

**Government Response to the Law Commission's
Report *Pecuniary Penalties: Guidance for Legislative Design***

Presented to the House of Representatives

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Introduction

The Government has considered the Law Commission's Report *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R133) (the Report) presented to the House of Representatives on 30 October 2014. The Government responds to the Report in accordance with Cabinet Office circular CO (09) 01.

The Government thanks the Law Commission for its Report. The Government agrees with most of the Law Commission's recommendations. The Government has identified the need for further work on three recommendations.

Background

Based on a referral from the previous Minister of Justice, and following a suggestion from the Legislation Advisory Committee (LAC), the Law Commission undertook a first principles review of whether pecuniary penalties are desirable.

Pecuniary penalties are monetary penalties that are imposed and enforced through non-criminal processes. They have the following characteristics:

- they are imposed by the High Court after a civil trial, following a finding of civil liability;
- liability is established on the civil standard of proof—that is, on the balance of probabilities;
- they can involve very substantial maximum financial penalties;
- payment of the penalty is enforced in the civil courts, as a debt due to the Crown; and
- neither imprisonment nor criminal conviction can result.

The Law Commission's Report

The Law Commission concluded that pecuniary penalties are a valid tool for regulatory enforcement, providing an intermediate penalty between criminal and infringement offences. The Law Commission's approach to the nature of pecuniary penalties is that they are quasi-criminal, in that they are a form of penalty and a tool of enforcement.

The Report makes a series of recommendations intended to advance consistency in legislation when designing pecuniary penalties. The bulk of the Report contains guidelines for departments when establishing or reviewing pecuniary penalties.

Consistency in pecuniary penalty regimes (recommendations 1–4)

The Law Commission's first four recommendations support the overarching goal of consistency in pecuniary penalty provisions. The Law Commission has developed 21 guidelines to assist departments designing pecuniary penalty regimes. These recommendations relate to how those guidelines will be implemented and supported. Matters covered in the Law Commission's guidelines include:

- the need to deal expressly with the question of insurance or indemnification for pecuniary penalty liability;
- that pecuniary penalties should continue to be imposed on the civil standard of proof;
- that it should not usually be possible for a pecuniary penalty and a criminal offence to be imposed for the same conduct; and
- that a primary limitation period of three years after reasonable discoverability of the contravention should generally apply.

The Law Commission recommends that:

- the Ministry of Justice be consulted on all proposals for pecuniary penalties at the policy development stage, in the same manner as for criminal offences;
- the LAC Guidelines include a section on best legislative practice for pecuniary penalty regimes, based on the Law Commission's guidelines;
- the Parliamentary Counsel Office draft model pecuniary penalty provisions; and
- when statutes containing pecuniary penalty provisions come up for review, the provisions should be re-evaluated in light of the proposed guidelines.

Government Response

The Government notes that the current ad-hoc development of pecuniary penalty regimes is undesirable and considers that these recommendations form a comprehensive package of measures that will achieve greater consistency in pecuniary penalty provisions.

Further work is required to analyse the Law Commission's guidelines. The Government proposes that the Ministry of Justice and the LAC work closely in consultation with affected departments and the Parliamentary Counsel Office (PCO) in this process.

However, subject to that work being completed the Government agrees in principle that:

- the LAC should draft a section on best legislative practice for pecuniary penalty regimes based on the Law Commission's guidelines;
- the Parliamentary Counsel Office draft model provisions for common pecuniary penalty provisions. The work on model provisions will be included in further work regarding the proposed guidelines; and

- government departments should review pecuniary penalty provisions in statutes that come up for review against the proposed guidelines.

The Government agrees that the Ministry of Justice be consulted on all proposals for pecuniary penalties and that the Cabinet Manual be amended accordingly.

Privilege against self-exposure to a pecuniary penalty (recommendations 5–6)

The Law Commission recommends that the Evidence Act 2006 be amended to provide for a privilege against self-exposure to a pecuniary penalty. The privilege could be removed in a particular pecuniary penalty regime if justified.

The proposed penalty privilege enables individuals to refuse to answer questions or provide information, both during court proceedings and during an investigation, on the grounds that to do so might expose them to a pecuniary penalty.

The Law Commission recommends extending the privilege to investigations and proceedings for pecuniary penalties for the same reasons it applies to investigations and proceedings for criminal offences namely:

- pecuniary penalties are quasi-criminal in nature and may result in a significant penalty;
- there is an imbalance of power between the State and the individual in pecuniary penalty investigations and proceedings; and
- evidence obtained in those potentially coercive circumstances may not always be reliable.

Government Response

There is some concern that introducing a penalty privilege could undermine the efficacy of pecuniary penalty regimes. The Government proposes that the Ministry of Justice, in consultation with the affected agencies, do further work on this issue and report back to the Minister of Justice.

Other Recommendations (recommendations 7–9)

Recommendation 7: Pecuniary and Criminal Penalties Review

The Law Commission recommends that the Government instigate a review of how maximum criminal and pecuniary penalties should be set in legislation. There is currently no guidance on how the level of pecuniary penalties should be set. Maximum criminal and pecuniary penalties have been set fairly unsystematically, with no agreed methodology or approach for determining the relative seriousness of an offence.

Government response

The Government agrees that a review of how maximum criminal and pecuniary penalties are set in legislation is desirable. Such a review will be progressed as other priorities allow.

Recommendation 8: Crown liability

Although all current pecuniary penalty statutes purport to bind the Crown, there is uncertainty about whether the Crown would in fact be liable to a pecuniary penalty under some statutes. The Law Commission recommends the Cabinet Office Circular CO (02) 4 require analysis of the impact of proposed pecuniary penalty statutes on the liability of the Crown. Crown liability for pecuniary penalties should be considered on a case-by-case basis and this issue should be drawn to Cabinet's attention in the same way as for criminal offences.

Government Response

Further work would need to be completed on guidance to be included in the Circular about when the Crown should be liable to a pecuniary penalty. The current Circular is out of date in some respects and needs to be generally updated. The Government has directed the Ministry of Justice, in consultation with the Cabinet Office, to complete further work on updating and supplementing Cabinet Office Circular CO (02) 4 to require analysis of the impact of pecuniary penalty statutes on the liability of the Crown and report back to the Minister of Justice.

Recommendation 9: Agencies' enforcement policies

The Law Commission also recommends enforcement agencies with the power to commence pecuniary penalty proceedings should develop and publish enforcement policies. Such publicity will improve transparency and consistency in decision-making. The policies should cover matters such as how an enforcement agency will decide whether to commence court proceedings.

Government Response

The Government agrees that enforcement agencies should develop and publish enforcement policies. The Government encourages those enforcement agencies which do not already have such policies in place to do this on a voluntary basis.

Next Steps

The Government has directed the Ministry of Justice to complete the work related to the proposed privilege against self-exposure to a pecuniary penalty and updating and supplementing Cabinet Office Circular CO (02) 4 to require analysis of the impact of pecuniary penalty statutes on the liability of the Crown, and report back to the Minister of Justice by the end of 2015. The Government has also directed the Ministry of Justice and the LAC to work closely in consultation with other affected departments and the Parliamentary Counsel Office to incorporate the proposed guidelines into the LAC Guidelines.