

Legislation Advisory Committee Guidelines

Guidelines on Process and Content of Legislation

2014 edition

OLD EDITION

Legislation Advisory Committee

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Note: These Guidelines will be amended from time to time. The latest version will be available at <http://www.lac.org.nz/guidelines/>

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PREFACE

WHAT IS THE LEGISLATION ADVISORY COMMITTEE?

The Legislation Advisory Committee (“LAC”) was established in 1986. Its members are appointed by the Attorney-General and consist of senior government legal advisers, academics and private practitioners. The LAC meets approximately every six weeks to consider bills that have been tabled and regularly makes submissions to, and appears before, select committees to comment on particular bills. The terms of reference of the LAC are:

- (a) to provide advice to departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office;
- (b) to report to the Attorney-General on the public law aspects of legislative proposals that the Attorney-General refers to it;
- (c) to advise the Attorney-General on any other topics and matters in the field of public law that the Attorney-General from time to time refers to it;
- (d) to scrutinise and make submissions to the appropriate body or person on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
- (e) to help improve the quality of law making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines and discouraging the promotion of unnecessary legislation.

WORKING WITH THE LAC

Officials do not need to wait until a bill is drafted to speak to the LAC. The Committee is available to discuss legislative design issues, including possible departures from these Guidelines, with departments at all stages of the legislative development process. The LAC encourages departments to do so before policy development is too advanced or actions, such as policy announcements, are made that are difficult to reverse. The LAC will continue to review bills after introduction; however, by this stage it is often too late to address significant design issues. As a result, select committee time will be used to address issues that might otherwise have been avoided.

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INTRODUCTION

These Guidelines have been produced by the LAC for government officials who are developing legislation. These Guidelines should enable officials to identify and address many of the issues that arise during the legislative development process.

These Guidelines are not intended to act as a hurdle for officials to overcome; nor are they concerned with second guessing policy decisions by Ministers. Rather, these Guidelines represent “best practice” in relation to the development of legislation.

Many of these Guidelines can be departed from in certain circumstances, and the LAC acknowledges the reality that strict compliance may not always be possible. Where a departure from these Guidelines does occur, officials should be prepared to demonstrate (often to a select committee) that they have fully considered the issues, and are able to provide good justification for the departure.

A number of the considerations in these Guidelines will also be addressed as part of the various existing government requirements relating to the legislative development process. Disclosure statements¹, Regulatory Impact Assessments², New Zealand Bill of Rights Act 1990 (“NZBORA”) vets³, and compliance with the Cabinet Manual⁴ will all have their own procedures and requirements.

WHAT IS THE PURPOSE OF LEGISLATION?

Legislation can be used to create and recognise rights or impose obligations and penalties. It is used to create institutions and provides the means for the Government to raise money and spend public funds. Legislation is used to give effect to New Zealand’s international obligations and, above all, to regulate public and private behaviour and enable the Government to act in a way that is in the best interests of New Zealand’s citizens.

Legislation is one of the most powerful tools available to the Government and should only be considered when there is a proper need. Legislation or provisions in legislation that have no legal effect and that are not intended to be enforced are a waste of Parliament’s time, a needless expenditure of public funds, and bring the law into disrepute.

WHAT IS HIGH-QUALITY LEGISLATION?

Legislation must be easy to use, understandable, and accessible to those who are required to use it. Quality legislation will achieve its underlying policy objective, but still have proper respect for important legal principles (including human rights) and smoothly integrate with the existing body of law.

¹ <http://www.treasury.govt.nz/publications/guidance/regulatory/disclosurestatements>

² <http://www.treasury.govt.nz/economy/regulation/regulatoryimpactanalysis>

³ <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>

⁴ <http://cabinetmanual.cabinetoffice.govt.nz/>

WHY IS CAREFUL LEGISLATIVE DESIGN IMPORTANT?

A thorough legislative design process will help ensure that work on a bill is not abandoned part way through its development because issues that should have been considered at the outset have subsequently come to light. It will result in less issues being raised at the select committee phase and the production of fewer Supplementary Order Papers. It will also reduce the risk that a bill may be enacted, but contain a defect or fail to achieve the intended purpose—all of which will require further legislation to address and may result in delayed implementation and increased cost.

If one adds up the time of policy officials, departmental lawyers, Parliamentary counsel, Parliament, and departments all involved in the task of developing and preparing to implement new legislation, the financial cost of even a modest bill can easily run to millions of dollars. Each unnecessary or poorly presented bill also represents a lost opportunity for departments to spend time on other projects and for Parliament to consider other matters. There are costs to the community; for example, those who take the time and expense to make submissions on bills, or those who must prepare for a bill that is coming into force.

WHEN TO USE THESE GUIDELINES

The production of legislation will involve a number of initial policy decisions, but it will also involve countless decisions that must be taken as the legislation develops. Each decision has the potential to bring further issues to light. These Guidelines will have the greatest impact when considered as a whole at the outset of the legislative development process, but also referred to as new issues arise and legislation develops.

HOW TO USE THESE GUIDELINES

The principles contained within these Guidelines are those that the LAC considers to be the most important to the legislative design process. These Guidelines are designed to be the first port of call for officials who are designing legislation, and will be supplemented in due course with more detailed text.

Each chapter of these Guidelines contains a general introduction to the issue and a series of questions, principles (*italicised*), and some brief explanatory text.

In general, the LAC considers that the default approach (reflected by the *italicised* text) should be adopted. In some cases the default position may be departed from, however officials must be able to provide reasoned justification for that departure and should include that justification in any supporting material.

The LAC will assess new bills against these Guidelines; however nothing in these Guidelines restricts the ability of the LAC to comment on any matter relating to a bill that it considers appropriate in the interests of encouraging high-quality legislation.

Most sections also contain a “further reading” section. The texts and other documents referred to in this section do not form part of these Guidelines; rather, they are provided to assist the reader who may wish to further explore the issues discussed in a particular chapter. The LAC does not endorse

the contents of those documents mentioned in the “further reading” sections (save for those documents produced by the LAC itself).

WORKING WITH THE PARLIAMENTARY COUNSEL OFFICE

The Parliamentary Counsel Office (“PCO”) also has an important role to play in developing legislation and officials should not hesitate to seek advice from the PCO. The PCO will help to turn policy ideas into legislation that is drafted in plain language, is easy to use, and is accessible to all who will need to use it. Guidance on instructing and working with the PCO can be found on the PCO website.⁵

DEPARTMENTAL BEST PRACTICE

Departments and agencies will deploy their resources in the manner that is most effective for the needs of the department. However, policy advisers and legal advisers should work together closely from the outset of the legislation development process. Both have important skills and insights that must be brought to bear on the design of legislation.

⁵ <http://www.pco.parliament.govt.nz/instructing-the-pco/>

1. Defining the policy objective

The objective of the bill is its backbone and should be identified early in the development process. As the legislation or policy develops, the principles that follow should be revisited to ensure the policy objective is clear, and that the legislation is the best way of achieving that objective.

Guidelines

1.1. Is the policy objective and purpose of the legislation clearly defined?

The policy objective must be clearly defined and discernible.

The broad underlying objective (the policy it is implementing or the reason for it) should be identified before substantive work starts. This does not mean that every minor policy decision must be settled, but the broad objective must be clear to everyone working on the bill.

Officials may find it helpful to produce an outline of the proposed bill, as this can sometimes assist in identifying issues, especially more detailed ones, that need to be addressed.

1.2. Is legislation the most appropriate way to achieve the policy objective?

All alternative means to legislation should be considered.

In many cases, a number of alternatives to creating new legislation will exist. The policy objective might be achieved more effectively through the use of education programmes, reliance on the common law or existing legislation, or reliance on existing private law civil remedies (see Chapter 19). Where legislation is preferred over another suitable, non-legislative alternative, this decision should be capable of justification. It is a Cabinet Manual requirement that unnecessary legislation is avoided (paragraph 7.20).⁶

1.3. Has there been appropriate consultation within government?

All relevant government departments should be consulted at an early stage.

It will generally be more efficient to consult with all relevant departments, and resolve any inter-agency differences in respect of the proposed legislation, before seeking Cabinet approval. This will help to identify possible conflicts or inconsistencies with any legislation or policies that may already exist or currently be in development. It will also help to identify interest groups or other sections of the public that should be consulted.

Effective and appropriate consultation within government is a Cabinet requirement (paragraphs 7.24–7.45). The CabGuide also provides some useful guidance on who to consult within government.⁷

⁶ <http://cabinetmanual.cabinetoffice.govt.nz/7.19>

⁷ <http://cabguide.cabinetoffice.govt.nz/procedures/consultation/departamental-consultation>

1.4. Has effective consultation with the public occurred?

Public consultation should take place.

Public consultation is key to ensuring that the Government has all the information it requires to make good law. Information should be made available to the public (those outside government) in a manner that enables people affected by the proposed legislation to make their views known. An effective consultation programme can contribute to higher-quality legislation, the identification of more effective alternatives, lower administration costs, better compliance, increased public “buy in”, and faster regulatory responses.

Public consultation is not required or possible in all cases. However, a failure to consult may result in valuable perspectives and information being overlooked and also risks unintended consequences. It may also result in a failure to identify alternative means of achieving the policy objective. Further information on planning and carrying out effective consultation is found in the Regulatory Impact Analysis Handbook.⁸

1.5. Do all the provisions of the proposed legislation clearly relate to the policy objectives and purpose of the proposed legislation?

The provisions of the proposed legislation should be consistent with its purpose and the policy that underlies it.

Each provision should relate to a policy objective that underlies the legislation. Conducting a regular review of the content of proposed legislation will help ensure consistency with the legislative objective, particularly in circumstances where the broad policy objectives have not been clearly identified at the outset or have developed during the legislative process.

Due to the pressures on Parliamentary time, it is becoming increasingly common for bills already in the House to be used as a means of passing provisions that might otherwise have justified separate legislation. Additional provisions must be consistent with the policy objective and purpose of the bill; or the description of the purpose of the bill should be amended to reflect the introduction of the new provisions.

⁸ <http://www.treasury.govt.nz/publications/guidance/regulatory/impactanalysis>

2. How new legislation relates to the existing law

New legislation does not operate in a vacuum. It will interact with the existing body of law (found in statutes and the common law) in a variety of ways. Some existing law, such as the Interpretation Act 1999 (“the Interpretation Act”), will have a general application to all new legislation. Other legislation will apply where the new legislation proposes to operate in specific ways. For example, the Privacy Act 1993 applies to legislation that involves the collection and storage of personal information.

The common law is a body of law developed by the judiciary. It consists of both deeply embedded constitutional principles and rules that arise from particular judgments or a series of cases. The common law is relatively stable. It can be altered by the judiciary, but fundamental shifts do not occur quickly and the courts are careful not to stray into territory that is more properly addressed by Parliament.

The extent to which new legislation will interact with the existing law will have a significant bearing on the content of the new legislation. A failure to properly address existing legislation or the common law may lead to uncertainty and to litigation. It is therefore necessary to have as thorough an understanding as possible of the relevant existing body of law before undertaking substantial work on the legislation. This is especially important where the intention is to reverse a particular judicial decision or trend that has developed through a line of decisions.

This chapter will help ensure that new legislation is developed consistently with, and properly addresses, the existing body of law.

Guidelines

2.1. Has all relevant existing legislation been identified and considered?

Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified.

Almost all new legislation will deal with matters that are governed to some extent by other legislation. Existing relevant legislation should be identified early in the development process so that any interactions or conflicts can be identified and addressed. In some cases, legislation that implements similar policies to that of the proposed legislation may provide a useful precedent.

2.2. Are any conflicts or interactions between new legislation and existing legislation addressed?

Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation.

Where there is an unavoidable or intentional conflict between new legislation and existing legislation, or where there is any interaction between two or more provisions in different legislation, the new legislation should make clear which provision shall prevail or how it is intended that the two provisions should operate together.

2.3. Are any matters addressed by the new legislation covered by existing legislation?

New legislation should not re-state matters that are already addressed in existing legislation.

Where a provision in existing legislation satisfactorily addresses an issue, it is preferable not to repeat that provision in new legislation. This kind of duplication often results in unintended differences, especially where legislation is amended over time or where the legislation is intended to address a different policy objective.

In some cases, existing legislation can be used to supplement new legislation. Some Acts are of general application (the Interpretation Act). Others must be expressly applied by the new legislation (The Ombudsmen Act 1975).

Where appropriate, “flag” provisions may be used in the new legislation to identify (but not re-state) the relevant provisions of the other legislation (see, for example, s. 8 of the Local Government (Auckland Council) Act 2009⁹, or s. 30B(3) of the Receiverships Act 1993¹⁰).

2.4. Have all relevant common law rules and principles been identified and considered?

Relevant common law rules and principles should be identified.

New legislation should as far as practicable be consistent with fundamental common law principles and Te Ao Māori (which incorporates Māori language, customs, beliefs, sites of importance, and the importance of community, whānau, hapū and iwi). Some of the fundamental common law principles are discussed in Chapter 3.

A considerable amount of substantive law (large portions of the law of tort (civil wrongs), contract, equity (such as the law of trusts and fiduciary obligations), as well as many of the principles of judicial review), are still found in the common law, albeit subject to some statutory modifications. When proposing to legislate in these fields, legal advice should be sought to identify the extent to which the common law still applies.

2.5. Have any interactions between the common law and the new legislation been identified and addressed?

Any conflict or interaction between new legislation and the common law should be explicitly addressed in the new legislation.

New legislation can alter, work in parallel with, or entirely override the common law. However the new legislation must clearly identify whether or not it is doing so. If the legislation is not intended to affect the common law, then this should also be explicitly set out in the new legislation. Section 12A of the Evidence Act 2006¹¹ is an example of legislation that preserves particular common law principles.

⁹ <http://www.legislation.govt.nz/act/public/2009/0032/latest/DLM2044936.html>

¹⁰ <http://www.legislation.govt.nz/act/public/1993/0122/latest/DLM327750.html>

¹¹ <http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393574.html>

2.6. Does the common law already satisfactorily address those matters that the new legislation is proposing to address?

New legislation should not address matters that are already satisfactorily dealt with by the common law.

New legislation should only address matters already covered by the common law where it can result in improvement, such as increased clarity or certainty. The cost (not only of passing the legislation, but of its subsequent administration) and the potential risks of legislating should not outweigh the benefits of the new legislation.

2.7. Are there any precedents in existing legislation?

Precedents from existing legislation should only be used if they are consistent with the scheme and purpose of the new legislation.

In some cases a provision or provisions in existing legislation may provide a useful precedent for the new legislation. The following matters should be considered when a precedent is being assessed for inclusion in new legislation:

- the search for appropriate precedents should not be limited to the particular department that is developing new legislation (the courts will often consider the legislation of other departments when seeking to identify precedents);
- the reasons for following a particular precedent, or for not following an apparently suitable precedent, must be considered and articulated in the policy documentation;
- if there is an intention for a provision to have the same effect as a provision in other legislation, then this should be articulated in the policy documentation and instructions to the PCO;
- inconsequential amendments (such as the re-ordering of words or provisions to no substantive effect) should be avoided;
- new legislation must not copy New Zealand or overseas statutes without first considering whether or not the precedent will be efficient and effective having regard to the circumstances of the new legislation;
- if a precedent is being used from foreign legislation (for example, where implementing trans-Tasman or other international agreements), the terminology used in foreign legislation must be appropriate for the New Zealand context.

3. Basic constitutional principles and values of New Zealand law

A number of fundamental principles and values are found in New Zealand law. Regardless of whether or not these principles are reflected in legislation, they run so deep in New Zealand law that the courts will often draw on them when interpreting legislation. Where new legislation is inconsistent with or challenges one of these fundamental principles, it will become the subject of concern and increased scrutiny by Parliament, the public, and often the courts.

Many of these principles exist in the common law or are reflected in legislation such as the Constitution Act 1986¹², the New Zealand Bill of Rights Act 1990 (“NZBORA”) ¹³, and the Public Finance Act 1989¹⁴. Other principles are found in constitutional conventions, the Standing Orders of the House of Representatives¹⁵, and in the Cabinet Manual¹⁶ (supplemented by the CabGuide¹⁷). While New Zealand does not have a written constitution, these principles, together with important documents such as the Treaty of Waitangi (“the Treaty”) and ancient English statutes such as the Magna Carta 1297¹⁸ and the Bill of Rights 1688¹⁹, form the constitution of New Zealand.

Officials are encouraged to read the short essay “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” by the Rt Hon Sir Kenneth Keith, which is found in the introduction to the Cabinet Manual.²⁰

The principles discussed in this chapter will be relevant throughout the policy and legislative development process. Where the proposed legislation has the potential to impact on any of the principles below, legal advice should be sought as early as possible.

Guidelines

3.1. Does the new legislation affect the basic constitutional principles and values of New Zealand law?

New legislation should respect the basic constitutional principles of New Zealand law.

The rule of law: The rule of law is the most fundamental constitutional principle in New Zealand law and incorporates a number of subsidiary principles. The full scope of the rule of law is the subject of debate, but at its core are the following principles:

- the law must be clear, accessible and apply to everybody (private citizens and the Government);
- human rights must be adequately protected, and proceedings before courts and tribunals must be fair;

¹² <http://www.legislation.govt.nz/act/public/1986/0114/latest/DLM94204.html>

¹³ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

¹⁴ <http://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>

¹⁵ <http://www.parliament.nz/en-nz/pb/rules/standing-orders>

¹⁶ <http://cabinetmanual.cabinetoffice.govt.nz/>

¹⁷ <http://cabguide.cabinetoffice.govt.nz/>

¹⁸ <http://www.legislation.govt.nz/act/imperial/1297/0029/latest/DLM10929.html>

¹⁹ <http://www.legislation.govt.nz/act/imperial/1688/0002/latest/DLM10993.html>

²⁰ <http://cabinetmanual.cabinetoffice.govt.nz/introduction>

- public powers must be exercised fairly and in accordance with the law, and must never be exercised arbitrarily;

The principles and values that follow all stem from, or uphold aspects of, the rule of law.

Equality before the law: Everybody is equal before the law and is subject to it. The application of legislation to the Government is complex and dealt with in more detail in Chapter 10.

Parliamentary sovereignty: Parliament is the supreme law-making body of New Zealand and comprises the House of Representatives and the Governor-General. The House of Representatives has the exclusive power to regulate its own procedures. One Parliament cannot prevent a subsequent Parliament from repealing or amending existing legislation, or from passing new legislation. The courts can neither invalidate legislation passed by Parliament nor interfere with the legislative process. It is often said that Parliament can legislate to do anything. Yet this does not mean that it should, particularly where human rights or fundamental principles are affected.

Separation of powers: Each branch of government (executive, legislature, and judiciary) must perform only those functions associated with that branch and not intrude into, or assume the functions of, another branch. This principle helps to prevent the concentration of power in one branch of government and helps to reduce the potential for abuse. While the executive/legislature divide is not always strictly adhered to in New Zealand (Ministers must be members of Parliament), stringent protections must be kept in place to keep the judiciary separate from the other branches.

Judicial independence and impartiality: Certain decisions must be made by judges independent of the Government. Judges interpret legislation and are the source of the common law. They decide disputes between individuals and between individuals and the Government. Courts are the only institutions that can impose criminal convictions or sentence people to imprisonment.

To properly perform these functions and to maintain public confidence in the judicial system, judges must be impartial in respect of the matter before them, and be independent of the executive and legislature. Legislation that affects a judge's appointment, tenure in office, or financial security will potentially affect judicial independence. Measures that create evidentiary presumptions, minimum or mandatory penalties, or restrict remedies also affect judicial independence and must be considered with care.

Free and fair elections: Members of the House of Representatives are chosen by a process of regular free and fair elections in which all citizens and permanent residents may vote and put themselves forward for election (subject to some restrictions in the Electoral Act 1993²¹). Any attempt to affect either the process by which elections are conducted or the eligibility criteria to vote or stand as a candidate will be the subject of considerable scrutiny.

²¹ <http://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html>

New legislation must respect the principles of the Treaty of Waitangi.

Respect for the spirit and principles of the Treaty of Waitangi: The Treaty is discussed in more detail in Chapter 4.

New legislation must respect the dignity of the individual and the presumption in favour of liberty.

Respect for the dignity of the individual: Respect for the dignity of the individual is of paramount concern to the law and gives rise to fundamental human rights. These rights include the right to:

- life;
- physical integrity;
- freedom from medical or scientific experimentation without consent;
- freedom to refuse to undergo medical treatment;
- freedom from discrimination on specified grounds;
- freedom from torture, cruel, degrading or disproportionately severe treatment or punishment

(see Chapter 5).

The presumption in favour of liberty: Nobody should be deprived of their liberty without proper cause and due process. Liberty can be denied in various ways. Examples include:

- arrest and imprisonment;
- detention for mental health treatment;
- detention for customs or immigration purposes;
- restrictions on a person's movement or activities (such as curfews or prohibition from entering certain parts of a town).

Those who are or may be deprived of their liberty should have access to the courts to review the legality of the restriction.

New legislation should respect property rights.

Respect for property: People are entitled to the peaceful enjoyment of their property (which includes intellectual property and other intangible property). The law actively protects property rights through the criminalisation of theft and fraud and through laws dealing with trespass, and other property rights. The Government should not take a person's property without good justification. A rigorously fair procedure is required and compensation should generally be paid. If compensation is not paid, there must be cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated).

The law may allow restrictions on the use of property for which compensation is not always required (such as the restrictions on the use of land under the Resource Management Act 1991²²).

The exercise of powers under legislation must be subject to the principles of natural justice where appropriate.

Natural justice: This is a flexible concept, the purpose of which is to ensure people are dealt with fairly. First, decision makers must be unbiased in respect of the matter before them. Second, decision makers must provide those affected by the decision with the opportunity to be heard. The exact requirements of natural justice will vary depending on the particular context of the case, having regard to the importance of the rights and interests involved. Natural justice operates at its highest level in the case of criminal trials, with strict procedural requirements; the requirements of natural justice in a licencing decision may be less stringent.

New legislation should not generally restrict the right of access to the courts.

Access to the courts: The ability of the courts to review the legality of government action or to settle disputes is a key constitutional protection. Legislation that seeks to limit this right must be justified, and will generally be given a restrictive interpretation by the courts. This principle does not prohibit a mandatory requirement to attempt a resolution by alternative dispute resolution (“ADR”) or review processes before bringing court proceedings in appropriate cases (see Chapter 26).

Legislation should not affect existing rights and should not criminalise or punish conduct that was not punishable at the time it was committed.

The presumption against retrospectivity: The general rule is that legislation should have prospective, not retrospective, effect (see Chapter 11).

Money must not be raised, spent or borrowed without Parliamentary authority.

Parliamentary authority is required to spend or borrow money, or levy a tax: Government departments can only spend those funds that Parliament specifically grants them each year. Departments that run over budget must seek approval from Parliament for more funds. Only Parliament can authorise the borrowing of money by the Government, and only Parliament has the power to authorise the raising of money by way of new or increased taxes. The granting of powers to charge fees and levies is discussed in Chapter 15.

Clear and unambiguous wording must be used if Parliament wishes to override fundamental rights and values.

The principle of legality: Parliament must use unambiguous language when seeking to override basic human rights. The courts will presume that general words in legislation are not intended to override basic human rights. If there is any doubt, it is likely that the right

²² <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM231916.html>

will prevail. This principle is reflected in s 6 NZBORA²³: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

New legislation must comply with New Zealand’s international obligations.

International obligations: There is a presumption that New Zealand will act in accordance with its international obligations, and that legislation will comply with those obligations (see Chapter 8).

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²³ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

4. The Treaty of Waitangi and Treaty settlements

The Treaty of Waitangi (“the Treaty”) has been described as “part of the fabric of New Zealand society” and is of vital constitutional importance. The development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty.

The Treaty requires that the Government and Māori act towards each other reasonably and in good faith—akin to a partnership. Two important ways to achieve this is through informed decision making (which includes effective consultation by government) and through the active protection of Māori rights and interests under the Treaty by the Government.

Due to its constitutional significance, in the absence of clear words to the contrary the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and interpret legislation accordingly. The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Treaty [7.60(a)].

Guidelines

4.1. Does the proposed legislation affect, or have the potential to affect, the rights or interests of Māori under the Treaty?

Māori interests that will be affected by the proposed legislation should be identified.

Legislation may affect the rights and interests of Māori if it impacts on the relationship between the Government and Māori, or the possession, use or ownership of land, waterways, forests, fisheries, taonga and other resources. Taonga may include tribal heirlooms or weapons, as well as intangible treasures such as language, cultural practices and traditions.

The Treaty is a “living document”. This refers to the common understanding that the intent and application of the Treaty will change as society and circumstances evolve, and that the interests of Māori to be protected under the Treaty are not only those that existed when the Treaty was signed. A Māori interest may arise in respect of the right to develop a resource that was either undiscovered or unexploited at the time the Treaty was signed. Interests might also be affected by the use of new technology, such as the ability of Māori to have access to television and radio broadcasts to promote culture and language.

4.2. Does the proposed legislation affect any matters that are the subject of an existing Treaty settlement?

New legislation must not be inconsistent with an existing Treaty settlement.

The Government is party to, and continues to negotiate, a number of Treaty settlements to provide redress for historical acts or omissions towards particular groups of Māori, and to improve their relationship with the Government.

Individual Treaty settlements are final, meaning the historical claims they settle and the settlement itself (with the exception of disputes over interpretation) may not be the subject of a further historical claim to the Waitangi Tribunal or the courts. The detail of each settlement is reflected in a Deed of Settlement that is given effect by legislation. Thorough consultation must take place with the relevant settlement group if new legislation has the potential to affect an existing Treaty settlement.

The Office of Treaty Settlements (“OTS”)²⁴ is a unit within the Ministry of Justice responsible for negotiating Treaty settlements on behalf of the Government. The Post Settlement Commitments Unit within the Ministry of Justice was established to safeguard the durability of Treaty settlements. These units should be consulted if there is a possibility that the rights or interests concerned may be the subject of a prospective or existing settlement.

4.3. Are any of the rights and interests affected by the legislation potentially recognised at common law?

Any land, bodies of water or other resources potentially subject to customary title (or rights), and that might be affected by proposed legislation, should be identified.

The common law recognises Māori customary title (akin to a property right) and customary rights (which may include rights of use and access) in land and other natural features. Customary title and customary rights pre-date the Government’s acquisition of sovereignty.

Recognition of Māori customary title and customary rights at common law is not dependent on the Treaty. Express language is required to extinguish any subsisting Māori customary title or customary rights. A statement that Parliament intends to legislate inconsistently with the principles of the Treaty will therefore not be sufficient to extinguish customary title.

The courts will generally hold that, unless voluntarily surrendered, abandoned or expressly extinguished in clear terms by legislation, customary title and customary rights will continue to have legal effect. Legislation that is intended to extinguish or apply to customary title and customary rights will require clear and precise wording to that effect.

Extra care must be exercised when dealing with customary title or rights relating to riverbed, lakes, the foreshore and seabed, as these often pose difficult legal issues.

4.4. Should Māori be consulted?

The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori.

Consultation is not required in all cases; however, it is one of the principal mechanisms through which the Government (via Ministers and government agencies) discharges its responsibility to make informed decisions to act in good faith towards Māori. A failure to effectively consult may be seen as a breach of the principles of the Treaty and harm the relationship between Māori and the Government.

²⁴ <http://www.ots.govt.nz>

A failure to consult may also result in Parliament passing legislation without appreciating fully the variety of views and interests that may be relevant. This may result in difficulties in applying and interpreting the legislation at a later date.

4.5. Who should be consulted?

Consultation must target Māori whose interests are particularly affected.

Government policies and legislation will have the ability to affect different groups of Māori in different ways. It is therefore important to identify who might be specifically affected and ensure their views are sought and fully considered. As no one body speaks for all Māori on all matters, iwi or entities that are specifically affected must be identified and consulted. For matters concerning particular regions, it may be appropriate to focus consultation on the iwi who have customary interests in that area.

The OTS will also be able to advise on which iwi have a representative body recognised by the Crown for Treaty settlement purposes.

The CabGuide webpage on “Consultation with government agencies”²⁵ notes that departments should, after making their own initial assessments, consider consulting Te Puni Kōkiri on proposals that may have implications for Māori as individuals, communities or tribal groupings; and the Crown Law Office for constitutional issues including Treaty issues.

4.6. In the event of a conflict between the proposed legislation and the principles of the Treaty of Waitangi, does the legislation include additional measures to safeguard Māori interests?

When legislation has the potential to conflict with the rights or interests of Māori under the Treaty, additional measures should be considered to ensure recognition of the principles of the Treaty or the particular rights concerned.

Two general classes of measures may be included in legislation to acknowledge or safeguard Māori rights and interests under the Treaty:

- **General measures:** These measures relate to the manner in which the legislation is administered or the way a power is exercised: For example, s 4 of the Conservation Act 1987²⁶ provides “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”. Section 9 of the State-Owned Enterprises Act 1986²⁷ provides “Nothing in this Act shall permit the Government to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”.
- **Specific measures:** The interests affected should be identified in the legislation along with the specific means of protecting them, such as the obtaining of consents if

²⁵ <http://cabguide.cabinetoffice.govt.nz/procedures/consultation/departmental-consultation>

²⁶ <http://www.legislation.govt.nz/act/public/1987/0065/latest/DLM103610.html>

²⁷ <http://www.legislation.govt.nz/act/public/1986/0124/latest/DLM97377.html>

consultation is deemed insufficient. For example, s.4 of the Environmental Protection Authority Act 2011²⁸ provides:

“In order to recognise and respect the Government’s responsibility to take appropriate account of the Treaty of Waitangi, -

(a) section 18 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and

(b) the EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under the Act”.

4.7. Does Parliament intend to legislate inconsistently with the principles of the Treaty of Waitangi?

Clear language is required where legislation is intended to be inconsistent with the principles of the Treaty.

In some circumstances the Government may wish to legislate in a manner that is inconsistent with the principles of the Treaty. In such circumstances it is essential for the legislation to clearly express this intention in the Act by the use of appropriate wording. The intention should also be reflected in the policy documentation that underlies the Act. If the intention is not clear, the courts will presume that Parliament intended to legislate consistently with the principles of the Treaty. This may yield results inconsistent with the intended policy outcome.

²⁸ <http://www.legislation.govt.nz/act/public/2011/0014/latest/DLM3366813.html>

5. New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (“NZBORA”)²⁹ affirms a range of civil and political rights, many of which are discussed in Chapter 3. NZBORA implements the International Covenant on Civil and Political Rights (“ICCPR”)³⁰ and affirms New Zealand’s commitment that policy and legislation will be consistent with those rights. New legislation should therefore be consistent with the rights and freedoms contained in NZBORA.

NZBORA applies to the executive, legislature, judiciary, and any other person performing a public function, power or duty. It identifies those areas where policy officials must tread carefully.

The rights affirmed by NZBORA can be grouped into six categories:

- life and security of the person;
- democratic and civil rights;
- non-discrimination and minority rights;
- search, arrest and detention rights;
- criminal procedure rights;
- rights to justice.

As discussed in Chapter 3, many of these rights have long histories and are deeply rooted in the common law. There is a developed body of case law concerning NZBORA and the interpretive approach the courts will take to legislation that affects NZBORA rights. It will therefore be necessary to obtain legal advice where NZBORA issues are involved.

Legal advice should be sought to ensure that any proposed legislation has had proper regard to the rights in NZBORA, and that any limitations thought to be necessary can be reasonably justified in a free and democratic society. The Ministry of Justice has produced detailed guidance for the public sector regarding NZBORA.³¹

It is necessary to have a good understanding of the rights and freedoms affirmed by NZBORA and to identify at an early stage whether any aspect of the proposed legislation may limit any NZBORA rights. If the legislation does limit an NZBORA right, every attempt should be made to eliminate the inconsistency. A full explanation as to why the limitation was necessary should be given to the relevant Cabinet committee and select committee. The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, NZBORA (see paragraph 7.60(b)).³²

²⁹ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

³⁰ <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/international-covenant-on-civil-and-political-rights>

³¹ <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector>

³² <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>

Guidelines

5.1. Have you selected the option that imposes no limitation or the least limitation on a particular right?

NZBORA rights should not be limited, or should be subject only to such reasonable limits as can be justified in a free and democratic society.

Alternative options for achieving the policy objective that will result in no limitation on NZBORA rights should be identified and considered. These alternatives might involve adopting a different legislative approach or relying on non-legislative alternatives (see Chapter 19).

The rights contained in NZBORA may be subject to reasonable limits which can be justified in a free and democratic society. Legislation that only imposes reasonable limitations on a right as provided for in NZBORA will not be inconsistent.

In those cases where a limitation is required, rigorous steps should be taken to identify the least limitation possible.

Determining whether a limitation is “justified in a free and democratic society” will involve assessing the policy objectives and relevant legal principles. Officials must therefore work closely with their legal advisers when conducting this assessment.

5.2. If the limitation cannot be justified, but remains the only possible way to achieve the policy objective, is the limitation only as wide as is necessary to achieve the policy objective?

Any unjustified limitation should be restricted to that which is necessary to achieve the policy objective.

There will be cases where the Government wishes to proceed with legislation that results in an unjustified limitation on an NZBORA right. Section 6 of NZBORA requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in NZBORA, that meaning shall be preferred to any other meaning.

This means that in cases where the Government wishes to proceed with legislation that is inconsistent with NZBORA, clear and unambiguous language must be used to confirm this intention.

The courts are prevented from striking down, or refusing to apply, legislation that is inconsistent with NZBORA. However, this is not a free pass to develop legislation that is inconsistent with NZBORA. Such legislation can have serious consequences.

- The Attorney-General is required to notify Parliament when a bill is introduced if a limitation on an NZBORA right is not reasonably justified and that the Bill is inconsistent with NZBORA.

- Standing Order 265(5) requires the Attorney-General's report to be referred to a select committee. The inconsistency may then be the subject of adverse comment during the select committee process, which might attract negative publicity.
- The courts may not strike down primary legislation, but may criticise the inconsistency in their judgments.
- Legislation that is inconsistent with NZBORA will place New Zealand at risk of breaching its international human rights obligations (under the ICCPR and otherwise) and expose it to any applicable sanctions.

All possible steps must be taken to ensure that the unjustified limitation is the least limitation required to achieve the policy objective. Additional procedures or safeguards that might further mitigate the limitation should also be considered.

OLD EDITION

6. Discrimination and distinguishing between different groups

Unjustified discrimination causes real harm to people and stigmatises already vulnerable groups. It can also result in reputational and financial consequences for the Government. This chapter will assist in identifying where proposed legislation might result in discrimination and how it might be addressed.

Section 19(1) of NZBORA³³ affirms that everyone is entitled to be free from discrimination on the grounds set out in s. 21 of the Human Rights Act 1993³⁴:

- sex (including pregnancy and childbirth);
- disability;
- marital status;
- age (starting at 16);
- religious belief;
- political opinion;
- ethical belief;
- employment status;
- colour;
- family status;
- race;
- sexual orientation;
- ethnic origin;
- national origin.

A provision will likely limit the right to freedom from discrimination where:

- it draws a distinction on one of the prohibited grounds of discrimination; and
- the distinction involves a material disadvantage to one or more classes of individuals.

Direct discrimination will occur when a provision in legislation expressly disadvantages a group. Disadvantage includes giving an advantage to another group. Indirect discrimination occurs when a provision might not expressly give one group an advantage over another, but the effect of the provision is that one group is disadvantaged. For example, a provision that does not include any reference to a person's sex but imposes criteria such as minimum height requirements will generally disadvantage women compared to men.

The Ministry of Justice holds policy responsibility for matters related to the Human Rights Act and provides detailed guidance for the public sector on its website.³⁵

The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Human Rights Act (see paragraph 7.60(b)).³⁶

If there is any doubt that new legislation will discriminate on one of the prohibited grounds, officials should consult their legal advisers.

³³ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

³⁴ <http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html>

³⁵ <http://www.justice.govt.nz/publications/publications-archived/2002/the-non-discrimination-standards-for-government-and-the-public-sector-guidelines-on-how-to-apply-the-standards-and-who-is-covered-march-2002/the-non-discrimination-standard-for-the-public-sector>

³⁶ <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>

Guidelines

6.1. Does the legislation affect the right to freedom from discrimination in s. 19 NZBORA?

Legislation should not discriminate on one of the prohibited grounds.

The starting point is that legislation should not discriminate on any of the prohibited grounds. However, it is not unlawful to discriminate by taking steps in good faith to assist or advance those disadvantaged by discrimination (s 19(2) NZBORA).

Discrimination by a state sector organisation on a prohibited ground will be, on its face, a limit on the NZBORA right to be free from discrimination. Where the discrimination is the only means of achieving an important policy objective, clear language must be used in the legislation and the limitation must be justified in a free and democratic society (see Chapter 5). The courts will presume that Parliament has intended to legislate consistently with NZBORA and will interpret the legislation as such in the absence of clear indicators in the legislation.

Particular care should be exercised in social policy areas such as welfare, health or education, where it is often necessary to treat groups differently to achieve a positive outcome for certain groups. Early consultation with legal advisers is recommended for officials working in such areas.

The Human Rights Act also contains a number of exceptions to the right to freedom from discrimination that may be relied on by both State sector and private organisations. For example:

- it is not unlawful to discriminate in employment matters on the grounds of sex or age, where for reasons of authenticity being a particular sex or age is a genuine qualification for the job (s 27(1));
- it is not unlawful to discriminate in certain circumstances in relation to insurance (s 48) or superannuation (s 70), where the discrimination is based on actuarial or statistical data.

6.2. Have you selected the option that results in the least amount of discrimination?

Any discrimination should be no greater than is necessary to achieve the policy objective.

When faced with multiple options for achieving the policy objective, the option that results in no discrimination should be selected. If that is not possible, the option that results in the least discrimination is to be preferred. Choosing the option that involves the least limitation on the right to freedom from discrimination will result in legislation that is more likely to be consistent with NZBORA.

6.3. Have you consulted the Human Rights Commission?

Consult the Human Rights Commission early in the policy development process.

The Human Rights Commission³⁷ is an independent body that advocates and promotes respect for human rights. It has a key role in educating the public on human rights issues and in providing a service to resolve disputes and complaints.

6.4. Have you considered all the consequences of non-compliance with NZBORA?

Consider the full range of consequences of passing legislation or taking action that does not comply with the Human Rights Act 1993 and section 19 NZBORA.

The consequences that may result where legislation is inconsistent with NZBORA are described in Chapter 5.

If the Human Rights Review Tribunal³⁸ finds that a piece of enacted legislation is inconsistent with the right to freedom from discrimination, it may also grant a declaration that the legislation is in breach of the right to freedom from discrimination. The declaration does not affect the operation of the legislation, but the Minister must report the declaration to Parliament and table a response.

³⁷ <http://www.hrc.co.nz/>

³⁸ <http://www.justice.govt.nz/tribunals/human-rights-review-tribunal>

7. Privacy and dealing with information about people

The Government should respect privacy interests and ensure that the collection of information about people is done in a transparent manner, where the type and amount of information collected and what is done with that information is clearly explained. Maintaining the community's trust that government will respect privacy interests is key to the Government's ability to collect the information it needs to provide many public services.

The Privacy Act 1993³⁹ governs the way that the Government and private sector organisations must handle personal information. The Privacy Act will be engaged if the new legislation involves the handling of information about a person that either identifies or is capable of identifying that person (defined as "personal information").

If the proposed legislation will affect the privacy of individuals, two bodies should be consulted: the Privacy Commissioner⁴⁰; and the Government Chief Privacy Officer ("GCPO")⁴¹. The Privacy Commissioner is an Independent Crown Entity charged with monitoring the protection of New Zealanders' privacy rights. The GCPO's role is to provide expert guidance and internal advice on privacy issues to the Government.

The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Privacy Act (see paragraph 7.60(c)).⁴²

Any policy development that involves personal information should involve a Privacy Impact Assessment⁴³ at an early stage to assess the extent of the impact and how it can be managed in the policy development process.

While this chapter focuses on how the public sector handles personal information, the Privacy Act also applies to how the private sector handles personal information (such as credit reports and banking information). The Privacy Act and many of the considerations in this chapter will therefore be relevant to legislation that affects or authorises the handling of personal information by private sector bodies.

Guidelines

7.1. Is the legislation consistent with the requirements of the Privacy Act 1993 and its 12 Information Privacy Principles?

Legislation should be consistent with the requirements of the Privacy Act 1993, in particular the Information Privacy Principles.

The two key concepts in the Privacy Act are purpose and transparency. You must know what you want to do and what personal information you need to do it, and you must clearly

³⁹ <http://www.legislation.govt.nz/act/public/1993/0028/latest/DLM296639.html>

⁴⁰ www.privacy.org.nz

⁴¹ <https://ict.govt.nz/governance-and-leadership/the-gcio-team/government-chief-privacy-officer/>

⁴² <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>

⁴³ <http://www.privacy.org.nz/news-and-publications/guidance-notes/privacy-impact-assessment-handbook/>

communicate both those aspects to those whose information is involved. Where relevant, legislation should clearly state its relationship with the Privacy Act and explicitly address whether the Privacy Act does or does not apply, or where parts of the Privacy Act do not apply.

The personal information that is required may already be held by a public body for another purpose. Whether the proposed use falls within the purposes for which the personal information was originally collected, and whether those purposes have been communicated to the individuals concerned, should be considered before developing legislation that permits a new use or disclosure of information that is already held.

The 12 Information Privacy Principles⁴⁴ are the cornerstone of the Privacy Act (and can be found in s 6). They address how agencies and private sector bodies may collect, store, use, and disclose personal information. They also allow a person to request access to and correction of their personal information. Many of the Information Privacy Principles have in-built exceptions, and Part 6 of the Privacy Act has further exemptions for them. For more guidance, consult the Privacy Commissioner's website.⁴⁵

Legislation may be inconsistent with the Privacy Act, but this must be explicit in the legislation. A full explanation will also need to be provided to the relevant Cabinet Committee as to why the inconsistency with the Privacy Act in the proposed legislation is necessary to achieve the policy objectives.

Where the policy objective requires an inconsistency with the Privacy Act, the legislation should be drafted so as to minimise the inconsistency. If there is any ambiguity regarding an inconsistency with the Privacy Act, the courts may prefer an interpretation of the legislation that involves the least impact on the privacy interests of individuals.

7.2. Have you complied with any relevant Code of Practice issued by the Privacy Commissioner?

The design of new legislation must take account of any applicable Code of Practice.

The Privacy Commissioner issues Codes of Practice that may modify the application of or replace the Information Privacy Principles (such as in respect of health information). Codes of Practice have the force of regulations and are enforceable through the Privacy Commissioner and the Human Rights Review Tribunal.

Legislation can be inconsistent with a Code of Practice, but this intention must be clear on the face of the legislation.

A list of the currently applicable Codes of Practice can be found on the Privacy Commissioner's website.⁴⁶

⁴⁴ <http://www.legislation.govt.nz/act/public/1993/0028/latest/DLM297038.html>

⁴⁵ <http://www.privacy.org.nz/news-and-publications/guidance-notes/information-privacy-principles/>

⁴⁶ <http://privacy.org.nz/the-privacy-act-and-codes/codes-of-practice/>

7.3. Have you consulted the Privacy Commissioner, the Ministry of Justice and the GPCO?

Consult the Privacy Commissioner, the Ministry of Justice and the GPCO when developing new policies and legislation that may affect the privacy of individuals.

The Privacy Commissioner and Ministry of Justice should always be consulted where policy and legislative proposals potentially affect the privacy of individuals.

The following uses of information raise specific issues on which further advice should be sought from legal advisers, the Privacy Commissioner, the Ministry of Justice, and the GPCO:

- **Public register:** A database or register that contains personal information, and that members of the public can search through.⁴⁷
- **Information matching:** The comparison by electronic means of one set of records held by one agency with those held by another agency to find records in both sets of data that are about the same person.⁴⁸
- **Information sharing:** The sharing of information between agencies (including between public and private agencies) to provide public services. New information sharing arrangements, that would otherwise breach the Privacy Act, should be governed by an Approved Information Sharing Agreement (“AISA”). The Ministry of Justice has produced guidance on AISAs.⁴⁹
- **Transfer out of New Zealand:** Sending information by any method to a body outside New Zealand (such as the sending of passport data to the border agencies of other countries or authorising banking records to be held overseas). Information sent outside New Zealand may no longer have the protection of the Privacy Act 1993 or other New Zealand laws or values. Also, the receiving jurisdiction may not have comparable safeguards to those found in New Zealand law. An appropriate level of additional safeguards should therefore be provided.

7.4. Does the legislation require a complaints process?

New legislation should use the existing complaints process under the Privacy Act 1993 unless there is a good reason not to do so.

The Privacy Act 1993 provides a comprehensive system for dealing with complaints arising from alleged breaches of the Privacy Act 1993. This includes a complaints investigation process by the Commissioner and proceedings before the Human Rights Review Tribunal.⁵⁰

⁴⁷ <http://www.privacy.org.nz/news-and-publications/guidance-notes/drafting-suggestions-for-departments-preparing-public-register-provisions/>

⁴⁸ <http://www.privacy.org.nz/news-and-publications/guidance-notes/guidance-note-for-departments-seeking-legislative-provision-for-information-matching/>

⁴⁹ <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/domestic-human-rights-protection/privacy-act-1993/approved-information-sharing-agreements/approved-information-sharing-agreements-aisa>

⁵⁰ <http://www.justice.govt.nz/tribunals/human-rights-review-tribunal>

New legislation should adopt the Privacy Act complaints procedure. Such new legislation should include clear words that incorporate the complaints procedure (see s 22F(4) of the Health Act 1956⁵¹ or s. 11A(7) of the Social Security Act 1964⁵²). Good reasons must exist to create any new complaints and review procedures.

7.5. Have you considered the consequences of non-compliance with the Privacy Act 1993?

The full range of consequences of creating legislation that does not comply with the Privacy Act 1993 should be considered.

The misuse or perceived misuse of personal information erodes the community's trust in the Government and other institutions, and can make it harder to collect information in the future. Further, other countries may be reluctant to share information with New Zealand if this country does not give proper respect to privacy rights.

⁵¹ <http://www.legislation.govt.nz/act/public/1956/0065/latest/DLM305840.html>

⁵² <http://www.legislation.govt.nz/act/public/1964/0136/latest/DLM359107.html>

8. Treaties and international obligations

New Zealand is party to a number of treaties that give rise to a diverse range of ongoing international obligations. These cover issues such as human rights, child abduction, human trafficking, the rights of the disabled, refugees, endangered species, trade, transport, communications, and other economic issues. The term “treaty” is used in this chapter to refer to all legally binding international agreements, including bilateral and multilateral treaties, and United Nations conventions to which New Zealand has acceded.

New Zealand must give full effect to a treaty, or it will risk breaching its international obligations. In such instances, considerable resources will be required to remedy any non-compliance with the relevant treaty. Non-compliance places New Zealand’s international reputation at risk and exposes it to any applicable sanctions under the treaty.

Given the breadth of New Zealand’s international obligations, proposed legislation will often affect, or have the potential to affect, one or more of New Zealand’s international obligations. Care must be taken to ensure that any proposed legislation does not inadvertently cause New Zealand to breach any of its existing treaty obligations.

All multilateral treaties and bilateral treaties of particular significance (as the Minister of Foreign Affairs determines) are required to undergo Parliamentary treaty examination. This process includes a National Interest Analysis (“NIA”).⁵³

Once Parliamentary treaty examination is complete, the practice in New Zealand is to pass any domestic legislation necessary for compliance with a treaty before that treaty comes into force for New Zealand.

The Ministry of Foreign Affairs and Trade (“MFAT”) is the Government’s principal adviser on matters relating to treaties and international relations. MFAT maintains the official database of New Zealand’s binding treaty obligations at international law⁵⁴, and should be consulted if a department is considering signing any international instrument that may impose obligations on New Zealand.

The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, international obligations (see paragraph 7.60(d)).⁵⁵

⁵³ <http://www.parliament.nz/en-nz/pb/rules/standing-orders/chapter7/00HOHPBReferenceStOrdersChapter7LIInternational1/international-treaties#SO395>

⁵⁴ <http://www.treaties.mfat.govt.nz/>

⁵⁵ <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>

Guidelines

8.1. Are any pre-existing treaties or international obligations relevant to the proposed legislation?

New legislation must not be inconsistent with existing international obligations.

MFAT, the Crown Law Office, and the particular department with responsibility for the relevant existing treaty should be consulted to identify any relevant international obligations and whether the proposed legislation will result in any inconsistency.

Where possible, any relevant non-binding international instruments should be identified. Although not binding on New Zealand in international law, they may have wider significance. These may be described as declarations, resolutions, and instruments under negotiation or non-binding international standards. Advice should be sought from MFAT, the relevant department or the Crown Law Office as to their legal significance.

New Zealand is currently party to, and is in the process of negotiating, a number of trade agreements (sometimes called Free Trade Agreements, Closer Economic Partnerships, or Strategic Economic Partnerships). These agreements can have specific provisions in areas such as intellectual property rights (including the use of trademarks and patent rights), and have dispute resolution processes that domestic law must not inadvertently restrict. Further information about existing trade agreements and those currently under negotiation can be found on MFAT's website.⁵⁶

8.2. Are you implementing a treaty?

The appropriate method of incorporating treaty obligations into New Zealand law should be used to ensure that all relevant international obligations are given full effect.

To have effect in New Zealand, international obligations must be incorporated into New Zealand law. In many cases this will require an amendment to domestic law to give effect to a treaty obligation. In other cases it will be necessary to pass entirely new legislation.

The language in treaties is often ambiguous. This is done so that a diverse group of governments can reach agreement. Any terms or language that may be ambiguous should be identified and Parliamentary counsel should be consulted to determine whether or not the language needs to (or can) be adjusted, and what method of incorporation is most appropriate.

The text below is intended only as a brief summary of the main methods of incorporation. Further advice should be sought from legal advisers, MFAT and the PCO as to which method is the most appropriate.

- **Wording method:** This is the most common method. The wording of the treaty is reflected in the body of the legislation, although the legislation may or may not

⁵⁶ <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/index.php>

specify the treaty that it is incorporating. The wording may be reflected verbatim or, if necessary, translated to more accurately reflect local conditions. This method is useful where it is necessary to translate the wording of a treaty to reflect local conditions or where the treaty requires additional steps to be taken in New Zealand law (for example, one purpose of NZBORA⁵⁷ was to implement the ICCPR).

- **Formula method “force of law”:** The full or partial text of the treaty is set out in the legislation, usually in a schedule. The legislation will use a form of words to proclaim that the treaty has the “force of law” and will apply domestically. This method is rarely used, but it is useful where the treaty amounts to a self-contained body of law that does not require any operational structures to support it (see the Sale of Goods (United Nations Convention) Act 1996⁵⁸).
- **Subordination method:** The legislation contains a provision that authorises the making of regulations or rules that give effect to the treaty or particular parts of it. This method is useful where the treaty provides for, or will require, ongoing technical changes that are appropriate to delegate to the executive, or in rare cases that require implementation under strict and compressed timetables (see s 36(1) of the Maritime Transport Act 1994⁵⁹).
- **Hybrid method:** In some cases more than one method may be used. For example, legislation may use the wording method to set out the relevant treaty rights and protections, but use the subordination method to trigger the application of those provisions. Another example is where the formula method is used to give the treaty force of law in New Zealand, but the wording method is used to create the specific mechanisms necessary for the administration of the law. The Adoption (Intercountry) Act 1997⁶⁰ uses the formula method to give effect to the relevant treaty, but uses the wording method to enable the administration of the treaty.

8.3. Does the legislation provide ready access to the treaty that it implements?

Legislation which implements a treaty should provide easy access to the treaty that it implements.

People must have ready access to the primary source of the legislation (for example, by including it in a schedule to the Act). However, treaties can be amended from time to time; so there must be clarity about the effect of any subsequent change to the referenced document, and how to best identify and provide access to the authoritative version of the treaty following any amendment. Part 3, Subpart 2 of the Legislation Act 2012 addresses similar issues regarding the incorporation by reference of material into delegated legislation.⁶¹

⁵⁷ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁵⁸ <http://www.legislation.govt.nz/act/public/1994/0060/latest/whole.html>

⁵⁹ <http://www.legislation.govt.nz/act/public/1994/0104/latest/DLM334660.html>

⁶⁰ <http://www.legislation.govt.nz/act/public/1997/0109/latest/DLM422494.html>

⁶¹ <http://www.legislation.govt.nz/act/public/2012/0119/latest/DLM2997666.html>

It will be necessary to balance the need to provide easy access to the text of the treaty being implemented against any practical difficulties of doing so. For example, it might not be appropriate to annex particularly lengthy or technically complex treaties to legislation.

OLD EDITION

9. Dealing with conduct, people and things outside New Zealand

In general, New Zealand law does not automatically apply to activities, people or property that are not within New Zealand's territory. This poses a number of difficulties for those attempting to regulate matters that take place wholly or partly outside New Zealand's territory, or for those attempting to apply New Zealand law to people or property outside New Zealand. This chapter will assist in identifying if particular legislation will have any cross-border implications, and how these might be addressed.

A failure to identify and address cross-border issues when developing legislation can lead to uncertainty, litigation, and potentially a failure to fully achieve the policy objective or the purpose of the legislation. This chapter will help officials to identify where new legislation raises cross-border issues and, if so, how to address those issues.

Where cross-border issues arise, three practical questions confront people seeking to understand and apply the law.

- Which rules apply? Will it be New Zealand law, or the law of another country?
- Who will make decisions in particular cases? Will it be a New Zealand court or decision maker, or an overseas court or decision maker?
- What effect will a decision have? Will a New Zealand decision be effective overseas? Will an overseas decision be treated as effective in New Zealand?

Addressing these questions can involve complex issues of international law and international relations. Also, despite the fact that legislation may have a strong policy justification and domestic support, as well as authority under international law, fully enforcing the legislation may be impractical due to the particular legal environment in other countries or their diplomatic relationship with New Zealand. So seeking legal advice is vital if cross-border issues arise. MFAT and the Ministry of Justice should also be consulted to ensure those issues are identified and properly addressed.

9.1. Do any cross-border issues need to be addressed?

Cross-border interactions and/or links relevant to the proposed legislation and policy should be identified.

An essential first step in identifying and addressing cross-border issues is to consider the circumstances in which they might arise. The following cross-border interactions and links commonly give rise to cross-border issues:

- cross-border dealings in goods or services;
- people outside New Zealand whose conduct affects people in New Zealand;
- crimes and civil breaches that have a link to or affect New Zealand or its people but occur in cyberspace;
- people in New Zealand whose conduct affects people outside New Zealand;
- civil proceedings in New Zealand that involve overseas parties;
- whether cooperation with other governments is needed to give effect to the policy;
- whether there are applicable treaties or other international obligations
- civil proceedings in New Zealand concerning dealings governed by foreign law;
- civil proceedings overseas that raise issues of New Zealand law;
- information or evidence required for the detecting and investigating breaches of the law, and for enforcing the law that takes place overseas.
- whether the determinations of New Zealand courts or other authorities will be recognised or enforced overseas and vice versa;
- criminal conduct outside New Zealand by people or businesses connected to New Zealand.

9.2. What is the intended scope of the legislation?

Legislation should set out the factors that determine whether or not New Zealand law applies.

Where cross-border issues do arise, legislation must provide clear guidance on whether New Zealand's rules or another country's rules will apply, and which country or body will have the jurisdiction to make decisions.

The following factors may suggest that New Zealand law should apply in a particular context:

- certain conduct or events occurred in New Zealand;
- certain property is situated in New Zealand;
- a particular transaction is governed by New Zealand law or has a New Zealand element;
- a person is a New Zealand citizen or permanent resident of New Zealand;
- a person is resident or otherwise present in New Zealand at the time of certain events or at the time that civil or criminal proceedings are commenced against them, or any relevant proceedings are commenced against them;
- certain consequences occur in New Zealand, and the person had knowledge as to whether or not those consequences would occur in New Zealand.

International law (including international agreements such as the Hague Convention) affects the extent to which New Zealand law can apply in other jurisdictions. This is a complex and

sometimes controversial area and advice should be sought from MFAT, legal advisers and, where relevant, the department with responsibility for implementing a particular treaty.

9.3. Should the legislation provide for recognition or enforcement of overseas decisions in New Zealand or vice versa?

Legislation should address whether or not foreign decisions are recognised or enforceable in New Zealand.

In some cases it may be necessary to recognise or enforce a decision of an overseas agency or court in New Zealand or vice versa, to ensure the legislation achieves its purpose. Express statutory authority will be required for foreign decisions to be recognised in New Zealand, and will generally form part of a wider cross-border regulatory regime.

9.4. Are special procedural rules required for civil proceedings?

Legislation that creates new civil proceedings should state the procedures for commencing proceedings and enforcing judgments against overseas defendants, if relevant.

The High Court Rules⁶², and the District Court Rules⁶³ contain default rules regarding the commencement of proceedings against overseas parties. There must be good reasons for departing from these procedures. Where a tribunal or other body is created, legislation should expressly provide for an analogous procedure.

The Trans-Tasman Proceedings Act 2010⁶⁴ sets out a framework to facilitate the resolution of civil disputes and the enforcement of civil judgments where there is a trans-Tasman element. Further guidance on trans-Tasman proceedings can be found on the Ministry of Justice website.⁶⁵

9.5. Are special procedural rules required for criminal proceedings?

New criminal offences should be subject to the rules on territorial application in sections 6 and 7 of the Crimes Act 1961.

Sections 6 and 7 of the Crimes Act 1961⁶⁶ limit the application of the Crimes Act and any other criminal offences (unless otherwise stated) to conduct that occurs within New Zealand. The criminal law will still apply where only one part of the conduct amounting to an offence occurs in New Zealand.

These rules should only be departed from in exceptional circumstances. There must be a clear case for New Zealand law to apply, and it must be reasonable to expect the people to whom the legislation will apply to comply with New Zealand law (because of their links with New Zealand) or any international standards reflected in New Zealand law. In such cases, justification should be recorded in the policy documentation.

⁶² <http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM147653.html>

⁶³ <http://www.legislation.govt.nz/regulation/public/2009/0257/latest/DLM2300101.html>

⁶⁴ <http://www.legislation.govt.nz/act/public/2010/0108/latest/DLM2576223.html>

⁶⁵ <http://www.justice.govt.nz/services/information-for-legal-professionals/trans-tasman-proceedings-regime>

⁶⁶ <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

In addition, the following issues will have an effect on attempts to address cross-border criminal activity.

- Generally, New Zealand law does not provide for a criminal trial or hearing to be held in respect of a defendant who is outside New Zealand (s25(e) NZBORA).⁶⁷
- New Zealand courts do not conduct criminal proceedings in respect of breaches of the criminal laws of another country. The alleged offence must be a criminal offence in New Zealand. However, it is possible for evidence in criminal and civil proceedings overseas to be taken in New Zealand under special legislation—see, for example, the provisions of the Mutual Assistance in Criminal Matters Act 1992⁶⁸.

9.6. Will any cross-border issues impair the ability of the relevant agency to perform its functions?

Legislation should include sufficient powers to enable enforcement agencies to request and use information from overseas agencies.

The investigative powers of New Zealand agencies can generally only be exercised within New Zealand in respect of suspected breaches of New Zealand law. In some cases, this principle may impair the ability of New Zealand agencies to effectively regulate conduct where cross-border issues are involved.

The Mutual Assistance in Criminal Matters Act 1992 provides a basic framework to enable countries to provide assistance to, and request assistance from, New Zealand in respect of criminal investigations and prosecutions. For non-criminal regulatory regimes, it may be necessary for the legislation to authorise the agency to enter into information sharing and assistance arrangements with foreign regulators.

⁶⁷ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁶⁸ <http://www.legislation.govt.nz/act/public/1992/0086/latest/DLM273057.html>

10. Applying the statute to the Crown

In most cases the law will apply to the Government in the same way that it applies to individuals. This is reflected in part by s 27(3) of the New Zealand Bill of Rights Act.⁶⁹ Special rules apply to those parts of central government that are collectively referred to as “the Crown”.

Considerable debate exists around what comprises the “Crown”; however, for the purpose of this chapter, the “Crown” can be taken to include Ministers, departments in the State Sector Act 1988⁷⁰, the New Zealand Defence Force, the New Zealand Police, and the New Zealand Security Intelligence Service. By convention, it does not include the courts or judges.

The default position is that legislation (or any other enactment) does not bind the Crown unless that enactment expressly provides that the Crown is so bound (s 27 Interpretation Act⁷¹). However, the practice in New Zealand is that legislation ought to bind the Crown unless good reasons exist for it not to do so.

Guidelines

10.1. Will the legislation apply to the Crown or other State sector organisations?

Legislation must state whether or not it binds the Crown.

The practice in New Zealand is for legislation to contain a provision that says “This Act binds the Crown”. In some cases it may only be appropriate for certain parts of the Crown to be bound or exempted (such as the exclusion of the armed forces and police from the Arms Act 1983⁷²). In these instances, clear words are required to establish which provisions bind the Crown and which provisions do not. The same can apply to delegated legislation (see, for example, s 153 Local Government Act 2002⁷³, which specifies which kinds of local authority bylaws bind the Crown).

10.2. Do compelling reasons exist to justify not binding the Crown?

Legislation should apply to the Crown unless there are good reasons for it not to do so.

The starting point is that the Crown should be bound by an Act, and delegated legislation made under it, unless the application of a particular Act to the Crown would impair the efficient functioning of government. Legislation that does not bind the Crown should not grant the Crown an unfair benefit or unexpectedly or adversely affect third parties.

Cabinet circular CO(02)4⁷⁴ identifies the following factors to take into account when assessing whether or not it is appropriate to bind the Crown:

⁶⁹ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁷⁰ <http://www.legislation.govt.nz/act/public/1988/0020/latest/DLM129110.html>

⁷¹ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

⁷² <http://www.legislation.govt.nz/act/public/1983/0044/latest/DLM72622.html>

⁷³ <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html>

⁷⁴ <http://www.dPMC.govt.nz/cabinet/circulars/co02/4>

- whether any operations or activities relating to the special functions of the Government would be hindered by making the Crown subject to the Act (such activities may be differentiated from those in which the Government operates in the same way as a private person);
- whether applying the Act to the Crown would, in light of the special role of the Crown, create any burden on the Crown over and above those on private persons;
- the financial costs of making the Crown subject to the Act.

The Public Finance Act 1989⁷⁵ contains provisions relating to the kind of financial liabilities the Crown can incur. The Treasury has produced further guidance on the Public Finance Act.⁷⁶

10.3. Is there a need for immunity from civil liability?

Any immunity from civil liability should be separately justified and should not be overly broad.

Immunities conflict with the central principle that the Government should be under the same law as everyone else.

Section 86 of the State Sector Act 1988⁷⁷ protects public servants from liability so long as they have acted in good faith. Concerns about subjecting individual public servants to personal liability, therefore, are not a justification for immunity. Section 86 only covers public service employees, and consideration ought to be given to others who might be exercising a public power. The need for such an immunity should be carefully justified and consideration given as to how to compensate an affected person. For instance, government departments and Crown entities remain liable even though their employees are immune.

Immunities will often not be necessary if the public power being exercised is properly described, including ancillary matters such as a power to seize or take samples attached to a power of entry.

There may be circumstances where creating a private law action is not intended, but the courts nevertheless imply one into legislation. The inclusion of an appropriate provision (such as s 179A of the Reserve Bank of New Zealand Act 1989⁷⁸) in legislation can reduce the likelihood of the courts imposing liability, but sufficient justification must exist for doing so.

⁷⁵ <http://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>

⁷⁶ <http://www.treasury.govt.nz/publications/guidance/publicfinance>

⁷⁷ <http://www.legislation.govt.nz/act/public/1988/0020/latest/DLM129110.html>

⁷⁸ <http://www.legislation.govt.nz/act/public/1989/0157/latest/DLM199364.html>

10.4. Should the Crown be subject to criminal liability?

Government departments may be liable to criminal prosecution only if compelling reasons exist for doing so.

Important practical and legal policy issues have made it generally inappropriate to subject the Crown to criminal liability. There is a particular conceptual problem of the Crown punishing itself. As such, exposing the Crown to criminal liability is rare. Cabinet circular CO(02)4⁷⁹ provides further guidance on imposing criminal liability on the Crown.

However, in areas such as health and safety, the similarity of departments as employers to private employers, or as providers of facilities, has led to those concerns being bypassed to a limited extent (see the Crown Organisations (Criminal Liability) Act 2002⁸⁰). Officials should always identify why a criminal sanction is needed in light of the existence of other measures that promote government accountability, and identify why a particular sanction (such as a fine or conviction) better achieves that goal. Care must be taken not to inadvertently expose the Government or its employees to criminal liability. For example, a provision that provides that “it is an offence not to comply with any provision of this Act” would capture all breaches of the Act, including failures by the regulator to comply with administrative or technical requirements of the Act. Such matters may be more appropriately dealt with by judicial review or in accordance with the Government’s existing accountability processes.

Criminal offences are discussed more generally in Chapter 21. Judicial review is discussed in more detail in Chapter 25.

⁷⁹ <http://www.dPMC.govt.nz/cabinet/circulars/co02/4>

⁸⁰ <http://www.legislation.govt.nz/act/public/2002/0037/latest/DLM156441.html>

11. Affecting existing rights, duties, situations and addressing past conduct

Legislation should have prospective, not retrospective effect. This is reflected principally by the presumption against retrospectivity in s 7 of the Interpretation Act⁸¹ (which will be repealed, with the majority of its provisions incorporated into the Legislation Act following passage of the Legislation Amendment Bill), and, in respect of criminal offences, by s 10A of the Crimes Act 1961⁸² and s 26(1) of NZBORA⁸³.

New legislation that is intended to only affect events that take place after it comes into force can still affect existing situations in a number of different ways.

- What happens to appeals lodged with a court or tribunal, but not yet decided when that court or tribunal is abolished? What about people who were entitled to appeal to the court or tribunal, but had not filed an application at the time of abolition?
- What happens to licence applications that have been filed, but not considered by the authority at the time new criteria or rules come into force?
- What happens to rights that people hold but that, due to a change in the law, will no longer be granted to anyone else? Conversely, something that may be permitted as of right might become subject to licensing as a result of a new law.
- What happens to people who have paid significant sums to obtain a licence, only to have legislation abolish or amend a licensing regime?

If not addressed, these kinds of situations can lead to uncertainty in the law, and injustice. Litigation is frequently generated where people are trying to establish the extent to which the law applies to their previous actions. Two general mechanisms will help to address existing situations: savings provisions; and transitional provisions.

- Savings provisions keep the repealed law alive for certain purposes, such as completing proceedings already commenced, or applications already made (see, for example, s 313 of the Local Government Act 2002⁸⁴ or s 399 of the Companies Act 1993⁸⁵). Sometimes savings provisions retain entire regimes to preserve accrued rights. This can result in two or more parallel systems existing for a period of time.
- Transitional provisions enable movement from an old regime to a new one (see, for example, ss 71–76 of the Financial Markets Authority Act 2011⁸⁶). For example, they may provide that employment is deemed to be continuous even though the person's employer is a new entity.

⁸¹ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

⁸² <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

⁸³ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁸⁴ <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html>

⁸⁵ <http://www.legislation.govt.nz/act/public/1993/0105/latest/DLM319570.html>

⁸⁶ <http://www.legislation.govt.nz/act/public/2011/0005/latest/DLM3231023.html>

Confusingly, “grandparenting” is a term sometimes used in the context of both savings provisions and transitional provisions. The term is used in both because there is not always a clear line; for example, where a holder of a warrant or office is treated as having been appointed under a new Act even though they qualified and were appointed under the old Act.

The PCO can provide further advice on which type of provision is appropriate in the particular circumstances.

Carefully worded savings and transitional provisions will provide clarity and certainty to the law, and will reduce the scope for expensive litigation, or changes to Bills as they progress. This chapter should assist in the early identification (in the policy development phase) of the existing rights, interests and situations that the new legislation will affect, and how they might be addressed.

Guidelines

11.1. Does the legislation have direct retrospective effect?

Legislation should not have retrospective effect.

The starting point is that legislation should not have retrospective effect. It should not interfere with accrued rights and duties.

Legislation might have a direct legislative effect when it:

- applies to events or actions that have already taken place;
- prevents a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to;
- punishes a person or imposes a burden or obligation in respect of past conduct.

The presumption against retrospective legislation is strongest in respect of criminal offences. People should not be made criminally liable for past actions that were not prohibited at the time of commission. Where the penalty that attaches to an offence is increased between commission and conviction, the lesser penalty should also apply.

Retrospective legislation might however be appropriate where it is intended to:

- be entirely to the benefit of those affected;
- validate matters that were generally understood and intended to be lawful, but were in fact unlawful as a result of a technical error;
- decriminalise conduct (for example, s 7 of the Homosexual Law Reform Act 1986⁸⁷);
- address a matter that is essential to public safety;
- provide certainty as a result of litigation (discussed in more detail in 11.4 below);

⁸⁷ <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM2179619.html>

- (in limited circumstances) make changes to tax law or other budgetary legislation.

Where direct retrospective effect is intended, this must be clearly stated in the legislation and must be capable of justification. If it is not expressly stated, there is the risk that the courts will apply the presumption that legislation does not have retrospective effect.

11.2. Might any issues or situations arise as a result of the new legislation that will require transitional provisions or savings provisions?

Potential transitional or savings issues should be identified early in the policy development process.

Transitional or savings provisions have the potential to significantly affect the overall design of legislation.

Not all legislation will have transitional and savings issues that will require specific provisions. Transitional provisions will be counterproductive where legislation is no longer applicable because circumstances have changed or the policy objective requires the legislation to have a direct retrospective effect.

11.3. Do the provisions in the Interpretation Act 1999 apply?

Legislation should not include specific transitional provisions if the generic provisions in the Interpretation Act 1999 satisfactorily address the issues.

Sections 17–22 of the Interpretation Act⁸⁸ contain savings provisions and transitional provisions that will apply to all legislation unless express words to the contrary are used or the context of the new legislation requires otherwise.

Where the provisions of the Interpretation Act sufficiently address the issue, they should be used. Where they do not satisfactorily address the issue, or where there is a good reason for departing from them, it will be necessary to draft specific transitional or savings provisions. Early advice should be sought from legal advisers and the PCO.

11.4. Does the new legislation relate to matters that are the subject of ongoing or prospective litigation?

New legislation should not pre-empt matters that are currently before the courts or deprive successful litigants the benefit of any court decision in their favour.

The separation of powers and the independence of the judiciary require that the executive and legislative branches of government do not interfere with the judicial process. However, in some cases ongoing or prospective litigation may identify an area of the law that requires amendment or new legislation, and it would be inappropriate for the Government to await the outcome of the litigation before taking action.

In these cases it is important that any new legislation is explicit that the new law will not apply to any cases currently before the court or act to deprive those parties (or previously

⁸⁸ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

successful parties) from any benefit they have gained or might gain from a decision of the court. This is sometimes called preserving the “fruits” of the litigation.

If the new legislation is intended to do either of the above, the legislation must contain clear words setting out this intention.

The Crown Law Office should be consulted if the proposed legislation relates to issues which are the subject of current or prospective litigation. The LAC has produced some further guidance on the application of legislation to judgments and pending proceedings; see Appendix 1, Report of the Legislation Advisory Committee, 1 January 1994 – 31 December 1995: Recurring Issues.⁸⁹

11.5. Are all transitional and savings issues addressed by the new legislation?

All transitional or savings issues that have been identified should be addressed.

Transitional provisions must be carefully worded so as to avoid uncertainty. Each transitional issue must be checked to ensure that it is adequately addressed either by the Interpretation Act or specific provisions in the new legislation.

11.6. Are all transitional provisions and savings provisions contained in the new legislation?

All transitional provisions should be contained in the new legislation.

For reasons of accessibility and clarity, where the provisions of the Interpretation Act are not relied on, all transitional provisions should be contained in the Act that they relate to. There are two exceptions to this principle which should rarely be used, and only when there is a genuine need to do so.

- In situations with a large number of transitional provisions and savings provisions, it may be appropriate to produce a separate Act to deal with them. However, this can significantly impact the accessibility of the legislation and may introduce undesirable complexity into the statute book.
- In situations where it is not possible to foresee all of the potential transitional and savings issues that might arise, it may be appropriate to create a provision that empowers the executive to make regulations dealing with transitional and savings issues. This option is not a substitute for a thorough assessment of the potential transitional and savings issues and will likely be the subject of an adverse report from the Regulations Review Committee (see Chapter 13).

The PCO and legal advisers should be consulted at an early stage if new legislation proposes to rely on one of the above exceptions.

⁸⁹ Available at www.lac.org.nz

12. Statutory interpretation and the Interpretation Act 1999

In reaching an interpretation of an Act, a court will rely on certain rules and conventions of statutory interpretation as well as the fundamental principles of law (see Chapter 3). The Interpretation Act⁹⁰ is the primary source of the rules of statutory interpretation in New Zealand, although some of its provisions are supplemented by the common law.

An awareness of the general principles of statutory interpretation and also the specific provisions of the Interpretation Act will assist in providing sufficient interpretive aids in the legislation, and reduce the risk of an unexpected judicial interpretation.

The Legislation Amendment Bill currently before the House will repeal the Interpretation Act and move most of its key provisions to the Legislation Act 2012⁹¹.

Guidelines

12.1. Have you considered the key principles of statutory interpretation?

The primary rules of statutory interpretation should be considered when designing legislation.

The meaning of an enactment must be ascertained from its text and in light of its purpose (Interpretation Act s 5):

- Generally words in an enactment will be given their natural or ordinary meanings. However an Act must be read as a whole; and other factors, such as the surrounding words, the subject matter of the relevant part of the Act, and the overall scheme of the Act will sometimes call for a different interpretation. The use of an interpretation section can greatly reduce the scope for ambiguity.
- Other features of the enactment, such as the table of contents, headings, marginal notes, diagrams, graphics, examples and explanatory material, as well as the organisation and format of the Act, may also be considered as part of the interpretation task.
- The purpose provision of the Act is a key aid to interpretation. Each new Act should have a purpose provision and, if possible, every provision in the Act should be interpreted consistently with the purpose provision. The large pool of sources that the courts will draw on in interpreting an Act highlights the need to ensure that the Act has internal coherence, and a clear purpose or policy objective that is adequately reflected in the provisions of the Act and any explanatory material.

Some Acts, such as Treaty settlement Acts (see Chapter 4) and the Parliamentary Privilege Act 2014⁹², have specific provisions directing the reader how to interpret them.

⁹⁰ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

⁹¹ <http://www.legislation.govt.nz/act/public/2012/0119/latest/DLM2997666.html>

⁹² <http://www.legislation.govt.nz/act/public/2014/0058/latest/whole.html>

An enactment applies to circumstances as they arise (Interpretation Act s 6): Where possible legislation should be “future-proofed” by ensuring that it is flexible enough to properly address foreseeable developments in technology or society generally.

An enactment does not have retrospective effect (Interpretation Act s 7): See Chapter 11.

Interpretation consistent with NZBORA is to be preferred wherever possible: See Chapter 5.

Common law rules of statutory interpretation: While many of the fundamental principles of statutory interpretation are reflected in the Interpretation Act, a number continue to exist in the common law. One such principle is that where a list of specific things is followed by a general description of those things. The general description is presumed to be restricted to the same class as the specific references. This principle is referred to as *ejusdem generis*. Another example is the presumption that Parliament will intend to legislate consistently with fundamental human rights and New Zealand’s international obligations.

12.2. Have you considered the specific provisions of the Interpretation Act 1999?

Legislation should be consistent with the Interpretation Act 1999. Matters that are already provided for in the Interpretation Act should not be re-stated in new legislation.

The following paragraphs are intended to raise awareness of the kinds of issues that the Interpretation Act provides for and that therefore do not need to be re-stated in the new legislation. The paragraphs do not analyse the provisions of the Interpretation Act in depth. Nor do they explain how the common law supplements those provisions.

The Interpretation Act contains provisions relating to the aspects noted below.

- The date and time of day when Acts and regulations come into force (ss 8–10).
- In what circumstances a power granted by an Act may be exercised before that Act comes into force (s 11).
- General rules that concern when a power may be exercised by a delegate. Examples include what powers are deemed to be held by someone granted the power to appoint a person to an office and the power to make or issue delegated legislation; and when a person may exercise a power to correct minor errors in the prior exercise of that power (ss 12–16).
- The effect that repealing legislation will have on existing rights, powers and situations, things that may have been done under the repealed legislation, and on legislation that the repealed legislation amended or repealed. This includes rules concerning the fate of enactments made under the repealed legislation, powers previously exercised under the repealed enactment, and how to treat references to the repealed enactment in other legislation (ss 17–22).
- Legislation will not bind the Crown unless the enactment expressly says so. The practice in New Zealand is for all legislation to apply to the Crown (s 27) (see Chapter 10).

Any of these provisions can be overridden, extended or restricted by clear language in a particular case; but that should be done deliberately and only if necessary.

12.3. Have you considered the specific definitions and meanings of expressions in Part 5 of the Interpretation Act 1999?

Legislation should apply the definitions in Part 5 of the Interpretation Act. New legislation should not re-state those definitions.

Part 5 of the Interpretation Act defines what certain words and phrases mean. It is not necessary to re-state these rules in new legislation, although it may be helpful to readers to include a flagging provision identifying that the following words and phrases will have the meaning given to them by the Interpretation Act:

- Act, enactment, Order in Council, Proclamation, regulations
- commencement
- Commonwealth country; part of the Commonwealth
- de facto partner; de facto relationship
- enactment
- Gazette
- Governor-General in Council
- Minister & consular officer
- Month and working day (but not “week”)
- New Zealand, North Island, South Island
- territorial limits of New Zealand; limits of New Zealand
- person
- prescribed
- public notice; public notification
- repeal
- regulations
- rules of court
- writing
- words that use the prefix “step-” (such as step-parent)
- Definitions of “Act”, “Governor”, “land”, and “Person” in enactments passed before the Interpretation Act

Again, particular statutes can define these words and phrases differently; but only if necessary. See, for example, the definition of “public notice” in s 5 of the Local Government Act 2002⁹³; and the many different statutory definitions of “working day”, including several that exclude the period from Christmas to mid-January.

Part 5 also includes rules for the interpretation of:

- words that denote the masculine gender used in enactments before and after enactment of the Interpretation Act;
- the use of parts of speech and grammatical forms of words;
- the use of plural and singular words;
- the calculation of time and distance.

⁹³ <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html>

13. Delegating law-making powers to the executive

Parliament makes laws by enacting primary legislation (Acts); however, it is not always appropriate or possible for Parliament to deal with all of the detailed underlying systems and structures that give effect to an Act. In these cases Parliament often includes in an Act a provision that authorises another body, usually part of the executive, to exercise some of its law-making functions to deal with those detailed underlying systems. The Act that delegates this law-making power is known as the “empowering Act”. The specific provision containing the power is usually known as the “empowering provision”. The product of the exercise of this power is known as “delegated legislation”.

Delegated legislation can be made by different bodies or officers within or outside the executive. These include the Governor-General in the Executive Council (the most common), a Minister, or a statutory body or officer. Delegated legislation is referred to by a range of terms, including secondary legislation, tertiary legislation, regulation, Proclamation, Order in Council, bylaw, rule, code, notice, or warrant.

A powerful check on delegated legislation is the requirement for all regulations (defined in wide terms by s 29 of the Interpretation Act⁹⁴), but not including most bylaws and empowering provisions, to face Regulations Review Committee (“RRC”)⁹⁵ scrutiny. The RRC is established and governed by the Standing Orders of the House of Representatives⁹⁶. The RRC might effect significant change to empowering provisions or regulations. The RRC may bring a regulation or empowering provision to the attention of the House for a variety of reasons, including that the empowering provision is drafted in such a way that regulations drafted under it may breach one of the grounds in Standing Order 319(2). Officials must be prepared to justify to the RRC why a power has been delegated to the executive or another body outside Parliament.

The Cabinet Manual establishes a number of rules and procedures for developing delegated legislation (see [7.77] of the Cabinet Manual).⁹⁷

This chapter will help identify those matters that are appropriate for Parliament to delegate, to whom the power should be delegated, what form the delegated legislation might take, and what matters the empowering provision should address.

Further guidance on codes will be provided in future updates to these Guidelines.

⁹⁴ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

⁹⁵ <http://www.parliament.nz/en-nz/features/00NZPHomeNews201204161/the-role-of-the-regulations-review-committee>

⁹⁶ <http://www.parliament.nz/en-nz/pb/rules/standing-orders>

⁹⁷ <http://cabinetmanual.cabinetoffice.govt.nz/7.77>

Guidelines

13.1. Is the matter appropriate for delegated legislation?

Legislation should not authorise delegated legislation to be made in respect of matters which are appropriate for primary legislation.

As a general rule, matters of policy and principle should be included in primary legislation. Delegated legislation should deal with technical matters of implementation and the operation of the Act.

While valid reasons do exist for delegating a power to the executive, each decision to authorise the making of delegated legislation should be justified on its own merits.

Some matters, such as limiting fundamental human rights, are clearly appropriate only for primary legislation; but the decision will not always be clear-cut, and some matters may be appropriate for both primary and delegated legislation.

The following matters should ideally (or in some cases can only) be addressed in primary legislation:

- matters of significant policy;
- matters affecting fundamental human rights;
- the creation of significant new public powers such as search and seizure or confiscation of property;
- granting or changing appeal rights;
- variations to the common law;
- the creation of serious criminal offences and significant penalties;
- authorising the levying of a tax, borrowing of money, or spending of public money;
- the creation of a new public agency;
- amendments to another Act;
- retrospective changes to the law;
- procedural matters that go to the essence of the legislative scheme.

Delegated legislation should only be authorised when it is necessary to give effect to primary legislation. It is particularly useful in situations where the environment in which the legislation must operate is subject to frequent change or where flexibility is desired for some other reason.

The following may be appropriate for delegated legislation:

- the mechanics of implementing an Act, fees, format and content of documents, certain lower-level procedures;
- large lists, schedules of minor details, and matters suitable for inflation indexation within identified parameters;
- technically complex matters;
- allowing for potential, but as yet unknown, contingencies;
- a need for flexibility, or regular technical updating;
- a need to respond to emergencies or other matters that require speedy responses;
- matters that need to be consulted

on before they are finalised or changed.

In limited cases, the setting of the commencement date may be delegated to the executive. Such provisions are likely to face additional RRC scrutiny and, as such, cogent reasons for the delegation must exist. The legislation should also incorporate a provision that the legislation is brought into effect automatically after a set period of no more than one year after its enactment, if not brought into force earlier by Order in Council.

It **will not** be appropriate to authorise delegated legislation:

- to fill any gaps in primary legislation that may have occurred as a result of a rushed or unfinished policy development process;
- to avoid full debate and scrutiny of politically contentious matters;
- solely to speed up its passage through Parliament;
- that simply follows a past practice of using delegated legislation.

13.2. For what purposes may the power to make delegated legislation be exercised?

The empowering Act should define clearly the purposes for creating delegated legislation.

Before settling the purposes for creating the delegated legislation, it is advisable to consult those who will implement the Act. This will help to identify the extent of the powers they require and in what circumstances they anticipate exercising those powers.

A power to create delegated legislation should be wide enough for implementation of the Act, but it should not be unfettered. The RRC may criticise a general empowering provision on the basis that it is an unexpected use of the delegated power.

13.3. Who will hold the power to make delegated legislation?

The person authorised to make delegated legislation must have an appropriate level of expertise, and hold an appropriate office having regard to the importance of the issues and the nature of any safeguards that are in place.

There are no absolute rules as to who should be authorised to make delegated legislation. Traditionally, delegated legislation is made by the Governor-General on the advice of Government Ministers, or is made by the relevant portfolio Minister(s). Key factors to take into account are the expertise required of the person making the delegated legislation, the importance of the issues in question, and what safeguards are in place (for example, publication, disallowance, Cabinet scrutiny or drafting by the PCO). The following is an indication of when a certain office holder might be the appropriate person to exercise a particular power.

- **Governor-General in Council:** Will be appropriate when the potential exists to significantly affect the population, a large number of people, or human rights. The Governor-General will also be appropriate when delegated legislation creates criminal sanctions (rarely done), amends Acts (very rarely), brings primary legislation

into force, or deals with non-technical matters. By convention, the Governor-General will act on the advice of the Executive Council (ordinarily given after Cabinet decisions that confirm or alter decisions of Cabinet committee), and sometimes is expressed to be on the recommendation of one or more Ministers or after compliance with a statutory consultation requirement.

- **Government Ministers:** Will be appropriate where some law making is appropriately entrusted to the relevant portfolio Minister(s) acting (in exercising the power) independently from Cabinet colleagues. There is considerable overlap between those powers that a Minister and the Governor-General might appropriately hold.
- **Public service chief executives:** Will be appropriate where the matter is of minor technical detail, with little impact on the rights of individuals (such as setting the format of prescribed forms).
- **Independent statutory body or officers:** Will be appropriate where the subject matter is highly specialised or technical, where there will be less impact generally on individual rights, and where adequate safeguards are in place. This delegation choice is to empower, as a delegate, a law-maker legally independent of Ministers. Specialist or technical participation can also be achieved by preconditions (such as recommendations or consultation) before making delegated legislation.
- **Local government/local authorities:** Will be appropriate where the subject matter will have a localised impact that requires in-depth knowledge of the particular region, or local government accountability is needed or desirable.
- **Occupational and professional groups:** Will be appropriate if the subject matter will only affect a particular profession or occupation, and if adequate safeguards are in place.

In some of those cases it may be preferable to use primary legislation to directly empower a party to do something (“The Registrar may prescribe the forms ...”), rather than attempt to say that regulations may say who may prescribe the forms (if it is obvious that the person will be the Registrar).

13.4. Is the delegated legislation subject to appropriate safeguards?

All delegated legislation should be subject to an appropriate level of scrutiny, publication and review.

What is considered an appropriate level of safeguards will increase with the significance of the delegated power. Each safeguard imposed will increase the complexity of the process, increasing the time and cost required to produce delegated legislation.

All delegated legislation should generally be subject to RRC scrutiny and judicial review.

- **Regulations Review Committee scrutiny:** The RRC will scrutinise all regulations regardless of their form.

- **Judicial review:** In contrast to primary legislation, delegated legislation may on many grounds be challenged in the courts and declared invalid on judicial review. Legislation should not restrict a right of access to the courts to challenge delegated legislation (see Chapter 25).

The form and substance of delegated legislation may trigger some further safeguards.

- **Publication:** Instruments that fall within the definition of “legislative instruments” in s 4 of the Legislation Act 2012⁹⁸ will trigger the publication requirements in the Legislation Act 2012.
 - If the delegated legislation does not fall within this definition, the legislation must make it clear how the instrument will be made public. This can be achieved by stating in the legislation that the instrument is a “legislative instrument” (a “deemed legislative instrument”), or by stating alternative publication requirements such as placing it on a departmental website or publishing it in the Gazette.
- **Disallowance:** Instruments that fall within the definition of “disallowable instruments” (which includes all “legislative instruments”) in s 38 of the Legislation Act 2012 must be presented to the House of Representatives. The House may revoke or amend an instrument in accordance with Part 3 of the Legislation Act 2012.
 - If the delegated legislation does not fall within this definition, the legislation must make it clear whether or not the instrument is a “disallowable instrument” and be tabled under the Legislation Act 2012.

An Order in Council will usually trigger the publication and disallowance procedures in the Legislation Act 2012, and will be subject to Cabinet requirements for consultation and certification by the PCO.⁹⁹ Sometimes it will be necessary to consider modifying those procedures if there is a cogent reason for the Order in Council not to be published in the Legislative Instrument series or **not** to be a disallowable instrument).

It may be appropriate to make the exercise of the delegated power subject to preconditions, such as a consultation requirement or a requirement that the power is exercised only once the recommendation, approval, confirmation, concurrence or consent of another person has been sought or obtained. Other potential preconditions involve requiring that certain things are shown, or certain circumstances exist, before regulations are made.

It may be appropriate to provide that the delegated legislation lapses after a certain period if not confirmed by Parliament.

⁹⁸ <http://www.legislation.govt.nz/act/public/2012/0119/latest/DLM2997666.html>

⁹⁹ <http://cabinetmanual.cabinetoffice.govt.nz/7.77>

13.5. Does the delegated power have any special features?

Legislation should address any special features of the power to make delegated legislation.

A delegated power may have certain features that should be explicitly addressed in the empowering Act.

- **Inconsistency with primary legislation:** Delegated legislation should rarely, if ever, override, suspend or amend primary legislation (empowering provisions that authorise delegated legislation of this nature are sometimes called Henry VIII clauses). Delegated legislation that attempts to do so without express authorisation is at risk of the courts declaring it unlawful and invalid, and it risks facing RRC criticism. In the rare cases where power of this kind is needed, it must be drafted in the most limited terms possible, must be consistent with and support the provisions of the empowering Act, and must be subject to adequate safeguards. The empowering provision should usually also be limited in time (that is to say, a temporary law), as should any regulations made under the power.
- **Retrospective effect:** Where delegated legislation is intended to have retrospective effect, the empowering provision must authorise that effect in clear and unequivocal terms.
- **Sub-delegation:** The identity or office of the person to whom the power to make delegated legislation is given is a key factor in the particular legislative scheme. Careful consideration should therefore be given as to whether that person should be able to sub-delegate a power given to them. Where the power to make delegated legislation is able to be sub-delegated, the empowering provision must clearly identify that intent.
- **Inconsistency with NZBORA:** In the rare cases where delegated legislation is required or permitted to be inconsistent with NZBORA¹⁰⁰, an express statutory provision authorising this outcome must exist. Despite s 4 of NZBORA stating that inconsistency with NZBORA is not a ground for invalidating an enactment, the courts have held that delegated legislation is invalid if it is inconsistent with NZBORA and the empowering provision does not expressly state that it may be inconsistent.

13.6. Does the legislation authorise “incorporation by reference”?

Incorporation by reference should only be used where it is impractical to do otherwise.

Incorporation by reference refers to creating or defining rights, powers and obligations by a reference in primary or delegated legislation to another document (possibly prepared by someone outside government), or part of a document, the provisions of which are not set out in legislation.

¹⁰⁰ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

Incorporation by reference might be appropriate where:

- the document is long or complex, covers technical matters only, and few people are likely to be affected;
- the document has been agreed with one or more foreign governments, cannot easily be recast into an Act of Parliament or delegated legislation, and deals only with technical or operational details of a policy already approved by Parliament;
- it is appropriate for the document to be formulated by a specialist government or inter-governmental agency or private sector organisation, rather than by Parliament or Ministers;
- the document has been developed by an organisation for use in respect of products (such as motor vehicles) manufactured by it or its members.

If not approached carefully, incorporation by reference can be inconsistent with some fundamental law-making principles, including the requirement for Parliament to have control over the law and the requirement for obligations imposed by law to be clear, understandable and accessible. It is therefore necessary to work closely with legal advisers to ensure adequate safeguards are in place and the requirements of the Legislation Act 2012 (where delegated legislation is incorporating the document) are complied with.

Consider whether any amendments to the incorporated material will automatically become part of the law. For instance, if a failure to comply with a requirement found in the incorporated material is an offence, those who subsequently amend the incorporated material are creating/amending the criminal law. The Legislation Act has default provisions addressing these issues (see Part 3, Subpart 2) that should be considered.

14. Granting powers of exemption

In some cases requiring a particular person to comply with legislation might be impractical or result in hardship to that person. In such cases, it may be necessary to empower a government body (including Crown entities and other State sector bodies) or office holders to exclude or exempt a particular person or class of people, transactions or things from the application of an Act or regulations (see, for example, s 70B of the Securities Act 1978¹⁰¹).

For convenience, the term “exemption” is used in this chapter to refer to all exemption powers regardless of whether they are called exemptions, waivers, dispensations, exclusions, concessions or otherwise. An exemption is distinct from a statutory exception. An exemption is a discretionary power granted to a particular body or office holder by primary legislation that, when exercised, will exclude or exempt certain things from the application of an act. An exception is a provision in primary legislation which states that the law does not apply to a certain person, group, thing or transaction.

Exemptions occupy a sliding scale and vary in terms of their significance and scope. At the one end of the scale are exemptions that vary the scope or application of an Act. At the other end are concessions that are “one off”, or minor allowances usually made only to individuals. The more significant the exemption, the more significant the procedural safeguards required in respect of its exercise. In the case of minor concessions, additional procedural safeguards may be unnecessary.

A power of exemption is a form of delegated power (see Chapter 13), though at times the distinction between a power of exemption and a discretion is hard to identify.

Guidelines

14.1. Should legislation grant a power of exemption?

There must be compelling reasons to grant a power of exemption.

Powers of exemption should not be the norm. They should not be granted to allow arbitrary exemption from the provisions of an Act, nor should they be granted to patch up incomplete policy development.

Where a power of exemption will delegate to the executive the power to change the scope or operation of an Act, or it reduces the accessibility of the law (because the law regarding to who or what legislation applies is spread across specific exemptions and the primary legislation), consideration should be given to whether that is a power better left to Parliament.

The Regulations Review Committee has expressed concern that in some cases exemptions have been so numerous and applied so broadly that the exemptions have supplanted the framework of rules to which they relate.

¹⁰¹ <http://www.legislation.govt.nz/act/public/1978/0103/latest/DLM26800.html>

Factors that may favour the granting of a power of exemption are:

- where the statute relates to a complex and rapidly developing field such that the boundaries may be difficult to foresee;
- fields where an urgent decision on an exemption may be required;
- where the circumstances requiring an exemption may be so exceptional or “one off” as not to justify amending an Act;
- where an area requires frequent adaptation to changing factual or policy circumstances;
- where minor unforeseen developments in, or technical issues with, the law may arise that do not justify amending an Act;
- where compliance is impractical, inefficient or unduly expensive but the policy objective can be achieved by imposing conditions in the exemption.

14.2. What safeguards apply to the exercise of the power of exemption?

Legislation must specify appropriate safeguards to apply to powers of exemption.

An exemption that varies the scope of legislation or applies to a class of people or things will require a greater level of safeguards than a minor concession to an individual which does not materially affect the scope or operation of the legislation. Where exemptions to individual parties may give an unfair advantage, consideration should be given to allowing class exemptions.

A power of exemption should generally be subject to the safeguards noted below.

- **Consistent with purpose of the Act:** The power must be exercised consistently with the purpose of the Act. The circumstances in which the exemption may be granted or the criteria for the exercise of the power should also be consistent with the purpose of the Act. This is often incorporated into the criteria (see next point).
- **Criteria for exercise of power:** Legislation should set out the criteria for granting the exemption. Clear criteria will reduce the likelihood of a successful judicial review of the decision to grant or refuse an exemption.
- **Reasons:** Legislation should include a requirement to give reasons for the exemption, although this requirement may not be necessary for minor or trivial exemptions.
- **Expiry:** Exemptions should be subject to an expiry date to ensure regular review of the exemption, except where the exemption must necessarily be permanent if granted or will naturally expire.

- **Judicial review:** The ability to seek judicial review of the exercise of an exemption power is an important safeguard. This right should not be unreasonably restricted (see Chapter 25).
- **Process review:** Usually there should be a process (which need not be in the legislation, but may be expected by Ministers or select committees) to review exemptions at regular intervals to identify a need to amend the primary legislation.

Two additional safeguards may also be appropriate: review requirements and annual reporting requirements.

- **Review requirements:** Legislation may include a provision that the power of exemption is reviewed at a future set date to assess whether or not permanent legislative amendment is required.
- **Annual reporting requirements:** The person or body that exercises the power may be required to submit a report to Parliament detailing the number of times and circumstances in which a power of exemption was exercised.

14.3. Will the power be subject to the publication or disallowance procedures in the Legislation Act 2012?

Legislation should clearly identify whether or not the power of exemption will be subject to the disallowance and/or publication procedures in the Legislation Act 2012.

For the avoidance of doubt, the Act should confirm whether or not the exemption instrument is a disallowable instrument, a legislative instrument, or both. Often a class exemption that is of general application will be a disallowable instrument and a legislative instrument. An “individual” exemption will often be a disallowable instrument yet not a legislative instrument (but in this case the legislation should provide for alternative publication requirements). Some “individual” exemptions will probably be neither, and publication may not be appropriate; for example, exemptions from wearing a seatbelts or helmets on health grounds in the Land Transport Act 1998 (s 166)¹⁰².

14.4. Will the exemption be subject to conditions?

Legislation must contain express authority to impose conditions on an exemption.

An exemption may either be granted on a blanket basis or may be subject to specific conditions. The ability to impose conditions on an exemption is a useful tool to ensure that the exemption granted is no broader than is strictly necessary, but the power to impose conditions must be explicitly authorised by the primary legislation. Conditions must also be consistent with the purpose of the Act.

¹⁰² <http://www.legislation.govt.nz/act/public/1998/0110/latest/DLM433613.html>

15. Authorising the charging of fees and levies

The ability to recover some or all of the cost of providing or performing a public function will often be vital to the ability of an agency to provide or perform that function. Granting a public body the power to charge fees or levies is a common method of cost recovery.

Legislative authority for imposing fees or levies is usually granted by empowering provisions that authorise the executive to make regulations providing for fees or levies. This chapter will help ensure that those empowering provisions are included in appropriate circumstances, and that the authority to make regulations is exercised in an appropriate manner.

There is an important distinction between a fee or levy and a tax.

Parliament may delegate to the executive the power to set and charge a fee or levy, but a tax may only be imposed by or under an Act. In rare circumstances Parliament may delegate the setting of certain features of a tax to the executive, but only in very certain and confined terms. Failure to provide adequate authority for a tax in the primary legislation may result in the courts declaring the subsequent regulations invalid. This may result in disruption to the provision of the service or function and considerable financial consequences to the agency concerned.

There is a further distinction between a fee and a levy. A levy is more akin to a tax in that it is usually compulsory to pay it, and is usually charged to a specific group. Also, a levy charged to members of a certain group or industry is usually used for a particular purpose (such as market development), rather than relating to specific services provided to an individual. In the Regulation Review Committee's view, imposing a levy using a fee-setting power is contrary to Standing Order 319(2)(c) in that the regulation appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made.

Fee-setting and levy-setting regulations made under the empowering provision are delegated legislation. As such, the considerations in Chapter 13 will apply and the regulations will be reviewable by the Regulations Review Committee. A discretion to waive a fee is, in effect, an exemption power (see Chapter 14).

Two essential pieces of guidance to review at an early stage are the Treasury's *Guidelines for Setting Charges in the Public Sector* (December 2002)¹⁰³, and the Office of the Auditor General's guidance *Charging fees for public sector goods and services*¹⁰⁴.

¹⁰³ <http://www.treasury.govt.nz/publications/guidance/planning/charges>

¹⁰⁴ <http://www.oag.govt.nz/2008/charging-fees>

Guidelines

15.1. Should the service or function be subject to a fee?

Fees should only be charged where the nature of the service or function is appropriate and the fee can be quantified and efficiently recovered.

Whether or not a service or function should be subject to a fee is not always clear and will involve a number of considerations. The table below sets out some of the key issues to consider when determining if it is appropriate to charge a fee:

Fees may be appropriate	Fees may be inappropriate
Service or function is rendered to an individual and confers a benefit	Service or function is provided to the community as a whole
Service or function is rendered by request	Service or function is non-voluntary
Easily quantifiable	Impractical to quantify the fee
Easy to recover	Impractical to recover the fee
Service or function is transactional or regulatory in nature	Service or function is contractual in nature (and the level of charge can be negotiated contractually)
Examples: driver licensing and passports, and Overseas Investment Office consents	Examples: police, public hospitals, and Department of Conservation concessions

Legislation should not provide for regulations to prescribe a fee for a service if the service is something that the user is not bound to use or the provider is not bound to provide, and the level of the fee could be negotiated contractually when the service is requested (such as granting a licence to run a business in a national park).

Whether or not the courts find that a particular charge is a fee or a tax will involve considering:

- the terms of the empowering provision;
- the level of the charge;
- the costs of providing the service or performing the function, relative to the income from charges;
- the purpose for the charge;
- who the charge applies to;
- in what circumstances the charge is imposed.

A fee may be considered a tax if it does not bear a proper relation to the cost of providing the function or service to which it relates.

15.2. Should the objective or function be subject to a levy?

Levies should only be imposed where it is appropriate for a certain group to contribute money for a particular purpose.

A levy does not relate to a specific good or service. It is usually charged to a particular group to help fund a particular government objective or function. ACC levies, for example, are factored into the costs of petrol and vehicle licensing to help cover the cost involved in treating people who are injured in motor vehicle accidents. The person paying might never benefit personally from the government service, but it is desirable that they contribute to the cost.

Another example is where the members of a particular industry pay a levy to cover the costs of a regulator or promoter of that industry. A particular member may have little direct contact with the regulator or not directly benefit from the promotion, but it is appropriate that the member contributes towards the costs. Where the Commodity Levies Act 1990¹⁰⁵ can apply, it is usually not acceptable to enact (by Act) a parallel scheme for a particular industry.

The key distinction between a levy and a general tax (such as income tax or GST) is that revenue gathered by a tax is not usually earmarked for any particular purpose. Rather, it is appropriated and spent by the Government according to the particular policy objectives or requirements of the day.

In some cases it will be appropriate to use a levy to pay for the costs of a particular government objective or function. In other cases it will be appropriate to use a tax-funded appropriation; for example, if the benefits accrue primarily to the public as a whole and there is only a remote connection to the group that would pay the levy.

15.3. Does the legislation provide authority to prescribe a fee or a levy?

Legislation must include an empowering provision that specifically authorises the executive to prescribe a fee or a levy.

With the exception of payments received under contractual agreements (public bodies generally do not need statutory authority to enter into contracts for commercial transactions), it will usually be unlawful for a public body to charge a fee or levy without express authority from Parliament.

15.4. How is the fee amount determined?

Legislation must set out the manner by which to determine the fee.

The empowering provision should state the basis by which to prescribe the fee. Fees for a service or function should normally be determinable in advance by the payer before the service or function is performed, unless the Act contemplates otherwise. Often fees and levies will be a fixed amount. However, if a fee is to be determined by a particular method or

¹⁰⁵ <http://www.legislation.govt.nz/act/public/1990/0127/latest/DLM226674.html>

calculation (such as a fee calculated by reference to an hourly rate), this should be authorised in the empowering provision.

The fee amount recovered should bear a proper relation to the cost of providing the service or function and should not exceed the cost of providing the service or function. Where the fee amount exceeds the cost, the fee will be at risk of being declared unlawful on the basis it is an unauthorised tax.

Any authority given to charge a fee is therefore implicitly capped at the level of cost recovery. Specific authority in the Act would be required to charge a fee that would recover more than the cost of providing the service because of an intention to impose a penalty, limit access to, or demand for, a service; or to meet a social objective. It is good practice that the relevant Cabinet papers provide a clear justification for the level of the fee.

A fee that cross-subsidises other services or other groups of users should generally be avoided. However, in the rare cases where it may be appropriate for a fee to cross-subsidise other services, or other users, the cross-subsidisation should be transparent and the empowering provision must be drafted widely enough to authorise the cross-subsidisation.

15.5. How is the levy amount determined?

Legislation must set out the manner by which to determine the levy.

There must be a proper relation between the levy amount charged and the particular objective or function concerned. The amount of a levy imposed on a particular group should be commensurate with the degree of connection between the group and the objective or function concerned. For example, if a levy covers the costs of a regulator, it may be inappropriate to impose a large levy on a group that has little to do with the functions of the regulator.

In some cases, an objective or a function is funded from a mixture of levies and an appropriation (for example, levies may pay for a portion of the costs of a regulator while an appropriation may pay the balance). In this case the benefits that accrue to the regulated industry should be considered, as should the broader public benefit.

15.6. Who will pay the fee or levy and in what circumstances can it be waived or refunded?

Legislation must clearly identify who may be charged the fee or levy and in what circumstances it may be waived or refunded.

Fees should only be charged to those people who benefit from the service or function. The fee should not be used to offset the cost of future users of the service, nor to attempt to recover any deficit that may have occurred as a result of previous under-recovery. A fee that does so will risk being declared unlawful.

Levies may be charged to a class or group of people (often defined by the fact that they are undertaking a certain activity), to fund certain costs that may arise in connection with that activity. It is not necessary that the person paying obtains a direct benefit from paying the levy.

Payment of a fee or levy cannot be waived or refunded without authorisation from an Act. The Act may either explicitly authorise the refund or waiver, or it may empower the making of regulations to authorise a refund or waiver. In either event, the Act or regulations should identify the circumstances under which the fee or levy may be waived or refunded.

15.7. Should there be a special process in connection with prescribing the fee or levy?

Legislation should identify any procedural requirements that must be carried out in connection with the fee or levy.

In some cases it will be appropriate for the Act to set out specific procedural requirements that must be satisfied before prescribing a fee or levy.

It may be desirable for the Minister responsible for the empowering Act to consult with existing and potential users of the service, industry groups, or the public more generally before recommending regulations to prescribe a new fee or levy.

In some cases it may be appropriate for a significant levy to be subject to a confirmation process (where regulations lapse at an identified time unless confirmed earlier by an Act).

OLD EDITION

16. Creating a new statutory power

The executive, legislative, and judicial branches of the Government require some form of authority before they can act. In many cases the exercise of a power will be central to achieving the policy objective.

The power to do something may be granted by express provision in legislation (statutory powers), the common law, or it may stem from the fact that the chief executive or other agency head is a legal person and is capable of contracting with other parties.

Where a public body acts without power, or acts in a way that is inconsistent with the powers given to it, that body will be deemed to have acted unlawfully, or *ultra vires* (beyond powers). This may result in costly and time-consuming litigation, and the body may be required to re-take the decision. In some cases it may result in the public body not having the powers that were intended. The legislation must therefore clearly articulate the scope of the power, who will exercise it, and how it will be exercised.

Guidelines

16.1. Is a new statutory power required?

A new statutory power should only be created if no suitable existing power or alternative exists that can achieve the policy objective.

If there is already clear authority in existing legislation, it will be inappropriate to grant the same power in new legislation. This will lead to duplication and a lack of certainty in the law, particularly where only one Act is amended (this may create an unintended distinction between the two provisions (see Chapter 2)).

If there is an existing common law power, careful consideration must be given to whether or not it is sufficient. If it is not sufficient, consideration should be given to replacing it with a statutory power. If the intention is to limit or extinguish the common law power, the new legislation must clearly state that (see Chapter 2).

If an existing power is relied on to perform a new function created by legislation, that power must be clearly identified in the documentation that supports the legislation along with the reasons why it is considered that the new function can be exercised under it.

16.2. Who should hold the new power?

Legislation should identify who holds the new power. The power should be held by the person or body that holds the appropriate level of authority, expertise and accountability.

There are two aspects to this issue. The first aspect is which branch of government will hold the power? Powers are usually granted to the executive. In cases where a power of a judicial nature is involved, it should be granted to the judiciary (which includes tribunals). The second aspect is which level within that branch will exercise the power? A power may be vested in the executive, but a decision must still be made about whether the power is to be exercised by officials, the chief executive, Minister or another statutory office holder.

The following factors should be considered when deciding where to place the power:

The character of the issues involved and the nature of the power includes:

- whether the power is appropriate for delegation;
- the importance of the individual rights and interests involved;
- the importance of the government interests involved;
- whether the power contains a broad policy element;
- whether the power should be exercised independently of government control or the control of the governance body of the organisation.

The characteristics of the person who holds the power includes:

- the expertise required of the decision maker;
- whether the new role will conflict with an existing role;
- the level of accountability desired of the decision maker.

The process by which the power will be exercised includes:

- the context in which the issues are to be resolved (such as by administrative decision);
- the procedure commonly used by the decision maker;
- whether the power involves the finding of facts and the application of precise rules to those facts;
- whether the power requires the making of broad judgements or the exercise of wide discretion.

Practical matters include:

- the ability of the decision maker to access relevant information;
- the existence of safeguards (such as the Ombudsmen and the Official Information Act).

In general, decisions relating to more significant issues should be taken by a person with an appropriate level of seniority and accountability. For reasons of simplicity, it will usually be preferable to place a power with the person who has ultimate accountability for the decision (such as a chief executive or Minister). The person exercising the power must have sufficient expertise in the area in which they are exercising the power. If a tension arises between the need to place a power with a suitably senior or accountable person, one option is to require the decision maker to have regard to or act on the recommendation of a subject matter expert.

16.3. Will the new power be delegable?

Legislation should state the extent to which a new power can be delegated.

To avoid uncertainty and litigation, legislation must be clear as to when (if at all) a power may be exercised by a person other than that to whom it was granted. Legislation must also be clear who that person is. Some powers are of such importance that they should only ever be exercised by the person granted them and no delegation should be permitted. Examples include powers to make subsidiary legislation, borrow money, and grant warrants of appointment. However, the reality of public administration often means that it is impractical (or impossible) for the person to whom a power is granted to exercise that power. If a statutory power is to be delegated to another person, an express provision allowing this will be required in primary legislation.

Section 14 of the Interpretation Act¹⁰⁶ provides that a power conferred on the holder of an office (other than a Minister) may be exercised by that person's deputy. The provisions of the Interpretation Act will apply unless legislation indicates otherwise. The Crown Entities Act 2004¹⁰⁷ contains default provisions providing for delegation by Crown entities. The State Sector Act 1988¹⁰⁸ contains standard delegation provisions for the public service, and the Local Government Act (Schedule 7)¹⁰⁹ specifies what a local authority may and may not delegate. These default provisions should be relied on unless there are good reasons not to do so.

Generally, legislation should not authorise a person to delegate the power of delegation.

16.4. Is the power no wider than is required to achieve the policy objective and purpose of the legislation?

Legislation should not create a power that is wider than is necessary to achieve the policy objective.

The extent of a statutory power should have a direct connection to the policy objective that the power was intended to help achieve. The power should be confined to that which is necessary to perform those actions necessary to achieve the purpose of the legislation.

16.5. What is the power and how will it be exercised?

Legislation should identify what the power is, for what purposes, and in which circumstances it may be exercised.

A clear statement of the power and how it will be exercised will assist those exercising the power, those people subject to it, and those who may be tasked with settling any dispute over the exercise of it. It should also reduce the risk of litigation regarding the particular exercise of a power.

¹⁰⁶ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

¹⁰⁷ <http://www.legislation.govt.nz/act/public/2004/0115/latest/DLM329631.html>

¹⁰⁸ <http://www.legislation.govt.nz/act/public/1988/0020/latest/DLM129110.html>

¹⁰⁹ <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html>

The following matters should be specified in the legislation:

- any pre-requisite circumstances or procedural steps (such as consultation) that must be taken before exercising the power;
- the appropriate process for exercising the power (will depend on the purpose and characteristics of the power, the issues to be resolved, the interests affected, and the qualities and responsibilities of the decision maker);
- if the power is to be exercised independently, that should be made clear either from the context, or by explicit provision (for example, the Crown Entities Act has a “statutorily independent function” regime that should be referenced in appropriate cases);
- whether the exercise of the power requires the taking into account or exclusion of certain matters (those matters should be identified, and it should be explicit whether or not those matters make up an exhaustive list).

See, for example, s 7 of the Major Events Management Act 2007.¹¹⁰

16.6. What safeguards are provided in the legislation?

Legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision.

Prescribed limits as to the extent and exercise of the power (see above) are key safeguards; however, it may be necessary to include additional safeguards to ensure the rights and interests of individuals are protected. An additional consideration is ensuring that the safeguards that apply are appropriate, having regard to the full range of people who are affected. The safeguards and procedures that are appropriate may differ where the people affected are mostly people with little access to legal representation (as opposed to corporate entities).

What is considered to be an adequate level of protection will increase as the interference with the rights of individuals increases. The rules of natural justice (see Chapter 3) will apply; however, the flexible nature of the doctrine means that it is good practice to explicitly identify the specific protections that apply so as to avoid any uncertainty. The following protections should usually apply to the exercise of a statutory power:

- the rules and criteria by which the power will be exercised should be specified in the legislation;
- a fair procedure should apply (this may include the right to make submissions, the right to be heard, and the right to produce evidence in support);
- decisions that affect a person’s rights or interests should be reviewable in some way (see Chapter 25).

¹¹⁰ <http://www.legislation.govt.nz/act/public/2007/0035/latest/DLM411987.html>

Where the power involves the making of a decision, the decision maker should be independent of the parties whose interests are affected. If this is not practicable (such as in administrative decision making), an independent means of review or appeal should be available.

16.7. Will a new power be given to a specialist tribunal?

New powers that are given to a specialist tribunal must be consistent with the particular field of expertise of that tribunal, must be appropriate in light of the procedure adopted by the tribunal, and must not impair the tribunal's independence and impartiality.

Specialist tribunals perform adjudicative functions in a defined specialist jurisdiction. They are independent of the executive, and their decisions will generally be appealable to the courts of general jurisdiction (see Chapter 25).

If a new power will be given to an existing tribunal, the power must relate to matters that are within the specialist jurisdiction of the tribunal. The new power must not conflict with the existing functions of the tribunal, nor should it compromise the tribunal's independence or the appearance of independence. The tribunal must either possess or be capable of amending its processes to ensure that appropriate procedures and safeguards are in place concerning the exercise of the new power.

The Ministry of Justice must be consulted if new powers are being given to an existing tribunal or if a new tribunal is being created (see Chapter 17).

17. Creating a new public body

The day-to-day business of government is conducted through a number of different public bodies. It may be necessary to establish a new body where new functions are created and there is no appropriate existing body that can perform those functions. Different organisational forms will have distinct governance and reporting requirements. They will also have different relationships with the executive and different relationships and obligations in respect of government policy.

The State Services Commissioner (“SSC”) advises the Government on the design and capability of the State services. The SSC should be consulted at an early stage when considering whether or not to create a new public body or alter the functions of an existing one. The SSC’s website¹¹¹ provides detailed information relating to the public sector organisations, and officials should contact the SSC for further advice.

17.1. Is a new public body required?

A new public body should only be created if no existing body possesses the appropriate governance arrangements or is capable of properly performing the necessary functions.

Creating a new public body involves considerable expense and should only occur where no pre-existing bodies are capable of performing the particular function. As part of the internal government consultation exercise, those public bodies that may have an interest in a particular subject and might be capable, with or without amendment to their structure or powers, of carrying out the new functions, should have been identified. In most cases it will be more efficient to give new powers to an existing public body, even if it requires further structural change, than it will be to create a new body. For more information on creating a new public power, see Chapter 16.

17.2. Is legislation required to create a new public body?

Legislation should only be used to create a new public body when it is required by law or is necessary to ensure that the body possesses the necessary powers, authority, and appropriate governance arrangements.

Legislation is required to establish a new tribunal, Crown Agent, Autonomous Crown Entity, or Independent Crown Entity (see below for a discussion of these forms). However, it is not always necessary to establish a public service department, a departmental agency, or any of the other organisational forms mentioned below. Whether or not legislation is required must be assessed on a case-by-case basis, having regard to the need to:

- confer a particular function (whether statutory or otherwise);
- grant the entity powers it would not otherwise have by virtue of being a legal person;
- establish appropriate governance and accountability arrangements;

¹¹¹ <http://www.ssc.govt.nz/>

- give effect to international obligations;
- give statutory recognition to the body;
- establish a statutory officer within a public sector agency, who will have the task of exercising specific statutory functions or powers.

17.3. What form should the new public body take?

A new body should be in the form that provides appropriate accountability arrangements and is best suited to performing the relevant functions.

It will be more efficient, and result in a more effective organisation, to rely on one of the existing organisational forms discussed below. Good reasons must exist for creating a new organisational form from the ground up rather than relying on an existing form.

The organisational forms below have comprehensive governance rules already in place that can be found in legislation. Where a new organisational form is created, legislation will still need to replicate these essential features of the existing forms. Many forms also have existing bodies of case law surrounding their operations that may need to be factored into any new form.

Sometimes it may be appropriate to adopt an existing proven regime such as the Crown Entities Act, but to exclude the application of any particular provisions that are not appropriate (see, for example, the provisions of the Heritage New Zealand Pouhere Taonga Act 2014¹¹²).

Choosing a particular organisational form purely for reasons of administrative convenience or presentation may result in the body not possessing all the qualities (such as independence or governance arrangements) it requires to operate properly or to fulfil its functions.

Public service departments: Public service departments are also known simply as departments or ministries. Some, such as the Crown Law Office and the Treasury, are named differently. Departments are directly accountable to a Minister and are part of government. All public service departments are listed in the first Schedule to the State Sector Act 1988.¹¹³

- Departments should be the preferred form where the body is required to exercise functions inherent to government (foreign policy, immigration, and citizenship), substantive coercive powers (tax collection, prisons), provide policy advice to the Government, or perform multiple functions. Where there is a constitutional requirement for ministerial oversight or direct responsibility, or where the subject matter is of importance to the Government, carries high public and political expectations, and has significant accompanying risk, a public service department should be the preferred form. This may involve granting an existing department a new power or creating a new department.

¹¹² <http://www.legislation.govt.nz/act/public/2014/0026/latest/DLM4005414.html>

¹¹³ <http://www.legislation.govt.nz/act/public/1988/0020/latest/DLM129110.html>

Departmental agency: A departmental agency is a new organisational form in the New Zealand context, provided for by amendments in 2013 to the State Sector Act 1988. Legally, a departmental agency is part of the host department, but it is headed by its own chief executive who acts under deemed delegation as the employer of those employees who carry out the departmental agency's activities.

- Departmental agencies are designed to carry out a clearly defined set of services, operational or regulatory activities under autonomous management, but within the policy and resource settings of a host public service department. The choice of a departmental agency can offer a preferable alternative to establishing a wholly separate department or Crown entity, and offers the benefits of maintaining system coherence and avoiding the fragmentation and costs of separate agencies.

Crown entities: Crown entities perform much of the operational business of government. They are governed by the Crown Entities Act 2004.¹¹⁴ Crown entities will usually be appropriate when there is a compelling need to have the function performed at arm's length from Ministers or under the authority of a governance board. Crown entities can take a variety of forms, each of which vary slightly from each other in respect of their legal form, function, source of funding and their relationship with Ministers.

- **Crown agent ("CA"):** This form is appropriate when the body is required to give effect to government policy. A CA has a large degree of ministerial oversight.
- **Autonomous Crown entity ("ACE"):** This form is appropriate when the body is required to have regard to government policy as one of a number of relevant factors. An ACE can still have a large degree of ministerial oversight.
- **Independent Crown entity ("ICE"):** This form is appropriate where it is important that the body has greater independence from Ministers to preserve public confidence in the body. The Minister is prevented from directing the body how to perform its functions, although the Minister can exert indirect influence through budget monitoring and the Statement of Intent process.
- **Crown entity company ("CEC"):** This form is appropriate where the functions are both commercial and non-commercial in nature although not as clearly defined as may be needed for a State Owned Enterprise.
- **School board of trustees:** This form is appropriate where a new State school or State-integrated school is created.
- **Tertiary Education Institution:** This form is appropriate where a new university, polytechnic, wānanga or institute of technology is created.

Examples of CAs, ACEs, ICEs and CECs are in Schedules 1 and 2 of the Crown Entities Act 2004.

¹¹⁴ <http://www.legislation.govt.nz/act/public/2004/0115/latest/DLM329631.html>

State Owned Enterprise (“SOE”): An SOE is designed to be run as a commercial enterprise and be independent of government influence over the SOE’s day-to-day operations. The Government is the sole shareholder and is therefore able to ensure that the business is run having regard to the values and interests of the community in which it operates. SOEs are governed by the State-Owned Enterprises Act 1986.¹¹⁵

- An SOE may be the appropriate form when there is an identifiable commercial objective and the body can operate as an efficient and profitable business.

Mixed ownership model company: A mixed ownership model company can be created when the Government sells minority shares (up to 49%) in an SOE. The Government retains control as the majority shareholder and the company ceases to be an SOE. It is also possible to create new companies with the Crown as majority or minority shareholder from the outset.

Officer of Parliament: An officer of Parliament is accountable to the House, not to Ministers. This form is used for roles that act as a check on the executive’s use of power and resources. For that purpose, an officer of Parliament must only discharge functions that the House of Representatives, if it so wished, might carry out. Offices of Parliament are rarely created; at present only three exist.¹¹⁶

Public Finance Act 1989 body (Schedule 4 and 4A): Where, due to its particular distinctive features, a body does not comply with all of the requirements of the Crown Entities Act 2004, that body may be listed in Schedule 4 or Schedule 4A of the Public Finance Act 1989¹¹⁷.

The State Services Commission maintains an up-to-date list of all the organisations in the State Sector, categorised by their organisational form.¹¹⁸ It has also produced guidance on how to identify the organisational form that is most appropriate to the particular functions concerned.¹¹⁹

17.4. Will the new public body be a tribunal?

Legislation should only create a new tribunal where it is inappropriate to give new powers to an existing tribunal and no other court, tribunal, or other specialist body is better placed to exercise the power.

Creating new tribunals is complex and involves considerable start-up costs, and ongoing costs. Creating a new tribunal should be a last resort and only considered if no other viable option exists.

A tribunal may be the appropriate body to determine questions or disputes that affect people’s rights, particularly where an independent assessment of facts and the application

¹¹⁵ <http://www.legislation.govt.nz/act/public/1986/0124/latest/DLM97377.html>

¹¹⁶ <http://www.parliament.nz/en-nz/parl-support/agencies/offices-of-parl/00CLOOCAdminAgenciesOffices1/offices-of-parliament>

¹¹⁷ <http://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>

¹¹⁸ http://www.ssc.govt.nz/state_sector_organisations

¹¹⁹ <http://www.ssc.govt.nz/reviewing-mog>

of specialist judgement or legal principles are required. Proceedings before a tribunal are generally more accessible, cost effective and allow a greater scope for individual and public participation. The procedures adopted are generally flexible enough to enable non-legally qualified people to represent themselves.

Any new tribunal should have, as a minimum:

- actual and perceived independence from the executive, in particular any department or agency that is likely to appear before the tribunal or that conducts an investigatory function relevant to the matter before the tribunal;
- members appointed in accordance with set criteria (such as minimum qualifications) to include at least one legally qualified member;
- a clearly defined jurisdiction, usually in a specialist field;
- a procedure appropriate to the subject matter of the dispute and flexible enough to accommodate the range of parties likely to come before it;
- powers necessary to perform its function and ensure a fair hearing, such as powers to adjourn, summons witnesses, require the production of documents, administer oaths and affirmations, take sworn evidence, and in appropriate cases close proceedings and suppress evidence or identities (the powers given to inquiries under the Inquiries Act 2013¹²⁰ may provide a suitable precedent in this regard);
- a right of appeal to a court of general jurisdiction (see Chapter 25).

The Ministry of Justice should be consulted before any substantive policy work is undertaken to create a new tribunal or alter an existing tribunal's powers or functions. The Ministry of Justice is currently producing detailed guidance on creating new tribunals. Once published, this guidance will provide the starting point for any department that is considering creating a new tribunal.

17.5. Will the public body be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987)?

All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987).

The Acts discussed in this section are key mechanisms by which government bodies are able to be held accountable for their activities. They should apply to all new bodies and existing bodies unless there are compelling reasons not to do so. The Ministry of Justice, the State Services Commission, the department that administers the particular Act, and any agency with operational responsibilities under the particular Act (departments and agencies

¹²⁰ <http://www.legislation.govt.nz/act/public/2013/0060/latest/DLM1566106.html>

identified below) should be consulted when considering whether to apply the following Acts to a Government body:

- **The Ombudsmen Act 1975¹²¹, the Official Information Act 1982¹²², and the Local Government Official Information and Meetings Act 1987¹²³:** The Department of Internal Affairs¹²⁴ and the Office of the Ombudsman¹²⁵.
- **The Public Audit Act 2001¹²⁶:** The Treasury¹²⁷ and the Office of the Controller and Auditor-General¹²⁸.
- **The Public Records Act 2005¹²⁹:** The Department of Internal Affairs and Archives New Zealand¹³⁰.

¹²¹ <http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM430984.html>

¹²² <http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>

¹²³ <http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM122242.html>

¹²⁴ <http://www.dia.govt.nz>

¹²⁵ <http://www.ombudsman.parliament.nz/>

¹²⁶ <http://www.legislation.govt.nz/act/public/2001/0010/latest/DLM88541.html>

¹²⁷ <http://www.treasury.govt.nz>

¹²⁸ <http://www.oag.govt.nz/>

¹²⁹ <http://www.legislation.govt.nz/act/public/2005/0040/latest/DLM345529.html>

¹³⁰ <http://www.archives.govt.nz> and also <http://www.dia.govt.nz/About-Internal-Affairs---Department-structure---Archives-New-Zealand>

18. Creating powers of search, surveillance and seizure

Powers of entry, search, surveillance and seizure (referred to in this chapter by the generic term “search powers”) must be authorised by an enactment, the common law (provided that the Government’s actions do not breach s 21 NZBORA¹³¹), or be carried out by consent.

Search powers balance important sets of values. On one hand is respect for liberty, dignity, bodily integrity, privacy, and the right to peaceful enjoyment by people of their property. These values are affirmed by the right to freedom from unreasonable search and seizure in s 21 NZBORA. On the other hand are law enforcement and regulatory objectives. Law enforcement objectives are ensuring public safety, and protecting the public through the prevention, detection and prosecution of crime. Regulatory objectives involve conducting inspections, monitoring and enforcing compliance in particular industries or regulated fields, particularly where serious harm can occur from non-compliance (such as physical harm to people, harm to the environment, or damage to New Zealand’s economy).

A well-designed set of search powers will strike a balance between respecting individual rights and providing an agency with the vital tools it needs to give effect to a policy or Act. Poorly designed search powers may be unjustifiably intrusive or might be insufficient. They may be difficult to use, be inconsistently exercised, and be subject to challenge in the courts. In these cases it may be necessary to urgently amend the legislation to rectify defective search powers.

The Search and Surveillance Act 2012¹³² reformed the law of search and seizure. It consolidates the existing police powers that were previously contained in multiple enactments. It also provides a detailed set of procedural rules and safeguards that will apply to the exercise of police powers in Part 2 and the majority of the powers held by non-police regulatory agencies (which remain in agency specific legislation, but are listed in the Schedule to the Act).

The Search and Surveillance Act strikes a balance between the competing rights discussed above. Therefore the procedural rules contained in Part 4 should generally be the first port of call for those intending to create new search powers. The Act is discussed in more detail below. Legal advisers and the Ministry of Justice (who play an important “gate keeping” role in respect of search powers) should be consulted to ensure that any proposed departures from the Act are justified.

Guidelines

18.1. Should new search powers be granted?

New search powers should only be granted when the policy objective cannot be achieved by other means.

If the information or evidence concerned can be obtained by means other than by granting new search powers either by recourse to the common law, consent, or existing powers, those alternatives should be used.

¹³¹ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

¹³² <http://legislation.co.nz/act/public/2012/0024/latest/whole.html>

If new search powers are required, the approach that results in the least limitation on privacy rights should be adopted.

Search powers should not be granted for the convenience of the agency or ease of prosecution. Each search power must have a separate justification for why it is necessary. A general justification that search powers are required will not be sufficient. The more invasive a particular search power, the greater the justification required to create that search power. Searches of a person's body are more invasive than searches of a business premises, and will generally require a greater justification.

In the regulatory context, search powers may have a legitimate monitoring or deterrent effect, but in the law enforcement context it is inappropriate for search powers to be used for coercive or deterrent reasons.

In the law enforcement context, search powers should generally not be available for infringement offences, breaches of regulations, or offences that are not considered serious enough to warrant a sentence of imprisonment. They should generally not be available for offences that are prescribed by delegated legislation.

Statutory law enforcement search powers must be triggered by suspicion that a specific matter or class of matters has taken place. Generally worded law enforcement search powers (which allow "fishing expeditions") will likely be interpreted narrowly by the courts, and should not be authorised by legislation.

In some cases, the effective exercise of search powers might necessitate the inclusion of a power to require information to be produced (such as codes to access computers) or questions to be answered. However, these powers are likely to be being used in situations where prosecutions are likely to follow, and the privilege at general law (and in the Evidence Act¹³³) against self-incrimination should be respected. If grounds exist to override that privilege, then the override should be explicitly stated. If not, then the privilege should be affirmed.

These powers should also respect other privileges such as legal professional privilege.

18.2. Is a warrant required to exercise new search powers?

All searches should be carried out pursuant to a warrant unless there are good reasons not to.

The starting point is that all law enforcement searches should be carried out pursuant to a warrant issued by an independent judicial officer.

Warrantless search powers can be exercised without independent judicial oversight; therefore a compelling reason must exist to create them. Generally, a real risk must exist that some serious harm or damage will occur or evidence will be lost if officers are required to obtain a search warrant.

¹³³ <http://www.legislation.govt.nz/act/public/2006/0069/latest/DLM393463.html>

However, consideration must still be given to whether or not any risk can be satisfactorily addressed by obtaining a warrant, but not giving notice to the person or the occupants of a property that is the subject of the search. In the law enforcement context, compelling reasons must exist for granting warrantless search powers in respect of non-imprisonable offences.

It may be appropriate to allow warrantless inspections to take place without notice where it is the only effective way to ensure certain regulatory standards are being adhered to (such as the inspection of restaurants). Regardless of the context, all searches must be carried out by properly authorised and trained officers.

Warrantless search powers should rarely extend to dwelling-houses or marae; and only in circumstances where there is a compelling justification for such a high level of intrusion. Such powers should be rarely granted in the regulatory context.

18.3. How should the search powers be framed?

New search powers should only be exercisable when there are “reasonable grounds to suspect” the relevant factual situation has occurred, and “reasonable grounds to believe” that evidence will be found, or a particular thing may be achieved during the course of that search.

In the law enforcement context, legislation should set out the thresholds that must be satisfied before a search power is exercised. The default thresholds below are based on the search powers of the police in s 6 of the Act and should apply to any new search powers:

- there are “reasonable grounds to suspect” the relevant factual situation has occurred (such as a criminal offence); **and**
- there are “reasonable grounds to believe” that evidence will be found, or a particular thing might be achieved, during the course of the search (a common example is finding evidence relating to a criminal offence).

Compelling reasons must exist for relying on different thresholds in a law enforcement context (such as a suspicion that the person is carrying a dangerous item, or may otherwise pose a serious and imminent threat to themselves or other people).

In the regulatory context, suspicion of a breach is not always necessary for search or inspection powers to be exercised. However the power must still be justified (for instance, a search or inspection power is required to monitor compliance with legislation). Even so, those powers must only be capable of being exercised for the purpose of monitoring compliance or detecting breaches of the legislation.

18.4. What procedure should apply to the exercise of the search power?

New search powers should apply the rules and procedures set out in Part 4 of the Search and Surveillance Act 2012.

Legislation that creates new search powers should contain a specific statutory provision that applies Part 4 of the Act.

Part 4 sets out a comprehensive set of rules concerning the conduct of searches by consent; the application for, issuing and execution of search warrants; the conduct of warrantless searches; how to treat legally privileged and confidential material; and the application of other legal privileges. Part 4 also addresses what happens to seized material following the end of proceedings or an investigation, and what immunities apply to those people who issue and execute orders and search warrants under the Act.

Where Part 4 applies, enforcement officers will also have access to the powers and procedures in Part 3 of the Act (including surveillance powers, production orders, declaratory orders, and surveillance device warrants).

Legal advice should be sought to help determine whether or not the rules and procedures in the Act should apply in their entirety or in part. Good reasons are required for not applying or for modifying the procedures in Part 4. Good reasons might include the need for a more specialised or technically complex set of rules and procedures (see, for example, the Animal Welfare Act 1999¹³⁴).

¹³⁴ <http://www.legislation.govt.nz/act/public/1999/0142/latest/DLM49664.html>

19. Ways to achieve compliance and enforce legislation

Compliance with legislation is often achieved by imposing criminal liability for breaches. However, a range of options exist that help regulate behaviour and encourage compliance in different ways. These options include education initiatives, warnings, self-regulation, relying on or modifying existing civil remedies, pecuniary penalties, infringement offences, and criminal offences.

There is also a set of civil actions and remedies that the Government can bring against private individuals in respect of a breach of a particular Act. These include compensation orders, management bans, enforceable undertakings, injunctions and orders to repair harm done (such as to the environment), as a result of a breach of a statute.

Where possible, the least coercive option, or combination of options, that achieves the policy objective should be adopted.

This chapter, when read with Chapters 20, 21, 22, and 23, will help identify which of the most common regulatory options are available and in which circumstances they may be appropriately used.

Legal advisers and the Ministry of Justice should be consulted early in the development process if there is an intention to amend or create a new civil remedy or order, criminal offence, infringement offence or pecuniary penalty.

Guidelines

19.1. How will the legislation be enforced?

The Government should not generally become involved in enforcing rules or otherwise regulating in an area where the rules can be reliably enforced by those who are subject to them.

Every Act has an administering department or ministry; however, consideration must be given to what role the Government will have in enforcing the legislation and whether regulation of the issues and conduct can be left to the individuals or groups concerned.

The Government's role will vary depending on what the statute sets out to do. A statute may grant legal rights or make use of existing rights that are left to the parties to a dispute to resolve (by the courts or otherwise) (see Chapter 20). At the other end of the spectrum is the criminal law, where the full weight of the Government's powers are brought to bear on an individual through the investigation and prosecution of crime and the administration of sentences (see Chapter 21).

Often legislation will provide for registration and discipline of professions, but the Government has little or no ongoing involvement in administering the Act; that is left to registration bodies and the profession concerned.

In general, the Government should have little involvement in areas where the enforcement of legal rights and obligations can reliably be left to those who are subject to them and where the civil law already provides adequate rules and procedures.

19.2. What regulatory tools are the most appropriate?

Regulatory options should be effective and efficient, workable in the circumstances that they are required to operate in, and be appropriate in light of the nature of the conduct and potential harm they are intended to address.

All regulatory options included in legislation must be consistent with the purpose of that legislation. Some statutes are intended to prevent, deter or punish certain behaviour. Other statutes are intended to protect the public or compensate those who have suffered loss. In some cases, legislation may intend to provide a mechanism by which individuals can resolve their own disputes by granting civil rights of action or by providing for a scheme of self-regulation. In other cases the legislation will be empowering (such as authorising local government to operate, and utilities to enter and acquire rights over private land).

Any decision to include a particular regulatory option in legislation, particularly those involving the intervention of the Government (for example criminal law, infringements, pecuniary penalties, injunctions, or management bans) must be based on a robust and transparent assessment of how appropriate the option is in relation to the purpose of the legislation and the particular circumstances in which it will operate.

- **The harm caused and the nature of the conduct involved:** The option must be appropriate in light of the conduct it relates to. For example, it will generally be inappropriate to use the criminal law to address matters relating to a simple breach of a commercial contract or a failure to pay a private debt. By contrast, conduct that involves deliberate and significant physical harm to a person should generally be subject to the criminal law.
- **Effectiveness and efficiency:** Will the option have the desired effect? For example, where deterrence is the primary objective, issuing a \$1,000 infringement notice to a large corporation may have little deterrent effect. Where the objective is to compensate someone for loss or damage, the ability to seek damages for torts or breaches of contract might be more effective than processes such as obtaining compensation through the criminal process.
- **Practical considerations:** Is the option workable having regard to the circumstances in which it is intended to operate? For example, it would be impractical to require local authorities to pursue every instance of illegal parking through civil debt recovery processes.

20. Creating new, or relying on existing, civil remedies

A number of civil remedies (sometimes called “private law remedies”) exist in the common law and some cases are supplemented by legislation. Most forms of civil remedy concern private disputes between individuals, bodies corporate and, in some cases, the Government, over contracts, debt or wrongs such as negligence. In private civil actions the Government may sue and be sued as if it were a private individual, unless legislation has a specific provision to the contrary.

The primary purposes of civil actions are to repair the harm done by one party to another and to prevent the harm from happening again. Different mechanisms (referred to by the generic term “remedies”) are available to the parties. These include:

- the payment of damages from one party to another;
- court-ordered requirements to perform contractual or legal obligations;
- a variety of other orders that prevent or restrict the conduct of a party (or, in rare cases, a third party) to the proceedings.

In many cases these disputes are settled through the use of alternative dispute resolution (“ADR”) and it is unnecessary to involve the courts.

Civil remedies are determined in the courts, applying the rules of civil procedure. Matters are decided on the civil standard of proof—the “balance of probabilities”—meaning that it is more likely than not that a particular thing occurred or exists. The civil standard of proof is a less stringent test than the criminal standard of “beyond reasonable doubt”.

Guidelines

20.1. Should existing civil remedies be relied upon?

Existing civil remedies should be relied on where they are adequate and appropriate for the purposes of enforcement.

Existing civil remedies should be used where they can apply to the circumstances of the new legislation and are efficient and effective mechanisms for the purposes of enforcement. If there is uncertainty as to whether or not an existing civil remedy will apply, or if it is necessary to modify it in some way to better suit the purposes of the legislation (such as making a new or different kind of remedy available), this must be made explicit in the legislation. Legal advisers will be able to identify existing civil actions and whether they are adequate.

20.2. Should a new civil remedy be created?

New civil remedies should only be created where there is a clear need, where it is necessary to achieve the purpose of the legislation, and no existing civil remedy is appropriate.

New civil remedies should not generally be created unless there is a clear need. This need may arise due to a gap in the current range of remedies or where there are difficulties in

modifying existing remedies. In other cases a new process or institution might be a more effective and efficient way of addressing an issue.

Broad consultation should take place before creating a new civil action, in particular with agencies that administer similar legislation. The Ministry of Justice, the Crown Law Office, and the PCO should also be consulted.

OLD EDITION

21. Creating criminal offences

Criminal offences are the most serious form of sanction that can be imposed under law. They are one of a variety of alternative mechanisms for achieving compliance with legislation (see Chapters 19, 20, 22 and 23) and should not be seen as the default response to breaches of legislation. There must be a clear need for a new or increased criminal penalty.

Before deciding whether or not to create a criminal offence, four matters should be thoroughly assessed. These matters will allow officials to establish whether or not a criminal penalty is necessary, or whether the conduct can be addressed by alternative mechanisms, such as the civil law, infringement penalties or pecuniary penalties.

- What conduct is to be prohibited? (the “physical element”).
- When should the person be held responsible? What is their culpability? (the “mental element”).
- What defences, if any should be available?
- Who should be punished? (for example, a company, or its directors, management, or offending individual employees).

Penalty regimes from other New Zealand or overseas statutes should not be duplicated without first considering whether or not they are appropriate having regard to the particular context of the new legislation.

Legal advisers should be consulted early in the policy development process. The Ministry of Justice should be consulted whenever a new criminal offence is created or an existing criminal offence is altered in some way (including an increase in the penalty).

Guidelines

21.1. What conduct is to be prohibited?

Legislation must precisely define the prohibited conduct.

People must be able to act in certain ways, or decide not to act in certain ways, and have a clear understanding of the legal consequences that might follow. It is therefore necessary to first consider exactly what conduct is being prohibited (called the *actus reus*) and how the conduct is connected with the harm caused.

In criminal proceedings, the prosecution must prove beyond reasonable doubt that the defendant committed the physical act. An imprecise statement of the prohibited conduct may lead to inconsistent enforcement of the law, uncertain application of the law, unintended changes in behaviour, or an acquittal.

It is undesirable to further penalise conduct where that conduct is already addressed in such a way (by criminal law or otherwise) that provides an appropriate level of punishment, denunciation, prevention, or deterrence.

21.2. When should the person be held responsible?

Legislation must state what mental element must be present for an offence to be committed.

Why and in what circumstances a person should be found guilty of a criminal offence should be considered. This “mental element” (called the “*mens rea*” or “*guilty mind*”) can be framed in many different ways (for example, the defendant “intentionally”, “recklessly”, or “knowingly” performed the prohibited conduct). Each of these formulations has subtle differences and is supplemented by the common law.

The default position is that the prosecution must prove the mental element of an offence beyond reasonable doubt. However, in some cases the defendant may be best placed to provide evidence of the mental element. Other strong policy reasons might also exist that justify requiring them to do so. In these cases it may be appropriate to “shift the burden” of proving the mental element from the prosecution to the defence. A common example is strict liability offences in which the prosecution must prove the physical element, but not the mental element, of an offence. The defendant must prove an absence of fault on the lesser standard of the balance of probabilities.

Other formulations exist, such as requiring the prosecution to prove that the defendant “knew or ought to have known” so that a defendant cannot escape conviction just by showing they did not actually know something was happening, or the consequences of an act.

Legislation that imposes a burden on a defendant to prove or establish any element of a defence in criminal proceedings will constitute a limitation on the presumption of innocence (NZBORA 25(c))¹³⁵. Cogent reasons will therefore be required to justify shifting the burden.

Strict liability offences are commonly used in the regulatory context and may be appropriate where:

- the offence involves the protection of the public, or a group such as employees, from those who voluntarily undertake risk-creating activities;
- there is a need to incentivise people who undertake those activities to adopt appropriate precautions to prevent breaches;
- the defendant is best placed to establish absence of fault because of matters primarily within their knowledge.

Legislation that imposes any burden of proof on a defendant in criminal proceedings should explicitly address:

- who the burden rests with;
- what matters they are required to prove;

¹³⁵ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

- the standard of proof that applies to those matters (usually “the balance of probabilities”).

21.3. What defences, if any, are available?

Legislation must identify any specific defences that are available.

When the prosecution is required to prove the mental and physical element of an offence, or disprove the mental element in strict liability offences, the defendant will be entitled to argue in defence that the prosecution has not proven (or disproven) the necessary elements to the requisite standard of proof.

Where particular factors exist that a person should be entitled to rely on in defence to the new criminal offence (other than the general defence above), it may be appropriate to provide specific defences.

These defences might require the defendant to point to enough evidence to raise the defence (such as for the defence against assault in s 48 of the Crimes Act 1961¹³⁶), or they might require the defendant to prove a certain state of affairs. In both cases, the burden will remain on the prosecution to prove beyond reasonable doubt that the defence is not available to the defendant.

21.4. Who should be punished?

Legislation must identify who will be liable to criminal conviction and in what circumstances they will be liable.

Criminal liability may be imposed on an individual or body corporate. Where a body corporate is liable, officials must consider whether directors or employees of that body may also be subject to criminal liability and in what circumstances. Where an individual is liable, a question is whether other individuals, who may have participated in the offending in some way, should be subject to liability.

A range of statutory mechanisms exist to achieve this. The PCO can provide advice on the most suitable option.

Sometimes the liability is imposed on parties as a matter of convenience, usually at the low level of infringement offences (for example, parking offences are committed by the owner of the vehicle, not the driver, irrespective of who parked the vehicle). However convenience alone is insufficient; there must be other reasons to justify the imposition of liability on a person who did not commit the prohibited act.

¹³⁶ <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

21.5. Should the conduct be subject to the criminal law?

Compelling reasons must exist to justify applying the criminal law to any conduct. The criminal law should be reserved only for conduct that society considers is sufficiently blameworthy to attract the consequences of a criminal conviction.

Having identified the physical and mental elements, who should be punished, and what defences might be available, the question of whether the conduct should be regulated by a criminal offence can be considered.

The criminal law is used to punish, deter and publicly denounce conduct that society considers is blameworthy, harmful and should be prohibited. The criminal law brings the full weight of the State's power to bear on those within its jurisdiction and will involve interfering with a number of fundamental rights. Depending on the seriousness of the misconduct, a person subject to a criminal conviction may experience a loss of liberty (imprisonment or home detention), a loss of property (confiscation, fines or reparation), or both. A person who is convicted will acquire the stigma of a criminal conviction and may suffer public denouncement of their conduct and, in some cases, impacts on future employment or overseas travel. Further, the criminal law may authorise the police or other enforcement agencies to search and arrest an individual and to search and seize their property for the purpose of investigating or preventing the commission of a crime.

It is because of these extraordinary consequences that criminal offences should be created with great care, and criminal convictions should only be imposed by an independent court where a defendant's guilt is proved by the prosecution to the standard of "beyond reasonable doubt" following a rigorously fair procedure.

The following factors, not all of which must be present, may be relevant in determining whether conduct should be criminalised:

- the conduct involves threats of emotional or physical harm, and the risk of, or actual, physical violence or sexual violence or emotional harm;
- the conduct involves serious harm to the environment, threats to law and order, fraud, bribery or corruption, or substantial damage to property rights or the economy;
- the conduct, if continued unchecked, would cause substantial harm to individual or public interests such that public opinion would support the use of the criminal law;
- the conduct is morally blameworthy;
- the harm to public or private interests that would result from the conduct is foreseeable and avoidable by the offender (for instance, it involves an element of intent, premeditation, dishonesty or recklessness in the knowledge that the harms above might eventuate).

General provisions, ("Every breach of this Act is an offence"), are not acceptable as they may capture too wide a range of conduct, not intended to be subject to the criminal law.

21.6. What range of penalties will apply?

Legislation must state the maximum fine and/or term of imprisonment.

Once legislation comes into force, the decision as to precisely what penalty will be imposed in a particular case rests solely with the courts. When imposing a sentence, the courts will have regard to the range of penalties available, the particular facts of the case, and the guidance and principles set out in the Sentencing Act 2002¹³⁷. The court will also have regard to any additional sentencing guidance provided by the legislation and higher courts.

The maximum penalty should not be disproportionately severe, but should reflect the worst case of offending. Legislation that sets minimum penalties is undesirable, as it limits the courts' ability to impose a sentence appropriate to the particular case and is contrary to the principle of judicial independence.

The maximum penalty will impact upon the procedure that the courts will adopt, including whether the High Court can hear the case and whether the defendant has the right to elect trial by jury. Section 6 of the Criminal Procedure Act 2011¹³⁸ provides more detail as to how the maximum penalty will affect the procedure that is adopted.

Where offending is in a commercial context, it may be appropriate to provide for a variable fine such as "three times the commercial gain from the offending". Proposals for such penalties should be discussed with the Ministry of Justice and the Ministry of Business, Innovation and Employment ("MBIE") at an early stage.

Reference to precedents and similar offences must be done with care. While there will be a hierarchy of penalties in a particular area (such as driving offences causing injury or death), New Zealand has not adopted the inflation-adjusted "penalty unit" system found in many other jurisdictions. Therefore, when comparing offences in different statutes, the penalties may be unduly low simply because of the age of the statute, and not provide an accurate guide.

¹³⁷ <http://www.legislation.govt.nz/act/public/2002/0009/latest/DLM135342.html>

¹³⁸ <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3359962.html>

22. Creating infringement offences

Infringement offences are a subset of criminal offences that do not result in criminal convictions. They usually involve low-level infringement fees (less than \$1,000) and are often imposed by the issuing of an infringement notice (such as the police issuing a fine for an unwarranted motor vehicle or issuing a speed camera fine). The purpose of infringement offences is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law. Infringement offences prevent the courts from being overburdened with a high volume of relatively straightforward and low-level offences. As a result, the criminal courts will generally only become involved if the infringement fee is not paid or if the recipient of the infringement notice challenges it.

New Zealand law contains a number of infringement provisions that impose penalties in excess of \$1,000. These provisions are exceptions to the general principles in this chapter and should not operate as precedents for new infringement offence regimes.

Before undertaking detailed work designing an infringement offence, the four preliminary questions identified in Chapter 21 should be addressed: What conduct is to be prohibited? When should a person be held responsible? What defences are available? Who should be punished?

Guidelines

22.1. Should the conduct be subject to an infringement offence?

Infringement offences should be reserved for matters regarded as being of concern to the community and should be prohibited, but do not justify the imposition of a criminal conviction, significant fine, or imprisonment.

The recent development of infringement offence regimes has been inconsistent. The Ministry of Justice has produced guidelines, approved by Cabinet, on the development of infringement schemes which departments should adhere to.¹³⁹

Infringement penalties may be appropriate when:

- large numbers of strict liability offences are committed in high volumes on a regular basis;
- the conduct involves straightforward issues of fact that can be easily identified by an enforcement officer;
- a “one size fits all” approach to penalising conduct can achieve a proportionate deterrent effect;
- identifying actual offenders is not practical (for instance, in relation to parking, speed cameras or toll road offences), but liability may be attributed to the person most able to exercise control of the offending (such as the owner of the vehicle that is found speeding or illegally parked).

¹³⁹ <http://www.justice.govt.nz/publications/global-publications/i/infringement-guidelines>

Infringement penalties will not generally be appropriate in cases that involve complex factual situations, offences that require a mental element, offences that require significant fines (more than \$1,000), or offences that the community considers would warrant a sentence of imprisonment.

Although called an “offence”, no conviction results if the infringement fee is paid.

22.2. Is there authority for the infringement regime?

Infringement offences must be authorised by primary legislation.

The power to specify an offence as an infringement offence must come from primary legislation. Delegated legislation may address some matters, but primary legislation must contain an appropriate empowering provision (see Chapter 13). To ensure consistency between new infringement regimes, and to ensure those regimes can operate effectively, the matters set out below should be addressed.

Authorising and defining the offence—primary legislation

- The prohibited conduct must be precisely defined.
- Can the prohibited conduct be proceeded against by standard criminal proceedings or not? In those cases where the same conduct may be of such seriousness that it warrants criminal sanctions, primary legislation must specify a separate criminal offence.
- Who has the authority to issue an infringement notice? Is it the police, inspectors from the Ministry for Primary Industries or other enforcement bodies or officers?
- In what circumstances may an enforcement officer issue an infringement notice? For example, must the officer observe the prohibited conduct or can they have reasonable cause to believe that the prohibited conduct took place?
- Will the penalty apply to the Crown?

Setting the maximum penalty that may be imposed—primary or delegated legislation

- In general the penalty should not exceed \$1,000, although, in cases with significant financial incentives to non-compliance, a higher level of penalty may be justified to achieve the deterrent effect. Penalties of more than \$1,000 should be stated in primary legislation. In some cases infringement fees of less than \$1,000 may be set by delegated legislation.

Operational aspects—primary or delegated legislation

- The precise form of the infringement notice may be specified in delegated legislation, but the basic requirements should be set out in primary legislation. All infringement notices should include a statement that advises the recipient of their right to challenge the infringement notice.

- To whom will the infringement fee be paid? Legislation must specify whether the fee will be paid to the enforcement body or to the general Crown Bank Account. If the fee is to be split, this must be provided for in the legislation.
- Special procedures (for example, to allow the deferral of payment, payment by instalments, or cancellation of a notice following remedial action) should be authorised in primary legislation, although delegated legislation may cover the detail.

Enforcement and challenges—primary legislation

- Procedures that are available to challenge and enforce an infringement notice should be addressed in primary legislation (see below).

22.3. What procedures apply to new infringement penalties?

Section 21 of the Summary Proceedings Act 1957 should apply to all new infringement offences.

Section 21 of the Summary Proceedings Act 1957¹⁴⁰ sets out a generic process by which a person may challenge an infringement notice. It also provides a process by which an agency may issue reminder notices, enter into instalment arrangements, and if necessary bring a person before the court and have an unpaid infringement penalty converted to a fine plus the associated court costs.

New infringement penalties should use this existing system. This is to ensure consistency across the infringement regime systems and to reduce complexity in the law. Cogent reasons are required to justify any departure from the Summary Proceedings Act procedure.

For s 21 of the Act to apply, legislation should contain an express provision to the effect that the new offence is an infringement offence for the purposes of s 21 of the Summary Proceedings Act 1957.

¹⁴⁰ <http://www.legislation.govt.nz/act/public/1957/0087/latest/DLM310743.html>

23. Creating new pecuniary penalties

Pecuniary penalties are a relatively new form of monetary penalty imposed by a court in civil proceedings applying the civil standard of proof (“the balance of probabilities”). They are widely, but inconsistently, used in New Zealand law.

Pecuniary penalties are punitive in nature, not compensatory, and can severely impact a person’s or entity’s solvency, property interests, reputation and opportunities. In some cases they can be imposed as an alternative to criminal penalties, and are particularly suited to regulating conduct in contexts where the intervention of the State is justified but the financial consequences serve more of a deterrent effect than criminal penalties.

Pecuniary penalties should not be included in legislation because they may be perceived as easier to obtain or allow higher maximum penalties. Every decision to include a pecuniary penalty should be justified having regard to the particular policy objective and purpose of the legislation.

In 2014 the Law Commission published a comprehensive report on the use of pecuniary penalties in New Zealand.¹⁴¹ The Government has yet to respond to the recommendations in that report. The LAC will produce further advice and guidelines once the Government’s response is published.

The courts are yet to rule on whether pecuniary penalties amount to an “offence” for the purposes of s 25 NZBORA and therefore attract the protections typically afforded to criminal procedures. In the interim, the PCO and the Ministry of Justice should be consulted before Cabinet approval is sought to create a new pecuniary penalty.

¹⁴¹ <http://www.lawcom.govt.nz/default/files/publications/2012/11/nzlc-ip33-civilpen-web.pdf>

24. Imposing time limits for enforcement

Imposing time limits on enforcement action for breaches of legislation involves two strong public interests: the prompt enforcement of legislation; and ensuring that someone who has committed an unlawful act does not escape punishment because their actions remained undetected for many years.

The passage of time may mean that a person finds it hard to defend themselves against a civil claim, a criminal charge, an infringement notice, or a pecuniary penalty. Key witnesses may be dead, documents may be lost, or witnesses memories may have faded. Also, often key forensic evidence has been destroyed.

In such cases, a delay in bringing proceedings may mean the defendant finds it hard to present a full defence or otherwise respond to allegations. This may compromise their right to a fair hearing. In the commercial context, financial and commercial implications exist for businesses or people who may be subject to the open-ended possibility of civil claims.

Limitation periods balance an individual's right to a fair hearing, the need for legal certainty in business and private life, entitlements to compensation and the public interest in seeing unlawful or otherwise wrongful conduct addressed.

Guidelines

24.1. Is the new or amended criminal offence subject to a limitation period?

The limitation periods in the Criminal Procedure Act 2011 should apply to all new criminal offences.

Section 25 of the Criminal Procedure Act 2011¹⁴² provides a standard set of time limits by which a criminal prosecution must be brought after an offence is committed. The limitation periods differ subject to the category of offence and the maximum penalty that can be imposed. The most serious offences (Category 4) have no limitation period.

Legislation should not provide for a different limitation period in respect of a new criminal offence.

The time in which an agency may issue an enforcement notice for an infringement offence is limited in practice by the requirements of s 21 of the Summary Proceedings Act¹⁴³ (which should apply to all new infringement offences). To comply with the reminder notice and court enforcement provisions in the Summary Proceedings Act, the initial infringement notice should be issued promptly and, in any event, within about 3.5 months of the date of the alleged offending.

¹⁴² <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3359962.html>

¹⁴³ <http://www.legislation.govt.nz/act/public/1957/0087/latest/DLM310743.html>

24.2. Are new civil proceedings subject to a limitation period?

The limitation periods in the Limitation Act 2010 should apply to all new civil proceedings.

The Limitation Act 2010¹⁴⁴ provides a generic set of time limits (and exceptions to those limits) that apply to civil claims. The Limitation Act sets limitation periods in respect of a variety of civil claims (such as money claims, land claims, and claims relating to wills or judgments of awards). Legal advisers should be consulted to establish whether or not the particular civil proceeding relied on falls within the Limitation Act.

The limitation periods in the Limitation Act will apply to those claims covered, unless another enactment expressly provides for another limitation period or otherwise sets a deadline by which a claim must be made. Strong policy reasons particular to the circumstances of the legislation must be present to justify a departure from the Limitation Act.

24.3. Are new pecuniary penalties subject to a limitation period?

As discussed in Chapter 23, further guidance on pecuniary penalties will follow pending the Government's response to the Law Commission's paper 'Civil Pecuniary Penalties'. In the interim, legal advisers and the Ministry of Justice should be contacted for further advice.

¹⁴⁴ <http://www.legislation.govt.nz/act/public/2010/0110/latest/DLM2033120.html>

25. Creating a system of appeal, review, and complaint

Where a public body or agency makes a decision that affects a person's rights or interests, that person should generally be able to have that decision reviewed in some way. The ability to review or appeal a decision helps to ensure that the decisions taken under the legislation are correct and in accordance with the law. Also, the prospect of scrutiny encourages first instance decision makers to produce decisions of the highest possible quality.

There are two general processes. Judicial review (discussed below), will be available regardless of whether a statutory appeal or other complaint mechanism is provided for. This chapter is primarily concerned with the second process, a statutory right of review or appeal.

Some complaints may be easily resolved by an internal review conducted by the decision-making body, while other complaints might only be properly resolved by adjudication by an independent court, tribunal or other body.

The following factors are relevant to deciding what kind of appeal, review or complaint system is included in legislation.

- Is there a need for a right of challenge?
- What is the nature of the decision concerned?
- What internal review or complaint processes will be available?
- What bodies, such as the Office of the Ombudsman or Privacy Commissioner, will investigate or review the decision?
- In which court or tribunal and by what procedure will any external appeal be determined?

Guidelines

25.1. Does the legislation seek to exclude or limit the right to apply for judicial review?

Legislation should not restrict the right to apply for judicial review.

The right to apply to the High Court for judicial review of a decision exists independently of any statutory appeal rights and is affirmed by s 27(2) NZBORA¹⁴⁵. In judicial review proceedings the court will determine whether the decision was made in accordance with the law, or if it was within the range of reasonable decisions that could have been made. The court may set the decision aside, to be re-made by the decision maker. In rare circumstances, the court may substitute its own decision.

Ouster clauses (sometimes called privative clauses) remove the ability of the courts to judicially review the decision. Ouster clauses interfere with the courts' constitutional role as interpreters of the law, and as such the courts will interpret such clauses strictly and may not give them their intended effect.

¹⁴⁵ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

25.2. Will the legislation provide for a process of internal review?

A process of internal review should be provided as the first stage in the complaints/appeal process.

Judicial review should not be relied on as the sole process of challenge.

It is good practice to provide for a process of internal review through which complaints are considered and a person or body within the department reviews the decision. Where used in appropriate cases (such as administrative decisions that relate to entitlements or benefits), internal reviews are an effective way of identifying and correcting mistakes without the cost and publicity that an appeal to an external body or judicial review may attract. While many bodies operate internal review procedures without legislative provision, it is good practice for legislation to provide for and set out the procedure for the internal review, any criteria to be applied to the review, and any limits on the scope of the review. It will generally be acceptable for the legislation to require a person to first apply for an internal review before appealing to an external body. This gives the public body the opportunity to correct any mistakes without the need to commence formal proceedings.

25.3. Will decisions taken under the legislation be subject to a complaint to the Office of the Ombudsman?

All bodies that exercise public functions should be subject to the Ombudsmen Act 1975 unless compelling reasons exist not to do so.

Ombudsmen¹⁴⁶ have a general power to investigate the activities of a wide range of bodies (listed in the Ombudsmen Act 1975¹⁴⁷) and report on the lawfulness, reasonableness, or correctness of those activities. These opinions are not binding (except in respect of opinions under the Official Information Act 1982¹⁴⁸). However, they may be forwarded to the House of Representatives if the Ombudsmen do not consider that adequate action has been taken by the public body. In many cases a public body will comply with the opinion of the Ombudsmen, leading to a satisfactory outcome for the complainant. The Ministry of Justice, the Department of Internal Affairs, and the Office of the Ombudsman must be consulted if the right to complain to the Ombudsmen is being restricted.

25.4. Will decisions taken under the legislation be subject to a complaint to other statutory office holders or commissioners?

Existing commissioners and other specialist statutory office holders should have jurisdiction in respect of decisions relevant to their specialist areas.

A range of statutory office holders are empowered to investigate complaints relating to specific fields. Examples include the Commerce Commission¹⁴⁹, the Privacy Commissioner¹⁵⁰,

¹⁴⁶ <http://www.ombudsman.parliament.nz/>

¹⁴⁷ <http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM430984.html>

¹⁴⁸ <http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>

¹⁴⁹ <http://www.comcom.govt.nz/>

¹⁵⁰ <https://www.privacy.org.nz/>

the Health and Disability Commissioner¹⁵¹, the Human Rights Commissioner¹⁵², and the Electricity Authority¹⁵³. The scope of their powers differs. Some hold significant investigative and enforcement powers and have the ability to bring court proceedings, while others are empowered to investigate complaints and attempt to resolve them without recourse to the courts.

Good reasons for not relying on an existing body might include the fact that the body lacks the necessary powers, independence or governance arrangements to properly address the issue. Also, the new powers or jurisdiction granted may conflict with the existing functions of the body. If consideration is being given to extending the jurisdiction of an existing body, that body should be consulted at an early stage.

25.5. Is the right of appeal in respect of decisions in criminal proceedings?

Appeals against decisions in criminal proceedings should be governed or be consistent with the Criminal Procedure Act 2011.

The Criminal Procedure Act 2011¹⁵⁴ provides a comprehensive appeal procedure in respect of criminal appeals. New legislation should not create a different criminal appeal procedure.

25.6. Will decisions taken under the legislation be subject to an appeal to the courts or other specialist body?

Legislation should identify which of the existing courts or specialist bodies will hear any appeal.

There is no common law right to a civil appeal (judicial review exists independently in the common law). Any appeal right must be granted by legislation and expressly stated.

Where a right of appeal from a decision or internal review is granted, the legislation should identify which body will hear the appeal. The two general classes of appeal body are the courts of general jurisdiction (District Court, High Court, Court of Appeal, and Supreme Court¹⁵⁵) and specialist bodies and courts (such as the Tenancy Tribunal¹⁵⁶, the Social Security Appeal Authority¹⁵⁷, Environment Court¹⁵⁸, and Employment Court¹⁵⁹).

Courts of general jurisdiction are more appropriate for second appeals from specialist courts; or for first appeals where general matters of criminal or civil law are involved. A specialist body will generally be appropriate for first appeals from decision makers in narrow fields or in cases that require technical expertise on the part of the decision maker.

¹⁵¹ <http://www.hdc.org.nz/>

¹⁵² <http://www.hrc.co.nz/>

¹⁵³ <https://www.ea.govt.nz/>

¹⁵⁴ <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3359962.html>

¹⁵⁵ <https://www.courtsofnz.govt.nz/about/system/role/overview>

¹⁵⁶ <http://www.justice.govt.nz/tribunals/tenancy-tribunal>

¹⁵⁷ <http://www.justice.govt.nz/tribunals/social-security-appeal-authority>

¹⁵⁸ <http://www.justice.govt.nz/courts/environment-court>

¹⁵⁹ <http://www.justice.govt.nz/courts/employment-court>

New tribunals are rarely created. Officials should work closely with their legal advisers and the Ministry of Justice before deciding whether to create a new specialist tribunal or expand the jurisdiction of an existing tribunal. The creation of new tribunals and the granting of new powers to existing tribunals are discussed in Chapters 16 and 17.

25.7. What rules or procedures apply to appeals to the District Court or High Court in respect of civil proceedings?

Appeals in civil proceedings should be governed by the procedures in the District Court Rules or High Court Rules.

The District Court Rules¹⁶⁰ and High Court Rules¹⁶¹ establish the appeal procedures that apply to civil appeals to those courts. New legislation should use these existing procedures unless there are good reasons to create an entirely new procedure.

Subsequent appeals (that is, those to the Court of Appeal and Supreme Court) should be governed by the respective rules of those courts.

25.8. What type of appeal will be granted?

Legislation should identify the type of appeal procedure to be adopted.

If new legislation does not rely on an existing appeal procedure (District Court Rules, High Court Rules, or existing tribunal rules), the appeal model that is most appropriate to the context of the legislation should be identified. The most commonly used models are “re-hearings” or “hearings *de novo*”.

- **Re-hearing:** The appeal is heard on the record of evidence considered by the previous decision maker, but the appellate body has the discretion to re-hear some or all of the evidence and to admit new evidence. Re-hearings are generally appropriate where specific legal or factual errors are the focus.
- **Hearing *de novo*:** In a hearing *de novo* (from the beginning again), the appellate body may approach the case afresh and the appellant receives an entirely new hearing. Hearings *de novo* will generally only be appropriate when there is a reasonable possibility that the first instance decision maker may have incorrectly ascertained the facts.

Re-hearings will generally be cheaper and faster than hearings *de novo*, but will still involve significant time and cost.

Two other appeal models are an appeal by way of case stated and pure appeals. These two models can be restrictive in terms of the evidence that the court can consider and what outcomes can be achieved. Legal advisers and the Ministry of Justice should be consulted if an appeal model other than either a re-hearing or hearing *de-novo* is being considered.

¹⁶⁰ <http://www.legislation.govt.nz/regulation/public/2014/0179/11.0/DLM6129567.html>

¹⁶¹ <http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM147653.html>

25.9. Will the right to bring an appeal be limited?

The right to bring first and subsequent appeals should not be unreasonably limited.

Limiting the right to bring an appeal is a way of encouraging finality and avoids the endless re-litigation of the same issues. However, any limits must be reasonable. Unreasonable limits may result in the right to bring the appeal being of little worth. Two common limitations that promote finality are to impose time limits (on first and subsequent appeals) and leave (permission) requirements on subsequent appeals.

- **Time limits on when an appeal must be brought:** Set a time limit for bringing an appeal. Exceptions to a time limit are appropriate as long as the criteria for granting an extension are expressly set out and it is clear that extensions should not be granted as a matter of course.
- **Leave requirements on a second right of appeal:** A second right of appeal should generally be available only with the leave of the first appellate body, or with special leave from the second appellate body. The statute should state the criteria for the granting of leave. Typically, these will include either the interests of justice or the public interest in having an important question of law resolved.

25.10. Will the subject matter of the appeal be limited?

The subject matter of an appeal should not be unreasonably limited.

Legislation should explicitly set out any limitations on the content of the appeal. If imposing limitations would leave an individual with no effective recourse to the courts, the right of appeal should not be limited.

The type of issues that may be considered on appeal should be determined in light of the purpose of providing the appeal, the competence of the appellate body, and the appropriate balance between finality on one hand, and accurate fact-finding and correct interpretation of the law on the other.

A decision may be appealed on the grounds that the factual findings at first instance are wrong (error of fact), or that the decision maker applied the law incorrectly (error of law). However, statutes may, and often do, limit a right of appeal simply to questions of law. The distinction between the two is not always clear-cut and legal advisers should be consulted.

25.11. What safeguards have been built into the appeal or review process?

The appeal procedure adopted should contain adequate safeguards to protect an individual's rights and interests and be consistent with the right to natural justice affirmed by section 27(1) NZBORA.

The character of the decision maker and the context of the decision that is made will determine to an extent which procedural protections are appropriate and proportionate for the new appeal process. Each protection risks creating a longer process, increased costs, or

added complexity. However, these risks must be balanced against the need to ensure that any appeal is conducted fairly and in accordance with the principles of natural justice.

Some common protections, many of which are provided for in the Criminal Procedure Act, and the District Court Rules and High Court Rules, that may be appropriate and proportionate include:

- independent and impartial decision makers;
- the opportunity to be heard (whether by oral hearing or in writing);
- ensuring parties are aware of things that affect their case (such as notice of hearings and impending decisions);
- disclosure of relevant material;
- the availability of legal representation;
- a right to call and cross examine witnesses;
- a requirement that the decision maker give reasons;
- the provision of interpreters;
- the provision of a further right of appeal.

Legislation must state if any of the above protections are not included. If it does not, the court may “read into” the legislation those protections that it considers are necessary to give the legislation a meaning that is consistent with NZBORA.

26. Including alternative dispute resolution clauses in legislation

Litigation can be expensive, time consuming, and can damage relationships. In appropriate cases the negative consequences of litigation can be reduced by providing for Alternative Dispute Resolution (“ADR”) processes in a statutory scheme.

ADR is a generic term for any form of dispute resolution other than proceedings in a court or a tribunal, and usually involves an independent third party. A range of procedures are available and are discussed in more detail on pages 400 to 410 of the 2001 edition of the Guidelines.¹⁶² The most common procedures are mediation, expert evaluation, arbitration, and adjudication. Each process has distinguishing characteristics that have to be considered before including them in a statutory ADR scheme.

ADR has a number of advantages over litigation, both in process and in outcome. It is more flexible and generally less confrontational than court proceedings, and enables the parties to have a greater say in the process. It is usually faster and cheaper than court litigation, and also has a greater scope for confidentiality. While court proceedings are generally limited to giving effect to legal rights, ADR processes may allow parties to reach settlements that meet other needs, for example by receiving an apology or explanation.

ADR processes should complement, but not exclude, the ability to bring court proceedings. They can take place before, and in some cases during, court proceedings. ADR already features in a number of New Zealand statutes. The Arbitration Act 1996¹⁶³ is one of the most prominent. It sets out a generic set of rules that apply to arbitrations in New Zealand. A number of other Acts incorporate ADR procedures into their statutory scheme to varying degrees.

Guidelines

26.1. Should the legislation contain an ADR provision?

ADR provisions should be included in legislation where the potential nature of the dispute is suitable for determination by ADR.

Not all disputes can be appropriately addressed by ADR. The resolution of criminal charges, determining points of law, or cases that require a determination of critical disputed facts will not generally be suitable for ADR. ADR will not be appropriate where important issues of public policy are at stake, the dispute relates to the content of legislation, a dispute over the meaning of legislation exists, fundamental rights or allegations of abuse of power are involved, or the outcome sought by one of the parties is outside the powers of the decision maker concerned.

¹⁶² Available at www.lac.org.nz

¹⁶³ <http://www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html>

26.2. Which form of ADR should be used?

The form of ADR adopted should help to achieve the policy objective and be appropriate having regard to the nature of the dispute and the issues in question.

A range of forms of ADR will be appropriate, depending upon the different types of issues. The ADR processes most likely to be suitable for inclusion in legislation can be divided into three broad categories:

- **Facilitative processes (facilitation, negotiation, mediation):** Involve an impartial third person with no advisory or determinative role who provides assistance in managing the process of dispute resolution.
- **Evaluative processes (conciliation, expert evaluation, case appraisal):** Involve an impartial third person who investigates the dispute, advises on the facts and possible outcomes, and assists in its resolution.
- **Determinative processes (adjudication, arbitration, expert determination):** Involve an impartial third person who investigates the dispute and makes a determination that is legally enforceable.

Some key issues to consider, when deciding which process is appropriate for a particular scheme, are noted below.

- **The role of the third party:** Will the third party predominantly help the parties to reach mutual agreement, will they investigate the dispute and advise on potential compromises and outcomes, or will they make a legally enforceable determination?
- **Control over participation and process:** How flexible or formal should the process be? How much of the process should the parties determine? What are the consequences (if any) of refusing to engage in, or withdrawing from, the process once commenced?
- **Nature of the outcome:** Will the outcome be confidential and binding on the parties? Will the outcome be appealable to a court under certain circumstances?
- **Administration:** Who will administer the service? Will the Government provide the ADR service? Will the service be free to all parties? How will the third person and location be determined?

Further detailed discussion on selecting the appropriate form of ADR can be found on pages 400 to 410 of the 2001 edition of the Guidelines.

26.3. Which elements of the ADR scheme should be included in the legislation?

Legislation should include those elements of the ADR scheme necessary to ensure the appropriate desired outcomes and procedures are adopted.

The flexibility of ADR is one of its great strengths. However, if not properly constrained by the legislation the processes and outcomes adopted may not accord with the original policy objective and may, in some cases, undermine it. The PCO has produced model ADR clauses that should be used when designing an ADR process.¹⁶⁴

Primary legislation that provides for an ADR process should:

- address the purpose and desired general outcome of the ADR process;
- describe the process clearly and consistently;
- set out sufficient safeguards to ensure that the principles of natural justice are adhered to, power imbalances are addressed, and the independence and impartiality of the third party is protected;
- identify the parties and any other bodies and people that might be consulted or involved;
- state whether the ADR process is subject to any legal privileges (such as self-incrimination), and whether the process and outcome are confidential;
- define when and in what manner the ADR process should commence, be suspended and end;
- define the role, qualifications, powers and protections of the third party (in particular, the third party should be prohibited from exercising more than one function; if a dispute is initially considered a mediation, but later turns to formal arbitration, the mediator should not also act as an arbitrator);
- state clearly whether or not the ADR process is a pre-requisite to any other dispute mechanism (including courts proceedings);
- set out the status of the resolution (for example, whether it will be legally binding or enforceable in court).

¹⁶⁴ <http://www.pco.parliament.govt.nz/adr-model-clauses/>

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