Zealand's law, for active legal work in the present as for historical research, is an indivisible whole. "The law" consists of the entire body of the law, including that which is included in the pre-digitised volumes of statutes.
4. The early volumes of the NZ Statutes are deteriorating rapidly because of paper aging, but intact copies remain. As soon as possible, these must be digitised lest they be lost entirely.
5. The legal profession has a constitutional role in the administration of justice. Although individual legal transactions may be "for profit" the availability to the legal profession of the body of New Zealand's primary legal materials (statutes, court judgments) is a basic constitutional requirement, crucial to the public interest.
6. The legal profession's call upon legal information is characterised by a requirement for speed. For example, it is common for a judge to call for information during a court proceeding, and for legal counsel to be sent out of court to find that information during a short recess. That information be readily available, is accordingly a requirement of the administration of justice, in the public interest.
7. The legal profession's requirement for access to historical statutes is not met by the existence of some few intact sets in some libraries. In practice, an urgent request for an historical statute may result in the "shattering statutes" effect noted in the Law News article last year by Helga Arlington. All of a library's copies may well be in this state, resulting in non-delivery of the item in the time frame needed, such as outside of business hours.

8. To be available effectively to the legal profession, the historical statutes need to be a part of commercial statutes databases. However, the costs of such inclusion would not be able to be recovered by commercial publishers, using a business financial model.
9. The public good would be served if a digitisation project for the NZ Statutes could be designed co-operatively such that the output could be used both for the PAL project and for addition to the commercial statutes.
10. NZLL proposes :
 - a. that the National Library consider the possibility of facilitating a partnership between public and private interests as described. This would involve the Parliamentary Counsel Office for the PAL project, and the commercial publishers Brookers and LexisNexis and possibly others.
 - b. that the agreement of publishers to include the historical materials in their commercial products would need to be negotiated
 - c. that the National Library as part of the project, formulate standards for the digitisation of historical legal materials;
 - d. that the NZLL be involved in the formulation of standards

Note : some historical scanning projects have been undertaken by the commercial publishers, notably the New Zealand Gazette (LexisNexis). The position regarding the Gazette will be separately documented, but briefly, the project has not provided an outcome that is in any way satisfactory for either the public or the legal profession. Commercially initiated projects undertaken randomly to date, have not met either the public good requirement, or adequate technical standards.