



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

BRIEFING PAPER

FOR THE MINISTER RESPONSIBLE

FOR THE LAW COMMISSION

DECEMBER 2011

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A. Summary

1. This briefing paper outlines why the Law Commission exists, what it does, introduces the Commissioners, and describes the Commission's current activities. It also identifies those issues that would benefit from early consideration by government, namely:
 - Law Commission reports awaiting Cabinet consideration;
 - Revival of other Parliamentary business; and
 - Appointment of new Commissioners.

2. It is envisaged the Minister may require more detailed briefing on aspects of the Commission's work. Some of the detail is contained in Appendices to this paper. The Commission has a large number of projects and the features of each can be dealt with only briefly in a paper of this sort. The Commission stands ready to brief the Minister in detail on any aspects of its work whenever and in whatever depth is required.

B. Introduction to the Law Commission

What the Law Commission does

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

the Law Commission “... is the statutory equivalent of a semi-permanent Royal Commission with a roving function ...”.¹

6. In fulfilling its statutory functions and responsibilities, the Commission provides legal advice to the Minister, and to public sector agencies as required, through its three services (outputs):
 - **Legal Advice: Law Reform** through which it leads and promotes debate on, and makes recommendations for the reform of current law, with this focus reflected in a rolling 3-5 year law reform work programme;
 - **Legal Advice: Quality of Legislation** through which it promotes and supports standards in the development of new legislation through the Legislation Advisory Committee and the Legislation Design Committee, and delivers a broader advisory function to the Government; and
 - **Legal Advice: Law Reform Implementation** through which it supports the legislative process in the implementation of law reform recommendations. Under this output it also monitors decisions and actions taken on the basis of, or informed by, its law reform reports, where it has a statutory obligation and/or where it is requested to do so by the Minister.
7. The Ministry of Justice is authorised by the Minister to be the monitoring department in respect of the Commission. The Ministry administers the Output Agreement between the Minister and the Commission, and monitors the Commission’s performance for this purpose.

¹ Sir Ivor Richardson; “*Commissions of Inquiry*” (1989) 7 Otago LR3.

The Value and Contribution of the Law Commission

Background

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

Current perspective

12. The Commission's services have been under increasing demand in recent years, both from Ministers and from government agencies. The Commission, whilst retaining its necessary independence from direct governmental control, is now more integrated into the policy and legislative framework. As a result, its output is now more likely to be acted upon and to contribute in a more immediate way to government outcomes.
13. The Commission has had as its Commissioners highly experienced and skilled lawyers from the judiciary, the public sector, the private sector, and the universities. The Commission's research and legal staff are also highly

qualified experts in their own right. The Commission therefore has significant and developed legal expertise in a number of areas that various parts of government are keen to tap into. These areas include:

- Criminal law, criminal procedure, and criminology;
- Commercial law
- Constitutional law, administrative law, and public law generally;
- Contract and tort law;
- Media law;
- Statute law, statutory interpretation, and legislative drafting;
- Trusts; and
- International law.

14. In addition to the quality and calibre of Commission staff, the increasing demands on the Commission recognise that the Commission is well-placed to provide high quality law reform advice that cannot adequately be provided elsewhere in the government sector. That need particularly arises in relation to areas of law reform where:

- (a) Issues are apolitical and require a long-term and substantial law reform effort that would be unlikely to receive sufficient priority or resources to be done within a government agency. Examples on the Commission's current work programme include the review of the law of trusts, the review of the Incorporated Societies Act 1908, and the review of the Judicature Act 1908 and consolidation of Courts legislation.
- (b) Issues straddle departmental boundaries or give rise to significant differences of views or interests between agencies, so that it is best for the matter to be considered by an independent agency. Current examples include our review of the law relating to civil penalties, and the review of the Official Information Act 1982, which is a fundamental piece of legislation providing a mechanism for citizens to access the volumes of information held by government.
- (c) Issues require public consultation or a public debate that can most effectively be undertaken through proposals or discussion papers generated by an agency that is independent of government, and that enables ministers to gauge public sentiment before reaching a view as to

the direction they wish to take. Examples on the Commission's current work programme include our projects on alternative models for prosecuting and trying criminal cases and the review of the Credit (Repossession) Act 1997.

15. Recent projects undertaken by the Commission demonstrate a belief that the Commission, with its unique research and public consultation methods, can make a contribution to the production of statutes with wider social and community consequences than what is sometimes called lawyers' law. The references to the Commission to review regulatory gaps and the new media and the review of the Burials and Cremations Act 1964 are such examples.

Current Commissioners and Staff

16. The following are the Commissioners of the Law Commission:
 - President –Hon Sir Grant Hammond KNZM (Appointment expires 14 May 2014).
 - Commissioner – Emeritus Professor John Burrows QC (Appointment expires 31 January 2012).
 - Commissioner – George Tanner CMNZ, QC (Appointment expires 30 September 2012).
 - Commissioner – Professor Geoff McLay (Appointment expires 1 December 2015)
17. The Law Commission Act 1985 provides for a minimum of three and a maximum of six Commissioners. Commissioners are remunerated in accordance with determinations of the Remuneration Authority.
18. The Commissioners form the Board for the purposes of both the Law Commission Act 1986 and the Crown Entities Act 2004, and have duties cast on them by those statutes. They are also legal experts who lead teams of researchers and collectively determine the content of the Commission’s final reports. Management of the operations of the Commission is provided by the Commission’s General Manager, Brigid Corcoran. She reports directly to the President who is, under the law, the Commission’s Chief Executive, and chairs the Board.
19. The Commission has 13 full-time equivalent policy and legal research staff. The Commission’s current policy is to recruit the best young graduates available, along with people with more experience and developed expertise in law as well as other disciplines within the senior staff. The names of the professional staff are set out in Appendix 2. The Commission also makes use of consultants with expertise in specialist areas for particular projects.
20. As a general guide, the Commission endeavours to maintain the ratio of Commissioners to research/policy staff at 1:3. Experience has demonstrated that this ratio maximises the efficiency and effectiveness of Commissioners and staff. The nature of the Commission’s work requires not only that the Commissioners manage projects but also that they be engaged fully in all the detailed research, presentational, and drafting issues.
21. The number of projects that any Commissioner can personally supervise, and the number of policy and legal staff that can report to a Commissioner,

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

C. Current Activities

Current Law Reform Projects

22. The Law Commission currently has 12 active law reform projects in progress. It has two further project on its books but not yet commenced. Its resources are fully committed. The addition of further projects at present would require additional resources.
23. The Commission's references for projects fall into two categories: those referred by the Government to the Commission under section 7 of the Law Commission Act; and those that it embarks on upon its own motion under section 6 of the Act. In recent years, the Commission has not carried out any self-referred projects as the weight of government references has been very heavy. Furthermore, serious questions need to be asked about embarking on a reference and devoting scarce resources to a project in which the government of the day has no interest. That is not to say the Commission will never undertake a self-referred project, but such occasions are likely to be rare.
24. A brief summary of the Law Commission's current projects is set out in Appendix 1. The Commission is happy to provide detailed briefings on all or any of the projects to the Minister and colleagues, whenever it is desired. It would be beneficial to the Commission to know ministerial views of the current projects. If Ministers can provide the time for briefings it would be greatly appreciated.

Process for preparing major reports

25. The pattern of handling a major project at the Law Commission is to:
 - Carry out preliminary research;
 - Have a discussion with the relevant stakeholders;
 - Produce an Issues Paper for online publication and take submissions on it; and
 - Produce a Final Report, occasionally with a draft Bill attached when that is appropriate.
26. With important and complicated new statutes, the Law Commission's method is likely to produce sounder and more enduring legislation and policy than the departmental method. Yet the Government through its Cabinet still has the

capacity to accept, reject, or adjust the recommendations of the Commission as it does with departmental ones. It is just that the platform for consideration has been prepared by a different method.

27. In complicated areas of the law, the Commission sometimes provides a draft Bill with its report to enable the forming of precise judgments about what is being proposed. This in turn facilitates consultation and discussion when Government is deciding whether it should accept a report. This is a different way of preparing legislation than the standard practice in government departments. There, policy is approved by Cabinet first, and the bill is then drafted and sometimes is being adjusted under pressure right up to the point of introduction.
28. As illustrated in Appendix 1, the Commission's current projects span a wide range of areas. Many relate to complex or contentious matters that the Law Commission is well-placed to consider.
29. There are an increasing number of projects that involve the Commission in joint or collaborative work with other agencies. Notable examples include the review of the Credit Repossession Act, work on alternative models for pre-trial and trial processes, and the review of the Official Information Act 1983.
30. In 2009, the previous Government agreed to a new process for engaging with the Law Commission and for considering Law Commission reports. This has led to the Commission having a much greater impact on government outputs and outcomes than was possible in the past.
31. A significant achievement in recent years has been the implementation of past reports that have languished due to other government priorities. Many of these reports dealt with issues that were technical in nature but had the ability to impact on the lives of many New Zealanders. In the past year, implementation of these reports has resulted in the passage of the Limitation Act 2010 – (NZLC R6, 1988), Insurance (Prudential Supervision) Act 2010 – (NZLC R46, 1998 and R87, 2004), and Unit Titles Act 2010 – (NZLC R59, 1999).

Methods for Dealing with Law Commission Reports

32. Every Law Commission in the Commonwealth has been afflicted with the same malady. It was best put by the Hon Justice Michael Kirby at the conference held on the occasion of the 20th Anniversary of the New Zealand Law Commission when he complained of the “inattention and inactivity” of lawmakers to Law Commission reports. He went on to say:²
- People with relevant power just do not appear to care enough. The subjects are not political. They will win no votes. They are not part of a government’s election winning agenda. The Opposition is indifferent. The officials are not pressing for change. Nothing is done.
33. The discussion at this conference led the Law Commission to take up the issue to see whether a better method could be devised for considering Law Commission reports. The Property Law Act 2007, for example, was originally proposed by the Law Commission in a Report³ published 12 years prior to the Act’s eventual enactment. No-one thought it worthwhile doing anything about the recommendations in the Report despite the fact that the Report dealt with a vital part of New Zealand’s basic legal infrastructure – property law.
34. After much effort, in 2009 the previous Government agreed to a new method for considering Law Commission reports and this is set out in a Cabinet Office Circular,⁴ attached as Appendix 2. The essence of the new method is that government departments must engage with the Commission during its consideration of the issues. When a report is tabled in Parliament it must be considered by Cabinet promptly. It cannot be ignored.
35. Obviously Cabinet is not obliged to accept the Law Commission’s recommendations, but it is obliged to consider them.
36. So far this new procedure has worked well and some major measures have been introduced to Parliament as a result. The Alcohol Reform Bill and the Privacy (Information Sharing) Amendment Bill were both dealt with under the new procedure.

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

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

⁴ Cabinet Office Circular: Law Commission: Processes for Setting the Work Programme and Government Response to Reports CO(09)(1)

The Legislation Advisory Committee and the Legislation Design Committee

37. The Law Commission provides advice and support to the Legislation Advisory Committee (LAC) and the Legislation Design Committee (LDC). The Commission receives an appropriation for this work. This important work has developed rapidly in recent years and is aimed at improving the quality of legislation.

Legislation Advisory Committee

38. The LAC was established in 1986 and is currently chaired by the President of the Law Commission. Its members include a former President of the Law Commission, practising lawyers, senior government lawyers, academic lawyers, the Chief Parliamentary Counsel, one economist, and George Tanner QC who is also a Law Commissioner. The LAC is appointed by, and responsible to, the Attorney-General.

39. The functions of the LAC are to:

- Provide advice to departments on legislative proposals and on providing instructions to Parliamentary Counsel Office;
- Report to the Attorney-General and the Cabinet Legislation Committee on public law aspects of legislative proposals;
- Advise the Attorney-General on any topics and matters in the field of public law referred to it;
- Make submissions to the appropriate body or person on Bills introduced into Parliament that affect public law or raise public law issues; and
- Help ensure the quality of law making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform to the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

40. The LAC reviews all Government Bills after introduction for compliance with the LAC Guidelines. The Guidelines, which the LAC publishes, cover a broad range of matters designed to assist policy advisers and lawyers involved in the design and development of legislation.

41. The issues addressed by the LAC range from instances where individual provisions in Bills are unclear through to more substantial issues such as the use of regulation-making powers to deal with matters that ought to be contained in statute, or the use of amending Bills that propose wholesale changes to existing statutes that would be better rewritten from scratch.
42. If the LAC considers that a Bill raises issues that ought to be addressed, it may:
 - Take up the matter with the relevant department;
 - Take up the matter with Parliamentary Counsel;
 - Write to the Minister responsible for the Bill or discuss the matter directly with the Minister;
 - Make a submission to the relevant select committee and, if the matter is significant, appear before the select committee.
43. Notable examples of recent Bills which, in the LAC's view, raised significant issues that required further consideration by Select Committees include the:
 - Canterbury Earthquake Recovery Bill
 - Alcohol Reform Bill
 - Aquaculture Legislation Amendment Bill (No 3)
 - Criminal Procedure (Reform and Modernisation) Bill
 - National Animal Identification and Tracing Bill
 - Weathertight Homes Resolution Services (Finance Assistance Package) Amendment Bill
 - Biosecurity Law Reform Bill
 - Road User Charges Bill
 - Crown Pastoral Land (Rent for Pastoral Leases) Amendment Bill
 - Regulatory Standards Bill
 - Education Amendment Bill (No 4)
 - Ngati Pahauwera Treaty Claims Settlement Bill
 - Freedom Camping Bill
44. The LAC gives advice to agencies at their request.
45. The Commission makes a significant contribution to the work of the LAC. It prepares reports for the LAC on Bills that might raise issues of compliance with the LAC guidelines. The President of the Commission in his capacity as chair of the LAC and the members of the LAC who are also Commissioners often take responsibility on behalf of the LAC for taking whatever steps the LAC considers appropriate in response to these reports. This may include meetings

with departments, meeting directly with a Minister, or making submissions to a select committee.

46. The LAC provides seminars for departments and law societies on the LAC Guidelines and the legislative and parliamentary processes. The President of the Commission in his capacity as chair of the LAC chairs these seminars and in the past, Commissioners have given presentations at them.

Legislation Design Committee

47. The experience of the LAC and other agencies engaged in the legislative process led to a belief that a new body was required to identify legal and constitutional problems with proposed legislation at an earlier stage. The objective in establishing the LDC was to provide for expert advice in the initial stages of developing legislation before final policy and design issues are set in concrete and a Bill finalised.
48. The LDC's principal focus is on significant or complicated legislative proposals, basic design issues, instrument choice, and impact on the coherence of the statute book. It looks at similar issues to the LAC but at a much earlier stage.
49. The LDC is not involved in policy formulation and its work does not cut across existing governmental accountabilities. Its role is purely advisory and departments are free to accept or reject the advice and suggestions it gives.
50. Like the LAC, the LDC is also chaired by the President of the Commission. However, unlike the LAC, the remainder of the LDC's membership is limited to senior officials from core government agencies. The other members are the chief executive of the Department of the Prime Minister and Cabinet, the Secretary for Justice, the Secretary to the Treasury, the Solicitor-General, and the Chief Parliamentary Counsel (or their nominees). Commissioners assist the LDC from time to time.
51. The Commission provides administrative support and research assistance to the LDC. Commissioners and staff of the Commission are also involved on behalf of the LDC in follow-up meetings with departments.
52. The LDC was initially established as a voluntary process that was available to agencies at their instigation. The LDC carried out an evaluation of its work in late 2007. That evaluation, which was based on a survey of departments, indicated that the LDC had added value and that there was considerable demand for its services. The previous Government subsequently agreed that the LDC be

retained and also agreed to a more formalised procedure for LDC consideration of Bills.

53. Under the new procedure, the legal advisor from the Department of the Prime Minister and Cabinet, the Legislation Programme co-ordinator in the Cabinet Office, and the Chief Parliamentary Counsel identify 15 or so Bills on the legislation programme for the year that might benefit from LDC consideration. The LDC then approaches relevant departments. New Bills added to the programme will be considered in the same way. Ministers and departments can also approach the LDC and request assistance.
54. Major matters that have been considered most recently by the LDC include, prospective legislation relating to the Rugby World Cup, consumer law reform and securities law. The LDC set up subcommittees to assist agencies on these matters.
55. The LDC has worked well under the new procedure, and has benefited from the involvement of senior officials and the opportunity to have a discussion with relevant agencies about legislative design at an early stage. However, it is still only operating on a partial basis. There is potential for its activity (and the activity of the LAC) to be expanded further, supplemented by other strategies to enhance the quality of legislation.

Other Advisory Activities

56. The Law Commission has a statutory function to provide advice and assistance to any government department or organisation on “the review of any aspect of the law of New Zealand” that the department or organisation may be undertaking and “on proposals made as a result of the review”.⁵ This is a wide power and in essence it is up to the government of the day to decide what use to make of it.
57. Ministers, departments, and select committees often seek advice on particular legal matters that arise, particularly those of a legislative character or those that involve particularly difficult legal or constitutional issues. The Commission has available legal expertise that particularly relates to legislative proposals and the preparation of government Bills. It has an overview of the entire statute book and can often provide advice that places particular legislative proposals in a wider context that departmental advisers sometimes do not see. Such advice, experience shows, is particularly useful when departments have different views on legal or legislative issues and matters reach something of an impasse.
58. The Commission sometimes collaborates with departments who are considering policy changes and improving ways of dealing with issues. A recent example includes its input into the New Zealand Gazette Redevelopment Research Project, and the work it is currently doing with the Ministry of Economic Development in considering the issues arising from the reform of consumer credit legislation. The Commission also makes submissions to select committees on inquiries and reviews, either at the instigation of the LAC or at the select committee’s request. On request, the Commission also advises the Regulations Review Select Committee.
59. From time to time, Ministers request advice on specialised aspects of legislative issues they are considering.

⁵ Law Commission Act 1985, s 5(1)(c).

D. Issues Requiring Early Consideration by Government

Law Commission Reports Awaiting Cabinet Consideration

60. There are a number of reports and Bills that have been completed by the Commission and await Cabinet consideration. These are:
- Review of the law of privacy– three reports awaiting a Government response:
 - *Public Registers: Review of Privacy Stage 2* (NZLC R101, 2008);
 - *Invasion of Privacy–Penalties & Remedies: Review of Privacy Stage 3* (NZLC R113, 2010);
 - *Review of the Privacy Act 1993: Review of Privacy Stage 4* (NZLC R123, 2011);
 - *A New Support Scheme for Veterans: A Review of the War Pensions Act 1954* (NZLC R115, 2010) is awaiting a Government response; and
 - *Habeas Corpus: Refining the Procedure* (NZLC R100, 2008) is awaiting a Government response. A Bill has been drafted.
61. The recommendations of *A New Land Transfer Act* (NZLC R116, 2010) were accepted by the Government in November 2010 and the Minister at the time (Hon Maurice Williamson) announced a bill would be introduced within a year. A Bill has been drafted. It has not yet been introduced into the House.
62. The Law Commission would like to meet with you and the relevant Minister to discuss how these reports can be progressed.

Revival of other Parliamentary Business

63. All parliamentary business before the House or its committees lapsed on the dissolution of Parliament. It is for the new Parliament to decide what parliamentary business should be reinstated. One recent Bill that resulted from a Law Commission report was introduced into the House in the months prior to Parliament's dissolution:
- The Members of Parliament (Remuneration and Services) Bill. This Bill establishes a new framework for setting entitlements for members of Parliament and the Executive. In December 2010, the Minister Responsible for the Law Commission presented the Law Commission's report *Review of the Civil List Act 1979—Members of Parliament and Ministers* to Parliament. The report recommended that Parts 3 and 4 of the Civil List Act 1979 should be repealed and replaced by a new statute.
64. There are another six Bills arising from Law Commission reports that are currently before the House. These are the:
- Search and Surveillance Bill (NZLC R97, 2007), which was introduced into Parliament in August 2009 and reported back in November 2010. The Bill rationalises and codifies the present law relating to the search and surveillance powers of law enforcement agencies. It is likely to receive some attention early in the term of a new Parliament as it will need to address those matters raised in the *Hamed* decision of the Supreme Court, which have temporarily been addressed in the Video Surveillance (Temporary Measures) Act 2011, but will not apply beyond mid April 2012.
 - Alcohol Reform Bill (NZLC R114, 2010), which had its second reading in September 2011. The Bill implements the Government's response to the Commission's 2010 report, *Alcohol in Our Lives: Curbing the Harm*.
 - Legislation Bill (NZLC R104, 2008), reported back from the Regulations Review Committee on 1 December 2010. The purpose of this Bill is to bring together the main provisions of New Zealand legislation that relate to the drafting, publication, and reprinting of legislation, to make the statute book more readable and accessible, and to replace the Statutes Drafting and Compilation Act 1920 with modern legislation that continues the Parliamentary Counsel Office as a separate statutory office.

- Inquiries Bill (NZLC R102, 2008), reported from the Government Administration Committee on 20 November 2009. This Bill reforms and modernises the law relating to public inquiries.
 - Trustee Amendment Bill (NZLC R79, 2002), reported back from the Justice and Electoral Committee on 9 July 2008 and deals with a range of miscellaneous matters related to the law of trusts.
 - Privacy (Information Sharing) Amendment Bill (NZLC Ministerial Briefing, March 2011) introduced August 2011 is an omnibus Bill that amends the Privacy Act 1993 and others. It deals with those matters raised in the Commission’s Briefing to the Minister regarding improvements that can be made to the Privacy Act 1993 about what, when, and how personal information can be shared.
65. The Commission would be happy to provide a briefing for you on these Bills if that would be helpful. As noted in Appendix 1, in relation to the Trustee Amendment Bill, the Law Commission now has a broader reference to review all of the law relating to trusts.
66. It is difficult to see why the Legislation Bill and the Inquiries Bill in particular have not been able to attract higher priority on the Order Paper. The former affects all legislation. The latter contains wider, review powers and would have been particularly useful given the unfortunate geophysical problems which have afflicted New Zealand of recent years.

Appointment of new Commissioners

67. The Law Commission Act 1985 provides for a minimum of three and a maximum of six Commissioners. The current Commission comprises the President and 2.4 full time equivalent Commissioners. The Commission operates as the Board for the purposes of the Crown Entities Act 2004.
68. In September 2011, Dr Warren Young who was the Deputy President of the Commission, resigned prior to the expiry of his term in May 2012. He has been retained as a consultant by the Commission on two days per week to finish off three projects he has been supervising for some time.
69. George Tanner QC who has been a valuable part of the Commission for the past four years, has been very unwell for six months and on leave without pay during this time. In Mr Tanner's absence the Commission has engaged two specialist trust practitioners to assist it with the review of trust law.
70. The five year term of Commissioner John Burrows QC expires at the end of January 2012, at which time if Mr Tanner has resigned and no new Commissioner has been appointed, the Commission will fall below the statutory minimum of three members. Professor Burrows is presently part time (three days per week) and while he does not wish to be reappointed for a further lengthy term, he is willing to continue to hold his warrant until a new Commissioner is appointed. He is able to do this beyond the expiry of his current warrant by virtue of s.32(b) of the Crown Entities Act 2004 which provides:
- A member continues to hold office despite the expiry of his or her term of office until...
- (b) the member's successor is appointed...
71. The Commission wrote to the previous Minister in early September 2011 advising of the need for the appointment of new Commissioners. The President subsequently met with the Minister to discuss this question. The then Minister confirmed that there should be two new appointments; one to replace Dr Young and one to replace Professor Burrows. The first would be early in the term of a new Parliament. The second in the 2012/13 financial year. In practical terms this will mean, a Commission consisting of the President and three Commissioners for the foreseeable future.

E. Funding

72. The Law Commission's baseline funding for the 2011/12 financial year is \$4.12 million. This includes one-off funding of \$0.278 million which is the final tranche for the review of the Sale of Liquor Act 1989. From 2012/13, the Commission's baseline funding is \$3.84 million.
73. Over the past six years the Commission has averaged 16 projects per year on its work programme and it has published 14 publications (including consultation, issues and study papers) per year. In addition, the Commission's responsibilities have increased by the obligation to be involved in the work leading to implementation of its reports.
74. While the Commission has received specific funding for three projects over the past few years (Sentencing Council Establishment Unit, Sale of Liquor Act review and War Pensions Act review), it has only been able to meet the demands placed on it, and markedly increase its output, by running operational deficits and drawing on its accumulated cash reserves to meet that deficit.
75. It is predicting an operational deficit of \$0.240 million this financial year. In its latest Statement of Intent, it has also forecast an operating deficit of \$0.047 million in 2012/13 and a return to an operating surplus of \$0.083 million in 2013/14. The Commission has managed to fund operating deficits over the past few years by drawing on its reserves. However, it will need to reduce its output and staffing resources to remain within its budget.
76. There is no ideal size or capacity for an institutional law reform commission, and many different structural and management models exist in commissions around the Commonwealth. However, to maintain respect as an independent law reform organisation the work must be of the highest quality with Commissioners working full time and supported by highly skilled staff.
77. During the past five years, the Commission has had the equivalent of five fulltime Commissioners and endeavoured to maintain a resourcing ratio of three legal and policy advisers to one Commissioner. This resourcing level underpinned an increase to the Commission's baseline funding in 2005 and has been its working assumption over the past six years. The Commission recognises that retaining five Commissioners during a period of significant funding pressure is not sustainable and in order to live within its means it is resolved to one Commissioner not being replaced, reducing the Commission to four Commissioners going forward. In addition, it has

budgeted on the basis of a net attrition rate of one senior policy adviser in the 2011/12 year and two policy staff in 2012/13.

78. In recent years it has sought to make and has achieved significant efficiency gains through reducing infrastructural costs (including internal support staff numbers), and reducing the ratio of legal and policy advisers supporting each of the Commissioners to below the optimal 3:1 ratio. While it is forecasting an operating deficit in the current financial year and in 2012/13, reserves will allow it to fund operations and maintain current staffing levels for legal and policy advisers during this period.

Technology infrastructure

79. The Commission has endeavoured to take advantage of advances in technology to reduce costs in the presentation of its preliminary policy proposals reports and consultation processes. It has developed the functionality available on its website to provide for the receipt of online submissions, public forums, closed forums with selected participants, social media interaction (Facebook and Twitter), audio and video media to support the publication of papers and public consultation processes.

All of Government (AoG) Contracts

80. The Commission has signed up to three AoG contracts and has achieved significant savings in computer hardware, and internal printing and photocopying costs as a result. It is anticipating that further efficiencies will be gained through its participation in future contracts.

APPENDIX 1

LAW COMMISSION'S ACTIVE LAW REFORM PROJECTS

Alternative pre-trial and trial processes

1. The Law Commission was asked to undertake a high-level review of pre-trial and trial processes in criminal cases following our 2008 report, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103) and recommendations from the Taskforce on Sexual Violence.
2. The terms of reference for the project require the Commission to:
 - consider whether the adversary framework within which those processes operate should be modified or fundamentally changed in order to improve the system's fairness, effectiveness and efficiency;
 - include an examination of inquisitorial models and consider whether all or any part of such models would be suitable for incorporation into the New Zealand system.
 - put particular emphasis upon the extent to which a new framework and/or new processes should be developed to deal with sex offence cases.
3. Coincidentally with the Commission's reference three criminal law academics received Law Foundation funding for a project to investigate possible options for modifying or reforming current processes for prosecuting sexual offending, including possible alternatives to adversary criminal trials. Although their project had a narrower focus than the Commission's, there was a very substantial overlap between the two. After consultation with the Law Foundation, therefore, both project teams decided to pool resources and undertake the work on a collaborative basis.

Current Status

4. In early 2012, the Commission is proposing to use a web based format to engage in a public consultation process on possible law reform options in relation to a number of the current adversarial criminal pre-trial and trial processes.

5. The Law Foundation funded research was published in a monograph at the start of December 2011.

Burials and Cremation Act 1964

6. This Act is substantially unchanged since enactment. This review will consider whether the Act is meeting public expectations and needs with respect to the handling and burial or cremation of the dead with specific reference to the:
 - care and custody of the body after death;
 - provision of culturally appropriate options for burial or cremation;
 - responsiveness to individual or group requirements that fall outside the ambit of the current Act (e.g. eco or green burials);
 - suitability of religious affiliation as the sole criteria for the establishment of burial grounds.

Current Status

7. An issues paper calling for public submissions in response to reform options proposed to current death certification processes was published in May 2011. A final report will be published by June 2012. A review of the remaining issues in the Act will be the subject of an issues paper to be published in June 2012.

Civil Penalties Review

8. Civil penalties have been an increasingly important feature of regulatory legislation in New Zealand. This review will look at the law relating to civil penalties, with emphasis on the circumstances in which they should be used and what sort of framework should be devised for them.

Current Status

9. This project has been progressing only slowly since 2010 as a result of resourcing being diverted into higher priority projects. It is now making good progress and an issues paper is likely to be published in June 2011.

Contempt Review

10. This project will review the law of contempt. This area of the law is significant and a first principles review is a large undertaking. This project came onto the work programme in September 2011. Further work is required to determine the scope of this exercise. In the meantime, the narrow issues

relating to ‘contempt in the face of the court’ provided for in various courts related statutes, will be addressed in the Judicature Act 1908 and Consolidation of Courts’ Legislation project.

Current Status

11. This project has been placed on hold until Commissioner and research resources can be allocated to it later in this financial year.

Credit (Repossession) Act 1997

12. This Act has considerable impact on both debtors and creditors alike and the Commission is working closely with the Ministry of Economic Development in reviewing its practical difficulties.

Current Status

13. An issues paper calling for public submissions in response to proposed reform options was published in July 2011. A final report will be published by June 2012.

Crown Proceedings Act 1950

14. The Crown Proceedings Act 1950 was modelled on a 1947 UK statute and does not reflect the way in which New Zealand is governed today or modern court practice. As a result the current Act presents procedural and substantive difficulties for both plaintiffs seeking to sue the Crown, and for the Crown in defending and responding to those actions. The purpose of the review is to modernise and simplify the Crown Proceedings Act. The review will also consider the relationship between the Crown Proceedings Act, and provisions that seek to immunise or indemnify the Crown and/or its servants, including section 86 of the State Sector Act 1988. The review is not intended to review the substantive law that provides the causes of action that lie against the Crown.

Current Status

15. This review is in the early stages of identifying issues and undertaking preliminary research. An issues paper is likely to be published early in the 2012/13 financial year.

Evidence Act 2006

16. Pursuant to s 202(1) of the Evidence Act 2006 (“Act”), the “Minister” (not defined) must, as soon as practicable after 1 December 2011 or any later date set by the Minister by notice in the Gazette, and on at least 1 occasion during

each 5-year period after that date, refer to the Law Commission for consideration the following matters:

(a) the operation of the provisions of this Act since the date of the commencement of this section or the last consideration of those provisions by the Law Commission, as the case requires:

(b) whether those provisions should be retained or repealed:

(c) if they should be retained, whether any amendments to this Act are necessary or desirable.

17. The Law Commission must then report on those matters to the Minister within 1 year of the date on which the reference occurs (s 202(3)).

Current Status

18. The Commission has been monitoring the operation of the Evidence Act 2006 in anticipation of the statutory review it is required to undertake in accordance with the Act as set out below.

Incorporated Societies Act 1908

19. This Act has been little amended since its enactment but it is used extensively by community organisations. Difficult questions frequently arise around governance and administration, and the resolution of internal disputes. This will be a first principles review.

Current Status

20. An issues paper calling for public submissions in response to proposed reform options was published in June 2011. A final report is likely to be published in early in the 2012/13 financial year.

Joint and Several Liability

21. The joint and several liability rule determines the liability of multiple parties in civil proceedings where a person has suffered loss, and how responsibilities for the loss are allocated among those parties. The application of the rule in New Zealand has been recently reviewed in the context of the building and construction sector. The Government believes the issue of joint and several liability needs to be considered in a broader review, not limited to the building sector, and referred the matter to the Law Commission in September 2011.

Current Status

22. This project has been placed on hold until Commissioner and research resources can be allocated to it later in this financial year.

Judicature Act 1908 and Consolidation of Courts' Legislation

23. This Act is 102 years old and requires some reorganisation and modernisation. The final report is likely to contain a draft Bill or Bills to consolidate existing legislation dealing with the structure and management of the High Court, District Court, Court of Appeal and Supreme Court, and to separate out other provisions in the Judicature Act. Although it is not intended that the review revisits major policy underlying the present Act, issues such as vexatious litigants, commercial list and whether there should be a register of judges' interests will be discussed in one or other of the Issues Papers and included within the final report.

Current Status

24. An issues paper calling for public submissions in response to proposed reform options in relation to a register of judges' pecuniary interests was published in March 2011. A further issues paper covering other issues arising from this review is likely to be published early in 2012.

Maximum Penalties

25. This project is a review of the maximum penalties contained in the five major criminal statutes. These statutes are the Crimes Act 1961, Misuse of Drugs Act 1975, Land Transport Act 1998, Arms Act 1983, and Summary Offences Act 1981. The project will recommend changes to correct existing penalty anomalies and to reflect changes in the rules relating to the automatic release of offenders. The project will take account of sentencing guidelines developed by the Sentencing Council. This project requires the development and application of a particular methodology for classifying offence seriousness.

Current Status

26. This project has made slow progress since it came onto the work programme, it having been delayed at times pending higher priority work required by Government. It will be completed by the end of June 2012.

Official Information Act 1982

27. After being in operation for 29 years, the Official Information Act 1982 is one of the most frequently used and controversial statutes. This review will report

on current law and practice relating to both this Act and the Local Government Official Information and Meetings Act 1987 and make recommendations on any changes that would improve the working of the legislation.

Current Status

28. This project is in its final stages. A report to the House, including recommendations for reform, is likely to be published early in 2012.

Regulatory Gaps and the New Media Review

29. This review is looking at the current regulatory regime for news media with respect to its adequacy in catering for new and emerging forms of news media, in particular:

- definition of “news media” for the purposes of the law;
- jurisdiction of the Broadcasting Standards Authority and/ or the Press Council in relation to currently unregulated news media; and
- whether existing criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective for the “new” media and whether alternative remedies may be available.

Current Status

30. An issues paper calling for public submissions on reform proposals will be published in December 2011.

Trusts and Charitable Trusts

31. This review is considering the law relating to trusts and charitable trusts in New Zealand, which has not been systematically examined for many years. It is likely to recommend new legislation to replace the Trustee Act 1956 and the Charitable Trusts Act 1957, & also examine the Trustee Companies Act 1967.

Current Status

32. This project has progressed during the past 12 months with the publication of four issues papers calling for public submissions on a variety of issues arising in the current law of trusts. A fifth and final issues will be published in December 2012. A final report to the House including recommendations for reform in relation to all issues traversed in the five issues papers, is likely to be published in the 2012/13 financial year.

**LAW COMMISSION: PROCESSES FOR PROJECT SELECTION AND
GOVERNMENT RESPONSE TO REPORTS (CO (09) 1)**

Key points

...

- **The Minister Responsible for the Law Commission will select government-referred projects for the annual Law Commission work programme following consultation with the relevant portfolio Ministers.**
- **Ministers who are proposing projects for referral to the Law Commission will be required to comment on how the proposed projects align with government priorities and confirm that departmental resources will be made available to work with the Law Commission during the project and to provide advice to the Government in responding to the final report of the Law Commission on the project. Proposed projects should meet one or more of the criteria set out in paragraph 5.**
- **The government will determine its position on Law Commission reports on government references by considering a Cabinet paper submitted by the relevant portfolio Minister. The portfolio Minister will determine on a case by case basis which agency is to prepare Cabinet papers on the topic. Where it is proposed to present a formal response to the House of Representatives, the Cabinet paper will include the views of the Law Commission.**
- **If Cabinet decides to accept the Law Commission's recommendations, with the result that a Bill is required, the Bill will be prepared with no further need for the government to present a response to the House of Representatives.**
- **If, however, Cabinet rejects the Law Commission's recommendations, or the government is responding to a self-initiated Law Commission project other than by introducing a draft Bill, the government will still be required to present to the House of Representatives a response to a Law Commission report within 120 working days.**
- **A place on the annual Legislation Programme still needs to be sought at the earliest opportunity for a proposed Bill resulting from Law Commission recommendations.**
- **The Minister Responsible for the Law Commission is required to present all Law Commission reports to the House of Representatives and publish those reports in accordance with section 16 of the Law Commission Act 1985. The current administrative arrangements supporting this process will continue.**

Introduction

1. Cabinet has recently made decisions adjusting aspects of the interaction between the [Law Commission](#) and executive government.
2. Projects for the Law Commission may be proposed by any Minister or by the Law Commission in consultation with its stakeholders. This circular, which replaces Cabinet Office circular CO (07) 4, makes adjustments to the processes for:
 - selecting projects referred to the Law Commission by the government (government references);
 - how the Parliamentary Counsel Office (PCO) should work with the Law Commission;
 - how the government will respond to Law Commission reports resulting from either government references or projects initiated by the Law Commission (self-initiated projects).
3. The processes in this circular apply to reports in the Law Commission's report series presented to the House of Representatives (the House) after the date of this circular. They do not apply to reports in the Law Commission preliminary paper series, study paper series, or annual reports.

Projects referred to the Law Commission by the government

Process for selecting Law Commission projects

4. Each year the Minister Responsible for the Law Commission (MRLC) will write to all Ministers inviting suitable proposals with a view to settling the work programme by the end of June¹.
5. Ministers will be required to:
 - comment on how proposed projects align with government priorities; and
 - confirm that departmental resources will be made available to work with the Law Commission during the project and to provide advice to the Government on responding to the final report of the Law Commission.
6. To allow for adequate scoping and costing of potential projects, early correspondence with and engagement by Ministers is desirable.
7. Following consultation with Ministers, the MRLC will approve an annual programme of projects for the Law Commission. Only projects supported by the relevant portfolio Ministers should be contained in the programme. The resource implications for the relevant departments in working with the Law

¹ Beginning with the programme for the 2009/10 year

Commission on a particular project and in responding to the final report of the Law Commission are to be considered by the MRLC in approving a programme.

8. Proposed projects should meet one or more of the following criteria:
 - involve issues that span the interests of a number of government agencies and professional groups;
 - require substantial, long term commitment or fundamental review;
 - involve extensive public or professional consultation;
 - need to be done independently of central government agencies because of the existence of vested interests, or a significant difference of views;
 - require independent consideration in order to promote informed public debate on future policy direction;
 - involve technical law reform of what is often called “lawyer’s law” that would be likely otherwise to escape attention.

Providing departmental and drafting assistance on government references to the Law Commission

9. If a project is approved, departmental resources should be made available to work on the project so that officials are kept in touch with the development of the project and can provide advice on it. This may include the provision of PCO legislative drafting assistance, if the nature of the report is such that it would be appropriate to append a draft Bill to it.
10. The extent to which the PCO will provide assistance at this stage will be considered by the government on a case by case basis. Any PCO drafting assistance to Law Commission projects must also be considered in light of the Government’s legislation programme priorities and take into account any PCO drafting resources that are already seconded to the Law Commission.

Cabinet consideration of Law Commission recommendations

11. Once a portfolio Minister has received a Law Commission report, a draft Cabinet paper will be prepared as soon as reasonably practicable reflecting the views of the Minister and all relevant agencies, and incorporating split recommendations where there is no consensus.
12. The portfolio Minister will decide on a case by case basis which agency will prepare the draft Cabinet paper on the Minister’s behalf. Options include the:
 - portfolio Minister’s department or other agency (the agency) preparing the Cabinet paper in consultation with other relevant agencies (including the Law Commission);
 - agency and the Law Commission jointly preparing the Cabinet paper;
 - Law Commission preparing the Cabinet paper in consultation with all relevant agencies;
 - Cabinet paper being prepared in any alternative manner.

13. The relevant Minister will submit the paper to a Cabinet committee seeking Cabinet's approval of the recommendations in the Law Commission report to the extent that the Minister considers appropriate.
14. If Cabinet accepts the recommendations with the effect that a Bill will be required, Cabinet will add the Bill to the Legislation Programme with an appropriate priority. If a Bill ready for introduction is not already appended to the Law Commission report, Cabinet may invite either the portfolio Minister or the Law Commission (as considered by Cabinet to be appropriate in the particular case) to issue drafting instructions to the PCO. The Bill that ensues will be introduced in the normal way in the name of the portfolio Minister.

Government response may be required

15. Where Cabinet accepts the recommendations in the Law Commission report, there will be no need for a formal government response to the Law Commission report to be presented to the House.
16. If Cabinet rejects the recommendations in the Law Commission report, the government will continue to be required to respond formally, by way of a paper presented to the House within 120 working days of the presentation of the Law Commission's report to the House. This process is set out in paragraphs 18 to 21.

Projects initiated by the Law Commission

17. It remains open to the Law Commission to initiate projects itself.
18. In the case of Law Commission reports on such projects, the government is required to respond to the recommendations within 120 working days of the presentation of the Law Commission report to the House, either by presenting a response to the House or by introducing a Bill.
19. If the Law Commission report raises matters that require policy decisions to be taken by Cabinet, a paper will need to be submitted to the appropriate Cabinet committee prior to the consideration of a proposed government response or draft Bill by the Cabinet Legislation Committee. The process for presenting a response to the House is set out in paragraphs 18 to 21.

Process where government response to be presented to House

20. The government is required to present to the House a response to a Law Commission report in two circumstances:
 - if Cabinet rejects the Law Commission's recommendations on a government reference; or
 - if the government responds to self-initiated Law Commission projects other than by introducing a draft Bill.
21. A government response must be presented to the House within 120 working days from the time that the Law Commission presents its report to the House.
22. Where a government response is required to a Law Commission report, the relevant Minister must obtain Cabinet approval for the text of the government

response by submitting the response, with a Cabinet paper, to the Cabinet Legislation Committee and Cabinet. In this case, the Cabinet paper is to include the views of the Law Commission.

23. Template documents showing the standard format for a government response and the Cabinet Legislation Committee paper are attached as Appendices 1 and 2. The template will need to be adapted to match the format of the particular Law Commission recommendations. It may be appropriate to summarise or cluster key recommendations together when drafting the government response.
24. Once the government response is approved by Cabinet, the office of the Minister concerned must arrange the presentation of the government response by delivering it the Clerk of the House of Representatives in the usual way.

Presentation of Law Commission reports to the government and the House

25. After the Law Commission has completed a report, it submits the report to the MRLC and the relevant portfolio Minister.
26. The MRLC is required to present all Law Commission reports to the House and publish reports in accordance with section 16 of the Law Commission Act 1985. Once a report has been presented to the House, or 20 working days after an advance copy of the report has been forwarded to the MRLC and the relevant portfolio Minister, the Law Commission will publish the report. This 20 working day period is to allow the government time to prepare its initial views for conveying to the Law Commission and more widely as appropriate.
27. The office of the MRLC is responsible for:
 - the administrative function of presenting Law Commission reports to the House;
 - monitoring the progress of government responses to Law Commission reports.
28. The office of the relevant portfolio Minister is responsible for the administrative function of presenting any government response to the House.

Place on annual Legislation Programme still required

29. A place on the annual Legislation Programme is still required for proposals for Bills that emerge as a result of the government accepting Law Commission recommendations. Ministers should submit proposals for Bills to be incorporated into the annual Legislation Programme, either as part of the annual process (if the prospect of a Bill is known at that stage) or as part of the Cabinet paper seeking agreement to the Law Commission's recommendations. The normal processes for obtaining a place on the Legislation Programme are set out in Chapter 7 of the Cabinet Manual, the legislation procedures in the CabGuide, and the relevant annual circular.
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Appendix 1

Below is the format for recommendations for a paper seeking approval by LEG of the government response to a Law Commission report.

The Minister of xx recommends that the Cabinet Legislation Committee:

1. **note** that on xx *[date]*, the Minister Responsible for the Law Commission presented the Law Commission's report entitled xx to the House;
2. **note** that the Law Commission recommended that the government:
xx [summarise key recommendations of Law Commission's report];
3. **note** that on xx *[date]*,
xx [summarise any relevant policy decisions taken with appropriate minute references];
4. **note** the submission of the Minister of xx and in particular his/her advice that:
xx [summarise main points of the proposed government response];
5. **approve** the proposed government response, attached to this submission, to the report of the Law Commission entitled xx;
6. **note** that the government response must be presented to the House by xx *[date]*;
7. **invite** the Minister of xx to present the government response to the House.

Note: The above format is set out on the basis of prior approval of the relevant policy issue. If necessary, the proposed government response could be prepared and considered by a policy committee at the same time as the policy is considered. In that case, the above recommendations should be adapted and added to the policy paper. There would then be no need for the proposed government response to be considered by LEG.

Appendix 2

GOVERNMENT RESPONSE TO LAW COMMISSION REPORT ON [title]

Presented to the House of Representatives

Introduction

An opening remark such as:

“The government has carefully considered the Law Commission’s report on xx”.

or

“The government welcomes the Law Commission’s report which represents a major contribution to the development of policy on xx”.

A sentence stating:

“The government responds to the report in accordance with Cabinet Office circular CO (09) 1”.

Any general statements or explanations of the nature and content of the response, such as:

“The government has taken (or intends to take) action on the majority of the Commission’s recommendations”.

or

“The government has taken action on certain of the Commission’s recommendations, but is as yet unable to respond positively on the recommendations dealing with xx because xx”.

or

“The government has carefully considered the Commission’s recommendations and has identified the need for further work on the issues raised. The government priority for this further work, relative to other higher priorities, means that significant progress on this work is unlikely to be made within the next xx.”

Law Commission Report and Government Response

Law Commission Report

[Summarise key recommendations of Law Commission’s report].

Response

List key recommendations of report and response in turn.

[For each recommendation or group of recommendations: State response. This should be concise and informative. Responses should be framed in terms of how “the government” responds to the issue, with references to the responsibilities of and action taken by particular Ministers/departments as appropriate].

Conclusion

Brief summary of overall response.