The Promulgation Of Primary Legislation In New Zealand

Principles, Policy, Practice And Practicalities

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Abstract

This thesis analyses, explores, and evaluates the reasons why particular processes are used to promulgate Acts of Parliament in New Zealand. The strengths and weakness of these various processes are evaluated and the advantages and disadvantages of this system of promulgation, as a whole, are demonstrated.

Chapter One of this thesis defines the concept of promulgation and demonstrates its significance as a legislative and administrative process. Chapters Two, Three and Four identify limitations on how promulgation of Acts of Parliament can occur and evaluate to what extent these limitations shape how promulgation occurs.

Chapters Five, Six, Seven and Eight of this thesis identify justifications for promulgating Acts of Parliament and evaluate how these justifications have altered over time. These Chapters analyse to what extent the justifications impact on how promulgation occurs.

Chapters Nine, Ten and Eleven analyse the requirements to promulgate Acts of Parliament in New Zealand. Chapter Nine identifies the current requirements—and the possibility of further requirements—under Statute Law, Common Law, and Constitutional Conventions. Chapter Ten analyses how the statutory requirements to promulgate have developed. Chapter Eleven examines proposed legislative changes to the statutory requirements to promulgate.

Chapter Twelve identifies the current processes that see Acts of Parliament promulgated. Chapter Thirteen analyses how these processes have changed over time. This Chapter demonstrates that identifiable trends in promulgation are a direct result of changes in the various justifications and limitations identified in Chapters Two to Eight of this thesis.
Acknowledgments

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Finally, I want to thank the three people without whom this thesis could never have been written — Catherine Gullidge, Andrew Geddis and Nigel Jamieson.
For my mother and for my father, the worst boss I will ever have.
The Law is stated as in force at 1 August 2012
Format and Style

In accordance with the New Zealand Law Style Guide;¹

— Tables of Cases and Statutes are in the bibliography at the end of this thesis as opposed to the beginning as are found in most legal texts.
— Website access dates are not provided, although many can be viewed retrospectively as they appeared, prior to 2012, via an internet archive The Wayback Machine.²
— Line spacing has been kept at 1.25.
— Unless needed for clarity the Oxford comma is not used.

Contrary to the New Zealand Law Style Guide

Wherever possible, precise URLs are given for website documents rather than to a website’s main page. Although these precise URLs may indeed, “quickly become out of date”, both before and after this happens these precise URLs “should enable the reader to locate” a particular document on a website more easily.⁴

Unrecorded changes to government websites

Every effort has been made to ensure this thesis sets out the text as stated by the various websites quoted as at 1 August 2012. This has been particularly difficult as there is no public record of changes made to these websites for the year 2012. For example, this passage from “How up to date is this website” on The New Zealand Legislation Website at 1 November 2012 then read:⁴

Current Acts and Regulations are updated with amendments as soon as possible after the amendments come into force. We aim to incorporate amendments within 15 working days after the amendment comes into force. However, if an amendment is to come into force more than 90 days after enactment/making, we aim to incorporate the amendment by the date the amendment comes into force.

The text in italics has been removed, so at 1 August 2012 this passage now reads:

Legislation on this website has amendments incorporated to provide a snapshot of the law as it currently stands. Amendments are added as soon as possible after they come into force, but not before. We aim to incorporate amendments within 15 working days after the amendment comes into force.

The lack of a public record of changes made to these government websites has made tracing recent developments in promulgation difficult.

² Internet Archive: Way Back Machine <archive.org>. “The Internet Archive is working to prevent the Internet - a new medium with major historical significance - and other "born-digital" materials from disappearing into the past. Collaborating with institutions including the Library of Congress and the Smithsonian, we are working to preserve a record for generations to come”. “About the Internet Archive — Why the Archive is building an Internet Library Internet Archive” Way Back Machine <archive.org/about/>.
³ Above n 1, at 7.1.6 and 2.11 respectively.
⁴ Parliamentary Counsel Office “About this site —What’s on this site and how it works – How up to date is this website?” <www.legislation.govt.nz/howitworks.aspx#whatonsite>.
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Email from Jenni Chrisstoffels (Research librarian Alexander Turnbull Library National Library of New Zealand) to Christopher Gullidge regarding the Depository Library Scheme (8 October 2011).

Email from Gillian McIlraith (Communications Advisor of the Parliamentary Counsel Office) to Christopher Gullidge regarding the use of twitter and RSS feeds to keep updated about new legislation being posted on the New Zealand Legislation Website (11 April 2012).

Tweet by cesther @cesther 2:26 pm 23 Apr 2012 to chris g @sheeplaw @cesther in response to “Are your tweets a good indication of the date and time a new Act appears on the NZLW? Do they lag behind the RSS feeds much?” 2:18pm 23 April 2012.

Appendix Three: Recent developments regarding the Legislation Bill 2010

Bibliography
The protracted and wearing anxiety and expense of the law in its most oppressive form, its torture from hour to hour, its weary days and sleepless nights, with these I'll prove you, and break your haughty spirit, strong as you deem it now.


There was a public notice displayed on Pitcairn for some time (although faded by weather) stating, in as many words, that British [sic] law, both statutes and the common law, applied on Pitcairn.

Introduction

Promulgation of the text of legislation is a neglected area of legal scholarship. This neglect is especially apparent when considering the number of works and monographs devoted to statutory interpretation and to legislative drafting. Without promulgation, the process of legislative drafting would be pointless and the process of statutory interpretation impossible. Yet the process of promulgation that must, out of necessity, come between these two activities usually is ignored. Even when the promulgation of law is dealt with in jurisprudence, as it occasionally is, it is almost always dealt with in passing, as an ancillary topic.

What does it mean to promulgate law? Promulgation is a process that occurs in almost all legal systems. The fact that this process occurs in a variety of legal systems means that it can occur in a variety of ways. The different approaches to promulgation can be placed on a continuum. At one extreme, promulgation can occur so as to meet only formal demands. These demands may be so minimal that satisfying them results in law being promulgated in an ineffective and insubstantial way. A good example of this is Caligula’s pillar, where the law was inscribed in very small letters on a tablet that was hung high from a pillar. This stratagem satisfied the Roman formal requirements to publish law, but it did not satisfy citizens’ demand that the law be promulgated in a way so they could know it. Accordingly, it is possible for legal text to be promulgated in accordance with formal requirements yet still be kept secret.

At the other extreme, the formal demands might be so stringent that promulgation occurs in a very substantive and effective way. For example, promulgation may occur to

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5 In this thesis, unless otherwise indicated, “legislation” refers only to primary legislation (Acts of Parliament) rather than primary and secondary legislation (delegated or subordinate legislation).
7 Process (defined here as a systematic series of actions directed to some end) is the appropriate term to describe promulgation. The term procedure may seem to be a more accurate description, but procedure implies a formal element which promulgation may not necessarily have.
8 Legal systems based solely on customary law could exist without promulgation, as the law may only reflect what is already custom. Nevertheless a legal system that is based only on customary law may still have promulgative processes.
9 Cassius Dio states “…after enacting severe laws in regard to the taxes, he inscribed them in exceedingly small letters on a tablet which he then hung up in a high place, so that it should be read by as few as possible and that many through ignorance of what was bidden or forbidden should lay themselves liable to the penalties provided…” Dio’s Roman History with an English Translation by Earnest Cary (William Heinemann, London 1924) at 357
10 At 357: “[The people] straightaway rushed together excitedly into the circus and raised a terrible outcry”.
11 Contrast The Philosophy of Law: An Encyclopaedia (1999) vol 2 Promulgation at [693]: “while a statute, decree, decision, or regulation may be pronounced in secret, it would be contradictory to suppose that it had been promulgated in secret”. Caligula’s Pillar provides just such an example of the law being promulgated in a way so as to keep it secret.
such an extent that individuals may be required to have *actual* knowledge of the law before it can bind them.\(^\text{12}\)

A process does not have to strictly adhere to a legal system’s formal requirements to promulgate to be categorised as promulgation. Promulgation may occur above the demands of formal requirements and consequently occur substantively and effectively, despite formal requirements that demand only insubstantial and ineffective promulgation.\(^\text{13}\)

Hypothetically, promulgation may even be said to have occurred, despite a process not having met formal requirements to promulgate.\(^\text{14}\)

The variety of ways in which promulgation can occur means that it can be difficult to recognise the common threads between them. However, closer examination reveals that there is a core of shared features that enable the recognition of “promulgation” as a concept. The presence of one or more of the constituent processes of promulgation—publication, proclamation or dissemination—enables a process to be categorised as promulgation.

It is not only between different legal systems that a variety of different processes of promulgation can be seen. Historically, the process of promulgation has occurred in New Zealand in a variety of ways and this diversity continues to this day. Moreover, the methods by which Acts of Parliament are promulgated in New Zealand have undergone considerable change in recent years. Some current methods of promulgation of legislation, for instance publishing electronic copies of statutes on the internet, would have been inconceivable thirty years ago. Other methods have undergone little change; all the Acts of Parliament passed in a year are still printed in bound volumes as they always have been in New Zealand.\(^\text{15}\)

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\(^\text{12}\) This approach effectively annuls the maxim ignorance of the law is no excuse. Several examples of this maxim being removed from American law are noted in Joseph E Murphy “The duty of the government to make the law known” (1982–1983) 51 Fordham Law Rev 255 at 281: “Partial or complete abolition of the *ignorantia legis* maxim has been attempted in several federal statutes conferring rulemaking authority on administrative agencies. Under the Securities Exchange Act of 1934, violators of rules issued under that Act are spared from imprisonment if they can prove their ignorance of the rules. The Public Utility Holding Company Act of 1935 and the Investment Company Act of 1940 go one step further by barring any conviction for violation of any rule of which the defendant can prove ignorance. The most advanced position along this line is found in the section of the Federal Trade Commission Act permitting the Commission to seek damages against violators of its rules. Under that Act an offender can be sued only if he had ‘actual knowledge or knowledge fairly implied on the basis of objective circumstances’.”

\(^\text{13}\) For example, as yet there is no legal requirement that electronic copies of statutes are to be posted on the New Zealand Legislation Website. Yet the posting of copies of statutes on the New Zealand Legislation Website is a process of promulgation.

\(^\text{14}\) “Insufficient promulgation” is still a type of promulgation. Usually “insufficient promulgation” will be so categorised purely because formal requirements to promulgate have not been met. A particular legal system may limit the definition of promulgation to processes that adhere to formal requirements but that does not have to be the case. For example, formal requirements for promulgation may require the posting of a minimum of ten thousand copies of a statute in public places. If only nine thousand copies were posted in public places there would still have been promulgation of that particular statute, just not sufficient promulgation to meet the formal requirements of that legal system. Rather than using the phrase “insufficient promulgation” a situation may also be described as a “failure to promulgate”. Subsequently, failure to promulgate may result from two different types of scenarios:

1. There may have been no promulgation at all.
2. There may have been promulgation but not to the extent required by formal requirements.

\(^\text{15}\) There have of course been significant changes to the way in which these bound volumes are published but despite that, volumes of all the statutes passed in a single year are still published annually. Changes that have affected the *Annual Bound Volumes* include alterations to the layout of the pages, the text, the margins, the font, the volume size and the use of marginal notes. Changes are continually being made; a change in recent years to the format of the *Annual Bound Volumes* is that pagination is no longer consecutive, each Act’s page numbering starts again from zero. This change was made in 2005. This was kindly pointed out to me by
comparatively new approach of publishing statutes on the internet raise both practical and principled questions: why have some of the methods changed and others stayed the same? Put differently, what influences the methods of promulgation?

To answer these questions, this thesis examines the promulgation of the text of legislation in New Zealand. An explanation is given of how promulgation is the outcome of the interaction of two elements, ends and means. Each of these elements are themselves made up of several factors. Change in the practice of promulgation and the legal requirements to promulgate only occur when there is change in these factors. The two elements of ends and means are categorised here as the policy considerations and the practical considerations behind promulgation.

Practical considerations are the physical limits that the process of promulgation must labour under, such as technological limitations, financial limitations, limitations imposed by the shape of the Statute Book and the ways in which the Statute Book changes. Policy considerations can be more accurately labelled as the purposes behind the promulgative process. Practical considerations are concerned with ‘how promulgation can occur’, while the policy considerations are concerned with ‘why promulgation should occur’. For example, the length of the Statute Book affects how promulgation can occur, while the inclusion of publication as an element of the Rule of Law affects why promulgation should occur.

Chapter One begins with an investigation of the concept of promulgation and its constituent parts—proclamation, publication and dissemination—to provide some theoretical background.

Chapter Two deals with the influence of financial considerations on promulgation and illustrates that this practical consideration can often be contingent on other considerations. This Chapter also shows how private publication of legislation can influence how promulgation occurs. Private publication of legislation is explored in more detail in Chapters Twelve and Thirteen.

Chapter Three examines the influence New Zealand’s particular Statute Book has on promulgation. This Chapter also examines the ways in which change is made to the Statute Book and how this affects the way that promulgation occurs.

Chapter Four examines the final practical consideration; technology. The influence of technology on promulgation is limited to some degree by several of the factors described in Chapter Three.

Chapters Five, Six, Seven and Eight investigate four of the major policy considerations that can influence why legislation is promulgated; to ensure legal validity, adherence to the Rule of Law, ensuring there is access to authentic copies of the law and ensuring that the law is communicated.

Chapter Nine looks at the current legal (both statutory and Common Law) requirements to promulgate legislation. This Chapter examines the duties that are imposed on the Parliamentary Counsel Office, the body charged with the promulgation of legislation in New Zealand.

Chapter Ten looks at the development of the statutory requirements to promulgate. The most elaborate statutory scheme dealing with promulgation requirements ever to exist in New Zealand is the currently in force Acts and Regulations Publication Act 1989 (the ARPA).

Lance White, Legal Annotator for Thomson Brookers. Another change, made in 2008, saw a return to the practice of including the textual formula “Wellington New Zealand: Published under the authority of the New Zealand Government” at the foot of the final page of each Act. Textual formula placed on the final page of each Act in this manner had not occurred since 1908.
Chapter Eleven looks at the proposed changes to the statutory requirements to promulgate contained in the Legislation Bill 2010.\textsuperscript{16}

Chapter Twelve gives an overview of the current practice of the promulgation of legislation. This Chapter also investigates the private publication of legislation. Private publication has often attempted to address perceived shortcomings of promulgation. Methods of private publication of statutes can highlight actual shortcomings of promulgative processes.

Chapter Thirteen examines the development of the practice of promulgation and the private publishing of legislation in the course of New Zealand’s history. This Chapter traces the practice of promulgation from before the establishment of the Government Printing Office in 1864 to the sale of the Government Printing Office in 1990 and after, into the days of electronic promulgation. Chapter Thirteen identifies three major trends in the development of the practice of promulgation. These trends are directly attributable to policy and practical considerations.

\textsuperscript{16} It is likely that the ARPA is going to be repealed and replaced by the Legislation Bill 2010 (162) currently before Parliament.
Part One: The phenomenon of promulgation

Chapter One: The phenomenon of promulgation

A The definition of Promulgation

In New Zealand, promulgation has been defined simply as “[t]he publication of a law already made”. In all likelihood the word originates from the Latin word *promulgare*, which means “to publish” or “expose to public view”. The Oxford English Dictionary today defines promulgation as “[t]he official publication or public proclamation of a new law, decree, ordinance, etc., thereby putting it into effect; an instance of this” and “[t]he action or an act of promulgating something; the fact of being promulgated; proclamation, publication, dissemination”.

There are several problems with the Oxford definition of the process. First, it assumes that promulgation must be an “official publication” when that is not always so. Second, it assumes that promulgation must be of “new” law. Promulgation of legal text can occur with such tardiness that, in some instances, by the time promulgation occurs the law can no longer be described with any accuracy as “new”. Another problem with the OED definition is the idea that promulgation “…[puts] [the law] into effect”. This does not sit very well with legal systems of the Westminster tradition where the coming into force of a statute is usually determined with reference to the date of Royal Assent. Law can be, and often has been, in force without promulgation.

For the purposes of this thesis a working definition of promulgation is proposed. Promulgation here is defined as the processes that the State engages in, at any time before or after legislation has been enacted, that involves the publication, dissemination or proclamation of the text of that legislation, or any combination of these three processes.
B The constituent processes of promulgation

Promulgation can occur through any one (or a combination) of three processes: publication, dissemination or proclamation. There can be proclamation of law without publication, dissemination without proclamation, or, conversely, promulgation through proclamation and publication causing dissemination.

Significantly, promulgation still occurs when these processes only take place in a feeble way. Caligula’s pillar, an example of a malicious style of promulgation, was not a proclamation in itself and resulted in no dissemination but was still a publication, albeit a deliberately minimal one. There was “public notification” as the law was posted “publicly for all to see, whilst obstructing the people’s ability actually to learn [the law]”. Despite being posted, “publicly for all to see”, this law was not made known nor made capable of being known.

Publication and dissemination are ideals, unachievable in practice. Proclamation can be both an ideal and a purely formal procedure. These three terms describe processes in their perfect form. Promulgation is, on the other hand, what occurs when publication, dissemination and proclamation of law occur to any degree, at any extent. It is the reality of promulgation, and the explanation for this reality, in relation to New Zealand’s legislation, that is the subject of this thesis.

C The significance of promulgation

Why does promulgation matter? The promulgation of law has long concerned both those who govern as well as the governed. The more the laws of a legal system go beyond merely reflecting social norms or custom, the more promulgation becomes significant as a communicative means for educating people about the law. Extensive promulgation can ensure that any who wish to have access to the statutory text on a particular topic can have

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25 Publication is “[t]he action of making something publicly known; public notification or announcement; an instance of this”. OED, above n 20.
26 Dissemination has a similar meaning to publication, both these processes in this context involve the spread of information, from a specific to a wider point: “[t]he action of scattering or spreading abroad seed, or anything likened to it; the fact or condition of being thus diffused; dispersion, diffusion, promulgation”. OED, above n 20.
27 Proclamation can be the giving notice of the making, or of the enactment, of law. Unlike the other processes of promulgation, the modern definition of proclamation is inherently legal in nature. Significantly, the Oxford English Dictionary defines proclamation as: “[s]omething that is proclaimed (applied either to its substance or its form). Originally [it was]: a formal order issued by a monarch or other legal authority, and made public. In later use [it encompassed]: an authoritative announcement, statement, order, etc., made by anyone” and “[t]he action of proclaiming; the official giving of public notice”. OED, above n 20. Therefore, proclamation can describe more than just a process; it can describe a formal procedure of a legal system. The significant distinction between proclamation and promulgation is that while promulgation does not have to be official, proclamation by definition has to be. Historic use of the word emphasises that it is a “formal order” while modern use shows that it is “authoritative”. Both these characterisations of proclamation show that it is an official communication.
28 For example, a proclamation made in one language to a group of people who only spoke another language. See “Promulgation of Statutes and ordinances” (1831) 3 U.S. L. Intelligencer & Rev 326 at 326–327: “We therefore ask any man, to answer reasonably whether it is justice that an ordinance promulgated only in the French, ought justly to be considered sufficiently promulgated, and more particularly when it is one that bears more immediately on those speaking only English”.
29 For example, promulgation can occur through the dissemination of statutory provisions through the enforcement of those provisions by the courts and subsequent court reporting without proclamation ever happening.
access to it, while also serving as an educational tool for the legislator, who does not then have to resort to other means of educating people of the law.

Some 2500 years ago, the XII Tables of Rome were purportedly a response to a need for the Plebeians to know the law the consuls administered. A little over 150 years ago, the inaccessibility of law due to then contemporary methods of promulgation was an accepted part of the New Zealand legal system.

Seeing that it is no easy matter to obtain a copy of a Provincial Ordinance, and that nine-tenths of those who would willingly discuss the subject, are either totally ignorant of the contents of this particular Ordinance, or at best but partially acquainted with them, we who are fortunate enough to possess a copy may do some service by giving a brief sketch of its provisions…

Twenty-two years ago a commentator wrote, “Acts of Parliament are not easily accessible in New Zealand”. Only twelve years ago it was recognised that people felt frustrated that, “they could access legislation of numerous overseas jurisdictions over the Internet, [but] they could not do so for themselves here at home”.

Beyond being purely a communicative tool, promulgation can also serve as a tool to ensure the validity of law. Although this approach could be taken with respect to legislation, it has not yet found much favour in New Zealand. Despite that, promulgation has become a significant element in modern conceptions of the Rule of Law. Also, so long as there is more than one copy of a law, the possibility of discrepancies between copies arises. Promulgative processes can also be shaped by the need for there to be copies of law that are authentic and authoritative.

The methods of promulgating the text of legislation are currently undergoing great change in New Zealand. This change makes the promulgation of law an even more dynamic topic. The Legislation Bill 2010 (162) contains proposed changes to the statutory requirements to promulgate legislation. This Bill, if enacted, will largely bring the requirements into line with current practice. This Bill is evidence of a currently evolving promulgative process.

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31 Gaius Terentilius Harsa inveighed against the authority of the consuls as excessive and intolerable in a free commonwealth, for whilst in name it was less invidious, in reality it was almost more harsh and oppressive than that of the kings had been, for now, he said, they had two masters instead of one, with uncontrolled, unlimited powers, who, with nothing to curb their licence, directed all the threats and penalties of the laws against the plebeians. To prevent this unfettered tyranny from lasting forever, he said he would propose an enactment that a commission of five should be appointed to draw up in writing the laws which regulated the power of the consuls. Whatever jurisdiction over themselves the people gave the consul, that and that only was he to exercise he was not to regard his own licence and caprice as law”. Titus Livy The History of Rome, (J.M. Dent and Sons 1912) Vol. I Book 3.10.

32 The Press (New Zealand May 25 1861) at 1.

33 David Elliot “Access to statute law in New Zealand” (1990) 20 VULWR 131 at 132.


35 See Legislation Bill 2010 (162-1) (explanatory note) at 5: “[t]he New Zealand Legislation Website went live at the beginning of 2008 and provides free electronic access to copies of Acts and regulations”. The explanatory note states that “[t]he purpose of this Bill is to modernise and improve the law relating to the publication, availability, reprinting, revision, and official versions of legislation”. Legislation Bill 2010 (162-1) (explanatory note) at 1.
Part Two: The practicalities

Chapter Two: Financial considerations and private publication

A Financial Considerations

Financial considerations, while obviously of significant practical importance, are not examined in great depth in this thesis. Often they only become relevant after policy considerations have been taken into account.\textsuperscript{36} If a policy consideration is perceived as being significant enough, financial expense becomes a less relevant consideration. For example, the great cost of the Public Access to Legislation (PAL) project\textsuperscript{37} —which resulted in the creation of the New Zealand Legislation Website— was no bar to its approval.\textsuperscript{38}

The rationale for the project is based on benefits for the public good rather than on a quantified financial rate of return to the Crown. A detailed discounted cash flow analysis has not been undertaken.

If the cost of promulgation is criticised this is usually done after other considerations have been taken into account.\textsuperscript{39} The topic of the law, for example:\textsuperscript{40}

Signs required for a planned anti-cruising bylaw in parts of Christchurch could cost ratepayers about $350,000. The Christchurch City Council will tomorrow be asked to write to Transport Minister Steven Joyce criticising the need to install an “unnecessary proliferation” of about 1000 signs to outline the bylaw, as required by legislation. Mayor Bob Parker said the requirement was “ludicrous”.

The criticism of this cost would arguably not have been so forthcoming if the proposed signs had been to signify tow-away parking zones near hospitals instead of warning unpopular “boy racers” of the new illegal status of one of their activities. This demonstrates how contingent the influence of financial considerations can be on the topic of the legal text. This consideration is explored in Chapter Three.

\textsuperscript{36} However, financial considerations can increase or decrease in significance. For example, financial considerations become more influential in times of austerity.

\textsuperscript{37} Extrinsic Services Limited The Parliamentary Counsel Office Public Access to legislation (PAL) Project: Post Implementation Review (Wellington, 2009) at 6.5 and 6.5.1.1. Available at <www.pco.parliament.govt.nz/earlier-news/>. While the overall cost of the PAL project was 28.444 million (GST exclusive) the initial cost which the Government approval was based upon was 5.19 million (GST inclusive) to complete the project and on-going operating costs of 0.782 million (GST inclusive) per annum. These estimates were revised, after stage one of the project, up to 8.174 million (GST inclusive) and on-going costs of 1.13 million (GST inclusive). These revisions required Cabinet approval.

\textsuperscript{38} Public Access to Legislation Project: Summary of Business Case at 2.1.

\textsuperscript{39} As far as can be ascertained there has been little criticism of the $1.2 million the New Zealand Transport Agency spent on “a nationwide advertising campaign which…include[d] TV, radio, online and print advertising as well as a leaflet drop to 1.73 million homes” (Lois Cairns “Give-way change imminent” (12/02/2012) The Dominion Post <www.stuff.co.nz/dominion-post/> regarding changes to traffic rules regarding giving way at intersections. See also New Zealand Transport Agency Waka Kotahi “New give way rules advertising campaign” (2012) <www.nzta.govt.nz/about/advertising/give-way/>.

\textsuperscript{40} Glenn Conway “Sign of the Times” The Press (New Zealand, 26 May 2010) at 1.
B Private publication of statutes

Another consideration that can be influential is the extent to which promulgation may be made unnecessary by private publication projects. Private publication of legislation has, for a long time, been significant in New Zealand. These private endeavours sometimes fill gaps left by perceived inadequacies of promulgation or sometimes work in conjunction with promulgative processes. Sometimes promulgation can be a response to perceived inadequacies of private publications of law.

In the context of other Common Law legal systems, this relationship between public promulgation and private publication of law has been noted:

In England and the United States, government announced a rule but made little effort to ensure its communication. Government met its formal duty when it published the new rule in a gazette or the federal register. The official publication, however, triggered a widespread, unofficial communication network. The mass media noted the publication and re-broadcast it. If they did not, government took pains to alert them to it…

The private publication of the text of legislation in New Zealand is explored in more detail in Chapters Nine and Ten of this thesis.

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41 Of particular significance is the annotation service provided by Brookers.
Chapter Three: Characteristics of the Statute Book

A Characteristics of the Statute Book and how it changes

Here the term “Statute Book” is used to refer to the totality of legislation of a legal system. This term, despite being noted in *Craies on Legislation* as a colloquialism, can be used as a “way of referring to the extant corpus of legislation in… [a Common Law legal system]”. In the New Zealand context the term Statute Book is appropriate when contrasted with the British context; “[t]he British system of free-standing Acts contrasts with the system found in most other Commonwealth countries where the whole Statute Book is a unit divided up into ‘chapters’”.

A particular Statute Book may differ greatly from other Statute Books. For example, the length of a Statute Book can vary widely from legal system to legal system. Hypothetically, the length of the Statute Book of one legal system could consist of millions of pages. Conversely, the “extant corpus of legislation” of another legal system could comprise only a few pages, or even a single page. The length of a Statute Book is one example of several of the characteristics that, while capable of great variation, are also very influential in determining how promulgation can occur.

These characteristics that influence the promulgative process can be divided into two groups. The first group concerns how the Statute Book changes. In this group four characteristics of great significance are; the speed with which changes to the Statute Book are made, the uniformity of the rate at which these changes are made, the way in which these changes are incorporated into the Statute Book and finally, the level of publicity associated with the legislative process that creates the Statute Book.

The second group of characteristics are concerned with the shape and the nature of the Statute Book itself. In this group significant characteristics are; the length of the Statute Book, the topics with which the Statute Book is concerned, what the law within the Statute Book is perceived as trying to do (for example, is it a codification of social norms?) and what this law is perceived as being (for example, is it Parliamentary will?).

B Changes to the Statute Book

1 The speed with which changes are made

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44 FAR Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 1165. The division of the Statute Book into chapters reflects the formal revision of legislation by subject matter through the use of textual amendment.
45 All of these characteristics are large topics in their own right. Here, for the sake of expediency, they are examined only in a cursory sense so as to highlight the influence they have on how promulgation of the Statute Book occurs and can occur. Nor is this thesis the place to determine how exactly some of these less obvious characteristics are expressed in the New Zealand Statute Book. Where possible, it is observed how these characteristics are expressed in the New Zealand Statute Book. However, the focus here is more on how these characteristics can influence promulgation rather than attempting to resolve contentious issues; for example, the perception of what the law contained in the New Zealand Statute Book is.
To illustrate the significance that the speed with which the Statute Book changes has for how promulgation occurs, examples of extreme speed and extreme slowness of legislative change can be instructive. In 2010, 139 Acts were enacted by the New Zealand Parliament. Imagine, for example, a legal system where instead of 139 Acts a year (or one Act passed every 2.6 days) only 100 Acts were passed every millennium, one Act every decade. This glacial rate of change to the Statute Book would mean that even if promulgation of a new Act occurred six months after enactment, then 95 per cent of the time new Acts would still have been promulgated.

Accordingly, promulgative processes could be very slow and still, for the vast majority of the time, adhere to the Rule of Law, allow for the law to be validated, communicated, and allow for authentic copies of Acts to be made available (if the promulgative processes indeed fulfilled these policy considerations). As the rate of legislative activity slows (to nearer one Act enacted every 50 years) promulgation that takes six months arguably becomes increasingly adequate. The proportion of time where new Acts are promulgated becomes larger and larger while the time where they remain un-promulgated become smaller and smaller. This legislative speed would result in instances where legislation was in force and had yet to be promulgated as rare exceptions, rather than the norm.

Contrary to that argument, if legislative activity was such a rare occurrence that it took place only once every fifty years then maybe swift promulgation practices would still be required. Individuals would be so used to relying on law that may not have changed in living memory, that when it did change it would be an event of such importance and significance that rapid promulgation would be necessary. Having relied on unchanging law for so long, new law would need to be communicated to have any effect. Either way, a slow rate of legislation would directly influence promulgative processes.

To take the other extreme, if legislative change were to occur at an incredible speed—for example, a new Act every 2.6 hours, or 2.6 minutes—slow promulgative processes become less and less adequate. If a process of promulgation were to take six months, then at a rate of a new Act every 2.6 hours, some 1300 Acts would remain un-promulgated during that time. In this scenario promulgative processes would need to be very rapid to meet the policy considerations. Also, in this scenario the situation could more easily arise where Acts were enacted and repealed before promulgation could occur.

These scenarios illustrate how important it is to ensure that the promulgative processes used are tailored to the speed of legislation. The great expense of creating the New Zealand Legislation Website, which has the strength of being able to promulgate legislation very promptly after enactment, may be less appropriate if legislative change took place incredibly slowly. Although, arguably if legislative change did occur incredibly slowly then the New Zealand Legislation Website may occasionally be a very appropriate method of promulgation.

Not only can certain promulgative schemes be of inadequate speed if the rate of legislation is rapid, but this very rapidity can also exacerbate promulgative delays:

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46 One example of legislative speed affecting private publication of legislation is the alteration, by Brookers, of their annotation cycles from yearly to six monthly. This was done purely as a response to the change of the pace with which Parliament was enacting legislation: “A major change to the annotations service came in 1988 when the flood of legislation pouring out of Parliament threatened to drown the annotation business. To manage the workload better, it was decided to move [from annual] to twice-yearly annotation cycles”. Geoff Adlam Local to Global: The History of Brookers 1910–2010 (Brookers, Wellington, 2010) at 57.

Responding to a letter from NZLS Executive Director Alan Ritchie criticising the length of delays in printing bound volumes of Acts and regulations (three and four years respectively) Mr East said he regretted that better progress had not been made since the Society’s previous approach on the matter in April 1991.

...[A] major contributing factor had been the “very heavy and sustained pressure” placed on the Parliamentary Counsel Office. For example, in the first six months of 1992, 71 Statutes aggregating 1157 pages were passed, and 181 regulations aggregating 1459 pages were made. Mr East said this volume of work was probably a record for the first six months of any year.

Reprinting copies of Acts, a process of promulgation, may also be inappropriate because of legislative speed. The brown bound series of *Reprinted Statutes of New Zealand* that began in 1979 was supposed to ensure that “every public Act of general application [was] available in a form that is not more than 10 years old”. 48 This meant that this process was aimed at ensuring that at worst only ten years elapsed between amendment and incorporation into the Reprint series. Not even this seemingly pragmatic goal was achieved. The Legislation Advisory Committee (writing in 1995) noted, “[t]he Education Act 1964 [most of which has now been repealed] was last reprinted… in 1976. There have been twenty-nine amendments to that Act since 1976”. 49 This shows how a promulgative process may be inappropriate purely because of the speed of the change of the Statute Book.

### 2 The rate of change

Parliament does not produce legislation at a uniform rate throughout the year. Legislation does not flow out of Parliament in a steady stream; it will flow out in a trickle, then a deluge, then a trickle again. For example, approximately one third of the statutes passed in 2010 were enacted on the 6th of July that year. 50

This is nothing new in New Zealand. In 1867, 92 of the 95 Acts passed that year received the Royal Assent on the last day of the session, the tenth of October. 51 This uneven rate of legislation has continued throughout New Zealand’s history: 52

In the early 20th century [Parliament still] conducted most of its business in the period from June to November before the gentlemen members leisurely made their way by train and boat to their home electorates

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50 To be fair, the Acts enacted on the 6th of July 2012, included numerous short amendment Acts divided from the Statutes Amendment Bill 2009 (101-2). These Acts swelled the annual total number of Acts enacted but were much shorter than other new principal Acts or other amendment Acts. The brevity of most of these amendment Acts must therefore also be considered. “The number of assents prepared for each year can vary significantly depending on whether a Statutes Amendment Bill has been passed by the House”. Mary Harris “Annual Report of the Office of the Clerk of the House of Representatives for the year ended 30 June 2012” (2012) AJHR A8 at 23.
52 Adlam, above n 46, at 4.
By the 1970s and 1980s “most new Acts and amendments tended to be passed in the last few days of each Parliamentary session”. 53

If a large proportion of Acts passed in a year are enacted on single day it places great strain on promulgative processes. If 50 Acts are enacted on a single day then if promulgation takes a week that is 50 Acts that remain un-promulgated for a week, rather than only 2 or 3 if the Acts are enacted at a uniform rate of one every 2.6 days. This is not desirable even if for the rest of the year only one or two Acts remain un-promulgated for a week.

Contrary to that, problems can also be created for promulgation if there is less time between periods of legislative activity. For example, in 1992 it was noted: 54

...problems [in the publication of the Annual Bound Volumes] had proved harder to overcome than earlier envisaged, particularly owing to a reduction in the period between Parliamentary sessions — down from 167 [days] in 1980 to just 43 [days] in 1990 and 71 [days] in 1991...

The Statute Book cannot be said to change at a glacial pace. 55 Rather the pace is more akin to how tectonic plate movement occurs. There can be periods of almost imperceptible change, periods of great change and periods of no change. This characteristic of the Statute Book ensures that promulgative processes that are quick are desirable over processes that are slow. Otherwise, occasionally a significant amount of legislation will remain un-promulgated. Again, this problem is nothing new. In 1867, in relation to the 92 Acts that received the Royal Assent on the tenth of October, “many of these Acts were thus in force before the Statutes could be printed, and naturally the Government Printer, quite wrongly, was sometimes blamed for the delay”. 56

3 The way changes are incorporated

In a young country like New Zealand, where conditions differ so much from those of older lands, a great deal of novel and experimental legislation has been inevitable. It was and is equally inevitable that in the process of time many and frequent amendments (and amendments of amendments) should become necessary. 57

The majority of Acts enacted by the New Zealand Parliament are amending Acts, “[i]n 2005 for example, there were 126 Acts passed. Of these, if one excludes the Imprest Supply and Appropriation Acts, only 14 were principal Acts”. 58 The publication of the text of statutes through Reprints, e-prints and annotations is a direct result of New Zealand adhering to a textual rather than a non-textual method of amendment to the Statute Book. There is “[a] broad distinction... between [these] two widely differing techniques of

53 Adlam, above n 46, at 56. Parliamentary sessions have, “[s]ince the forty-fourth Parliament (1993–1996)...been [limited to] only a single session lasting the entire life of the parliament and this has now become the norm... [although] [t]he sittings of the House during the session may be interspersed with adjournments, mostly for only a few hours until the next regular meeting of the House, but occasionally for periods of a week or month or even longer”. David McGee Parliamentary Practice in New Zealand (3rd ed, Dunmore Publishing, Wellington, 2005) at 109.
54 “Resources boost to ease statute delays”, above n 47, at 3.
55 But see David Harvey “Public access to legislative information and judicial decisions in New Zealand: Progress and Process” (2002) 10 Aust L Libr 48 at 66.
56 Glue, above n 51 at 43.
57 William Downie Stewart “Foreword” to volume 1 of The Public Acts of New Zealand (Reprint), 1908–1931 (Butterworths, Wellington, 1932) at vii.
drafting amending legislation. One method may be described as direct and textual, the other as indirect, referential and cumulative”. 59 A Statute Book does not necessarily need to be changed by textual rather than non-textual amendment, for example; “[a]lthough little used in Britain until recently, this method [of textual amendment] is now accepted as being the usual one”. 60

The textual, or direct, method of amendment is where, “the text of an Act or other instrument to be amended is expressly altered by the deletion, substitution, or addition of words in specified place or places”. 61 Legislation is quite literally “cut and pasted” into the Statute Book. Nowhere else is this more apparent as when looking at a volume of statutes annotated by Brookers with amendments “paysted” in and deletions struck out in red pencil. 62

Conversely the non-textual, or indirect method—63

…consists of a narrative statement in the amending law stating the effect of the amendment. The amending law does not in so many words purport to amend the principal law, nor does it merge with it and lose its separate existence on enactment as an amending law generally does when the direct method is followed…The effect is a cumulative one as statute is piled on statute…

There is no point in reprinting a copy of a statute, annotating a statute, or republishing an updated e-print of a statute if the statute itself has not been changed by an amendment altering its text. Although the statute will indeed have been modified by the enactment of an amending Act, the amendment, if non-textual, must be read alongside the original statute.

The existence of these three processes of publication; annotation, reprinting and e-printing are contingent on a textual style of amendment being used by the legislature to change the content of the Statute Book. While the textual amendment approach may result in an amending Act making no sense on its own it has the “effect… that the instrument can then be reprinted as amended and remains a single text”. 64

4 The level of publicity associated with the legislative process

If the process that changes the Statute Book is subject to a great deal of publicity the need for promulgation, so as to communicate the law, may be reduced. The level of interest people take and the degree to which they participate in the legislative process — and the level of opportunity people have to do these two things— greatly affect the publicity associated with the legislative process. This publicity in turn, affects the need for promulgation. If it is widely known that changes are being made, and the details of these changes are well known, then it has to follow that the level of reliance placed on promulgation so as to communicate the law is reduced.

60 Bennion, above n 44, at 289.
61 Bennion, above n 44, at 288.
62 “Never use the spelling “paste” to refer to the gum which is used to stick the insets and booklets into the books of statutes and regulations. For some reason lost in the mists of time, the company always spells it “payste” in all internal communications. Barbara Hunter thinks this may have been how it was printed on the original bottle of payste — which must have been sourced around 1910”. Adlam, above n 46, at 112.
63 Thornton, above n 59, at 405.
64 Bennion, above n 44 at 288.
The publicity of the legislative process can be real or even constructive (either explicit or implied). Blackstone noted:

…a statute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of law, as was necessary by the civil law with regard to the emperor’s edicts; because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives.

There is then, a link between the need for promulgation and the level of publicity of the legislative process, even if the publicity is based on the fiction that every member of a legal system is in Parliament when a statute is made.

Blackstone’s fiction that everyone is in Parliament almost appears a reference to an Athenian style of direct (or “pure”) democracy where every citizen is in reality present during the making of the laws. This raises several issues; if everyone was directly involved in changing the Statute Book would promulgation be necessary? Or if no-one was involved at all, except for an all-powerful dictator, would promulgation be absolutely crucial? New Zealand is a representative democracy. What is the impact of this factor on the need for promulgation?

In New Zealand people are involved in the making of laws, through the election of their representatives, but only indirectly through these representatives. What may be more significant than the degree to which it is possible to directly participate in the legislative process, however, is to what degree an interest is taken by the public in the legislative process. A Statute Book, that is the product of a direct democracy, will still require promulgation to a high level to be communicated if only one per cent of people actually take an interest in the legislative process. Conversely, people may take a high level of interest in the televised meetings of a one man dictator and his three henchmen, while they discuss what laws would be best added to their Statute Book. This level of interest would naturally reduce the need for communicative motivated promulgation.

The level of interest actually taken in the legislative process by the New Zealand public, is beyond the scope of this thesis. Despite that, it is likely that the level of publicity of the legislative process in New Zealand falls somewhere in the middle of a continuum, that would have miniscule levels of publicity and public participation on one end and extensive levels of publicity and public participation on the other. It is likely that in the New Zealand context the situation may tend towards the latter rather than the former.

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65 William Blackstone Commentaries on the Laws of England (15th ed, Law Printer, London, 1809) vol 1 at 184. The lack of a requirement for formal promulgation must rely on this legal fiction to be reconciled with Blackstone’s other comment that “a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never properly be called a law”. Blackstone, at 45. See also Coke’s summary of Rex v Bishop of Chichester YB Pasch 7 39 Edw 3 (1365) which is made in a similar vein “…parliament represents the body of the whole realm; and therefor it is not requisite that any proclamation be made”. Edward Coke The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts (E & R Brooke Bell-Yard, London, 1797) at 26.

66 This reasoning could lead to different level of promulgation being required for any Acts that are the result of referenda.

67 For more on the level of publicity of the legislative process and the opportunities for public participation in the legislative process see generally McGee, above n 53; Andrew Geddis Electoral Law in New Zealand: Practice and Policy (LexisNexis, Wellington, 2007).

68 Contrast Geoffrey Palmer “What is Parliament for?”[2011] NZLJ 378 at 378: “What goes on in Parliament is subject to much less analysis, reportage and attention from the media than it was 30 years ago (Geoffrey Palmer New Zealand’s Constitution in Crisis (John McIndoe, Dunedin, 1992) at 201–227). This may reflect a lessening of public interest in how we are governed. But in a democracy unless there is adequate communication between the governors and the governed, democratic accountabilities break down”.

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The influence the publicity of the legislative process has on how promulgation occurs can be seen when contrasting requirements to promulgate laws that are the result of different legislative processes. This is particularly apparent in the justifications for some of the different approaches taken in promulgating primary legislation as opposed to secondary legislation.

In the case of United States v Casson\(^{69}\) the Court noted:\(^{70}\)

Appellant's claim that he was denied access to knowledge of the law, however, overlooks the widespread publication that Congress gives to the contents of a bill as it journeys through the legislative process…

In Casson, the Court pointed out:\(^{71}\)

…the Congressional Record and documents published by Congress prove that the bill and all its provisions were in the public domain for over six months, received the widest publicity and full disclosure by Congress and over 100,000 copies of the bill in the exact form in which it passed were printed, distributed and available to the general public over two weeks before the President signed the bill. This is more than adequate notice to the public of the contents of the bill.

This reasoning was later criticised in United States of America v Burgess\(^{72}\) which held:\(^{73}\)

Charging the public with notice of available information about bills as they pass through the legislative process, an idea earlier suggested In re Welman, 29 Fed. Cas. 681, 683 (D.Vt. 1844), is difficult to square with the right to fair warning. Given the large number of bills which are never approved, or do not receive significant publicity, or are reported inaccurately and incompletely in the media, or follow irregular legislative paths (often with major last-minute changes), broad application of Casson would carry the fiction of constructive notice to extra-ordinary lengths. Also there are the thousands of pages of Congressional proceedings to consider. While published statutes also bulk large in these times, the statutes at least provide definitive and generally available statements of the laws. Problems of notice and fair warning are magnified if Casson is applied to a statute like § 609 which is never published as a law. For then the public would be charged with notice of Congressional proceedings stretching for an indefinite period into the past. Casson itself dealt only with the interim period between approval and publication of legislation. Presumably its broadly stated rule of constructive notice of Congressional proceedings was not intended to apply for an indefinite future period since after a reasonable time has passed for publication of a newly enacted law, the public should be able to rely on the published laws themselves for guidance as to what conduct is prohibited.

While the criticism of the logic of Casson in Burgess is persuasive that does not mean that the pre-enactment publicity of legislation can be discounted out of hand. This is especially so when this publicity is compared to the little or no publicity some legislative processes have. In Johnson v Sargant & Sons,\(^{74}\) Bailhache J decided that a piece of

\(^{69}\)United States v Casson 434 F.2d 415 (DC Cir 1970) at 415.

\(^{70}\)At 420.

\(^{71}\)At 422.


\(^{73}\)At [46] to [47].

\(^{74}\)Johnson v Sargant & Sons [1918] 1 KB 101.
secondary legislation was not in force prior to publication, despite stating that a statute would be in force prior to publication. Bailhache J wrote:  

While I agree that the rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, there is about statutes a publicity even before they come into operation which is absent in the case of many Orders such as that with which we are now dealing; indeed, if certain Orders are to be effective at all, it is essential that they should not be known until they are actually published. In the absence of authority upon the point I am unable to hold that this Order came into operation before it was known, and, as I have said, it was not known until the morning of May 17.

The validity of the Order, in this instance, was determined by reference to whether or not promulgation had occurred, because of the absence of “publicity” prior to the coming into operation of the law. In the Canadian case of R v Ross the court went into more detail explaining the distinction between the pre-enactment publicity of secondary and primary legislation: 

…before a public Act can receive the Royal assent and become law it must first, in the form of a bill, be presented to and deliberated upon and conveyed or passed, through its different stages at different times and on different days, by the action of the members of the Legislative Assembly in concourse duly assembled in the proper place designated for that purpose, at which the public, including representatives of the press, are generally permitted to be present. Therefore the proceedings necessary to enact and bring into force an Act or law binding upon the public give to it a certain measure of publicity, and it is not difficult to understand why it is a general rule of law that one cannot successfully plead ignorance of such an Act or law.

But, on the other hand, an order made by a Minister, such as the one under discussion, is on a different footing than is an Act of the Legislature. The making of such an order is at the discretion of the Minister himself, as appears by the provisions of s. 119 of the Forest Act, and is drawn up and signed in his private office or some other private place, as I assume was the case with the order in question.

The New Zealand case of Scott v Bank of New South Wales does not make a similar distinction between the coming into force of delegated legislation and primary legislation based on lack of pre-enactment publicity. In that case it was held that The Finance Emergency Regulations 1940 came into force on April 10, rather than on April 11 when they were gazetted.

In New Zealand, some parts of the legislative process are subject to great levels of publicity; all Bills are made available online shortly after their introduction into the House. Some parts of the legislative process are the opposite, “[w]hether or not particular

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75 At 103.
76 This logic equally applies to primary legislation too. For example, if knowledge of the legislative proposal would lead to hoarding, say if there was to be a tax increase on a certain type of goods.
77 R v Ross [1945] 3 DLR 574 (BC Co Ct).
78 At 576.
79 Scott v Bank of New South Wales [1940] NZLR (SC) 922. The result here seems to be based on the Acts Interpretation Act 1924 ss8 and 23(3). Scott at 933.
80 Parliamentary Counsel Office “How often the site is updated — How up to date is this website?” New Zealand Legislation <www.legislation.govt.nz/about.aspx#updated>. “We aim to make legislation (including Bills and Supplementary Order Papers) available on this website in accordance with the following timeframes…
* new Bills introduced into the House: the day after introduction
* subsequent versions: the day after the printed version is made available to the House”.
legislation, or legislation on a particular topic, is being drafted is generally confidential, and the Parliamentary Counsel Office cannot provide any information on this matter". Indeed, in relation to this lack of publicity it has been suggested—

[that] [i]t would be a sound idea to require exposure drafts to be released before a Bill is ever introduced into Parliament. This will often obviate the need for heavy amendments during the parliamentary legislative process. Some of this has been done recently and it has had good results (George Tanner “Confronting the Process of Statute Making” paper presented to the New Zealand Legal Method Seminar The Statute: Making and Meaning (Auckland, 16 May 2002) at 73).

C The Statute Book

1 The perceptions of Statute Law

How the text of an Act of Parliament is promulgated may alter depending on whether that Act is perceived as being the will of the legislature, or a record of custom, or as purely a response to a particular problem. The modern view is that legislation is indeed, the will of Parliament. The New Zealand courts have long echoed this view. However, it has been argued that in the past Statutes were perceived not as Parliamentary will but as records of custom.

Statutes have existed for nearly 800 years in Common Law legal systems. The Statute of Merton 1235 was probably the first statute. The Parliament of 800 years ago was a very different entity than it is today and subsequently so were the statutes it created. Initially, Parliament was a court, the highest court in the land. As a court Parliament did not make laws. Even had Parliament not been a court, it would still not have, in medieval times, been able to make laws. That was not how the nature of law was perceived at the time.

Acts of Parliament were, it is argued, not made but found. Despite statutes having existed since medieval times, “[i]n mediaeval England legislation in its proper sense was all but unknown. Laws in feudal times are in the main declarations of existing custom; they are as Professor Jenks says “not enactments, but records”. McIlwain wrote:

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82 Palmer, above n 68, at 380.
83 Crown Health Financing Agency v P [2008] NZCA 362, [2009] 2 NZLR 149; R v Pora [2001] 2 NZLR 37(CA); Mangin v Commissioner of Inland Revenue [1971] NZLR 591 (PC); Re Clift, Ex P New Zealand Insurance Company, Limited [1952] NZLR 342 (Compensation Court); Re Otago Clerical Workers’ Award: Otago and Southland Stock and Station Agents’ Clerical Employees’ Trade Union v Otago Clerical Workers’ Industrial Union of Workers [1937] NZLR 578 (CA); Re Bowden’s Settlement (1903) 23 NZLR 612 (SC).
84 Bennion, above n 44, at 180.
86 Law could not be made, Sidgwick wrote because “…at an earlier period of our own history law was to an important extent conceived by both governors and governed as a subject of science, capable of being learnt by special study, but not capable of being altered by the mere arbitrary will of government, any more than the principles or conclusions of mathematics”. Henry Sidgwick The Elements of Politics (2nd ed, Macmillan, London, 1897) at 652–653.
87 McIlwain, above n 85, at 42.
88 McIlwain, above n 85, at 46–47.
...the idea of ‘making’ law is alien to then existing modes of thought, and when changes occur, as they must, if consciously made, they are usually only the correction of defects in the machinery for administering the ancient customs, or they purport to be the restoration of these customs after a period of wrongful desuetude, or the abolishing of abuses that have contravened the ancient rules; or finally, if the changes cannot be brought conveniently under any of these, they are concealed under a fiction.

This would have made it impossible to think of legislation as the “will” of Parliament. The concept of statutes being the “will of Parliament” can be seen hinted at as far back as the 17th century in Coke’s Institutes; where it was stated that statutes should be construed “according to the intent of them that made it”. 89

Trends in approaches to statutory interpretation can in some cases suggest general trends in the perception of the Statute Book as a whole. For example, generally the modern trend in interpretation of Statutes, “may be described loosely, if not perhaps entirely accurately, as a change from the literal to the purposive”. 90 A purposive approach to interpretation is entirely consistent with the Statute Book being perceived as something that is made, but not entirely consistent with a perception of it as something that is found.

Until the Interpretation Act 1999, the approach for interpreting statutes had been explicitly, to interpret the purpose of statutes as being remedial. 91 Acts of Parliament were to be seen as a remedy. This approach would suggest that Acts, rather than purely being the “will of Parliament”, were seen as responses by Parliament to particular problems. 92 This illustrates the exceptional nature statutes had, and arguably continue to have, 93 as solutions to problems; “[a]n official report stated in 1835 that ‘the statutes have been framed extemporaneously, not as parts of a system, but to answer particular exigencies as they occurred’”. 94 D A S Ward noted that section 5(j) of the Acts Interpretation Act 1924 was “a modern version of the mischief rule in statutory form”. 95

The mischief rule of statutory interpretation was laid down in Heydon’s Case96 in 1584 and provided that “for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law)”: 97

...four things are to be discerned and considered: (b.) 1st What was the common law before the making of the Act (c.) 2nd. What was the mischief and defect for which the common law did not provide? “3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth. And, 4th, the true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy.

89 Coke, above n 65, at 330.
91 See Acts Interpretation Act 1924, s5(j). Arguably, the repeal of section 5(j) by the Interpretation Act 1999, s 38(1) has not done away with the remedial approach. In Jack v Manukau City Council HC Auckland, M 1698/99, 14 December 1999 Randerson J at [14] and [15] “while noting the differences in wording between the two provisions, said he was satisfied that the approach to interpretation in use before the 1999 Act should continue after it”. Burrows and Carter, above n 90, at 207.
92 Despite there being statutory recognition of this approach it was lamented as early as 1956 that it was neglected by the Courts. DAS Ward “Trends in the Interpretation of Statutes” (1957) 2 VUWLR 155 at 160.
93 See Jack v Manukau City Council, above n 91, at [14] and [15].
94 Bennion, above n 44, at 1165.
95 Ward, above n 92, at 160.
96 Heydon’s Case (1584) 76 ER 637 (KB).
97 At 638 (emphasis added).
This statement was explicitly recognised in New Zealand, prior to the enactment of the Acts Interpretation Act 1924, in Christie v Hastie, Bull, & Pickering Ltd.\(^98\) That all statutes were to be treated as “remedying disease” shows the extent to which statutes were exceptional responses to what the Common Law failed to provide for.

The perception of statutes has arguably then, evolved from being seen as records of the discovery of law, to purely solutions to problems that the common law failed to provide for, to expressions of Parliamentary will.\(^99\) These perceptions of the Statute Book imply different approaches to promulgation. If the Statute Book is a record of custom, then the Statute Book is a repository of the law and communication may not be seen as necessary.\(^100\) If the Statute Book is perceived as an expression of the will of Parliament, then being an expression of will this implies communication and consequently promulgation. The perception of the Statute Book as a collection of remedies could imply both the functions of communication and recording into the Statute Book.\(^101\)

2 The length of the Statute Book

The length of the Statute Book is very influential in determining how promulgation can occur. The Statute Book could be so small it could be memorised. Thomas More wrote in Utopia:\(^102\)

> They have very few laws, for their training is such that very few suffice. The chief fault they find with other nations is that even their infinite volumes of laws and interpretations are not adequate. They think it completely unjust to bind people by a set of laws that are too many to be read or too obscure for anyone to understand.

Memorising law is quite possible and even practical if the volume of law is small enough; Cicero wrote that school children learned the Twelve Tables by heart.\(^103\) If it were short enough, the Statute Book could be disseminated by word of mouth and recorded using nothing but memory. This would make elaborate promulgative processes that deal with hard copy and electronic copy superfluous. Alternatively, the Statute Book could be too long to easily memorise but still only several pages, allowing it to be printed and posted on every street corner. A Statute Book of a few hundred pages, could be printed in a pocket book that every citizen could carry around, similar to the pocket sized versions printed of the United States Constitution. However, once the Statute Book was so long it could no longer be contained in a single volume, or even two or three volumes,

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\(^98\) Christie v Hastie, Bull, & Pickering Ltd [1921] NZLR 1 (SC).

\(^99\) Although the New Zealand Common Law suggests that to a certain extent statutes as well as being Parliamentary will are still considered remedial. See Jack v Manukau City Council, above n 91, at [14] and [15].

\(^100\) Contrast Gilbert Bailey “The Promulgation of Law” (1941) 35 The American Political Science Rev 1059 at 1067. Citing McIlwain, Bailey states “In fourteenth-century England, the provincial publication of statutes which proclaimed and affirmed Magna Carta and other immemorial customs of the realm is said to have been one of the chief functions of Parliament, some doubt existing as to the validity of these declaratory statutes unless they were published in town and borough”.

\(^101\) In noting these distinctions; between Acts with a purpose or object, Acts based on custom or Common Law (or even pre-existing statute law), and Acts remedying mischief, it is important to remember that even today one Act can arguably still fall into all three categories. However, as noted above, this thesis is dealing with general trends of the Statute Book as a whole.


\(^103\) Cicero De legibus at 2.4.9 as cited in Alan Watson The Law of the Ancient Romans (Southern Methodist University Press, Dallas, 1970) at 13.
promulgative process had to be—until recently with the advent of modern technology—less and less communicative (in the transmission sense)\(^{104}\) to the individual citizen.

The New Zealand Statute Book is well beyond the stage where it can be reduced to a pocket book.\(^{105}\) The New Zealand Law Commission (Law Commission) notes that just two particular Acts, albeit particularly large Acts, together total over 3000 pages: “the Local Government Act 2002 is 492 pages, and the Income Tax Act 2007 is 2,855 pages”\(^{106}\). Almost every year several thousand pages of statute are enacted:\(^{107}\)

Routinely, three or four volumes of Acts each comprising anywhere between 700 and 800 pages are published for each year. In 2005 the number of pages totalled 2,062; in 2006, there were a total of 3,308 pages. In 2007 there were a total of 5,083 pages spanning seven volumes.

Consequently, while still growing in length every year, the New Zealand Statute Book has been immense for over a century and longer. The 1908 Consolidation of the Statute Book was five volumes, while the 1931 Reprint was nine volumes.

The length of the New Zealand Statute Book means that rather than promulgative processes that supply each individual a copy of the Statute Book, it has been more pragmatic to focus on providing points of access to the Statute Book. Consistent with this pragmatic approach has been the creation of points of access where portions of the Statute Book may be purchased. The New Zealand Legislation Website and the storing of hard copies of Acts in public libraries are promulgative processes that make it possible for individuals to access portions of the Statute Book without attempting to give every individual a copy of the Statute Book.

This length also limits how numerous the above points of access to the Statute Book in its hard copy form can be. Although collections of the Annual Bound Volumes may be kept at every major public library, they could not be envisaged on every street corner. Many smaller community libraries are not supplied with the Annual Bound Volumes. This too shows how the size of the extant corpus of statute law of a legal system greatly affects how promulgation occurs.

The Income Tax Act 2007 is an example of where the length of just one particular statute can influence already established promulgative processes. The established practice was (and still is)\(^{108}\) that the Parliamentary Counsel Office will make pamphlet copies of legislation available for sale at designated Bookshops and by subscription “within 10 working days of introduction”\(^{109}\). However, this goal was not met for three Acts in 2007, one of these being the Income Tax Act 2007:\(^{110}\)

One of these Acts was large (2,855 pages) and had to be printed as a five-volume set, and took 35 working days to produce and make available. [However] [u]nhBound proofs of the set were made available for viewing at retail outlets that stock legislation until printed and bound copies became available.

\(^{104}\) See Chapter Seven of this thesis.

\(^{105}\) There are over 1100 statutes in the New Zealand Statute Book. Law Commission, above n 58, at 6.

\(^{106}\) Law Commission, above n 58, at 2.39.

\(^{107}\) Law Commission, above n 58, at 1.2.


\(^{110}\) The other two Acts were delayed because one “was assented to in the lead up to the Christmas holiday period and took 16 days to be printed and made available. The...[other] took 12 working days to be made available because of the need to correct a printing error”. At 52.
This situation is not unique. In 2006, three Acts took longer than 10 working days to make available because of their size.111

The limitations imposed by the length of the Statute Book on how promulgation can occur may have been ameliorated somewhat by modern technology. Hand-held devices that access the internet in conjunction with freely available databases of legislation enable a citizen to carry around in their pocket a tool that, if various systems are in place,112 can access the whole of the New Zealand Statute Book.113 Modern information technology has reached the stage where, despite its length, the New Zealand Statute Book can be carried around in a citizen’s pocket. For example, a USB flash drive114 smaller than a human finger is capable of recording and reproducing, although not self-displaying, the New Zealand Statute Book in its entirety.115

3 The topics of the Statute Book

The topics of legislation also determine how promulgation occurs. If promulgative processes are motivated by the policy consideration of communication then the topics contained in the Statute Book become increasingly relevant in influencing how these processes occur. The topic of one particular Act may be of interest to a large number of people while another may not. This interest creates a high demand for certain Acts. This can be taken into consideration in promulgative processes. The Reprint policy of the Parliamentary Counsel Office takes into account which Acts are “best-selling titles”.116

Private and local Acts, (statutes that deal with only specific individuals or specific localities) and Public Acts have long been promulgated differently. From the early 1800s

...his Majesty’s printer was authorised and directed to print not less than five thousand five hundred copies of every public general Act, and three hundred copies of such local and personal Act.

The difference of over 5,000 copies between public Acts and local and personal Acts can be explained by the different subject matter of these three types of Acts.

The influence of the topic of an Act in affecting its promulgation, particularly when this promulgation is motivated by making the law knowable, can be seen by asking two questions. First, how well known is the topic of an Act already prior to its promulgation? Second, how widely known does the topic of an Act need to be? This issue is further complicated by the fact that not only does the Statute Book cover a diverse range of topics, but so too can individual Statutes.

112 These systems are explored in more detail in Chapter Four of this thesis.
113 This does not include all secondary legislation. Although the vast majority of New Zealand’s secondary legislation is available on the internet.
114 Universal Serial Bus.
115 For example, in relation to Common Law, LexisNexis New Zealand now offers for sale a collection of the New Zealand Law Reports on a single flash drive.
116 “In implementing… [the reprinting] policy, the PCO focuses on best-selling titles that are frequently or heavily amended, on the basis that these represent the priorities of users of legislation”. Parliamentary Counsel Office “Reprinting policy” <www.pco.parliament.govt.nz/reprinting-policy/>.
Posting sections 160, 167 and 168 of the Crimes Act 1961 on every street corner in New Zealand, to communicate to individuals that it is unlawful to murder would serve no practical communicative purpose purely because it is well known to all that to murder is unlawful. A provision of an Act making it illegal to shake hands with someone when being introduced would need to be communicated to all because no one would know it, requiring promulgative processes that would need to result in extensive publication and dissemination.

Hobbes wrote that “[l]awes of nature… [unlike other laws] need not any publishing”.118 Seidman expanding on this sentiment wrote:119

If law merely restate[s] social norms, every properly raised person will know the law. The criminal law particularly supposedly only codifies established community mores… If every properly socialized person knows the law, its communication becomes unnecessary.

A great deal of legal scholarship and jurisprudence has been devoted to the relationship of social norms to the law and the related Blackstonian distinction of offences malum in se120 and malum prohibita.121 An analysis of this area is well beyond the scope of this thesis. For present purposes it suffices to say that if a promulgative process is aimed at meeting the policy consideration of communication, a statute that deals with a social norm will require a different level of promulgation than one that is not.122 Placed in the wider context of not just a particular statute but the Statute Book as a whole, if the topics contained in the Statute Book are in the main concerned with social norms, promulgation, as a method of communication, will be at a different level than if the Statute Book as a whole is concerned with topics that are not social norms.

The potential reach of a statute also influences promulgation. Beyond the question of whether or not the topic of an Act is a social norm, what if an Act affects only a very small number of people? Or even only one individual or organisation (as is the case with some private Acts of Parliament)? Should promulgative processes costing millions of dollars be used to ensure that all are informed of a change in legal duty or power that affects only one person or a small class of people?123 Arguably, this depends on the nature of the change and the person in question.124 This element is expressed, as noted above, in the different historical promulgative requirements that have been made in relation to Public Acts opposed to Private Acts.125

118Philosophy of Law, above n 11, at [693].
119 Seidman, above n 42, at 106. Similarly Fuller wrote: “The need for this education [informing the citizen of every law that might conceivably apply to him] will, of course, depend upon how far the requirements of law depart from generally shared views of right and wrong”. Lon L Fuller The Morality of Law (Yale University Press, New Haven, 1969) at 50.
122 See Stephen Guest “Legality, Reciprocity, and the Criminal Law” in Dawn Oliver (ed) Justice, Legality, and the Rule of Law: Lessons from the Pitcairn Prosecutions (Oxford University Press, Oxford, 2009) 183 at 199: “The case of the ‘different culture’ indicates that, where someone is enculturated to a lesser degree of understanding of wrongness, a greater degree of promulgation is required; in order for the criminal law to announce that certain acts ‘not be done’ –to use Hart’s term– extra effort needs to be put into carrying that message more clearly to the enculturated intended addressees”.
123 Even the unpopularity of the class of people a law is aimed at may affect the perception of the need to promulgate. See Conway, above n 40. See also Chapter Two of this thesis.
124 Simply because an Act may affect only one person that does not mean that it will not be necessary to ensure promulgation of the Act is extensive. An Act concerning the powers of the Prime Minister may need to be promulgated differently than an Act concerning the duties of the writer of this thesis.
Finally, if the legislator desires to change people’s behaviour through legislation — by stopping or requiring certain behaviour — then promulgation to communicate this new legal mandate becomes very important. The statute in this instance would not be reinforcing a social norm, but rather seeking to create a new behavioural norm. In order to do so effectively, it may need to be communicated so it could be known by all. In the context of the role of the State in promoting development in the Third World Seidman wrote:  

A law cannot induce consciously changed behaviour unless it is communicated to role-occupants. Self evidently, a role occupant unaware of new rules will comply only accidentally, if at all. Development depends upon effective communication… To induce new behaviour, law makers must first communicate their expectations to bureaucrats and citizens. Because of communication gaps some laws remain paper tigers. Peasants frequently did not know about agricultural credit programmes, just as in the United States, welfare clients did not know their entitlements. The first efforts to abolish nyarubanja tenancies (a form of feudal landholding) in western Tanzania ran aground in part because those affected lacked precise information about the new law.

Recently one commentator has suggested that in relation to legislation in England; “[m]uch of the legislation has been motivated more by well-intentioned wishes to make announcements that certain sorts of activities are to be abhorred”.  

This leads on to a related issue. Is the Statute Book an attempt to provide legislative backing for established social norms? Or is the Statute Book a collection of attempts at altering social norms? If the Statute Book is aimed at the former, communication of the law through promulgation may well be redundant; if it is the latter then communication through promulgation may be a necessity. If the Statute Book is an attempt at neither, but rather an attempt to regulate,  

then promulgation through communication is also a necessity. If the Statute Book is aimed at doing a combination of all three of these things, as the New Zealand Statute Book quite possibly is, then the need for communication through promulgation may vary from Act to Act and perhaps more specifically from topic to topic.

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126 Seidman, above n 42, at 105.
128 Indeed, one commentator does go so far to suggest that the New Zealand Statute Book is largely concerned with regulating behaviour: “New Zealand legislation is also very detailed; far more so than in similar jurisdictions such as the United Kingdom, where legislation tends to be more high-level, with much of the detail being in regulation. Chief Parliamentary Counsel David Noble thinks this is because our Parliament is reluctant to delegate its legislative powers to the Executive to make regulations”. Mai Chen Public Law Toolbox: Solving problems with government (LexisNexis, Wellington, 2012) at 270.
129 The Statute Book in this case would only contain “regulatory laws: [for example] laws about the use of sodium cyclamate in bottled cola drinks; laws about speed limits; laws about condemnation procedures for highways, sewers, and ports”. Lawrence M Friedman “General theory of Law and Social Change” in Jacob S Zeigel (ed) Law and Social Change (Osgoode Hall Law School York University, Toronto, 1973) at 19.
Chapter Four: The influence of technology

Technology has a large influence over how processes of promulgation occur. The changes from oral law to scribal law to printed law and now to digital law have each influenced how promulgation occurs. For example, the onset of printing from the 1400s onwards had enormous significance on how promulgation could occur but also more generally on the development of the Common Law legal system as a whole: 

Historians of communications have explored the social impact of law publishing, and legal historians have examined the influence of printing on the doctrinal and institutional development of the common law. To cite only several of its various ramifications, print, historians say, helped along the recognition that law was made rather than found; facilitated the formation of the modern notion of precedent, the solidification of a group identity within the profession, and the breakdown of the oral learning exercises in the Inns of Court; and both provoked and carried a common law apologetic and nationalist literature.

The technology of promulgation can also affect the substance of the law as well as the law-making process, whether the means of promulgation are paper based or based on electronic technology. The means of promulgation can also be based on brass, as the Twelve Tables were, or based on stone, as Hammurabi’s Pillar was. Nor does promulgation have to be in writing, it can also be based solely on oral methods.

With the advent of the internet, the speed of publication, the velocity and extent to which dissemination can take place has altered promulgative processes significantly. Using the internet as a form of publication it is now technically possible for statutes to be disseminated all around New Zealand within moments of enactment. By 2009, 75 per cent of New Zealand homes had internet access and this has likely increased. Also by 2009 over a million homes had broadband providing high speed internet access. Prior to the rise of the internet this speed and ubiquity of legislative promulgation through publication of hard copy would have been impossible.

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130 These divisions are made by several communication scholars. See Joseph W Dellapena “Law in a shrinking world: the interaction of science and technology with international law” (1999–2000) 88 KY LJ 809 at 861.
133 See generally Harold A Innis Empire and Communications (Dundurn Press, Toronto, 2007).
134 For example, in medieval Iceland the Logsogumator was an official whose duty it was to recite aloud the whole law of Iceland. It was also this official’s duty to answer questions on the law and state what the law was. Bailey, above n 100, at 1065. Promulgation based on oral methods can often work in conjunction with behavioural methods. For instance, the behaviour of the town crier who made proclamations at the market cross was arguably as much a part of this scheme of promulgation as the town crier’s oratory.
136 At 1. However in 2009 only 80 per cent of individuals over the age of fifteen had used the internet in the last 12 months: At 4.
The growing importance of the internet in the promulgation of the text of legislation can be seen in the continual growth of the use of the New Zealand Legislation Website and its previous incarnation:  

Statistics provided by Brookers indicate that the interim website is being used extensively by a wide range of users, and that usage is steadily increasing. Overall activity almost tripled over the period 9 September 2002 to 30 June 2003. The total number of hits on the website per month increased from around 816 000 in September 2002 to over 3.6 million in June 2003, the total number of page requests per month increased from 183 000 to 585 000 over that period, and the total number of visitors to the website per month increased from nearly 36 000 to over 101 000. These statistics provide valuable information on likely demands on the new PCO legislation website.

More recently, statistics showing the annual number of “unique visitors”138 to the New Zealand Legislation Website have also grown significantly. The increase has been from a little over 400,000 in 2007 to a little over 900,000 in 2011.139

Promulgative processes that are based on electronic copies or hard copies both rely on various systems being in place. Hard copies require printing technology, physical transportation and storage. Electronic copies require electronic storage, internet connections, electronic devices (computers or hand-held devices capable of accessing the internet) and electricity.140 The salient difference between the systems that hard copies rely on, compared to the systems that electronic copies rely on, is that the systems for hard copies are, aside from storage, one offs.

The electronic copies require the continued existence of these systems for publication and dissemination of these statutes to be available. Should any one of these systems fail, access to copies of statutes promulgated electronically becomes impossible.141 An extended power outage or a collapse of the Government servers or a failure of the New Zealand Legislation Website would result in these electronic copies of legislation being inaccessible.142 The internet is not only vulnerable to maladies caused by mechanical or man-made faults but also to problems caused by nature.143

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138 “A term used in Web advertising to describe a visitor to a Web site who can be identified by information provided by them...” Darrel Ince A Dictionary of the Internet. (Oxford University Press, 2009, Oxford Reference Online) <www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t12.e3332>.
140 Electronic copies of statutes can be stored on electronic devices, such as flash drives, that remove the reliance on the internet. However the publication of primary sources of law on electronic devices that do not require the internet has seen little use in New Zealand.
141 “Printed versions are also necessary as a ‘back up’ on the rare, but not completely unheard of, occasions when the internet is temporarily unavailable”. New Zealand Law Librarians Association “Submission to the Regulations Review Committee on the Legislation Bill” at [1].
142 An example of a failure of State websites in New Zealand is the recent outages of websites maintained by the Ministry of Economic Development: “[t]his year, three major IT infrastructure incidents have caused significant outages to the online services. The outages lasted 43 hours (in May), 15 hours (in August) and 3.5 days (and longer for some services, in September)”. Deloitte “Ministry of Economic Development: IT infrastructure service failure review” (14 February 2012) Ministry of Economic Development Manatū Ohanga <www.med.govt.nz/about-us/publications/corporate-publications> at 1.
143 A repeat of the Carrington Event of 1859 could see the internet effectively switched off, worldwide. The Carrington Event was a massive solar flare and solar storm which caused a temporary disturbance of the Earth’s magnetic field. It caused extensive aurorae around the world but had relatively little negative effect. Most notable was the effect on electronic equipment. The Event severely damaged and disrupted Telegraph systems, as these were the only electronic devices that existed at the time. See Stuart Clark The Sun Kings:
Part Three: The policy

Chapter Five: Legal validity through promulgation

A Different approaches to validity through promulgation

Promulgation has long been seen to be related to the validity of law. Blackstone famously wrote in the eighteenth century that, “a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never properly be called a law”.144 Some 500 years before Blackstone published his Commentaries, Thomas Aquinas had written:145

> Wherefore, in order that a law obtain the binding force which is proper to a law it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.

In the late 1960s, Lon Fuller, using the parable of King Rex146 illustrated his view on the importance of promulgation for legal validity:147

> A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except in the Pickwickian sense in which a void contract can still be said to be one kind of contract.

Saint Germain writing in the sixteenth century had argued the opposite:149

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144 Blackstone, above n 65, at 45. Despite this Blackstone went on to note that the methods of notification of this resolution varied greatly: “It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, viva voce, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner”.

145 Saint Thomas Aquinas “Summa Theologica — Question 90 The Essence of Law” (1265–1274) New Advent <www.newadvent.org/>. A different translation of this same passage is provided in Saint Tomas Aquinas Summa Theologiae Latin text and English translation, Introduction, Notes, Appendices and Glossaries (Blackfriars, London, 1963) vol 28 at 17: “ …to have binding force, which is an essential property of a law, it has to be applied to the people it is meant to direct. This application comes about when their attention is drawn to it by the fact of promulgation. Hence this is required for a measure to possess the force of law”.

146 For the parable of King Rex see Fuller, above n 119, at Ch 2.

147 At 39.

148 Promulgation was Fuller’s direction number two: “…a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe”. At 39.

149 William Muchall (ed) Doctor and Student or Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases concerning the Equity Thereof Revised and Corrected (R Clarke & Co, 1874) at 249.
That...[a statute] shall be proclaimed, etc., that is but of the favour of the makers of the statute, and not of necessity; and it cannot therefore be taken, that their intent was that it should be void if it were not proclaimed.

Similarly, Hart wrote in the 1960s that “laws may be complete before this [promulgation] is done, and even if it is not done at all”. 150

Historically, the Common Law has followed Germain and Hart’s approach. The ancient precedent on validity through promulgation is the elusive case of Rex v Bishop of Chichester 151 which according to Coke held: 152

Although proclamation be not made in the county, every one is bound to take notice of that which is done in parliament, for as soon as the parliament hath concluded any thing, the law intends that every person hath notice thereof, for the parliament represents the body of the whole realm; and therefor it is not requisite that any proclamation be made, seeing the statute took effect before. 153

Coke apparently had some misgivings about this precedent. In the United States case of US v Burgess 154 it was noted that in the 1812 case The Ann 155 Story J found— 156

“great difficulties in sustaining the reason of these principles [contained in Rex v Bishop of Chichester]” which “impose[d] restraints on judicial equity,” but said, in the absence of contrary authority, he was bound by the law as he found it. Why Story felt bound by Bishop of Chichester is not clear. Coke himself was apparently troubled by Thorpe’s ruling. The defendant had argued that the practice was for statutes to be published by proclamation and made available in counties “to the end that the subjects might have expresse notice thereof, and not to be overtaken by an intendment in law.” 4 Institutes at 26. Coke wrote that he investigated and found that before printing came to England the acts of every parliament were sent to sheriffs of every county for proclamation and reference. And Story knew from Blackstone that since the introduction of printing statutes were notified in England by “writing, printing and the like”. Thus the right to published notice of legislative enactments could be seen as one of “the rights, liberties, and immunities of free and natural born subjects within the realm of England”, which the colonists were entitled to at the time of their emigration from the mother country”

Despite these reservations, the principle purportedly laid down in Rex v Bishop of Chichester has been embedded in the Common Law. For example, in 2003 the English Court of Appeal stated unequivocally that; “[i]t is beyond argument that an Act of Parliament takes legal effect on the giving of the Royal Assent, irrespective of

151 Rex v Bishop of Chichester YB Pasch 7 39 Edw 3 (1365). Ironically copies of this case are not easily accessible: “Analysis of Rex v. Bishop of Chichester must be left to scholars. The court has not found a published English translation. A report of earlier proceedings in that case appears in VI Select Cases In The Court of King’s Bench Under Edward III 143–45 (G.O. Sayles ed., Selden Society, Vol. 82, 1965). Thorpe's answer to the defendant's first argument that the law under which he was charged was not a statute is described in Matthew Hale, The Original Institution, Power and Jurisdiction of Parliaments 34 (1707)”. Burgess, above n 72, at [38].
153 Contrary to this McIlwain stated: “In fourteenth-century England, the provincial publication of statutes which proclaimed and affirmed Magna Carta and other immemorial customs of the realm is said to have been one of the chief functions of Parliament, some doubt existing as to the validity of these declaratory statutes unless they were published in town and borough”. Bailey, above n 100, at 1067.
154 Burgess, above n 72.
155 The Ann 1 F. Cas 926 (CCD Mass 1812).
156 Burgess, above n 72, at [37]–[38].
This statement was made without reference to Rex v Bishop of Chichester or to Coke’s statement of the rule.

Therefore, for over 600 years under the Common Law, promulgation has not been a requirement of the enactment of statutes. This also appears to have been the position in New Zealand. Certainly, there is no recorded case of a statute in New Zealand having ever been struck down as being invalid or without force due to insufficient promulgation.

Today a failure to meet formal requirements to promulgate could possibly provide a way to invalidate some forms of legislation. Although an invalidation of un-promulgated legislation by the Courts does seem unlikely. Indications for this can be found in recent developments in New Zealand’s Common Law relating to parliamentary sovereignty and to manner and form provisions.

B HLA Hart’s rule of recognition and validity

The ‘rule of recognition’, is a way of describing what is valid law in a legal system by reference to the practice of that legal system. Hart pointed out that the validity of a law was not to be confused with its efficacy. The inefficacy of a rule “may or may not count against its validity”. This allows for the rule of recognition to be consistent with statutes being valid law even if they are not yet in force and consequently inefficacious.

Hart’s rule of recognition states there are criteria by which members of a legal system can determine what in fact are the laws of that legal system. In a hypothetical tribal society for instance, a rule of recognition could be; whatever the King says while standing on one leg and holding his hand on his heart is law. The rule allows for laws to develop and be removed, however it is not a law itself. This rule merely describes what the legal officials of a legal system accept as law. It is not a law itself because “the rule of recognition’ is “unlike…[other rules] in that there is no rule providing criteria for the assessment of its own validity”. Instead, its existence is “established by reference to actual practice”. The ‘rule of recognition’ can be described as “the idea that in every society there is an ultimate test of legal validity, a source-based way to verify whether a rule is a legal rule or some other sort of rule, perhaps a moral one or merely a rule of etiquette”.

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157 R (on the application of L and another) v Secretary of State for the Home Department and another [2003] EWCA Civ 25at [17] [Secretary of State].

158 Prior to 1365 this is less certain. McIlwain opines that “[a]t first, apparently, while the composition of Parliament fluctuated, there was doubt as to the validity of an enactment until it had been proclaimed locally throughout the realm. Only gradually did the theory arise that the whole of England was constructively in Parliament; that they were all assumed to be there consenting to what Parliament did. The theory of representation was complete in the fourteenth century”. CH McIlwain Constitutionalism and the Changing World (Cambridge University Press, London, 1939) at 146. For more on the constructive presence of people in Parliament see Chapter Three of this thesis.

159 Worldwide it is difficult to find examples of situations where insufficient promulgation of legislation has been dealt with in detail by the courts. The American case of Burgess, above n 72, at [50] is one such example. This case dealt with a statute that had never been published. The court here noted the uniqueness of the situation: “...[N]one of the cases from The Ann [1812] to Casson [1970] dealt with a statute which has never been published as a law”. Another, recent example is Steven Raymond Christian and Others v The Queen [2006] UKPC 47, although in this judgment the issue of insufficient promulgation is not analysed in great detail.

160 For manner and form provisions see below.

161 Hart, above n 150, at 100.

162 Hart, above n 150, at 104.

163 At 105.

**C Parliamentary sovereignty as a rule of recognition**

Writing fifty years before Hart, New Zealand jurist, Sir John Salmond, asked “whence, comes the rule that Acts of Parliament have the force of law? This is legally ultimate: its source is historical only, not legal”.  
165 Salmond, like Hart, was alluding to the fact that the validity of laws are established by practice, not the laws themselves. 

New Zealand’s ‘rule of recognition’ has been described thus:  
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New Zealand inherited Britain’s rule of recognition, the main component of which is parliamentary supremacy. 167 Acts of Parliament cannot be second-guessed by any other body, judges included. 

Although it may lead to injustice, “an Act of Parliament can do no wrong”. 168 Parliamentary Sovereignty can be described as “what the Queen [through her representative the Governor- General] in Parliament enacts is law”. 169 Statutes, in theory are supreme law, 170 courts cannot overrule them 171 nor can secondary legislation override them. 172

Parliamentary sovereignty is recognised by statute in New Zealand under section 15 of the Constitution Act 1986; “[t]he Parliament of New Zealand continues to have full power to make laws”. 173 Although as Hart notes “even if [the rule of recognition] were enacted by statute, this would not reduce it to the level of a statute; for the legal status of such an enactment necessarily would depend on the fact the rule existed antecedently to and independently of the enactment”. 174

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166 Allán, above n 164, at 142. For recognition of this point from the bench see *Berkett v Tauranga District Court* [1992] 3 NZLR 206 (HC) at 212: “all New Zealand Courts will recognise and act upon the Acts of their Parliament”. See also *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC) at 593: “it is not within the province of this Board to criticise the policy of the Legislature; the Board's duty is to construe and apply the enactments made by the Legislature”.
167 Although there is a conceptual distinction between ‘parliamentary supremacy’ and ‘parliamentary sovereignty’, here these terms are used interchangeably.
168 *City of London v Wood* (1701) 12 Mod. 669. The New Zealand Parliament has even legislated to declare a person dead when they were not dead. See the John Donald Macfarlane Estate Administration Empowering Act 1918.
170 “Statute prevails over all other sources of law, including judicial precedent and common law principles, subordinate legislation made under Parliament’s delegated authority, prerogative instruments issued under the Crown’s constituent power, international treaties entered into or ratified by the government, and the comity of nations and principles of customary public international law”. Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Thompson Brookers, Wellington, 2007) at 502. However, Parliamentary sovereignty as the rule of recognition creates some paradoxical tension. On the one hand statute is the supreme law in New Zealand because of Parliamentary sovereignty. Yet statute is not supreme because it is dependent on Parliamentary sovereignty as a rule of recognition to make it supreme. See Hart, above n 150, at 108. In short, statutes are supreme in theory because of Parliamentary sovereignty but statutes are not supreme because Parliamentary sovereignty is what makes them supreme in practice.
171 However, courts can declare Acts invalid that have not been enacted in accordance with manner and form provisions. This is discussed below.
172 Secondary legislation can override primary legislation if a Henry VIII clause is contained within a statute. For an extreme example of a Henry VIII clause see Canterbury Earthquake Response and Recovery Act 2010, s 6.
174 Hart, above n 150, at 108.
Section 15 does not purport to give legal authority for Parliament to legislate, it merely recognises a pre-existing power to legislate. Section 16 of the Constitution Act 1986 provides that “[a] Bill passed by the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent”. Parliamentary sovereignty has also been recognised in the Supreme Court Act 2003; “Nothing in this Act affects New Zealand's continuing commitment to…the sovereignty of Parliament”.

Promulgation is not part of New Zealand’s rule of recognition. The rule has not been stated, either in statute or as identified by commentators, that statutes are law because “whatever the Queen in Parliament enacts and promulgates is law.” Statutes in New Zealand are not invalid until published; they are valid immediately after they have received the Royal Assent, all that remains is for them to come into force. Nor does the commencement date of an Act have to depend on promulgation, although the need for promulgation can influence this date. Prior to an Act coming into force it is still valid law. Often, unless otherwise specified, Acts come into force the day (the commencement date) after they have received the Royal Assent.

**D The perceived erosion of parliamentary sovereignty**

The treatment of parliamentary sovereignty over the past three decades is best summed up as:

…once idealised and inviolate… [the doctrine]…has been subjected to increasing academic scrutiny. Writers have challenged the foundations of sovereignty doctrine and the courts have theorised about pernicious legislation that might cause them to re-examine their responsibilities.

Despite that, the same commentator feels able to state that—

New Zealand is the acme of legislative supremacy. It has no fundamental laws, no entrenched Bill of Rights, and no federal division of powers. Its freedom of legislation [now] transcends even that of Britain.

It is beyond the scope of this thesis to determine whether or not parliamentary sovereignty has been eroded. However, it is arguable by reference to both judicial comments and academic commentary that, a perceived erosion of the forcefulness of

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175 Section 3(2).
176 Often Statutes are in force prior to their publication. See below.
177 Sometimes even that does not remain, as is the case with retrospective legislation.
178 See Chapter Seven of this thesis.
179 The Interpretation Act 1999 s 8(2) provides “[i]f an Act does not state or provide for a commencement date, the Act comes into force on the day after the date of assent”. Importantly though, Standing Orders provide “[a] bill must include a distinct clause stating when the bill comes into force”. Standing Orders of the House of Representatives 2011, SO 253 (1). Some Acts have complicated commencement sections. See the Taxation (Budget Measures) Act 2010, s 2; Taxation (Annual Rates, Trans-Tasman Savings Portability, KiwiSaver, and Remedial Matters) Act 2010, s 2; Taxation (GST and Remedial Matters) Act 2010, s 2.
180 Joseph, above n 170, at 487.
181 Joseph, above n 170, at 498. Lord Hope described the United Kingdom position in these terms; “…parliamentary sovereignty [in Britain] is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in McCawley v The King [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified”. R (Jackson) v A-G [2006] 1 AC 262 (HL) at 303.
parliamentary sovereignty has occurred. In New Zealand parliamentary sovereignty was first forcefully challenged by Cooke J’s strongly worded obiter in *Taylor v New Zealand Poultry Board*.  

There are, Cooke J stated “[s]ome common law rights [that] presumably lie so deep that even Parliament could not override them.” The doctrine of parliamentary sovereignty had previously ensured that the validity of legislation, once enacted, could not be called into question. In 1991, the High Court stated unequivocally:

> ...the constitutional position in New Zealand... is clear and unambiguous. Parliament is supreme and the function of the courts is to interpret the law as laid down by Parliament. The Courts do not have a power to consider the validity of properly enacted laws.

Parliamentary sovereignty has subsequently been challenged by later judges. Elias CJ, Thomas J extra-judicially and Professor Phillip Joseph have expressed reservations about the concept. Writing in 1999, Goldsworthy expressed some concerns about what he saw as the “rise of judicial activism” coupled with a reduction in the certainty of parliamentary sovereignty:

> Growing doubt about parliamentary sovereignty among New Zealand, Australian and British judges has coincided with increasing judicial activism in all three countries. In public law, this has mostly involved the invalidation of actions of the executive government...Despite occasionally complaints, parliaments and executives in Britain, Australia, and New Zealand have generally acquiesced in, or tacitly approved of, the expansion of judicial review of executive actions, which does not fundamentally threaten their powers as long as the parliaments retain the capacity to control or even reverse it. But that depends on continued acceptance of the doctrine of parliamentary sovereignty. When judges question the doctrine, the potential threat posed by judicial activism to the powers of the legislature and executive is much more serious.

Elias CJ admits, extra-judicially, that, “[t]he courts are themselves subject to the Rule of Law and accordingly cannot usurp powers lawfully exercised by other agencies, including Parliament.”

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182 *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394(CA) at 398. Although Cooke J had hinted at this in several cases previously: *L v M* [1979] 2 NZLR 519(CA) at 527; *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 78; *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374(CA) at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 121.  

183 *Taylor*, at 398.  

184 This is despite a statutory provision allowing the court’s to do just that having existed in New Zealand since 1908; The Declaratory Judgements Act 1908, s 3, See below.  

185 Rothmans of Pall Mall (NZ) Ltd v A-G [1991] 2 NZLR 323(HC) at 330.  

186 See Joseph, above n 170, at 537 where Joseph argues that “[l]ater courts have acknowledged the possibility that in an “extreme case” a court might be forced to revisit the convention that requires judges to uphold duly enacted statutes”. In support of this Joseph cites; *Cooper v A-G* [1996] 3 NZLR 480 (HC); *Shaw v CIR* [1999] 3 NZLR 154 (CA); *Reid v Minister of Labour* [2005] NZAR 125 (HC); *Jackson*, above n 181.  


189 Elias, above n 187, at 159. Also see Supreme Court Act s 3(2): “Nothing in the Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament”. See also Sian Elias “Mapping
At the very least, the perception has altered to the point where parliamentary sovereignty is no longer beyond question. New Zealand judges have even stated that Parliament can “misfire” and subsequently statutes may be “ineffective”.\textsuperscript{190} Commenting on the somewhat questionable ability of the courts to declare legislation inconsistent with the New Zealand Bill of Rights under \textit{Moonen}\textsuperscript{191} one academic opined:\textsuperscript{192}

At some point, if things continue to proceed this way, our democratically elected Parliament will not be able to pass any statute it likes. The unelected judges will have a sort of veto. Our rule of recognition here in New Zealand will have changed. It will have changed quietly and without any referendum or vote in the House.

\textbf{E Manner and Form Provisions}

Despite being the “acme of legislative supremacy” New Zealand courts can already make declarations regarding the validity of legislation if there are “manner and form provisions” that must be adhered to.\textsuperscript{193} Manner and form provisions provide for procedural aspects of the legislative process, not the substance of legislation; “The Courts, providing Parliament \textit{proceeds according to law} in the way described, cannot stop Parliament making such legislative changes…If content of legislation offends, the remedies are political and ultimately electoral”.\textsuperscript{194} Significantly, however, “manner and form provisions are rare”\textsuperscript{195}.

Unless there is a manner and form provision the courts will not strike down legislation for what transpires during its passage through the House.\textsuperscript{196} This limit on parliamentary sovereignty means that—

\[\text{parliament may alter the rules that prescribe how it must combine in order to express itself. It may transform itself by enacting special procedures of law-making (sometimes described as manner and form), such as a 75 per cent parliamentary vote or majority approval at a referendum.}\]

\textsuperscript{190} Pora, above n 83, at [48].

\textsuperscript{191} \textit{Moonen v Film and Literature Board of Review} [2000] 2 NZLR 9 (CA) at [19].

\textsuperscript{192} Allan, above n 164, at 144. But see, Claudia Geiringer “On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act” (2009) 40 VUWLR 613 at 623: “Although all of the cases continue to leave open the ultimate question as to whether there is such a jurisdiction, a number of them place significant hedges around its scope and the circumstances in which it might be exercised, the most significant being its restriction to civil proceedings. More generally, the tenor of this body of case law suggests that, even if a residual jurisdiction to make declarations of inconsistency does exist, it will be exercised only rarely”. For more on declarations of inconsistency see generally Anthony Mason “Human Rights: Interpretation, Declarations of Inconsistency and the Limits of Judicial Power” (2011) 9 (1) NZJPIL 1; \textit{McDonnell v Chief Executive of the Department of Corrections} [2009] NZCA 352, [2009] 8 HRNZ 770; \textit{Attorney-General v Howard} [2011] NZCA 58, [2011] 1 NZLR 58 at [42],[77] and [124] per Glazebrook J [182] William Young P, and [190] Robertson J.


\textsuperscript{194} \textit{Westco Lagan} at 95 (emphasis added).

\textsuperscript{195} See McGee, above n 53, at 113.

\textsuperscript{196} See \textit{British Railways Board v Pickin} [1974] AC 765; \textit{Edinburgh and Dalkeith Railway v Wauchope} (1842) 8 CL.& F 723.

\textsuperscript{197} Joseph, above n 170, at 547. For example, see section Electoral Act 1993, s 268(2).
In New Zealand, the courts have moved from a reluctance to question the validity of legislation, to an acknowledgement of the binding nature of manner and from provisions on parliamentary sovereignty. In 1955, McGregor J stated “it would not be competent for the Court in the present proceedings to question the validity of enactments to which reference has been made”. The other two judges in this case “assumed jurisdiction to rule on the statutes but upheld their validity”.

In *Westco Lagan v A-G* McGechan J stated, “this Court has jurisdiction to determine whether there has been compliance with any mandatory ‘manner and form’ requirements imposed by statute law for the enactment of legislation by Parliament”. In support of this McGechan J held:

It is recognised, at least to the extent of declaratory relief, by s 3 Declaratory Judgments Act 1908 enabling determination of any question as to the “construction or validity of any statute” (italics added). It has been recognised by the Court of Appeal in the otherwise insignificant case of *Shaw v CIR* [1999] 3 NZLR 156, 157 paragraph 13:

“[13] The first issue is the proper interpretation of the Declaratory Judgments Act 1908. As noted above s 3 provides that the Court may make declarations on the construction or validity of any statute. The Court’s power under s 3 to consider the validity of legislation is limited to ensuring that a statute was properly enacted; in other words the Court may determine whether Parliament itself has followed the laws that govern the manner in which legislation is created. Parliament is subject to law just like every other person and body in New Zealand; it is bound by statutory requirements: see David McGee, “The Legislative Process And The Courts” in P Joseph (ed), Essays On The Constitution (Brookers, 1995). Section 3 does not, however, give the Courts a power to consider the validity of the content of legislation. As was said by Robertson J in *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 at p 330: “the constitutional position in New Zealand . . . is clear and unambiguous.”

As yet, there are no manner and form provisions relating to promulgation as a required part of the passage of legislation. While there are statutory requirements to promulgate legislation under the ARPA these are not required as part of the procedure for enacting legislation. What would happen if a New Zealand Court faced a situation where legislation has not been sufficiently promulgated in accordance with the provisions under this Act?

If a court was predisposed to the importance of promulgation as an element of legal validity and sympathetic to the perceived reduction in the forcefulness of parliamentary sovereignty, the court could use Shaw’s reading of the Declaratory Judgments Act 1908 to find that:

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198 See Joseph, above n 170, at 579. “In the 1950’s, judicial dicta equivocated over the courts’ competence to rule on the validity of statutes; in the 1980’s, extra-judicial comment indicated a cautious acceptance of entrenchment; and in the 1990’s, judicial dicta acknowledged the binding force of manner and form”.

199 *Simpson*, above n 193, at 272.

197 See Chapter Nine of this thesis for more on these requirements.
Under section 3 this court has the power to consider the validity of legislation, but we are limited to determining whether or not a statute was properly enacted. However, this court is also able to ensure that “Parliament itself has followed the laws that govern the manner in which legislation is created” [emphasis added] (Shaw v CIR [1999] 3 NZLR).

The word “creation” implies a wider scope than “enactment” of legislation. While legislation may be enacted without promulgation it cannot be created without promulgation. As Blackstone wrote; “a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never properly be called a law”.205

The requirements for the “creation” of legislation extend to promulgation requirements under the Acts and Regulations Publication Act 1989 and consequently these are manner and form provisions. Therefore this court is able to declare this statute invalid under the section 3 of the Declaratory Judgments Act 1908 because it failed to meet the statutory requirements under the Acts and Regulations Publication Act 1989.

While a judicial decision using this logic may be possible, a result of this kind seems unlikely. Moreover, in this situation a court would be equally able to follow the reasoning of the English Court of Appeal, “[i]t is beyond argument that an Act of Parliament takes legal effect on the giving of the Royal Assent, irrespective of publication”.206

F Legal validity as a policy consideration

There are, as far as can be ascertained, no references in New Zealand, to legal validity being a policy consideration behind processes of promulgation. At no point has Parliament, the Executive, the Judiciary, nor the Parliamentary Counsel Office stated that if a particular Act of Parliament were to remain un-promulgated that Act would be invalid. At most, then, legal validity could only be an implicit policy consideration. At worst, it is a policy consideration that does not operate in motivating the promulgation of legislation in New Zealand at all. However, while legal validity is not explicitly referred to by the various branches of Government, adherence to the Rule of Law is. The need to promulgate so as to adhere to the Rule of Law and the extent to which this is a policy consideration of promulgation in New Zealand is discussed below, in Chapter Six.

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205 Blackstone, above n 65, at 45.
206 Secretary of State, above n 157, at [17].
Chapter Six: Promulgation and the Rule of Law

The Rule of Law has become increasingly ubiquitous in New Zealand legal rhetoric. Despite the warning of Raz in 1979 that the “undoubted value of the Rule of Law should not lead one to exaggerate its importance”, the Rule of Law is now so omnipresent it has been labelled a “political catchphrase”. The concept of the Rule of Law, which defies easy definition, is substantially different from how Dicey first perceived it in 1885. It now seems widely accepted that the Rule of Law contains a promulgative element that Dicey never envisaged. The modern importance placed on the Rule of Law in New Zealand legal rhetoric has led to compliance with this element of the Rule of Law being one of the driving factors behind the promulgation of legislation.

A Promulgation as an element of the Rule of Law

The Rule of Law is described as “an ambiguous concept, depending upon the purpose for which it is invoked”. Rather than attempt an exhaustive definition, it is simply examined to what extent promulgation is included as a factor in the perception of the Rule of Law.

In 1885 Dicey’s influential exposition identified the Rule of Law as three principles:

Absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power…equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts…. [and that] the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution… [is] the result of the ordinary law of the land”.

Lord Bingham recently defined the core of the principle of the Rule of Law:

…that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.

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207 This thesis is concerned with the ‘thin’ formal conception of the rule of law rather than the ‘thick’ substantive conception of the Rule of Law. For more on this distinction see Brian Z. Tamanaha On the Rule Of Law: History, Politics, Theory (Cambridge University Press, Cambridge 2004) at ch 7. For the Rule of law in the New Zealand context See generally Joseph, above n 170, at ch 6.
210 A V Dicey Introduction to the study of the Laws of the Constitution (10th ed, Macmillan & Co, London, 1959) at 202–203. Some academics do suggest that the Rule of Law as a concept stretches back to Plato or Aristotle, however it was in 1885 that it was first so labelled and categorised. For a discussion of the Rule of Law’s pre-Victorian evolution see Tamanaha, above n 207, at chs 1–4 and Geoffrey De Q Walker The Rule of Law: Foundation of Constitutional Democracy (Melbourne University Press, Melbourne, 1988) at ch 3. Tamanaha admits at the very least that 1888 was, “the first prominent formulation and analysis of the rule of law in a liberal democratic system”. At 63.
211 Joseph, above n 170, at 148.
212 Dicey, above n 210, at 202–203.
Importantly, Bingham, writing in 2009, stresses the publication element of the Rule of Law while Dicey did not mention promulgation in any of its various incarnations in 1885.

At what point then, was promulgation imported into the concept of the Rule of Law? Lord Hewart in his attack on the growth of the use of secondary legislation in 1929 wrote:

> ...the “Rule of Law” is the supremacy or the predominance of law, as distinguished from mere arbitrariness, or from some alternative mode, which is not law, of determining or disposing of the rights of individuals.

Significantly, publication does not feature in Hewart’s conception of the Rule of Law in 1929.

Arguably, promulgative elements were imported into the Rule of Law some time during the mid-20th century. By 1944, F A Hayek felt able to describe the Rule of Law thus:

> ...stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced before hand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.

Hayek’s description of the Rule of Law includes the rules being “announced”. This “announcement” is to be done in a substantive and effective way so people can predict how the State will use its powers and be able to act accordingly. Publication and consequently promulgation can therefore be inferred into the concept of the Rule of Law from as early as 1944. In 1948, in *Blackpool Corporation v Locker* Scott LJ stated that publication, albeit in a somewhat qualified sense, was part of the Rule of Law; “of supreme importance to the continuance of the rule of law under the British constitution...[is] the right of the affected party to know what the law is”.

Raz, writing in 1979, stated “it is one of the important principles of the doctrine [of the Rule of Law] that the making of particular laws should be guided by open and relatively stable general rules”. Raz goes on to point out that the “law must be capable of being obeyed”. To be capable of being obeyed, “[law] must be such that [people] can find out what it is and act upon it”. Raz also suggested, when noting the problems created for the Rule of Law by legislating retrospectively, that “[s]ometimes it is known for certain that a retroactive law will be enacted. When this happens retroactivity does not conflict with the Rule of Law”. This underscores the importance of laws being knowable under Raz’s conception of the Rule of Law. That laws need be knowable to be consistent with the Rule of Law strongly implies a communicative and therefore a promulgative element into Raz’s conception of the Rule of Law.

Prior to Raz, Lon Fuller “presented a highly influential formulation of the rule of law which he called ‘legality,’... requiring: generality, clarity, public promulgation,

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214 Lord Hewart *The New Despotism* (E. Benn, London, 1929) at 23.
215 F A Hayek *The Road to Serfdom* (George Routledge & Sons, London 1944) at 54.
216 *Blackpool Corporation v Locker* [1948] 1 KB 349 (CA).
217 At 361.
218 Raz, above n 208, at 213.
219 At 213.
220 Compare *Victoria University of Wellington Students’ Association v Shearer* [1973] 2 NZLR 21 (SC), at 23. “People must be told what Parliament is doing and must be able to read the letter of the law”.
221 At 214.
stability over time, consistency between the rules and the actual conduct of legal actors, and prohibitions against retroactivity and requiring the impossible”. 222 When the hapless King Rex decided to keep the laws secret, then a legal system failed to exist. 223

More recently, the link between communication of law and the Rule of Law has been recognised in the House of Lords decision R (Anufrijeva) v Secretary of State. 224 In this case an asylum seeker had been denied asylum but this decision was never communicated to the individual. At issue was whether or not an un-communicated administrative decision could bind an individual. The House of Lords held that lack of communication meant the decision had no effect. In support of this Lord Steyn held:225

...the constitutional principle require[s] the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course, that there must be exceptions to this approach, notably in the criminal field, eg arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category.

Ironically Lord Bingham dissented. 226

Anufrijeva deals with how the lack of communication affects the validity of administrative decisions rather than legislation. The fact that there was “a deliberate policy decision by the Home Office not to comply with the public law duty [to communicate the decision]”, 227 which amounted to an abuse of power was also fundamental in Lord Steyn’s reasoning. However, Lord Steyn’s logic that individuals have a right to know of law that adversely affects them under the Rule of Law applies equally to legislation as to administrative decisions. Following the reasoning of Lord Bingham, Raz, Hayek, Fuller and Lord Steyn promulgation, particularly its constituent element of publication (making known), is today very much an element of the Rule of Law.

B Promulgation and the Rule of Law in New Zealand

In New Zealand the Rule of Law has been described as: 228

...the sentinel of constitutional government. ... The concept seeks to reconcile organised state power and individual autonomy. It prescribes the formal requirements of legal norms: generality, accessibility, neutrality, stability and predictability.

222 Tamanaha, above n 207, at 93.
223 Fuller, above n 119, at ch 2.
224 R (Anufrijeva) v Secretary of State [2003] 3 WLR 252 (HL).
225 At [28].
226 Lord Bingham admitted that, “I share the distaste of my noble and learned friends for the procedure followed in this case, that distaste should not lead the House to give reg 70(3A)(b)(i) anything other than its clear and obvious meaning”. For Lord Bingham “[f]ailure to give notice within a reasonable time would be a breach of the Home Secretary’s public law duty but would not necessarily nullify or invalidate his decision”. Lord Bingham concluded that “a cardinal principle of the Rule of Law, not inconsistent with the principle of legality that... effect should be given to a clear and unambiguous legislative provision”. At [20], [15] and [20] respectively.
227 At [35].
228 Joseph, above n 170, at 147(emphasis added).
The importance of the Rule of Law has been recognised in the New Zealand Statute Book. The link between the Rule of Law, legislation and promulgation has also been recognised by the Law Commission. The Law Commission in its Report, *The Presentation of New Zealand Statute Law* states how accessibility and availability of legislation is a factor in the Rule of Law:

The rule of law is an important concept in most democratic societies. One aspect of the rule of law is to ensure Acts of Parliament are accessible and available. Otherwise those to whom the law applies cannot find its content. The prime issues with which this report deals with are how to present that law so people can find the law and how to ensure the law is up-to-date.

This statement was quoted by the Attorney-General, Chris Finlayson MP, in moving that the Legislation Bill 2010 be read for the first time.

Both private and public bodies that are concerned with the publication of law in New Zealand have noted the importance the Rule of Law has in motivating the publication of legal text. The mission statement of the New Zealand Legal Information Institute (NZLII, a branch of the non-profit organisation WorldLII) is “public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law.”

Paradoxically, the legal publisher LexisNexis New Zealand, whose existence depends on legal information not otherwise being freely available, recognises publication as an element of the Rule of Law.

The most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy.

Most significantly, the Parliamentary Counsel Office, the parliamentary body engaged in promulgating New Zealand’s statutes declares:

The outcome that the PCO seeks to achieve is a contribution to parliamentary democracy under the rule of law by supporting Parliament and the executive in their law-making roles and contributing to the Government’s objectives. The PCO seeks to ensure that:

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229 See Supreme Court Act, s3(2); Lawyers and Conveyancers Act 2006, s 4(a) and s 65(e); Policing Act 2008, s 8 (a).
230 Law Commission, above n 58, at iv.
231 (28 July 2010) 665 NZPD 12824.
232 For more detail on NZLII see Chapter Twelve of this thesis.
235 For more on the Parliamentary Counsel Office see Excursus One.
236 Parliamentary Counsel Office “Role of The PCO” <www.pco.parliament.govt.nz(role-of-the-pco)/>.

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—legislation, including Bills and SOPs, is accessible to the public in printed and electronic forms, and printed copies of Government Bills and Government SOPs are provided to the House of Representatives.

The importance of the Rule of Law as a policy consideration behind promulgation of legislation in present day New Zealand therefore cannot be underestimated. There is a belief that adhering to the Rule of Law is important.237 It is accepted, both globally and in the specific context of New Zealand, that promulgation is a core element of the Rule of Law. Consequently, adherence to the Rule of Law is a major policy consideration behind promulgation and one that is explicitly referred to. The changing understanding of the Rule of Law has also influenced the policy consideration of communication; in particular one element of this consideration; to whom the law should to be communicated.238

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237 Arguably, this belief itself could in turn shape constitutional law. It has been suggested that perception can be have a major influence on constitutional law. See Palmer, above n 209, at 567. Palmer argues that “…culture, and cultural norms, are part of a constitution…[T]he underlying foundations of a constitution, even if contested, are deeper-seated than even the formal Westminster device of constitutional conventions would indicate. The foundations of a constitution are culturally embedded in its operation through the values of those who operate it and who, inherently, subscribe to a national culture”.

238 See Chapter Seven of this thesis.
Chapter Seven: Communication

A Communication, a working definition

Of all the policy considerations behind promulgation, communication is arguably the most significant. What is meant by the *communication* of the text of statute law? There are several opposing concepts of communication and several theories to account for these different concepts. In the face of these conflicting views it is pragmatic to have a working definition.

The ever increasing volume of statute law ensures that here communication resists its more generally accepted definition of; “[t]he transmission or exchange of information, knowledge, or ideas, by means of speech, writing, mechanical or electronic media.”239 This definition is founded on the ‘transmission view of communication’. The transmission view can be described briefly as “I have an idea…and I transmit it to you, and you have the idea. If the ideas are the same, we have communicated”240 Consequently, the transmission view of communication implies that the “information”, “idea” or “knowledge” needs to be received. It is doubtful whether there is anyone who would be capable of ‘receiving’ the totality241 of New Zealand statute law.

Accordingly, the ‘ritual view of communication’ is somewhat closer to an appropriate definition of communication in the context of statute law. This is a more archaic approach to communication and is—242


Availability is included in Fuller’s concept of promulgation. Despite not mentioning the term communication, that is in essence what Fuller is writing about when he responds to the argument that:244

We have thousands of laws, only the smallest fraction of which are known, directly or indirectly, to the ordinary citizen. Why all this fuss about publishing them? Without reading the criminal code, the citizen knows he shouldn’t murder and steal...

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239 OED, above n 20.
240 This is the “[t]he transmission view of communication, in a nutshell”. Gary P Radford *On the Philosophy of Communication* (Thomson Wadsworth, Belmont, California, 2005) at 2.
241 See Chapter Three of this thesis.
242 Radford, above n 240, at 15.
243 The Law Commission takes a similar approach in the context of statute law, however the Law Commission treats availability as a part of the concept of accessibility rather than as a definition of communication “When we say the law must be accessible, what do we mean? The term has at least three relevant meanings in this context. First, it can refer to availability to the public…” Law Commission, above n 58, at 1.4–1.5. The Law Commission’s definition of availability is explored and distinguished below.
244 Fuller, above n 119, at 50–51.
and “[a]s for the more esoteric laws, the full text of them might be distributed on every street corner and not one man in a hundred would ever read it”. Fuller responded:

To this a number of responses must be made. Even if only one man in a hundred takes the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the laws generally available. This citizen at least is entitled to know, and he cannot be identified in advance....The requirement that laws be published does not rest on any such absurdity as an expectation that the dutiful citizen will sit down and read them all.

Of course legal texts that are available may still be unknowable to individuals due to lack of clarity or complexity of subject matter. A legal text that is not available however, will never be knowable to any individual, no matter how clear the language or how simple the subject matter. Examination of making the law knowable by fulfilling all three elements of availability, clarity and simplicity is well beyond the scope of this thesis. Consequently, only the element of availability is focused upon. Thus for present purposes communication means solely available, rather than clear, simple and available.

B Communication of statute law as availability of statute law

The Law Commission has defined “availability” of legislation in a more limited way than in the ‘knowable’ sense used here. In defining the scope of its Report The Presentation of New Zealand Statute Law the Law Commission stated its focus was on the importance of legislation being accessible. The Law Commission then divided accessibility into three separate concepts, navigability, clarity and availability.

Availability could have been defined by the Law Commission in terms of knowability. However, it was defined by reference to the existing duties to publish law under the ARPA. Availability of legislation was, for the Law Commission, limited to being available for purchase. This definition echoes the mid-19th century English style of communication as Bentham observed:

In England the business of promulgation is a very simple affair. In the body of every Act of Parliament, a day is specified in which it shall be considered as being in force. Nothing is done to circulate it by the King, or judges, or anybody else; but a copy is given to the King's printing office where it is printed in an obsolete obscure type, and inconvenient folio form, and sold, as may be expected under a monopoly, at a dear price; and there it lies for the use of anyone that has money to spare to buy it, and thinks that it is worth his while to do so. Every man is then supposed to know and to understand the law.

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245 At 51.
246 At 51 (emphasis added).
247 A law that is not available may be knowable in one sense if that law is a social norm, however in this situation it is arguably the social norm that is known, rather than the law itself. An individual could know that when meeting a person for the first time he has to tell the person their name and still be unaware that there is a law that makes failure to do this punishable by death.
248 Law Commission, above n 58, at 12.
249 At 13.
250 At 16.
251 At 16–17.
252 As cited in Bailey, above n 100, at 1070 (emphasis added).
While Bentham noted that law was sold at a “dear price” in New Zealand legislation must be sold at a “reasonable price”.  

Here communication, as noted above, means making available. Available means knowable and is not limited to current statutory requirements.

C Communication of law in jurisprudence

Communication, in the transmission, ritual or in the available sense used here, is not explored in its own right in most jurisprudential theories. This is the case even though jurisprudential theories have on rare occasions contained communication as an element of the explanation of what can constitute a legal system or what is law. For example, Jeremy Bentham touched on communication:

A law is an expression of will, that is an assemblage of signs expressive of an act of the will. These signs then may by possibility be any signs \( \text{whatever which are capable of expressing such a will} \): the behaviour of him who instead of saying, put to death the chief leaders of the people, smote off the tallest heads among a parcel of poppies might instead of being advice might have been a command.

Bentham’s theory of law as an “expression of will” includes a communicative element. These signs must be, according to Bentham “capable of expressing such a will”.

John Austin, a student of Bentham, postulated the “command theory of law” which also included communicative elements. Raz identified the elements of Austin’s Command Theory as—

\( \text{…c is A’s command if and only if : (1) A desires some other persons to behave in a certain way; (2) he has expressed this desire; (3) he intends to cause harm or pain to these persons if his desire is not fulfilled; (4) he has some power to do so; (5) he has expressed his intention to do so; and, finally (6) c expresses the content of his desire (1) and of his intention (3) and nothing else.} \)

(2) and (5) are communicative elements of Austin’s command theory, again being “expressions” of “desire” and “intention”.

253 Acts and Regulations Publication Act 1989 [ARPA], s 9(1). The inherent ambiguity in the term “reasonable price” is explored in Chapter Nine of this thesis.

254 Making legislation knowable has three elements. First it has to be knowable that there is law on such a topic, or that the law has been changed on that topic. Second, it has to be knowable whether the law on a topic is in force, third the content of the law on a topic has to be knowable. It is the third element that is the focus of this thesis.

255 In saying that semantics, which is both related to and often seen as a subset of semiotics, which itself is a branch of communication studies, is prominent in jurisprudence on interpretation: “Not unexpectedly, a great deal of attention is paid to semantics in statutory interpretation; the ‘rules of language’ such as \text{ejusdem generis} and \text{noscitur a sociis} are based directly on semantic principles to do with the sense relations of words”. Frederick Bowers Linguistic Aspects of legislative Expression (University of British Columbia Press, Vancouver, 1989) at 4–5.


257 Curiously, Bentham’s use of the word “signs” echoes Blackstone’s “external sign” that was his prerequisite of law: “…a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never properly be called a law”, see above n 144.

Hart argued against Austin’s command theory in *The Concept of Law*. Hart noted the importance of the communicative element in Austin’s theory and expunged it from his own:259

It is … worth noticing that though jurists, Austin among them, sometimes speak of laws being addressed to classes of persons this is misleading in suggesting a parallel to the face-to-face situation which really does not exist and is not intended by those who use this expression. Ordering people to do things is a form of communication and does entail actually ‘addressing’ them, i.e. attracting their attention or taking steps to attract it, but making laws for people does not.’

Hart argued the “face-to-face” situations260 could not be a parallel to law making because they could not, in his view, be—261

the standard way in which law functions, if only because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do.

Giving commands on the scale that Hart envisaged may262 be an impossible task for a complex legal system. Notwithstanding the uncertainty of Hart’s impossibility, the working definition of communication used here is more in line with Fuller’s, rather than Austin or Hart’s, approach to the communication of law.

**D Users of legislation**

The policy consideration of communicating the text of legislation has very different influences on how legislation is promulgated depending on to whom the law is to be made available. If the text of the law is to be made available solely to the legal profession then the resulting promulgation will be very different than if the law is to be made knowable to the general public. This issue of to whom the law is to be made knowable has evolved over time and can be summed up in the question, who are the users of legislation? This evolution can be explained by the changes in the Rule of Law noted in the previous Chapter of this thesis.

In New Zealand the perception of who the users of legislation are has changed greatly since the reprints of the early to mid-20th century. When noting that New Zealand had a long history of access to legislation projects Geoff Lawn cautioned that “the idea that legislation should be readily accessible to the general public is a recent notion”.263

259 Hart, above n 150, at 21.
260 Hart gives the example of when “[a] policeman orders a particular motorist to stop or a particular beggar to move on”. However, it could be argued that these two examples are more accurately categorised as the use of a legal power, rather than simply the communication of the existence of that legal power. Hart, above n 150, at 20.
261 Hart, above n 150, at 21.
262 With modern technology ensuring that the internet is now in most New Zealand homes, combined with online databases of legislation, Hart’s objection may carry less weight today.
263 Geoff Lawn “Improving Public Access to Legislation: The New Zealand Experience so far” (2004) 6 UTS Law Review 49 at 51. But see Memorandum by A Domett to The Ordinances of New Zealand passed in the first ten sessions of the General Legislative Council, A.D. 1841 to A.D. 1849 : to which are prefixed the Acts of Parliament, Charters, and Royal Instructions relating to New Zealand. (Printed for the Colonial Government, Wellington, 1850) [Domett’s Ordinances] at 1; “The object of paramount importance in this matter is, in the opinion of the committee, the reproduction of the ordinances in such a form as will render an acquaintance with the provisions most easy of attainment by all whom they affect”. See also *The Statutes of*
The 1931 Reprint was certainly not aimed at the general public. This is evidenced by Chief Justice Myers’ comments in the foreword to the 1931 Reprint: 264

I hope and believe that these volumes will be of great convenience to the Courts, to practitioners, and to government Departments, and that they will greatly expedite and simplify the work of all those whose business is to construe and advise upon the statute law”.

In the foreword to the 1957 Reprint the Attorney-General at the time stated “this reprint is necessary to enable practitioners to find in a clear and concise form the general statute law as at present in force” 265 This reprint was not an exhaustive collection of statutes, Acts were omitted “that could safely be omitted without unduly lessening the value of the work of the ordinary practitioner”. The 1957 Reprint similar to the 1931 Reprint was not aimed at a broad audience but at a specific group. The approach of defining users of legislation as a specific group was not atypical to New Zealand at the time. 266

In 1973, in Victoria University of Wellington Students’ Association v Shearer 268 Wild CJ stated that “people must be told what Parliament is doing and must be able to read the letter of the law”. 269 This was stated in general terms without any reference to a particular class or group.

By the 1979 Reprint, the Brown Reprinted Statutes of New Zealand series, there was no specific mention in the foreword of this reprint of a specific target audience. This suggests a change in the perception of the people to whom legislation was to be made knowable had occurred. The Attorney-General at the time stated in the foreword that the availability of the general statute law, and in particular of loose pamphlet reprints of public Acts, will be greatly improved by this new series of reprints. The new series will result in a more compact and accessible collection of statutes.

New Zealand, 1842–84 : being the whole law of New Zealand, public and general, and a reprint of 511 ordinances and acts of the above Colony in force on January 1st, 1885 : together with ... indexes ... (Christchurch, 1885) [The 1885 Reprint] at 1.

Stewart, above n 57, at viii.

HGR Mason “Foreword” Reprint of the Statutes of New Zealand 1908–1957 Vol 1 (Government printer, Wellington, 1958) at v (emphasis added).

At v: “Thus the Education Act 1914 has been omitted because of its limited general application, its complexity in its present state, and the prospect of its being consolidated and re-enacted within the next year or so. The Acts relating to the Island territories, such as the Cook Islands Act 1915 and the Samoa Act 1921, are also omitted because of their local application and their liability to frequent amendments as constitutional changes take place”.

In the United Kingdom in 1970 the Statute Law Society, an association of “self-proclaimed statute users” (Statute Law Society Statute Law Deficiencies: Report of the Committee appointed by the Society to examine the failings of the present statute law system (Sweet & Maxwell, London, 1970) at 2) sent out a questionnaire to statute law users to aid the society in “examining the ways in which the official system of framing, enacting and publishing statute laws of the United Kingdom Parliament fail to meet the requirements of the user” (Statute Law Deficiencies at 3) Significantly 5000 questionnaires were sent out to “a wide range of users including members of the professions, local authorities, members of both Houses of Parliament and representatives of trading, commerce, industry, academic life, trade unions and social welfare institutions” (Statute Law Deficiencies at 4). These questionnaires were not sent out to the public.

Victoria University of Wellington Students’ Association v Shearer [1973] 2 NZLR 21 (SC).

At 23.

McKay, above n 48, at iii.
In 1998, the Parliamentary Counsel Office published *Public Access to Legislation: A Discussion Paper for Public Comment*. Despite this publication being concerned with “how legislation (Acts of Parliament and Statutory Regulations) should be made available to the public”, the public were not yet thought of as “users of legislation”; “[u]sers of legislation and the general public are invited”. The discussion paper continued with this distinction; “[v]arious people need access to legislation. These include lawyers, Judges, police, politicians, researchers, librarians and many others”. In the paper, the inclusion of the public as a class seems to be justified partly because of changes in legislative drafting techniques.

It must be recognised that with the adoption of a plain language approach to the drafting of legislation, ordinary members of the public may want direct access to legislation in order to both understand it and read it.

The 1999 Report *Improving Public Access to Legislation* which built on the discussion paper and the submissions in response to it stated that, “[t]he diversity of interest in legislation…has created a broader base of demand than was previously the case when legislation (or the law) was almost solely the province of the legal profession”. The “users” of legislation in 1999 were seen to be a much broader class than they had been, yet still a distinction was drawn between “users” and the public.

By 2002 the perception of who the users of legislation were had changed markedly from that of 1931. While arguing that electronic promulgation was the next logical step to be taken Judge David Harvey wrote extra judicially:

The increase of legislative information together with the growing complexity of legislation, its dynamic, continued demand for transparency and openness in government, and a broader base of users of legislation, have put pressures upon Parliamentary Counsel Office which, within the print paradigm, it is unable to satisfy.

In beginning “stage one” of the Public Access to Legislation project (PAL) the Parliamentary Counsel Office undertook a survey on *Printed Legislation and other Publications*. The Parliamentary Counsel Office stated, “[a] wide variety of users of

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272 At 1 (emphasis added).

273 At 2.

274 At 3. A report in 1999 is more cautious in attributing this change solely to legislative drafting techniques and states that “the diversity of interest in legislation, possibly driven in turn by the simplification and increased accessibility of legislation has created a broader base of demand”. Pricewaterhousecoopers *Improving public access to legislation* (Parliamentary Counsel Office, Wellington, 1999) at 23.


276 At 1.

277 At 23.

278 However fifty years before the 1931 Reprint a wide conception of “users of legislation” was in the mind of Wilfred Badger when he wrote in the Preface to the 1885 Reprint: “the law of the colony being almost inaccessible even to lawyers, and entirely so to the great mass of people, rendering an entire reprint of existing Law alike necessary and expedient.” 1885 Reprint, above n 263.

279 Harvey, above n 55, at 56 (emphasis added).

280 This project ultimately resulted in the creation of the New Zealand Legislation Website.
legislation were invited to participate in the survey”. In the 2002 Annual Report of the Parliamentary Counsel Office it was stated:

The survey confirmed the responses to the PCO’s 1998 public discussion paper on public access to legislation, which indicated that there will continue to be significant public demand for access to legislation.

The Parliamentary Counsel Office reprint policy in 2002 was based on “concentrat[ing] on reprinting best-selling titles that are frequently or heavily amended, on the basis that these represent the priorities of users of legislation”. Focusing on these “bestselling titles” also implied a focus on a limited class of “users of legislation” rather than the general public being perceived as users of legislation.

To this day the Parliamentary Counsel Office reprint policy is “established each year in consultation with key users of legislation”. While legislation is promulgated so as to be made knowable to the public in some instances —through the New Zealand Legislation Website (NZL) and depositing copies in public libraries— the reprints are still printed with these “key users” in mind.

The Business Case for the PAL project took a somewhat more nuanced approach to defining “users of legislation”. The public were labelled “individual users of legislation” and the traditional users of legislation, were labelled as “intensive users of legislation”. The PAL project was aimed at the public rather than the traditional “users”:

The project will benefit a broad range of users of legislation in a variety of different ways. The groups who will gain the most are likely to be individual users of legislation, community agencies, and interest groups. These are the groups that are most adversely affected by the inequitable situation that currently exists.

The groups least likely to benefit directly are the intensive users of legislation. It is expected that they will continue to use the value-added and cross-linked databases provided by the private sector legal publishers and other commercial firms.

This shows that different promulgative schemes can be directed to different ends. The promulgative process of hard copy reprinting of Acts is based upon the policy consideration of making the legal text of statutes available to a specific group; “key users”. Conversely, the NZL is motivated so to communicate statutes to the general public.

The public and the users of legislation are not yet synonymous in the eyes of the Parliamentary Counsel Office. The Law Commission in 2008, when suggesting that not all Acts need be accessible for non-lawyers, noted the distinction between users and public but went on to imply that this distinction may be inappropriate:

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282 At 18.
283 At 18.
284 Also, people may be users of legislation without necessarily being purchasers of copies of legislation.
286 The New Zealand Legislation Website and the Depository Library Scheme are discussed below.
287 Intensive users of legislation included “…lawyers, the judiciary, companies, librarians, legal researchers, and government departments”. Summary of Business Case, above n 38, at 5.2.7.
288 Summary of Business Case, above n 38, at 5.2.8.
289 See below.
290 Law Commission, above n 58, at 84.
there are a lot of Acts that should be widely accessible to all people, even if they lack legal training...[A] lot of non-lawyers use Acts. The law, if possible, should be accessible to all who want it.

Somewhat ironically, and despite Geoff Lawn’s comment that “that legislation should be readily accessible to the general public is a recent notion”, in light of one particular example it could almost be said that the perception of the users of legislation in New Zealand has simply come full circle. The Law Commission’s statement in 2008 that “there are a lot of Acts that should be widely accessible to all people” echoes Domett’s statement in 1850:

The object of paramount importance in this matter is, in the opinion of the committee, the reproduction of the ordinances in such a form as will render an acquaintance with the provisions most easy of attainment by all whom they affect.

The evolution of the perceived audience of promulgation can be explained by the developments both in the conceptions of the Rule of Law and the perception of the significance of the Rule of Law. It is inconsistent in the extreme to maintain that “statute users” on the one hand are a limited class, yet on the other refer to the Rule of Law as requiring that, “Acts of Parliament are accessible and available. Otherwise those to whom the law applies cannot find its content”.

E Obedience and compliance

Making the law knowable enables individuals, if they locate the law, to actively comply with and obey it. If the law is unavailable and unknowable then any obedience and compliance that occurs is accidental rather than intentional. Whether or not people desire to find out the law becomes irrelevant when the law is unknowable. One commentator puts it another way, that “[t]he very idea of obedience presupposes knowledge of that which is to be obeyed, without which knowledge there could be only the coincidence, never the obligation, of obedience”.

The Law Commission points out in The Presentation of New Zealand Statute Law that “people have to obey the law; ignorance of it is no excuse. So they need to be able to find it and understand it”. Communicating legal text to enable knowledge of the law and therefore compliance with it, has found explicit expression in the origins of the NZL.

The business case … does not seek to quantify the following types of outputs or benefits that flow from this project in financial terms [but instead through]:

\[^{291}\text{Lawn, above n 263, at 51.}\]
\[^{292}\text{Domett’s Ordinances, above n 263 at 1 (emphasis added).}\]
\[^{293}\text{Law Commission, above n 58, at iv.}\]
\[^{294}\text{The related issue of the degree to which laws reflect social norms and the impact this has on the need for communication through promulgation is dealt with in Chapter Three of this thesis.}\]
\[^{295}\text{Bailey, above n 100, at 1059.}\]
\[^{296}\text{Law Commission, above n 58, at 3. There has long been debate regarding the obligation to obey the law. For a good summary of several aspects of the debate see Leora Batnitzky “A Seamless Web? John Finnis and Joseph Raz on Practical Reason and Obligation to Obey the Law” (1995) 15 Oxford Journal of Legal Studies 153.}\]
\[^{297}\text{Summary of Business Case, above n 38, at 6.}\]

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• the potential for improving knowledge of, and compliance with, New Zealand legislation by individuals, businesses, and organisations, whether in New Zealand or overseas, due to their ability to access a database of legislation that is up to date and comprehensive

Why is it a good thing that people obey the law? This can be answered in several different ways depending on whose perspective is taken. First, the legislator that goes to the trouble of making law wants the law to be complied with. Legislating is costly and time consuming. The legislator that goes to the time and expense of making law does not want their effort resulting in inefficacy. This result is what happens when laws cannot be obeyed because they are unknowable; “no society can work in an efficient manner unless laws are obeyed ‘willingly’ and ‘spontaneously’”.298 Indeed, Hart notes that “[t]he legislator’s purpose in making laws would be defeated unless this [bringing the law to the attention of those to whom it applies] were generally done”299.

Second, if laws are unknowable through lack of publication or dissemination and the legislator still desires compliance and obedience then the law must be made knowable by other methods. The most obvious alternative method is making the law known through its enforcement.300 Bentham’s criticism of the Common Law as “dog law” illustrates the problem of this approach:

It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won’t tell a man beforehand what it is he should not do - they won’t so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it.

This is a stark representation of the inherent unfairness of using enforcement to inform someone of the law after they have breached it.

Despite the inherent unfairness of “dog law”, making the law knowable through enforcement is an accepted approach in New Zealand. Communication of law through enforcement is done not just with the person who has breached the law in mind however, but also with the general population in mind. To continue with Bentham’s metaphor, punishment is meted out not just for the bad dog but for all the other dogs as well. Deterrence is a significant factor in sentencing an offender.303 An oft-cited example of this is the approach found in R v Radich:304

299 Hart, above n 150, at 22.
300 The promulgation of law through the application of law by the courts and by court reporting is largely beyond the scope of this thesis.
302 Although a large part of the unfairness Bentham complains about here is not only due to the law being made known through enforcement, but also that the law is being made after it has been enforced. Bentham is therefore also complaining about the retrospective nature of the Common Law.
303 Sentencing Act 2002, s 7(1)(f) provides that one of “[t]he purposes for which a court may sentence or otherwise deal with an offender are –…(f) to deter the offender or other persons from committing the same or a similar offence”(emphasis added). Deterrence as a sentencing factor does depend on the level of premeditation involved in the crime. The higher the level of premeditation the more deterrence will be a factor. See for example R v Terewi [1999] 3 NZLR 62 (CA). But see R v Leuta [2002] 1 NZLR 215 (CA) at 230, and R v Rawiri HC Wellington CRI-2007-032-5294, 14 August 2009. Deterrence as a sentencing factor
One of the main purposes of punishment … is to protect the public from the commission of … crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so.

The two objections to the enforcement approach is that it is expensive and second, as noted above, that it is unfair. Unfortunately, it is beyond the scope of this thesis to investigate the cost of making the law known through publication versus the cost of making law known through enforcement. Suffice it to say that the cost of making the law known may be more expensive through publication rather than enforcement (or vice versa) depending on the topic of the law and who is affected by the law.\footnote{R v Radich [1954] NZLR 86 (CA) (emphasis added).}

This second objection, from the perspective of the legislator rather than the legislator, is that it is unfair to punish people, or be punished, for not obeying or complying with law that is impossible to know. Making the law knowable to satisfy the element of fairness has been described thus:\footnote{Christofides shows how significant making the law knowable in the microcosm of a particular locality can be in influencing sentencing. This approach is not new. The case of Mary Jones in 1771 is apposite; “[T]here had been a good deal of shop-lifting about Ludgate; an example was thought necessary; and this woman was hanged for the comfort and satisfaction of shopkeepers in Ludgate Street”. Charles Dickens Barnaby Rudge: A tale of the riots of ’eighty / by Charles Dickens ; with seventy-six illustrations by George Cattermole and Hablot K. Browne (’Phiz’) ; and an introduction by Kathleen Tillotson (Oxford University Press, Oxford, 1954) at xxv.}

\begin{quote}
To suppose that a statute, an administrative rule or an executive proclamation could penalize a person’s conduct when it was impossible for the person to know of the law raises an elementary issue of fairness. If a citizen cannot be tried and convicted without first being notified of the allegations against him, can he be convicted of an offense committed with no prior notice of the applicable law?
\end{quote}

This second objection serves to give the policy consideration of communication a great deal of weight in New Zealand. Promulgation of legislation as a means to communicate the content of statute law out of a desire for fairness has been significant in two of the major promulgative schemes in New Zealand. The PAL project which ultimately resulted in the NZL is of course funded by the New Zealand Government and “as with any other publicly funded government project, it was necessary to present a case to the New Zealand Government to gain approval and funding”.\footnote{Lawn, above n 263, at 62 (emphasis added).}

The business case for the PAL project was not argued on the basis of a cost benefit analysis, but it took some lengthy discussions with the more fiscally minded parties to the process to establish the merits of the public interest argument. In the end, the PAL project was not approved on the basis of a detailed discounted cash flow analysis nor of a financial rate of return to the
Crown. It was accepted as a true “public interest” project. Very few public sector projects are approved on this basis”.

The Business Case for the PAL project stated:

New Zealand is now in the position where the public can access the laws of many countries via the Internet, but cannot access an authoritative and comprehensive version of New Zealand legislation. Intensive users of legislation have access to commercial electronic databases, but these are generally only available on a subscription basis. There is an equity issue about the provision of access to legislation in New Zealand. In a totally commercial environment, the quality of access equates with the ability to pay. In the context of the provision of a core item of economic and social infrastructure such as legislation, ability to pay and, in turn, return on investment are not appropriate analytical tools.

The establishment of the Depository Library Scheme, which had existed until recently, was also motivated by fairness.

The Depository Library Scheme in New Zealand was established, in 1971, to provide the public with free access to government publications through key public libraries scattered around the country. As part of its commitment to equity and making information available to the general public, the central government funded the Government Printing Office to administer the Scheme and supply copies of specified government publications to the depository libraries.

It has also been observed that communication of the law to enable obedience and compliance is crucial from an economic perspective. At the microscopic level, “[e]ntrepeneurs particularly must know [and therefore be able to know] the legal consequences before hazarding capital”. At the macroscopic level, communication of law is arguably good for the economy and therefore important for both the legislative and the legislator. Lord Bingham, in the 2008 Robin Cooke Lecture, explored this argument in some detail. His Lordship pointed out:

…the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing the rights and obligations of the parties. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided. This was a point recognised by Lord Mansfield around 250 years ago when he said:

The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.

…But this is not an old fashioned and outdated notion. Alan Greenspan, the former chairman of the Federal Reserve Bank of the United States, when recently asked, informally, what he considered the single most important contributor to economic growth, gave as his considered answer, "The rule of law”. Even more recently, The Economist published an article which said:

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308 Summary of Business Case, above n 38, at 6.
310 Seidman, above n 42, at 107.
311 Bingham “What is the law?”, above n 213.
312 At 598.
313 Hamilton v Mendes (1761) 2 Burr 1198, 1214; 97 ER 787, 795.
The rule of law is usually thought of as a political or legal matter. But in the past ten years the rule of law has become important in economics too. The rule of law is held to be not only good in itself, because it embodies and encourages a just society, but also as a cause of other good things, notably growth.

Arguably then, communication of legislation, so as to better enable compliance, promotes not only economic stability but also economic growth.

**F The Open Government Movement**

In New Zealand the significance of communication as a policy consideration behind promulgation has also been influenced by the “Open Government Movement”. The Depository Library Scheme as noted above was initiated partly “to provide the public with free access to government publications”. David Harvey has noted extra judicially that, “the continued demand for transparency and openness in government” has put pressure on the Parliamentary Counsel Office’s task of the publication of legislation.

This belief that government publications and information should be available to the public has not always existed in New Zealand. The Official Secrets Act 1951 made it—

...illegal for a government officer to communicate official information to any person other than a person to whom he or she was authorised to communicate it, or a person to whom it was in the interests of the State to communicate it.

The underlying presumption of this Act was that information should not be disclosed unless there was good reason for doing so.

There is some difference of opinion on the reasons for the enactment of the Official Secrets Act 1951. One academic writes that this Act is often attributed to—

...a sequel to the waterfront strike of 1951, but the complete silence on the part of the Labour Opposition on the Act, which was passed four days after its introduction, seems to belie such a view. It must not be forgotten that the Act was also passed not long after the Second World War and at the beginning of the Cold War decade.

By 1980, the mood had changed markedly. *Towards Open Government (the Danks Report)*, a report by the Committee on Official Information was published in 1980. This Report states that the Committee—

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314 Hernon and Chalmers, above n 309, at 65.
315 Harvey, above n 55, at 56.
317 “[T]he Official Secrets Act is based on the British Statute of 1911, and the systems of security classifications is closely related to it. The Act assumes that official information is the property of government, and should not be disclosed without specific reason and authorisation. Those who want information must take the initiative and provide justification, and those who supply it must ask themselves whether they have the authority and good reason to do so. Criminal sanctions are attached to ‘wrongful communication’”. *Danks Report*, above n 316, at 5.
319 *Danks Report*, above n 316, at 5. One commentator states that the Committee was “…established after a chain of events triggered by the then chief ombudsman, Sir Guy Powles, who had difficulty trying to obtain information for a review of the New Zealand Security Intelligence Service”. Jessica White “Towards
was set up by the Government “to contribute to the larger aim of freedom of
information by considering the extent to which official information can be made
readily available to the public” and in particular to “examine the purpose and
application of the Official Secrets Act 1951”.

It was the Danks Report that recommended legal recognition for the proposition “that the
presumption henceforth should be that information is to be made available unless there is
good reason to withhold it”.320

The Danks Report noted that the submissions it received indicated that “[t]here is a
growing desire in various sections of the community for fuller information about the
policies and activities of the government”.321 The Danks Report recommendations stated
that the “essential purpose of the new system we propose is to improve communication
between the people of New Zealand and their government”.322

These recommendations led to the enactment of the Official Information Act
1982.323 This Act provides in section 5 that “information shall be made available unless
there is good reason for withholding it”.324 In the space of thirty years the approach
evolved from one of non-disclosure, to availability of government information.

The Danks Report identified several “reasons for openness”. These were
participation, accountability, effective government and concern with individuals.325
Significantly, for present purposes, the desire for effective government as a “reason for
openness” is explained thus:

Notwithstanding the need for participation and accountability, the Government’s
essential task is still to govern. If it is to do this effectively it has to win votes
and secure public support, not least for the major development decisions in
which it is involved and which may not necessarily be foreshadowed by election
platforms...New Zealand society has been criticised as being too closed, too
resistant to change...The role of improved information flows and discussion in
this process is recognised by the Government. The 1980 Budget statement
concludes by referring to major developments shaping up and observes:
“Change requires public understanding and agreement on what are often
complex and difficult issues. The government has worked, and will continue to
work, to secure that understanding and agreement to make these changes”.

320 However, this principle had been earlier alluded to by the 1962 Royal Commission of Inquiry on the State
Services: “Government administration is the public’s business, and the people are entitled to know more
than they do of what is being done and why”. The point was taken up by the state services commission,
which in a circular to permanent heads in 1964 “Too often information is only
given if there is a good reason
for doing so. The rule should be that information is only withheld if there is a good reason for doing so”.
Danks Report, above n 316, at 21.
321 At 5.
322 At 7.
323 Section 4 of this Act stated its purpose is “[t]o increase progressively the availability of official
information to the people of New Zealand in order—
(i) To enable their more effective participation in the making and administration of laws and
policies; and
(ii) To promote the accountability of Ministers of the Crown and officials,—
and thereby to enhance respect for the law and to promote the good government of New Zealand:
324 Official Information Act 1982, s 5: “The question whether any official information is to be made
available, where that question arises under this Act, shall be determined, except where this Act otherwise
expressly requires, in accordance with the purposes of this Act and the principle that the information shall be
made available unless there is good reason for withholding it”.
325 Danks Report, above n 316, at 14–16.
326 Danks Report, above n 316, at 15.
The logic used here to justify open government applies equally to communication of legislation. Unfortunately, there is a dearth of material on the relationship between the Open Government Movement and the communication of legislation. This is unsurprising as the former concept was initially concerned with the Executive, rather than Parliament. Yet as evidence of a change in attitudes, the Open Government Movement is supremely relevant to the availability of legislation. Making publications of the Executive available to the public while still allowing for Acts of Parliament to be unavailable would be extremely inconsistent.

The link between open government and the availability of legislation was recognised in the failed Copyright (Crown Copyright) Amendment Bill 1989 (135-1): This Bill, in recognition of the importance of open government in a democratic society, provides in legislation for the unrestricted right of access by the public to and use of the laws of New Zealand, whether statutory, judicial or quasi-judicial

This link has been noted in other legal systems in the context of democracy:

The legislative arm of government is enhanced by providing existing and proposed legislation without charge or restriction as it increases the openness and accountability of government and the legislature, facilitates lobbying by all citizens not just professional lobbyists nor those with large financial resources or backing to pay for reporting services. It also improves the standing of the legislature by showing responsiveness: ‘at the end of the day, the cost of publishing the law is a cost of democracy. Democracy has certain inherent costs that must be borne by the entire society for the benefit of society’: Tom McMahon ‘Improving access to the Law in Canada with Digital media’ (1999) 16 Government Information in Canada 1, 30.

The link between the communication of legislation and democracy has recently been noted in New Zealand. In the first reading of the Legislation Bill 2010 Kennedy Graham MP stated that; “[e]nsuring that legislation is accessible to the public is a fundamental aspect of democracy”.

“Open Government” has found expression in the “e-government” movement. E-government is “about government agencies working together to use technology so that they can better provide individuals and businesses with government services and information”. E-government featured prominently in the business case for the Public Access to Legislation project:

The Access Project is one of the core components of the Government’s e-government vision. This vision states that e-government will improve the quality...
of government, and people’s participation in it. The vision specifically refers to legislation (i.e., government laws). It states that:

“People will be better informed because they can get up-to-date and comprehensive information about Government laws, Statutory Regulations, policies and services.”

G Un-promulgated in-force legislation

In 1990, the Law Commission recommended that “the usual date of commencement [of Acts of Parliament] should be 28 days after the date of assent or making”. The logic behind this recommendation was that “an important practical element of that obligation [the moral obligation to obey the law] is often the allowing of sufficient time for the knowledge of the new law and of its actual text to spread throughout New Zealand”. This recommendation for a default presumption in the Interpretation Act 1999 was subsequently rejected.

Despite the significance of fairness in the policy consideration of communication legislation in New Zealand can still be in force and yet un-communicated. It is still inherently unfair if Acts that are in force are unknowable for any length of time. In the past, this often happened for substantial periods, but is less common today. Most frequently, directly after an Act was passed it was unavailable until publication occurred. Publication could take days, weeks or even months.

Today the means by which legislation is most promptly promulgated is via the NZL. Posted on the NZL under the heading “How up to date is this website?” is the following summary of how soon legislation is communicated via the website:

The date and time that the website was last updated is shown on the homepage.

We aim to make legislation available on this website according to the following timeframes (or earlier where possible):

- New Acts: within five working days of Royal assent
- New Regulations: the day after the date they are notified in the Gazette
- Bills:
  - New Bills introduced into the House: the day after introduction
  - Subsequent versions: the day after the printed version is made available to the House
- Supplementary Order Papers: the day after they have been circulated to Members of Parliament.

New Acts, Bills, and Supplementary Order Papers are made publicly available only after we are notified to publish by Parliament.

…

333 Law Commission A New Interpretation Act: To avoid “prolixity and tautology” (NZLC R17, 1990) at 103.
334 At 103.
335 Interpretation Act 1999, s 8(2): “If an Act does not state or provide for a commencement date, the Act comes into force on the day after the date of assent”. Interpretation Act 1999, s 10(1): “An enactment comes into force at the beginning of the day on which the enactment comes into force”.
336 “There was once a legal fiction that however long a session of Parliament lasted it was deemed to have lasted only one day [the first day of the session], and all Acts passed during the session were deemed to have come into force on that day”. Burrows and Carter, above n 90, at 561. This fiction was removed by the Acts of Parliament (Commencement) Act 1793.
337 Parliamentary Counsel Office, above n 80, at “How up to date is this website?” (emphasis added).
You can track newly published legislation using our web feeds. See Keeping up to date with the law—web feeds.

Amendments
Legislation on this website has amendments incorporated to provide a snapshot of the law as it currently stands. Amendments are added as soon as possible after they come into force, but not before. We aim to incorporate amendments within 15 working days after the amendment comes into force.

Each Act or Regulation states when amendments were last incorporated (the “as at” date). If an amendment has been enacted/made, but not yet incorporated into the principal enactment, an alert message will appear on that principal enactment. We aim to make this alert message available on the website within five working days of the publication of the amendment on the website.

Our ability to meet these timeframes may be affected from time to time by the number or complexity of amendments.

A “fixed wait approach”, which would always require the lapse of a defined period of time before an Act takes effect to allow for promulgation, could be taken. Instead a “non-promulgation approach” is taken, where “a law may take effect even before it is enacted and certainly at any time thereafter. Neither promulgation nor availability of the law is required”. This approach, as Murphy notes, demonstrates “a lack of concern for promulgation” and consequently a lack of concern for making the law available and knowable.

In reality, in New Zealand, delayed commencement often, but by no means always, has the effect of ensuring that law is published before it is in force. In 2011 for example, out of the 100 Acts enacted 51 came into force later than the day after the date of assent. The other 49 Acts —including one private and one local Act— came into force, or had provisions that came into force the day after the date of assent. Of these 49 Acts 30 came into force in their entirety the day after the date of Assent.

Twitter provides a fairly accurate record, to within approximately ten minutes, of the time and date of publication of these Acts on the NZL. Although for the purposes of this research, twitter records were only available from the 17th of May 2011 onwards. Consequently, publication times and dates for the 14 Acts enacted in 2011 prior to the 17th of May are unknown. Of these 14 Acts 5 came into force, or had provisions that came into force, the day after assent, the other 9 came into force at some point after the day after the date of assent.

Of the 44 Acts that came into force, in whole or in part, the day after the date of assent —and that the publication time is available— 42 were in force before they were

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338 Murphy, above n 12, at 273.
339 Often the commencement date is delayed, but this is only occasionally done to allow for promulgation (often it is done for other reasons) and it is only done on an ad hoc basis and not for every Act. A detailed study of the different reasons—and how often these various reasons are employed in justifying— delaying commencement provisions is beyond the scope of this thesis.
340 Murphy, above n 12, at 270.
341 At 271.
342 See Email from Gillian McIlraith (Communications Advisor of the Parliamentary Counsel Office) to Christopher Gullidge regarding the use of twitter and RSS feeds to keep updated about new legislation being posted on the NZL (11 April 2012) in Appendix Two of this thesis. See also Tweet by cesther @cesther 2:26 pm 23 Apr 2012 to chris g @sheeplaw @cesther in response to “Are your tweets a good indication of the date and time a new Act appears on the NZLW? Do they lag behind the RSS feeds much?” 2:18 pm 23 April 2012 Appendix Two.
343 See Appendix One.
published on the NZL. Only two were posted on the website on the day they received the Royal Assent; the Video Camera Surveillance (Temporary Measures) Act 2011 and the Taxation (Canterbury Earthquake Measures) Act 2011.\textsuperscript{344} The time lapse between coming into force and publication for the other 42 Acts varies between 5 days 23 hours 52 minutes\textsuperscript{345} and 0 days 9 hours 47 minutes.\textsuperscript{346} Of these 42 Acts 13 were posted on the NZL the day after the date of assent. Six were posted on the second day after the date of assent and another six were posted on the third day after the date of assent. 11 were posted on the fourth day after the date of assent and one was posted on the fifth day and another on the sixth day after the date of assent.

Of the 42 Acts, whose publication date is available, that came into force at some point in time after the day after the date of assent, all were posted on the NZL before they came into force. So in 2011, of the 86 Acts, whose publication times and dates are available, 42 were in force before they were promulgated to any degree, electronic or otherwise.\textsuperscript{347} Some of these delays between commencement and publication were hours (13 Acts) but many were days (29 Acts).

\textbf{H Communication as a policy consideration}

The policy consideration of communication is of particular significance with regard to the NZL and the Depository Library Scheme, but of less significance in the process of hard copy reprinting of Acts.

Making legislation available so as to be knowable is the most persuasive reason to promulgate. The persuasiveness of the need to make legislation available can be attributed to the issues of obedience and compliance, the impact of the Open Government Movement and the change in perception of who the users of legislation are. However, the fact that instances still occur in New Zealand where legislation is in force but is unavailable, for any length of time—no matter how brief—suggests that communication as a policy consideration of promulgation could be given more significance than it already has.

\textsuperscript{344} Video Camera Surveillance (Temporary Measures) Act 2011 was published at 5:57pm 17 October and the Taxation (Canterbury Earthquake Measures) Act 2011 was published at 4:12pm 24 May 2011.

\textsuperscript{345} Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 had provisions which came into force on 12:01am 1 July 2011 “except subpart 2 of Part 2 and sections 52 to 68, comes into force on the day after the date on which it receives the Royal assent” section 2(1). This Act was not posted on the NZL until 11:53pm 6 July 2011.

\textsuperscript{346} Sleepover Wages (Settlement) Act 2011 came into force at 12:01am 18 October. This Act had been posted on the NZL by 9:48am on the 18th of October 2011.

\textsuperscript{347} During the period between commencement and publication the best alternative for an individual who wished to ascertain the text of a piece of legislation would be to consult the Supplementary Order Papers and the Bills of that piece of legislation.
Chapter Eight: Availability of authentic copies of statutes: the raison d’être of promulgative schemes?

A The problem of authenticity

To what extent are promulgative schemes justified by the need to make sure that copies of statutes with high levels of authenticity are available? Is the approach taken that copies of Acts are going to be promulgated anyway so it is only logical that these copies are also authenticated? Or are promulgative schemes themselves put in place to ensure that authentic copies of statutes are available? The answers to these questions differ depending on the promulgative scheme.

Ostensibly, electronic promulgation is less motivated by the goal of providing access to highly authentic copies of Acts than other policy considerations such as communication or the Rule of Law. However, this is set to change. The promulgative schemes for hard copy conversely focus on producing highly authentic copies of Acts. However, with one exception, the established practice is that these hard copies of Acts are less authentic than the un-promulgated Royal Assent copies of Acts.

The modern concept of authentic is “[o]f authority, authoritative (properly as possessing original or inherent authority, but also as duly authorised); entitled to obedience or respect”. Authentic copies of statutes are those that are recognised as having the authority of being an accurate exposition of the law as recognised by law.

Even before turning to issues of interpretation or lack of clarity, doubt can arise in people’s minds as to what the law is. In light of this, one Parliamentarian noted:

It must be a paramount principle that all New Zealanders have a right of access to the law. With that goes another principle, which the member overlooked, and that is the need to maintain the integrity of the printed versions of the law that are available. The two principles are inseparable. One is access to the law, but access to the law is worthless if one cannot be completely convinced that the version of the law that one has access to is accurate, and that the law as a body has integrity.

This is the problem of authenticity. Before turning to the issue of what do the words of a law mean, first it must be ascertained what the words of a legal text actually are. There are rules, some based on law and some based on practice, that are used to determine what the words of a law are. So frequently are the words of a law ascertained, so often are these rules of authentication used, that their use passes almost without notice.

348 The word authentic stems from the Greek authentikos meaning “principal, genuine”. *The Oxford Compact English Dictionary* (Oxford University Press, New York, 2000) at 62. In Latin authenticus meant first hand authority or original. During the Middle Ages the meaning of authentic developed, “to combine the ideas of authoritative and original”. The concept has continued to develop and now authenticity can be based, but is no longer contingent, on a document being an original. OED, Above n 20
349 OED, Above n 20.
352 “Authentication” can describe two distinct processes. The first is the process by which a copy is made authentic. For example, the use of a particular formula being attached to a copy that subsequently makes that copy authentic. The second is the process by which a copy is observed to be authentic through the recognition of a particular formula attached to that copy. The latter process is likely, but not necessarily, determined by the first. Authentication is the practical processes by which authenticity is either conferred or accepted. There can be levels of authenticity, where a document is considered more authentic than one
Occasionally these rules are noticed, usually when something goes wrong, or something changes. Nearly 300 years ago in *R v Jeffries* an English court was faced with the issue of what were the words of the law, when two copies of the same statute had different text. 130 years later an American court had to deal with the same issue; “not what [was] the construction of an admitted statute, but what [was] the statute”.

Currently, in New Zealand the alteration and the diversification of the mediums used for promulgating law creates doubt. For example, the Parliamentary Counsel Office ceased publishing the *Reprinted Statutes* series in 2003. The *Reprinted Statutes* were effectively replaced by the privately produced *Bound Reprinted Statutes* series. The *Reprinted Statutes* and the *Bound Reprinted Statutes* appear, aside from their colour, quite similar on the shelves but have very different levels of authenticity under these rules.

This Chapter of the thesis examines what constitutes authoritative, and consequently authentic, copies of statutes. This enables an analysis to determine the extent to which promulgative schemes in New Zealand are motivated by ensuring copies of statutes of a high level of authenticity are available.

### B What constitutes an authentic copy of a statute?

The way in which copies of statutes are recognised as being authentic can be done through the conferring of “official status” on these copies. Official status in the New Zealand context is usually taken to mean “the copies of legislation [that] can be produced in Court as evidence of their contents without further proof”. In New Zealand these are the copies that have met the requirements of section 16C and 16D of the ARPA and/or section 141 of the Evidence Act 2006.

Section 16C(1) provides:

> Every copy of any Act of Parliament or of any Imperial enactment or any Imperial subordinate legislation (as defined in section 2 of the Imperial Laws Application Act 1988) being a copy purporting to be printed or published (whether before or after the commencement of this section) under the authority of the New Zealand Government is, unless the contrary is shown, deemed—
> 
> (a) to be a correct copy of that Act of Parliament, enactment, or legislation; and
> 
> (b) to have been so printed or published

Section 16D is concerned with reprints of legislation and provides:

> (1) This section applies to any copy of a reprint of any legislation, where that copy purports to be printed or published (whether before or after the commencement of this section) under the authority of the New Zealand Government is, unless the contrary is shown, deemed—
> 
> (a) to be a correct copy of that Act of Parliament, enactment, or legislation; and
> 
> (b) to have been so printed or published

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353 *R v Jeffries* [1721] 1 Strange 446.
354 *Pease v Peck* 59 US 595 (1855) at 595.
355 Law Commission, above n 58, at 2.12. Also see Burrows and Carter, above n 90, at 166: “‘[o]fficial status’ in this context means that the copies of legislation can be produced in court as evidence of their contents without further proof”. While “judicial notice” must be taken of Acts of Parliament (Section 16A of the ARPA) that phrase is not used in relation to copies of Acts being evidence of what is in fact an Act of Parliament.
356 These sections were inserted by the Evidence Act 2006, s 216, when it came into effect by order in council on 1 August 2007, Evidence Act 2006 Commencement Order 2007, cl 2.
commencement of this section) under the authority of the New Zealand Government.

(2) Unless the contrary is shown, every copy of a reprint to which this section applies is to be taken—
(a) to be a copy of a reprint that correctly states, as at the date at which it is stated to be reprinted, the law enacted or made by the legislation reprinted and by the amendments (if any) to that legislation; and
(b) to have been printed or published under the authority of the New Zealand Government.

(3) To avoid any doubt, the presumption contained in subsection (2) applies to a copy of a reprint in which changes authorised by section 17C have been made.

(4) The presumption contained in subsection (2) may be rebutted by the production of the official volume in which the relevant legislation or any amendment to that legislation, as the case requires, is contained.

(5) Subsection (4) does not limit any other means of rebutting the presumption contained in subsection (2).

Section 141 of the Evidence Act 2006 is concerned with New Zealand and foreign documents. Copies of statutes fall under this Act as documents that purport to have been printed or published by the Government Printer and/or by authority of the New Zealand Government:

(1) Subsection (2) applies to a document that purports—
(a) to have been printed in the Gazette; or
(b) to have been printed or published by authority of the New Zealand Government; or
(c) to have been printed or published by the Government Printer; or
(d) to have been printed or published by order of or under the authority of the House of Representatives.

(2) If this subsection applies, the document is presumed, unless the Judge decides otherwise, to be what it purports to be and to have been so printed and published and to have been published on the date on which it purports to have been published.

The use of the word “purports” in all of these sections without further requirements is somewhat unfortunate. The roughest, grubbiest hand-written text of an Act that is

358 In modern usage “purports” seems to imply falsity. Purports means “appear to be or do, especially falsely”: The Oxford Compact English Dictionary, above n 348, at 920. By using the word “purports” these sections in a bizarre circularity on the one hand provide a way to authenticate documents and on the other hand by only having “to seem”, bring their authenticity into doubt. The Oxford English Dictionary offers a definition of purports as “Esp. of a document, picture, or object: (originally, without implied doubt as to the validity of the claim) to seem; (in later use) to profess or claim by its tenor, be intended to seem, appear ostensibly to be or do something. (Now the usual sense.)” OED, above n 20.

359 Are neatness and a particular appearance of the copy implied into the concept of “purports”? It is likely that these factors are not. Official copies of Acts may look rough: “Any member of this House who goes to the statutes in the lobby—and I suspect that most members have never done that: it is only recently that I have had the joy of having to do so—and tries to pull the income Tax Act to find out what it actually contains, and who is perhaps used to other legislation, is in for a horrible shock indeed. It is an Act of shreds and patches—one that is littered with bits of paper, cross references, and Mr Brookes Friend’s annotations, and it goes on and on.” Hon Michael Cullen MP (10 March 1992) 522 NZPD 6753. Of course the annotations mentioned here are not official, but they do make a neat official copy of an Act look very rough. It would be difficult to say that just because a copy of an Act looks rough it can no longer purport to be printed under the authority of the New Zealand Government. Moreover, to “purport” a certain medium for the copy is not required. These sections do not specify paper copies. The Parliamentary Counsel Office could erect a marble tablet on the grounds of Parliament House inscribed with the New Zealand Bill of Rights Act 1990 and if the textual formula “published under the authority of the New Zealand Government” was included it would come under section 16C of the ARPA.
merely “purporting to be printed or published (whether before or after the commencement of this section) under the authority of the New Zealand Government” is an official copy of an Act under section 16C of the ARPA.\textsuperscript{360} Even the text of a statute written on a beach using a piece of driftwood could include the textual formula “published under the authority of the New Zealand Government” and thus be an official copy of an Act, unless the contrary is shown, of course. All three of these sections state the rule that if a copy of an Act of Parliament “purports to have been printed or published under the (or by) authority of the New Zealand Government” it is “presumed”, “deemed” or “taken” to be an authentic copy of the law.

Privately printed or published copies of Acts do not —which is not to say they could not— contain the textual formula and consequently have a lower level of authenticity. For example, the Bound Reprinted Statutes series, privately published by Brookers since 2003, contain “complete facsimiles of the text of the loose reprinted legislation published by the Parliamentary Counsel Office”.\textsuperscript{361} The copies of Acts in this series each bear the New Zealand Coat of Arms on their first page but lack the textual formula, “published under the authority of the New Zealand Government”. Despite being facsimiles of copies that are authentic under the ARPA, the lack of this textual formula places them at a lower point in this hierarchy of authenticity.

Copies of Acts are printed and published in accordance with the Chief Parliamentary Counsel’s duties under section 4(1) of the ARPA. Every one of these copies must “state that it is published under the authority of the New Zealand Government”.\textsuperscript{362} On copies of Acts printed in the Annual Bound Volumes as far back as the 1850s it is stated that these Acts are “printed under the authority of the New Zealand Government”. However, solely because a copy of an Act “purports to have been printed or published under authority” does not put the authenticity of such a copy beyond all question.

Commenting on section 29 of the Evidence Act 1908,\textsuperscript{363} Joseph writes that these “provisions lay down a presumptive rule for identifying statutes that would not allay genuine concern as to the authenticity of an Act or its contents”.\textsuperscript{364} None of these sections provide an irrebuttable presumption, all three allow for these copies to be decided to be incorrect expositions of the law and thus not authentic. Section 141(2) of the Evidence Act 2006 sets a low threshold, giving the judge discretion to “decide otherwise” without reference to considerations that must be taken into account. Section 16C and 16D of the

\textsuperscript{360}While the obligation under the ARPA s 4(2) is to include textual formula to purport to be printed or published under authority a copy of an Act may also use different formula, symbolic or textual. For example, a copy may purport to be printed or published under the authority of the New Zealand Government by having a New Zealand Coat of Arms printed on its front page. However, using the Coat of Arms leaves room for doubt. The reader has to know that the Coat of Arms signifies the authority of the New Zealand Government and also that the Coat of Arms signifies the exercise of that authority in the printing or publishing of the document. Another, more explicit way of purporting to be printed or published under the authority of the New Zealand Government is the inclusion of words to that effect. The formula used is, “published under the authority of the New Zealand Government”. Arguably a copy of a statute could purport to be printed or published under the authority of the New Zealand Government by the use of the words alone but not necessarily the use of the Coat of Arms alone. Hard copies of Acts published by the Parliamentary Counsel Office contain both, the Annual Bound Volumes, for example, have both the text and the Coat of Arms on the front page of the volume (since 2008, the first time since 1908, the textual formula has been included on the final page of each Act in the Annual Bound Volumes), the individual pamphlet Acts have the Coat of Arms on the front page and the text on the final page).

\textsuperscript{361} Foreword to The Bound Reprinted Statutes (Brookers, Wellington, 2005) Vol 1.

\textsuperscript{362} Section 4(2) of the ARPA. This section includes both copies and reprints of Acts.

\textsuperscript{363} This section was the precursor to section 16C of the ARPA. These sections are almost identical.

ARPA are more specific and both state that “unless the contrary is shown” the copies are deemed/taken to be a correct copy of the Act of Parliament. Section 16D(4), in relation to reprints, provides:

The presumption contained in subsection (2) may be rebutted by the production of the official volume in which the relevant legislation or any amendment to that legislation, as the case requires, is contained.

Section 16C does not state how the presumption may be rebutted in relation to copies. This gives reprints of Acts under section 16D a lower level of authenticity than copies of Acts in the “official volumes”. These “official volumes” are presumably the Annual Bound Volumes.

C “Unless the contrary is shown”; the questionable supremacy of the Royal Assent copies

It is generally accepted that, “[i]f there were genuine doubt as to the authenticity of the Act or its contents, reference could be made to the copies signed by the Governor-General and held at Parliament House (or Archives New Zealand) and the High Court”. 366 This approach is suggestive of a hierarchy of authenticity in relation to texts of statutes. In this hierarchy these Royal Assent versions (the copies signed by the Governor-General rather than the green copies) 367 would be at the top. 368 The official copies (purporting to be printed or published under authority) would come below the Royal Assent copies, copies of Acts being above reprints of Acts. Finally, copies of Acts that did not purport to be printed or published under authority, such as annotations or privately published copies of Acts, would be placed at the bottom of this hierarchy.

However, there is a precedent which suggests that the copies purporting to be printed or published under authority may in some circumstances be treated as more authentic expositions of the law than the Royal Assent versions. The Royal Assent version and the official copies published of the Protection of Personal and Property Rights Act 1988 differed. 369 Section 116 of the Royal Assent version read, “The enactments specified in the Third Schedule to this Act are hereby repealed”. 370 The official copies replaced the word “Third” with “Fourth”. To see the significance of these two different words it is necessary to list the enactments specified in either schedule; In the Fourth schedule the enactments specified are:

– The Aged and Infirm Persons Protection Act 1912.

365 “Official volume” is defined in section 16D(6) of the ARPA as any volume containing copies of legislation that are deemed, by section 16C, to be correct copies of that legislation.
366 McGee, see above n 53, at 395.
367 For more on the green copies of Acts of Parliament, known simply as the “greens”, see Chapter Twelve of this thesis.
368 The situation where the two Royal Assent versions differ from one another seem to be beyond contemplation. If this did occur it is difficult to say which of the two Royal Assent versions would be at the top of the hierarchy. Maybe it would be the version the Governor-General signed first, or maybe the copy Parliament held. Possibly, the version that most closely adhered to the Bill concerned, as it had been when read a third time, would be placed at the top of the hierarchy.
370 At 345.
–The Mental Health Amendment Act 1972: sections 10 (2), 10 (3), 11, and 12.
–The Mental Health Amendment Act 1975.
–The Judicature Amendment Act (No. 2) 1985: so much of Part 11 of the Second Schedule as relates to section 30 of the Aged and Infirm Persons Protection Act 1912.

In the Third schedule the enactments specified are:

–Part IX of the Protection of Personal and Property Rights Act 1988

It seems very likely the reference to the Third schedule in the Royal Assent version is a mistake, unless the Act was to provide for its own partial repeal on enactment, which commentators have noted would be bizarre. Without a great deal of controversy the official copies were treated as the authentic copies and the Royal Assent versions were ignored.

There was no legislation passed fixing the mistake in the Royal Assent version, despite the fact that this approach has been taken in relation to other Royal Assent versions that contained errors. This has been done both before and after the enactment of the Protection of Personal and Property Rights Act 1988. Examples of this approach, as noted by McGee are:

The Sharebrokers Act Amendment Act 1872, s. 2 (correcting an error in the Sharebrokers Act 1871; Electoral Amendment Act 1996, s.2 (correcting an error in the Electoral Amendment Act 1995); Crown Entities Act 2004, s.201(1) (correcting an error in the Gas Amendment Act 2004)”.

A situation similar to the Protection of Personal and Property Rights Act 1988 where the official copies are treated as more authentic as the Royal Assent versions of a statute may now be less likely to happen. The use of correcting legislation through the Electoral Amendment Act 1996, s 2 and the Crown Entities Act 2004, s 201(1) suggest that if the Royal Assent version states the law in a certain way, the way to change it is through repeal rather than “sweeping the mistake under the rug”. This approach that the copies of an Act that had been disseminated are authoritative over the assent copies is not a lone example. In 1855, the American case of Pease v Peck where the official copies are treated as more authentic as the Royal Assent versions of a statute may now be less likely to happen. The use of correcting legislation through the Electoral Amendment Act 1996, s 2 and the Crown Entities Act 2004, s 201(1) suggest that if the Royal Assent version states the law in a certain way, the way to change it is through repeal rather than “sweeping the mistake under the rug”. This approach that the copies of an Act that had been disseminated are authoritative over the assent copies is not a lone example. In 1855, the American case of Pease v Peck

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371 The likely explanation for this mistake is that the fourth schedule had originally been the third in an earlier version of the Bill. What was to become the Third schedule for the Bill was added after the second reading of the Bill. On page 88 of the final version of the Bill the heading for the schedule for the enactments repealed was (Third) Fourth Schedule.

372 Munday, above n 369, at 347. A response to this article was published: DG McGee “Hesitation or “hesitation”?” [1989] NZLJ 404. It is not unknown however, for an Act to repeal one of its own provisions. For example, see the Tourist Hotel Corporation Of New Zealand Act 1989 s 17(2) and s 1.

373 McGee, above n 53, at 393.

374 There are some earlier examples of courts correcting mistakes in statutes rather than Parliament enacting correcting legislation. See Munday, above n 369, at 348: “What is certain is that only in the very clearest of cases have courts been prepared to amend parliament’s handiwork”. See generally Ross Carter “Statutory Interpretation and the Rectification of Drafting Errors” [2012] NZ L Rev 207.

375 An alternative analysis to errors being part of the enactment (and so correctable only by amending legislation or by rectifying interpretation) is that the ‘Act’ is invalid so far as what is purportedly assented to is not the Bill that was passed by the House.

376 Above n 354.
It is no doubt true, as a general rule, that the mistake of transcriber or printer cannot change the law; and that when the statutes published by authority are found to differ from the original on file among the public archives, that the courts will receive the latter as containing the expressed will of the legislature in preference to the former. Yet, as the people who are governed by the laws, and the courts who administer them, practically know the law only from the authorized publication of them, the propriety of recurring to ancient, altered, and erased manuscripts, for the purpose of changing their construction after a lapse of thirty years, and after their construction has been long settled by the courts, and has entered as an element into the contracts and business of the citizens, may well be doubted. The reception and long acquiescence in them, as printed and distributed by authority, by those who had it always in their power to alter or annul them, and did not, may justly be treated as a ratification of them in that form by the sovereign people.

Greer concluded that the legislature did indeed have the power to rectify the mistake and since they had not it would be—

In *Pease v Peck* significance was attached to the time lapse and the long application of the mistake. In New Zealand the approach of dealing with the Protection of Personal and Property Rights 1988 seems to have been justified purely by convenience, as there was little time lapse before the mistake was discovered.

Notwithstanding the single example of the Protection of Personal and Property Rights Act 1988, the supremacy of the Royal Assent versions seems fairly settled. However, there seems to be no formal recognition that copies of Acts that “purport to have been printed or published under authority” have to be the same as the Royal Assent versions.

A possible explanation is that the requirement that official copies must be facsimiles of the Royal Assent versions is arguably implied into the word “copies”. So the duty of the Chief Parliamentary Counsel in section 4(1)(a) of the ARPA is to; “arrange for the printing and publication of copies of every Act enacted by Parliament after the commencement of this section” is in effect imposing a duty to print and publish copies of the Royal Assent versions.

Another possible explanation for the perceived supremacy of the Royal Assent versions of an Act is that it may purely be a matter of long established practice recognised by the Common Law. Historically, in England the approach was that the Parliament roll was the supreme copy of the law. Wilberforce wrote in 1881:

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377 At 595.
378 At 596 to 597.
379 At 598.
380 This was a parchment which could be rolled up by hand with additions being stitched into it to prevent false documents being inserted. It was kept in the Rolls Office in Chancery Lane, London, later renamed the Public Bills Office”. John J Rankin “Errors in Acts” (1987) Stat LR 53 at 54. Contrary to that Holdsworth states: “The Statute Rolls themselves are neither accurate nor perfect. Many documents not upon the Statute Roll have been recognized as possessing statutory validity. ‘Acts of Parliament’, says Coke, ‘are many times
Down to the year 1849 the only authentic record of the statutes of the realm was to be found in the Parliament roll, which was engrossed upon parchment and kept amongst the public records. If any doubt arose as to the correctness of a printed copy of any act of parliament, or if two printed copies differed, the court would refer to the roll, or accept the printed copy which had been examined with it”.

Wilberforce notes the 1721 case of R v Jeffries. In that case it was reported that “Kebel’s statutes and Rastal’s differed, and they who were adhering for Kebel’s proved that they had examined him with the Parliament roll. The Chief Justice ruled it was enough, and Kebel was read”. This approach was approved of in obiter in Price v Hollis, “The court would not look into it to see whether it [the Parliament Roll] was strictly right”. According to Price v Hollis then the authentic copy of the statute is to be found on the Parliament roll whether or not that copy is correct.

This approach is confirmed in the case of Edinburgh and Dalkeith Railway v. Wauchope. Not only was the Parliamentary Roll the most authentic copy of a statute, it was the farthest a Court could look back into legislative history. Provided that a Bill had met the two requirements of passage through the Houses and Royal Assent:

All that a court of justice can do is to look to the Parliamentary Roll. If from that it should appear that a Bill had passed both Houses and receive the Royal assent, no court of justice can inquire into the mode in which it was introduced into Parliament, or into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

In 1849, a change was made to “The Standing Orders of the House of Commons”:

Both Houses of Parliament resolved, that for the future each bill, instead of being engrossed, should be printed by the Queen’s printer, and that a print on vellum, authenticated by the Parliament or by some other proper officer of the House of Lords, should be deposited in the Record Tower.

Jackson notes that:

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381 Edward Wilberforce Statute Law: The Principles which govern the construction and operation of statutes (Stevens and Sons, London, 1881) at 12.
382 Above n 353.
383 Wilberforce, above n 381, at 12.
384 Price v Hollis (1813) 1 M and S 105 105 ER 40 at 107.
385 Above n 196.
386 This may have changed because of the approach established by Pepper v Hart [1993] AC 593. However, Pepper v Hart involved an inquiry ascertaining an Act’s meaning, not its text.
387 Dalkeith Railway, above n 196, at 725.
This vellum copy is then lodged in the House of Lords Record Office. This is the copy to which the courts would seek access, in case of any doubt regarding the authenticity or text of a statute.

The English approach, that the most authentic copy of a statute is, as Justice Greer put it, “to be found only in a document reposing in the crypts” goes some way to explaining the significance and authority that is attached to the Royal Assent copies in the New Zealand legal system.

Another possible explanation for disseminated copies of Acts falling below the Royal Assent copies in the hierarchy of authenticity stems from Hart’s rule of recognition. In New Zealand the rule of recognition is, whatever the Queen (through her representative the Governor-General) enacts in Parliament is law. This rule of recognition is dependent on the Royal Assent, which is given by the Governor-General signing the Bill passed by the House of Representatives. The two copies are signed by the Governor-General, without this signature they would not be law. Although the Act may not be in force until the day after the Royal Assent (in most cases) these copies become law the moment after the Governor-General’s pen leaves the paper.389 The only copy of the law then is what the Governor-General has just signed. Consequently, the Royal Assent versions are the first texts of the law in existence and all other copies are merely reproductions of these two versions.

This explanation carries less weight if other copies of Acts exist before the Governor-General has signed the Royal Assent copies. As of 2011, despite the fact that other copies of an Act are not available until after Royal Assent, that does not mean that other copies of an Act are not in existence until after the Royal Assent. Indeed, copies of Acts that meet section 16C of the ARPA are available so promptly after Royal Assent that some of these copies must be in existence before the Royal Assent is given.

D Authenticity and the New Zealand Legislation Website

It is unclear if there is a divergence of opinion between the Law Commission and the Parliamentary Counsel Office over the concept of official copies. As noted above the Law Commission states that copies with official status are “the copies of legislation [that] can be produced in Court as evidence of their contents without further proof”. The Parliamentary Counsel Office however defines the “officialised material” on the NZL as the copies of Acts that have “been confirmed as being an accurate and authoritative version of legislation”.390 The Parliamentary Counsel Office states unequivocally that the copies on the NZL lack official status.391

The electronic versions of legislation on this website, and any legislation printed from this website:
• have no official status

389 Section 16 of the Constitution Act 1986 provides: “A Bill passed by the House of Representatives shall become law when the Sovereign or the Governor-General assents to it and signs it in token of such assent”. However, as discussed in Chapter Five of this thesis this section, while declaratory of prior Common Law or constitutional Convention, is of somewhat superfluous because of New Zealand’s rule of recognition. Hypothetically what would happen if the Governor-General paused for an extended length of time between signing the first and second copies of the same Act? Would the Bill become law after the first copy has been signed or after the second copy? Section 16 suggests only one signature is necessary.


391 Parliamentary Counsel Office, above n 21.
are made available for information only and should not be relied on as the authoritative text
• are intended to become the official source of New Zealand legislation in the future.

However, to fulfil the requirements set out in section 16C or Section 16D of the ARPA and thus “be produced in Court as evidence of their contents without further proof” the copies of Acts must no more than purport to be printed or published under the authority of the New Zealand Government.

1 PDF copies of Acts

The PDF copies on the NZL, for some Acts, arguably meet these requirements. The copies need not be printed, only published, which is not defined in the ARPA, yet logically this includes publishing via the internet.

For example, the PDF version of the Freedom Camping Act 2011 purports to be “published under the authority of the New Zealand Government” on its final page, as do many other PDF versions of Acts, while the PDF version of the Tokomairiro Farmers’ Club Reserve Act 1877 does not. Therefore, some copies of Acts on the NZL meet the requirements of section 16C or section 16D of the ARPA. This is despite the website itself stating that “electronic versions of legislation on this website, and any legislation printed from this website have no official status”. Yet under the Law Commission’s definition of “official status” these copies do have this status.

A possible explanation of the Law Commission and the Parliamentary Counsel Office stating that the copies on the NZL are not official, when in reality they are, is that it may not be desirable to have a repository of statute law where some copies are official and some are not. It may indeed be prudent in the interests of certainty to ensure that none of these copies are treated as official when in fact, some of them are and some of them are not. Suggesting that legislation needs be passed before these copies are official, reinforces the inaccurate belief that these copies are not official. In the context of sections 16C and 16D of the ARPA however, this approach of the NZL still appears inconsistent.

Both The Presentation of New Zealand Statute Law and Statute Law in New Zealand give these PDF copies “semi-official” status. In Statute Law the reason for the distinction between semi-official and unofficial is explained:

Even before any legislation is enacted giving “official status” to electronic versions (for example, pdf copies printed from, or viewed in that format at, the

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392 Law Commission, above n 58, at [2.12].
393 The effect of this statement on the concept of “purport” may be interesting. Hypothetically, could a copy of an Act purport to be published under the authority of the New Zealand Government if the volume or website that the copy is contained in states that none of the contents of this volume or website “purport to be printed under the authority of the New Zealand Government”? Would this denial amount to “showing the contrary” under sections 16C and 16D of the ARPA?
394 The copies that do meet the requirements of section 16C and section 16D may be what the Law Commission has in mind when it writes “the New Zealand Legislation Website will not be official in the sense set out above until legislation is passed to make it an official legislative source. However even before the passage of such legislation, certain enactments on the Website will be able to be regarded as having a sort of “semi-official” status. Two types of enactment will fall into this category. These types of enactment are Acts that are enacted after the website was launched and Acts made before the website was launched but that have been “officialised by the Parliamentary Counsel Office”. Law Commission, above n 58, at [2.18].
395 “The New Zealand Legislation Website will not be official in the sense set out above until legislation is passed to make it an official legislative source” Law Commission, above n 58, at [2.18].
396 Burrows and Carter, above n 90, at 167.
website), two types of enactments will have “semi-official” status. One category is enactments made after the launch of the new system. The second category of semi-official legislation is the Acts and regulations acquired as source data from Brookers and officialised by the PCO’s Reprints Unit.

Similarly in *Presentation* it is stated:397

The New Zealand Legislation Website will not be official in the sense set out above until legislation is passed to make it an official legislative source. However, even before the passage of such legislation, certain enactments on the website will be able to be regarded as having a sort of “semi-official” status. Two types of enactment will fall into this category. The first category includes those Acts and statutory regulations that are enacted or made after the New Zealand Legislation Website was launched. The second category of semi-official legislation will include those Acts and statutory regulations that have been acquired from Brookers and that have since been officialised by the PCO Reprints Unit. See, for example, the Wills Act 2007 (2007, No 36) and Succession (Homicide) Act 2007 (2007, No 95).

Some of the PDF copies of Acts are electronic reprints, as they “[incorporate] all amendments made … as at the date of the most recent in-force amendment”.398 The Parliamentary Counsel Office divides these copies into “reprints or eprints”.399 The copies that are not yet “officialised” are referred to as “eprints”. The copies that have “semi-official” status are referred to as reprints.400

Creating the category of “semi-official” status for these copies may be convenient and even prudent, nevertheless in light of the accepted definition of official and section 16C of the ARPA it is somewhat less than legally accurate.

2 HTML copies of Acts

Prima facie none of the HTML copies of Acts on the NZL state that they are published under the authority of the New Zealand Government. There is no explicit textual formula to that effect, nor a coat of arms on these copies. However, some of these HTML copies are electronic reprints. On the title page of these reprints there is a note stating:

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397 Law Commission, above n 58, at [2.18].
399 Parliamentary Counsel Office “Electronic Reprints/eprints” <www.pco.parliament.govt.nz/eprints/> [Electronic Reprints/eprints]: “Electronic reprints/eprints The New Zealand Legislation website provides access to legislation with all amendments incorporated. These documents can be described as reprints or eprints. Acts and regulations that have been amended show the date of the latest amendment to have been incorporated at the top of the contents page (“Reprint as at …”). At the bottom of the contents page is a link to the reprint notes.
Reprints on the New Zealand Legislation website
If the legislation has semi-official status (see Making online legislation official) the reprint will have been prepared following the same editorial conventions as a traditional printed reprint—see Reprinting conventions.
eprints on the New Zealand Legislation website
If the legislation has not yet been officialised it will refer to itself as an eprint. All in-force amendments since the legislation was passed or made will have been incorporated, but only the amendments incorporated since September 2007 will be listed in the reprint notes.”
400 Electronic Reprints/eprints, above n 399, See Chapter Eight of this thesis.
Changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in this reprint.

A general outline of these changes is set out in the notes at the end of this reprint, together with other explanatory material about this reprint.

In the reprint notes of the Auditor Regulation Act 2011 for example, it is stated:

This is a reprint of the Auditor Regulation Act 2011. The reprint incorporates all the amendments to the Act as at 1 February 2012, as specified in the list of amendments at the end of these notes.

Under section 16D of the Acts and Regulations Publication Act 1989, reprints are presumed to correctly state, as at the date of the reprint, the law enacted by the principal enactment and by the amendments to that enactment. This presumption applies even though editorial changes authorised by section 17C of the Acts and Regulations Publication Act 1989 have been made in the reprint.

This presumption may be rebutted by producing the official volumes of statutes or statutory regulations in which the principal enactment and its amendments are contained.

It is explicitly stated that this copy is a reprint and section 16D of the ARPA is then referred to. As noted above section 16D of this Act provides:

16D (1) This section applies to any copy of a reprint of any legislation, where that copy purports to be printed or published (whether before or after the commencement of this section) under the authority of the New Zealand Government

This copy of the Auditor Regulation Act 2011 does not state anywhere that it is printed or published under the authority of the New Zealand Government. However, the reprint notes state that it is a reprint. The reprint notes then go on to state the significance 16D of the ARPA has for reprints.

Could simply stating that section 16D of the ARPA applies to this copy mean that this copy purports to be printed or published under the authority of the New Zealand Government? This proposition seems very tenuous. Consequently, this copy would be an official copy under the Law Commissions definition of “the copies of legislation [that] can be produced in Court as evidence of their contents without further proof”. This is achieved merely by referring to the sections of the ARPA that give some copies of Acts the level of authenticity that means they can be evidence of their contents without further proof in Court. As noted above and cementing incoherency, the Parliamentary Counsel Office does state elsewhere on the NZL, that the electronic copies of legislation “have no official status”.

3 Authenticity as the raison d’etre of the New Zealand Legislation Website

Assume for the sake of simplicity that the Parliamentary Counsel Office has, consistent with its protestations, published electronic copies of Acts of low levels of authenticity as a means of producing copies in Court as evidence of their contents without further proof...
authenticity, that are less authentic than the hard copies of Acts that they publish. What
then, is the significance of this approach, for the level of importance attached to the policy
consideration of ensuring copies of Acts of a high level of authenticity are available? Does
this policy consideration motivate this promulgative scheme? As noted elsewhere the
Parliamentary Counsel Office states “[t]he electronic versions of legislation on this
website, and any legislation printed from this website…are made available for information
only”. This suggests that communication rather than making available highly authentic
copies of Acts is the prime policy consideration motivating the NZL.

It seems fairly certain however, that at some future time the NZL will be a source
of highly authentic copies of Acts. The Parliamentary Counsel Office is currently
“officialising” and this was intended to be complete (at this stage) by 31 December
2012.404 It is also fairly certain that the goal has always been, from the inception of the
PAL project,405 to create an online source of official copies of Acts.

The PriceWaterhouseCoopers Report in 1999 Improving Public Access to
Legislation stated “[t]he ultimate requirement is to provide public access to an official, up
to date (compiled) version of legislation in an easily accessible form at a reasonable
cost”.406 Elsewhere this report stated that “New Zealand… is very well placed to make
decisions that favour providing official status to an electronic version of legislation”.407 In
2008 the Chief Parliamentary Counsel stated “[t]he aim of the project was to provide
public access to up-to-date official legislation in both printed and electronic forms”.408 It is
fairly certain then, that the NZL was always going to be a scheme that would provide
access to authenticated copies of statutes.

However, here the approach favoured was to provide access to unofficial copies of
Acts, rather than to not provide access to copies at all. The NZL did not “go live” only
when all the copies of statute it contained were considered official by the Parliamentary
Counsel Office. The NZL is indeed an example of promulgation being motivated by the
policy consideration of making authentic copies of statutes available. However, this policy
consideration is given less significance than the consideration of communicating the
content of statute law. It was seen to be better that the content of statute law be
communicated unofficially than not at all.

404 “The intention is that officialisation will be completed by 31 December 2012”.
“Status of legislation on this site: Making Online Legislation official”. New Zealand Legislation
405 The NZL is the outcome of the PAL project: “The completion of the PAL project is a great advance for
accessibility of legislation. The project was undertaken by the Parliamentary Counsel Office, in collaboration
with the Office of the Clerk and the Tax Drafting Unit of the Inland Revenue Department. The project was
completed in January 2008; the New Zealand Legislation Website went live on 16 January 2008”. Law
Commission, above n 58, at [2.2].
406 Improving public access to legislation, above n 274, at 3 (emphasis added).
407 At 29.
Counsel Office under the heading “The objectives of the PAL project”, providing access to official
legislation was not mentioned. Despite this the same report states that there will be “establishment of a new
Reprints Unit (RU) to undertake the work necessary to make the acquired database of New Zealand
The policy consideration of authenticity has a role in shaping how promulgation occurs, but not the major role, as the approach of the Parliamentary Counsel Office to the NZL illustrates. Hard copy promulgation consistently results in copies of Statutes with a high level of authenticity, but not the highest, being promulgated.

Electronic copies of Statutes will soon be given concrete recognition as highly authentic copies. Once this happens the number of potential copies of Acts promulgated that have a high level of authenticity will increase greatly. In the future a court may have to decide which copy of a Statute is more authentic; the two copies that “repos[e] in the crypts” of two public buildings, or the countless copies displayed in millions of homes around the country. If this were to happen the logic of Pease v Peck and the approach taken with the Protection of Personal and Property Rights Act 1988 may seem appropriate.

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409 Above n 354, at 598.
410 Above n 354.
Chapter Nine: The legal requirements of promulgation

A The current statutory requirements for promulgation: The Acts and Regulations Publication Act 1989

The Acts and Regulations Publication Act 1989 provides the current legislative framework for the promulgation of legislation. This framework deals with only one type of promulgative scheme, the printing and publication of hard copies of Acts of Parliament for sale. The background to this Act is explored in more detail in Chapter Ten of this thesis while the proposed additions and changes to this legislative framework through the Legislation Bill 2010 are explored in Chapter Eleven.

I The requirements to publish Acts of Parliament

The purpose of the ARPA, as stated in the title, is “to provide for the printing and publication of copies of Acts of Parliament and statutory regulations and to ensure that copies of Acts of Parliament and statutory regulations are available to the public”. This general purpose is given more specific enforcement, in relation to statutes, through section 4 of the Act which imposes a duty on the Chief Parliamentary Counsel to print and publish legislation:

The Chief Parliamentary Counsel shall, under the control of the Attorney-General, arrange for the printing and publication of—
(a) Copies of every Act enacted by Parliament after the commencement of this section;

Section 10(1) of the Act extends this duty by requiring that the Chief Parliamentary Counsel:

...shall, under the control of the Attorney-General, make available for purchase by members of the public at the places designated from time to time by the Attorney-General under section 9(1) of this Act, copies of Acts of Parliament and regulations at a reasonable price.

Section 9(2) of the Act allows for copies of Acts of Parliament to be “made available for purchase to members of the public not only at the places designated…but also other places.”

Section 9(1)(a) of the Act provides that the Attorney-General “shall from time to time, by notice in the Gazette designate places where copies of...Acts of Parliament...shall be available for purchase by members of the public”. This section ensures that so

411 This is conventionally known as the “long title”.
412 In full the “long title” of the ARPA provides that this is an Act:
(a) To provide for the printing and publication of copies of Acts of Parliament and statutory regulations; and
(b) To ensure that copies of Acts of Parliament and statutory regulations are available to the public; and
(c) To provide for the Government Printing Office to cease to be a department of the Public Service
413 Section 10(1) only applies to Acts that have not been repealed or expired. Section 10(2) provides that: “On the repeal or expiry of any Act of Parliament or the revocation or expiry of any regulations, subsection (1) of this section shall cease to apply in relation to that Act of Parliament or those regulations”.

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long as there is free access to the Gazette an individual can easily find out where it is possible to purchase Acts of Parliament.

Section 17 of the Act provides that “[i]t shall not be necessary to gazette Acts of Parliament. Neither the verb “Gazette” nor the term “Acts of Parliament” are defined in the interpretation section of the Act. Therefore, section 17 could mean either that it is not necessary to put a copy of the full text of an Act of Parliament in the Gazette or it is not necessary to put a notice in the Gazette stating that a particular Act of Parliament now exists. McGee clarifies this somewhat by noting, with regard to section 17, that “[i]t is not necessary for the text of an Act to be published in the New Zealand Gazette”.

2 The requirement to publish reprints of Acts of Parliament

As already noted in Chapter Three of this thesis, a vital role in the promulgation of legislation is fulfilled through the reprinting of statutes. In terms of individual statutes, legislation more often takes the form of amending Acts rather than principal Acts. Parliament has legislated a duty to compile and reprint Acts, rather than creating a requirement for the Parliamentary Counsel Office to provide a service to annotate copies of statutes. Section 4(1)(c) of the Act creates a duty to publish these reprints:

The Chief Parliamentary Counsel shall, under the control of the Attorney-General, arrange for the printing and publication of…(c) [r]eprints of Acts of Parliament and reprints of regulations;

This duty is to some extent discretionary since there is no requirement that all Acts of Parliament be compiled and reprinted. This discretion can be explained by the fact that not all Acts are amended. However, nor is there a requirement that all amended Acts are compiled and reprinted. The current practice is instead that much amended Acts may be


415 Except to say that an “Act of Parliament includes an Act of the General Assembly”. However, Gazette is defined in section 29 of Interpretation Act 1999 as “the New Zealand Gazette published or purporting to be published under the authority of the New Zealand Government; and includes a supplement”. Gazette was defined in an identical way under the Interpretation Act 1924, s 4.

416 McGee, above n 53, at 394.

417 Statutes Drafting and Compilation Act 1920, s 5(a) provides “as and when directed by the Prime Minister or the Attorney-General, to compile, with their amendments, statutes, amendments whereof have been enacted, and to supervise the printing of such compilations”. While this Act deals with reprinting and compilation, the process of Consolidation is not mentioned.

418 Brookers provides such a service. “The publishing firm Brookers…[visits] subscribers twice a year and [annotates] each principal Act by process of striking out amended or repealed provisions with a red pencil, and inserting slips of paper to show the amended version”. Law Commission, above n 58, at [1.22].
The development and current practice of publishing reprints, is discussed in more detail in Chapters Nine and Ten of this thesis.

3 The overall framework of the Act: publication through the sale of legislation

The Law Commission notes that, “[h]ard copy must be paid for, except when used in public libraries”. The promulgative framework established by the Act is based on having to pay for the text of legislation. While there is a duty for printing and publication of both copies of Acts and reprints of Acts, publication extends only so far as making available for sale. Not making publicly known.

Section 10(1) of this Act goes only so far as to create a duty for the Chief Parliamentary Counsel “to make available for purchase by members of the public at the places designated from time to time by the Attorney-General under section 9(1) of this Act copies of Acts of Parliament”. For this duty to have any practical significance, places need to be designated under section 9(1) of the Act by a notice in the Gazette. If no places are designated under notice under section 9(1) then the duty imposed by section 10(1) is arguably avoided.

While section 10(1) ensures that copies of Acts must be available for purchase reprints of Acts are not mentioned in the section. Significantly, reprints of Acts and copies of Acts are seen as distinct under the Act. Consequently, under the ARPA it would seem that while copies of Acts shall be made available for sale, there may not be a duty to make Reprints of Acts available for sale

4 Problems with the promulgation requirements under the Act

There are several promulgative requirements that could be provided for, but are not given force, under the Acts and Regulations Publication Act 1989. First, despite the general purpose of the Act, there is no statutory requirement that legislation be made available on the internet. The internet is already regarded as an effective medium for publication that is, in practice, already used. A statutory requirement that copies of legislation be made freely available on the internet would complement the retail nature of the scheme already created by the Act.

The lack of a specific statutory requirement to publish Acts via the internet means that the *Business Case* for the PAL project was inaccurate where it stated:

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419 Law Commission, above n 58, at 19. “In implementing… [the reprinting] policy, the PCO focuses on best-selling titles that are frequently or heavily amended”. Parliamentary Counsel Office, above n 116. See also Chapters Seven and Twelve of this thesis.

420 Law Commission, above n 58, at [2.33].

421 Under the ARPA, s4(1)(a) and (c). Here it is appropriate to use the distinction used in the Act between copies of Acts and reprints of Acts.

422 It is quite possible that no notice was made under section 9(1) until quite recently (see above n 414).

423 See ARPA, s 4(1) and s7(1). Although compare s 7(2).

424 Legislation Bill 2010 (162-2) proposed by the Law Commission (and discussed in Chapter Eleven) does attempt to deal with some of these issues.

425 See Chapter Four and Chapter Twelve of this thesis.

426 *Summary of Business Case*, above n 38, at 2.1 That the PAL project would help fulfil the Crown’s “statutory responsibility to make legislation available to the public” was incorrect. There was no statutory provision that required anything close to the PAL project under the ARPA when this statement was made. See Chapter Nine of this thesis.
The key rationale for the Access Project rests on the “public good” nature of the benefits that flow from it. The project is necessary to enable the Crown to fulfil its statutory responsibility to make legislation available to the public, both as enacted and in an up-to-date form with amendments incorporated.

While the general purpose of the Act is to “ensure copies of Acts of Parliament… are available to the public” that does not equate with an explicit and therefore enforceable “statutory responsibility to make legislation available to the public” on the part of the Crown. The Crown’s statutory responsibilities do not yet extend to making legislation available to the public via the internet.

A further problem with the requirements under the ARPA is that there is no statutory requirement that legislation be made available free of charge at public libraries. Making copies of Acts available at some public libraries already occurs in practice. Nor is there a requirement that the Annual Bound Volumes of Acts are published. The duties of the Parliamentary Counsel Office under the Act are fulfilled at present only through the publication of pamphlet copies. The Annual Bound Volumes are another significant way in which publication of legislation occurs in practice but is not required under statute.

Furthermore, there is no requirement that legislation be made available at a low cost. Section 10 of the Act goes only so far as to require that “the Chief Parliamentary Counsel shall… make available for purchase by members of the public… copies of Acts of Parliament at a reasonable price”. A “reasonable price”, from the purchaser’s point of view, could mean a price so low that the cost of printing the Act is barely recouped. Conversely, from the vendor’s point of view, it could mean a price so high that it takes into account the running of a body that is needed to create legislation, for instance the cost of running a Parliament. A recent study has suggested that, on average, each Act of Parliament costs $3.5 million to produce.

Section 10 was drafted at a time when Crown copyright in copies of Statutes was enforced and the Government of the day appeared to insist that “statutory material should be a source of revenue”. This historical context does suggest that “reasonable price” may not have been originally intended merely as a standard by which printing costs could be recouped. An Act of Parliament that is only available at a prohibitively expensive price is a very minimal type of publication. In reality, the impact of copies of Acts being prohibitively expensive and laws being published in very small text on a tablet posted on the top of a high pillar is, arguably, very similar.

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427 Arguably the publication of volumes containing all the laws enacted in the previous year was the first promulgative requirement to exist in New Zealand. See Queen Victoria’s Royal Instructions to Governor Hobson discussed in Chapter Ten.


429 This type of approach may not be that fanciful. It is no different to the approach of the New Zealand Standards Council when determining how much is a reasonable price to charge for copies of standards they produce: “Standards New Zealand is a self-funded, not-for-profit Crown-owned entity. We rely on the income we make from the sale of publications to maintain the national Standards body”. Standards New Zealand “Why do I have to pay for Standards?” <www.standards.co.nz/faqs/General.htm>. However, while assessable from different perspectives, “a reasonable price “is ultimately a single, objective legal test supervisable by way of a declaratory judgment or other judicial review proceeding.


432 At 242.

433 In practice the Chief Parliamentary Counsel has only increased the price of copies of legislation to “help recoup increased production and distribution costs”. Letter from David Noble Chief Parliamentary Counsel to Subscribers regarding the price increase for legislation 1 July 2011 (29 June 2011).
This scheme only provides for the printing and publication of Acts of Parliament that are enacted after the commencement of the Act. Section 6 provides a discretion to print and publish regulations made before the commencement of the ARPA, but not Acts of Parliament.

Nor is there a timeframe on how quickly the duties of publication have to be fulfilled. There is no requirement that legislation be published in any shape or form before it becomes law or even before it enters into force. Consequently, the situation does arise where legislation is in force but remains un-promulgated. Nor is there any statutory requirement that bills are published during their passage through the House which could go some way to ameliorate this problem.

B The common law requirements to promulgate legislation

There is at least one Common Law precedent that may impose a requirement to promulgate legislation. This precedent is to be found in cases that deal with the principle that “ignorance of the law is no excuse”. Occasionally, in these decisions, explanations have been made that attempt to justify this concept. These explanations usually seek to justify this principle through either a presumption of legal knowledge, or through an appeal to expediency.

In New Zealand, as far as can be ascertained, courts have not resorted to a presumption of legal knowledge. However, when ignorance of the law is no excuse is explained by a presumption of legal knowledge promulgative requirements have occasionally featured as an element of this presumption. Significantly, this is the approach

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434 Compare the Legislation Bill 2010 (162-2) cl 6(2). This would create a duty for the Chief Parliamentary Counsel to ensure that “[a] copy of every Act must be published in electronic form as soon as practicable after the Act is enacted” (emphasis added).

435 The publication of Bills during their passage through the House is covered by the Standing Orders of the House of Representatives. See Chapter Ten of this thesis.

436 For more detail on the possible significance of pre-enactment publication see Casson, above n 69, at 420; Burgess, above n 72, discussed in Chapter Three of this thesis.

437 Another precedent of more limited scope may exist under the New Zealand Bill of Rights Act 1990. Section 24(d) of this Act provides a right that “everyone who is charged with an offence shall have the right to adequate time and facilities to prepare a defence”. This provision arguably creates a duty for publication of the text of legislation, albeit in a very specific and ad hoc way. If someone charged with an offence did not have access to the legislation that created the offence under which they were charged it seems unlikely that they would be able to prepare any defence at all. The idea of a right to have access to copies of legislation under section 24(d) has been explored in Common Law. See R v Royal (No 2) (1993) 10 CRNZ 4 (HC); Attorney-General v Otahuhu District Court [2001] 1 NZLR 737 (HC); Taylor v Department of Corrections HC Auckland CIV 2009-404-2350, 24 March 2010.

438 There is some significance in this principle being defined as “not an excuse” rather than “not a defence” or not a “justification”. For a discussion of the distinction between justification and excuse see Robertson, (ed) Adams on Criminal Law (looseleaf ed, Brokers) at [CA 20.04].

439 There are not many examples of situations where ignorance of the law is no excuse is explained because it is difficult or actually impossible, to be ignorant of the law. But see Murphy, above n 12, at 281: “Partial or complete abolition of the ignorantia legis maxim has been attempted in several federal statutes conferring rulemaking authority on administrative agencies”. Another example is to be found in the legal system of Pitcairn Island in the 19th Century. A constitution was written for the inhabitants of the island in 1838 by Captain Russel Elliot. The first of these laws provided that: “...A public journal shall be kept by the Magistrate, and shall from time to time be read; so that no one shall plead ignorance of the law for any crime he may commit. The journal shall be submitted to the inspection of those Captains of British men-o-war, which occasionally touch the island”. Quoted in “Making law on the Fly: The duties of the Pitcairn magistrate” (2010) 79 (3) New Zealand Justices’ Quarterly at 10.
that has been favoured by the Law Commission and the Parliamentary Counsel Office. This Chapter summarises these different explanations for the principle ignorance of the law is no excuse. This Chapter also explores to what extent the approach favoured by the Law Commission and the Parliamentary Counsel Office have been recognised by the New Zealand Common Law.

1 Ignorance of the law is no excuse: the rationales

That “ignorance of the law is no excuse” is a part of the New Zealand legal system need hardly be stated. This principle is recognised in the Crimes Act 1961. The principle was also recognised in New Zealand legislation long before 1961. It has also long been recognised in English Common Law prior to any mention in the New Zealand Statute Book. The two explanations offered for the rule, usually fall into one of these two categories; firstly, that ignorance of the law is no excuse because everyone is presumed to know the law. Or second, that knowledge of the law is not presumed but that ignorance of the law is no excuse purely for the sake of expediency.

The appeal to expediency has been explained in various ways, when it is explained at all. It is most commonly formulated as either; 1) That allowing ignorance of the law as a defence would result in procedural problems, or 2) to allow a defence based on ignorance of the law would encourage people to be ignorant of the law, or 3) that if

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440 This approach has also been recognised in Parliament. Simon Bridges MP speaking on the Legislation Bill during its first reading stated: “Nevertheless, this is, even if dull, a very worthy and significant bill, in the sense that it does go fundamentally to the rule of law—that is, law that rules us rather than others. I say that, because if we go behind that I mean that we are presumed to know what the law is. It is a fundamental precept of criminal law that we should know what the law is—that is, we should be able to find it, get hold of it, read it, and understand it”. (3 August 2010) 665 NZPD 12960.
441 See generally Margaret Briggs “Mistake of Law” (LLM Thesis, University of Otago, 1994) at 16–31. Please note that this section of the thesis contains extensive footnotes. It would be preferable to elevate these to the main text, however the size limits imposed on this thesis ensure that this is not possible.
442 Crimes Act 1961, s 25.
443 Crimes Act 1908, s 45 and Criminal Code 1893, s 25.
445 “[K]nowledge is neither relevant nor presumed”. Greenberg, above n 43, at 373.
446 John Selden The Table-talk of John Selden: with a biographical preface and notes (3rd ed, John Russell Smith, London 1860) at 180: “Ignorance of the law excuses no man; not that all men know the law, but because ‘tis an excuse every man will plead, and no man can tell how to refute him”. These procedural problems have been described by Austin that “…if ignorance of law were admitted as a ground of exemption, the courts would be involved in questions which it were scarcely possible to solve and which would render the administration of justice next to impracticable”. John Austin Lectures on jurisprudence, or, The philosophy of positive law (3rd ed, J Murray, London, 1869) at 498. Although it must be noted that Austin made this statement in the context of a presumption of knowledge. Briggs explains Austin’s objection: “…if ignorance or mistake of law were allowed to excuse, the court would, in every case, be forced to make a two stage inquiry: first, whether the individual was ignorant or mistaken as to the law; and, secondly, whether such ignorance or mistake was “inevitable”. Briggs, above n 441, at 19. ATH Smith puts it that “…the brutal utilitarianism that lies behind the objection…is not so much that proof is impossible but that justice must be curtailed by considerations of social utility and the distribution of resources”. ATH Smith “Error and Mistake of Law in Anglo-American Criminal Law” (1985) 14 Anglo-Am L Rev 3 at 16.
447 Oliver Wendell Holmes stated that “to admit the excuse [of ignorance of the law] at all would be to encourage ignorance where the law maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales”. Oliver Wendell Homes The Common Law (49th ed, Little Brown, Boston, 1963) at 41.
“ignorance of the law were allowed to excuse it would conflict with the principle of legality”.448

The “presumption of knowledge” explanation for the principle has also been explained in various ways namely: 1) the presumption itself is a legal fiction for sake of expediency449 or 2) that the people who are bound by the law are deemed to have taken part in the making of the law,450 or 3) that the presumption of knowledge of the law is required so punishment can be morally justified451 or 4) because the laws so accurately reflect social norms (both prescriptive and proscriptive noms) within which the legal system functions,452 or 5) that the State has an obligation to make the law accessible and so

448 For Hall the principle of legality means; 1) that rules of law express objective meanings, 2) that certain persons shall after a prescribed procedure declare what these meanings are, and 3) that these, and only these, interpretations are binding, i.e. only these meanings of the rules are law. If ignorance of the law were an excuse “whenever a defendant in a criminal case thought the law was thus and so, he is treated as though the law were thus and so, ie the law is actually thus and so”. Jerome Hall General principles of Criminal Law (2nd ed, Bobbs-Merrill, Indianapolis, 1960) at 382.

449 Fuller argues that the presumption “…apologizes for the necessity in which the law finds itself of attributing to the acts of parties legal consequences that they could not even remotely have anticipated.... this ‘presumption’ merely means that ignorance of the law is immaterial...The administration of the law would be a much more pleasant task if the legal consequences attributed to the acts of parties were such as the parties might have foreseen. This fiction is a way of obscuring the unpleasant truth that this is not the case”. Lon L Fuller Legal Fictions (Stanford University Press, Stanford, 1967) at 84.

450 This makes the foundation for the presumption a legal fiction, rather than directly recognising the fiction of the presumption itself. This can variously be attributed to Coke and Blackstone: “…[T]here needing no formal promulgation to give it the force of law, as was necessary by the civil law with regard to the emperor’s edicts; because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives”. Blackstone, above n 65, at 184. In a similar vein Coke wrote “…parliament represents the body of the whole realm; and therefor it is not requisite that any proclamation be made”: Coke, above n 65, at 26. This justification can also rest on the publicity of a legislative process in a way that does not necessarily have to resort to legal fiction. This was the approach in the Canadian case of R v Ross, above n 77, at 576, after detailing the legislative process the court stated that “…the proceedings necessary to enact and bring into force an Act or law binding upon the public give to it a certain measure of publicity, and it is not difficult to understand why it is a general rule of law that one cannot successfully plead ignorance of such an Act or law”.451

451 “The offender's knowledge of the law is also implicit in any moral value judgment of guilt applied to his act. The criminal is blamed for his act because in it he expressed an attitude of opposition to law, a refusal to accept the moral tenet of the law. The moral right to punish flows from an evaluation of the criminal act as an act by which the offender sets up his own morality or immorality—against the morality of the punishing social system. Thus, punishment requires that the offender knew and defied the law. Knowledge of law as a moral requisite of crime and punishment is not a peculiarity of early law but is part, theoretically at least, of all law which purports to be identical with, or based upon, morality”. Ryut and Silving, above n 444, at 424. See also Children, Young Persons, and Their Families Act 1989 ss 198(1)(b) and 272A(2)(d) and R v JTB (Appellant) (on appeal from the Court of Appeal (Criminal Division)) [2009] 1 AC 1310 at [8] and [9].

452 This justification obviously applies more to primitive legal systems, with much fewer rules than modern legal systems. However, this presumption could arguably apply at least to the “major crimes” of a modern legal system that satisfies Hall’s criteria. “Legality cannot be separated from morality in a sound system of penal law. In such a system, at least the penal law of the major crimes represents both the formal criteria of legality and sound values”. Jerome Hall, above n 448, 386. This statement illustrates that a legal system could support a presumption of legal knowledge if the legal system reflected accurately the morality of the community of that legal system. Compare Rudolf Leonhard “The vocation of America for the science of Roman Law” (1913) 26 Harvard Law Rev 389 at 407 to 408. Here it was argued that the morality of a community can reflect the legal system: “Human customs everywhere fit themselves to the law. As a rule whoever follows these customs may be sure of not offending the law even if he ignores the statutes and the other forms of law. Only in this way can the ordinary man, to whom all the rules are not accessible or intelligible in practice, escape the disagreeable consequences of ignoring the law”.

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people have access to the law.\textsuperscript{453} It is this final explanation that has found favour with the Law Commission and the Parliamentary Counsel Office.

2 The explanation for the principle in New Zealand

The approach that ignorance of the law is no excuse because the State has an obligation to promulgate was stated by Hobbes in 1651:\textsuperscript{454}

\begin{quote}
To rule by words, requires that such words be manifestly made known; for else they are no laws: for to the nature of laws belongeth a sufficient, and clear promulgation, such as may take away the excuse of ignorance; which in the laws of man is but of one only kind, and that is, proclamation, or promulagation by the voice of man.
\end{quote}

In 2009 Guest wrote, in a similar vein, that “unreasonable promulgation makes ignorance of the law reasonable”.\textsuperscript{455}

In the summary of its Report \textit{Presentation of New Zealand Statute Law} the Law Commission states:\textsuperscript{456}

\begin{quote}
The state has an obligation to make law accessible to citizens. People have to obey the law; ignorance of it is no excuse. So they need to be able to find it and understand it.
\end{quote}

This reasoning was also used by the Parliamentary Counsel Office in \textit{Public access to legislation: A discussion paper for public comment}\.\textsuperscript{457} The Law Commission in expanding on the link between the principle and the obligation to promulgate states:\textsuperscript{458}

\begin{quote}
It is a fundamental precept of any legal system that the law must be accessible to the public. Ignorance of the law is no excuse because everyone is presumed to know the law. That presumption would be insupportable if the law were not available and accessible to all.
\end{quote}

The reasoning used to link the principle with an obligation to promulgate cannot rely overly on New Zealand case law to support it. The New Zealand Common Law has not recognised that the principle is based on a presumption of knowledge. Chapman J, in

\begin{quote}
\textsuperscript{453} In Roman Law this approach was described in the Digest of Pandects: “…ignorance of the law should not be considered excusable unless the party should not have access to a magistrate, or is not intelligent enough to easily ascertain that ignorance of the law is a detriment to him, which is very rarely the case”. SP Scott \textit{Corpus Juris Civilis: The Civil Law including the Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and the Constitutions of Leo In Seventeen Volumes} (AMS Press, New York, 1973) Vol 3 at 239.

\textsuperscript{454} Thomas Hobbes \textit{Leviathan with selected variants from the Latin edition of 1668} ( Hackett Publishing, Indianapolis (Indiana, United States of America) 1994) at 235 (Ch 31, Para 3).

\textsuperscript{455} Guest, above n 122, at 202.

\textsuperscript{456} Law Commission, above n 58, at 3.


\textsuperscript{458} Law Commission, above n 58, at [1.1].
\end{quote}
"...There are many cases where the giving-up a doubtful point of law has been held to be a good consideration for a promise to pay money. Numerous other instances might be cited to show that there may be such a thing as a doubtful point of law. If there were not there would be no need of Courts of Appeal, the existence of which shows that Judges may be ignorant of law. That being so, it would be too much to hold that ordinary people are bound to know in what particular Court such-and-such a practice does or does not prevail.'

The result of this statement of the law is that no such knowledge of the law applicable to this title can be properly imputed...

In England this line of cases was also cited with approval in Bowmaker v Tabor, which states the position of the English Common Law on this justification:

It is entirely fallacious to say that everyone is presumed to know the law. That fallacy was exposed once and for all by Lord Mansfield CJ in Jones v Randall, at p 40: "it would be very hard upon the profession if the law was so certain that everybody knew it; the misfortune is that it is so uncertain that it costs much money to know what it is, even in the last resort." Then, in Martindale v Falkner, Maule J said, at p 719: "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so." After citing Jones v Randall, Maule J went on to say, at p 720: "The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime, or from liability upon a contract." This judgment was cited with approval by Blackburn J in R v Tewkesbury Corpn, at p 635.

This passage is noted with approval in Craies on Legislation:

[Ignorance of the law]... is...no mere rebuttable presumption of knowledge of the law: rather, it is the principle that law binds the subject whether he be aware of it or not, unless an express excuse of ignorance is provided.

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459 King v Price (1905) NZLR 291 (CA).
460 Reg v Tewkesbury Corporation (1868) LR 3 QB 629 at 635.
461 Martindale v Falkner [1846] 135 All ER 1124.
462 Jones v Randall [1774] 1 Cowp 37.
463 At 306.
464 Martindale v Falkner shows that it is contemplated and even accepted that some classes of people may be ignorant of the law. It is not without some irony that the classes of people who it is occasionally contemplated may be ignorant of the law include judges, legislators, and the police. Glanville Williams stated: "Maule J. is credited with the observation that 'everybody is presumed to know the law except His Majesty's judges, who have a court of appeal set over them to put them right'". Glanville Williams Criminal Law The General Part (Stevens & Sons, London, 1953) at 386. For legislators it has been pointed out that "[t]he mere fact that Parliament may have thought that the law was one thing does not preclude the Courts deciding it is another (Birmingham Corp v West Midland Baptist (Trust) Assn (Inc) [1970] AC 874 [Green] (HL), at p 898 per Lord Reid)." Pora, above n 83 at [47]. For police the Crimes Act 1961, s 29 provides "[e]very one acting under a warrant or process that is bad in law on account of some defect in substance or in form, apparent on the face of it, shall be protected from criminal responsibility to the same extent and subject to the same provisions as if the warrant or process were good in law if in good faith and without culpable ignorance or negligence he believed that the warrant or process was good in law; and ignorance of the law shall in this case be an excuse".
465 Bowmaker v Tabor [1941] 2 KB 1 (CA).
466 At 5.
467 Greenberg, above n 43, at 373.
It is noted later in *Craies*, that this approach leads to such injustice, that it is crucially important that the law is promulgated so as to be available. However, this need for promulgation is based solely on a need for fairness.\(^{468}\)

More recently in New Zealand, the case of *R v Leolahi*\(^{469}\) considered the principle without any reference to a presumption of knowledge:\(^{470}\)

This contention is, as was argued by Mr Pike for the Crown and recognised by the trial Judge, a plea of ignorance of the law. Such pleas are barred by s 25 of the Crimes Act. Lord Bridge of Harwich’s dictum in *Grant v Borg* [1982] 2 All ER 257 at p 263 is apposite:

“. . . the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word ‘knowingly’ in a criminal statute as requiring not merely knowledge of the facts material to the offender’s guilt, but also knowledge of the relevant law, would be revolutionary and, to my mind, wholly unacceptable.”

This dictum is directly relevant to this case. In accordance with traditional doctrine, the Crown in a prosecution under s 105B is only required to prove that the offender knew the “facts material to the offender’s guilt”. As found by the trial Judge, Mr Leolahi knew these facts, including the fact that Ms Matagi was acting corruptly. *He may not have known that his dealings with Ms Matagi amounted to a criminal offence* or, if he appreciated that it was an offence, he may not have realised how serious the offence is regarded.

This reasoning is not based on a presumption of legal knowledge on the part of Mr Leolahi. Prior to *Leolahi* the lack of presumption was also recognised in *Crump v Wala*\(^{471}\) in 1994 where the judge recognised these comments by Lord Aitkens in *Evans v Bartlam*:\(^{472}\)

I cannot think that there is any presumption that [the plaintiff] knew of this remedy either sufficiently for the purposes of the doctrine as to election or at all. For my part I am not prepared to accept the view that there is in law any presumption that any one, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application\(^{473}\)

However, the link between the principle and promulgation through publication has been implicitly recognised in New Zealand by the courts to some extent. In *R v Palmer* the court held:\(^{474}\)

Ignorance of the law is not a legal defence although it may in some circumstances bear on penalty. We need not consider the case of failure to promulgate change because that was done by both the Hansard record and the

\(^{468}\) Greenberg, above n 43, at 374: “The result is that it is of enormous importance that laws are made accessible to the public as soon as possible”.

\(^{469}\) *R v Leolahi* [2001] 1 NZLR 562 (CA).

\(^{470}\) At 566 (emphasis added).

\(^{471}\) *Crump v Wala* [1994] 2 NZLR 331 (HC) at 337.

\(^{472}\) *Evans v Bartlam* [1937] AC 473 at 479.

\(^{473}\) *Evans v Bartlam* has also been recognised in New Zealand in *Inspector of Mines v Onakaka Iron and Steel Company, Limited (In Liquidation)* [1942] NZLR 466 (SC) at 498.

In R v Rimmington [2006] 1 AC 459 Lord Bingham referred at [33] to an earlier statement of the principle that elementary justice is achieved if:

… the rules of which the citizen is to be bound [are] ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. 476

That standard was met.

In contrast to the prevailing New Zealand approach, the Canadian courts have tied the principle “ignorance of the law is no excuse” to the law’s accessibility. Consequently, in Canada there is an exception to “ignorance of the law is no excuse” in the defence of “invincible mistake of law”. In Corp de l’Ecole polytechnique v Canada 477 the court stated:

Invincible mistake of law, accepted by the Courts and Parliament, refers to mistakes which it is impossible to avoid because it is impossible for the person charged to know the law, either because it has not been promulgated or because it was not published in a satisfactory way so that its existence and contents could be known.

The Privy Council case of Lim Chin Aik v R 478 took a similar approach:

[Ignorance of the law is no excuse] cannot apply to such a case as the present where it appears that there is in the state of Singapore no provision, corresponding, for example, to that which is contained in s. 3(2) of the English Statutory Instruments Act, 1946, for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate inquiry to find out what “the law” is.

This defence of invincible mistake of law has not been recognised in New Zealand. Nevertheless, in commentary on section 25 of the Crimes Act 1961 Adams on Criminal Law notes when discussing the Canadian approach that “[i]t is unclear whether s 25 [of the Crimes Act 1961] could be interpreted so as not to apply to such a case”. 479

As noted above the Law Commission does opine that— 480

[The state has an obligation to make law accessible to citizens. People have to obey the law; ignorance of it is no excuse. So they need to be able to find it and understand it]

Adams on Criminal Law states that a Canadian “invincible mistake of law” defence may exist in New Zealand. Indeed, Palmer implies failure to promulgate may affect the principle. 481 Despite these statements, the New Zealand Common Law is, by and large, unsupportive of the statements made by the Law Commission and the Parliamentary

475 Compare Burgess, above n 72, at [46] to [47]. Although it does not feature in the court’s reasoning here, this particular law change would have also been notified in the Gazette as well as published in the ordinary manner for statutory regulations.

476 Compare Christian, above n 159, at [81] to [84].


479 Robertson, above n 438, at 25.01.

480 Law Commission, above n 58, at 3.

481 Palmer, above n 474, at [36]: “We need not consider the case of failure to promulgate change because that was done by both the Hansard record and the website entry”.

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Counsel Office. Consequently, while the Common Law around “ignorance of the law is no excuse” could create a requirement to promulgate this has arguably not happened in New Zealand.

C Could there be a Constitutional Convention regarding promulgation?

Constitutional Conventions are not based on statute, or Common Law, rather they are “the unwritten maxims of constitutional conduct”. These “unwritten maxims” were first identified as Constitutional Conventions by Dicey in *Introduction to the Study of the Laws of the Constitution*. Constitutional Conventions are—

[r]ules of political obligation that are distinguished from ordinary political usage in two ways: they evoke a sense of obligation that the actors are bound by rules of conduct, and they serve a necessary constitutional purpose

Constitutional Conventions are difficult to identify. When attempting to identify a practice as a Constitutional Convention Ivor Jennings suggested a three part test:

We have to ask ourselves three questions: first what are the precedents; secondly, did the actors in the precedents believe they were bound by the rule; and thirdly, is there a good reason for the rule. A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.

In the New Zealand context Joseph notes that Parliament debating without a radio broadcast (while breaching Standing Orders of the House) would not breach a Constitutional Convention because the practice does not have a “constitutional rationale”. Do the processes of promulgation fall afoul of this too? Is there no “good reason” for the promulgation of statutes through publication? There are good reasons for promulgation through publication. Nevertheless, do the processes of promulgation have a “constitutional rationale”? How exactly a “good reason” becomes a “constitutional rationale” is beyond the scope of this thesis. It is possible that one or several of the policy

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482 There have been attempts at introducing a defence of invincible mistake of law in to statute. Both these attempts failed. See the Crimes Bill 1989 (152-1), cl 26(3) and the Statutory Publications Bill 1989(164-1), cl 17. See Ross Carter *Regulations and Other Subordinate Legislative Instruments: Drafting, Publication, Interpretation and Disallowance* (Occasional Paper No 20, New Zealand Centre for Public Law, Wellington, 2010) at 28-29.
484 Dicey, above n 210 at Part III.
485 Joseph, above n 170, at 34.
486 “Some are so elusive that one is left wondering whether in fact the ‘convention’ is an ethereal will-o’-the-wisp”. SA de Smith and R Brazier *Constitutional and Administrative Law* (8th ed, Penguin Books, London, 1998) at 39.
488 Standing Orders of the House of Representatives 2011, SO 44.
489 Joseph, above n 170, at 217.
490 See Chapters Five, Six, Seven and Eight of this thesis.
considerations that motivate promulgative processes could indeed provide this “constitutional rationale”.

There is some evidence in the “precedents” that “the actors in the precedents believe they were bound by the rule”. For example, whether or not Parliamentarians were merely parroting without thought statements of the Law Commission during the reading of the Legislation Bill 2010, it is clear that some at least felt bound. David Parker MP stated that; “I think the Law Commission put it very well when it stated this in its report: ‘The state has an obligation to make law accessible to citizens’”. While Kennedy Graham MP stated that, “[e]nsuring that legislation is accessible to the public is a fundamental aspect of democracy”. Moreover in 1989, while arguing against Crown copyright in copies of statutes, the Doug Graham MP stated that; “historically it [the Crown] has always accepted the constitutional importance of wide dissemination of the law”.

It is not attempted to resolve the issue here of whether any processes of promulgation are required by Constitutional Convention. However, at the very least it is arguable that the three elements of Jennings test for identifying Constitutional Conventions could possibly be met. Even a single precedent, that the actor felt bound, accompanied by a good reason, may be enough to establish a Constitutional Convention to promulgate.

491 (29 July 2010) 665 NZPD 12873. Compare this to (15 November 1989) 502 NZPD 13562: “For the first time in New Zealand the Government will have placed on it an obligation, which is enforced by legislation, to publish all legislation that is passed by Parliament. That is a commendable step forward, because we should do all that we can to ensure that people know about the Acts and regulations passed by Parliament or the Government that may affect their lives”.
492 (3 August 2010) 665 NZPD 12960.
493 (14 March 1989) 496 NZPD 9699.
Chapter Ten: The development of the statutory requirements

A Promulgative requirements in New Zealand preceding 1852

The importance of promulgation has been noted from an early stage of New Zealand’s legal development. Queen Victoria’s Royal Instructions to Governor Hobson of the 5th of December 1840 stated: 494

that all Laws or Ordinances…to be enacted…[shall] be drawn up in a simple and compendious form, avoiding so far as may be all prolixity and tautology…[and] that in the month of January, or at the earliest practicable period at the commencement of each year, you do cause a complete collection to be published, for general information, of all Ordinances enacted during the preceding year.

When conflict developed between Hobson and the editor of the New Zealand Advertiser and Bay of Islands Gazette 495 (the Newspaper that was contracted to publish the notices for the fledgling colonial government) culminating in the suspension of the Gazette Hobson wrote to the missionary printer William Colenso: 496

My dear Sir,

I understand you have been good enough to offer your services to relieve me, as far as may be consistent with other engagements, from the embarrassment I am under in consequence of the determination of the Editors of the Gazette not to publish our notices. Will you do me the favour to print in a Gazette extraordinary some notices of the commissioners which the law imperatively requires to be circulated through such means…

While Hobson made no reference to the particular law that “imperatively required” him to publish and circulate certain government notices, the fact that he felt he could state that he had to as part of his administration, is significant.

B The New Zealand Constitution Act 1852

The New Zealand Constitution Act 1852 (UK) 497 founded a “system of representative government that combined a central bicameral Parliament and a number of provincial governments”. 498 Section 60 of this Act provided:

494 “Royal instructions: Queen Victoria's instructions to the first Governor of New Zealand” (5 December 1840) in The Ordinances of New Zealand passed in the first ten sessions of the General Legislative Council, A.D. 1841 to A.D. 1849 : to which are prefixed the Acts of Parliament, Charters, and Royal Instructions relating to New Zealand. (Printed for the Colonial Government, Wellington, 1850) 9, at 14 and 15.
496 Salmond, above n 495, at 7.
497 New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72.
The Governor shall cause every Act of the Said General Assembly which he shall have assented to in Her Majesty’s name to be printed in the Government Gazette for general information, and such publication by such Governor of any such Act shall be deemed to be in Law the promulgation of the same.

In contrast with the relevant provisions of the ARPA, this section illustrates the high level of significance placed on gazetting legislation rather than selling individual copies of Acts. This fact reflects the high level of importance of the Gazette in the process of promulgation in mid-19th Century. There was also no statutory requirement for the publication of statutes in Māori. 499

C Interpretation Act 1878

The shift in focus from publication of legislation through the Gazette to promulgating through providing purchasable copies of Acts occurred in 1878. Section 60 of the New Zealand Constitution Act 1852 was repealed by section 13 of the Interpretation Act 1878:

Section sixty of the Constitution Act is hereby repealed, and it shall not be necessary to gazette the Acts passed by the General Assembly in any session thereof; but copies of all such Acts shall be procurable by purchase, at such places in the colony as the Governor from time to time may appoint.

While this section removed the duty of gazetting Acts of Parliament in favour of a duty to make copies of Acts of Parliament “procurable by purchase” it did not expressly prohibit the gazetting of Acts of Parliament; “Nothing in this section contained shall preclude the Governor from directing that any Act shall be gazetted, at such times as he shall think fit”. 500

D Interpretation Act 1888

The Interpretation Act 1888 did not alter the requirements of the 1878 Act in any fundamental way except to change the location of where copies of Acts were “procurable by purchase”. Rather than “at such places in the Colony as the Governor from time to time may appoint” the Interpretation Act 1888 stated that Acts may be purchased only “at the office of the Government Printer”. 501

This section was the precursor to the current sections in the ARPA. It remained unaltered in both the Acts Interpretation Act 1908 (s14) and the Acts Interpretation Act 1924 (s13). 502 Consequently, for most of the 20th century the statutory requirement to promulgate statutes read:

It shall not be necessary to gazette the Acts of the General Assembly, but copies of all such Acts shall be procurable by purchase at the office of the Government Printer.

499 See Generally PG Parkinson The Māori language and its expression in New Zealand law: two essays on the use of te reo Māori in Government and in Parliament (Victoria University of Wellington Law Review, Wellington, 2001). Standing Orders of the House and Legislative Council in 1865 provided “that Bills that particularly related to Māori had to be printed in Māori”. At 10–11. There was no similar requirement to publish Acts.

500 Interpretation Act 1878, s 13.

501 Interpretation Act 1888, s 9.

502 For a more detailed discussion of the ambit of Section 13 see below and Shearer, above n 268, at 25.
The Statutory Publication Bill 1989 (164-1) was introduced by the then Attorney-General Geoffrey Palmer MP largely because of the sale of the Government Printing Office. The Explanatory note of the Bill provided that “[t]his Bill [p]rovides for the Government Printing Office to cease to be a department of the Public Service”. The Bill subsequently was divided into two Acts; the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989. The enactment of the ARPA marked possibly the most significant change to the statutory requirements for promulgation in New Zealand’s history.

In moving that the Statutory Publications Bill 1989 be introduced the Attorney-General opened by saying, “[this bill] strengthens the duty of the Crown to make legislation available to the public”. It seems more than a little inconsistent that a Bill that purportedly strengthened the requirements of promulgation of legislation also disestablished the Government Printing Office, the means by which the Executive formerly met the existing promulgative requirements. Palmer finished by saying; “[t]his is quite an exciting and important bill because by strengthening the statutory duty of the Crown to make legislation available to the public, accessibility of legislation will be enhanced”. Yet nowhere in between these two statements did Palmer explicitly say how the Bill would “strengthen the duty of the Crown”.

Palmer does refer to Clause 4 and 6 of the Bill. Clause 4(a) of the Statutory Publications Bill 1989 (164-1) became Section 4(a) of the ARPA. Clause 6(a) of the Bill became section 9. Arguably, it is only Clause 4(a) that Palmer could have been referring to as “strengthen[ing] the duty of the Crown”, and that claim depends on a somewhat inaccurate reading of the Common Law around section 13 of the Acts Interpretation Act 1924, the then current provision creating a duty to promulgate.

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503 Mark Perry “Acts of Parliament: Privitisation, Promulgation and the Crown Copyright—Is there a Need for a Royal Royalty?” [1998] NZ L Rev 493 at 497. See also Carter, above n 482, at 27; “[k]ey to the Bill’s rapid enactment was the sale of the Government Printing Office (which, under the Bill, would cease to be a department of the Public Service)”.

504 Statutory Publications Bill 1989 (164–1) (explanatory note) at i. The explanatory note stated:

“This Bill—
(a) Provides for the printing and publication of—
(i) Copies of Acts of Parliament and statutory regulations; and
(ii) Reprints of Acts of Parliament and statutory regulations:
(b) Provides for the disallowance of statutory regulations:
(c) Ensures that copies of Acts of Parliament, Bills, and statutory regulations are available to the public:
(d) Repeals the Regulations Act 1936:
(e) Provides for the Government Printing Office to cease to be a department of the Public Service.
Part II, which relates to regulations, is based on the proposals for a Regulations Bill contained in the Regulations Review Committee 1986 (I.16B) and on the Government Response of April 1987 to that Report (I.20)”.

505 (11 July 1989) 499 NZPD 11205.

506 Perry notes the promulgative requirements of the Statutory Publications Bill 1989 were “an attempt to fill the lacuna left by the privatisation of GPO by making provision for dissemination of Acts and regulations”. Perry, above n 503, at 497.

507 (11 July 1989) 499 NZPD 11207.

508 “The Chief Parliamentary Counsel shall, under the control of the Attorney-General, arrange for the printing and publication of… Copies of every Act of Parliament…”.

509 “The Attorney-General shall designate places where copies of— (a) Acts of Parliament… shall be available for purchase by members of the public”.

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In Victoria University of Wellington Students Association Inc. v Shearer, Wild noted:

…the sharp contrast between the language of s13 [Acts Interpretation Act 1924] and s 3 of the Regulations Act 1936 which statute was “to make provision for the printing and publication of statutory regulations and for matters incidental thereto”. Section 3(1) provides:

All regulations made after the commencement of this Act shall forthwith after they are made be forwarded to the Government Printer and shall be numbered, printed and sold by him…

It will be seen that whereas in that provision the legislature expressly imposes on the Government Printer by name a duty to number, print and sell regulations, s13 merely names the office of the Government Printer as the place where copies shall be procurable by purchase. In the light of that contrast and the statutory history of s13 I think that responsibility under s13 rests upon the Crown and that the reference to the office of the Government Printer is merely in the nature of a signpost.

This would suggest that section 13 of the Acts Interpretation Act 1924 created no requirement to promulgate legislation. This section simply states where copies of Acts can be purchased. Wild noted this absurdity, “If copies were to be procurable it no doubt followed that they were to be made procurable, but not a word was said in the new statute to define that duty or to designate any person or official to discharge it”. However, Wild concluded:

It should perhaps be added that this is not a decision that the public are not entitled to obtain copies of Acts of Parliament: it is merely a decision that in the circumstances of this case the plaintiff cannot have mandamus against the defendant as Government Printer.

As such, Shearer stands for the proposition that section 13 did not give rise to an action in mandamus against the Government Printer in a particular situation. Shearer did not limit the ambit of the promulgative requirement created by section 13. Wild explicitly stated that; “I think that responsibility under s13 rests upon the Crown”. It is difficult to see then, how the Attorney-General supported his statement that the Statutory Publications Bill would “strengthen… the duty of the Crown to make legislation available to the public”.

The other salient change the Statutory Publications Bill 1989 made to the statutory requirement to promulgate was to change the place of purchase of copies of Acts from the office of the Government Printer to “designated places”. This change in purchase location occurred because the office of Government Printer was to be disestablished. Interestingly, this section does not stipulate a minimum number of “designated places”. It did not establish a requirement to have numerous branches around the country to facilitate the sale

510 Shearer, above n 268.
511 At 25.
512 At 25 (emphasis added).
513 At 26.
514 At 25.
515 At best, it could be argued that there was some extremely subtle strengthening of the duty on the Crown. Under the Statutory Publications Bill (and consequently the ARPA) mandamus was made available against the Chief Parliamentary Counsel. However, a declaration was already available against the Crown because the duty under section 13 was not directory only.
of copies of Acts. On a literal reading of this section, this requirement could thus be met by having no more than two “designated places”.

**F The Law Commission on the Statutory Publications Bill 1989**

The New Zealand Law Commission was established under an Act of Parliament in 1985. One of the Law Commission’s chief functions is “[t]o 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 practicable”. 516


> The obligation [to make the law available] has in fact been stated in the law as to statutes since last century...[a]nd the present Bill carries forward such provisions. We see no reason to depart from that practice of a legislative statement of the obligations.

It would seem the Law Commission preferred the status quo rather than extending the obligation. In saying that the Law Commission did note: 519

> …the present legislation places a heavier obligation on the Government to make regulations available than to make Acts available …Not surprisingly of the 30 who commented to us on that matter all but three thought there should be no difference. … Moreover, 20 (including the Government Printing Office) said that the obligation should be stated in more specific terms so that it might be enforceable in law.

Therefore, despite “see[ing] no reason to depart from that practice of a legislative statement of the obligations” the Law Commission did indeed recognise a need to strengthen the requirements to promulgate legislation.

**G Historical statutory requirements to publish reprints of Acts.**

Historically in New Zealand reprints of Acts have usually been ad hoc responses by private persons and companies (rather than the Executive or Parliament) to perceived shortcomings in the accessibility of legislation. 520 Although reprint projects have also been the result of attempts at legislative consolidation.

The Reprint of Statutes Act was passed in 1878 to ensure— 521

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516 Law Commission Act 1985, s 5(1)(d). Statements of the Law Commission regarding promulgation must be read with this in mind. It is also necessary to keep in mind that while the Law Commission is concerned with accessibility of law this concern is tempered by practicality (emphasis added).


518 At [8] and [9].

519 At [10].

520 See, for example *The Ordinances of New Zealand passed in the first ten sessions of the General Legislative Council, A.D. 1841 to A.D. 1849* : to which are prefixed the Acts of Parliament, Charters, and Royal Instructions relating to New Zealand. (Printed for the Colonial Government, Wellington, 1850), *The 1885 Reprint*, above n 263, and *The Public Acts of New Zealand (Reprint 1908–1931) Classified and annotated* which was a joint project between Butterworths and the Government. See Chapter Thirteen of this thesis for more on reprint projects.

521 Preamble of the Reprint of Statutes Act 1878. Discussed in Burrows and Carter, above n 90, at 150.
that measures should be adopted for preparing a new edition of the Public General statutes in force in the Colony, omitting therefrom all enactments which have expired by effluxion of time, have had their effect, or have been expressly and specifically repealed or disallowed.

Section 4 “authorised and empowered [the Commissioners] to prepare and arrange for publication the said edition”. As Burrows notes, “this commission’s power was extended the following year, effectively transforming it into a commission to recommend consolidation”.522 This extension in turn was repealed and replaced by the Reprint of Statutes Act 1895.

In 1908, these Commissioners finally submitted a consolidated edition of over two hundred Acts. This exercise was not simply a reprint in the modern sense, it was a true consolidation as it required an Act of Parliament to enact the 208 statutes.523 Following the 1908 Reprint and until the enactment of the ARPA there was no statutory requirement for the publication of reprints.524

H The requirements to publish Bills

As far as can be ascertained there have never been any statutory requirements to publish Bills. Section 4(1)(b) of the Statutes Drafting and Compilation Act 1920 provides that; [t]he duties of the officers of the Bill Drafting Department shall be [t]o supervise the printing of such Bills and amendments”.

The Bills referred to here are Government Bills525 that the Ministers of the Crown have directed to be “prepared for the consideration of parliament”.526 The amendments are to those “drafts as may from time to time be required by Ministers of the Crown during the passage of such Bills in Parliament”.527 This strongly implies that the Bills printed under this requirement are for Parliament’s use only, hardly an exercise in widespread publication.

Aside from that the nearest New Zealand has come to having a statutory obligation to publish Bills was in the Statutory Publications Bill 1989. The long title of this Bill stated that it was an Act “to ensure that copies of Acts of Parliament, Bills, and statutory regulations are available to the public”.528 In saying that, this Bill was said to only to “empower (but… not require) the publishing of Bills”.529

Standing Orders however have developed to provide that copies of Bills must be provided to the Clerk of the House for circulation and that if a Bill contains amendments after it has been before a select committee it must be reprinted.530 There are exceptions to this requirement to reprint after the select committee process.531 A Bill is treated as not “available for debate until copies of it, as reprinted, have been circulated to members”.532

522 Burrows and Carter, above n 90, at 150. This extension was made by The Revision of Statutes Act 1879.
523 Burrows and Carter, above n 90, at 154–156.
524 The nearest that a provision came to creating a duty for the publication of Reprints is that imposed on the Compilation Department of the Parliamentary Counsel Office by section 5(a) of the Statutes Drafting and Compilation Act. See above n 417.
525 As opposed to private members Bills or local or private Bills.
526 Statutes Drafting and Compilation Act, s 4(1)(a).
527 Statutes Drafting and Compilation Act, s 4(1)(a).
528 Statutory Publications Bill 1989 (164-2) at 2.
529 Law Commission, above n 517, at 11.
530 Standing Orders of the House of Representatives 2011, SO 264.
531 These exceptions are set down under Standing Orders of the House of Representatives 2011, SO 264(2):
532 Standing Orders of the House of Representatives 2011, SO 264(4).
There must be publication of notice of private or local Bills before they can be introduced. Notice of these types of Bills must be put in daily newspapers. Finally it is required that the promoter of a private bill or local bill must give notice to every person who, to the knowledge of the promoter, has a direct interest in the subject-matter of the bill or in the exercise of any power proposed to be given by the bill.

A similar rule requiring “notice” to be given to people with a direct interest in the subject matter for bills that are to become public Acts would be consistent with this Standing Order. The lack of this rule for public bills is explained by the impracticality of being able to give “notice” to everyone who “has a direct interest in the subject matter of the bill”.

I Crown copyright in Acts of Parliament

Copyright gives...

The practice of publishing and disseminating copies of the text of Acts of Parliament is dependent on either Crown copyright not existing in copies of statutes or on the goodwill of the Crown to not “prevent persons from doing things” in relation to these copies. The extent to which Crown copyright has existed and been applied therefore has an impact on the development of the practice of promulgation.

534 Standing Orders of the House of Representatives 2011, SO Appendix C, 3:
“(1) A notice must be published at least once in each of two consecutive calendar weeks,—
(a) if for a private bill, in a daily newspaper circulating in each of the cities of Auckland, Hamilton, Wellington, Christchurch, and Dunedin:
(b) if for a private bill affecting any land or interest in land, also in a daily newspaper circulating in the locality in which the land is situated:
(c) if for a local bill, in a daily newspaper circulating in the local authority district.
(2) If subparagraph (b) or subparagraph (c) of paragraph (1) cannot be applied as no daily newspaper circulates in the locality or local authority district, then the notice is—
(a) published in a daily newspaper circulating in an adjoining district, or
(b) affixed to a noticeboard that is accessible to the public without charge.
See also appendix C 7”.
536 The form and content and mode of delivery of the notice is prescribed by Standing Orders of the House of Representatives 2011, SO Appendix C, 2 and 6.

acquired [copyright] title by a kind of prerogative copyright in certain books or publications such as Acts of Parliament, Proclamations, Orders in Council, the Book of Common Prayer, and the Authorised Version of the Bible.

In 1989, the Government Printing Office had begun putting a copyright notice on statutes it published. This notice indicated—

...that the consent of that office (the Government Printing Office) [was] required with respect to the reproduction of legislation. This notation was without the prior approval of the then Attorney-General, Mr Palmer...[However] Mr Palmer... was in favour of Crown copyright. It was said that this would promote the dissemination of Crown-generated material and enable reasonable fees to be charged to commercial publishers of legislation.

In 1989, the Copyright (Crown Copyright) Amendment Bill 1989 (135-1) was introduced into the House by the opposition to abolish Crown copyright in Acts of Parliament (as well as other parliamentary publications), but this was never passed. This Bill was introduced largely as a response to the privatisation of the Government Printing Office and the new (yet ultimately short lived) practice of putting notations on statutes. The explanatory Note to this Bill stated;
This Bill, in recognition of the importance of open government in a democratic society, provides in legislation for the unrestricted right of access by the public to and use of the laws of New Zealand, whether statutory, judicial or quasi-judicial. Full and proper exercise of democratic rights requires that this material is available to all to be studied, to be used and to be quoted as a matter of public entitlement. The Bill recognises that prerogative rights in respect of public documents such as statutes and judgments are not appropriate in a modern democratic State.

Crown copyright seemed to be a safeguard on the ability of Government to maintain that the sale of “statutory material should be a source of revenue”.

It was not until 1994, that a statutory provision abolishing Crown copyright in Acts of Parliament was enacted. Section 27(1)(b) of the Copyright Act 1994 states “[n]o copyright exists in any of the following works, whenever those works were made… Any Act as defined in section 4 of the Acts Interpretation Act 1924 [section 29 of the Interpretation Act 1999].” However, this section did not come into force until 2000 by Order in Council. Therefore, until 2000 Acts of Parliament were subject to Crown copyright. Enforcing Crown copyright in copies of statutes (or even the possibility of enforcing crown copyright) could have had a significant impact on a promulgative scheme that was retail-based. The removal of Crown Copyright is consistent with the trends that have led to the rise of a promulgative scheme that is based on freely available statutes being accessible to a wide audience.

credence to that possibility when, in the 23 February 1989 issue of LawTalk, he was reported as indicating that the Government did not intend to extract profit from legislation, but that if fees were to be collected from commercial reproductions –and that was stated as a possibility– the proceeds would be applied to subsidising official legislative publications. It is clear therefore that the notation put on statutes was intended to establish a climate for change of some kind. A complicating factor has been the proposed sale of the Government Printing Office. Some members of the public were concerned in case the Government assigned its copyright to the Government Printing Office, which was then sold. I am happy to be able to assure the House that from answers provided by the Minister of Justice that is certainly not intended. Thus, provided the Crown retains the copyright, it can dictate who is entitled to reproduce such material, and at what cost. There has been no cost to date. Clearly, in future it is intended that there shall be”. (14 March 1989) 496 NZPD 9699.

Copyright (Crown Copyright) Amendment Bill 1989 (135-1).

Hammond, above n 431, at 242.

Copyright Act 1994, s 27. See also s27(1A) which removes Crown Copyright in any work that is incorporated by reference in “any Act as defined in section 4 of the Interpretation Act 1924 [section 29 of the Interpretation Act 1999]”.

Copyright Act Commencement Order 2000 cl 2.
Chapter Eleven: Proposed changes to the current requirement: The Legislation Bill 2010

A Background

At the time of writing, the Legislation Bill 2010 is awaiting its second reading. It has been examined by the Regulations Review Committee which recommended several amendments. The Bill was initially proposed by the Law Commission to implement the recommendations made in the 2008 Report *Presentation of New Zealand Statute Law* and create greater order in the area of law that relates to Acts by bringing together provisions that are scattered across a number of statutes.

There are several differences between the Law Commission’s recommended Legislation Bill 2010 and the Government’s Legislation Bill 2010 as introduced into the House. The explanatory note to the Government Bill states it is intended “to modernise and improve the law relating to the publication, availability, reprinting, revision, and official versions of legislation and to bring this law together in a single piece of legislation.”

B Deletion of “printing” in Clause 6 of the Government Bill

Clause 6(1), under the heading Subpart 1 Publishing legislation Responsibilities and requirements, is to be the new provision setting the promulgation requirements for legislation. This Clause will replace section 4 of the ARPA and provides:

The Chief Parliamentary Counsel must arrange for the publication of—
(a) copies of every Act enacted by Parliament after the commencement of this section; and
(b) copies of all legislative instruments made after the commencement of this section; and
(c) any reprints of Acts and legislative instruments, and any reprints of regulations made before the commencement of this section, issued by him or her in addition to reprints to which subsection (5) applies; and
(d) reprints of Imperial enactments and Imperial subordinate legislation.

This clause differs from the clause proposed by the Law Commission in the 2008 Report:

8 Publication of legislation
(1) The Chief Parliamentary Counsel must arrange for the publication, in both printed and electronic form, of—
(a) copies of every Act enacted by Parliament after the commencement of this section; and

548 See Justice and Electoral Committee 2012/13 Estimates for Vote Parliamentary Counsel (20 July 2012) at 2 for recent developments concerning the Legislation Bill 2010. The relevant part of this report is reproduced in Appendix Three.
549 Law Commission, above n 58, at [9.3].
551 Legislation Bill 2010 (162-1) (explanatory note) at 1.
Significantly, the phrase “arrange for the printing and publication of” is to be replaced by “arrange for the publication of” rather than “arrange for publication, in both printed and electronic form.” The deletion of the word “printing” is consistent with the Law Commission’s view that there is a shift in focus from providing hard copies of Acts to providing electronic copies of Acts. It is argued that ensuring the availability of legislation can be done more effectively by the internet than by the printing press.

However, the Law Commission also recommends that “[f]or the foreseeable future, hard copy versions of Acts should continue to be produced and made available at a reasonable cost to the public”. But the exclusion of the word “printing” from clause 6(1) means the express statutory requirement to promulgate statutes in hard copy form has been removed. The Chief Parliamentary Counsel could meet the duties imposed by clause 6(1)(a) by the publication of electronic copies only. In short, the statutory requirement to promulgate legislation through the printing and publication of hard copy version of Acts is removed completely by the deletion of the word printing.

It is possible that a residual duty for publication of hard copies may remain, that maybe the term “publication” would imply both printed and electronic forms. If, for some reason, electronic publication became ineffective then publication through hard copies could be done to meet this requirement. This does depend on a rather strained definition of publication that would ignore the legislative history behind the section. However, the select committee report by the Regulations Review Committee does state:

The bill would also alter the roles and functions of the Chief Parliamentary Counsel in the following ways:
• The Chief Parliamentary Counsel would be required to publish legislation in electronic as well as printed form.

The select committee does not state that the Chief Parliamentary Counsel would be required to publish legislation in electronic rather than printed form but “as well as” printed form. This suggests that the Regulations Review Committee views the Bill as providing for a continuing duty to publish hard copies. To this end the Regulations Review Committee stated:

We considered recommending an amendment to ensure it is clear that there is provision for all legislation to be printed in hard copy, as we were aware of concern that the passing of the bill into law might result in legislation being published in electronic form only. However, we are assured that the purpose of the power in clause 6(4) of the bill to make an Order in Council that

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552 ARPA, s 4.
553 Law Commission, above n 58, at 150.
554 Law Commission, above n 58, at [2.1] to [2.43]: “The state has an obligation to make statute law available. In this modern context, it would be untenable to suggest that the best way to meet this obligation is solely through the use of paper resources”.
555 Law Commission, above n 58, at [2.43].
556 “In its response to NZLC R104, the Government has agreed to continue publishing legislation in printed form until the legislation database is officialised and then to review the situation.” Legislation Bill 2010 (162-1) (explanatory note) at 6.
557 Legislation Bill 2010 (161-2) (select committee report) at 2.
558 At 6.
559 Legislation Bill (161-2), cl 6(4): “The Governor-General may, by Order in Council,—(a) authorise or direct the Chief Parliamentary Counsel to arrange for the publication in printed form of any legislation or class of legislation specified in the order; and (b) specify conditions to which the authorisation or direction is subject.”
It is difficult to reconcile the logic contained in these various statements. The value of hard copy versions of Acts is “not to be undermined” but legislation may “be made properly accessible” in the future through electronic publication only. The latter statement does exactly what the former statement is concerned with not occurring. Further, it is even more difficult to argue that a residual duty for publication of hard copy exists in clause 6(1) when compared to clause 6(4) which deals with hard copy.  

C Printing statutes in hard copy.

The lacuna created by the removal of hard copies from the Chief Parliamentary Counsel’s promulgative duties through excluding the word “printing” in Clause 6(1) is filled in part by Clause 6(4) which provides:

The Governor-General may, by Order in Council,—
(a) authorise or direct the Chief Parliamentary Counsel to arrange for the publication in printed form of any legislation or class of legislation specified in the order; and
(b) specify conditions to which the authorisation or direction is subject.

Thus, instead of a duty imposed by primary legislation on the Chief Parliamentary Counsel it is a duty that will be imposed by Executive discretion. There is nothing to force the Executive to make an Order in Council directing the Chief Parliamentary Counsel to arrange for the printed form of any legislation; a discretion that is of course not susceptible to an order of mandamus. This approach reflects the Government’s intention as outlined in the explanatory note of the Bill; “[I]n its response to NZLC R104, the Government has agreed to continue publishing legislation in printed form until the legislation database is officialised and then to review the situation”.

This equivocation on the future of printed copies of legislation stands in contrast with the Law Commission’s recommended approach. After noting the different advantages of both electronic publication and hard copy versions of statutes, the Law Commission recommended that “hard copy should remain available. A democratic government should respond to the needs of the people rather than insisting that they acquire new habits”. Contrary to this reasoning, the Government’s signalled intentions suggest that the future availability of hard copies of statutes is contingent on there not being another source of copies of “officialised” Acts.

D Electronic versions of legislation

For the first time in New Zealand’s history, the Legislation Bill 2010 will impose a duty on the Chief Parliamentary Counsel to promulgate legislation electronically. The

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560 See below.
561 R v Fergusson (1874) 2 NZ Jur 20.
563 Law Commission, above n 58, at 34.
564 Government Response to Reports of the Law Commission: Presentation of New Zealand Statute Law and Review of the Statutes Drafting and Compilation Act 1920 at [8].
Legislation Bill 2010 will also explicitly provide a means of giving official status to legislation promulgated in this way, through allowing for procedures of authentication to be established.\textsuperscript{565} The two clauses relevant to the duty of publication in electronic form are:

\begin{itemize}
  \item \textbf{Clause 6(2)}
  A copy of every Act must be published in electronic form as soon as practicable after the Act is enacted.
  \item \textbf{and}
  \textbf{Clause 9}
  Availability of electronic versions of legislation
  \begin{enumerate}
    \item The Chief Parliamentary Counsel must ensure that, as far as practicable, official electronic versions of legislation issued under section 17 are at all times able to be accessed at, or downloaded from, an Internet site maintained by or on behalf of the New Zealand Government.
    \item Official electronic versions of legislation must be made available under this section free of charge.
    \item This section applies to all enacted legislation other than legislation that ceased to be in force before the commencement of this section.
    \item This section is subject to any regulations made under section 22.
  \end{enumerate}
\end{itemize}

Clause 6(2) imposes the duty to promulgate Acts electronically. Clause 9 ensures the availability of official electronic versions of legislation. Clause 9 applies only to “electronic versions of legislation issued under section 17 of this Act”,\textsuperscript{566} while clause 6(2) applies to every Act.

The use of the phrase “as far as practicable” dilutes the duty of the Chief Parliamentary Counsel to ensure that official electronic versions of legislation are at all times able to be viewed from, accessed at, or downloaded from, an internet site. While the use of this phrase may be explained by the Chief Parliamentary Counsel’s dependence on technology to meet the duty, there was no similar phrase in section 4 of the ARPA. Arguably, the Chief Parliamentary Counsel was, under that section, also dependent on technology to meet that duty.

The other significant change to promulgation requirements made by these clauses is that “versions of legislation must be made available under this section free of charge”.\textsuperscript{567} This illustrates a clear change from the retail-based scheme under the ARPA to a philosophy more consistent with legislation being freely available.

\section*{E The sale of hard copies of legislation}

The aspects of section 9 of the ARPA that deal with the power of the Attorney-General to designate places where copies of Acts of Parliament and regulations may be purchased are effectively reproduced in Clause 7 of the Legislation Bill 2010 (162-2).

\textsuperscript{565} See below.
\textsuperscript{566} Clause 17 provides only a discretion that the Chief Parliamentary Counsel “may issue (a) official electronic versions of legislation and (b) official printed versions of legislation”. Therefore, while clause 9 does impose duties, these are concerned with electronic versions. These versions do not have to be issued but only may be issued. This is no doubt to allow for the time it takes to “officialise” the New Zealand Legislation website.
\textsuperscript{567} Legislation Bill 2010(162-2), cl 9(2).
Clause 8(1) is almost wholly carried over from section 10(1) of the ARPA. In addition however Clause 8(2) goes on to define that this reasonable price must have “regard to the actual cost of printing and making the copies available for sale”. This clarification prevents the Parliamentary Counsel Office from taking a similar approach to the New Zealand Standards Council and to rely on the sale of copies of Acts to maintain the Parliamentary Counsel Office or even Parliament.

**F Requirements to publish reprints**

Under the Legislation Bill 2010, reprints of Acts will still be required to be published but not printed. Under Clause 6(1) of the Bill which is to be the replacement for section 4(c) of the ARPA:

The Chief Parliamentary Counsel must arrange for the publication of—
(c) any reprints of Acts and legislative orders, and any reprints of regulations made before the commencement of this section, issued by him or her in addition to reprints to which subsection (5) applies; and

Clause 6(5)(b) of the Legislation Bill 2010 goes only so far as to confer a discretion to make hard copy versions of reprints: “When an Act or a legislative order is amended after the commencement of this section, the Chief Parliamentary Counsel…may also arrange for the reprint to be published in printed form”. This approach is explained in the Government Response to the Law Commission Reports:

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.

In the place of a requirement to print hard copies of reprints of Acts there is to be a duty to publish electronic reprints:

When an Act or a legislative order is amended after the commencement of this section, the Chief Parliamentary Counsel…must arrange for a reprint of the Act or legislative order to be published in electronic form so that an up-to-date version of the legislation is available in accordance with section 9 as soon as practicable;

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568 “The Chief Parliamentary Counsel shall, under the control of the Attorney-General, make available for purchase by members of the public at the places designated from time to time by the Attorney-General under section 9(1) of this Act copies of Acts of Parliament and regulations at a reasonable price”.

569 Standards New Zealand, above n 429.

570 Government Response to Reports of the Law Commission, above n 564, at [20].

571 Arguably a “user pays”, “print on demand” approach is already taken. See the reprinting policy of the Parliamentary Counsel Office. Parliamentary Counsel Office, above n 116.

572 Legislation Bill (162-2), cl 6(5)(a).
G The Parliamentary Counsel Office

The Legislation Bill 2010 proposes several changes to the Parliamentary Counsel Office. Notably in Clause 57(1), “the PCO continues as an instrument of the Crown and a separate statutory office under the Attorney-General’s control”. That the Parliamentary Counsel Office already is an “instrument of the Crown” is a somewhat contentious proposition. The Legislation Bill 2010 seems finally to put this debate to rest, ensuring that it is the Executive that promulgates (and is required to promulgate) legislation in New Zealand and not Parliament.

Clause 58 sets out the functions of the Parliamentary Counsel Office. Despite there being no explicit requirement in the Bill to do so, printing hard copies of Acts is indeed recognised as one of the functions of the Parliamentary Counsel Office. Significantly, one of the functions of the Parliamentary Counsel Office is “to arrange for the printing and publication of Acts, legislative instruments, and reprints of legislation in electronic and printed form (as provided in Part 2).”

H Authentication of copies of Acts

Under the Legislation Bill 2010 both electronic and hard copies of Acts will have equivalent official status. The “official version” of an Act is defined in the Bill as “in relation to legislation, means a version of the legislation that has the status of an official version of the legislation under section 17”. Clause 17 provides a discretion for the Chief Parliamentary Counsel to issue official versions of Acts:

Electronic and printed official versions of legislation
(1) The Chief Parliamentary Counsel may issue—
(a) official electronic versions of legislation; and
(b) official printed versions of legislation.
(2) A printed version of legislation that is produced directly from an official electronic version is also an official version.
(3) An electronic or printed document that is identifiable as an official version of legislation in accordance with regulations made under section 22 must be treated as an official version unless the contrary is shown.
(4) This section applies whether the legislation is enacted, made, printed, or published before or after the commencement of this section.

Clause 9(1) provides that these official versions issued under section 17 must be available electronically. The authentication procedure where official status is conferred on a copy is to be determined by regulation. Clause 22 provides:

The Governor-General may, by Order in Council, make regulations for 1 or more of the following purposes:
(a) imposing requirements or conditions concerning the manner in which official versions of legislation in electronic form are to be made available to the public under section 9;
(b) specifying features by which an electronic document or a printed document is identifiable as an official version for the purpose of section 17, including (without limitation)
by—
(i) imposing requirements or conditions as to the form of official versions of legislation:

573 See Excursus One.
574 Legislation Bill (162-2), cl 58(1)(d).
(ii) providing how official versions of legislation in an electronic form can be authenticated

The authentication procedure whereby the authentic status of a copy is accepted is provided for by clause 18. This largely takes the same approach as 16C(1) and 16D of the ARPA with regard to the presumption of authenticity. Nevertheless, clause 18 does not rely on a copy “purporting to be printed or published (whether before or after the commencement of this section) under the authority of the New Zealand Government”. Instead, clause 18 implicitly relies on any regulations made under clause 22(b), specifying features by which a copy is identifiable as an official version and provides:

Legal status of official version

(1) An official version of legislation as originally enacted or made is taken to correctly set out the text of the legislation.
(2) An official version that is a reprint—
   (a) is taken to correctly state, as at the date at which it is stated to be reprinted, the law enacted or made by the legislation reprinted and by the amendments (if any) to that legislation; and
   (b) is evidence that any changes made in the reprint are authorised by subpart 2…
(4) The presumptions in subsections (1) to (3) apply unless the contrary is shown.

I Publication of Bills

Despite Clause 58(1)(c) stating that one of the functions of the Parliamentary Counsel Office is “to arrange for the printing and publication of Bills and amendments to them (as provided in Part 2)” in keeping with the approach thus far no statutory duty is created for the publication of Bills. Part 2 creates no general requirement for the printing and publication of Bills.
Part Five: The practice of promulgation

Chapter Twelve: The current practice of promulgation of legislation

A Overview

Promulgation of legislation currently occurs in New Zealand through the publication of both electronic and hard copies of Acts. The legislative framework that governs the publication of the various form of hard copy of legislation results in copies of Acts being “made available for sale”. Copies of Acts are also made available at major public libraries—by Legislation Direct at the request of the Parliamentary Counsel Office—where individuals can access them for free. The process that enables hard copies to be made available at public libraries is not governed by statute. Hard copies of statutes, in various forms—such as annotations and volumes of reprints—are also produced by private firms. These play a significant role in the publication of copies of Acts.

Electronic copies of statutes are available from several websites. One of these websites, the NZL, is maintained by the Parliamentary Counsel Office. This website provides free access to electronic copies of legislation. There are also several non-governmentally maintained websites that provide access to electronic copies of legislation. Some of these websites provide access to electronic copies at no cost while others charge a fee for subscription.

There are now more entities engaged in the publication of statutes than ever before. The roles and relationships of these entities to each other are, in some instances, not easily discernible. This lack of clear demarcation may be explained by the ad hoc nature of many of these entities; this matter is explored in more detail in Chapter Thirteen.

B Electronic copies of legislation

1 The New Zealand Legislation Website

After the Royal Assent has been given, the most prompt process of promulgation is the posting of the new Act on the NZL in both HTML and PDF form. This can happen within days or even hours of enactment. The NZL “is owned and provided by the New Zealand Parliamentary Counsel Office/Te Tari Tohutohu Pāremata”. Electronic copies of Acts can be viewed, downloaded or printed from this website. The goal is that new Acts will be posted on the website within five working days of Royal Assent and amending Acts will usually be incorporated into principal Acts within 15 working days after the amendment has come into force. This goal was met in 2010/2011. Through the use of

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575 The role of the Parliamentary Counsel Office is fundamental in the process of promulgation in New Zealand, both in practice and under the current and proposed legislative schemes. See Excursus One.
576 Several government departments and court websites provide links to their relevant legislation on their websites. These are, by and large, links to the New Zealand Legislation Website.
577 See Appendix One.
579 Annual Report 2011, above n 108, at 47. For a table of the times of posting on the NZL for the majority of Acts enacted in 2011 see Appendix One.
RSS feeds and Twitter\(^{580}\) the Parliamentary Counsel Office provides online updates for when new legislation is posted on the website.\(^{581}\)

At the present time the Parliamentary Counsel Office “is working towards making the NZL an official source of legislation,\(^{582}\) and the more recent legislation it provides [already] has ‘semi-official’ status.”\(^{583}\) Importantly, “[n]othing is deleted from the database, so it gradually builds up over time into a repository of historical as well as current data from the go-live date forward.”\(^{584}\)

Bills from 2008 (as well as some earlier Bills) onwards are also available on the NZL.\(^{585}\) These Bills are posted on the NZL the day after their introduction into the House.\(^{586}\) Before their introduction into the House, Bills are not posted on the website.

Electronic copies of statutes on the NZL incorporate all amendments, arguably making these online versions reprints, although not in the traditional hard copy sense. These copies contain details about their amendments:  

Acts and regulations that have been amended show the date of the latest amendment to have been incorporated at the top of the contents page (“Reprint as at ...”). At the bottom of the contents page is a link to the reprint notes.

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\(^{580}\) Although the twitter updates are maintained by a “private person”. Email from Gillian McIlraith (Communications Advisor of the Parliamentary Counsel Office) to Christopher Gullidge regarding the use of twitter and RSS feeds to keep updated about new legislation being posted on the NZL (11 April 2012). See Appendix Two.

\(^{581}\) The NZ Legislation Twitter profile states: “NZ Acts, Bills, Regulations, SOPs and related news items tweeted as they’re published. Unofficial”.

\(^{582}\) “Officialisation of the website content is the main focus of the Reprints Unit, and is currently expected to be completed by 31 December 2012. In addition to the 49 titles that were officialised in the course of producing the hard copy reprints, the Reprints Unit completed the officialisation of 388 items of legislation, comprising all of 2006 (169 Acts and Statutory Regulations), all of 2005 (136 Acts and Statutory Regulations), and 83 of 127 Acts and Statutory Regulations for 2004 in this reporting year. This means as at 30 June 2009, the officialisation programme is 16% complete”. Parliamentary Counsel Office “Report of the Parliamentary Counsel Office Te Tari Tohutohu Pāremata for the year ended 30 June 2009” [2009] I AJHR A9 at 15. But see Parliamentary Counsel Office “Report of the Parliamentary Counsel Office Te Tari Tohutohu Pāremata for the year ended 30 June 2012” [2012] I AJHR A9. This report extends the expected completion date to sometime in the 2012/13 financial year. Also See Chapter Eight of this thesis.


\(^{586}\) Parliamentary Counsel Office “What’s on this site and how it works”, above n 21:

We aim to make legislation available on this website according to the following timeframes (or earlier where possible):

…

•Bills:
  •new Bills introduced into the House: the day after introduction
  •subsequent versions: the day after the printed version is made available to the House

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\(^{587}\) Electronic Reprints/eprints, above n 399.
The Parliamentary Counsel Office divides these copies into “reprints or eprints”. 588 The copies that are not yet “officialised” are referred to as “eprints”. The copies that have “semi-official” status are referred to as reprints. 589

Amendments are incorporated into the copies of Acts on the NZL at a slower rate than new Acts are posted on the website: 590

Amendments are added as soon as possible after they come into force, but not before. We aim to incorporate amendments within 15 working days after the amendment comes into force. Our ability to meet these timeframes may be affected from time to time by the number or complexity of the amendments.

However, to ameliorate the impact of this delay the practice is to provide an alert that amendments have been made even if these amendments are still unincorporated: 591

Each Act or Regulation states when amendments were last incorporated (the “as at” date). If an amendment has been enacted/made, but not yet incorporated into the principal enactment, an alert message will appear on that principal enactment. We aim to make this alert message available on the website within five working days of the publication of the amendment on the website. Our ability to meet this timeframe may be affected from time to time by the number or complexity of amendments.

The NZL is becoming increasingly significant in the dissemination of the text of Acts of Parliament. From 2007 to 2011, the annual number of unique visitors to the NZL has more than doubled from little over 400,000 to over 900,000. 592

2 New Zealand Legal Information Institute

NZLII is a joint project of the University of Otago Faculty of Law, University of Canterbury and the Australasian Legal Information Institute (AustLII) with the assistance of the Law School, Victoria University of Wellington. 593 NZLII is a branch of WorldLII and participates in the free access to law movement, 594 by providing access to case law, and legislation. This website provides access to several databases of New Zealand Legislation; New Zealand Acts, New Zealand Repealed Acts, New Zealand Acts as enacted (1841–2007) and New Zealand Historical Acts — 1908 Consolidation, as well as New Zealand Bills 1998–. 595 These electronic copies can be viewed, downloaded or printed from NZLII.

The NZLII website provides access to a complete online collection of all legislation ever enacted in New Zealand. The New Zealand Acts as enacted (1841–2007) 596 and the New Zealand Historical Acts — 1908 Consolidation database are significant because they provide access to copies of Acts in their original un-amended form. These databases are not available on the NZL. While NZLII is not owned or maintained by the Government it

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588 Electronic reprints/eprints, above n 399.
589 Electronic reprints/eprints, above n 399. See also Chapter Eight of this thesis.
590 Parliamentary Counsel Office “What’s on this site and how it works”, above n 21.
591 Parliamentary Counsel Office “What’s on this site and how it works”, above n 21.
593 NZLII “Home”<www.nzlii.org/nzlii/>.
594 NZLII “Home”.
595 NZLII “Home”.
596 These include the “Shattering Statutes”. See below 600.
does work in conjunction with the Parliamentary Counsel Office to make electronic copies of Acts available;\(^{597}\) All other electronic copies of statutes on NZLII have been supplied by the Parliamentary Counsel Office. Consequently, the distinction between State promulgation and non-State publication of legislation in this instance is somewhat blurred.

3 Knowledge Basket

Knowledge Basket provides free access to legislation, both Acts and Bills. The Knowledge Basket is a privately owned database.\(^{598}\) However, it is not an exhaustive collection. It provides access to Bills from 1985 to 2007. Knowledge Basket provides access to some copies of Acts:\(^{599}\)

…[including] original versions (amendments not incorporated) of Acts in force in 1987, and all Acts passed from 1987 to 2007 (amendments not incorporated), and reprints from November 2002 to 2007.

Knowledge Basket also provides a database containing the annual volumes of Acts from 1888 to 1894, the “shattering statutes”.\(^{600}\)

4 Online databases of legislation available through subscription

Brookers (Thomson Reuters) and LexisNexis (Butterworths) provide comprehensive online databases of New Zealand legislation (both Acts and Bills), with commentary and links to case law, available by subscription. CCH also provides a database of selected legislation that relates to commercial, employment and tax. These electronic copies can be viewed, downloaded or printed.

C Hard Copies of Legislation

1 The Annual Bound Volumes

Physically, the most impressive medium for size and length that the Statute Book can take is the Annual Bound Volumes. A comprehensive collection of the Annual Bound

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\(^{597}\) The PCO has been working on a project to digitise New Zealand Acts from 1841 to 2007 as originally enacted. The aim of the project is to provide free online access to all New Zealand Acts in their original form (ie as enacted), whether or not they have subsequently been repealed. The digitisation project has now been completed and the collection is being hosted by NZLII, the New Zealand Legal Information Institute, with the collection also being made available to the National Library. The collection is called the New Zealand Acts 1841–2007 As-Enacted Collection. The Acts are in PDF format and do not include any later amendments or show whether or not they have been repealed. NZLII also hosts the 1908 Consolidation, a separate database that the University of Auckland kindly provided to the PCO. The 1908 Consolidation is a collection of 208 Acts enacted via the Consolidated Statutes Enactment Act 1908 to revise, re-enact, and replace 806 earlier Acts (which were repealed by that 1908 Act).

\(^{598}\) The Knowledge Basket “About The Knowledge Basket” <www.knowledge-basket.co.nz/about/>.

\(^{599}\) Parliamentary Counsel Office “Online legislation- Other online sources of legislation” <www.pco.parliament.govt.nz/online-legislation/>.

\(^{600}\) “The volumes of New Zealand Acts of 1888 to 1894 were printed on acid paper that has deteriorated over the years, and is now in many cases so brittle that it disintegrates when handled” Parliamentary Counsel Office “Shattering statutes” <www.pco.parliament.govt.nz/shattering-statutes/>. 
Volumes (from 1853-2011) linearly takes up approximately 16 metres.601 These volumes are a collection of all the Statutes enacted by Parliament in a single year. Each edition can be a single slim volume, as they were in 1984, or run to several large volumes as they did in 2007, depending on the amount of legislation enacted in a given year.

These volumes are now printed and published by Legislation Direct for the Parliamentary Counsel Office and sold to subscribers. From 2008-2010 the Annual Bound Volumes editions have been published in March or April the following year.602 They can, according to the Parliamentary Counsel Office; “be purchased from Legislation Direct or selected retail outlets, and are available at many public libraries”.603

2 Pamphlet copies of Acts

Copies of individual Acts are published by Legislation Direct for the Parliamentary Counsel Office throughout the year. These copies are made available for purchase through Legislation Direct, and the Government Bookshops. These copies are also available by subscription.604 The goal is that these copies will be made available within 10 working days of the Royal Assent. In 2010/2011 this goal has been met.605

Facsimiles of Bills are also available for sale at Government Bookshops and by subscription. The aim is that these will be available within five working days of introduction. This goal has also been met in 2010/2011.606

3 Individual Reprints

Reprints are “now published only in pamphlet form” by Legislation Direct for the Parliamentary Counsel Office.607 Bound volumes of Reprints are no longer printed in New Zealand at the request of the Parliamentary Counsel Office. In 2003, after 24 years and 42 volumes, the Reprinted Statutes of New Zealand series was discontinued. The Parliamentary Counsel Office’s focus on the NZL has reduced the emphasis placed on the production of hard copy reprints:

[N]ow that the New Zealand Legislation Website is online, the primary focus of the PCO Reprints Unit is the officialisation of the database of legislation that underpins the website. The Reprints Unit is working to ensure that the entire database is progressively officialised, which is predicted to take approximately three years. The Reprints Unit still intends to produce some hard copy reprints during the officialisation period, and to integrate the annual reprinting

601 Although an exhaustive collection of the Annual Bound Volumes contains many repealed Acts.
602 Annual Report 2011, above n 108, at 47.
603 Parliamentary Counsel Office “Printed Legislation” <www.pco.parliament.govt.nz/reprinting-policy/>. The Legislation Direct website does not state anywhere that it sells the Annual Bound Volumes. However, “we do have the Bound Statutes and regulations. They are now $108.36 inc GST each. Our website only shows legislation that has come through since 2003 - it is very basic.” Email from Fiona Jenkins (Customer Service Representative of Legislation Direct) to Christopher Gullidge regarding the Annual Bound Volumes and the supply of copies of statutes to public libraries by Legislation Direct (18 October 2010). See Appendix Two.
604 A subscription that includes all pamphlet copies of Acts passed in a year and all the Green assent copies costs approximately $370 (excluding GST). This information is courtesy of the staff of the Robert Stout law Library.
605 Annual Report 2011, above n 108, at 47.
606 Annual Report 2011, above n 108, at 47.
608 Law Commission, above n 58, at 20.
programme with the officialisation programme as far as possible. However, it will be important to balance resources for reprinting against those needed for officialisation. A consequence is likely to be that fewer hard copy reprints will be produced during that period.

In 2010/2011 nine Acts were reprinted while 566 “items of legislation” were officialised on the NZL.\(^{609}\)

Reprints continue to be made available from Legislation Direct and the Government Bookshops.\(^{610}\) As noted above, not all amended Acts are reprinted; “[r]eprints are published according to the Parliamentary Counsel Office reprinting policy, which is used to establish an annual reprinting programme. An annual reprints survey contributes to establishing the programme”.\(^{611}\)

The reprinting policy of the Parliamentary Counsel Office takes account of the following considerations:\(^{612}\)

- the volume of legislation being enacted
- the amount, frequency, and significance of amending legislation
- the Government's legislative programme
- the usefulness of particular legislation to general and specialist users, including the legal profession, the judiciary, and government departments
- the resources available to the PCO (both human and technological)
- the size and nature of the New Zealand market for printed reprints
- the limits imposed by the price the market will pay for reprinted legislation
- achieving a balance between electronic and printed products.
- In implementing this policy, the PCO focuses on best-selling titles that are frequently or heavily amended, on the basis that these represent the priorities of users of legislation.

These considerations, along with the restrictions placed on the Parliamentary Counsel Office due to its “officialisation” responsibilities, can be seen in operation in the summary of the 2010-2011 reprinting programme.\(^{613}\)

The legislation included in the 2010-2011 reprinting programme has been selected according to the following criteria:

- recommendations received in the 2010 reprints survey
- recommendations received in the 2009 reprints survey that were not included in the programme for 2009-2010
- the number of amendments since the last reprint (if reprinted)
- the significance of any amendments since the last reprint (if reprinted)
- any significant amending legislation being drafted by the PCO
- any amending legislation on the Legislation Programme
- inclusion in the list of top 200 legislation sellers for the last 12 months to 31 July 2010


\(^{610}\) Parliamentary Counsel Office, above n 607.

\(^{611}\) Above n 607. “Interestingly the annual surveys do not excite widespread interest—the 2009 survey and the decision on which of New Zealand’s Laws should be consolidated and reprinted was based on 15 responses”. Adlam, above n 46, at 92.

\(^{612}\) Parliamentary Counsel Office, above n 116.

\(^{613}\) Parliamentary Counsel Office, above n 285.
• what's possible given a limited budget
• what will have the least impact on the Reprints Unit's ability to officialise all principal legislation on the New Zealand Legislation website by 31 December 2012.

4 Volumes of Reprints

The discontinuance of the Reprinted Statutes series in 2003 was a “horrifying prospect for Brookers”.614 In response Brookers began publishing the Bound Reprinted Statutes in 2005. The Bound Reprinted Statutes, are produced privately, however and lack the level of authenticity of the Reprinted Statutes.615 These volumes “contain complete facsimiles of the text of the loose reprinted legislation published by the Parliamentary Counsel Office”.616 Consequently, the content of these volumes is dependent on the pamphlet Reprints published by Legislation Direct for the Parliamentary Counsel Office discussed above. At the time of writing there are 39 volumes in the series. Several new volumes617 are published every year.

5 The Royal Assent copies

The two618 Royal Assent copies are “held at Parliament House (or Archives New Zealand) and the High Court”.619 Facsimiles of the Royal Assent copies are also made. These are sometimes known as “greens”, because of the green paper they are printed on.620 “Greens” are the most prompt way legislation is promulgated through hard copy, since these facsimiles “provide the first hard copy version of the new Act”.621 “Greens” are available by subscription for approximately $370 (excluding GST) a year which includes a subscription to the pamphlet copies of individual Acts as well.622 There are a small number of— libraries and institutions [that] are on the mailing list for these assent copies but they are not available electronically at or from the New Zealand Legislation Website, nor otherwise generally available.

6 Annotations624

Brookers provides a six monthly annotation service by subscription. This annotation service adds amendments to volumes of legislation and strikes out repeals in red pencil. These annotations are on slips of paper that are “paysted” into the Bound

614 Adlam, above n 46, at 92.
615 See Chapter Eight of this thesis.
616 The Bound Reprinted Statutes, above n 361.
617 The number of volumes printed depends on how many Acts are reprinted as well as the size of the Acts reprinted.
618 “Occasionally a third print is authenticated if it is intended that the promoter of particular legislation should retain a copy of the Bill with the Royal assent recorded on it”. McGee, above n 53, at 391.
619 McGee, above n 53 at 395.
620 Burrows and Carter, above n 90, at 159.
621 Burrows and Carter, above n 90, at 159.
622 This information is courtesy of the staff at the Robert Stout Law Library
623 Burrows and Carter, above n 90, at 159.
624 See also Chapters Three and Thirteen of this thesis.
Volumes of Statutes. These annotations are made to both privately produced volumes (The Bound Reprinted Statutes series) and volumes printed by Legislation Direct for the Parliamentary Counsel Office.

Advance annotations are also made by Brookers in the period before the six monthly annotation round. LexisNexis NZ also publishes the Butterworths Annotations to the New Zealand Statutes. This service is annotated monthly.

**D Points of access for hard copy**

1 **Making hard copy available for purchase**

“The PCO does not supply copies of legislation to the public”.625 It is not possible to access hard copies of legislation directly from the Parliamentary Counsel Office. Indeed, aside from the NZL, which is owned and maintained by the Parliamentary Counsel Office, it is not possible to access any copies of Acts directly from the Parliamentary Counsel Office.626 Instead, the Parliamentary Counsel Office contracts with a publisher to print legislation. Legislation Direct provides access to hard copy legislation by making copies available for purchase. Originally the predecessor of Legislation Direct was part of the Government Printing Office.627

Hard copies of legislation (Reprints, pamphlet copies and Annual Bound Volumes) that are published by Legislation Direct for the Parliamentary Counsel Office are available for purchase from several sources.628 Copies can be purchased from the Legislation Direct website itself which is:629

…maintained by the printer contracted to the Parliamentary Counsel office for print and distribution functions of Government legislation. The site is monitored during office hours Monday through Friday.

The Parliamentary Counsel Office also makes hard copies available to be purchased at the designated Government bookshops.630 These hard copies are also able to be purchased at many private booksellers.631

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626 Although the Parliamentary Counsel Office website provides links to the New Zealand Legislation Website.
627 Cox, above n 538, at 188.
629 Legislation Direct <www.legislationdirect.co.nz/>.
Christchurch Bennetts Bookshop Christchurch Polytechnic Institute of Technology, Madras Street, Christchurch.
Dunedin Whitcoulls 143 George Street, Dunedin.
Hamilton Bennetts Bookshop University of Waikato, Gate 5, Hillcrest Road, Hamilton.
Palmerston North Whitcoulls 38–42 Broadway Avenue, Palmerston North.
Bennetts Bookshop Massey University, Palmerston North.
Wellington Bennetts Bookshop Bowen House, corner of Lambton Quay and Bowen Street, Wellington”.
2 Making copies of legislation available at public libraries

Major public libraries in New Zealand are supplied with the *Annual Bound Volumes*, the pamphlet copies of Acts, individual reprinted Acts and copies of Bills free of charge. Legislation Direct supplies these copies of legislation to libraries at the request of the Parliamentary Counsel Office. Many major public libraries also subscribe to the annotation service offered by Brookers and the *Bound Reprinted Statutes* published by Brookers. The public libraries are required to pay for the cost of these copies as they are privately printed.

**E Points of Access for Electronic copy**

The NZL, while an instrument for the widespread publication of the text of legislation, somewhat paradoxically remains only a point of access to the Statute Book. This website ensures that every home with an internet connection has access to a copy of the New Zealand Statute Book. However, that does not equate to every home with an internet connection having a copy of the New Zealand Statute Book. If the NZL shut down, for any reason, the point of access is closed.

Copies of statutes can be recorded electronically. Modern flash drives have advanced to the stage where the New Zealand Statute Book could be recorded on a single flash drive. Along with providing points of access for electronic copies through the NZL, the Parliamentary Counsel Office could publish “Annual Acts” flash drives similar to the *Annual Bound Volumes*. In conjunction with publishing a Flash Drive containing the *New Zealand Acts as enacted (1841–20–)* the Parliamentary Counsel Office could through yearly publishing of an *Annual Acts* and *Reprinted Acts* flash drive reduce the reliance on promulgation through the use of points of access to the Statute Book.

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632 Interview with Anne Tuck, Dunedin Public Library, (Christopher Gullidge, 7 December 2011). Although the Parliamentary Counsel Office only states that *Annual Bound Volumes* and individual reprints are available at many public libraries. The Parliamentary Counsel Office does not state that individual copies of Acts are available at “many public libraries”. Parliamentary Counsel Office, above n 628.

633 Jenkins, above n 603. See Appendix Two.

634 “Not all owners of Acts subscribe to this [annotation] service. Even some libraries do not”. Law Commission, above n 58, at 1.22.
Chapter Thirteen: The development of the practice of promulgation of legislation

A Broad trends

There are three broad trends in the development of the practice of promulgation of legislation in New Zealand. The first is the comparatively recent growth in the significance of electronic publication of statutes.

The second trend is the change in perception of the intended audience of promulgative processes. Historically in New Zealand the perception resulted in copies of legislation being made available only to a specific class of “statute users”. Now some major promulgative processes (particularly electronic publication), are aimed at making copies of Acts available to the general public.635

Promulgation through online databases makes legislation more widely available than it did twenty years ago. Prior to the advent of online legislation databases, it was the Depository Library Scheme that provided access to legislation to the general public. Prior to the establishment of this scheme in 1971, promulgation did not result in widespread dissemination of copies of statutes.

Finally, a second major type of promulgative scheme has taken shape in New Zealand. Originally, the only major promulgative scheme in New Zealand involved making copies of statutes available for sale.636 Promulgative processes in New Zealand can now be divided into two major schemes, making copies of statutes available for sale, and making copies available for free. With the exception of making hard copies available at public libraries, the former scheme involves only hard copies of legislation while the latter scheme involves electronic copies of legislation.

The continued existence of a retail-based scheme of promulgation, should ensure that hard copies of Acts in the form of the “greens”, Annual Bound Volumes, pamphlet copies of Acts and reprints will continue to be published and sold. Should the scheme that sees copies of Acts made available for sale be eclipsed by the scheme that makes copies of Acts available for free however, the continued publication of Acts in these hard copy forms will become less and less certain.

B Electronic copies of legislation

1 The PAL Project

The NZL went live in 2008.637 Prior to the completion of the Public Access to Legislation project (PAL) an interim website of New Zealand Legislation was provided by Brookers from 2002 until June 2007.638 The PAL had a somewhat protracted gestation

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635 See Chapter Seven of this thesis.
636 See Chapters Nine and Ten of this thesis for the statutory framework around this scheme.
637 Post Implementation Review, above n 37, at 1.2.2.
638 Adlam, above n 46, at 92. Prior to that Brookers and Status publishing had provided online databases of legislation from the mid-1990s. See Helen Arlington “History of LINX” LINX– New Zealand’s legal research tool <www.linx.org.nz/history.cfm>.
period, “[The PAL] commenced in 2001 and had to overcome numerous difficulties before the Legislation New Zealand website was finally implemented in January 2008”.

The Public Access to Legislation (PAL) Project Post Implementation Review states the “prime catalyst for the Public Access to Legislation system was to provide free access, via the World-Wide Web, to New Zealand legislation”. At the beginning of the PAL project a new database of New Zealand legislation was going to be constructed by the Parliamentary Counsel Office. However, “Brookers was selected, in 2002, to work with Unisys, and provide the PCO with the electronic legislation database and associated services for the PAL project”.

2 Private online databases

Online electronic access to Statutes in New Zealand arguably began with LINX, albeit access was only available through subscription. Status Publishing and Brookers followed some years later.

During the 1990s the battle to produce electronic statutes got underway, with publishers moving from Magellan software through Recall Plus to Folio VIEWS. The rivals, Brooker’s and Status Publishing, struggled to come to terms with the difficult format of the statutes and their updating requirements. It would be fair to say that the LINX librarians stood and watched a little smugly as their own struggles were repeated years later by the publishers who did not even have the online database searching experience - on systems such as Dialog and Medline - the librarians had brought to their earlier ventures.

In 1994, the “electronic Brookers Statutes of New Zealand...[was] launched ...featuring 792 principle acts. The product ...[was] initially released on floppy disk and CD-ROM”. Also in 1994 Knowledge Basket was established. This suite of databases provided “the (then) GP Print Legislation database collection”.

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639 See generally Post Implementation Review, above n 37.
640 Post Implementation Review, above n 37, at 36.
641 Post Implementation Review, above n 37, at v.
642 Adlam, above n 46 at 92.
643 “Unisys New Zealand Ltd was the implementation partner for the PAL Project”. Post Implementation Review, above n 37, at 9.2.
644 Post Implementation Review, above n 37, at 20.
645 LINX began in 1986 with a decision to automate the Auckland District Law Society Library at the High Court in Auckland. Arlington, above n 638.
646 Arlington, above n 638.
647 Adlam, above n 46, at 129.
649 The Knowledge Basket, above n 648.
C Hard Copies of legislation

1 The Government Printing Office

From 1864 to 1990 hard copies of Acts were printed by the Government Printing Office. Prior to 1864, copies of Acts were printed by a contracted government printer. In 1864 the Government Printing Office was established as a government department. This government department was sold in 1990, for approximately $23 million to Rank Group Ltd as part of a policy of privatisation of the Fourth Labour Government. Since 1990, hard copies of Acts have once again been printed by a contracted government printer.

2 The Annual Bound Volumes

Arguably, the Annual Bound Volumes have been required to be published since before there was primary legislation in New Zealand. Queen Victoria’s Royal Instructions to Governor Hobson of the 5th of December 1840 stated—

…that the Governor publish, in January or as early as practicable in a year, “a complete collection . . . for general information, of all Ordinances enacted during the preceding year”.

Today Annual Bound Volumes that were published as early as the 1850s can still be found in libraries.

The publication of the Annual Bound Volumes however, has often been a slow process. In the 1920s, “The annual bound volumes of legislation were …taking a long time and had to be re-ordered each year”. Nor did the timeliness of publication initially improve with the sale of the Government Printing Office in 1990, “[by] 1992 the Government Printer was three years behind in printing the official bound volumes of statutes”. By 1995, the “latest set of bound statutes…[available was] for the 1991 year”. By 2000, the timeliness of the publication of the Annual Bound Volumes had been improved to the extent that the Annual Bound Volumes for legislation passed in 1999 were published in 2000.

3 Pamphlet copies of Acts

By the 1980s, when new Acts were passed, “usually 3,000 copies [were] printed”. However, at this time there were some delays in the printing of these...
individual copies.\footnote{By the 1980s, the Government Printing Office was “[taking] much longer than a month to prepare and distribute the official legislation”. Adlam, above n 46 at 56.} By the early 1990s, this had improved and despite there being substantial delays in the publication of the \textit{Annual Bound Volumes}, copies of individual Acts were published fairly rapidly.\footnote{“Resources boost to ease statute delays”, above n 47, at 3: “[T]he publication of the pamphlet copies of Acts and regulations had been carried out promptly throughout the period in which there had been delays [for the \textit{Annual Bound Volumes}].”}

\section*{4 Green Royal Assent copies}

The 1985 \textit{Marketing Plan for Legislation: A Report for Government Printing Office} describes the dissemination of legislation in the 1980s in some detail and highlights the importance placed on the Green copies prior to the advent of the internet:\footnote{PriceWaterhouse, above n 658, at 11.}

Once the Bill has passed through the House and has received the Royal Assent, copies of the Assent copy are printed. Copies are made available via the Bills Office and via a selective mailing list (the “Green List”)…\footnote{PriceWaterhouse, above n 658, at 11.} This list has had informal beginnings, and to those people interviewed it meets their needs for timely and accurate advice on new passed legislation. Essentially subscribers receive copies of new legislation up to four weeks before it is made available through Government bookshops and to those subscribers on mail order. Unfortunately also, delays can arise within Parliament, Parliamentary Legal counsel or within the Government Printing Office causing the new assented legislation to be available some weeks after it was actually passed into law. An example was the Fish Royalty’s [sic] Bill, which was assented to on 26 October 1985, but was not available from the Government Printing Office until the end of November. This creates difficulties if the legislation becomes effective from the date of Assent.\footnote{While this thesis focuses on reprinting in terms of promulgation that is not to say that reprinting projects are only aimed at promulgation of legislation. Reprinting projects can, and are arguably more likely to, be seen as a means of codification, in its various guises. The process of codification (the process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code, \textit{Blacks Law Dictionary} (9th ed, 2009) Codification at [194]) is not explored in this thesis, as it comes under the topics of navigability and clarity of legal text.}

\section*{5 Reprint projects}\footnote{Burrows and Carter, above n 90, at 148.}

Throughout New Zealand’s legal history there have been several reprinting projects. Some of these projects were private or public or even a combination of public and private. Some of these projects have been pure compilations \footnote{Burrows and Carter, above n 90, at 153.} (the somewhat historic term for reprinting)\footnote{While this thesis focuses on reprinting in terms of promulgation that is not to say that reprinting projects are only aimed at promulgation of legislation. Reprinting projects can, and are arguably more likely to, be seen as a means of codification, in its various guises. The process of codification (the process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code, \textit{Blacks Law Dictionary} (9th ed, 2009) Codification at [194]) is not explored in this thesis, as it comes under the topics of navigability and clarity of legal text.} whereby much amended Acts are reprinted with all the amendments incorporated. Some reprint projects have merely been collections, whereby collections of statutes are reprinted in a single volume or volumes. Another type of project that goes beyond a pure “compilation” is a “consolidation”, whereby the law is “rationalised”.\footnote{Burrows and Carter, above n 90, at 148.} A consolidation does not just bring together all the amendments to an Act together but all the
statutes on a topic together. Despite that, a consolidation like a compilation is not done to alter the law only to reproduce it.

The first reprint was made in 1850, before New Zealand had enacted its own primary legislation. This reprint was The Ordinances of New Zealand passed in the first ten Sessions of the General Legislative Council, AD 1841 to AD 1849: to which are prefixed the Acts of Parliament, Charters, and Royal Instructions relating to New Zealand. This volume is commonly known as Domett’s Ordinances after Alfred Domett the politician who was largely responsible for this reprint. Domett’s Ordinances was, as the title suggests, neither a consolidation, nor a compilation but merely a collection of all the Ordinances passed by the Legislative Council from 1841-1849. This reprint was aimed at improving accessibility.

It was not until 1885, that another collection of Acts and Ordinances was published in English. These were the 1842-84 The Statutes of New Zealand: Being the whole of the Law of New Zealand Public and General and a Reprint of 511 Ordinances and Acts of the above colony in force on January 1st 1885. This Reprint, “seems to have been privately produced by Wilfred Badger, a barrister and solicitor, and funded by private subscription”.

The 1908 Consolidation was both a reprint as well as a true consolidation of New Zealand statute law as 806 Acts were reduced to 208 Acts. Prior to 1908, the New Zealand Statute Book, “comprised… forty-eight volumes, and of these twenty… [were] out of print, and unobtainable. The cost of these forty eight volumes would be about £52, and they would contain, of course, a large quantity of dead matter”.

The Acts that made up the 1908 revision were enacted by the Consolidated Statutes Enactment Act 1908, “[t]he statutes were published as a five-volume appendix to the Act”. There were some notable exceptions to the Acts included in this consolidation

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666 The terms ‘consolidation’ and ‘revision’ are not always used consistently. While the term ‘consolidation’ can be used loosely, the most common meaning of it is captured in the following definition by Alec Samuels: ‘The statement or re-enactment of the statutory law… in a single or organised form, bringing all the scattered relevant statutory law together in one statute, in order “to consolidate and reproduce the law as it stood before the passing of the Act”. Consolidations thus rationalise the law.” Burrows and Carter, above n 90, at 153.

667 See The Consolidation Commission “Final Report of the Consolidation Commission” New Zealand Historical Table and Index to the Consolidated Statutes 1908 (Government printer, Wellington, 1908) at iii.

668 JF Burrows and RI Carter, above n 90, at 150.

669 Memorandum to Domett’s Ordinances at 9.

670 Although in 1871 a “[l]ist of Acts and Ordinances specifically Affecting the Aboriginal Natives of New Zealand” was published. This included Acts printed in Māori and English. A Mackay Compendium of Official Documents relative to Native Affairs in the South Island (Government printer, Wellington, 1871).

671 Burrows and Carter, above n 90, at 150.

672 For the background of this revision see Chapter Ten of the thesis on the historical statutory requirements to publish reprints of Acts. See also Adlam, above n 46, at 1–2.

673 Adlam, above n 46, at 3.

674 “Consolidating the Laws” Hawera & Normanby Star (Hawera, 11 December 1907) at 4. See also Burrows and Carter, above n 90, at 155.

675 Adlam, above n 46, at 3.
however, as it was, “directed to complete consolidation of the Public General Acts, apart from those dealing with Native land. [Also] [l]ocal and personal Acts did not come within the scope of [the] work”. In 2011, the 1908 Consolidation was made freely available on the NZLII website. Prior to 2011, the Consolidation was only available in law libraries and some major public libraries.

In 1932, there was another reprint of statutes. This was because—

of [the] twenty-nine volumes [the five volumes of the 1908 consolidation and the subsequent 24 annual volumes that were issued] nine… [were] out of print, so that to the inherent difficulty of considering the mass of legislation now on the statute-book (with all its complexities resulting from repeals, substitutions, and verbal amendments) there [had] been added the further impossibility, of obtaining copies of legislation at all.

This reprint resulted in “the effective consolidation of New Zealand’s statute law-816 Acts- into nine volumes”. This reprint was not a consolidation like the 1908 Reprint so the Acts contained within it were not required to be re-enacted by Parliament. The Courts were required to take judicial notice of the copies of Acts in the reprint. This was a joint project between the Government and Butterworths:

A campaign in 1930 to sell Halsbury’s Statutes…met with little success until…tables comparing the sections of certain English and New Zealand Acts [were produced]. These led, in discussion with Herbert Page and with the Chief Justice of New Zealand, to an even more ambitious proposition, to publish a complete annotated reprint of the New Zealand Statutes, 1908-31. This was published under contract with the Government…It involved close co-operation between the New Zealand Parliamentary Law Draftsmen and Butterworths in London as well as Wellington.

The next major reprint project was the Reprint of the Statutes of New Zealand 1908-1957. This “reprint covered 423 Acts and spanned 16 volumes”. The 1957 reprint was not an exhaustive collection of statutes. Acts were omitted “that could safely be omitted without unduly lessening the value of the work of the ordinary practitioner”. This Reprint was “not completed and published until 1961, some three years after the first volumes were published in 1958. By the time the reprint was published as a complete set of 16 volumes, it was already four years out of date”. Notwithstanding this reprint being “already four years out of date” the importance of 1957 Reprint is shown by the effect it

676 Thomas Sidey “Revising the New Zealand Statute Book” [1932] NZLJ 300 at 302.
677 See above.
678 Stewart, above n 57, at vii.
679 Adlam, above n 46, at 23.
680 “Judicial notice of the reprint shall be taken by all Courts and persons acting judicially and the provisions of section twenty-nine of the Evidence Act 1908 shall extend and apply thereto”. Reprint of Statutes Act 1931, s 4.
682 Law Commission, above n 58, at 6.10.
683 Mason, above n 265.
684 Law Commission, above n 58, at [6.11].
had on the firm Brookers, “[Because of the Reprint] [a]nnotation became easier for a while.”

This reprint is described in the official history of the Government Printing Office:

One of the largest jobs undertaken by the Department in recent years was the reprinting of the New Zealand Statutes. The work was begun in 1958 and completed in March 1961. The reprint comprised 16 volumes, each of approximately 900 pages, the result of years of work by the Law draftsman and his staff in the consolidation and annotation of New Zealand legislation in force up to 31 December 1957.

From 1964 to 1977 various Acts were reprinted and bound in the Annual Bound Volumes. Twenty-Six volumes containing reprints were printed during this period. Reprinted Acts were printed as their own volumes or as parts of other volumes. In this period as many as three volumes of reprints (1968, 1975 and 1976) or as few as one volume (1964, 1965, 1967 and 1977) were published annually. Occasionally a reprint volume would contain only a single topic, this happened with three volumes in relation to Land and Income Tax.

The Brown Volumes Reprinted Statutes of New Zealand series began in 1979 and was discontinued in 2003. The Brown volumes were produced “in association with the Chief Parliamentary Counsel, [and reprinted]… existing statutes… from time to time. A complete updated, consolidated reprinting of Statutes [had] been continuing, (the Reprinted Statutes of New Zealand), and these [were] available as and when they [were] printed”. This reprint took a similar approach to the Annual Bound Volume reprints but followed a different approach to the previous reprint projects, “[u]nlike 1931 and 1957 when the whole corpus of statute law had been reprinted, the new policy meant Acts were reprinted ‘steadily and progressively’”. In the foreword to the first volume the Attorney-General wrote:

The publication of these volumes will soon make the 1957 Reprint redundant. Such publication will continue to the point where every public Act of general application is available in a form that is not more than 10 years old. Once that situation is reached it will be maintained by a continuation of the cycle and the earlier volumes in this series will be replaced progressively. In addition Acts in common use that have been heavily amended will be reprinted as the occasion requires.

But the Law Commission notes that “[t]his intention was not fully realised, however, due to the volume of legislation and rate of amendment and insufficient resourcing”. The Reprinted Statutes of New Zealand produced “42 volumes and [reprinted] 805 Acts”. After 24 years—

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685 Adlam, above n 46, at 38.
686 Glue, above n 51, at 144.
688 Adlam, above n 46, at 51.
689 At 11.
690 Adlam, above n 46, at 51. See also McLay, above n 48, at iii.
691 McLay, above n 48, at iii.
692 Law Commission, above n 58, at 91. For example, “[t]he Education Act 1964 was last reprinted in the official statute book in 1976. There have been twenty-nine amendments to that Act since 1976”. Legislation Advisory Committee, above n 49, at 18.
693 Law Commission, above n 58, at 91.
694 Annual Report 2003, above n 137, at 35.
The last bound volume in the Reprinted Statutes of New Zealand Series (Volume 42) was published in early 2003. From now on, the PCO will publish individual pamphlet copies of reprints of Acts and Statutory Regulations.

The *Reprinted Statutes of New Zealand* series “was discontinued by the PCO in anticipation of the completion of the PAL project”. In the foreword to the final volume of the *Reprinted Statutes of New Zealand* it was stated:

The *Reprinted Statutes of New Zealand* series, which began in 1979, was intended to ensure the publication of every Public Act of general application in a form that was not more than 10 years old. Each reprinted Act has been published in pamphlet form as well as in the volume of the series. Modern technology now makes it possible for legislation to be made publicly available continuously in an up-to-date form. Acts and regulations with their amendments incorporated are able to be produced in printed and electronic form from computerised databases. These databases have been available from legal commercial publishers for some years. As a result of the Government’s Public Access to Legislation Project, up-to-date legislation will become available from a database owned and operated by the Parliamentary Counsel Office. This legislation will be available free via the internet. Reprints of individual Acts and regulations in printed form will be made available under a new publication policy. This new system for providing public access to legislation will replace the reprint series.

The private firm Brookers responded to the discontinuance of the *Reprinted Statutes of New Zealand* series by publishing their own series of reprints. The *Bound Reprinted Statutes* were first published in 2005: The reasoning for this move is explained in the company history:

The sudden realisation that reprinted statutes would no longer be available in bound volumes—instead appearing as a haphazard collection of reprints—was a horrifying prospect for Brookers. Without the appearance of a consolidated volume, either the ‘pamphlets’ would need to be annotated, or the original Act would require annotation. Either way, there would be an ever-increasing number of annotations to the bound volumes of legislation or to the slender pamphlets….Market research carried out by Brookers through customer interviews and meetings with Brookers’ Law Librarians Advisory Boards in Auckland and Wellington showed there was a widespread dissatisfaction with the new reprint policy. However as it was clear that the Parliamentary Counsel Office had no intention of changing its strategy, Brookers decided to publish its own volumes of reprinted statutes.

### 6 Individual reprints

The number of reprints of individual Acts has varied greatly. To take recent years as an example; in 2000 19 Acts were reprinted, in 2001 0 Acts were reprinted. In 2002 3 Acts were reprinted. In 2003 and again in 2004 11 Acts were reprinted. In 2005 21 Acts were reprinted. In 2006 39 Acts were reprinted. In 2007 35 Acts were reprinted. In 2008

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695 Law Commission, above n 58 at [6.15].
697 Adlam, above n 46, at 92.
14 Acts were reprinted. In 2009 36 Acts were reprinted. While in 2010 7 Acts were reprinted.

This lack of uniformity in the numbers of Reprints produced can be partly attributed to the establishment of the new Reprints unit and reprints policy. A new Reprints Unit will be responsible for the officialisation of the legislative database acquired from Brookers, the production of hard copy reprints of Acts and Statutory Regulations in accordance with a new reprints policy and annual reprints programme.

7 Annotations

The printing of Acts with amendments incorporated goes a long way to achieving the publication of Acts of Parliament. However, reprints (until the advent of the internet) were produced fairly slowly. Privately produced annotations that were published comparatively quickly subsequently satisfied the need for more prompt publication of legislation.

Significantly, this service has never been provided by the Government and it has never been provided for free. Annotation then, is not an aspect of promulgation of legislation but instead private publication of legislation. In New Zealand this private publication has for nearly 100 years been done by the legal publishing firms Brookers (now Thomson Reuters) and to a lesser extent Butterworths (now LexisNexis).

The problem of keeping statutes up to date can never be solved by Consolidation, as Sidey noted in 1932, “[i]t is our greatest trial that no work of consolidation can ever be final”. As soon as the 1908 Consolidation was printed it was out of date:

For the very first Session in which the Consolidated Statutes were produced there is an annual volume containing no fewer than fifty public Acts of which twenty-nine were amendments of the Consolidated Statutes of that year”.

John Friend, the founder of Brookers, developed a system for annotating the Consolidated Statutes and by 1909, “Friend found that he was being visited by other members of Wanganui’s legal profession who wanted to check that their version of the law hadn’t changed”. This system—

…used a combination of printed slips of paper- or ‘insets’ as they were very quickly known- manual erasers, and rubber stamps. The insets were pasted into the appropriate page of a statute and the imprint of a pre-made rubber stamp or a
manual marking were used to draw attention to the changes. A red line was ruled through any section or part which was repealed.

This system was designed to meet the objective—

…to focus firstly on alerting users of legislation to the fact that something has changed, and then to provide them with instant information on the actual changes. This… remained the key feature of the company’s annotation service.

In this way legislation that took the form of amendments was disseminated less through the publication of Annual Bound Volumes that the Government Printing Office printed, but more through the annotation of the Annual Bound Volumes by a private company.

The importance of the private company of Brookers in promulgating amendments is seen by the wide range of people and groups the company supplied with their annotation service:

The firm’s customers included lawyers throughout New Zealand, the Department of Justice, other Government departments, Crown Solicitors, District Law Societies, Public Trust Offices, borough and county councils, harbour boards, banks, electric power boards and public trust offices (sic)…The House of Representatives and law drafting office—however employed an official Annotator of Statutes—their statutes were too important to entrust to a commercial enterprise.

In 1929, Butterworths began its own annotation service and became a serious competitor for Brookers. However, this did not stop the development of a near monopoly on annotation services by Brookers and by the 1940s—

Brooker & Friend annotated the statutes of almost all government departments and counted 45 departments as customers by 1946. The government sector took around 31 per cent of all statutes annotations by 1951. The biggest was the Justice department, with sets of statutes located in most courthouses throughout the country. These made up about 11 per cent of all sets of statutes annotated. The Police was another important customer, with 5 per cent of all sets.

The final significant development to the system of annotation used by Brookers (for the purposes of this thesis) occurred “in 1988 when the flood of legislation pouring out of Parliament threatened to drown out the annotation business…[i]t was decided to move to twice yearly annotation cycles”. With the advent of legislation databases “[d]emand

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707 At 4.
708 “John Friend’s system established a cut-off date each year, usually at the end of the year and consistent with the annual bound volume of legislation published by the Government printer in the next year”; Adlam, above n 46, at 4.
709 Adlam, above n 46, at 12. The importance of this annotation service as a process of publication of legislation that took the form of amendments is also illustrated in an anecdote: “Stuart Brooker suffered a legal publisher’s nightmare when he was telephoned by the then President of the Court of Appeal, Sir Alexander Turner, in 1972: ‘He told me that he was discussing some legislation with his brother judges and they had noticed that they had different annotations. He then asked if I could go to the Court and tell him what was going on. So I went down there and I had to tell them that we had made a mistake. We checked all the judges’ books in the whole Court of Appeal and we found quite a few errors’”. Adlam, above n 46, at 51.
710 By the end of the 1930s only a few Government departments had not subscribed to the annotation service provided by Brookers. The Parliamentary Counsel Office was the last and finally subscribed to the service in 1996. Adlam, above n 46, at 19. Prior to 1996, the Parliamentary Counsel Office had its own staff manually annotate its hard copy statutes.
711 Adlam, above n 46, at 12.
712 At 32.
713 At 57.
for bound volume annotations…dropped steadily as electronically-searchable legislation became more assimilated, but the annotations business had continued to defy the gloomier predictions of its demise”.\(^714\)

8 Bills

Despite there being no statutory requirement to print and publish bills, systems had been developed to ensure their publication. Publication of a bill depended on it being formally brought before Parliament; “Bills are not made public until they have been introduced into the House”.\(^715\) Once the “approval to make the Bill publicly available through the Government Bookshop and mail order subscribers [was] given” —\(^716\)

[the Government Printer [decided] how many copies should be printed. The quantity is determined on the basis of history and potential public interest in the new legislation. Usually within a week (or two) of introduction to the House the Bill [was] available from all Government Bookshops.

The Bills [were] also available “to mail order subscribers. This subscription order facility [allowed] individuals or organisations to receive copies of any Bill as it [became] available, through the mail”.\(^717\) This system was not ideal as—\(^718\)

…[o]n many occasions, time delays [occurred] between introduction and having the Bill available for the interested members of the public. Many people have overcome this by use of informal means, such as direct access to their MP.

9 Copies of Bills and Acts in Māori

Prior to 1865, the Māori language was not used in Government publications except for the “occasional proclamation by the Governor”.\(^719\) Only some legislation has been printed in Māori in New Zealand. Some Acts and Bills that were perceived as specifically relating to Māori were circulated in Māori communities from 1858 to 1910. The first Acts to be printed in Māori—\(^720\)

were the Native Districts Regulation Act 1858 and the Native Circuit Courts Act 1858 which were issued together in pamphlet form as well as being explained in the Maori Messenger of 15 September 1858.

In 1865—\(^721\)

[d]ue to Fitzgerald… the Kahiti o Niu Tirenī was started as a vehicle for informing Māori of the effects of the legislation affecting them. It was to be a messenger (karere) for the Māori people as the New Zealand Gazette was for the pakeha and the vehicle for all Government communications.

\(^{714}\) At 93.
\(^{715}\) PriceWaterhouse, above n 658 at 9.
\(^{716}\) At 9.
\(^{717}\) At 11.
\(^{718}\) At 9.
\(^{719}\) Parkinson, above n 499, at 3.
\(^{720}\) Parkinson, above n 499, at 4. Prior to this a large number of Acts and ordinances affecting the Māori population had been enacted but none had been printed in Māori “and the Government appears not to have printed any explanations in Māori either”. Parkinson, above n 499, at 4.
\(^{721}\) Parkinson, above n 499, at 8.
While there was a requirement under Standing Orders of both the House and the Legislative Council to publish Bills in Māori from the mid-1860s in reality, “no Bills at all were printed in Māori until 1872”. In 1868 Mete Kingi Paetahi MP said in a speech to the House “There is one thing I am dark about in this Assembly, although the words spoken by the Assembly are very good…. The papers are only printed in your own language, your words are not sent to the Māori people”. The first Bill printed in Māori was the Native Councils Bill 1872. Several volumes of legislation were also published in Māori.

D Points of access

I Available for purchase

Copies of the Statute Book in hard copy have always been expensive. After the 1908 Consolidation, when the New Zealand Statute Book was (albeit briefly) reduced to about 3000 pages in 5 volumes, the price was still approximately ten guineas. Prior to 1908, the New Zealand Statute Book would have cost about £52.

As to where Acts could be purchased, by the 1980s, Government Bookshops were located in “Wellington…, Auckland, Hamilton, Christchurch and Dunedin, with a shop presence in Palmerston North”. Prior to the existence of the internet, much higher dependence would have been placed on the Government bookshops by non-subscribers to legislation than is placed today. Despite this, the Government Bookshops did not always stock Acts:

[Staff in the Government Bookshops] feel frustrated about not being able to help customers when they know a bill or Act has been introduced or passed, and it hasn’t arrived in stock. This happens on average “once a month when the House is sitting”.

From the late 1920s, subscription to copies of legislation also had been a significant way in which legislation was purchased:

…[in the 1920s] the Government printer was not performing particularly quickly… Lawyers around New Zealand were required to place individual orders for new Acts as they became available and were unable to place a standing order.

Following a proposal from Butterworths the Government Printing Office began allowing “legislation users to subscribe to individual Acts and bound volumes…For 1928 the rate was set at £2-17-6 for a complete set of loose Acts and one annual volume bound

722 Parkinson, above n 499, at 13.
723 (13 August 1868) NZPD 466.
724 See Parkinson, above n 499, at 21.
725 For example, Bills and Acts in Māori 1880 (Government Printer, 1880) and various collections of legislation such as Acts Affecting Native Lands, Etc. (In English and Māori), Passed by the General Assembly, Session 1892, 1893, 1897, 1898, 1899 (George Didsbury), A Mackay Compendium of Official Documents relative to Native Affairs in the South Island (Government Printer, Wellington, 1871).
726 “Consolidating the Laws”, above n 674, at 4.
727 At 4.
728 PriceWaterhouse, above n 658, at 15.
729 At 16.
730 Adlam, above n 46, at 21.
However, delays in printing often occurred. Acts were subsequently not available for purchase, either through subscription or through the Government Bookshops.

2 The Depository Library Scheme

The Depository Library Scheme was established in 1971. Until recently, this scheme provided; “the public with free access to government publications through key public libraries scattered around the country”. The Scheme was, until, 1990, the Government Printing Office’s responsibility. With the sale of the Government Printing Office the responsibility of the scheme passed to the National Library. In 1996, research indicated that at many public libraries the Annual Bound Volumes, Reprinted Statutes of New Zealand and pamphlet Acts and Individual Reprints of Acts were used daily. It is somewhat difficult to ascertain what has happened to the scheme. Apparently, the National Library no longer administers the scheme:

With the introduction of electronic publications, libraries access the publications online and so no longer require a paper version. Some libraries may still have kept their name on the mailing list for new publications but this is no longer administered by the National Library and would be a private agreement between the publisher and the library. I assume this happened progressively from around 2004 as more of this type of material became available online.

Major public libraries in New Zealand continue to be supplied with the Annual Bound Volumes, the pamphlet copies of Acts, individual reprinted Acts and copies of Bills free of charge directly by Legislation Direct.

Legislation Direct supplies these copies of statutes at the request of the Parliamentary Counsel Office to public libraries (the Parliamentary Counsel Office supposedly then pays Legislation Direct for them).

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731 At 21.
732 Adlam, above n 46, at 56. For more on the subscription service at this time see PriceWaterhouse, above n 658, at 17–19.
733 Hernon and Chalmers, above n 309, at 65. It is unknown if and how public libraries received hard copies of legislation prior to 1971. Although it was a statutory requirement that the publisher of every book printed in New Zealand, which could well have included volumes of statutes, had to deposit, at their own expense, three copies (originally two) to the National Library within 30 days of publication. See the Copyright Act 1962, s 64 and the National Library Act 1965 s 30A. See also the National Library of New Zealand (Te Puna Matauranga o Aotearoa) Act 2003, ss 41 and 42.
734 Hernon and Chalmers, above n 309, at 66.
735 At 65.
736 “With the impending sale of the Government Printing Office, in 1989, to the private sector, the responsibility for administering the Scheme was transferred to the National Library”. Hernon and Chalmers, above n 309, at 66.
737 Hernon and Chalmers, above n 309, at 72.
738 Email from Jenni Chrisstoffels (Research librarian Alexander Turnbull Library National Library of New Zealand) to Christopher Gullidge regarding the Depository Library Scheme (8 October 2011). See Appendix Two.
739 Interview with Anne Tuck, Dunedin Public Library, (Christopher Gullidge, 7 December 2011).
740 Jenkins, above n 603.
the cost of this (as far as can be ascertained) in any of the Annual Reports of the Parliamentary Counsel Office from 2002-2011.\footnote{See the Annual Reports of the Parliamentary Counsel Office from 2002–2011. Parliamentary Counsel Office Annual Report 2002, above n 281, to Annual Report 2011, above n 108.}
Part Six: Pitfalls and Possibilities

Conclusion

There is nothing to suggest that promulgation as it now stands is in its ultimate stage of development. It is possible that publication through hard copy could disappear entirely in the future. The production of hard copies of statutes could fade away, suddenly or incrementally, just as the production of manuscripts of statutes did after the advent of the printing press. The demise of hard copy promulgation, as already shown by this thesis, would not be positive.

Copies of statutes can be fragile, yet printed books are no less delicate than manuscripts. An electronic copy of an Act accessed via the internet is however, more delicate than a hard copy of the same Act. One power outage, one internet fault, one website failure and the electronic publication of statutes not only stops, it recedes.

Electronic publication should not be discounted however. I only caution that the advantages of electronic promulgation should not blind us to its disadvantages while the disadvantages of hard copy promulgation should not blind us to its advantages. This short-sightedness, while currently common, is not prudent.

The existence of two promulgative schemes, one based on hard copy and retail, the other free and based on electronic copy, complement each other well. On one side of the equation, the slow and expensive, yet sturdy hard copies on one side contribute their concrete character to promulgation. On the other, the quick and cheap yet fragile electronic copies contribute to availability through promulgation.

Unfortunately, both these schemes suffer from the same weakness. They create only points of access to the Statute Book—points of access that enable the individual only to access portions of the Statute Book. Given the length of the Statute Book, at a time when technology was less advanced, promulgation through the then-created points of access was appropriate. Yet should the established points of access close, the whole concept of the Statute Book disappears.

But see Judith Keating “Electronic publication of New Brunswick legislation—yesterday, today and tomorrow” (paper presented to the Commonwealth Association of Legislative Council, London, September 2005). New Brunswick provides an example of the growth of electronic publication of legislation and the corresponding decline of hard copy publication. Also, it could be argued that if Acts were only published electronically people could still print them off, so publication of hard copy Acts would, in that limited sense, still occur.

It took manuscripts several hundred years to fade away after the advent of the printing press. For the protracted demise of manuscript, along with the coexistence of print and manuscript in legal materials, see David J Harvey “The law Emprynted and Englysshed: The Printing Press as an Agent of Change in Law and Legal Culture 1475–1642” (PHD Thesis University of Auckland, 2012) at Chs 5, 6 and 7.

Or perhaps more accurately, printed books and manuscripts are of an equal scale of fragility.

Imagine a process that resulted in every library, with no exception, in the country being supplied with hard copies of the Statute Book. When this project is only three quarters completed (so only three quarters of the libraries have copies of the Statute Book), a fire destroys the factory where these copies are printed and so no more can be supplied. Promulgation stops, but it does not recede. Three quarters of the libraries still have copies. Now, imagine a project that resulted in every library, with no exception, being provided with the equipment to access the NZL. After three quarters of the libraries have been provided with equipment the New Zealand Legislation Website fails. Promulgation stops, but unlike the former scenario three quarters of the libraries do not still have copies of the Statute Book, promulgation has receded.

The sole exception to this retail scheme is the successor to the Depository Library Scheme.

The only copies of the Statute Book would be the Royal Assent copies of statutes, the private databases of legislation maintained by legal publishers, the hard copies of Acts already purchased by individuals and the electronic copies of Acts already downloaded by individuals.
Now information technology has advanced to a level where promulgation through points of access need not be, and should not be, the only approach to promulgation of the Statute Book. New technology should result in cumulative rather than substitutive promulagative schemes. Production of Annual Acts, New Zealand Acts as enacted (1841–2007) and Reprinted Acts flash drives could result in a third type of promulagative scheme, one that provided individuals with their own copies of the Statute Book.

A less radical, yet possibly more realistic, approach would be for the NZL to allow individuals to download PDF documents that contained the complete New Zealand Acts as enacted (1841–2007), Reprinted Acts and Annual Acts. This would still rely on a point of access, the NZL, but it would allow for copies of the Statute Book, in its entirety, to be stored electronically by any individual. Should this point of access falter and fail the Statute Book would remain jurisprudentially viable. Wherever individuals had downloaded these documents, copies of the Statute Book would be diffused and thereby electronically backed up.

The NZL is beset by another problem, beyond the weakness that currently afflicts both schemes; many of the electronic copies of statutes on the NZL have an ambiguous level of authenticity. In the near future, this problem is likely to be resolved. The completion of the officialisation process, the enactment of the Legislation Bill 2010, and the consequent regulations when made, as empowered under clause 22 of the enacted Bill, should resolve, what is at the moment, a contentious issue.

Promulgation in New Zealand, to a large degree, is shaped by the constant and sustained importance of textual amendment in the legislative process. So long as the rigorous implementation of textual amendment continues, the need for reprinting remains. Major projects of consolidation could modify this, but probably only briefly. It is, after all, “our greatest trial that no work of consolidation can ever be final”.

Today, more is expected of promulgation. Promulgation of legislation is expected to be consistently done both widely and promptly. Heightened expectations help to mitigate the likelihood of a failure to meet the formal requirements to promulgate. When a failure does occur however, these expectations mean that the failure will be felt more keenly. These heightened expectations may achieve through Common Law or Constitutional Convention what jurisprudence in its concern for legal validity has so far been obliged to leave untried; namely that any failure to promulgate will be, or can be equated to a failure to make law.

748 Sidey, above n 676, at 302.
Excursus One: The promulgation of primary legislation; a task for which branch of government?

Is the promulgation of the text of primary legislation in New Zealand the responsibility of Parliament or the Executive? In reality, which of these two branches of government actually promulgates primary legislation?

In New Zealand, it is the Parliamentary Counsel Office that is the body responsible for the promulgation, as well as drafting the majority of New Zealand’s primary legislation. In reality, it is also the Parliamentary Counsel Office that manages the promulgation of primary legislation. The status then, of the Parliamentary Counsel Office, as a part of the Executive or a part of Parliament, is the answer to the above questions. Unfortunately, the status of the Parliamentary Counsel Office is not altogether certain.

Establishment of the Parliamentary Counsel Office

The predecessor of the Parliamentary Counsel Office from 1910-1920 was the Law Drafting Office, which was a branch of the Crown Law Office and consequently a part of the executive. The Statutes Drafting and Compilation Act 1920 set up the Parliamentary Counsel Office as; “an Office of Parliament under the control of the Attorney-General”. It is somewhat unusual to have a Parliamentary Counsel Office set up by statute, as “most overseas PCO’s have been established under the prerogative rather than by statute”.

Promulgation; the task of the Executive or of Parliament?

The Law Commission has long argued that in New Zealand promulgation is the responsibility of the Executive:

…the present law [recognises], that the duty to publish the law lies with the Executive. Parliament makes and empowers the making of legislation but it is the responsibility of the Executive-in the end the Ministers- to ensure that it is made known.

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749 See Chapter Nine of this thesis and the Acts and Regulations Publication Act 1989 for the responsibilities of the Parliamentary Counsel Office. By reason of changing technology and restructuring since 1990 the environment in which the Parliamentary Counsel Office operates is very fluid, making the exact nature of the Parliamentary Counsel Office a dynamic topic.
750 There are several types of statutes that the Parliamentary Counsel Office does not draft; including statutes drafted by the Inland Revenue Department (see the Inland Revenue Department (Drafting) Order 1995) and Acts that originally were introduced as Members Bills, although “[t]he PCO also drafts Members’ Bills if directed to do so by the Attorney-General”; Parliamentary Counsel Office, above n 236.
752 For the history of legislative drafting in New Zealand prior to 1910 see also Law Commission NZLC R107, above n 550, at 30.
753 Statutes Drafting and Compilation Act 1920, ss 2(1), 2(2). Originally the Parliamentary Counsel Office was called the Law Drafting Office. The renaming occurred in 1973; see the Statutes Drafting and Compilation Amendment Act 1973.
754 Law Commission NZLC R107, above n 550, at 34.
755 Law Commission, above n 517, at 11.
However, a former parliamentary counsel writes, “[s]ince 1920 parliamentary counsel in New Zealand have viewed their principal responsibility as officers of parliament serving parliament”.  

Initially, it was “clear that PCO was to be seen as a true office of Parliament”. The Law Commission states that, “[t]oday things have moved on” and that now “it is difficult (although not impossible) to assert that PCO has the primary function of an office of Parliament”. The status of the Parliamentary Counsel Office as an Office of Parliament places it in an anomalous position. An officer of Parliament is defined as—

...[an appointment] to provide a check on the arbitrary use of power by the executive... [an officer] must only be discharging functions that the House of Representatives itself, if it so wished, might carry out...[and] each officer of Parliament should be created in separate legislation principally devoted to that office.

Promulgation need not be the responsibility of the Executive. A prime example of this is the Legislative Counsel of Nova Scotia, the equivalent of New Zealand’s Parliamentary Counsel Office. The Legislative Counsel’s responsibilities are “[t]he preparation and publication of bills and statutes of the House of Assembly”. Significantly, “the Office of the Legislative Counsel is under the direction of the Chief Legislative Counsel who is responsible to the Speaker of the House of Assembly”.

The New Zealand Law Commission states that;

...the question of where the drafting office is located (that is, within the executive or attached to the legislature) is closely linked to the question of to whom the office reports.

Under that reasoning the Legislative Counsel of Nova Scotia is part of Parliament and not the Executive. Consequently, it is Parliament who promulgates legislation in Nova Scotia rather than the Executive.

It is likely that in New Zealand, despite the Parliamentary Counsel Office being originally established as an Office of Parliament, in practice it is the Executive who promulgates primary legislation. The prominent factor that suggests that the Parliamentary

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757 Law Commission NZLC R107, above n 550, at [4.3]. See also Law Commission NZLC R107, above n 550, at 12: “In moving the second reading in the Legislative Council the Attorney-General Sir Francis Bell said it was desirable that ‘the law drafting office should be made an office of Parliament and should be removed from the public service’. This had the effect that the Legislative Department (as it then was) became responsible for the payment of the salaries of the staff of PCO, and for the provision of accommodation for them. Indeed, the drafters were immediately transferred from the Old Government Building to Parliament Buildings. It is clear that PCO was to be seen as a true office of Parliament. Sir Francis Bell said that staff other than principal officers ‘will be appointed by the Speakers of both Houses, but upon the recommendation of the Prime Minister…. Parliament now will have its own officers, who will be in the Parliamentary Buildings’.”
758 Law Commission NZLC R107, above n 550, at [4.4]-[4.5].
760 House of Assembly: Office of the Legislative Counsel <nslegislature.ca/legc/index.htm>.
761 Above n 760.
762 Law Commission NZLC R107, above n 550, at 35.
Counsel Office is part of the Executive is that it “is under the control of the Attorney-General and takes directions from ministers”. The Law Commission states that “[the Parliamentary Counsel Office] is controlled by the Attorney-General in his or her role as the senior Law Officer of the Crown”. As noted above the location of a drafting office as either part of the executive or parliament is closely linked to whom the office reports. In New Zealand, it seems that it is the Executive that in practice promulgates and is responsible for the promulgation of primary legislation through the Parliamentary Counsel Office.

763 Law Commission, above n 58, at 13. However, the role of the Attorney-General has also been described thus: “The detachment of the Attorney-General in England from the Executive is, from the Constitutional aspect, entirely correct...To treat the Attorney-General as a sinecure or as an unnecessary adjunct to the Executive Government is a mere puerility”. “The Office of the Attorney-General” [1934] NZLJ 81 at 83. This suggests that a categorisation of the Parliamentary Counsel Office being a part of the executive based on the Attorney-General being part of the executive may not be as certain as the Law Commission suggests.

764 For an in-depth discussion about the Parliamentary Counsel Office as part of the executive see Law Commission NZLC R107, above n 550, at 10-14.

765 To this end the Law Commission has recommended that the “…PCO should no longer be described in the legislation as an office of Parliament”. Law Commission NZLC R107, above n 550, at 28. This has been included in the Legislation Bill, cl 57(1): “The PCO continues as an instrument of the Crown and a separate statutory office under the Attorney-General's control”.

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Excursus Two: The Government Printing Office

The establishment of the Government Printing Office

Since the 1840s, promulgation had depended on a contracted Government Printer. In 1864, the New Zealand Government Printing Office was established.\(^{766}\) This followed several investigations into the feasibility of a State owned Printing Office. In 1855, a Committee appointed by the House of Representatives reported:\(^{767}\)

…that “a great saving” in the expense of printing would be effected and “greater regularity in the performance of the work attained” by the establishment of a Government Printing Office.

Again, in 1858 the idea of having a Government Printing Office was investigated.\(^{768}\) On this occasion the Library and Printing Committee of the House found “the work was performed by the contractors ‘in a satisfactory manner and generally speaking with tolerable punctuality and despatch’”.\(^{769}\) Although the Committee did note that “[i]t felt that the ‘present prices’ were too high [after an increase of about 100 per cent in the contract rates between 1856 and 1858]”.\(^{770}\)

In 1861, the issue was again investigated and a board reported in 1862 that a Government Printing Office should be established “not only as a matter of economy, but as a matter of convenience in expediting the daily work of the General Assembly during Session, and the general ordinary work of the Government”. A Select Committee examined this report and stated:\(^{771}\)

By the establishment of a Government Press two objects have been stated as likely to be gained. First a reduction of expense in the general printing of the Government during the year. Secondly an increase of expedition and accuracy in the execution of the Sessional printing.

The Government acted on the recommendations of this report and the Government Printing Office was subsequently established.\(^{772}\)

The Government Printing Office

From the beginning of its existence the Government Printing Office was the organisation that printed hard copies of statutes. However, the publications of the Government Printing Office were never, even from its establishment, solely limited to Acts of Parliament. The first annual report of the Government Printing Office in 1868 stated that it printed:\(^{773}\)

…the year’s statutes (1867), the Journals of the House of Representatives and the Legislative Council, the appendix to the Journals of the House of Representatives and the index to these Appendices from 1860-1866; the Parliamentary Debates and the New Zealand Government Gazette; Kahiti (the

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\(^{766}\) Mark Perry, above n , 503, at 495.
\(^{767}\) Glue, above n 51, at 29.
\(^{768}\) At 29.
\(^{769}\) At 29.
\(^{770}\) At 29.
\(^{771}\) At 31.
\(^{772}\) At 31.
\(^{773}\) At 42.
Maori Gazette); regulations, statistics, standing orders on Private Bills, a catalogue of the General Assembly Library; a *Handy Book for Coroners*, geological reports, laws for steam vessels, harbour and quarantine regulations, regulations for the armed constabulary.

The publication of Statutes depended on the smooth operation of the Government Printing Office. On two occasions the Government Printing Office was affected by industrial action in 1871 and 1972.\(^{774}\)

By the time the Government Printing Office was sold the number of publications the office printed had grown considerably, including “telephone directories, maps, school journals and statistical reports” as well as various books and monographs.\(^{775}\)

**The sale of the Government Printing Office**

In such times the Government service is inevitably the target for suggested economies, no matter how unp racticable they may be. The Government Printing Office received its share of criticism.\(^{776}\)

In 1981, the Government Printing Office was restructured as a notional company but remained a government department.\(^{777}\) An announcement was made on 9 June 1988 that the Government Printing Office was to be sold.\(^{778}\)

The idea to sell the Government Printing Office was consistent with the policy of the Fourth Labour Government of selling government assets (such as the railways, telecommunications, insurance, state banks and the state airline) to reduce government debt. The sale of the Government Printing Office was the first sale of a government department.\(^{779}\) By 1991, The Government Printing Office had been sold to Rank Group Ltd for [approximately] $23 million.\(^{780}\) The total cost of the sale was $11,988,140 which meant the proceeds from the sale of the Government Printing Office business were 9,684,860.\(^{781}\)

The “Principles and Procedures”\(^{782}\) for the sale of government businesses stated the sales criteria as:

a) The Government must receive more from the sale of the business than it would from retaining ownership, bearing in mind the risks attached to continued ownership;

b) The sale of a particular business must not impede the Government’s economic goals and must contribute to them;

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\(^{775}\) GP Print Ltd “Submission to the Commerce Committee Copyright Bill 1994, “Crown Copyright” at 1.

\(^{776}\) Glue writing about the Government Printing Office during the Great Depression in Glue above n 51, at 107.

\(^{777}\) Perry, above n 766, at 495

\(^{778}\) At 495


\(^{780}\) “Cabinet approved the sale of the GPO for $23 million at the end of December 1989. However the sale was not finally concluded until October 1990, and even then there were still some issues outstanding”. Perry, above n 503, at 495.

\(^{781}\) Government Administration Committee, above n 779, at 27. The minority report strongly disputes this figure saying “The minority believes it is absurd to leave out of the proceeds of sale the sale of the GPO building to the National Archives. The minority therefore states that $33.6 million is the correct figure for the sale proceeds” At Appendix H 63.

\(^{782}\) Set out in the Budget of July 1988. See Perry, above n 503, at 495
c) The sale of a particular business must not impede the Government’s social goals but must contribute to them.

As Perry notes, “[w]ether the sale of the GPO satisfied any of these criteria is debatable”.\footnote{783 Perry, above n 503, at 496.}
Appendices

Appendix One: Commencement and promulgation dates for Acts of Parliament in 2011

The table below shows the Royal assent dates, commencement dates and publication dates for the statutes enacted in 2011 where publication on the New Zealand Legislation Website occurred after (with two exceptions) commencement (in whole or in part) of these Acts. These Acts all came into force, in whole or in part, on the day after the date of assent.

These dates and times are based on unofficial “tweets” published on Twitter. RSS feeds for the New Zealand Legislation Website are a more accurate indication of the time of publication and are more official than tweets.784 The use of tweets rather than RSS feeds to establish these times of publication is based on necessity; there being no accessible record of RSS feed times and dates.

Despite these limitations, tweets are still a fairly good indication of the date and time of publication of new Acts on the New Zealand Legislation Website. The individual who publishes these tweets “uses the web feeds to generate the data, so in terms of timing, the web feeds come first”. 785 In response to the query; “[a]re your tweets a good indication of the date and time a new Act appears on the NZLW? Do they lag behind the RSS feeds much”? 786 the individual responded that; “[the tweets are a] relatively good indicator, from memory polling/lag is roughly every ten minutes. Feeds will always be slightly faster”. 787

It can be inferred then, that the times of these tweets indicates the publication times of new Acts on the New Zealand Legislation Website with a margin of error of approximately ten minutes.

The other limitation of the below table is that the twitter account used to generate these publication dates only extended back to the 17 May 2011. So the publication date of Acts before the 17 of May 2011 is unknown. These 14 Acts are not included in this table. Below this table is a list of all the Acts whose publication date is known and that did not lag behind commencement because commencement was at some point in the future after the day after the date of assent.

784 The tweets are published by a “private person”. Email from Jenni Chrisstoffels (Research librarian Alexander Turnbull Library National Library of New Zealand) to Christopher Gullidge regarding the Depository Library Scheme (8 October 2011). See Appendix Two.
785 Above n 784.
786 Tweet by the author.
787 @cesthers Tweet.
Dates and times for enactment, commencement and publication of Acts that
commenced prior to publication in 2011.

<table>
<thead>
<tr>
<th>Act</th>
<th>No</th>
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<th>Commencement</th>
<th>Publication</th>
<th>Time lapse between commencement and publication</th>
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<td>Adoption Amendment Act 2011</td>
<td>No 60</td>
<td>16 August 2011</td>
<td>Day after (12:01am 17 August)</td>
<td>12:04pm 18 August 2011</td>
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<td>Appropriation (2011/12 Estimates) Act 2011</td>
<td>No 55</td>
<td>12 August 2011</td>
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<td>No 21</td>
<td>19 May 2011</td>
<td>Various: Date appointed Default 1 July 2012</td>
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<td>Children, Young Persons, and Their Families Amendment Act 2011</td>
<td>No 33</td>
<td>22 July 2011</td>
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<td>No 29</td>
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<td>Duties of Statutory Officers (Census and Other Remedial Provisions) Act 2011</td>
<td>64</td>
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<td>17 May 2011</td>
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<td>38</td>
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<td>56</td>
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<td>19 September 2011</td>
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<td>69</td>
<td>12 September 2011</td>
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<td>No 28</td>
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<td>No 65</td>
<td>29 August 2011</td>
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<td>No 45</td>
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<td>No 98</td>
<td>17 October 2011</td>
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<td>No 53</td>
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<td>No 48</td>
<td>22 July 2011</td>
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<td>No 32</td>
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<td>Earthquake Measures) Act 2011</td>
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<td>Whanganui Iwi (Whanganui (Kaitoke) Prison and Northern Part of Whanganui Forest) On-account Settlement Act 2011</td>
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<td>22 July 2011</td>
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**Acts published on New Zealand Legislation Website before commencement where commencement was after the day after assent**

Email from Fiona Jenkins (Customer Service Representative of Legislation Direct) to Christopher Gullidge regarding the Annual Bound Volumes and the supply of copies of statutes to public libraries by Legislation Direct (18 October 2010).

Good morning Christopher

Yes we do have the Bound Statutes and regulations. They are now $108.36 inc GST each. Our website only shows legislation that has come through since 2003 - it is very basic.

We supply public libraries at the request of the Parliamentary Counsel Office and they are supplied one set free of charge. In the past the practice may have been a statutory requirement because of access. I don't really know to be honest. Now people can access everything online if they wish.

We used to be a government department as you probably know - this will have all come from that era.
I hope this goes some way towards helping you.
Kind regards
Fiona Jenkins
Customer Service Representative

Email from Jenni Chrisstoffels (Research librarian Alexander Turnbull Library National Library of New Zealand) to Christopher Gullidge regarding the Depository Library Scheme (8 October 2011).

Dear Christopher Gullidge
Thank you for your enquiry. I am sorry for the delay in replying but I needed to confirm the information with one of our senior managers first.

With the introduction of electronic publications, libraries access the publications online and so no longer require a paper version. Some libraries may still have kept their name on the mailing list for new publications but this is no longer administered by the National Library and would be a private agreement [sic] between the publisher and the library. I assume this happened progressively [sic] from around 2004 as more of this type of material became available online [sic]

The report of the Ministerial Working Party is quoted in the 1996 research report but I have been unable to find any trace of it. I assume we must have one in our files and so will continue to try to track down a copy.

All current Acts are available online. The National Library continues to receive loose Acts, bound volumes and reprinted statutes in paper format as a private arrangement between the publisher and the Library. I don't know if other libraries also get these in paper format. The National Library continues to use the Brooker's annotation service for our bound volumes
of Acts. I am not aware that we have ever received the Green assent copies but we do get the three versions of the Bills.

Regards

Jenni Chrisstoffels

Email from Gillian McIlraith (Communications Advisor of the Parliamentary Counsel Office) to Christopher Gullidge regarding the use of twitter and RSS feeds to keep updated about new legislation being posted on the New Zealand Legislation Website (11 April 2012).

Hi Christopher
The web feeds will be quicker, though possibly not by much...
We (the Parliamentary Counsel Office) don't provide the twitter feed - it's actually been put together by a private person, who's done a great job but obviously we can't make any statements about its reliability or maintenance. As I understand it, it uses the web feeds to generate the data, so in terms of timing, the web feeds come first.
One advantage of the web feeds is that you can customise them to notify you of the specific types of legislation you are interested in.

Kind regards
Gillian McIlraith
Communications Adviser

Tweet by cesther 2:26 pm 23 Apr 2012 to chris g @sheeplaw @cesther in response to “Are your tweets a good indication of the date and time a new Act appears on the NZLW? Do they lag behind the RSS feeds much?”2:18pm 23 April 2012

@sheeplaw relatively good indicator, from memory polling/lag is roughly every ten minutes. Feeds will always be slightly faster.
Appendix Three: Recent developments regarding the Legislation Bill 2010

The Attorney-General has stated, noting the possibility of opposition, that the Legislation Bill 2010 may be withdrawn and combined with The Regulatory Standards Bill 2011. The situation is set out in the Report of the Justice and Electoral Committee 2012/13 Estimates for Vote Parliamentary Counsel (20 July 2012). The recommendation of this report is reproduced below—

**Recommendation**
The Justice and Electoral Committee recommends that the appropriations for the year ending 30 June 2013 for Vote Parliamentary Counsel as set out in Parliamentary Paper B.5, administered by the Parliamentary Counsel Office, be accepted.

**Introduction**
The Attorney-General, Hon Christopher Finlayson, is responsible for the appropriations within Vote Parliamentary Counsel, which is administered by the Parliamentary Counsel Office. The total appropriations sought for Vote Parliamentary Counsel for 2012/13 amount to $23.026 million. This represents a decrease of $1.420 million from the estimated actual expenditure in 2011/12. The change is largely explained by changes in capital expenditure, with the phasing of expenditure associated with the development of the New Zealand Legislation system.

**Quality of work**
The Attorney-General had no issues to bring to our attention, other than to formally acknowledge the consistently high quality of work produced by the office. He considers its staff to be the best statute drafters in the world. We are similarly satisfied with the performance of the office.

**Secondment of Chief Parliamentary Counsel**
The Chief Parliamentary Counsel, Dr David Noble, is on a two-year secondment to the United Kingdom. Bill Moore is acting Chief Parliamentary Counsel in his absence. The Attorney-General reassured us that this arrangement was not problematic and was beneficial to both jurisdictions. However, if Dr Noble does not return in September as planned, the Attorney-General will review the arrangement. We will follow this matter with interest.

**Legislation Bill**
We asked the Attorney-General for an update on the Legislation Bill, currently awaiting its second reading in the House. This bill seeks to update and consolidate the law relating to
legislation (publication, availability, reprinting, and revision) and provide a proper statutory base for the work of the Parliamentary Counsel Office. The Attorney-General told us that he is considering withdrawing this bill and combining it with the ACT-Party-initiated Regulatory Standards Bill, incorporating various recommendations from the Law Commission’s report on the Interpretation Act 1999. We are concerned that there may be opposition to this move, as the Regulatory Standards Bill is perceived by some as too ideologically driven to create sustainable legislation. The Attorney-General acknowledged that it would be undesirable to have ideologically-based regulatory standards, which would be subject to amendment under successive governments. We will continue to follow this matter with interest.
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