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**RESPONSE TO REQUEST FOR SUBMISSIONS: NATIONAL LIBRARY
DISCUSSION PAPER ON LEGAL DEPOSIT IN NEW ZEALAND,
OCTOBER 2000.**

22 NOVEMBER 2000.

The New Zealand Law Librarians' Group Inc (NZLLG) offers the following submissions in response to the National Library's Discussion Paper 2 on legal deposit in New Zealand, October 2000. In preparing its submission, the NZLLG has concentrated on issues of particular interest to law librarians, rather than addressing more general issues relevant to the library profession as a whole (which will no doubt be addressed by LIANZA on the profession's behalf), except where we feel that the more general issues are equally relevant to legal materials.

1. PURPOSE OF LEGAL DEPOSIT

1.1 The history of the legal deposit scheme has been a troubled one. An increasing number of liable parties are ignoring their obligations under the Act, culminating in one commercial publisher recently taking the National Library to court in an attempt to annul its legal obligations.

1.2 There are a variety of reasons for both active and passive disregard of legal deposit requirements:

- ignorance;
- lack of real financial or commercial sanctions for non-compliance;
- change in public and political opinion recognising free public access to information as a public good, to which both private and public agencies should contribute;
- growth of "user-pays" imperatives in national and local government organisations & the disestablishment of a central government publisher that could provide simplified access to all government publications under a non-commercial business regime;
- increased imperatives for public libraries to contribute financially to local government income, resulting in the reduction of free public services and/or collections.

1.3 The first question to be answered, therefore, in any review of legal deposit legislation concerns clarification of the primary purpose of the legal deposit regime, and whether that purpose is sustainable in New Zealand in the 21st century.

1.4 One of the key issues identified in social and political debate on the problems facing governments and societies in the “Information Age” is that of the information-rich versus the information-poor. Recent New Zealand governments have stressed the importance of all New Zealanders having equitable access to at least the basic information required in daily life. Legal information undoubtedly features in that definition – specifically the laws of the land, their history and development, and their current interpretation. The present government has demonstrated its support for that concept by instructing the Parliamentary Counsel Office to make New Zealand legislation available electronically, free of charge, to all New Zealanders within the next 2 years.

1.5 We suggest that, before it will operate more successfully, the legal deposit legislation needs to decide and clearly state its primary purpose – which we see as either preservation of the documentary record, enhanced public access to information or a combination of both purposes.

1.6 Currently, legal deposit legislation requires that three copies of all New Zealand publications be submitted to National Library – with one copy being distributed to each of the Parliamentary Library, Alexander Turnbull Library (ATL) and to National Library general collections.

1.7 Effectively, this means that only one copy is easily available for public access because:

- the ATL copy cannot be borrowed, which restricts access to personal users in Wellington. Moreover, as ATL is primarily focused on scholarly research and preservation of the documentary heritage, its access policies are restrictive; and
- Parliamentary Library is effectively a closed collection for the exclusive use of Parliament and its staff. Its access policy specifically states that public access, if permitted at all, is the lowest of its priorities.

Preservation as primary purpose

1.8 If preservation of the documentary record is to be the primary purpose of the legal deposit scheme, then it is logical to require publishers to supply more than one copy of works. However, we question whether the current stipulated libraries are the most suitable repositories.

1.9 The logic of the ATL copy is clear, but we would suggest that, for reasons of disaster recovery, either the Hocken library in Dunedin or perhaps the Auckland War Memorial Museum library would be more suitable second sites than the Parliamentary Library. Alternatively, the National Library’s Wanganui premises might offer a reasonable alternative for safe storage.

Access as primary purpose

1.10 If public access is the primary purpose of the scheme, then we suggest, again, that the inclusion of a Parliamentary Library copy be reviewed. It is undeniable that many publishers see the Parliamentary Library copy as free subsidisation of a privileged minority. While it is important that members of Parliament have access to some areas of New Zealand publishing,

we question whether that justifies free access to potentially all New Zealand publications. (We accept that not all publications are taken, and that the third copy can then revert to the National Library public collections, but that is merely received practice and the potential for abuse exists.)

1.11 If a third copy is to be retained in the National Library collections for public access, and publishers are required to provide that copy free of charge, we suggest that government reaffirm its commitment to making that copy available nationally free of charge, regardless of developments in the Interloan system.

1.12 More equitable national access would also be achieved if, as suggested in 1.9, one depository copy was held in a library outside Wellington. The range of potentially suitable libraries would, in this case, be much wider than those suggested in 1.9, but the need to also function as an effective back-up copy for disaster recovery purposes is just as valid. However, if the decision was made to use the National Library's Wanganui premises, then the Library's policy regarding access to the Wanganui collections may need to be reviewed.

1.13 The NZLLG has made repeated submissions to government on the subject of free public access to legislation and to the problems created by the lack of public access to New Zealand legal resources generally. We recognise the importance of the legal deposit scheme as one method of ensuring that all New Zealanders can have:

- access to the laws that govern their society; and
 - information as to:
 - how those laws are currently interpreted;
 - their historical development; and
 - the development of the legal system that administers them
- through free, easy access to:
- all forms of primary and subsidiary legislation;
 - case law;
 - texts and commentaries.

Access and preservation as primary purpose

1.14 If both access and preservation are to be the stated benefits of legal deposit, then at least two copies would seem to be required, and we believe there is a valid argument for three copies if one is to be held outside Wellington for disaster recovery purposes.

1.15 However, we also suggest that National Library needs to consider carefully whether Parliamentary Library still has a valid reason to be a depository library in these circumstances, for the following reasons:

- with ATL in its traditional role as the preserver of New Zealand's national heritage (and the depth of its collections suggests it is logical it does so) then there is little justification for preserving another copy literally across the road;
- since Parliamentary Library does not provide public access as of right, the second reason for its retention as depository library would seem unsustainable; and
- if the Parliamentary Library only requires coverage of a limited range of New Zealand subject areas in order to do its business, as the Discussion paper states, then we suggest, in recognition of the "user pays" philosophy espoused by both National and Labour governments over the last twenty years, the Library should pay for the resources it requires.

Legal resources

1.16 With regard to legal deposit of New Zealand legal materials, it needs to be acknowledged that all three major legal publishers in New Zealand (Butterworths, Brookers and CCH (NZ)) are merely New Zealand branches of extremely large international publishing empires. They are subject to the commercial imperatives of their parent companies, to which the preservation of New Zealand's documentary heritage is of little interest or importance. Those same commercial imperatives result in New Zealand legal materials generally being relatively expensive – particularly as the bulk of their output is in loose-leaf, CD-rom or electronic format and bought on subscription rather than as one-off publications. Legal deposit can therefore play an important role in both the preservation of their output and improving access – at least in Wellington, and for that purpose at least ought to continue.

1.17 We therefore support the continuation of a legal deposit scheme. We also consider that the scheme should remain a legislative one, as the right to access this type of information should be regarded as part of New Zealanders' civil rights.

2. PARTICULAR PROBLEMS FOR LEGAL DEPOSIT RAISED BY THE FORMATS OF LEGAL MATERIALS

Loose-leaf publications

2.1 As mentioned in 1.16 above, legal materials present particular problems for legal deposit regimes in that a relatively small part of the output is in traditional monograph or serial format. Because the law is constantly changing, legal publishers have, for many years, published in loose-leaf format for ease of updating. This raises a range of difficulties:

- each update replaces an ad hoc collection of pages. If these pages are filed by a depository library on receipt, then the work remains current for access purposes;
- but how should these updates be managed if the purpose of holding the work is preservation? If they are never filed, (as is current ATL practice) then the work is a snapshot of the law at the time it was published, but useless for representing the law at any other time. It becomes impossible to recreate the law at any other point in time without filing each relevant update for each research project, and then unfiled them for the next user.

CD-roms and online electronic delivery

2.2 Over the last 10 years, legal publishers have increasingly delivered their products in electronic format – initially as a mixture of loose-leaf and/or CD-rom formats. However, recent developments now offer the option of daily updating services via the Internet.

2.3 These formats raise problems, not all of which were raised in the Discussion paper, namely:

- CD-roms are usually “locked” to prevent access by non-subscribers. Legal deposit copies need to be permanently “unlocked” to ensure the information remains available, but publishers may be unwilling to do this if free public access is perceived as damaging their market or allowing competitors access to their product for analysis;
- migration to alternative formats will need to be maintained over time or the material will be lost. This may involve also maintaining hardware that can read the formats used;

- CD-rom products updated by dynamic Internet sites are in constant flux. Decisions will need to be made as to what to preserve – weekly, monthly or annual snapshots;
- live URLs, a standard part of electronic (and paper) commentaries, will need to remain current if the value of the work is to be retained. Whose responsibility will this be for a legal deposit copy ?; and
- with sites changing on a minute-by-minute basis, how does one define a “representative sample” or force a publisher to provide and maintain access ?

2.4 Currently, all three legal publishers are moving rapidly towards full electronic delivery of the bulk of their products. This involves the publisher in holding all its base information (legislation, case law and commentary) in electronic format and offering the client the opportunity to customise its own products by:

- selecting precisely which “bytes” of information it needs;
- updating them on a regular, possibly daily, basis; and
- changing the content chosen as job parameters or interest areas develop.

2.5 The result of these developments will be the creation of as many “publications” as there are clients – but with few “publications” that would qualify for legal deposit under the current law. We can state that this type of information delivery will be current practice within 2 – 3 years in New Zealand, as New Zealand legal publishers are selling the concept to major clients as we write. And if it is happening in legal publishing, then it will soon begin happening in other professional and scientific publishing arenas.

2.6 This trend raises several problems for a New Zealand legal deposit regime:

- how is a “publication” to be defined in this case and who should be liable for legal deposit, if it still exists – the publisher or the client ?;
- if, as is quite possible, the publishing process or the server/s storing the New Zealand legal information that is used to create these products is moved offshore (say to Australia), where New Zealand legislation has no validity, how can New Zealand’s legal materials be preserved or made accessible to the general public ?;
- even if a definition of “publication” can be agreed that will include products in this format, this method of delivery includes regular, often daily, updating. The “publication” is effectively never static.
 - so what does one preserve ? and
 - how does one enforce access to the constantly changing pool of information that constitutes a publishers’ entire product range ?

2.7 If these problems cannot be solved, what happens to the record of New Zealand’s laws and legal system, and how can it be preserved or made accessible for future generations ?

Recommendations

2.8 As is mentioned in the Discussion paper, current legal deposit legislation only covers printed material. Within 5-10 years at the outside, it is unlikely that much of New Zealand’s legal materials (both primary law and commentaries) will be held in printed form. It is therefore vital that the current legislation be amended to include other formats.

2.9 With the rapid development in electronic delivery methods, up to and including WAP technology, we suggest that no formats be defined. The legislation should maintain as wide a potential coverage as legally possible, as current experience shows that it is not possible to

predict delivery formats more than 3 – 5 years in advance and altering legislation this often would be a waste of government time.

2.10 The Discussion paper talks about the unresolved difficulty of collecting quasi-ephemeral electronic material (Point 36) and current voluntary schemes operating effectively in Australia and the United Kingdom. Praiseworthy though it is that some publishers are voluntarily depositing electronic materials, a voluntary scheme (much like a verbal contract) may ultimately turn out not to be worth the paper it is written on – particularly if the bulk of a publishers’ business hinges on electronic delivery in a highly competitive market.

2.11 Point 29 of the Discussion paper discusses potential levels of compensation for publishers. With the radical change in delivery methods for New Zealand legal information, it seems inevitable that some form of compensation would need to be offered to encourage New Zealand legal publishers to continue to adhere to legal deposit requirements. As already mentioned, all three major legal publishers are owned by international companies and all three report to Sydney. Butterworths already offer their online services through their Sydney office. Regardless of the legal deposit regime in operation, there is a reasonable possibility that at least one of them – if not all – will move offshore in the foreseeable future. We therefore suggest that, whatever method of electronic legal deposit National Library chooses to follow, the ease with which New Zealand legal publishing (and no doubt other New Zealand branches of international publishing houses) can move outside the jurisdiction be taken into consideration.

3. DEFINITION OF “PUBLICATION”

3.1 As already mentioned, the rapid spread of electronic publications requires that any legal deposit scheme contain a robust definition of “publication” in order to ensure that:

- current and future publishing formats will fall under the ambit of that legislation; and
- publishers are clear as to which of their products are covered by that legislation.

3.2 Increasingly, government publications are also being published electronically – some exclusively in this format. With government departments able to choose their own publishers and publishing format, and no central agency having responsibility to collect and make these publications available, it’s important that National Library work with National Archives, and any other interested agency, (such as the State Services Commission as owner of the NZGO government portal) to ensure that the full record of New Zealand government is preserved.

3.3 Because of the importance of international exposure and/or exchange of information in many specialist arenas (eg law, information technology, science), a substantial number of New Zealand authors choose to publish overseas – either whole publications or as contributors to other works or journals. Under the current legislation, there is no way to claim legal deposit of these works. If the legislation is to be changed, perhaps National Library would like to consider the utility and practicality of attempting to define what percentage of a work needs to be written by New Zealand authors before the work can be regarded as a New Zealand publication, and legal deposit of say 1 copy of the work requested from the overseas publisher.

4. PRINTING ON DEMAND

4.1 In print as well as electronic formats, current publishing trends reflect the push towards customisation. Major British and American book chains now offer “print-on-demand” titles that are produced for the client on their premises on request. Some of these chains are in operation in New Zealand now(eg Borders Bookshop, Auckland) or offer the same service to New Zealand customers over the Internet.

4.2 The potential for the same problems raised by customised electronic legal texts arises where this process allows the creation of new “publications” from an amalgam of pre-existing texts – ie when a collection of chapters, essays and articles from various sources are printed and bound together for a particular purpose. Currently this is most likely to occur in educational publishing, but the potential exists (if copyright issues are successfully managed – or if copyright becomes unenforceable) to create new “publications” “on the fly”.

4.3 With “print-on-demand” already in commercial use, we suggest that this is an area that should also be considered in any review of legal deposit legislation.

CONCLUSION

As mentioned initially, we have concerned ourselves primarily with the issues we see arising from legal materials that directly affect the legal deposit regime, as it now stands. Should any further comment be required or if we can assist any further, we would be happy to do so.

**on behalf of
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