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**LEGISLATION ADVISORY  
COMMITTEE  
GUIDELINES**

**Guidelines on Process and Content  
of Legislation**

**2001 edition and amendments**

**Legislation Advisory Committee**

May 2001

*Note: These Guidelines will be amended from time to time. The latest version will be on the Internet at <http://www.justice.govt.nz/lac/index.html>.*

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## LEGISLATION ADVISORY COMMITTEE

### Terms of Reference

- 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 Minister of Justice and the Legislation Committee of Cabinet on the public law aspects of legislative proposals that the Minister or that committee refers to it;
- c To advise the Minister of Justice on any other topics and matters in the field of public law that the Minister 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.

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# LEGISLATION ADVISORY COMMITTEE

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May 2001

Hon Margaret Wilson  
Attorney General and  
Associate Minister of Justice  
Parliament Buildings  
WELLINGTON

Dear Minister

I am pleased to attach the 2001 edition of the LAC Guidelines.

The original Guidelines were issued by the Legislation Advisory Committee in 1987 and revised in 1991. They have now been further revised to take account of developments in the law and in the legislative process since that time.

The Guidelines have also been reformatted to make them suitable for publication on the Internet.

A large number of people (both within and outside government) have contributed to the preparation of this edition, and we are grateful to them for their advice and assistance.

Yours sincerely

Richard Clarke  
Chairperson

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## LAC GUIDELINES

### 2001 edition and amendments

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## FOREWORD

The promotion of legislation is a vital function of government. The Government uses legislation to implement policies for the protection and promotion of the rights and interests of New Zealanders, to raise taxes, to authorise spending, to regulate relations between individuals and between individuals and the state, and for many other important purposes.

Translating policy proposals into sound and principled legislation is not an easy task. If any of the many steps which make up the overall process of developing policy into legislation are poorly executed, the rights and liberties of individuals and groups may be put at risk and the policy may not be given effect to. Unnecessary controversy and litigation, and perverse effects on the operation of public and private interests, are likely to be the result.

There are costs for the Government in developing legislation. These costs occur in the development of policy, the Cabinet process, and the law drafting and parliamentary processes. There are costs too for the community in the examination of Bills by individuals and interested groups, and in their making submissions to select committees of the House of Representatives. Lack of care and poor procedure at any of these stages can greatly increase the overall cost of the process.

Errors in Bills can be corrected at the select committee stage. But to rely on select committees to correct ill-conceived or poorly drafted legislation is not acceptable. The committee process provides the public with an opportunity to comment on the legislative embodiment of the Government's policy and to bring matters which may need further consideration to the attention of Parliament; it is not a quality inspection process designed to correct poor policy analysis or drafting.

Experience teaches that both the process for the making of legislation and the content of legislation can be improved. These Guidelines were first prepared in 1987, revised in 1991, and again in 2000 by the Legislation Advisory Committee, and are designed to set out central aspects of that process and elements of the content of legislation that should always be addressed.

The message is clear. We must -

- ask whether legislation is needed to give effect to the policy which the Government is planning to implement;
- follow proper procedures in preparing the legislation, in particular by consulting appropriately outside Government and within it;

- 
- ensure that the legislation complies with established principles, unless there is good reason for departing from them.

This Government, like its predecessors, has directed that Ministers and their officials in proposing and preparing legislation are to address the principles of process and content set out in these Guidelines. They are required to advise the Cabinet Legislation Committee of the steps they have taken to comply with the Guidelines. These matters are also emphasised in the *Cabinet Office Manual* Chapter 5 (Legislation and Legal Matters).

The message in these Guidelines is for the whole of government, and particularly for senior officials, parliamentary counsel and departmental lawyers, all of whom can be expected to be aware of the Guidelines.

The Guidelines are also of interest and value to the many other New Zealanders who participate in the legislative process. They are able to use the Guidelines in commenting on proposed legislation and in developing non-government legislation.

This 2001 edition of the Guidelines complements other recent important changes affecting legislation, namely the Interpretation Act 1999, the new format of legislation, and changes in drafting style, all of which will help to significantly improve the quality of our legislation.

Hon Margaret Wilson  
Attorney-General and Associate Minister of Justice

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## INTRODUCTION

### *Role of legislation*

- 1 Legal rules are essential to the functioning of our society. Increasingly they are found in legislation. They cover a broad range of subject areas and activities. They include rules:
  - for maintaining the structure of society (eg, the criminal law and the electoral law);
  - for regulating relations between individuals (eg, family law and the law of contract);
  - for regulating activities in a modern industrial society (eg, safety codes and industrial relations);
  - for providing and maintaining essential services beneficial to the development of society (eg, health, education and welfare legislation);
  - for facilitating private activity (eg, company law and partnership);
  - for gathering taxes to finance the provision of public services; and
  - for establishing the institutions to carry out these activities.
- 2 This body of rules imposes restraints on individuals and groups within society and regulates the way they exercise various freedoms. But at the same time it both confers and protects important rights, liberties and benefits. As a system it works only if the great majority of society and all major sections within it see it as supporting and protecting their interests.
- 3 The balances in society are constantly changing and the legal rules, therefore, are in need of constant review and adjustment. At any time the bulk of the law will remain constant. But the Government of the day must assume responsibility for assessing changes in the political, economic and social environment and for determining whether adjustments to the law are needed in response to those changes. Where such adjustments are proposed, they will be unlikely to gain broad acceptance unless they have been developed through an adequate *process*, including appropriate consultation. There are also important *legal principles* relating to fairness and the preservation of individual liberty that need to be complied with if the legislation is to prove acceptable. In addition to being acceptable, new legislation must also be *effective*. This means it must be technically sound and fit into the general

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fabric of the existing law. It should also be *accessible and understandable*.

#### *Application of Guidelines*

- 4 These Guidelines set out some of the more important matters relating to both process and content that need to be considered in the promotion of legislative change, whether it is to be effected by statute or by regulation, rules, orders, notices or other subordinate legislation.
- 5 It is intended that the Guidelines will be periodically reviewed to enhance their usefulness to those who prepare legislation. Suggestions for additions or amendments are welcomed at any time by the Legislation Advisory Committee.
- 6 What can be done to ensure that the Guidelines are applied? There are two answers to that question, one more general, the other specific. The general answer looks to the overall process for the preparation and enactment of legislation. Those who have a hand in the preparation of legislation - within departments, other government bodies and the Parliamentary Counsel Office - have a major responsibility for giving effect to the Guidelines. No doubt some of those who make submissions on Bills will also call attention to instances where they consider the Guidelines have not been followed. It is equally for the relevant select committee and for Parliament itself to consider the application of the Guidelines. Ignoring the Guidelines may mean poor legislation and often result in political and administrative embarrassment.
- 7 The specific answer looks to those who have the principal responsibility for legislation - its content and form and the method of its preparation. The responsibility is ultimately with Ministers. But they look to their departmental officials to satisfy them that the Guidelines have been applied or, when they have not been, that they have at least been carefully considered and departed from only for good reason which is clearly stated.
- 8 The Guidelines include a checklist of the matters addressed by the Guidelines to assist officials who have primary responsibility for a new piece of legislation (whether a statute, regulations, rules, order, notice or other subordinate legislation).

#### *Other LAC publications*

- 9 A list of other publications of the Legislation Advisory Committee is set out at the end of these Guidelines. Many of these publications will also be of assistance in the preparation of legislation.

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### *Acknowledgements*

- 10 The Legislation Advisory Committee wishes to acknowledge and thank its predecessor committees for the excellence of the previous editions of the Guidelines, on which this edition is substantially based. Members of the Committee themselves prepared most chapters of this edition, with the remaining chapters being prepared by Alison Lewes (Ministry of Justice, Secretary of the Committee), Fiona Leonard, Bill Moore, and Mark Gobbi of the Parliamentary Counsel Office, Phillippa Smith of the State Services Commission, and the Bill of Rights section of the Ministry of Justice. The Committee thanks all of these contributors for their excellent work, and also thanks Guy Beatson, Ross Carter, Denese Henare, Sir Kenneth Keith, Rebecca Kitteridge, Ivan Kwok, Peter Mumford, Robin Oliver, Roger Palairt, Sir Geoffrey Palmer, David Pickens, Marie Shroff, Hilary Talbot, and Nicola White who reviewed a draft of the Guidelines and provided valuable comments.

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- David Goddard, Queen's Counsel, Wellington Chapter 16, Cross-border Issues
- Renato Guzman, Parliamentary Counsel Office, Wellington Chapter 3A, Part 2, Statutory Interpretation
- Bill Moore, Parliamentary Counsel Office, Wellington Chapter 11, Part 4, Limitation period for civil remedies, Chapter 12, replacement paragraph 12.5.3 Chapter 12, Part 7, Limitation period for criminal offences
- Scott Murray, Parliamentary Chapter 10, Delegation of Lawmaking

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Chapter 10A, The Exercise of  
Delegated Lawmaking Powers

- Diana Pickard, Ministry of Justice, Wellington
- Chapter 4, New Zealand Bill of Rights Act 1990 and Human Rights Act 1993

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The Legislation Advisory Committee also wishes to thank Daphne Brasell and her team at the Parliamentary Counsel Office for proof-reading the Supplement.

### **Disclaimer**

The LAC Guidelines are intended to provide guidance of a general nature for persons involved in the preparation of legislation. Those using the Guidelines are advised that:-

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- The Guidelines must be read in conjunction with this disclaimer and any other disclaimer that forms part of them.

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# LAC GUIDELINES

## CHECKLIST

Issue	Yes/No/Comment
<p><b>CHAPTER 1</b></p> <p><b>Means of achieving the policy objective</b></p> <p>1.1 Has the policy objective been clearly defined?</p> <p>1.2 Has consideration been given to achieving the policy objective other than by legislation?</p> <p>1.3 Has there been appropriate consultation within the Government?</p> <p>1.4 Have those outside the Government who are likely to be affected by the legislation been consulted?</p> <p>1.5 Have all Cabinet requirements for new legislation been complied with?</p>	
<p><b>CHAPTER 2</b></p> <p><b>Understandable and accessible legislation</b></p> <p>2.1 Has sufficient time and consideration been given to the preparation of the legislation?</p> <p>2.2 Have departmental lawyers been fully involved?</p> <p>2.3 Has the drafter fulfilled his or her role?</p> <p>2.4 Is the legislation understandable and accessible?</p>	
<p><b>CHAPTER 3</b></p> <p><b>Basic principles of New Zealand's legal and constitutional system</b></p> <p>3.1 Does the legislation comply with fundamental common law principles?</p> <p>3.2 Have vested rights been altered? If so, is that essential? If so, have compensation mechanisms been included?</p> <p>3.3 Have pre-existing legal situations been affected, particularly by retroactivity? If so, is that essential? What mechanisms have been adopted to deal with them?</p> <p>3.4 Does the legislation enable the levying of money? If so, is the levy a tax imposed other than by Parliament?</p>	

Issue	Yes/No/Comment
<p><b>CHAPTER 3A</b></p> <p><b>Statutory interpretation</b></p> <p>3A.1 Have the rules of statutory interpretation been considered?</p> <p>3A.2 Has the Interpretation Act 1999 been considered?</p>	
<p><b>CHAPTER 4</b></p> <p><b>New Zealand Bill of Rights Act 1990 and Human Rights Act 1993</b></p> <p>4.1 Is the legislation consistent with the New Zealand Bill of Rights Act 1990? If not, is it a justified limitation?</p> <p>4.2 Is the legislation consistent with the Human Rights Act 1993? If not, is it a justified exception?</p>	
<p><b>CHAPTER 5</b></p> <p><b>Principles of the Treaty of Waitangi</b></p> <p>5.1 Should there be consultation with Maori? If so, what form should the consultation take?</p> <p>5.2 Is there a possibility of conflict between the principles of the Treaty and the legislation? If so, should uncertainty be avoided by including an appropriate provision in the legislation?</p> <p>5.3 Are any Maori rights and interests affected by the legislation recognised at common law? If so, have they been clearly identified and addressed by the legislation?</p>	
<p><b>CHAPTER 6</b></p> <p><b>International obligations and standards</b></p> <p>6.1 Are there any international obligations and standards relevant to the legislation?</p> <p>6.2 If so, does the legislation properly implement those international obligations and standards?</p>	
<p><b>CHAPTER 7</b></p> <p><b>Relationship to existing law</b></p> <p>7.1 Has the Interpretation Act 1999 been considered?</p> <p>7.2 Has all other relevant legislation been considered?</p> <p>7.3 Has the common law been considered?</p> <p>7.4 Are transitional or savings provisions required?</p>	
<p><b>CHAPTER 8</b></p> <p><b>Creation of a new public power</b></p> <p>8.1 If a new public power is proposed, is it needed, or are suitable powers available under existing law?</p> <p>8.2 Who is the appropriate person to have the power?</p>	

Issue	Yes/No/Comment
8.3 Has a process for exercising the power been established? 8.4 Has the power and process been clearly stated? 8.5 What protections have been included for those who could be affected by the exercise of the power?	
<b>CHAPTER 9</b> <b>Creation of a new public body</b> If a new public body is to be created, what should it be- 9.1 a Department of State? 9.2 a State enterprise? 9.3 an Office of Parliament? 9.4 a Crown entity? 9.5 Is it clear whether the Ombudsmen Act 1975, the Official Information Act 1982, and the Local Government Official Information and Meetings Act 1987 apply to the body?	
<b>CHAPTER 10</b> <b>Delegation of legislative power</b> 10.1 Is delegation appropriate, and if so with what limits? 10.2 What procedures should be specified to control the process of making the delegated legislation? 10.3 To whom should the delegation be made? 10.4 Is a provision for “deemed regulations” appropriate? 10.5 Is a provision for a “subdelegation” appropriate? 10.6 Is the use of “incorporation by reference” appropriate? 10.7 If the legislation includes a power to give policy directions, has the appropriate process been followed?	
<b>CHAPTER 10A</b> <b>The exercise of delegated legislative power</b> 10A.1 Have the terms of the empowering provision and the general law been complied with when making the delegated legislation? 10A.2 Is the proposed delegated legislation beyond the power conferred by the empowering provision? 10A.3 Does the proposed delegated legislation contain an unlawful subdelegation?	

Issue	Yes/No/Comment
<p>10A.4 Is the proposed delegated legislation invalid by reason of repugnancy to any other enactment?</p> <p>10A.5 Is the proposed delegated legislation invalid by reason of uncertainty?</p> <p>10A.6 Does the proposed delegated legislation infringe any of the grounds set out in Standing Order 382?</p>	
<p><b>CHAPTER 11</b></p> <p><b>Remedies</b></p> <p>11.1 If remedies are required, which of the range of remedies is appropriate?</p> <p>11.2 Should an existing civil remedy be applied?</p> <p>11.3 Should new remedies or processes be established?</p> <p>11.4 Should a special limitation period be established?</p>	
<p><b>CHAPTER 12</b></p> <p><b>Criminal offences</b></p> <p>12.1 Is it necessary to create a new offence?</p> <p>12.2 Has the appropriate mental element been determined?</p> <p>12.3 Are appropriate defences available?</p> <p>12.4 Is the offence a summary or indictable offence, and is this appropriate?</p> <p>12.5 If the offence is an infringement offence, is this appropriate?</p> <p>12.6 Has an appropriate range and level of penalties been determined?</p> <p>12.7 What is the appropriate limitation period?</p>	
<p><b>CHAPTER 13</b></p> <p><b>Appeal and review</b></p> <p>13.1 Should the legislation provide a right of appeal?</p> <p>13.2 Have the proper criteria for choosing the appellate body been applied?</p> <p>13.3 Have the proper criteria for choosing the type of appeal been applied?</p> <p>13.4 Does the legislation specify the appropriate appellate procedure?</p> <p>13.5 Does the legislation give sufficient guidance for the purposes of judicial review on the grounds of error of law?</p> <p>13.6 Does the legislation give sufficient guidance for the purposes of judicial review on the grounds of breach of natural justice?</p>	

Issue	Yes/No/Comment
13.7 Does the legislation unduly restrict judicial review?	
<b>CHAPTER 14</b> <b>Powers of entry and search</b> 14.1 Are powers of entry and search necessary? 14.2 Are the powers conferred justified, and have appropriate safeguards been included?	
<b>CHAPTER 15</b> <b>Powers to require and use personal information</b> 15.1 Does the legislation affect privacy interests? 15.2 Has the Privacy Act 1993 been complied with?	
<b>CHAPTER 16</b> <b>Cross-border issues</b> 16.1 Are there cross-border issues that should be addressed? 16.2 What is the intended scope of the NZ legislative regime? 16.3 Are special rules required for civil claims with cross-border elements? 16.4 Are special rules required for criminal offences with cross-border elements? 16.5 Will any regulatory agency responsible for the regime be able to perform its role effectively in cross-border cases? 16.6 Should the legislation provide for recognition or enforcement of overseas decisions in New Zealand, or vice versa?	
<b>CHAPTER 17</b> <b>Bills after introduction</b> 17.1 Are the recommendations in the Departmental Report and in any supplementary report appropriate? 17.2 Have amendments to the bill in any government SOP been prepared in accordance with the guidelines? 17.3 Have any scope issues been anticipated and addressed? <b>CHAPTER 18</b>	
<b>Alternative dispute resolution clauses in legislation</b>	
18.1 Which ADR process is most suitable?	
18.2 What ADR principles need to be in the legislation?	
18.3 Are the elements of the chosen legislative scheme workable and appropriate?	



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# SECTION 1

## PROCESS OF DEVELOPING LEGISLATION

### CHAPTER 1

#### MEANS OF ACHIEVING THE POLICY OBJECTIVE

##### INTRODUCTION

###### **Background**

A decision to prepare new legislation should not be taken lightly, as the development and implementation of new legislation often involves significant costs for the community. These costs include the direct development costs, the time and expenses of those who review draft legislation, the costs of the enactment process, printing and publication costs, and the time and expenses of those who need to adjust to, learn about, enforce, administer, implement, or comply with the new legislation.

On the other hand, despite the costs involved, legislation may be the most cost-effective or appropriate means of implementing new policy or resolving a particular problem.

If new legislation is proposed, it is important that the process indicated below is followed. This process is designed to improve the quality of legislation, and increase its acceptance by the community, by clarifying its objective/s, determining how best to achieve the objective/s, and ensuring that affected persons are properly consulted.

If this process is followed, the costs of poor quality legislation (including uncertainty and confusion, legal advice, and litigation) should be largely avoided.<sup>1</sup>

###### **Issues**

The following issues are discussed in this Chapter:

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<sup>1</sup> For further discussion see the *Regulatory Impact Statement Guidelines* issued by the Ministry of Economic Development.

- 
- Part 1: Has the policy objective been clearly defined?
- Part 2: Has consideration been given to achieving the policy objective other than by legislation?
- Part 3: Has there been appropriate consultation within the Government?
- Part 4: Have those outside the Government who are likely to be affected by the legislation been consulted?
- Part 5: Have all Cabinet requirements for new legislation been complied with?

## PART 1

### HAS THE POLICY OBJECTIVE BEEN CLEARLY DEFINED?

#### **1.1.1 Outline of issue**

An essential first step is to clearly define the policy objective/s. The time when the policy is to come into effect, and the transitional measures necessary for its implementation, should also be carefully considered at an early stage.

#### **1.1.2 Comment**

In an ideal world the policy to be embodied in new legislation should be clearly determined before preparation of the legislation commences. However, in practice this is not always possible, and policy development and preparation of legislation often proceed in tandem.

Nevertheless, before substantive drafting of legislation commences, the broad policy objective/s should be clear, and the relationship of the legislation with existing law (see Chapter 7) and alternative means of achieving the policy objective should have been fully considered.

At an early stage the time of commencement of the legislation, and the transitional provisions necessary to implement it (see Chapter 7), should be considered. The latter issue, in particular, can lead to identification of significant difficulties with the proposed legislation and modifications to the legislation to overcome these difficulties are sometimes necessary.

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The commencement date of new legislation requires careful consideration. The Government often wishes to have an early commencement date, but the practical effect of this on the community must be considered. It is easy to underestimate the time it takes the community to become aware of new legislation, and develop measures to comply with it. There are numerous instances where last minute representations from the community have led to a deferral of the commencement date of new legislation.

### **1.1.3 Guidelines**

The policy objective/s of the legislation, and the proposed means of achieving these, can often be clarified by preparing an outline of the proposed legislation including the headings of the principal clauses and brief notes as to their content. Such an outline will help to identify any gaps or inconsistencies in the proposed policy.

At an early stage the transitional provisions necessary to implement the legislation should be considered and prepared in outline form.

The commencement date of new legislation should allow sufficient time after its enactment for the community to become aware of it, and develop measures to comply with it.

## **PART 2**

### **HAS CONSIDERATION BEEN GIVEN TO ACHIEVING THE POLICY OBJECTIVE OTHER THAN BY LEGISLATION?**

#### **1.2.1 Outline of issue<sup>2</sup>**

As noted in paragraph 1.1 above, the development and implementation of new legislation can impose significant costs on the community. Accordingly, other means of achieving the policy objective should be identified, and a decision taken as to whether legislation is the most appropriate means.

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<sup>2</sup> This part largely comes from “*A Guide to Preparing Regulatory Impact Statements*” issued by the Ministry of Economic Development in March 1999.

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### 1.2.2 Comment

Early in the policy development process officials should carry out an informed consideration of the options available to deal with an identified problem. The decision about how to intervene may be as important as the decision about whether to intervene. A variety of options are available. These are likely to have very different implications for results, the magnitude of costs and benefits, their distribution, and administrative requirements.

#### *Options for achieving policy objective*

In more detail, options available to the Government might include (but not be limited to):

- no government intervention;
- status quo;
- use of existing law;
- increasing enforcement;
- information and education campaigns;
- economic instruments (taxes, subsidies, and tradable property rights);
- voluntary standards/codes of practice;
- self regulation; and
- co-regulation.

#### *No government intervention*

This option involves relying on the market in conjunction with existing laws (general liability law). This option is particularly important to consider when undertaking reviews of existing regulation.

By holding individuals and firms responsible for their actions and requiring them to pay damages where liable, for example, incentives may develop for individuals and firms to take appropriate levels of care. Through legal remedies (litigation and the common law), individuals can enforce their rights rather than relying on government action to do so.

This approach is more appropriate where flexibility is needed in the application of the law, such as where there is a heavy emphasis on the circumstances surrounding the case (for example, where the degree of culpability is important).

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In many circumstances, however, legal remedy may be too uncertain, slow, or costly (high transaction costs) to be an efficient method of changing behaviour.

#### *Status quo*

The status quo is a dynamic concept. It is the situation that will arise if current policy is maintained. Maintaining current policy could lead to deterioration in the public interest, for example, escalating environmental damage in the event allowable maximum pollution discharge limits aren't reduced as the number of polluting factories increases. Equally, evaluation of the status quo should include consideration of the potential for a problem to "self-correct". The status quo should always be considered as an option, to ensure that alternatives are not chosen which would lead to worse outcomes than expected by maintaining the current policy settings. The status quo is frequently the option against which other options should be compared.

#### *Use of existing law*

Legislation with proven ability to overcome problems of the nature being addressed may already exist but, in some cases, may not have sufficient coverage to deal with the circumstances under consideration. In these cases it will often be more appropriate to expand coverage of this existing legislation than to attempt to create a new legislative regime. The chief advantages of using existing legislation are that a proven method of addressing the problem is employed, and that consistency between the treatment of the same issue arising in different circumstances is achieved.

In other cases, existing law may be available to achieve the policy objective. For example, the Government has inherent powers to establish new departments and does not need legislative authority to do so. For further discussion on the use of existing law see Chapter 7.

#### *Increasing enforcement*

Another approach is to consider the implications of increasing the level of enforcement associated with existing law, rather than implementing new or amended provisions. It may be the case that existing law is adequate in itself but is not enforced adequately.

#### *Information and education campaigns*

This approach acts to change the quality and level of the information available, or to change its distribution. This can be achieved by regulating for certain information to be provided, or by government providing the information itself. This may involve requiring information about the

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attributes of a product, process, or situation (eg dangerous working conditions) be disclosed.

These measures improve markets by allowing people to make decisions that better match their preferences. The main advantage of these strategies over some other approaches is that they allow individuals to choose what is best for themselves given the information available, rather than Government imposing one solution on all.

### *Economic instruments*

Economic instruments seek to influence market behaviour by altering the relative prices of goods and services in a market, or by creating a market where none previously existed. Market behaviour can be influenced either directly (for example, through a tax or user charge), or indirectly (for example, through controlling the level of supply). Economic instruments will generally require a statutory basis. The two main types of economic instruments are:

- *Taxes, charges, or subsidies*: Government can alter private incentives (and therefore behaviour) by taxing actions it wishes to discourage and subsidising action it wishes to encourage. For example, by taxing pollution or subsidising education to correct for perceived externalities. A tax or charge used to influence behaviour in this way is distinct from a general tax, where the objective is to raise revenue for government spending programmes while seeking to minimise behavioural change.
- *Tradable quota (marketable rights)*: These are a means of controlling, for example, the quantity of some externality produced, or the amount of a scarce resource taken. Tradable quota have been used in the United States to control emissions of sulphur dioxide, and in New Zealand to provide for the sustainability of commercial fisheries. Under tradable quota systems, the government sets an overall maximum supply level for the outcome of a specific activity. Producers must then hold a right to produce (eg, sulphur dioxide) or take (eg, fish), and may not produce or take any more than the level provided for by the quota. Quota is a valuable property right. Providing for tradable quota places strong incentives on the market to use resources efficiently, and ensure the quota goes to where it is valued the most.

### *Voluntary standards/codes of practice*

Positive behaviour can be achieved through instruments such as voluntary standards and codes. The standards can be developed by industry or co-

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operatively with government as codes of practice or guidelines that seek to detail what is deemed to be acceptable practice.

Voluntary codes maximise the potential for flexibility of response to allow easy adjustment in response to changes in the industry or occupation. They are best applied where there are strong occupational or industry bodies, where the implications of non-compliance do not pose significant or irreversible risks, and where non-compliance with the standard or code is visible (certification, for example, will tell consumers whether their provider complies with specified standards).

### *Self-regulation*

Self-regulation can be defined as an arrangement in which an organised group (such as an industry association or professional body) regulates the behaviour of its members, and where that organised group can impose sanctions. The advantages of self-regulation are; rules are more likely to be observed if they are made by insiders, changes and updating can be more rapid, rules are developed using the expertise of those being regulated, and it is cheaper for the Government as the regulated group bears the costs of regulating (and also have strong incentives to minimise those costs). Compliance is achieved because the players involved may find it in their interest to obey the (non-binding) rules. This can be driven by a concern by individuals and firms about their reputation, or by peer pressure.

As it is the industry that formulates the rules and codes of conduct, there is a risk that self regulation could result in anti-competitive behaviour. That is, unnecessary barriers to entry to an occupation or market, or other undesirable practices such as price fixing may occur.

### *Co-regulation*

Co-regulation refers to a situation where the regulatory role is shared between government and an industry body. Co-regulation can range from simple endorsement of industry self regulation, to providing legislative backing to privately defined rules when industry lacks sufficient sanctions to ensure compliance, thus bordering on traditional regulation.

Co-regulation is used for certain types of occupational regulation (eg, lawyers, doctors, financial advisers). In such cases, the legislature may delegate regulatory authority to an organisation representing members practising that occupation. The organisation makes rules, levies charges, and applies discipline. These can have the same force and legal authority as if the government itself carried them out. Again, care needs to be taken to ensure

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the interests of consumers are given prominence, and that opportunities for anti-competitive practices are minimised.

### **1.2.3 Guidelines**

The above options for achieving a policy objective should be fully considered on the basis of all relevant information, before a decision is made to prepare new legislation. This consideration should include estimating the benefits and costs of each option that could be used, and comparing those benefits and costs against those of the proposed legislation.

## **PART 3**

### **HAS THERE BEEN APPROPRIATE CONSULTATION WITHIN THE GOVERNMENT?**

#### **1.3.1 Outline of issue**

In the case of Government legislation, all relevant departments and agencies should be properly consulted in regard to the legislation before it is approved by Cabinet.<sup>3</sup>

#### **1.3.2 Comment**

The lateral thinking necessary to ensure that all appropriate perspectives have been brought to bear on a Government legislative proposal can usefully begin with consultation with other relevant divisions within the initiating department.

Consultation with other Government departments and agencies is the next step and a very important part of the overall process. It reflects the collective responsibility of Cabinet. It is an efficient use of time and resources. It can avoid piecemeal reform. It ensures that possible problems are identified early in the development of a proposal. It may reveal to the initiating department that there are possible conflicts or inconsistencies with legislation being prepared by another department. In this way it can help to produce a positive and constructive approach towards the proposal on the part of those consulted. This can be important in the search for solutions to any problems

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<sup>3</sup> Consultation is not of course a substitute for those preparing legislation taking direct responsibility for its quality.

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that subsequently emerge. Conversely, a failure to consult appropriately with other relevant departments and agencies can lead to substantial loss of time and a lot of unnecessary work in resolving problems and disagreements that could have been readily avoided at an early stage before the initiating department became committed to a particular approach.

Another advantage of early consultation with other departments and agencies is that it can help in identifying the groups and organisations outside the Government that should be consulted about the proposal.

These Guidelines are not the place to establish comprehensive checklists for deciding which departments and agencies should be consulted on which issues. The list of relevant departments and agencies must be determined in each case according to the subject matter of the proposal. In many cases the list of the principally interested departments and agencies should be fairly obvious. Thus the Ministry of Justice has broad responsibility in respect of such matters as criminal law, fair procedures and constitutional and human rights, State Services Commission in respect of machinery of government and staffing implications, Treasury in respect of economic policy and financial implications, and Ministry of Foreign Affairs and Trade in respect of international legal obligations and foreign policy implications.

Budget-night legislation (indeed any legislation accorded urgency) is sometimes an example of good process having to be avoided. There are two issues: first whether the legislation must be enacted in that way, and, secondly, if it is, whether there has been adequate consultation within the department and more broadly in the Government (as there is not the same opportunity for public scrutiny).

### **1.3.3 Guidelines**

See paragraphs 5.21 to 5.23 of the *Cabinet Office Manual*.

See also Cabinet Office circular CO(00)4 on Coalition Consultation Procedures.

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## PART 4

### HAVE THOSE LIKELY TO BE AFFECTED BY THE LEGISLATION BEEN CONSULTED?

#### 1.4.1 Outline of issue<sup>4</sup>

A key aim of systematic public consultation is to make information available to the public, to listen to a wide range of interests, to obtain more and better information from affected parties, and to be more responsive to what is heard. This allows for better information for efficient decision-making.

Consultation is not synonymous with consensus. It is, however, a process that permits and promotes the two-way flow of ideas and information among all sectors of society and between them and the Government. Effective consultation is based on principles of openness, transparency, integrity, and mutual respect. It requires that:

- key information be provided to those being consulted;
- those being consulted are in a position to influence policy formulation;
- sufficient time is allowed for a considered response to be compiled by those being consulted;
- the agency undertaking the consultation has the capability to interpret and use the information derived correctly, for example, consultation with iwi groups will require an understanding of Maori perspectives and issues; and
- the information gained is considered in good faith, that is, the advice obtained cannot be discounted without good reason, and must be sought prior to final decisions being taken.

#### 1.4.2 Comment

A well designed and implemented consultation programme can contribute to

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<sup>4</sup> This Part largely comes from “A Guide to Preparing Regulatory Impact Statements” issued by the Ministry of Economic Development.

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higher quality legislation, identification of more effective alternatives, lower administration costs, better compliance, and faster regulatory responses to changing conditions. Just as important, consultation can improve the credibility and legitimacy of Government action, win the support of groups involved in the decision process, and increase acceptance by those affected.

Effective consultation is difficult to carry out and can be costly in terms of time and resources. Less well organised, diffuse, or smaller interests can easily be left out. Information received from stakeholders may be one-sided, of poor quality, or irrelevant to the issues at stake. Consultation can also occur too late to allow affected groups to influence key decisions such as problem definition and whether legislation is needed.

Invariably, the costs of consultation are incurred in the short term, while the benefits emerge over the longer-term.

### 1.4.3 Guidelines

There is currently a wide range of different consultative approaches. These include departmental advisory bodies, secondment of personnel from the private sector, public discussion papers, multi-stakeholder negotiations, focus (consultative) groups, targeted briefings, workshops, questionnaires, public notice and comment, hearings and select committees. The appropriateness of each approach will depend on the issues under consideration, the nature of the group being consulted, and the resources, including time, available for undertaking the consultation.

The following publications are relevant:

Guidelines for consulting community organisations: a resource for government departments or other agencies, Ministry of Consumer Affairs, Wellington.

Treaty of Waitangi: Consultation, Ministry of Maori Development, The Ministry, 1993.

A Guide for Departments on Consultation with Iwi, Te Puni Kokiri, 1993, Wellington.

Judgment: Air New Zealand v Wellington International Airport, High Court 6 January 1992; Court of Appeal [1993] 1 NZLR 671.

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## PART 5

### HAVE ALL CABINET REQUIREMENTS FOR NEW LEGISLATION BEEN COMPLIED WITH ?

#### **1.5.1 Outline of issue**

The *Cabinet Office Manual* sets out the Government's procedural requirements in regard to Government legislative proposals.

#### **1.5.2 Comment**

In the case of Government legislation the procedural requirements set out in Chapter 5 of the *Cabinet Office Manual*, and Sections 6 and 7 of the Cabinet Office Step by Step Guide, must be observed. These include –

- The form for “bids” for inclusion of Bills on the Government's legislative programme (see Section 6)
- The form for submissions to the Cabinet Legislation Committee on draft Bills ready for introduction (see Section 6)
- The form for submissions to the Cabinet Legislation Committee on Regulations (See Section 6)
- The 28 day rule for the commencement of regulations (see Section 7).

#### **1.5.3 Guidelines**

Comply with Chapter 5 of the *Cabinet Office Manual* and Sections 6 and 7 of the Cabinet Office Step by Step Guide.

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## CHAPTER 2

### UNDERSTANDABLE AND ACCESSIBLE LEGISLATION

#### INTRODUCTION

##### **Background**

Legislation gives legal effect to policy decisions. Policy decisions may range from those that are high level at one end to those that involve technical or minor detail at the other. In general, Acts of Parliament (“primary legislation”) deal with matters of high level and general policy. Regulations and other legislative instruments made by Ministers of the Crown and others (“subordinate legislation”) deal with the implementation of that policy.

Not all primary legislation needs to be supported by subordinate legislation. But whether primary legislation stands on its own or requires subordinate legislation to implement it, it is essential that the meaning of the legislation is clear. It is an established legal principle that everyone is presumed to know the law. Legislation creates rights and confers powers. It also imposes duties and obligations. The effect of legislation is pervasive. If legislation enacted by Parliament or made by the Executive is to be workable and effective, it must be expressed in a way that ensures it is understood by those to whom it applies.

Consequently, those responsible for the preparation of legislation, both policy-makers and drafters, have a responsibility to make it as understandable and accessible as practicable.

##### **Issues discussed**

The following issues are discussed in this chapter:

Part 1: Has sufficient time and consideration been given to the preparation of the legislation?

Part 2: Have departmental lawyers been fully involved?

Part 3: Has the drafter fulfilled his or her role?

Part 4: Is the legislation understandable and accessible?

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## PART 1

### HAS SUFFICIENT TIME AND CONSIDERATION BEEN GIVEN TO THE PREPARATION OF THE LEGISLATION?

#### **2.1.1 Outline of issue**

Legislation affects individuals, corporations, and organisations in society in different ways. For example, criminal legislation restricts certain kinds of behaviour, company and commercial legislation regulates the conduct of business, tax legislation is the mechanism for obtaining revenue to provide government and public services, social welfare legislation allocates resources, resource management legislation controls the use of land and other natural resources.

If rights conferred by legislation are to be exercised and if the obligations it imposes are to be complied with, they must be stated in terms that those to whom they apply can understand them, that is, so that they know what their rights and obligations are. The rule of law as the foundation of democratic society requires good quality legislation. Good quality legislation is understandable and accessible. Poor quality legislation is often neither, and has economic and social costs.

#### **2.1.2 Comment**

The Parliamentary Counsel Office is responsible under the Statutes Drafting and Compilation Act 1920 for drafting all government Bills (other than tax Bills) and statutory regulations. Tax Bills are drafted in the drafting unit of the Inland Revenue Department. The drafting of legislation is a complex process that involves extensive interaction between drafter and departmental officials. Good quality legislation is the result of a team effort.

Departmental officials involved in the development of policy that is to be embodied in legislation must ensure that the policy is well thought out, coherent, consistent, and workable. They need to consider not just the broad policy objectives, but also the details of its implementation.

It is important to involve the department's own lawyers early in the process. They are familiar with legislation. They can assist in the design of a sound legislative scheme and identify the issues that have to be addressed as well as potential problem areas. One of their principal functions is to provide drafting instructions. To do this effectively, they need to have a thorough

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understanding of the policy underlying the legislation, what the legislation is intended to do, and how it will work.

Enacting statute law is the most important activity Parliament undertakes. Making subordinate legislation is one of the most important activities the Executive undertakes. They both depend on the quality of the work of departmental officials and drafters.

It is important to set realistic timetables for making the policy decisions that will constitute the basis of legislation, for providing good drafting instructions, and for the drafting process. Legislation that has been frequently amended is often the result of poorly thought out policy decisions and insufficient time for drafting. The phrase “the devil is in the detail” is as true of legislation as it is of the fine print of many commercial and consumer contracts. Lack of time spent on getting the detailed provisions of legislation right can be costly both for the Government that promotes it and users.

High quality legislation:

- endures
- does not need frequent amending
- gives effect to the Government’s policies
- reduces fiscal risks to the Government
- avoids the courts having to decide what it means
- reduces compliance costs for users
- limits the scope for avoidance.

### **2.1.3 Guidelines**

Time and care should be taken in developing the policy that is to be incorporated in legislation to ensure that it is coherent, consistent, and workable. Ensure that the detailed machinery and other provisions necessary for the proposed legislation are properly worked out. Making sure this is done in the developmental stage will result in the legislation being produced more quickly.

Departmental lawyers should be brought into the policy development process as early as possible. They have a significant role to play in translating policy into legislation but, to be effective, they need to understand all aspects of it. Parliamentary Counsel can also be asked for advice about the design of a

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legislative scheme and can assist in the early stages of its development before drafting begins.

A realistic timetable should be allowed for the drafting of the legislation.

Legislation should give effect to policy objectives in a way that will not cause unnecessary difficulties or complications for those who have to comply, and will not require recourse to the courts to resolve ambiguity, internal inconsistency, or conflict with other legislation or the common law.

## PART 2

### HAVE DEPARTMENTAL LAWYERS BEEN FULLY INVOLVED?

#### 2.2.1 Outline of issue

Departmental lawyers play a key role in producing good quality legislation. The departmental lawyer is usually responsible for preparing drafting instructions, working with the drafter to produce a draft Bill or set of regulations, advising both the select committee of the House and the responsible Minister during the passage of a Bill, and providing advice to departmental officials about the implementation of the legislation when it has been enacted or made. In some instances, this work may be undertaken by other officials but the role and responsibilities are nevertheless the same.

#### 2.2.2 Comment

The departmental lawyer's job is to translate particular political and administrative policy into drafting instructions. To do this, the lawyer needs to have a thorough understanding of the overall policy as well as the administrative mechanisms that will be needed in the legislation to carry it into effect. He or she will also need to know how the proposal fits into the general body of law. In particular, what other legislation will affect the proposed legislation, eg Official Information Act 1982, Public Finance Act 1989, New Zealand Bill of Rights Act 1990, Privacy Act 1993, and how the common law may apply, eg the prohibition against self-incrimination or the liability in tort for the actions of officials.

The process of preparing drafting instructions involves:

- identifying the overall purpose, objective, or philosophy behind the legislative proposal
- identifying the main or basic concepts

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- identifying the main rules or objectives
  - identifying the ancillary rules or objectives
  - working out how the main and ancillary rules or objectives work together (are they consistent and compatible with each other?)
  - reviewing the structure of rules or objectives to see whether it is complete
  - considering whether any of the rules or objectives should be implemented in subordinate legislation.

The preparation of good drafting instructions takes time. It may be tempting to send the drafter a copy of a Cabinet decision that records general policy decisions, a submission to a Cabinet Committee, or some background papers and leave it to the drafter to try and work out what is required. By itself, that will not aid the drafter and may simply delay the production of the legislation.

The constituents of good instructions are set out in Appendix 1.

In addition to preparing drafting instructions, the departmental lawyer must:

- explain any aspects of the instructions
- respond to issues raised by the drafter
- read the drafts prepared by the drafter carefully
- check them for consistency
- test the draft against scenarios to make sure it is robust and will achieve its objective
- consider, from the standpoint of the user, whether the draft is clear and understandable
- provide comments on drafts promptly.

In the drafting of large or complex legislation, it is common for many drafts to be produced. Progress towards completing the drafting of legislation can be incremental as each revision seeks to improve on or refine the previous draft. The process of checking and providing comments should be repeated with each new draft.

The publication *A Guide to Working with the Parliamentary Counsel Office* contains information about the respective roles of instructor and drafter and about the processes involved in drafting legislation. Departments have copies

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of this publication. Copies may be obtained from the Parliamentary Counsel Office or via the Internet at *www.pco.parliament.govt.nz*.

### **2.2.3 Guidelines**

The departmental lawyer should have a thorough grasp of the broad policy objectives of the proposed legislation as well as of the detailed administrative, technical, and mechanical aspects.

The departmental lawyer should aim to provide comprehensive drafting instructions that comply with the criteria set out in Appendix 1.

Drafting legislation is a collaborative undertaking. Good legislation is the product of a team effort. Each draft of legislation should be read critically by the departmental lawyer to ensure it—

- is technically sound
- will give effect to the desired policy
- is internally consistent
- is compatible with the general body of statute and case law
- will be clear and understandable to users.

## **PART 3**

### **HAS THE DRAFTER FULFILLED HIS OR HER ROLE?**

#### **2.3.1 Outline of issue**

Legislative drafting is not just a technical exercise. A drafter is counsel to the Government in its legislative capacity. He or she must work in close collaboration with the instructing department and ensure that, so far as possible, legislation is based on sound legal principles, gives effect to the intended policy, and is as clear and understandable as practicable.

#### **2.3.2 Comment**

Legislative drafters provide a specialist form of legal service. The relationship between drafter and instructing department is similar to that between solicitor and client. The drafter must provide advice and drafting services in a professional and impartial manner. It is not the drafter's role to push through whatever an instructing department wants at all costs. On occasions drafters have to speak the unpalatable truth or expose the weakness in a legislative

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scheme. This does not always make them popular with Ministers or policy-makers, but it is a necessary part of their job.

The drafter has a wider responsibility to ensure that, in the public interest, legislation as finally enacted by Parliament or made by the Executive—

- complies with fundamental legal principles
- complies with the Guidelines
- is workable and effective
- is clear and unambiguous
- will withstand challenge or adverse criticism in the Courts
- does not impose unnecessary or unreasonable compliance costs.

Typically, the drafter's work involves—

- receiving and reviewing instructions from the instructing department
- raising issues with the instructing department that arise out of the instructions or seeking clarification of matters
- producing drafts that are clearly drafted and that give effect to the policy intent
- devising solutions to problems that arise during the drafting process
- assisting in resolving conflicts between departments over the policy or provisions in a draft
- in the case of Bills, drafting amendments for Select Committees and during the Committee of the Whole stage and ensuring that the assent copies are completely accurate and incorporate changes made during the parliamentary process
- in the case of statutory regulations, certifying to the responsible Minister that the regulations are in order.

Drafting involves mastering the policy and legal background of the proposal and dealing with the relationship with other legislation and the common law. Importantly, it involves working out a structure for a Bill or regulations that is coherent and logical. A sensible structure will aid readability and understanding just as will the use of clear language. Depending on the type of legislation, the drafter should consider whether readers will be assisted by including an outline Part that gives an overview of the Bill or regulations. In some cases, it may be appropriate to include examples, either separately or as part of the text of a provision, of how particular or complex provisions will

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operate. The drafter may wish to discuss these matters with the instructing department and obtain its views.

It is the drafter who has ultimate responsibility for the way a Bill or regulations are drafted and for ensuring that legislation will be effective and clear. Drafts will be reviewed within the Parliamentary Counsel Office by another drafter as part of the Office's quality assurance process.

The drafting of legislation is affected by a number of other matters designed to ensure consistency across the statute book. They include—

- the format or design of Acts of Parliament and statutory regulations, that is, physical layout, typeface, and size of text
- the Standing Orders of the House of Representatives
- drafting practices and conventions.

The publication *A Guide to Working with the Parliamentary Counsel Office* should be referred to for a more detailed discussion of the role of the drafter and the drafting process.

### **2.3.3 Guidelines**

In order to draft workable and effective legislation, the drafter must understand the policy objectives and the administrative and other requirements that it will be necessary to include in the legislation to implement the policy.

The drafter should work constructively with his or her instructors, seek clarification where necessary, endeavour to devise solutions to problems that arise during the drafting process, and assist in resolving differences of opinion among departments.

At the same time, however, if a drafter considers that the policy or some aspect of it does not comply with legal principle, is or may be unworkable, or that he or she is instructed to draft something will not be understandable and accessible, he or she must raise the matter with the instructing department and, if necessary, with the responsible Minister and the Attorney-General.

Finally, it is the drafter's responsibility to ensure that a draft is effective and clear.

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## PART 4

### IS THE LEGISLATION UNDERSTANDABLE AND ACCESSIBLE?

#### 2.4.1 Outline of issue

For legislation to command public acceptance it must meet certain standards. It must be developed in accordance with proper processes, reflect legal principle, be technically effective, and be able to be understood by those to whom it applies. Other Chapters in the Guidelines address many of these issues. This Chapter focuses on the characteristics of good legislation from the standpoint of understanding and accessibility.

#### 2.4.2 Comment

A difficult issue frequently faced in the development of legislation is the identity of the users or audience of the legislation. Legislation that deals with complex or technical matters will inevitably be difficult to understand for those who do not have a background in the subject matter. For example, commercial legislation will in many instances demand that the reader have some understanding of the business environment. Revenue legislation may require knowledge of accounting concepts, such as capital, income, and depreciation. A reference in a statute to the law of torts assumes that the reader is familiar with that particular branch of the law.

Judgments have to be made continually as to how legislation should be drafted to ensure that persons who will be affected by it will best understand it. There are no simple answers to this dilemma. A lawyer skilled in the law of personal property securities or company law may find provisions included in legislation dealing with these topics and designed to assist readers with less expertise unnecessary. A balance has to be struck and it is ultimately a matter of judgment for the instructor and drafter.

Legislation must also be technically precise and effective. Precision and effectiveness cannot be compromised in the interests of clarity. Over simplification can result in legislation failing to have its intended result. Again, a balance has to be achieved and that is not always easy.

Legislation is not meant just for lawyers and judges. It is used and applied everyday by persons with no legal training. Members of Parliament need to understand the statutes that Parliament enacts and the Executive has to understand the statutory regulations it makes. Participation in the law-making

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process demands that the public understands the implications of proposed legislation at both the policy level and its implementation.

Basic rules or principles applying to a well drafted piece of legislation can be stated with some assurance. It needs to be remembered, however, that drafting practices are constantly changing as drafters seek better ways of communicating.

The Law Commission's Report 35 *Legislation Manual: Structure and Style* contains useful material on matters of drafting style. The Parliamentary Counsel Office has incorporated material from this report in its own drafting manual and adopts many of the drafting practices and policies recommended by the Commission.

### 2.4.3 Guidelines

All legislation, whether primary or secondary, should seek to comply with the following criteria.

#### *Good organisation of material.*

- Material should be arranged in a logical order.
- General provisions should be followed by specific provisions and exceptions.
- Provisions that relate to the same subject should be grouped together.
- Provisions should be arranged in temporal sequence.
- Provisions that are significant should come before provisions of lesser importance.
- Clauses should be limited in the number of subclauses they contain. As a general rule, a clause should have no more than 6 subclauses.
- Division into Parts and the use of headings and subheadings breaks up a long document and aids comprehension.
- Clauses should be numbered.

#### *Use of clear language*

- The drafting should be as simple as possible. It should also be precise so that the document has its intended effect. The instrument must be

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workable but at the same time drafted in language and in a style that ensures it can be readily understood by its readers. Clarity of drafting should encourage clarity and simplicity of policy.

- Sentences should be short and well structured.
- Sentences should not contain excessive embedded and relative clauses.
- The active rather than the passive voice should be used.
- Archaic language and expressions should be avoided.
- Gender neutral language should be used.
- The drafting should be consistent. Words should be used in the same sense. If the sense is changed, this should be made clear.
- Overuse of capitals should be avoided.
- Propositions should be expressed in positive rather than negative terms.
- Similar propositions should be expressed in similar language.
- Repetition and unnecessary words should be avoided.
- Excessive cross-references and qualifications should also be avoided.
- Expressions in common or everyday use should be used wherever possible. Jargon should be avoided. However, technical terms will be necessary in legislation that deals with technical subject matter.
- Paragraphs and subparagraphs can break up blocks of text but multiple paragraphs and subparagraphs, while having the appearance of clarity, can often involve several ideas or concepts and be difficult to understand.

The use of outline Parts that give a reader an overview of an Act and that explain the scheme and key concepts in it may assist users. Graphics and diagrams that explain procedures and processes may also be useful aids. Including examples to explain the operation of complex or technical definitions or provisions may also be appropriate. The Interpretation Act 1999 now expressly recognises that this material may be referred to in ascertaining the meaning of legislation.

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## SECTION 2

# CONSISTENCY WITH BASIC PRINCIPLES AND EXISTING LAW

### CHAPTER 3

## BASIC PRINCIPLES OF NEW ZEALAND'S LEGAL AND CONSTITUTIONAL SYSTEM

### INTRODUCTION

#### **Background**

Everybody can understand their private ordering of affairs. Mostly that is done at a private and social level by personal commitments and between strangers by contract.

Everybody also understands that people's conduct can unintentionally cause harm to other persons including strangers. So we have the law imposing a duty to take care not to harm persons' property and person, and the law of defamation taking care not to harm people's reputation.

People understand that harm can be done intentionally and so there are criminal laws and civil laws imposing penalties and compensations for theft and destruction of property and various assaults to the person including death.

With all these laws dealing essentially with personal behaviour there is the apparatus of the State. The first purpose of the State is to defend the community against outside enemies and the second main function is to maintain internal order. The criminal law administered by the State is designed to maintain internal order and to allow individuals to enjoy their freedoms of person and property.

In addition to these essential tasks, in common with many other countries the political processes in New Zealand have developed numerous other functions of the State. The extent and content of these functions fluctuate over time as different political views dominate the lawmaking process. Over recent history these additional State functions have included:

- regulating activities in a modern industrial society (eg, safety codes and industrial relations);

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- providing and maintaining essential services beneficial to the development of society (eg, health, education and welfare legislation);
  - provision of bodies of law to facilitate private activity (eg, company law and partnership);
  - the gathering of taxes to finance the provision of public services; and
  - establishing the institutions to carry out these activities.

The laws giving effect to these state functions are typically statutes. Some of the oldest and principal functions such as defence and foreign affairs can in part be given effect by use of the traditional prerogative of the Crown. Statutes are the product of resolutions of the House of Representatives assented to by the Governor General. This process is sometimes referred to as parliamentary democracy. It has a long tradition, which affects the way that statutes are interpreted and so given effect by the courts. It is important for persons involved in the process of making legislation to understand this tradition and the expectations the Courts bring to its exercise, if they want to be able to anticipate how the Courts will interpret the new statute.

The tradition of government brought by the British was representative in character. In the United Kingdom, Parliament, consisting of the House of Commons and the House of Lords, would consider and vote on laws, which were submitted to the Monarch for approval. This is the “Westminster model”. The United Kingdom has its own history of development of democracy from rule by the Monarch, to some powers for a parliament, to increasing rights to vote by property holders, to all adult men, and then women.

New Zealand did not adopt the representative government immediately. It was phased in, after direct rule by the Monarch’s Governor, to partial and later the full Westminster model. New Zealand has its own history of extending the voting rights until they included all men and women.

The central principle of the Westminster model is that the Crown’s Ministers have to have the support of the majority of votes in the House of Representatives. Only Parliament can pass laws enabling taxes to be raised and authorising the expenditure of the tax raised.

The laws of Parliament are interpreted authoritatively only by the Courts. The Courts apply well-established principles. The first principle is enacted in section 5(1) of the Interpretation Act 1999: “*The meaning of an enactment must be ascertained from its text and in the light of its purpose.*” But it is wrong to suppose that the Courts read statutes in isolation from the rest of the

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laws. Statutes are read as taking effect in a legal system, among all the other laws. Statutes are the superior law and prevail over the common law. But there is often doubt as to exactly how and whether a particular provision of a statute will mesh in or prevail over *existing* law.

The common law has developed over centuries and is still developing to adapt to changing social conditions. It is organised around a respect for individual dignity and individual possession of property, and the supremacy of Parliament as a source of law. One of the earliest remedies of the law is the action of trespass, punishing individuals for assaulting others or entering upon their land without consent, or taking their goods. This common law concern for individual rights permeates into the interpretation of statutes passed by Parliament. It affects the perspective of the Courts to the taking away of rights and to a readiness to recognise that new individual rights have been created. This perspective gives rise to a number of issues which are discussed in Parts 1 to 3 of this chapter. But it can be usefully introduced by some general consideration of the situations which make the perspective relevant and of the need of persons making new law to address it.

Many public interest statutes can affect pre-existing individual rights recognised by the common law but for statute, either deliberately or inadvertently. The Courts will give effect to deliberate statute amendment of common law rights in the area of the statute's subject matter, but can be faced with a difficult task when it is not clear whether the statute intended to deprive a person of a common law recognised right. The basic common law perspective of the courts is that a person's liberty and property will only be taken away or confined after due process of the law, which processes are designed to ensure that no one is deprived of individual liberty unless a case is proven against that person by fair procedures. These ancient rights of due process protecting liberty and property date back at least to the 13<sup>th</sup> century and the Magna Carta. They are now in the Imperial Laws Application Act 1988 which preserves many of the ancient statutes securing liberty and due process. Some but not all are also reflected in the New Zealand Bill of Rights Act 1990.

The same perspective means that the Courts are disposed to recognise and look for protection of new individual rights in statutes. So, if a welfare statute grants entitlement to benefits to individuals who qualify, then the Courts will expect the statute to have fair procedures to resolve disputes about an individual's entitlement.

Part of the process of testing the quality of ideas for reforming the law is to ask how they would affect existing rights and privileges of individuals,

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whether it is justified to take those rights and privileges away, and how it should be done. If the new law would create new entitlements, similar consideration needs to be given as to the manner in which these new entitlements will be fairly determined and protected. If a Court charged with interpreting a new law has doubt that that analysis has been done when examining an uncertain provision of a statute, it might well conclude the statute did not intend to adversely affect existing rights, and/or presume that new rights will be granted impartially and should be protected from arbitrary removal. So it behoves political lobbyists, public servants and Members of Parliament to examine proposed law reforms against similar tests to decide whether and to what extent it is desirable to take away existing rights, and to ensure that there are fair processes in place in respect of new entitlements. If there are not, then it is desirable that there should be a further inquiry, to be satisfied that there is good reason to change the existing law, and to endeavour to design the new law to fit established respect for individual rights. New laws are often proposed out of urgent political situations. There is often associated a popular opinion that matters hitherto not controlled by Parliament through statutes should now be so, and without any delay. In this context it is especially important to endeavour to bring to the task, however urgent, a degree of detachment from the immediate needs of the moment.

In this sense parliamentary democracy should be understood, as it is by the Courts, to be a system of equilibrium between the right of the majority, through Parliament, to make law binding on individuals, and yet a respect for individuals' rights, whether old or new. Parliamentary democracy is not simply the proposition that anything a majority decides must be always right and good. Rather it proceeds upon a presumption that when the majority vote for a law which constrains individuals or takes away any of their freedom of person or property it will only be for a good reason. That good reason may be a judgement that the price of constraining some individuals' liberty and perhaps taxing some of their property or otherwise interfering with their property and goods is a cost which is outweighed by the benefit to the community as a whole. Similarly where the new law grants new entitlements to individuals, the common law perspective will dispose the Courts to presume that Parliament intends the entitlements to be recognised and protected fairly as individual rights. This perspective applies not only to the administration of the instant statute but to the transition to a new statute if the statute law is subsequently reformed.

Part of the protection put in place to ensure that individual freedoms are not capriciously taken away is the notion of separation of power. Most constitutions around the world ensure, in varying ways and by varying degree, that no one person holds all the political power. The traditional ideal

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of separation is between the lawmaker, the executive, and the judge. Although New Zealand does not have a complete written constitution this is also the case in New Zealand. The exclusive right of the courts to declare the law, including what a statute means, is an important separation of power, of the judge from the lawmaker and the executive.

### **Issues discussed**

The following issues are discussed in this Chapter:

- Part 1: Does the legislation comply with fundamental common law principles?
- Part 2: Have vested rights been altered?
- Part 3: Have pre-existing legal situations been affected?
- Part 4: Does the legislation enable the levying of money?

## **PART 1**

### **DOES THE LEGISLATION COMPLY WITH FUNDAMENTAL COMMON LAW PRINCIPLES?**

#### **3.1.1 Outline of Issue**

In considering whether legislation is needed, and, if so, what form it should take and what will be its effect, it is necessary to consider not only the language of the proposed statute, but its place within the wider law and the principles by which it will be interpreted.

#### **3.1.2 Comment**

Statute law, expressing the will of the elected representatives in Parliament, is extensive but only part of New Zealand law. It may be considered a continent within the ocean of the common law. In some cases, such as the criminal law, the law has been largely codified by statute<sup>5</sup>.

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<sup>5</sup> Crimes Act 1961. See, however, s.20 maintaining common law defences.

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The whole of the common law is judge made. Its development and progressive updating by them to meet changing social needs is a constitutional function of the common law judiciary<sup>6</sup>.

The common law includes:

- much of our substantive law, such as
  - the law of tort<sup>7</sup> (apart from such modifications as the Defamation Act 1992<sup>8</sup> and the Fair Trading Act 1986)
  - the law of contract<sup>9</sup> (apart from such measures as the codification of the law of sale of goods<sup>10</sup>, the so-called “contracts statutes”<sup>11</sup>, and the Consumer Guarantees Act 1993)
  - most of what is called “equity”<sup>12</sup> (apart from the Trustee Act 1956);
- much of the law<sup>13</sup> by which Parliament’s statutes are interpreted by the judges (see below) (apart from the Interpretation Act 1999);
- almost the whole of the law of judicial review (see below)<sup>14</sup>.

An Act of Parliament will override the common law to the extent of any inconsistency between them.

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<sup>6</sup> To be contrasted with the theoretical denial of such function to the French civil law judges: see *The Law of France and the Law of New Zealand* [1999] NZLJ 13, citing Article 5 of the Code Napoléon.

<sup>7</sup> Discussed in such texts as *Todd on Torts* (2nd ed).

<sup>8</sup> In *Lange v Atkinson* [2000] NZLR 257 the Privy Council decided that the determination of the common law of New Zealand did not necessarily follow that of England and is a matter for the judicial politics of New Zealand.

<sup>9</sup> Discussed in such texts as Burrows Finn & Todd *Law of Contract in New Zealand* (1997).

<sup>10</sup> Sale of Goods Act 1908.

<sup>11</sup> Contracts Enforcement Act 1956; Illegal Contracts Act 1970; Contractual Mistakes Act 1977; Contractual Remedies Act 1979; Contracts (Privity) Act 1982.

<sup>12</sup> Discussed in such texts as *Snell on Equity* (30<sup>th</sup> ed) and *Modern Equity* by Meagher, Gummow and Lehane (3<sup>rd</sup> ed).

<sup>13</sup> Discussed in such texts as Burrows *Statute Law in New Zealand* (2<sup>nd</sup> ed); Bennion *Statutory Interpretation* (3<sup>rd</sup> ed).

<sup>14</sup> Discussed in such texts as Joseph *Constitutional and Administrative Law* (2<sup>nd</sup> ed forthcoming), Taylor *Judicial Review*; De Smith Woolf and Jowell *Judicial Review of Administrative Action*. The Law Commission is to propose that almost all of the Judicature Amendment Acts 1972 and 1977, which provide procedures parallel to those of the common law, should be repealed, leaving the substantive law of judicial review essentially in the common law.

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In exercising their function of interpreting legislation, the courts will seek to ascertain and give effect to the will of Parliament. That is presumed to conform with the principles stated below.

Certain broad principles of public policy are the subject of presumptions of the common law.<sup>15</sup> The judiciary will be reluctant to interpret legislation in a manner that conflicts with them. Rather, as observed by Lord Hoffmann in *Ex parte Simms* [1999] 3 All ER 400 at 412, -

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights...The constraints on Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

These principles apply equally in New Zealand:

The process is like that of a spring: as the Crown attempts to depress the court’s powers of control of constitutional balance the courts’ resistance increases progressively<sup>16</sup>

It is the responsibility of the Executive and of Parliament to avoid imposing such pressures on the courts as to risk constitutional brinkmanship.<sup>17</sup>

#### *Fundamental common law principles*

The principles include:

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<sup>15</sup> Some dating back to Roman law, still important, are conveniently found in *Brooms Legal Maxims* (10<sup>th</sup> ed) 1939.

<sup>16</sup> W D Baragwanath *Dynamics of the Common Law* (1987) 6 Otago University Law Review 355 at 367, citing *New Zealand Drivers’ Association v New Zealand Road Carriers* [1982] 1 NZLR 374.

<sup>17</sup> See *Cooper v Attorney-General* [1996] 2 NZLR 480.

1. The principle that the dignity of the individual is a paramount concern of the law<sup>18</sup>. This principle is most obviously seen in the application of basic human rights, for example, the requirement that informed consent be given before medical procedures are undertaken on a person and in other rights such as freedom from discrimination.
2. The principle of legality which essentially means that legislation will be interpreted in a manner consistent with legal principles. Hence, for example, it will be presumed that mens rea is required in the case of statutory crimes, and, that statutory powers must be exercised reasonably.<sup>19</sup>
3. The principle that the citizen is entitled to have access to the courts<sup>20</sup>, despite legislation which might be construed to remove it<sup>21</sup>.
4. The principle that construction of legislation is a matter for the courts and not the executive<sup>22</sup>.
5. The principle that no-one will be required to perform something that is impossible<sup>23</sup>; from which follows the presumption against construing legislation as having retrospective effect<sup>24</sup> (the principle relating to non-retrospectivity is discussed in more detail in Part 3 below).

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<sup>18</sup> The principle was noted by President Maclaurin of MIT in an address reproduced in *Richard Cockburn Maclaurin* MIT 1920 page 47 “These views will remain of vital interest and import as long as they satisfy the deepest needs of man. They are two in number: First a view of the possibilities and the worth of the individual man, a view that gives dignity to the human struggle however sordid its conditions; and the second a view of the right relations of man to his neighbor, a view that supplies an impulse and a guide to social action.” It has been applied recently by the Constitutional Court of South Africa in *State v Makwanyane* [1995] 1 LRC 269, by the Supreme Court of Canada in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, and in essays by Feldman [1999] Public Law 682 and [2000] Public Law 61.

<sup>19</sup> Stated by Sir Rupert Cross in *Statutory Interpretation* (3<sup>rd</sup> ed) and applied in *Reg v Home Secretary ex p Pierson* [1998] AC 588. *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622.

<sup>20</sup> Famously endorsed by the 17th Habeas Corpus legislation still in force : see Reprinted Statutes Volume 30 and NZLC R44 *Habeas Corpus: Procedure* (1997). See also *R v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779.

<sup>21</sup> *Chester v Bateson* [1920] 1 KB 829 cited *New Zealand Drivers' Association v Attorney-General* [1982] 1 NZLR 374, 390.

<sup>22</sup> *L v M* [1979] 2 NZLR 519.

<sup>23</sup> *Withy & Ors v Commissioner of Inland Revenue* (No 2) (1998) 18 NZTC 13, 732.

<sup>24</sup> *Accolade Autohire Ltd v Aeromax* [1998] 2 NZLR 15; see also s.7 Interpretation Act 1999.

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6. The principle that no-one is guilty of a crime who has not committed a criminal act with knowledge of the facts that make it criminal<sup>25</sup>.
  7. The principle that the citizen is not required to answer questions by anyone including officials<sup>26</sup>.
  8. The principle in favour of liberty of the subject<sup>27</sup>.
  9. The principle that no-one may be penalised except by a general measure rather than by act of attainder<sup>28</sup>.
  10. The principle that no tax will be imposed except by Parliament<sup>29</sup> (this principle is discussed in more detail in Part 4 below).
  11. The principle that property will not be expropriated without full compensation<sup>30</sup> (see the further discussion on this principle in Part 2 below).
  12. The principle that everyone exercising public authority must act legally, reasonably, and honestly.<sup>31</sup>

These requirements include, among many others:

- giving a person who may be adversely affected by a decision the opportunity to respond<sup>32</sup>.
- satisfying minimum standards of competence<sup>33</sup>.

13. The principle of the rule of law that no-one, including the Crown in exercise of executive authority, is above the law<sup>34</sup>.

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<sup>25</sup> *B (A Minor) v Director of Public Prosecutions* [2000] 2 WLR 452 (HL).

<sup>26</sup> *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394.

<sup>27</sup> Burrows *Statute Law* p204; Dicey *An Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed) pp 207-8; Sedley *Freedom Law and Justice* Sweet & Maxwell 1999 Ch 1.

<sup>28</sup> See *Kable v Director of Public Prosecutions* (1995) 185 CLR 528.

<sup>29</sup> *A-G v Wilts United Dairies* (1921) 37 TLR 884 (CA); (1922) LJKB 897 (HL); 8(2) *Halsburys Laws of England* (4<sup>th</sup> ed Reissue) para 229.

<sup>30</sup> *Cooper v Attorney-General* [1996] 2 NZLR 480; *Wells v Newfoundland* (1999) 177 DLR (4<sup>th</sup>) 73.

<sup>31</sup> Sedley *Freedom, Law and Justice* Ch 2.

<sup>32</sup> *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

<sup>33</sup> See cases cited in *Chelliaya v NZIS* [2000] BCL 1.

14. The principle that all are treated equally under the law<sup>35</sup>.
15. The principle that New Zealand's constitutional conventions are not infringed<sup>36</sup>.
16. The principle that New Zealand law conforms with both international law and our treaty obligations<sup>37</sup>; in particular that it conforms with the Treaty of Waitangi<sup>38</sup> (see Chapter 5).
17. The principle that delegated authority must be exercised within the power actually conferred, despite use of subjective language<sup>39</sup>.
18. The principle that foreign tax legislation is unenforceable in New Zealand courts<sup>40</sup>.

The list is illustrative, not comprehensive.

Because it is impossible for Parliament to legislate for every contingency the court may have to interpret language the application of which in a particular case is unclear. See for example the leading criminal law case of *R v Rongonui* [2000] 2 NZLR 385, in which 3 judges held that the law of provocation stated in s 169 of the Crimes Act was to be construed in a certain sense and 2 preferred another. Some examples of the courts' approach when construing legislation are:

- the court will where necessary fill a gap to express the presumed intention of Parliament<sup>41</sup>;

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<sup>34</sup> *M v Home Office* [1994] 1 AC 377; Sedley *The Crown in its own Courts* in Forsyth and Hare ed *The Golden Metwand and the Crooked Cord* (1998) pp 253-266; NZLC R37 *Crown Liability and Judicial Immunity: a response to Baigent's Case and Harvey v Derrick* (1997) pp 6-13.

<sup>35</sup> *Reckitt & Coleman (NZ) Ltd v Taxation Board of Review* [1966] NZLR 1032.

<sup>36</sup> Marshall *Constitutional Conventions* Clarendon 1986; Roach *The Attorney-General and the Constitution* (2000) University of Toronto Law Journal 1, 21 ff; JJ McGrath QC, S-G *The Crown, the Parliament and the Government* (1999) 7 Waikato Law Review 1.

<sup>37</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257; NZLC R45 *The Treaty Making Process: Reform and the Role of Parliament* (1997).

<sup>38</sup> *New Zealand Maori Council v A-G* [1987] 1 NZLR 687.

<sup>39</sup> *Reade v Smith* [1959] NZLR 996.

<sup>40</sup> *Government of India v Taylor* [1955] AC 491; *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278.

<sup>41</sup> *Northern Milk Vendors Assn Inc v Northern Milk Ltd* [1988] 1 NZLR 530 ; *Goldsboro v Walker* [1993] 1 NZLR 397, 404 (applying the Latin maxim from *Broom* that expression of the greater impliedly include the lesser); *Inco Europe v First Choice Distribution* [2000] 1 WLR 586 (HL).

- the court will where necessary have recourse to its inherent jurisdiction.<sup>42</sup>

Of particular importance in the sphere of government are the principles of judicial review, which apply to all persons and bodies exercising public functions, other than Parliament which accepts responsibility to regulate its own affairs<sup>43</sup>. The courts of general jurisdiction – the High Court and the Court of Appeal – reserve the right to intervene and grant relief whenever such a body infringes the law. They may apply to most forms of Executive conduct, whether pursuant to statutory authority<sup>44</sup> or in exercise of the Crown’s prerogative<sup>45</sup>.

It is impossible in this Part to do more than sketch a broad outline of the effect the common law may have in relation to actual or contemplated legislation. It is no substitute for referring any problem or proposal to an experienced lawyer, familiar with New Zealand’s public constitutional, administrative and criminal law, and able where necessary to discern the need for specialist advice.

### 3.1.3 Guidelines

Check whether the legislation complies with the fundamental common law principles. If it does not, the reasons for non-compliance should be determined and the matter referred to the Attorney-General.

## PART 2

### HAVE VESTED RIGHTS BEEN ALTERED?

#### 3.2.1 Outline of Issue

The issue discussed in this Part is the approach to be taken in legislation to property rights. In particular, the question is whether or not legislation removing property rights should also provide for compensation for the loss of such rights.

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<sup>42</sup> *Canada Trust Co v Stolzenberg* [1997] 1 WLR 1582 at 1589.

<sup>43</sup> S.1 Article 9 Bill of Rights 1688 (Eng) Reprinted Statutes of New Zealand Volume 30 p 41; *Prebble v Television New Zealand* [1994] 3 NZLR 1.

<sup>44</sup> Judicature Amendment Acts 1972 and 1977.

<sup>45</sup> *Burt v Governor General of New Zealand* [1992] 3 NZLR 672; *Patel v Chief Executive of the Department of Labour* [1997] 1 NZLR 102.

### 3.2.2 Comment

In various situations the presumption has been advanced that title to property or full enjoyment of its possession may not be compulsorily acquired without compensation unless such an acquisition was clearly the intention of Parliament. (See, for example, *Cross* “*Statutory Interpretation*” 1995, pp 178-179 and *O. Hood Philips’* “*Constitutional and Administrative Law*” 7ed 1987, p 530.)

The strength of the presumption is illustrated by the decision in *Burmah Oil Company (Burma Trading) Ltd v Lord Advocate* [1965] AC 75. Lord Reid observed that, “even at the zenith of the royal prerogative, no one thought that there was any general rule that the prerogative could be exercised, even in times of war or imminent danger, by taking property required for defence without making any payment for it.” (p 102).

The presumption applies in New Zealand although there is no protection of property rights equivalent to that in the US Fifth Amendment. The latter protects the taking of property without due process. Chapter 29 of Magna Carta which protects the “right to justice” and the right not to be disseised of freehold is, however, part of New Zealand law.

The presumption requires the drafter to consider whether the proposed legislation is a “taking” of “property”. There is a vast range of American authority on this point. If property is involved and if what is proposed is a taking, consideration will need to be given as to whether or not compensation should be provided. In these circumstances, if compensation is not to be paid the legislation should make quite clear this intention.

The development of this presumption reflects the fact that “the protection of property is generally regarded as one of the fundamental values of a liberal society.” (*Cross*, p 179). Legislation which affects such values, for example, legislation taking away a property right and providing that no compensation is to be paid, may also raise issues about the acceptability of the legislation. As Baragwanath J observed in *Cooper v Attorney-General* [1996] 3 NZLR 480 at 485, “Disregard of convention” will “bring pressure” upon the legitimacy of decisions made by elected representatives “in the sense of unchallenged public acceptance of the constitutionality of legislation, ...”.

In the United Kingdom the pressure brought to bear on the resultant legislation is referred to in the context of a “principle of legality”. For example in *R v Secretary of State for the Home Department, ex parte Simms and another* [1999] 3 WLR 328 the House of Lords noted, in considering a blanket ban on interviews for prisoners, “In these circumstances even in the

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absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle... This is called “The principle of legality” (at p 340 per Lord Steyn).

Obviously, matters engaging the notion of a “principle of legality” will arise only in the more extreme case.

### **3.2.3 Guidelines**

If legislation would implement a taking of property, consideration should be given to whether compensation should be paid to those affected.

Where legislation would constitute a taking of property and it is not intended that compensation will be paid, the legislation should make this quite clear.

## **PART 3**

### **HAVE PRE-EXISTING LEGAL SITUATIONS BEEN AFFECTED?**

#### **3.3.1 Outline of issue**

The issues are:

- What impact does the legislation have on existing situations?
- What factors should be considered when deciding how the legislation should affect existing situations?
- How should the legislation deal with relevant pending litigation?

#### **3.3.2 Comment**

The general principle is that statutes and regulations operate prospectively, that is, they do not affect existing situations. This principle is set out in s.7 of the Interpretation Act 1999 which provides that enactments do not have retrospective effect. Reference should also be made to ss 17 to 21 of that Act which deal with the effect of the repeals of legislation.

The general principle is strongest in the case of criminal liability and this is seen in particular provisions in the criminal law area, namely, s 10A of the Crimes Act 1961 and s 4 of the Criminal Justice Act 1985. Section 26 of the New Zealand Bill of Rights Act 1990 is to similar effect. Section 26 repeats New Zealand’s international obligations in this area which are found in Article 15 of the International Covenant on Civil and Political Rights.

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At common law, there are general presumptions of interpretation which also have the effect of applying the law prospectively. Clear legislation is needed to displace these presumptions.

Unless there is clear provision to the contrary in legislation, the effect of the relevant statutory provisions and the common law is that legislation will apply prospectively. In any particular case, careful consideration should be given to legislation which might or will have an effect on existing situations. The question may arise whether particular application, transitional, or savings provisions are required.

A number of factors should be considered in deciding how legislation should deal with existing rights. The overall question is one of fairness to those affected (*L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, the Boucraa* [1994] 1 AC 486). In particular, legislation should not interfere with accrued rights and duties, nor should it create criminal liability or penalty retrospectively.

However, while the general principle is that legislation is prospective, not all examples of legislation which impacts on existing situations will be unfair (see *Burrows, Statute Law in New Zealand*, 1999, page 358). Examples of retrospective provisions which are seen as having only a benign effect include those which validate appointments, or provide for backdated salary and benefit payments and new superannuation arrangements. The impact of the legislation on those affected can be assessed by considering a range of factors including the purpose of the legislation and the hardship of the result on those affected. For example, individuals may have a reasonable expectation based on entering into legal obligations, such as contracts, on the basis that the law will have a certain impact.

In some circumstances, it may be unjust to apply new law to old situations. The Law Commission in chapter V of its report on a *New Interpretation Act* (NZLC R17 1990) for instance notes that no-one should be subject to a criminal penalty for some act that was not a crime at the time of the alleged offence. There may however be a public interest requiring the law, for instance of taxation of oil exploration, to be altered.

Another factor to consider is whether it is necessary for effective administration for the law to affect existing situations. For example the Law Commission report notes that new courts, institutions and procedures might have to apply to existing obligations and rights to avoid injustice or inefficiency in administration. This may include consideration of economic factors such as the costs to the Government.

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Accordingly, the Committee was critical of a 1992 Bill repealing s 51 of the Patents Act 1953. The repeal cut off three applications for licences in relation to patented food or medicines before those applications had run their course. The problem was that in the circumstances the applicants had accrued rights and those rights should have been protected by appropriate transitional arrangements in the Bill. The Committee was also concerned that the repeal prevented patentees from asserting their rights by bringing a successful appeal.

There is further discussion of examples of legislation contradicting this principle in the Committee's Report No 9 *Recurring Issues*. The Report also includes a memorandum on "Legislation Overriding Judgements and Legal Proceedings" that was prepared in May 1995 at the request of the Finance and Expenditure Select Committee. In addition to the bar on applying criminal liability retrospectively, the memorandum states that a judgment and proceedings under the old law should be protected where the judgment obtained or sought can be given effect to without undermining the purpose requiring retrospectivity. For example, the Citizenship (Western Samoa) Act 1982, was designed to implement a protocol signed by the Governments of New Zealand and Western Samoa to deal with the consequences of the decision in *Lesa v Attorney-General* [1982] 1 NZLR 165. It considerably altered the law stated in that decision, but s 5, in conformity with the decision, declared the litigant in the particular case to be a New Zealand citizen otherwise than by descent. Consistently with principle, the Act also made clear that no-one subject to the Act should be prosecuted for overstaying offences allegedly committed before the Act was passed.

Finally, legislation should not, in general, deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under earlier law, or to continue proceedings asserting rights and duties under that law.

### 3.3.3 Guidelines

Unless there is clear provision to the contrary in legislation, legislation will apply prospectively. However, consideration should be given to the impact of legislation on existing situations. A number of factors should be considered. The overall question is fairness to those affected.

Another consideration is whether it is necessary for effective administration for the law to affect existing situations.

Hence, the questions to ask are:

- Is there a case for retrospectivity? and

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- If there is, would the judgment, if it is continued in effect, nullify the substance of the legislation?

## PART 4

### DOES THE LEGISLATION ENABLE THE LEVYING OF MONEY?

#### 3.4.1 Outline of issue

The fundamental constitutional principle which applies to the imposition of taxes and government charges is that Parliament, and Parliament alone, can levy money for the Crown. This principle is reaffirmed in section 22 of the Constitution Act 1986, which provides that it is not lawful for the Crown to levy a tax except by or under an Act of Parliament.

#### 3.4.2 Comment

Legislative authority for the imposition of fees is usually provided by including empowering provisions in an Act to authorise the making of regulations to fix fees or charges.

An Act usually provides that fees are prescribed by regulation if they are charged for—

- a service or function which is standard to Government (eg the issue of passports)
- a service or function over which the user has no choice or contractual control
- a service or function which the Government has an interest in ensuring is not overpriced (the issue of professional practising certificates at a price which does not exclude entry to the profession).

Fees should bear a proper relation to the cost of providing the service or performing the functions.

Although an Act may empower the making of fees regulations, this does not mean that the Act empowers the Crown to impose a tax. The cases establish that a fee, due, rate, levy, or toll may in fact be a tax by another name. *Re a By-law of the Auckland City Council* [1924] NZLR 907 at 911 (SC). In such cases the fee or charge is invalid. However, a fee, due, rate, levy, or toll will not be considered to be a tax if the amount charged is merely for recovering administrative costs reasonably incurred in regulating an activity.

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*Fee charging principles*

The principles that apply to setting fees by regulation have been considered by the Regulations Review Committee, the Audit Office, and, more recently, the Treasury<sup>46</sup>. These principles recognise the constitutional position where consumers have no choice but to purchase goods and services from the Crown.

The Regulations Review Committee approach is based on 2 broad principles. The first is the constitutional principle that the Crown cannot levy taxes without the explicit authority of Parliament. A fee that recovers more than the cost of a service provided under an Act or regulation may be a tax in disguise. Secondly, a regulation which fixes a fee or charge may offend 1 or more of the grounds in the Standing Orders under which the committee considers regulations.<sup>47</sup> For example, a fee may trespass unduly on personal rights and liberties if it is imposed in unfair circumstances.

Detailed principles relating to charging of fees for particular matters are set out in the Audit Office and Treasury guidelines. The Audit Office guidelines require a public sector agency to consider a number of factors when setting or reviewing fees and charges. The fee setting process must include a determination of the costs of resources required to produce an output, apply an appropriate method for calculating fees or charges, and consider other relevant administrative aspects. The Treasury in its guidelines requires that charges set are not excessive in relation to the costs incurred and that charges are appropriate and fair.

*Fee or a tax?*

The mere fact that an amount is described as a fee does not preclude it from it being considered to be a tax by another name. If it is considered to be a tax then the fee is ultra vires and invalid.

The distinction between a tax and a fee was considered in the Regulations Review Committee's *Inquiry into the constitutional principles to apply when Parliament empowers the Crown to charge fees by regulations*. The Committee endorsed the decision of the High Court of Australia in *Air*

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<sup>46</sup> *Report of the Regulations Review Committee on the Inquiry into the constitutional principles to apply when Parliament empowers the Crown to charge fees by regulations*, 1989, AJHR, I. 16C; and *Report of the Audit Office on Guidelines on Costing and Charging for Public Sector Goods and Services*, 1989; and *Treasury Guidelines for Setting Charges in the Public Sector*, March 1999.

<sup>47</sup> Standing Order 382.

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*Caledonie International and Others v Commonwealth of Australia* [1988] 82 ALR 385. The court discussed the character of a tax and considered that if a levy was compulsory, was for public purposes, and was enforceable by law, then it had the basic characteristics of a tax. The case involved the consideration of an immigration fee and the court decided that even though the impost was described as a fee it could be, and in fact was, a tax<sup>48</sup>.

The Committee has also emphasised that if the amount of a ‘fee’ fixed by regulation under statutory authority exceeds the value of that which is acquired, that fee is properly to be seen as a tax.

#### *Increases in fees*

A regulation proposing a significant increase in fees is likely to be the subject of a report by the Regulations Review Committee, as it is the Committee’s practice to make enquiries about such increases. The Committee may recommend to the Government that the regulations be revoked.

A fee should bear a proper relation to the cost of providing a service. The situations in which fees may be queried include the following:

- fees that are clearly out of line with comparable fees elsewhere (eg, a per page photocopying fee that is clearly much more expensive than other per page photocopying fees prescribed elsewhere)
- if the Cabinet papers disclose any suggestion of cross-subsidisation, factors other than cost recovery, or any suggestion that the fees are being used to encourage or discourage people from a particular course of activity
- fees that seem excessive in relation to what the task to be performed involves

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48 However, a New Zealand case decided before *Air Caledonie* may lend support for fixing fees in excess of the cost of the value of the service. The decision of Heron J in *Cossens and Black Limited v Prebble* (Heron J, 11 August 1987, Wellington A318/84) suggested that one fee may be able to subsidise the provision of another service. Heron J disagreed with the argument that the fees must relate to the services provided under section 197 of the Shipping and Seamen Act 1952. Instead he held that the Executive may prescribe fees for any service provided under the Act, and the amount may take into account more than just matters directly related to that service. However, keep in mind the later decision when considering this issue given the later decision of the High Court of Australia in *Air Caledonie* and the approach of the Audit Office and the Regulations Review Committee.

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- substantial increases in fees with no indication in the Cabinet papers as to why
  - fees, some of which are substantially increased and others which are not with no indication in the Cabinet paper as to why.

An example of regulations that the Committee drew to the attention of the House and recommended be revoked were the Disputes Tribunals Amendment Rules 1998. The rules proposed a substantial increase in filing fees and reflected a move towards a greater level of cost recovery by the Department for Courts. A majority of the committee were concerned about the likely impact the regulations would have on access to the Disputes Tribunals procedures. They were of the opinion that the rules were not only contrary to the objects and intentions of the Act under which they were made, but that they also created potential barriers to justice. These are both grounds on which the committee can draw regulations to the attention of the House under Standing Order 382. They considered that the barrier could be either that the level of the fees excludes potential claimants on low incomes or that the fees represent too high a proportion of the total amount claimed.

### **3.4.3 Guidelines**

When considering whether the correct principles relating to charging of fees have been applied, the following questions should be asked:

- Is the fee greater than cost recovery?
- Do any of the grounds in Standing Order 382 apply?
- Has the department or agency considered the Audit Office and Treasury guidelines when setting the fee?

A fee is likely to be regarded as a tax if—

- it is greater than the cost recovery
- it does not bear a proper relation to the cost of providing the service or performing the function

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- it is compulsory, for a public purpose, and enforceable by law, regardless of whether it is less or more than cost recovery.<sup>49</sup>

Those preparing legislation should ask the relevant government agency to justify any substantial increase in fees preferably with reference to the following:

- Audit Office guidelines
- Treasury guidelines
- Cabinet papers.

If it appears that a fee for one service is being used to cross-subsidise another service, consider whether the cross-subsidisation is appropriate in light of the empowering Act, the Audit Office guidelines, and the views of the Regulations Review Committee. In particular check the following:

- Is the cost of providing the output “an essential element” in the determination of the fee?
- Are those paying the fee receiving essentially the same services or benefits, or are different groups receiving significantly different benefits? is the cross-subsidisation in the provision of particular services transparent and authorised by primary legislation?
- Is the cross-subsidisation in the provision of particular services transparent and authorised by primary legislation?

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<sup>49</sup> *Report of the Regulations Review Committee on the Inquiry into the constitutional principles to apply when Parliament empowers the Crown to charge fees by regulations* endorsing the decision of the High Court of Australia in *Air Caledonie International and Ors v Commonwealth of Australia* [1988] 82 ALR 385.

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## CHAPTER 3A

### STATUTORY INTERPRETATION

#### INTRODUCTION

##### **Issues**

The following issues are discussed in this chapter:

Part 1: Have the rules of statutory interpretation been considered?

Part 2: Has the Interpretation Act 1999 been considered?

#### PART 1

### HAVE THE RULES OF STATUTORY INTERPRETATION BEEN CONSIDERED?

#### **3A.1.1 Outline of issue**

If there is a dispute over the meaning of expressions in an Act, the case may go to court, and the court's interpretation will be authoritative. It is thus important that those preparing Acts are mindful of the rules and conventions used by courts in interpreting Acts.

#### **3A.1.2 Comment**

##### *The main rule*

The main rule for the interpretation of statutes in New Zealand is contained in section 5(1) of the Interpretation Act 1999.

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

This rule, important though it is, needs to be supplemented in certain ways. First, it is not just the dictionary meanings of words that matter. Context is vital. Most words have several shades of meaning, and it is not possible to determine which one is appropriate unless one has regard to the context in which the words appear. Secondly, the rule omits the fact that matters extraneous to the Act may affect the way it is interpreted: common law, other

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statutes, and international treaties are only some of the matters which may be relevant in arriving at the correct interpretation of the provision in question. Thirdly, cases involving the interpretation of Acts are usually not just about the meaning of the words in the abstract, but rather are about determining how those words apply to factual situations, often situations which were not precisely foreseen by the drafter of the Act. In many cases of this kind the question is not so much one of resolving an ambiguity in language; rather it is about determining whether a word can legitimately extend to cover the facts of the case in question.

Bearing all this in mind, the true interpretation of a provision is generally its most *natural* reading taking into account purpose and relevant context. Artificial or strained meanings are not to be adopted without good reason.<sup>50</sup>

However even this is too simple. Sometimes if other features, in particular the purpose of the provision, are strong enough, the courts may be willing to place a more strained interpretation on its words.

### ***The text of the Act***

#### *Internal context*

Every word of an Act must be read in the context of the other words of the section in which it appears; the part of the Act in which it is situated; and the scheme of the Act as a whole.

#### *The section*

All words take their colour from the words immediately surrounding them. This is sometimes called the *noscitur a sociis* rule.<sup>51</sup>

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<sup>50</sup> Thus, when a statute provided that a local authority could provide electric power to an *adjoining* district, it was held that New Plymouth could not supply to Waitara or Inglewood because they were several kilometres distant, and thus not *adjoining* in the most natural sense of that word: *New Plymouth Borough v Taranaki Electric Power Board* [1933] NZLR 1128.

<sup>51</sup> Thus, in a provision rendering it an offence to engage in “riotous, violent or indecent behaviour” in a place of worship, it was held that the word “indecent” was coloured by those which proceeded it, that is, “riotous” and “violent”, and was not confined to indecency of a sexual nature: *Abrahams v Cavey* [1968] QB 479; see also *M v L* [1999] 1 NZLR 747 at 765 and 766 (“sanity or testamentary capacity or other legal capacity”).

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*The part of the Act*

A provision must be read in the light of the subject matter of the part of the Act in which it appears. Sometimes apparently general provisions need to be read down and confined to the subject matter of the part in question.<sup>52</sup>

*The scheme of the Act*

Before settling on an interpretation of a provision it is vitally important to read that provision in the context of the Act as a whole.<sup>53</sup> This is so for the following reasons:

- Many Acts have a consistent purpose, theme, or philosophy which the reader must thoroughly understand before attributing a meaning to any of its provisions.
- Sometimes a reader's initial impression of a section needs to be modified or qualified in the light of other provisions of the Act.
- Sometimes the answer to the question to which the reader is seeking an answer is found not in the express provisions of any one section but rather in indications in a number of sections. Thus the Marriage Act 1955 contains no section specifically providing that it applies only to marriages between a man and a woman. But that is the clear conclusion derived from a careful reading of the Act as a whole.<sup>54</sup>

*Internal aids**Indications*

Section 5(2) and (3) of the Interpretation Act 1999 provide as follows:

- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
- (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and

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<sup>52</sup> *R v Schildkamp* [1971] AC 1 at 25; *R v Wilkinson* [1999] 1 NZLR 403 at 407.

<sup>53</sup> Sir Ivor Richardson has described scheme and purpose as “the twin pillars” of modern interpretation: (1985) 2 <sup>Aust</sup>ralian Tax Forum 3.

<sup>54</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523.

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sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

It should be noted in particular that as a result of section 5(2) and (3), marginal notes and part headings are now available for interpretative purposes. Previously, part headings were not, and there was some doubt about marginal notes.<sup>55</sup> However, none of the aids referred to in section 5(2) and (3) are determinative. They are guides only. The words of the substantive enacting provisions must prevail when they are clear. It is of the essence of marginal notes and part headings that they are very brief indications of the subject matter; they can thus never be a precise guide. Moreover, usually as a result of amendments to a provision during its passage through Parliament, marginal notes can on occasion be quite misleading.<sup>56</sup>

#### *Purpose provisions*

Many modern Acts contain an object section which states, often in some detail, the purpose of the Act. Until the year 2000, many Acts also had long titles which served a similar function. Purpose provisions are of key importance given the injunction in section 5(1) of the Interpretation Act 1999 that enactments are to be interpreted in the light of their purpose. Every provision of an Act should, if possible, be interpreted consistently with that purpose provision.<sup>57</sup> Moreover, if the Act confers powers on persons or institutions those powers should be exercised consistently with the purpose so stated.<sup>58</sup>

#### *Interpretation sections*

Most Acts contain near the beginning an interpretation section which provides a dictionary for the Act by defining a number of key words and phrases which appear throughout the body of the Act. The words and phrases thus defined may be ones which could otherwise give rise to ambiguity, or ones which are abbreviations or even coined terms to enable the ensuing provisions of the Act to be drafted with more economy. Definitions of some words are introduced by the word “means”, and of others by “includes”. As a

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<sup>55</sup> Acts Interpretation Act 1924 s 5(f)(g).

<sup>56</sup> See, for example, the note to s 59 of the Personal Property Securities Act 1999: until 2002 it referred to “knowledge” whereas the body of the section contains no such requirement.

<sup>57</sup> *Schlaadt v ARCIC* [2000] 2 NZLR 318 at 322.

<sup>58</sup> *Manukau City Council v Ports of Auckland* [2000] 1 NZLR 1 at 14.

rule, the word “means” introduces an exhaustive definition.<sup>59</sup> “Includes”, however, introduces an incomplete definition; the definition given contains some of the things the word can cover, but admits the possibility it may cover other things as well.<sup>60</sup>

Nevertheless, everything depends on context, and on rare occasions “includes” can herald an exhaustive definition.<sup>61</sup>

It is common in New Zealand Acts for an interpretation section to commence with the phrase: “In this Act, unless the context otherwise requires”. This phrase indicates that, particularly in a long Act where the word in question appears several times, there may be occasions where it does not bear its defined meaning. But the statutory definition is displaced only where there are strong indications to the contrary in the context.<sup>62</sup>

### *Rules of language*

Some rules of language may be of assistance in interpretation.

- One cannot read into a list things which are not expressly stated. This is sometimes expressed by the Latin phrase *expressio unius est exclusio alterius*.<sup>63</sup>

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<sup>59</sup> Thus, the Conservation Act 1987 (s 2(1)) provides:

*working day* means a day that is not a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign’s birthday, Labour Day, or a day during a period commencing on any Christmas Day and ending with the 15th day of the following January.

It is quite clear that this is exhaustive, and is all *working day* means for the purposes of that Act.

<sup>60</sup> Thus, in the Arms Act 1983 (s 2):

*sale* includes (a) barter; and (b) offering or attempting to sell, or having in possession for sale, or exposing for sale, or sending or delivering for sale, or causing or allowing to be sold, offered, or exposed for sale ...

It is clear that, in addition to these specified extended meanings, the word “sale” retains as well its normal meaning in ordinary speech.

<sup>61</sup> “Means” and “includes” are discussed in *Caldow Properties Ltd v HJG Low and Associates Ltd* [1971] NZLR 311.

<sup>62</sup> *Police v Thompson* [1966] NZLR 813.

<sup>63</sup> For example, *R v Joyce* [1968] NZLR 1070.

- It is assumed that the same word bears the same meaning wherever it is used in the Act.<sup>64</sup>
- It is assumed that where different words are used they bear different meanings.<sup>65</sup>
- It is assumed that every word in a provision bears a meaning and is not surplusage.<sup>66</sup>
- If a list of specific items is followed by a general word, it is assumed that if the specifics are all examples of a class the general word is likewise confined to that class. This is the *ejusdem generis* rule.<sup>67</sup>

However, these “rules” are no more than guidelines, and they readily give way to counter-indications. Lord Nicholls has said:<sup>68</sup>

Linguistic arguments ... should be handled warily. They are a legitimate and useful aid in statutory interpretation, but they are no more than this ... In the process of statutory interpretation there always comes a stage, before reaching a final decision, where one should stand back and view a suggested interpretation in the wider context of the scheme and purpose of the Act. After all, the object of the exercise is to elucidate the intention fairly and reasonably attributable to Parliament when using the language under consideration.

The so-called “rules” make their appearance far less frequently in judgments than they used to. Thus, the purpose of the Act may indicate that a general word following a list of specifics was truly meant to be general,<sup>69</sup> and sometimes the intent of a provision may be crystal clear despite the fact that words have been inadvertently omitted or unnecessarily inserted. We shall take up this point again in the context of the purposive approach.<sup>70</sup>

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<sup>64</sup> *R v Dunn* [1973] 2 NZLR 481 at 483.

<sup>65</sup> *Hadley v Perks* (1866) LR 1 QB 444 at 457.

<sup>66</sup> *Hill v William Hill (Park Lane) Ltd* [1949] AC 530 at 546.

<sup>67</sup> *R v Gold* [1987] QB 1116, affd [1988] AC 1063.

<sup>68</sup> *Associated Dairies Ltd v Baines* [1997] AC 524 at 532.

<sup>69</sup> *R v Coneybear* [1966] NZLR 52.

<sup>70</sup> Below, paragraph 4 under the heading *Purpose*.

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### *Purpose*

As section 5(1) of the Interpretation Act 1999 makes clear, a provision must be interpreted in the light of its purpose. Section 5(1) replaces the old section 5(j) of the Acts Interpretation Act 1924.<sup>71</sup>

The purpose of the Act as a whole may be derived in various ways:

- A purpose or object provision in the Act may summarise it.
- It may be evident from reading the Act as a whole.
- It may be able to be derived from knowledge of the social or economic mischief the Act was passed to remedy.
- It may be discovered from extrinsic material such as parliamentary debates or committee reports.

At other times, one is concerned with the purpose of one provision in an Act rather than the purpose of the Act as a whole. It may be obvious from a careful reading of the provision what its purpose is; at other times extrinsic material may be helpful.

The purposive approach to interpretation has gained much ground in recent years. It is now the dominant approach. It ensures that narrow “literal” meanings are not attributed to words if that would defeat Parliament’s purpose. It operates in a number of ways:

- It can enable a word to be given an extended, even strained, meaning to cover the facts of the case although there are obviously limits as to how far this can be taken.<sup>72</sup>

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<sup>71</sup> “(j) Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit.”

<sup>72</sup> Thus, in one case it was held that a sweet container made to resemble a baby’s bottle came within the expression “toy” as used in the safety standards provisions of the Fair Trading Act 1986: *Commerce Commission v Myriad Marketing Ltd* (2001) 7 NZBLC 103, 404.

- It means that drafting deficiencies will not impede interpretation as long as the purpose of the provision is clear. Words can be ignored as surplusage, and normal linguistic conventions can be departed from, to give effect to that clear purpose.<sup>73</sup> It has been said that a court can even correct obvious drafting errors.<sup>74</sup>
- It provides the limits within which a statutory power or discretion may be exercised.
- It induces a weakening of some of the old so-called “presumptions” that certain classes of Act, for example, penal and tax Acts, were to be strictly construed in favour of the individual. There are judicial dicta to the effect that Acts in these categories are now to be interpreted in the same way as others.<sup>75</sup>

The purposive approach ensures that Acts will be made to work as Parliament intended them to, rather than being subjected to an artificially strict construction which could impede Parliament's will.

Nevertheless, it is important to note the limitations on the purposive approach. First, it is the text of the Act which is being interpreted, and words can only be stretched so far. Even the purposive approach does not allow words to be given meanings they cannot bear.<sup>76</sup> Secondly, the purposive approach needs to be balanced against, and sometimes reconciled with, the approach to interpretation which gives effect to the fundamental values of our

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<sup>73</sup> *McMonagle v Westminster City Council* [1990] AC 716; *Wilson & Horton Ltd v CIR* [1996] 1 NZLR 26 at 33.

<sup>74</sup> “The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words ... This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation ... Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed”: *Inco Europe Ltd v First Choice Distribution* [2000] 2 All ER 109 at 115 per Lord Nicholls. See also *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604 at 612-614 per Thomas J.

<sup>75</sup> For example, *R v Clayton* [1973] 2 NZLR 211 at 214 (penal acts); *CIR v Alcan NZ Ltd* [1994] 3 NZLR 439 at 444 and 446 (tax acts). (But in cases of genuine doubt the individual should still get the benefit of that doubt.)

<sup>76</sup> *Cutter v Eagle Star Insurance Co Ltd* [1998] 4 All ER 417 at 425.

legal system. We refer to this later.<sup>77</sup> Thirdly, it is important that the purposive approach only be used when it is quite clear what the parliamentary purpose is. It does not entitle interpreters to guess at purpose, or invent one of their own.<sup>78</sup>

#### *Updating interpretation*

Section 6 of the Interpretation Act 1999 provides as follows:

**6** An enactment applies to circumstances as they arise.

The earlier version of this in the Acts Interpretation Act 1924 (section 5(d)) contained the indicative phrase that the law “shall be considered as always speaking”. This recognises the fact that many Acts have been in force for many years and operate today in a society very different from those in which they were originally enacted. Sometimes Judges are required to engage in a fairly liberal interpretation to ensure that the purpose of an old Act is fulfilled in today’s different conditions. Thus, it has been held that a computer programme is a “document” for the purposes of the fraud provisions in the Crimes Act 1961,<sup>79</sup> that computer hacking is “damage to property”;<sup>80</sup> that Internet images are “photographs”,<sup>81</sup> and that the phrase “member of the family” includes a gay partner.<sup>82</sup> If courts were unable to take such an approach, Parliament would need constantly to be amending old Acts. Nevertheless, there are limits on the updating or “ambulatory” approach. The activity under scrutiny must be within the purpose of the original legislation; the words of the Act must be able to bear the meaning, albeit a very liberal one, which is placed upon them; and the interpretation given must not be such a dramatic change in the law that it should have been left to Parliament rather than the courts.<sup>83</sup>

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<sup>77</sup> Below, under the heading ‘Values’

<sup>78</sup> *Chan Chi-hung v R* [1996] 1 All ER 914 at 922.

<sup>79</sup> *R v Misis* [2001] 3 NZLR 1.

<sup>80</sup> *R v Garrett* [2001] DCR 955.

<sup>81</sup> *R v Fellows* [1997] 2 All ER 548.

<sup>82</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

<sup>83</sup> *Birmingham City Council v Oakley* [2001] 1 AC 617, especially at 632 per Lord Hoffmann. Cf *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

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### *Extrinsic materials*

In interpreting Acts, courts routinely refer to materials external to the Acts. There is greater readiness in this regard today than there used to be. One still finds occasional statements that some sorts of extrinsic materials (in particular, legislative history) should not be referred to if the Act is clear as it stands, but that is not a significant constraint. By the time a case has reached the courts, it is almost always possible to raise some doubt or ambiguity which will justify reference to these other materials. In fact, even legislative history is usually now admitted if counsel so request. Extrinsic materials may be referred to for a number of reasons. Sometimes they are merely contextual; if one understands the genesis and setting of an Act one usually understands the Act itself more readily. Sometimes they are used the better to understand the purpose of the legislation. Sometimes courts refer to them to ensure that a proposed interpretation is consistent with other elements in the legal system.

Some of the extrinsic materials that may be referred to include the following.

#### *Current statutes*

It is very common for one Act of Parliament to be read in the context of other Acts on similar topics. Sometimes this is valuable by way of comparison so that one can assess the importance of the different wording used in the different Acts.<sup>84</sup> More often, though, it is used to ensure consistency across the system.<sup>85</sup> If a provision of one Act is apparently inconsistent with one in another Act, the court will make an effort to reconcile them, perhaps by reading one of them down, or by deciding that one of them is to be read as a special code which stands as an exception to the more general provisions of the other.<sup>86</sup> If provisions of two Acts are irreconcilably inconsistent, the court may, as a last resort, hold that the second in time impliedly repeals the earlier. It very seldom needs to go to this extent.

#### *Interpretation Act 1999*

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<sup>84</sup> For example, *Taylor v NZ Poultry Board* [1984] 1 NZLR 394 at 404.

<sup>85</sup> For example, *H v C* [1999] 3 NZLR 502.

<sup>86</sup> For example, *R v Allison* [2002] 1 NZLR 679.

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In addition to laying down principles of interpretation, the Interpretation Act 1999 contains provisions to assist in achieving the goal of consistency across all statutes. Thus:

- In Acts passed earlier than 1 November 1999 the masculine gender includes the feminine.<sup>87</sup>
- In all Acts the singular includes the plural, and vice versa.<sup>88</sup>
- There are rules for calculating distance and time.<sup>89</sup>
- There is a section allocating universal definitions to words commonly used in enactments.<sup>90</sup> Thus, words like “Act”, “enactment”, “month”, “person”, “prescribed”, “public notice”, “repeal”, “summary conviction” and “writing” (among others) are given definitions which are to apply in every enactment unless the enactment otherwise provides or its context otherwise requires.<sup>91</sup> These universal definitions are sometimes overlooked by interpreters.

#### *Earlier statutes*

Acts which have been repealed and replaced by the one under consideration are often referred to for interpretative purposes. They may be relevant as demonstrating the origin of a particular word or phrase;<sup>92</sup> and changes in wording between the versions can sometimes be significant.<sup>93</sup> Nevertheless, it is important not to attach too much significance to the latter. Now that plain English drafting is beginning to replace the older styles it may sometimes be that changes in wording have no purpose other than to express the same concept in more elegant language.

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<sup>87</sup> Section 31.

<sup>88</sup> Section 33.

<sup>89</sup> Sections 35 and 36.

<sup>90</sup> Section 29.

<sup>91</sup> Section 4.

<sup>92</sup> For example, *Registrar-General of Land v NZ Law Society* [2001] 2 NZLR 745.

<sup>93</sup> For example, *Attorney-General v Daemar* [1980] 2 NZLR 89.

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### *Common law*

The common law has a long history, and has shaped some of our most fundamental areas of law, including contract and tort. If statutes are enacted in those areas there is sometimes a question as to how significantly, if at all, they change the common law. While it has been authoritatively stated that it is only if the words of the statutory code are “of doubtful import” that one should seek assistance from the earlier common law,<sup>94</sup> it is in fact quite common for courts to interpret statutes as not departing from established common law principles. Thus, the Contractual Remedies Act 1979, which enacts an apparently simple code about misrepresentation and cancellation of contract for breach, has on several occasions being interpreted by the Court of Appeal as not disturbing established common law principles.<sup>95</sup> It is most important, however, to adopt this style of interpretation only after very careful consideration. Some Acts were passed to remedy defects in the common law, and it would be to stultify their purpose to hold that they perpetuated it. It is important always to familiarise oneself thoroughly with the purpose of the Act; this may indeed have been to reform rather than preserve the common law.

Another question can sometimes arise: that is, whether a statute replaces a common law principle or rather preserves it and provides a new statutory rule which can operate in tandem with it. Thus, for example, it was held under the Employment Contracts Act 1991 that instead of relying on the personal grievance provisions of the Act an employee who was wrongfully dismissed could continue to rely on the old common law remedies for breach of contract.<sup>96</sup> Such questions require a careful consideration of the purpose of the legislation and whether it is so inconsistent with the common law that the latter cannot sensibly continue to operate in parallel.

### *Treaties*

Some Acts are passed to implement treaties into our domestic law. Others simply deal with a subject matter on which there happens to be international treaties to which New Zealand is a party. In both cases the courts strive to interpret the domestic Act consistently with the relevant international treaties. It is important that treaties be given effect to consistently across the countries

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<sup>94</sup> *Bank of England v Vagliano Bros* [1891] AC 107 at 144 and 145 per Lord Herschell.

<sup>95</sup> For example, *Garratt v Ikeda* [2002] 1 NZLR 577 and *Thompson v Vincent* [2001] 3 NZLR 355.

<sup>96</sup> *Ogilvy & Mather (NZ) Ltd v Turner* [1994] 1 NZLR 641.

that are parties to them, and the courts realistically assume that Parliament would not wish to legislate inconsistently with New Zealand's international obligations. If the wording of the domestic Act is clearly inconsistent with the treaty, the Act must prevail, but an effort will be made to interpret the domestic Act to avoid such inconsistency.<sup>97</sup>

A similar approach applies to the Treaty of Waitangi. Again, it is a realistic assumption that Parliament did not intend to legislate inconsistently with the Treaty, and where possible Acts will be construed so that they do not infringe its principles.<sup>98</sup>

*Social, economic, and environmental context*

Courts sometimes have regard to social, economic, and environment factors to better understand the purpose and intent of a statute.<sup>99</sup> This type of material can assist in a number of ways.

- An examination of the historical context prior to the passing of the Act may lead to a better understanding of the problem or mischief it was meant to remedy, and, consequently, of its purpose.
- It can be helpful to understand the current conditions in which the Act must continue to operate; this is particularly so of specialist statutes such as the Commerce Act 1986 and the Resource Management Act 1991.
- It may enable an interpreter to assess what the result of a particular interpretation is going to be. For example, when the Court of Appeal had to determine whether future earnings should be classified as matrimonial property it received evidence to enable it to understand the effects of such an interpretation on the relevant communities of interest.<sup>100</sup>

Nevertheless, it has been said in relation to this sort of material, that theory and practice are not well-developed in this country; “the basis on which

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<sup>97</sup> For example, *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44.

<sup>98</sup> *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 at 184.

<sup>99</sup> See Sir Ivor Richardson, “The role of judges as policy makers” (1985) 15 VUWLR 46 at 51 and 52.

<sup>100</sup> *Z v Z (No 2)* [1997] 2 NZLR 258. And see *Williams v Attorney-General* [1990] 1 NZLR 646 at 681.

judges should receive extra-statutory contextual information ... presently remains elusive in New Zealand".<sup>101</sup>

*Legislative history*

Although they were once excluded from consideration, it is now not uncommon for courts and other interpreters to refer to legislative or parliamentary history to assist in the interpretation of Acts. Among the materials which are referred to in this way are:

- reports of committees recommending legislation;<sup>102</sup>
- explanatory notes to Bills;<sup>103</sup>
- amendments made to Bills during the parliamentary process;<sup>104</sup>
- commentaries of parliamentary select committees;<sup>105</sup>
- parliamentary debates as reported in *Hansard*.<sup>106</sup>

Most often such materials are referred to simply to provide contextual background, but on occasion they can be helpful in providing indications of the purpose of a provision, or sometimes even evidence of the intended application of a provision to a particular situation. Extracts from Ministers' speeches in parliamentary debates are the most commonly referred to. However, caution is required. Only the words of the statute as enacted represent the intention of Parliament; the statements found in the legislative history are only indications of what the promoters of a particular provision believed. Thus, statements in the parliamentary history must not be allowed

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<sup>101</sup> Justice McGrath, "Reading legislation and Ivor Richardson" in Carter, D and Palmer, M (eds), *Roles and perspectives in the law: Essays in Honour of Sir Ivor Richardson* Victoria University Press, Wellington, 2002, at 617 and 618.

<sup>102</sup> For example, *Thexton v Thexton* [2001] 1 NZLR 237 at 250.

<sup>103</sup> For example, *Frucor Beverages Ltd v Rio Beverages Ltd* [2001] 2 NZLR 604.

<sup>104</sup> For example, *Brown & Doherty Ltd v Whangarei County Council* [1990] 2 NZLR 63 at 67.

<sup>105</sup> For example, *R v Palmer* [2000] 1 NZLR 546 at 550.

<sup>106</sup> For example, *De Richaumont Investment Co Ltd v OTW Advertising Ltd* [2001] 2 NZLR 831 at 841; *Everitt v Attorney-General* [2002] 1 NZLR 82 at 95.

to supersede or qualify the words of the Act itself.<sup>107</sup> Moreover, particularly under the Mixed Member Proportional (MMP) voting system where many amendments are made to a Bill during its progress through the House, one must always be vigilant to be sure that statements made early in the process remain relevant to the Act as finally enacted. One must also be careful to distinguish statements which truly reflect the reason for a particular provision or amendment from those which are more politically motivated. Courts need to exercise strict control over relevance. Nevertheless, with these cautions, there is no doubt that parliamentary history is playing an important part in statutory interpretation in the modern era.

### *Values*

When interpreting Acts, a court owes a duty not just to Parliament to ensure that its intention is carried out, but also to society to ensure that the rights of the citizen are upheld. This consideration tempers the purposive approach.

#### *The New Zealand Bill of Rights Act 1990*

The New Zealand Bill of Rights Act 1990 (Bill of Rights Act) codifies a number of important human rights. They include rights such as the rights of freedom of expression and assembly, and rights of access to the courts and to natural justice.

Section 6 of the Bill of Rights Act provides as follows:

**6 Interpretation consistent with Bill of Rights to be preferred**

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.

Thus, in cases where the words of an Act are ambiguous, or where more than one result is possible when applying the words to the facts of the case, the interpreter must *when it can be done* favour an interpretation which is consistent with the rights in the Bill of Rights Act. Normally it will be possible to reconcile this approach with the purposive approach, for it is

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<sup>107</sup> See *R v Bolton ex parte Beane* (1986) 79 ALR 225; *McLennan v Attorney-General* [1999] 2 NZLR 469 at 473; *R v Poumako* [2002] 2 NZLR 695 at 702. Members of the House of Lords have recently expressed considerable concern about the use sometimes made of *Hansard*: *Robinson v Secretary of State for Northern Ireland* [2002] UK HL 32 at paras 39 and 40.

normally quite realistic to say that Parliament cannot have intended a meaning which would infringe the Bill of Rights Act. But there are some occasions where the result might be different according to whether one takes a purposive approach or an approach based on section 6 of the Bill of Rights Act. In such a case, one Judge has said that section 6 is “comparable in importance to - perhaps of even greater importance” than the purposive approach.<sup>108</sup> Two things should be noted.

First, a Bill of Rights Act-consistent approach should only be taken if the words of the enactment in question *can* bear that meaning. Our courts have said that the words of the enactment must reasonably be capable of the meaning given to them, and that unnaturally strained meanings are not acceptable.<sup>109</sup> Yet in the past, when fundamental values were at stake, courts sometimes did adopt artificial meanings in an attempt to give effect to those values, and in Britain under the similar provision of the Human Rights Act 1998 (UK) there is evidence that the English courts are taking a very robust view of what amounts to a “possible” meaning.<sup>110</sup>

Secondly, section 5 of the Bill of Rights Act must not be neglected in this exercise. It provides as follows:

**5 Justified limitations**

**Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

In determining, for the purposes of section 6 of the Bill of Rights Act whether a limiting provision is consistent with a right, the requirements of section 5 should be weighed in the balance in that interpretative exercise: a *reasonable* and *justified* limitation is *not* inconsistent with a relevant right in the Bill of Rights Act.<sup>111</sup>

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<sup>108</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 272 per Cooke P.

<sup>109</sup> *Ibid* at 279; *Norton-Bennett v Attorney-General* [1995] 3 NZLR 712 at 717. And see *R v Patterson* [2002] 1 NZLR 245.

<sup>110</sup> See below, text at n 81.

<sup>111</sup> **Whether a limit is reasonable and justified depends on whether it is proportional to its objective. It must be rationally connected to that objective and no greater than necessary to achieve it. There is a most helpful discussion of s 5 by Andrew Butler in “Limiting**

Nevertheless, if a limiting provision is clear and is susceptible to no other interpretation than that it is inconsistent with a right in the Bill of Rights Act, the provision under interpretation will prevail by virtue of section 4 of the Bill of Rights Act. The Bill of Rights Act does not “trump”, or override, other legislation. But there have been suggestions that in such a case a court can give an indication (or “declaration”) that such inconsistency exists.<sup>112</sup>

### *Fundamental principles*

Long before the Bill of Rights Act, there had developed in the common law a set of fundamental principles which the courts strove to uphold. Many of them were human rights which emphasised the dignity of the individual and protected his or her property. Many but not all of these rights have been codified in the Bill of Rights Act. Those that have not been codified include the principle that property is not to be taken without compensation, and the right to freedom from slavery. Others of these ancient values are not so much human rights as fundamental principles of decent conduct. They include the rule that a person should not profit from his or her own wrong, and also the principle of equality before the law. Sometimes these principles are referred to as “principles of legality”. They almost served as an unwritten constitution.<sup>113</sup> They always have had, and still do have, an influence on statutory interpretation. The courts require clear words in legislation to override or limit them. It is the same style of interpretation as section 6 of the Bill of Rights Act requires. Thus, it has been held that the power in the Police Act 1958 to require particulars from an arrested person is confined to those bare particulars which relate to the person’s identity;<sup>114</sup> it has been held that the powers of interception of information conferred by the New Zealand Security Intelligence Service Act 1969 do not include the power to break into a dwelling house;<sup>115</sup> and regulation-making powers in an Act have been held

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**Rights”, a paper delivered to the conference: “Roles and Perspectives in the Law”, at Victoria University of Wellington, 5 and 6 April 2002. A template for applying ss 4, 5, and 6 of the Bill of Rights, is provided in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at 16, although the formulation there set out has not escaped criticism: see, for example, Professor Paul Rishworth, NZLS seminar: *The Bill of Rights – Getting the Basics Right* (2001), 44-46. In *Moonen v Film and Literature Board of Review* CA 238/01, 16 April 2002, at 760 the Court of Appeal noted that the template in *Moonen No 1* was not meant to be prescriptive.**

<sup>112</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at 16.

<sup>113</sup> They are fully discussed in Chapter 3 of these Guidelines.

<sup>114</sup> *Moulton v Police* [1980] 1 NZLR 443.

<sup>115</sup> *Choudry v Attorney-General* [1999] 2 NZLR 582.

to be subject to the implicit proviso that regulations cannot be made which infringe the principles of natural justice.<sup>116</sup> There is a sense in which legislation and fundamental common law principles coalesce.

*The presumption against retrospectivity*

There is a presumption that Acts are not to be read as being retrospective. Section 7 of the Interpretation Act 1999 lays down an apparently blanket rule:

**7 An enactment does not have retrospective effect.**

However, given that all the provisions of the Interpretation Act 1999 apply only so far as they are consistent with the words and context of the particular legislation under scrutiny,<sup>117</sup> it is clear that section 7 does no more than codify the long-standing presumption against retrospectivity which existed at common law. But that presumption has different strengths in different contexts. It is strongest in relation to legislation that imposes obligations or penalties, or takes away acquired rights. In the case of beneficial social legislation, a court may be much more inclined to find that the legislation operates retrospectively as well as prospectively.<sup>118</sup> Among the matters taken into account will be the words of the legislation in question, its purpose, its context, and the injustice or otherwise of finding retrospectivity. The much-quoted maxim that procedural Acts are more likely to be interpreted retrospectively than substantive ones is at best only a guideline; the effect of statutes upon previously acquired rights is more important than any label which may be attached to them.<sup>119</sup>

*The consequences of an interpretation*

The courts are naturally unwilling to arrive at an interpretation which has unreasonable or inconvenient results. As Danckwerts LJ said: “An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available”.<sup>120</sup> Sometimes the consequences of a preferred interpretation are expressly noted in judgments:

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<sup>116</sup> *Drew v Attorney-General* [2002] 1 NZLR 58. Fundamental principles, as well as the Bill of Rights, were relied on in arriving at this conclusion.

<sup>117</sup> Section 4 of the Interpretation Act 1999.

<sup>118</sup> See, for example, *W v W* (2000) 14 PRNZ 157.

<sup>119</sup> *Accolade Autohire Ltd v Aeromax Ltd* [1998] 2 NZLR 15.

<sup>120</sup> *Artemiou v Procopiou* [1966] 1 QB 878 at 888.

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- Sometimes the fact that an interpretation is “sensible” is referred to as one of the reasons for arriving at it.<sup>121</sup>
  - Sometimes a court will wish to know the economic or social implications of a certain interpretation to assess its likely effect.<sup>122</sup>
  - When old Acts are being interpreted, their workability in a modern world is a relevant consideration.<sup>123</sup>
  - Cases determining whether a statute is retrospective in its operation occasionally make express reference to any unfairness or injustice that such a finding would entail.<sup>124</sup>
  - Practical convenience and smoothness of transition are relevant factors in the interpretation of transitional provisions.<sup>125</sup>

### *The future*

Approaches to statutory interpretation change over time. In New Zealand, as in other jurisdictions, there has been a clear move over the last 30 years or so from a literal to a purposive approach. No doubt there will be new emphases in future. It is worth discussing at least two matters which may possibly influence the approach to interpretation in New Zealand in the years to come.

### *Human rights*

The Human Rights Act 1998 (UK) section 3 requires English courts “so far as it is possible to do so” to interpret United Kingdom legislation consistently with the European Convention on Human Rights. This requirement has had far-reaching results. First, when the Human Rights Bill was undergoing the parliamentary process, Lord Cooke said that section 3 went further than existing rules of interpretation “because it enjoins a search for possible

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<sup>121</sup> For example, *Hamilton City Council v Fairweather* [2002] NZAR 477 at 491-492 per Baragwanath J.

<sup>122</sup> *Z v Z* (No 2), above n 51.

<sup>123</sup> See above, text at n 30.

<sup>124</sup> *Accolade Autohire Ltd v Aeromax Ltd* above n 70 at 18.

<sup>125</sup> A good example is *Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd* (PC) [2002] UKPC 25, 25 May 2002.

meanings as distinct from the true meaning – which has been the traditional approach in the matter of statutory interpretation in the courts”.<sup>126</sup>

This suggests that what the court must seek is not so much the intention of the Parliament which passed the legislation in question, but the interpretation which best harmonises that legislation with the convention. Dicta in the English courts support this.<sup>127</sup> There are some indications that the New Zealand courts may be prepared to take a similar approach under the Bill of Rights Act,<sup>128</sup> but it has not been as strongly or consistently articulated.

Secondly, the New Zealand courts have taken the line in applying section 6 of the Bill of Rights Act that it can only give words a rights-consistent interpretation if that meaning is *reasonably* available.<sup>129</sup> a strained interpretation is not acceptable. The English courts have been more robust: a *possible* meaning is enough. This has led to interesting contrasts between New Zealand and English decisions.<sup>130</sup> It has also led to debate in the United Kingdom as to what are the limits of “possible” meaning.<sup>131</sup>

Whether the more overt rights-based English approach will filter through to New Zealand remains to be seen. There are signs that at least some of our Judges are prepared to take a very strong line in the protection of human rights.<sup>132</sup> But it is believed that it is unlikely that our courts will go as far as their English counterparts. The Human Rights Act 1998 (UK) contains no equivalent to section 4 of the New Zealand Bill of Rights Act and, as Lord

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<sup>126</sup> GB Hansard 583 HL Deb col 573 (Nov 18, 1997).

<sup>127</sup> “When the court interprets legislation usually its primary task is to identify the intention of Parliament. Now, when s 3 applies, the courts have to adjust their traditional role in relation to interpretation so as to give effect to the direction contained in s 3”: *Poplar Housing and Regeneration Community Assn Ltd v Donoghue* [2002] QB 48 at 72 per Lord Woolf CJ. See also *Re K* [2001] Fam 377 at 394 per Butler-Sloss P.

<sup>128</sup> See *R v Poumako* [2000] 2 NZLR 695 at 702. This may also be an implication of *Flickinger v Hong Kong* [1991] 1 NZLR 439 where it is said that an established interpretation of an Act may have to be revisited after the Bill of Rights Act.

<sup>129</sup> Above, text at n 60.

<sup>130</sup> In *R v Lambert* [2001] 3 All ER 577 (HL) it was held that a “reverse onus” provision should be interpreted as referring to an evidential onus; in *R v Phillips* [1991] 3 NZLR 175 the New Zealand Court of Appeal found this was not a “reasonable” interpretation of such a provision.

<sup>131</sup> See Young [2002] CLJ 53.

<sup>132</sup> See the judgments of Elias CJ and Tipping J, and Thomas J in *R v Pora* [2001] 2 NZLR 37.

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Cooke has intimated,<sup>133</sup> section 6 of the New Zealand Act is not identical to section 3 of its United Kingdom equivalent. These factors, together with the increasing influence in the United Kingdom of the more liberal European styles of interpretation, are likely to mean that New Zealand courts will not feel able to go to the same lengths.<sup>134</sup>

*Plain English drafting*

There is a strong movement in New Zealand towards plain English drafting of legislation, by virtue of which provisions are expressed as economically as possible and in modern language. One of the objectives is to make legislation more accessible to ordinary people, although it is acknowledged that this aspiration will not always be able to be achieved: much law will always be for experts.

It may be that Acts in plain English will come before the courts less often, in that being clearer than their predecessors they will require less interpretation. However, that is probably being too optimistic. The English language is inherently imprecise, and very few words do not have shades of meaning. This, coupled with the fact that Acts have to be applied to situations unforeseen by the drafter, means that there will continue to be work for the courts. This will particularly be so where the drafter has used open-textured statements of principle.

It is, as yet, too early to say whether these developments in drafting style will have any influence on the way courts and others interpret such Acts. In theory they could. In the past, drafters have tended to draft for lawyers and Judges, secure in the knowledge that certain rules and conventions would be used to interpret the resultant Acts. With plain language drafting, however, the potential audience could be much wider, and one may need seriously to ask how *an ordinary reader* (not a Judge or lawyer) would understand the provision.

There could in theory be several implications. One could be that extrinsic materials will have less of a part to play: the non-lawyer has little knowledge of the antecedents of revised Acts, or of legislative history. Another might be

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<sup>133</sup> *R v DPP ex parte Kebeline* [2000] 2 AC 326 at 373.

<sup>134</sup> A useful account of statutory interpretation in Europe is to be found in Manchester C et al, *Exploring the Law: the dynamics of precedent and statutory interpretation* (2nd ed) Sweet and Maxwell, London, 2000, Chapters 1-5.

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that internal aids to interpretation – outline parts, graphics, examples, headings, etc – could take on a greater importance than they have traditionally had: they all contribute to conveying the message to the reader. Another might be that more consideration should be given to how an ordinary reader would understand an old Act in the world of today.

The point has also been made<sup>135</sup> that as old statutes drafted in the traditional “legalistic” style are replaced by modern plain English versions it may become increasingly clear that the message or underlying principle of the law is not the same thing as the words in which it is couched. Once it becomes obvious that the same thing can be said in different ways, we may be induced to move progressively away from the old literal approach to interpretation, and closer to the freer style, not so word-dependent, which has always been used in European countries.

However this is speculative only. The plain English statutes have so far made few appearances in the courts, and one cannot yet make confident pronouncements.

### **3A.1.3 Guidelines**

If there is dispute over the meaning or application of an Act the matter may go to court, and it is the court which will authoritatively determine the true interpretation of the statute. Those preparing legislation should therefore be mindful of the rules and conventions which the courts apply in the process of interpretation.

- The Act will be read as a whole. It is thus important that it have internal coherence.
- Any indications provided in the Act (eg, notes and headings) may be used for interpretation.
- Courts are required to interpret an Act in the light of its purpose. Statements of purpose in the Act should thus be carefully considered and expressed.
- Courts can go no further than to interpret the words of the Act: they normally will not supplement or gloss those words. It is thus

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<sup>135</sup> Sullivan, R, (2001) 22:3 Statute Law Review 175.

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important that all matters necessary for the effective operation of the Act be spelled out in the Act.

- The courts will take a variety of matters external to the Act into account when interpreting it. It is thus essential that those responsible for the preparation of the legislation bear these matters in mind, and ensure that the Act's relation with them is very clear. These external matters include:
  - **treaties;**
  - **the common law;**
  - **other statutes;**
  - **documents created during the legislation's inception, eg: explanatory notes, select committee commentaries, etc.**
- Courts attempt to interpret Acts consistently with fundamental values of the legal system, many but not all of which are contained in the Bill of Rights Act. Those preparing legislation should attempt to ensure that it is consistent with these values.

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PART 2

HAS THE INTERPRETATION ACT 1999 BEEN CONSIDERED?

**3A.2.1 Outline of issue**

The Interpretation Act 1999 (the Act) has been in force since 1 November 1999. It replaces the Acts Interpretation Act 1924 and is largely based on the recommendations made by the Law Commission in its 1990 report *A New Interpretation Act: To Avoid Prolixity and Tautology* (NZLC R17)).

This Part complements the comments made in Part 1. It sets out the provisions of the Act and provides a brief commentary on those provisions.

In general, new legislation should be consistent with the Act, and matters that are already provided for in that Act should not be restated in new legislation.

**3A.2.2 Interpretation Act 1999**

***Interpretation Act 1999***

*Public Act 1999 No 85*

***An Act relating to the interpretation, application, and effect of legislation***

*BE IT ENACTED by the Parliament of New Zealand as follows:*

***1 Short Title***

*This Act may be cited as the Interpretation Act 1999.*

*Part 1*

*Purposes, commencement, and application*

***2 Purposes of this Act***

*The purposes of this Act are-*

- (a) to state principles and rules for the interpretation of legislation; and*
- (b) to shorten legislation; and*
- (c) to promote consistency in the language and form of legislation.*

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## Comment

The Act serves these purposes in several ways. First, it contains basic principles relating to the interpretation of legislation. Secondly, it sets out detailed rules about matters that commonly arise in legislation (including the date of commencement of legislation, the exercise of powers between the passing and commencement of legislation, the exercise of powers in legislation generally, the effect of repeals, and the computation of time and distance). Thirdly, it sets out standard definitions of terms frequently found in legislation.

The general provisions and detailed rules contained in the Act mean that those provisions do not have to be repeated in every piece of legislation. Those provisions apply across the statute book. They can be used repeatedly and with certainty as to their effect. The result is that legislation can be framed in more economical terms and the length of legislation is reduced.

This is not to say that the Act is only concerned with the technical aspects of legislation. The general principles of interpretation set out in the Act (especially the principle contained in section 5(1) that the meaning of an enactment must be ascertained from its text and in the light of its purpose) confirms Parliament's central position in New Zealand's constitutional arrangements and the importance of giving effect to the law enacted by Parliament. The Act may also assist in making legislation more accessible to the public, which may in turn enhance public participation in the democratic process. Thus, while at first glance the Act may appear to be technical in nature, it has a far more important constitutional role.

### **3 Commencement**

*This Act comes into force on 1 November 1999.*

### **4 Application**

(1) *This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless-*

(a) *the enactment provides otherwise; or*

(b) *the context of the enactment requires a different interpretation.*

(2) *The provisions of this Act also apply to the interpretation of this Act.*

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### Comment

The provisions of the Act are essentially “default provisions”; they apply to an enactment unless there are legislative signals to the contrary. Accordingly, it is possible to depart from the provisions of the Act if a different result is desired. This can be done expressly or by implication. For example, if the term “month” is intended to have a different meaning from the standard definition in section 29 of the Act, it will need to be defined differently. An express provision is needed to override the standard definition of that term in section 29, although it is not necessary to specifically refer to that section by, for example, providing “Despite section 29 of the Interpretation Act 1999, **month** means the period commencing on the first business day in any calendar month and ending on the last business day of that month”. A definition of the term that is different from the section 29 definition will be enough. Likewise, if an enactment is to be given retrospective effect, the enactment will have to override the general principle in section 7 of the Act. That section provides that enactments do not have retrospective effect. This can be achieved by providing that the enactment is to be treated as having come into force on a date before its enactment.

### *Part 2*

#### *Principles of interpretation*

##### **5** *Ascertaining meaning of legislation*

- (1) *The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
- (2) *The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
- (3) *Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.*

### Comment

Section 5(1) represents a legislative direction to those interpreting legislation to give effect to the purpose of the legislation. It gives legislative effect to the purposive approach to interpretation that was inherent in section 5(j) of the

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Acts Interpretation Act 1924,<sup>136</sup> which has long been adopted by the courts in interpreting legislation but is framed in shorter and more modern language.

The term “indications”, which is used in section 5(2) and (3), is not defined in the Act but examples of it are given in section 5(3). Those examples are non-exhaustive and include “preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples, and explanatory material, and the organisation and format of the enactment”.

## **6      *Enactments apply to circumstances as they arise***

*An enactment applies to circumstances as they arise.*

### Comment

Section 6 reflects the “dynamic” or “ambulatory” approach to interpretation that was contained in section 5(d) of the Acts Interpretation Act 1924. Under this approach, the enactment is considered as always speaking and, regardless of the passage of time, an old enactment may be applied to new circumstances.

This is in contrast to the “historical” or “static” approach to interpretation, which required legislation to be interpreted in accordance with its meaning at the time of enactment. For example, the word “document” in a 1963 statute might not, under the historical approach, necessarily include a videotape.<sup>137</sup>

## **7      *Enactments do not have retrospective effect***

*An enactment does not have retrospective effect.*

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<sup>136</sup> Section 5(j) of the Acts Interpretation Act 1924 required legislation to be given “such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit”. Section 5(1) of the 1999 Act is notable as it does not refer to “such fair, large, and liberal construction and interpretation”.

<sup>137</sup> Cf *Longcroft-Neal v Police* [1986] 1 NZLR 394, where the Court of Appeal held that a videotape cassette came within the definition of “document” in section 2 of the Indecent Publications Act 1963.

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Comment

Section 7 codifies the well established common law presumption against the retrospective operation of legislation. As noted earlier, this section does not prevent Parliament from enacting retrospective statutes. Nor does it prevent the Executive from making regulations that have retrospective effect, so long as the empowering statute allows this to be done.

*Part 3*

*Specific provisions applying to legislation*

*Commencement of legislation*

**8** *Date of commencement of Acts*

- (1) *An Act or an enactment in an Act comes into force on the date stated or provided in the Act for the commencement of the Act or for the commencement of the enactment.*
- (2) *If an Act does not state or provide for a commencement date, the Act comes into force on the day after the date of assent.*

**9** *Date of commencement of regulations*

- (1) *Regulations or enactments in regulations come into force on the date stated or provided in the regulations for the commencement of the regulations or for the commencement of the enactments.*
- (2) *If regulations do not state or provide for the date on which the regulations or enactments in the regulations come into force, the regulations come into force on the day after the date of their notification in the Gazette.*

Comment

Before the commencement of the Act, Acts that were silent as to the date of their commencement came into force on the day on which they received assent. In other words, they came into force at the beginning of the day of assent. This allowed for a slight degree of retrospectivity and would have conflicted with the principle against retrospectivity under section 7 of the Act. Thus, the Act now provides that an Act comes into force on the day *after* the date of assent. It is, of course, open to Parliament to provide for a different commencement date. For example, it is quite common for different provisions of the same Act to come into force on different dates. Sometimes an Act may also provide for its commencement on a date to be appointed by the Governor-General by Order in Council.

Under the Standing Orders, however, Bills are required to have a distinct clause stating when the Bill comes into force (SO 252 refers). This means that Acts will almost always specify a commencement date or make specific provision for their commencement. If an Act is silent as to when it comes into force, the default position under section 8 of the Act is that the Act comes into force on the day after the date of assent. If an Act is required to come into force on the commencement of the date of assent or on the expiry of the previous day, it will be necessary to provide for this in the same manner as for any other retrospective legislation.

Similarly, regulations invariably contain commencement provisions. Under section 9 of the Act, the default position for regulations is that they will come into force on the day after the date of their notification in the *Gazette*.

### **10 Time of commencement of legislation**

- (1) *An enactment comes into force at the beginning of the day on which the enactment comes into force.*
- (2) *If an enactment is expressed to take effect from a particular day, the enactment takes effect at the beginning of the next day.*
- (3) *An Order in Council may appoint a day for an enactment to come into force that is the same day as the day on which the Order in Council is made, in which case the enactment comes into force at the beginning of that day.*

#### **Comment**

Section 10(1) relates to the time, rather than the date, of commencement. It states that an enactment comes into force at the beginning of the day on which the enactment comes into force.

#### *Exercise of powers between passing and commencement of legislation*

### **11 Exercise of powers between passing and commencement of legislation**

- (1) *A power conferred by an enactment may be exercised before the enactment comes into force or takes effect to-*
  - (a) *make a regulation or rule or other instrument; or*
  - (b) *serve a notice or document; or*
  - (c) *appoint a person to an office or position; or*
  - (d) *establish a body of persons; or*

- 
- (e) *do any other act or thing for the purposes of an enactment.*
- (2) *The power may be exercised only if the exercise of the power is necessary or desirable to bring, or in connection with bringing, an enactment into operation.*
- (3) *The power may not be exercised if anything that results from exercising the power comes into force or takes effect before the enactment itself comes into force unless the exercise of the power is necessary or desirable to bring, or in connection with bringing, the enactment into operation.*
- (4) *Subsection (1) applies as if the enactment under which the power is exercised and any other enactment that is not in force when the power is exercised were in force when the power is exercised.*

### Comment

Section 11 of the Act deals with the anticipatory exercise of powers in legislation. It allows powers under an enactment to be exercised before the enactment comes into force if the exercise of those powers is necessary or desirable to bring the enactment into operation. A common example of the use of this provision is the making of regulations or rules<sup>138</sup> that are required to ensure that the Act is ready to operate as soon as it comes into force.

However, note the qualification in section 11(3) of the Act, which provides that a power may not be exercised if anything that results from exercising the power comes into force or takes effect before the enactment comes into force unless the exercise of the power is itself necessary or desirable to bring the enactment into operation.

Section 11 of the Act essentially re-enacts section 12 of the Acts Interpretation Act 1924, but there is a change. The 1999 Act uses the word “enactment” instead of “Act”.

The application of section 11 of the Act has been considered by the Court of Appeal in *New Zealand Employers Federation Incorporated v National Union of Public Employees* [2002] 2 NZLR 54. The central issue in that case was whether the registration of a union by the Registrar of Unions under Part 4 of the Employment Relations Act 2000 before the commencement of that

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<sup>138</sup>

Regulations that prescribe forms, fees, and court rules are examples.

Act involved the exercise of a power “necessary or desirable to bring, or in connection with bringing” the enactment into operation within the exception provided by section 11.

The majority of the Court held that section 11 did not authorise the registration of unions before the commencement of the Employment Relations Act 2000. The Court considered that employee associations were not part of the governmental administrative institutions necessary or desirable for bringing that Act into force. Tipping J said (para 99):

The concept of bringing an enactment into operation involves a distinction between getting an enactment ready to operate, and actually operating its substantive provisions. The distinction is between putting in place the infrastructure necessary or desirable to make the enactment work on the one hand, and, on the other, the actual operation of its substantive provisions. In my view the power in issue in this case falls into the latter non-qualifying category...

*Exercise of powers in legislation generally*

**12 Power to appoint to an office**

*The power to appoint a person to an office includes the power to -*

- (a) *remove or suspend a person from the office:*
- (b) *reappoint or reinstate a person to the office:*
- (c) *appoint another person in place of a person who -*
  - (i) *has vacated the office; or*
  - (ii) *has died; or*
  - (iii) *is absent; or*
  - (iv) *is incapacitated in a way that affects the performance of that person’s duty.*

**Comment**

Although the powers contained in section 12 will often be found in statutes that specifically provide for the appointment of a person, this section has been retained to avoid uncertainty. It essentially re-enacts section 25(f) of the Acts Interpretation Act 1924, but goes a little further than section 25(f) by including the power to make an appointment if the appointee has vacated office.

### **13 Power to correct errors**

*The power to make an appointment or do any other act or thing may be exercised to correct an error or omission in a previous exercise of the power even though the power is not generally capable of being exercised more than once.*

#### Comment

Section 13 allows a power to be exercised to correct an error or omission in a previous exercise of the power, even though the power is not generally capable of being exercised more than once. The purpose of section 13 is to allow minor technical corrections to be made in order to prevent the exercise of a power from being technically invalid. Section 13 does not appear to be intended to allow the re-exercise of a power on the basis that the people exercising the power had changed their minds, but is directed more at allowing corrections that are clerical or technical in nature to be made.

Section 13 was considered by the High Court in *Neil Construction Ltd v North Shore City Council* [2001] 3 NZLR 533. The issue in that case was whether unsold subdivided land that had been valued in a single assessment rating by the respective local councils could be revalued as individual lots. The High Court held that the original rating could not be regarded as an error that fell within section 13. The High Court also held that, in any event, section 13 could not be applied because section 4(1) of the Act expressly provides that the Act only applies unless the context otherwise requires. In the *Neil* case, the High Court held that the express and detailed provisions of the Rating Valuations Act 1998 and the Rating Valuations Rules 2000 prevented the more general provisions of section 13 applying in that case.

### **14 Exercise of powers by deputies**

*A power conferred on the holder of an office, other than a Minister of the Crown, may be exercised by the holder's deputy lawfully acting in the office.*

### **15 Power to amend or revoke**

*The power to make or issue a regulation, Order in Council, Proclamation, notice, rule, bylaw, Warrant, or other instrument includes the power to -*

- (a) *amend or revoke it:*
- (b) *revoke it and replace it with another.*

### **16 Exercise of powers and duties more than once**

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- (1) *A power conferred by an enactment may be exercised from time to time.*
  - (2) *A duty or function imposed by an enactment may be performed from time to time.*

Comment

Sections 14 to 16 avoid the need for individual Acts to provide expressly for the matters set out in those sections.

*Repeals*

**17** *Effect of repeal generally*

- (1) *The repeal of an enactment does not affect -*
  - (a) *the validity, invalidity, effect, or consequences of anything done or suffered:*
  - (b) *an existing right, interest, title, immunity, or duty:*
  - (c) *an existing status or capacity:*
  - (d) *an amendment made by the enactment to another enactment:*
  - (e) *the previous operation of the enactment or anything done or suffered under it.*
- (2) *The repeal of an enactment does not revive -*
  - (a) *an enactment that has been repealed or a rule of law that has been abolished:*
  - (b) *any other thing that is not in force or existing at the time the repeal takes effect.*

Comment

It is usual for a new Act to repeal an existing Act that it replaces, or a new Act may simply repeal an existing Act without replacing it. Section 17 of the Act sets out the effect of repeals generally. It explains what effect the repeal has on existing situations and things that have been done under the repealed Act.

One particular effect of section 17 is that the repeal of an Act will not automatically repeal any amendment made by that Act to some other Act (*see*

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section 17(1)(d)). This avoids the need for savings provisions, but amendments made by an Act to other Acts that are not intended to survive a repeal will have to be considered separately and specific provision will have to be made for them.

**18 *Effect of repeal on enforcement of existing rights***

- (1) *The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.*
- (2) *A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.*

**Comment**

Section 18 does not avoid the need for detailed transitional provisions to be included in legislation whenever existing law is changed or replaced and things that had been commenced under an old regime are intended to be completed under that regime, rather than the new regime. Section 18 is merely a backstop provision.

The application of section 18 was considered by both the High Court and the Court of Appeal in *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353. In that case, Progressive Enterprises Ltd (Progressive) had applied to the Commerce Commission for clearance to acquire Woolworths New Zealand before the commencement of the Commerce Amendment Act 2001. As the 2001 Act set out a stricter test for competition, the issue was whether the Commerce Commission should, in determining the application, apply the test in force at the time the application was made or the new test enacted by the 2001 Act. The High Court had held that as Progressive's application had been made before the new test came into force, it should be determined under the test in force at the time of the application. The Court of Appeal reversed that decision and held that the Commerce Commission should have applied the new test. In reaching its decision, the Court of Appeal held that section 18 should not be read disjunctively. The reference to "completion of a matter or thing" in section 18 must be read to relate to an existing right, interest, title, immunity, or duty. In the context of that case, the Court of Appeal held that the interest Progressive had in the determination of its application under the Commerce Act 1986 was not a right or interest for the purposes of section 18.

In the Court of Appeal (and also in the High Court), the judgment turned on whether section 18 applied and, in particular, whether the clearance application was a proceeding relating to an existing right or interest to which the old law would apply. When the case reached the Privy Council, however, the judgment focused on the meaning of the term “proceedings” in section 26(b) of the Commerce Amendment Act 2001 (see *Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd* (2002) 7 NZBLC 103). That section provides that nothing in the 2001 Act “affects any proceedings commenced before the commencement of this Act”. The Privy Council held that, in this context, “proceedings” is not limited to court proceedings and includes the clearance process as a single statutory proceeding involving the Commerce Commission and potentially, on appeal, the High Court or Court of Appeal.

Given that the Privy Council judgment did not address the same grounds covered in the Court of Appeal’s decision, the status of the Court of Appeal’s interpretation of section 18 is unclear.

### ***19 Effect of repeal on prior offences and breaches of enactments***

- (1) *The repeal of an enactment does not affect a liability to a penalty for an offence or for a breach of an enactment committed before the repeal.*
- (2) *A repealed enactment continues to have effect as if it had not been repealed for the purpose of -*
  - (a) *investigating the offence or breach:*
  - (b) *commencing or completing proceedings for the offence or breach:*
  - (c) *imposing a penalty for the offence or breach.*

### **Comment**

Section 19 confirms that the repeal of an enactment does not prevent prosecutions from being brought under the repealed provision as long as the offence or breach was committed before the repeal. It should be noted that section 19 is slightly broader in effect than the corresponding provision (section 20(h)) of the Acts Interpretation Act 1924 as it expressly refers to the “investigation” of the offence or breach of an enactment. This change was made in light of the decision in *Comptroller of Customs v ML Hannigan* 25/9/97, Salmon J, HC, Auckland M 697/97, where the High Court held that section 20(h) did not apply to the investigative process.

**20 Enactments made under repealed legislation to have continuing effect**

- (1) *An enactment made under a repealed enactment, and that is in force immediately before that repeal, continues in force as if it had been made under any other enactment -*
- (a) *that, with or without modification, replaces, or that corresponds to, the enactment repealed; and*
- (b) *under which it could be made.*
- (2) *An enactment that continues in force may be amended or revoked as if it had been made under the enactment that replaces, or that corresponds to, the repealed enactment.*

**21 Powers exercised under repealed legislation to have continuing effect**

*Anything done in the exercise of a power under a repealed enactment, and that is in effect immediately before that repeal, continues to have effect as if it had been exercised under any other enactment -*

- (a) *that, with or without modification, replaces, or that corresponds to, the enactment repealed; and*
- (b) *under which the power could be exercised.*

**Comment**

Sections 20 and 21 of the Act provide for the continuation of subordinate legislation (for example, regulations, notices, orders, and rules) made, or acts done, under a repealed enactment. The subordinate legislation, or the act done, continues as if it had been made under a later enactment that *corresponds to* the repealed enactment.

The notion that the later enactment must correspond to the repealed enactment is carried over from sections 20(d) and 20A of the Acts Interpretation Act 1924. The term “corresponds” has been retained, despite the recommendation of the Law Commission that it be replaced with the term “substitution”, because the meaning of “corresponds” is well settled under the common law. In *Re Eskay Metalware Limited (in liquidation)* [1978] 2 NZLR 46, the Court of Appeal held that the new provision must be of the same character as its predecessor and must have the same kind of function. The new provision does not need to be identical in scope but it must deal with a subject-matter that is essentially the same as that of its predecessor. If the new provision is directed to the same end, there need not be precise correspondence in the manner of dealing with the subject-matter.

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## **22     *References to repealed enactment***

- (1)     *The repeal of an enactment does not affect an enactment in which the repealed enactment is applied, incorporated, or referred to.*
- (2)     *A reference in an enactment to a repealed enactment is a reference to an enactment that, with or without modification, replaces, or that corresponds to, the enactment repealed.*
- (3)     *Subsection (1) is subject to subsection (2).*

### **Comment**

Section 22(2) re-enacts section 21 of the Acts Interpretation Act 1924, but uses the word “enactment” rather than the word “Act”. The effect of this change is to resolve conflicting case law as to whether section 21 applied only where the entire Act was repealed, rather than just a section of an Act (see *Ministry of Transport v Hamilton* (HC, Wanganui, M 73/84, 4 April 1985), in which Eichelbaum J held that section 21 operated only where a whole Act was repealed. See also *R v Barker* (1987) 3 CRNZ 83, in which it was held that the reference to an Act in section 21 included a section of an Act).

### *Amending legislation*

## **23     *Amending enactment part of enactment amended***

*An amending enactment is part of the enactment that it amends.*

### **Comment**

Section 23 of the Act provides that an amending enactment is part of the enactment that it amends. The effect of this section is two-fold. First, it is not necessary to state that an amending Act is part of another Act or that amending regulations are part of other regulations. Secondly, it is no longer necessary, when repealing a principal Act, to separately repeal Acts that have amended the principal Act or, when revoking principal regulations, to separately revoke the amending regulations.

### *Authority to make certain enactments*

## **24     *Authority to make certain enactments***

- (1)     *It is not necessary for an enactment, Proclamation, Order in Council, warrant, or other instrument made under an enactment to refer to facts, circumstances, or preconditions that must exist or be satisfied*

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*before the enactment, Proclamation, Order in Council, Warrant, or other instrument can be made.*

- (2) *An enactment, Proclamation, Order in Council, Warrant, or other instrument is not invalid just because the enactment under which it is expressed to have been made does not authorise its making as long as its making is authorised by another enactment.*

Comment

Section 24(1) restates section 24 of the Acts Interpretation Act 1924, but does so in more modern language. It provides that it is not necessary for subordinate legislation to state, on its face, any facts, circumstances, or preconditions that must exist or be satisfied before the subordinate legislation can be made.

Section 24(2) is new. It provides that subordinate legislation remains valid even though the subordinate legislation incorrectly refers to an enactment that does not authorise its making, so long as another enactment authorises the making of the subordinate legislation.

**25** *Amendment and revocation of regulations made by Act*

*Regulations amended or substituted by an Act may be amended, replaced, or revoked by subsequent regulations as if they had been made by regulation.*

Comment

Section 25 avoids the need, in cases where regulations are amended by statute, to provide expressly that the amendment is to be treated as having been made by regulation in order to ensure that the regulations can later be amended.

*Forms*

**26** *Use of prescribed forms*

*A form is not invalid just because it contains minor differences from a prescribed form as long as the form still has the same effect and is not misleading.*

Comment

Section 26 permits minor differences from a prescribed form as long as the form still has the same effect and the differences are not misleading. In *Motor*

*Vehicle Dealers Institute Inc v Auckland Motor Vehicle Disputes Tribunal* (2000) 6 NZBLC 103,159 (CA), the Court of Appeal decided not to disturb the finding of both the Motor Vehicle Disputes Tribunal and the High Court that a window notice on a second-hand non-commercial motor vehicle did not comply with the requirement under the Motor Vehicle Dealers Act 1975 for the window notice to contain the words “Warning. Odometer reading may be incorrect”. The Court of Appeal noted that while it would not encourage departure from the strict wording of the 1975 Act, the words used in the window notice at issue – “We make no representation as to the accuracy of the odometer reading.” B did provide the required particulars and the form might have been saved by section 26. However, as the application of section 26 did not form part of the appeal, the view expressed by the Court of Appeal in respect of that section did not form part of the reasons for the judgment in that case.

#### *Part 4*

##### *Application of legislation to the Crown*

#### **27** *Enactments not binding on the Crown*

*No enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment.*

#### **28** *Review of this Part*

- (1) *The Ministry of Justice must, by 30 June 2001, report to the Minister of Justice -*
  - (a) *whether it is desirable that the law be changed so that all enactments bind the Crown unless provided otherwise; and*
  - (b) *whether changes in the law may be required to impose criminal liability on the Crown for the breach of any enactment.*
- (2) *In preparing the report, the Ministry must consider any reports prepared by the Law Commission or any other body relating to the liability of the Crown.*
- (3) *As soon as practicable after receiving a report from the Ministry, the Minister must present a copy of it to the House of Representatives.*

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Comment

Section 27 of the Act retains the presumption previously contained in section 5(k) of the Acts Interpretation Act 1924 that an Act is not binding on the Crown unless the Act expressly so provides. The Law Commission had initially recommended that this presumption should be reversed so that all enactments bind the Crown unless provided otherwise. The Act requires that this matter be reviewed by the Ministry of Justice and a report provided to the Minister of Justice. That review has now been completed. The recommendation that has been made is that the presumption in section 27 should be retained, but the *Cabinet Manual* should be amended to require that the question of whether the Crown ought to be bound be considered with each proposal for a new Bill. The Cabinet Office *Step by Step Guide* has been amended in line with that recommendation. The practical effect of this is that the question of whether a draft Bill should bind the Crown will have to be considered at the policy development stage of the legislation.

*Part 5*

*Meaning of terms and expressions in legislation*

**29 Definitions**

*In an enactment,-*

**Act** means an Act of the Parliament of New Zealand or of the General Assembly; and includes an Imperial Act that is part of the law of New Zealand:

**commencement**, in relation to an enactment, means the time when the enactment comes into force:

**committed for trial** means committed to the High Court or a District Court under the Summary Proceedings Act 1957:

**Commonwealth country and part of the Commonwealth** mean a country that is a member of the Commonwealth; and include a territory for the international relations of which the member is responsible:

**consular officer** means a person who has authority to exercise consular functions:

**enactment** means the whole or a portion of an Act or regulations:

**Gazette** means the New Zealand Gazette published or purporting to be published under the authority of the New Zealand Government; and includes a supplement:

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**Governor-General in Council** or a similar expression means the Governor-General acting on the advice and with the consent of the Executive Council:

**Minister**, in relation to an enactment, means the Minister of the Crown who, under the authority of a warrant or with the authority of the Prime Minister, is responsible for the administration of an enactment:

**month** means a calendar month:

**New Zealand** or similar words referring to New Zealand, when used as a territorial description, mean the islands and territories within the Realm of New Zealand; but do not include the self-governing state of the Cook Islands, the self-governing State of Niue, Tokelau, or the Ross Dependency:

**North Island** means the island commonly known as the “North Island”; and includes the islands adjacent to it north of Cook Strait:

**Order in Council** means an order made by the Governor-General in Council:

**person** includes a corporation sole, a body corporate, and an unincorporated body:

**prescribed** means prescribed by or under an enactment:

**proclamation** means a proclamation made and signed by the Governor-General under the Seal of New Zealand and published in the Gazette:

**public notification**, public notice, or a similar expression in relation to an act, matter, or thing, means a notice published in-

- (a) the Gazette; or
- (b) one or more newspapers circulating in the place or district to which the act, matter, or thing relates or in which it arises:

**Regulations** means-

- (a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
- (b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
- (c) an Order in Council that brings into force, repeals, or suspends an enactment:

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- (d) *regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:*
  - (e) *an instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or the Acts and Regulations Publication Act 1989 or the Regulations (Disallowance) Act 1989:*
  - (f) *an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e):*

**repeal**, *in relation to an enactment, includes expiry, revocation, and replacement:*

**Rules of Court**, *in relation to a court, means rules regulating the practice and procedure of the court:*

**South Island** *means the island commonly known as the “South Island”; and includes the islands adjacent to it south of Cook Strait:*

**summary conviction** *means a conviction by a District Court Judge or by 1 or more Justices of the Peace in accordance with the Summary Proceedings Act 1957:*

**territorial limits of New Zealand, limits of New Zealand**, *or a similar expression, when used as a territorial description, means the outer limits of the territorial sea of New Zealand:*

**working day** *means a day of the week other than-*

- (a) *a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, and Labour Day; and*
- (b) *a day in the period commencing with 25 December in a year and ending with 2 January in the following year; and*
- (c) *if 1 January falls on a Friday, the following Monday; and*
- (d) *if 1 January falls on a Saturday or a Sunday, the following Monday and Tuesday:*

**writing** *includes representing or reproducing words, figures, or symbols-*

- (a) *in a visible and tangible form by any means and in any medium:*

- (b) *in a visible form in any medium by electronic means that enables them to be stored in permanent form and be retrieved and read.*

### Comment

Section 29 of the Act sets out standard definitions of terms and expressions commonly used in legislation. This means that those terms and expressions do not have to be defined every time in a new Act. Some key terms defined in this section are “Act”, “enactment”, and “regulations”.

“Act” is defined to mean an Act of the Parliament of New Zealand or of the General Assembly and includes an Imperial Act that is part of the law of New Zealand. That definition is different from the definition of “Act” in section 4 of the Acts Interpretation Act 1924. Under the previous definition, this term was defined to include all rules and regulations made under an Act. This is no longer the case under the new definition. This means that a reference to “Act” in legislation enacted from 1 November 1999 will no longer automatically include rules and regulations. In the case of Acts passed before 1 November 1999, however, the previous position is preserved. The term “Act”, when used in Acts passed before that date, includes rules and regulations (*see* section 30 of the Interpretation Act 1999).

“Enactment” means the whole or a portion of an Act or regulations. This term is used extensively in the Act, except in sections 8 and 9, where the terms “Acts” and “regulations” are used deliberately to connote different rules relating to commencement.

“Regulations” is given an extended meaning to include most types of delegated legislation included in the Statutory Regulations Series.

Other commonly used terms defined in section 29 of the Act include “commencement”, “Governor-General”, “Minister”, “month”, “person”, “public notification”, “working day”, and “writing”.

### **30** *Definitions in enactments passed or made before commencement of this Act*

*In an enactment passed or made before the commencement of this Act,*

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*Act includes rules and regulations made under the Act:*

*constable includes a police officer of any rank:*

*Governor means the Governor-General:*

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*land* includes messuages, tenements, hereditaments, houses, and buildings, unless there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure:

*person* includes a corporation sole, and also a body of persons, whether corporate or unincorporate.

#### Comment

Section 30 of the Act retains certain definitions contained in the Acts Interpretation Act 1924. These definitions apply only to Acts passed or regulations made before 1 November 1999.

#### **31 Use of masculine gender in enactments passed or made before commencement of this Act**

*In an enactment passed or made before the commencement of this Act, words denoting the masculine gender include females.*

#### Comment

Section 31 of the Act provides that, in the case of enactments passed or made before 1 November 1999, words denoting the masculine gender include females. As for enactments passed after that date, there are no rules in the Act regarding the meaning of gender-specific terms. This is because those rules are not needed. New Zealand legislation is drafted in gender-neutral language. If it is necessary, a gender-specific term may be used (for example, to describe certain criminal offences that may be committed only against females). This means that, for enactments passed or made after 1 November 1999, gender-specific terms will have their ordinary meaning.

#### **32 Parts of speech and grammatical forms**

*Parts of speech and grammatical forms of a word that is defined in an enactment have corresponding meanings in the same enactment.*

#### Comment

Section 32 of the Act provides that parts of speech and grammatical forms of a word that is defined in an enactment have corresponding meanings in the same enactment. It is no longer necessary to state in a definition of a word that a different part of speech or grammatical form of that word has a corresponding meaning. For example, it is not necessary to add to a definition of “sell” a statement that “sale” has a corresponding meaning.

By contrast, section 2 of the Adult Adoption Information Act 1985 defines the term “adult”, where it is used as a noun, to mean a person who has attained the age of 20 years. That definition continues on to state that the same term, where it is used as an adjective, has a corresponding meaning. If this Act were to be drafted today, this last aspect of the definition would no longer be necessary, because of section 32 of the Interpretation Act 1999.

### **33 Numbers**

*Words in the singular include the plural and words in the plural include the singular.*

### **34 Meaning of words and expressions used in regulations and other instruments**

*A word or expression used in a regulation, Order in Council, Proclamation, notice, rule, bylaw, Warrant, or other instrument made under an enactment has the same meaning as it has in the enactment under which it is made.*

### Comment

Section 34 re-enacts, with minor modification, section 7 of the Acts Interpretation Act 1924. The effect of section 34 is that, if a term is defined in an empowering Act and is used, but not defined, in subordinate legislation made under that Act, the term is given the same meaning as in the empowering Act.

### **35 Time**

- (1) *A period of time described as beginning at, on, or with a specified day, act, or event includes that day or the day of the act or event.*
- (2) *A period of time described as beginning from or after a specified day, act, or event does not include that day or the day of the act or event.*
- (3) *A period of time described as ending by, on, at, or with, or as continuing to or until, a specified day, act, or event includes that day or the day of the act or event.*
- (4) *A period of time described as ending before a specified day, act, or event does not include that day or the day of the act or event.*
- (5) *A reference to a number of days between 2 events does not include the days on which the events happened.*
- (6) *A thing that, under an enactment, must or may be done on a particular day or within a limited period of time may, if that day or*

*the last day of that period is not a working day, be done on the next working day.*

**36**    ***Distance***

*A reference to a distance means a distance measured in a straight line on a horizontal plane.*

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*Part 6*

*Amendments and repeals*

**37** *Amendments to other Acts*

*The enactments specified in Schedule 1 are amended in the manner indicated in that schedule.*

**38** *Repeals and saving*

(1) *The enactments specified in Schedule 2 are repealed.*

(2) *Section 26 of the Acts Interpretation Act 1908 as set out in Schedule 2 of the Acts Interpretation Act 1924 continues in force despite the repeal of both of those Acts.*

**3A.2.3 Guidelines**

The Interpretation Act 1999 should be considered when new legislation is being prepared. Those preparing legislation should study the Act and become familiar with its provisions. Particular emphasis should be given to the general principles of interpretation and the standard definitions of commonly used legislative terms set out in the Act, which are often overlooked. Although it is possible to depart from the provisions of the Act, this should only be done if there are good reasons for doing so.

In general, -

- new legislation should be consistent with the Act; and
- terms and expressions defined in the Act should have the same meanings in new legislation; and
- matters provided for in the Act should not be restated in new legislation.

If there is doubt as to the meaning or application of any provision of the Act, Parliamentary Counsel should be consulted.

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**CHAPTER 4**  
**NEW ZEALAND BILL OF RIGHTS ACT 1990 AND HUMAN RIGHTS ACT**  
**1993**

INTRODUCTION

**Background**

The New Zealand Bill of Rights Act 1990 (Bill of Rights Act) affirms a range of civil and political rights. It embodies New Zealand's commitment to the International Covenant on Civil and Political Rights.

The Bill of Rights Act applies to acts done by the three branches of Government, as well as by any person performing a public function, power or duty conferred by law.<sup>139</sup> These acts can include legislation, policies, practices and service delivery. As far as is possible the rights contained within the Bill of Rights Act apply to all legal persons. The Bill of Rights Act is **not** supreme law and cannot be used to override, or implicitly repeal or revoke, other legislation. However, section 6 of the Act requires legislation to be interpreted and applied in a manner consistent with the Bill of Rights Act where possible.

The Bill of Rights Act also contains a mechanism for alerting Parliament to inconsistencies with the Bill of Rights Act in draft legislation. Section 7 requires the Attorney-General to report to the House of Representatives on any provision of any bill introduced to the House that appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights Act. However, section 5 of the Act accepts that the rights and freedoms contained within the Bill of Rights Act can be subject to reasonable and justified limitations.

The Human Rights Act 1993 (Human Rights Act) is an anti-discrimination statute that provides that discrimination against particular groups or individuals is unlawful if it occurs in certain areas of activity. The Human Rights Act applies (in different ways) to discrimination in both the

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<sup>139</sup> As set out in section 3 of the New Zealand Bill of Rights Act 1990.

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government and public sector, and in the private, non-government sector. For the private sector, it contains a number of specific exemptions relating to particular types of behaviour.

All submissions for Cabinet Committees, prepared by government departments on policy and legislation, from May 2003, are required to include a statement of the proposal's compliance or non-compliance with both the Bill of Rights Act and the Human Rights Act.

### **Issues**

The following issues are discussed in this Chapter:

Part 1: Is the legislation consistent with the New Zealand Bill of Rights Act 1990?

Part 2: Is the legislation consistent with the Human Rights Act 1993?

## **PART 1**

### **IS THE LEGISLATION CONSISTENT WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990?**

#### **4.1.1 Outline of issue**

There are six main groups of rights and freedoms contained within the Bill of Rights Act.<sup>140</sup> These relate to:

- life and security of the person;
- democratic and civil rights;
- non-discrimination and minority rights;
- search, arrest and detention rights;

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<sup>140</sup> The New Zealand Bill of Rights Act 1990 is included in its entirety in the LAC Guidelines 2001 edition, as Appendix 2. Readers should refer to the specific rights and freedoms listed there for a fuller understanding of the requirements of each of the specific rights.

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- criminal procedure rights; and
  - rights to justice.

In addition to the compliance statements required in all submissions to Cabinet Committees, the Ministry of Justice, (and the Crown Law Office, in the case of bills in the name of the Minister of Justice or an Associate Minister of Justice), have developed procedures for checking that proposed legislation is consistent with the Bill of Rights Act, in order to advise the Attorney-General. This process is referred to as Bill of Rights Act vetting and is usually undertaken in consultation with the department sponsoring the legislation (and Parliamentary Counsel). Following consultation, the Attorney-General is advised whether the legislation<sup>141</sup> is consistent or inconsistent with the Bill of Rights Act. This advice will usually include information about any inconsistency that is considered to be justified in terms of section 5 of the Bill of Rights Act. If the legislation remains inconsistent, the Attorney-General will be advised accordingly and, in the ordinary course, on her or his instructions a report will be prepared for the purposes of section 7.

Legislation is vetted for compliance with the Bill of Rights Act in two separate stages. The first stage is to assess the provisions of the legislation for compliance with the rights and freedoms within the Bill of Rights Act. This involves:

- determining the likely interpretation and application of the apparently inconsistent provision;
- ascertaining the scope of the right apparently breached; and
- assessing the provision in light of the right itself to ascertain whether the provision in fact breaches the right.

If there is an inconsistency, the second stage is to ask: is this a “reasonable limit ... demonstrably justified in a free and democratic society” as required

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<sup>141</sup> The advice is provided to the Attorney-General on the basis of the final version of a bill as prepared for the Cabinet Legislation Committee, before the bill’s introduction.

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under section 5 of the Bill of Rights Act. In essence, the inquiry under section 5 is twofold.<sup>142</sup>

- First, does the limit have a significant and important objective? - the limitation should serve a significant and important function to warrant overriding a constitutionally protected right.
- Secondly, is the limit rational and proportional? - there should be a rational and proportionate connection between the law limiting the right and the reason for the limitation. The measures adopted should impair the right as little as possible.

Where the provision is inconsistent and is not a reasonable and justified limitation, a section 7 report is prepared.

Section 7 reports are “... designed to alert [Members of Parliament] to legislation which might give rise to an inconsistency and accordingly enable them to debate the proposals on that basis.” These reports are prepared by the Ministry of Justice for all legislation, except for bills in the name of the Minister of Justice or an Associate Minister of Justice, in which case the reports are prepared by the Crown Law Office. The reports are tabled in the House by the Attorney-General upon the legislation’s introduction. Once tabled, the reports are public documents and are published in the Appendices to the Journals of the House of Representatives.

#### 4.1.2 Comment

In broad terms, the rights and freedoms contained in the Bill of Rights Act are as follows.<sup>143</sup>

**Life and security of the person:** These are the most basic of rights to be enjoyed by members of civilised societies: the right not to be deprived of life, not to be subjected to torture or cruel treatment, not to be subjected to medical experimentation and the right to refuse medical treatment.

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<sup>142</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *Moonen v Literature Board of Review* [2000] 2 NZLR 9 (CA); *Moonen v Literature Board of Review (No 2)* [2002] 2 NZLR 754 (CA).

<sup>143</sup> The New Zealand Bill of Rights Act 1990 is included in its entirety in the LAC Guidelines 2001 edition, as Appendix 2. Readers should refer to the specific rights and freedoms listed there for a fuller understanding of the requirements of each of the specific rights.

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**Democratic and civil rights:** The democratic system is based on the recognition of these inherent rights: the rights to freedom of expression (including the freedom not to say anything), peaceful assembly, association, thought, conscience and religious belief, movement, the right to practice ones' religion or beliefs and the right to vote and be a candidate for Parliament.

**Non-discrimination and minority rights:** The Bill of Rights Act includes a provision that affirms the right to be free from discrimination on the same grounds as are contained in section 21 of the Human Rights Act 1993. Minorities also have the right to profess and practise their religions and use their languages.

**Search, arrest and detention rights:** Everyone has the right not to be subjected to unreasonable search and seizure. There is also a right to be free from arbitrary detention. People who are arrested or detained have the right to a number of protections including, for example, the right to be told of the reason for their arrest and to consult and instruct a lawyer.

**Criminal Procedure Rights:** Everyone charged with an offence has the right to the minimum standard of criminal justice, including rights to:

- be tried without undue delay;
- not to be forced to be a witness or confess guilt;
- a fair trial and to attend his or her own trial;
- be presumed innocent until proved guilty according to law;
- present a defence and cross examine; and
- appeal.

People also have the right not to be liable for anything that was not an offence at the time it occurred, the “non-retroactivity principle”. The common law principle of “double jeopardy” is also in the Bill of Rights Act, meaning that once convicted, pardoned or acquitted a person may not be tried or punished for the same offence again.

**Rights to justice:** If a person's rights may be affected by a decision of a tribunal or public authority, they have the right to the observance of the principles of natural justice in that process and to apply for judicial review of

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the decision. People also have the right to bring civil proceedings against, and defend proceedings brought by, the Crown in the same way as they may bring civil proceedings against individuals.

### **Stage One: Consistency with the rights and freedoms in the Bill of Rights Act**

When developing policy, it is necessary to have a clear idea of the proposal the policy is seeking to achieve. Once the proposal is clear, it must be considered in light of the rights and freedoms contained within the Bill of Rights Act. Is the proposal consistent with these rights and freedoms? If the proposal is consistent, it is essential that any subsequent legislation produced also remains consistent. However, if the proposal is in some way inconsistent with the rights and freedoms in the Bill of Rights Act, officials should seek further guidance.

When developing policy, officials should consider the different legislative options available to achieve their proposal. Generally there will be a number of ways in which a provision can be worded with the same proposal in mind. It is necessary to choose the formulation that both achieves the objective of the legislation and is most consistent with the Bill of Rights Act.

For example, legislative proposals for an inspection regime may be either consistent or inconsistent with the right to be secure against unreasonable search and seizure, as provided by section 21 of the Bill of Rights Act. Consistency with section 21 will largely depend upon how the scheme is translated into legislation, the need and purpose for the regime, and whether there are sufficient thresholds and safeguards included (such as the requirement for search warrants before entry into private dwelling houses and whether the use of force is allowed).

It is clear that Parliament intends legislation to be consistent with the Bill of Rights Act where possible. (This is particularly evident in sections 6 and 7.) However, the Bill of Rights Act does not override inconsistent legislation, because of section 4. In some instances Parliament has enacted legislation even though the Attorney-General has drawn to its attention that to do so would be inconsistent with the Bill of Rights Act.

Section 5 of the Bill of Rights Act states that the rights and freedoms in the Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The effect of this section is that a legislative provision may be consistent with the Bill of Rights

Act even where it limits a right or freedom affirmed by the Bill of Rights Act, if the limitation is justified in a free and democratic society.

Therefore, once it is established that the proposal sought is itself inconsistent with a right or freedom affirmed by the Bill of Rights Act, it should be determined whether the resulting legislation may be a “justified limitation” under section 5. It is for the agency sponsoring the policy and legislation to provide the information necessary to “demonstrably justify” such a limit – in other words, the Crown bears the onus of providing sufficient evidence to satisfy this inquiry.

### **Stage Two: Reasonable limits justifiable under section 5 of the Bill of Rights Act**

In its decisions in *Ministry of Transport v Noort* and *Moonen v Film and Literature Board of Review*<sup>144</sup> the Court of Appeal has set out a process for inquiring whether a limit imposed on a right affirmed by the Bill of Rights Act is “justified” in terms of section 5. This process is similar to the inquiry established by the Canadian Supreme Court in *R v Oakes*.<sup>145</sup>

In *Moonen*, Justice Tipping set out the process in the following way:

*[First] ... identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective.... The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective.*

Essentially, the *Moonen* inquiry has two components that legislation should satisfy before it can be said to be a “justified limitation” in terms of section 5 of the Bill of Rights Act:

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<sup>144</sup> *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754 (CA).

<sup>145</sup> *R v Oakes* (1986) 26 DLR (4th) 200. The Canadian Supreme Court has constantly reiterated that the appropriate “test” of justification remains section 1 of the Canadian Charter. The Court in *Oakes* merely provided guidelines to assist subsequent courts in their decision-making process. For a discussion on this point see *RJR MacDonald v Canada* (1995) 127 DLR (4th) 1.

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- *Identification and assessment of the objective of the limit* – The objective behind a limitation on a right should be “important” and “significant” enough to warrant the limitation of the protected right.
  - *Identification and assessment of the rational and proportionate connection between the objective and the limit* – An inconsistent provision should be proportionate to the objective of the provision. In essence, this means that the provision should impair the right as little as possible.<sup>146</sup> As the Court noted in *Moonen*, a sledge hammer should not be used to crack a nut. The inconsistent provision should also be rationally linked to its objective, such that it is justifiable in light of the objective. A wide variety of evidence is able to be considered under the *Moonen* inquiry, including empirical evidence and research. The Court of Appeal has held that social, legal, moral, economic, administrative, ethical and other considerations may be relevant to the inquiry under section 5.

## Regulations

The Bill of Rights Act also affects regulations. While section 7 of the Bill of Rights Act does not require the Attorney-General to report to Parliament on the consistency of regulations,<sup>147</sup> the Cabinet Office requires papers that accompany all proposed regulations to the Cabinet Legislation Committee to state the compliance or otherwise of the proposed regulations with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. This paper for the Cabinet Committee must also note any Parliamentary Counsel certification reservations, which can include Bill of Rights Act and Human Rights Act compliance issues.

Further, section 6 of the Bill of Rights Act requires that regulations be given a meaning that is consistent with the rights and freedoms affirmed by the Bill of Rights Act, where that is possible.

Section 6 also requires that regulation-making powers be interpreted consistently with the Bill of Rights Act, where possible. If a regulation-making power can be given a meaning consistent with the Bill of Rights Act,

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<sup>146</sup> *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] 3 All ER 939, at 954 (PC).

<sup>147</sup> Section 7 refers only to “bills”.

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then regulations made under that Act that are inconsistent with the Bill of Rights Act can be considered *ultra vires* and struck down.<sup>148</sup> This striking down would be done because the inconsistent regulation was outside the scope of the regulation-making power, rather than because it was inconsistent with the Bill of Rights Act.<sup>149</sup>

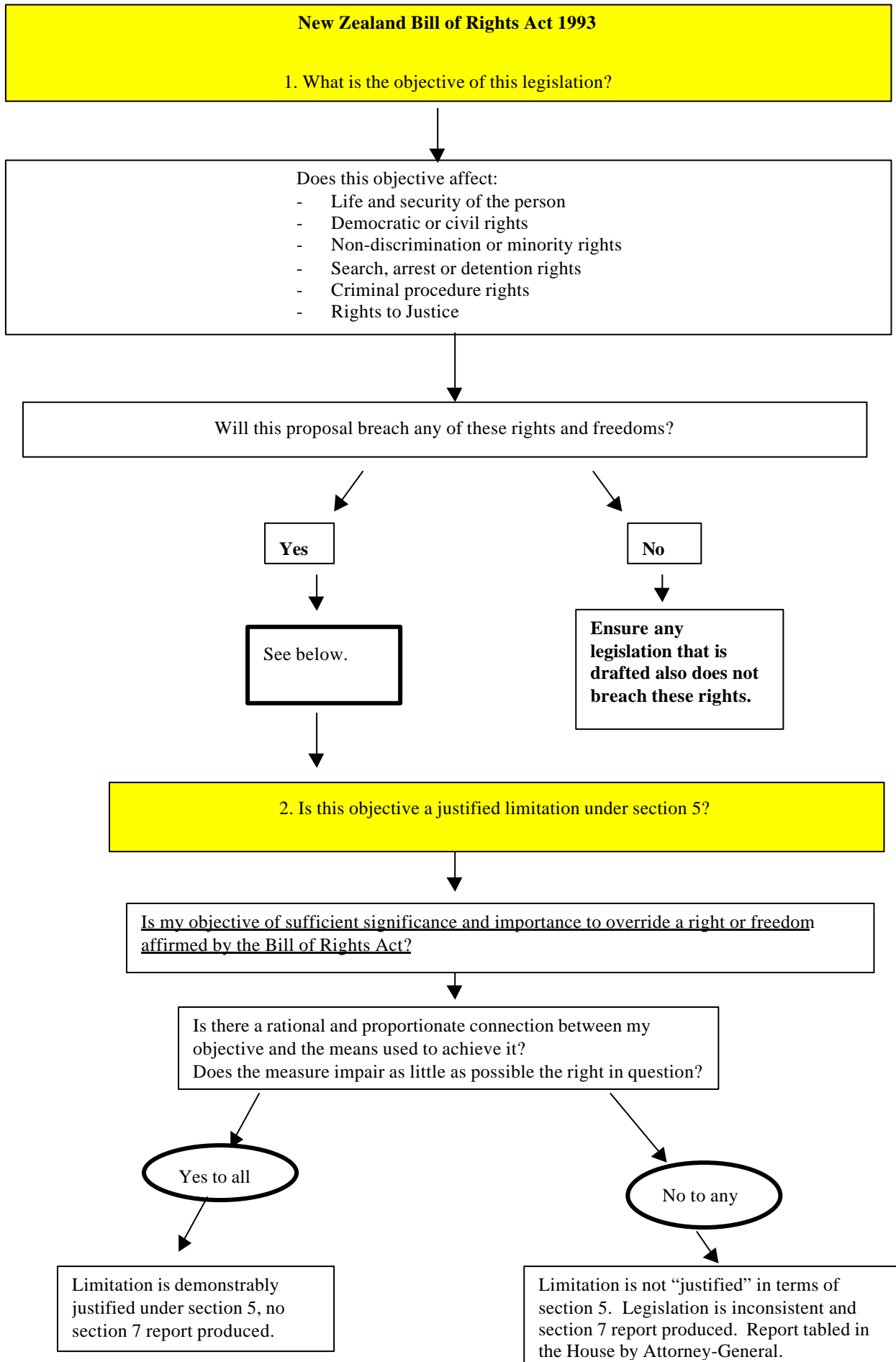
#### 4.1.3 Guidelines

See the diagram on the next page. When developing a policy, officials should first look to the proposal and decide whether it is consistent with the rights and freedoms affirmed by the Bill of Rights Act. If the policy or proposal is consistent, the proposed legislation should be developed in such a way as to ensure it is also consistent. If a provision is inconsistent with a right or freedom affirmed by the Bill of Rights Act, it should meet the requirements of the inquiry under *Moonen* to qualify as a justified limitation under section 5. If a provision satisfies the *Moonen* inquiry, the Ministry of Justice (or the Crown Law Office for Justice bills) will advise the Attorney-General that the provision is a justified limitation under section 5 and is therefore consistent with the Bill of Rights Act. The Ministry (or Crown Law Office) will therefore recommend that there should be no section 7 report produced.

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<sup>148</sup> *Drew v Attorney-General* [2002] 1 NZLR 58.

<sup>149</sup> See further chapters 10 and 10A.



**Note:** The diagram may be used to assess all enactments for consistency with the New Zealand Bill of Rights Act 1990. However, please note that the requirements of section 7 of the Bill of Rights Act do not apply to regulations.

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## PART 2

### IS THE LEGISLATION CONSISTENT WITH THE HUMAN RIGHTS ACT 1993?

#### 4.2.1 Outline of issue

The Human Rights Act deals with discrimination. This can be discrimination occurring in the government and public sector, and in the private, non-government sector.

There is no statutory obligation for legislation to comply with the Human Rights Act. However, the Government has made undertakings that all legislation and government policies, practices and regulations are to comply with the Act. As mentioned previously, all submissions on policy and legislation made to Cabinet Committees must indicate whether the proposals are consistent with both the Human Rights Act and the Bill of Rights Act and, if not, how any inconsistency may be addressed.

Under the Human Rights Act, for policies and/or legislation to give rise to discrimination it must, as a first step, differentiate between people on the basis of a personal characteristic that is a prohibited ground of discrimination. There are 13 grounds on which discrimination is prohibited, which are set out in section 21 of the Human Rights Act<sup>150</sup>:

- religious belief
- ethical belief
- colour
- race
- sex (which includes pregnancy and child birth)
- marital status

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<sup>150</sup> See section 21 of the Human Rights Act for the full definition of these 13 grounds.

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- political opinion
  - employment status
  - family status
  - disability
  - sexual orientation
  - ethnic or national origins (which includes nationality and citizenship)
  - age (which means any age commencing at 16 years).

Once this distinction on the basis of a personal characteristic has been identified, the Human Rights Act then deals with it in two different ways, depending upon whether the possible discrimination arises as a result of:

- government activity (where Part 1A of the Human Rights Act applies); or
- non-government activity (where Part II of the Human Rights Act applies).

#### **4.2.2 Comment: Part 1A of the Human Rights Act: Government and public sector activity: The Bill of Rights Act non-discrimination standard**

Part 1A of the Human Rights Act applies to any discrimination in the majority of government and public sector activities. The only exceptions are discrimination in Government and public sector actions in respect of employment matters, racial disharmony, sexual harassment, racial harassment and victimisation. These exceptions are covered by Part II of the Human Rights Act, in recognition that for these (mostly employment-related) situations, there should be no difference between the legal obligations imposed on the private and public sectors.

Part 1A of the Human Rights Act imports into that Act the non-discrimination standard from the Bill of Rights Act, and applies that standard to most government and public sector activities. In effect, this standard means that under Part 1A an activity by a person or body in the government and public sector will be examined for consistency with sections 19 and 5 of the Bill of Rights Act. In other words, a public sector activity will be in breach of Part 1A of the Human Rights Act if it is inconsistent with section 19 of the

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Bill of Rights Act and cannot be demonstrably justified under section 5 of that Act.

*Section 19 of the Bill of Rights Act – Imported into Part 1A of the Human Rights Act*

Section 19(1) of the Bill of Rights Act provides that everyone has the right to be free from discrimination on the grounds set out in section 21 of the Human Rights Act. Section 19 of the Bill of Rights Act does not define “discrimination”. However, the leading decisions of the New Zealand and Canadian courts on the meaning of “discrimination”<sup>151</sup> indicate that the key questions in assessing discrimination under our Bill of Rights Act are:

1. Is there a distinction based on one of the prohibited grounds of discrimination?
2. Does this distinction involve disadvantage to the person or group?

Discrimination identified under section 19 of the Bill of Rights Act is treated the same whether it arises directly or indirectly. (Direct discrimination arises when a decision is based on a personal characteristic, such as refusing to rent property to people who are not married. Indirect discrimination arises when an apparently neutral decision has a negative effect on a particular group of the population, for example height restrictions, which apply equally to all, may indirectly discriminate against women and Asians, as these groups tend to be shorter than European males of average height. A further example of indirect discrimination, this time on the basis of sexual orientation, arises where certain benefits are granted to married couples which will not be available to same-sex couples, as they are unable to marry.)

If a proposal is inconsistent with section 19, the next step is to consider whether the discrimination is justifiable under section 5 of the Bill of Rights Act.

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<sup>151</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523; *Egan v Canada* (1995) 124 DLR (4th) 609; *Law Society of British Columbia et al v Andrews* [1989] 1 SCR 143; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; *M v H* [1999] 2 SCR 577; *Lovelace v Ontario* [2000] SCC 37.

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*Section 5 of the Bill of Rights Act – Imported into Part 1A of the Human Rights Act*

Section 5 of the Bill of Rights Act provides that section 19 can be subjected to reasonable limits, provided these limits are prescribed by law and can be demonstrably justified in a free and democratic society. The inquiry to apply under section 5 of the Bill of Rights Act is set out above, under the heading “4.1.2 Comment: Stage Two: Reasonable limits justifiable under section 5 of the Bill of Rights Act”.

The Bill of Rights Act non-discrimination standard, which has been read into Part 1A of the Human Rights Act, means that in practice if the Government and public sector seeks to limit the right to freedom from discrimination by differentiating on the basis of certain personal characteristics, then it will need to provide strong justifications for that discrimination. As outlined in paragraph 4.1.2 above, a wide variety of justificatory evidence is able to be considered.

The Bill of Rights Act non-discrimination standard requires the Government and public sector to justify its actions and demonstrate that it has discriminated as little as possible in order to achieve its objectives. This accords with basic principles that government decisions should be fair, reasonable, and more open to public scrutiny than decisions taken in the private sector.

**4.2.2 Comment: Part II of the Human Rights Act: Non-government activity: The Human Rights Act non-discrimination standard**

Part II of the Human Rights Act 1993 applies to any discrimination in private, non-government activities which occurs in the following specified areas of public life:

- provision of goods, facilities and services
- employment
- access to public places, vehicles or facilities
- education, vocational training, qualifying bodies
- accommodation, land, housing.

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Part II also applies to discrimination in government and public sector activities in the areas of employment, racial or sexual harassment, racial disharmony and victimisation.

As with Part 1A, Part II of the Human Rights Act 1993 does not define “discrimination”. The first step in identifying discrimination is where a distinction is made on the basis of one of the prohibited grounds set out in section 21 of the Human Rights Act, in one of the specified areas, and it leads to disadvantage.

Part II of the Human Rights Act recognises disadvantage in two different ways - actual and assumed disadvantage. For most areas covered by Part II of the Act actual disadvantage must be established. For example, in a number of areas a complainant must show that a particular action subjected them to “less favourable treatment”. However, in some areas covered by Part II, there is an assumption that some behaviour always leads to disadvantage. For example, section 22(1)(a) of the Act assumes that refusal to employ a qualified person on the basis of a prohibited ground will, in every case, disadvantage that person. This assumption is also apparent in section 44(1)(a) of the Act, relating to the refusal to provide goods and services on the basis of one of the prohibited grounds. Therefore, once you have established that your legislation or policy differentiates on a prohibited ground in an area covered by the Act, it is necessary to check Part II of the Human Rights Act to determine whether disadvantage must be established or whether it is assumed.

Part II of the Human Rights Act 1993 prohibits both direct and indirect discrimination, but (unlike Part 1A) it deals with direct and indirect discrimination differently. Part II applies to discrimination that arises directly, while section 65 of the Act applies specifically to discrimination arising indirectly (see the further discussion of section 65 below).

#### *Exceptions and justifications*

Once it is established that the legislation or policy amounts to discrimination in terms of Part II of the Human Rights Act, the next step is to determine whether that discrimination is lawful or unlawful.

Part II of the Act provides a number of exceptions and justifications which, once satisfied, legitimise (make lawful) otherwise “discriminatory” (and unlawful) behaviour. Courts have tended to give human rights legislation a broad interpretation, recognising the importance of human rights. For the same reason, courts tend to apply exceptions to the basic human rights principles restrictively. This should be considered when formulating policy and legislation.

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These exceptions and justifications are as follows:

- *Specific exceptions* - these cover a range of situations including: preferential schemes for certain groups, matters of national security, citizenship, public safety considerations and areas where to provide for the disabled would require the taking of unreasonable measures.
- *General exceptions* - for example, “measures to ensure equality” and the exception for genuine occupational qualification or genuine justification.

There is also an exception built in to the definition of “indirect discrimination”. Indirect discrimination will not be unlawful if there is a “good reason” for it. “Good reason” is not defined in the Act and is considered on a case by case basis. New Zealand courts have so far followed a test set down by the European Court in *Bilka Kaufhause GmbH v Weber von Hartz* [1987] ICR 110 which involves answering 3 questions:

- Does the policy meet a genuine need of the enterprise?
- Is the policy suitable for attaining the objective pursued by the enterprise?
- Is the policy necessary for that purpose?

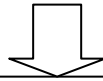
It is important to remember that, because of the nature of human rights legislation, any “good reason” presented to the court would be rigorously examined.

### **4.2.3 Guidelines**

See the diagrams of Parts 1A and II of the Human Rights Act on the next two pages. The diagrams set out broadly the process for considering whether a government or private activity raises an issue of discrimination.

**1 Government and public sector actions**

Does the action or activity relate to actions of government and the public sector covered by Part 1A of the Human Rights Act 1993, such as legislation, decisions by the Crown, policies, practices, or services?



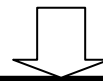
**2 Ground**

Does the proposed legislation, policy, practice, or service make a distinction based on one of the prohibited grounds of discrimination?

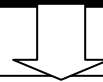


**3 Disadvantage**

Does that distinction, made in the proposed legislation, policy, practice, or service, involve a disadvantage to the affected person or group?



**Proceed if you have answered “yes” to each of the questions under the headings in boxes 1, 2 and 3.**



**4 Affirmative action**

Is this a measure taken in good faith for the purpose of assisting persons disadvantaged because of discrimination (that is unlawful under Part II of the Human Rights Act 1993)?



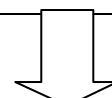
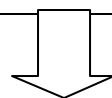
**If you have answered “yes” to the above question, it is likely that the proposed legislation, policy, practice or service will not amount to discrimination under Part 1A of the Human Rights Act 1993.**

**If you answered “no” to the above question, it is likely that the proposed legislation, policy, practice or service will be prima facie discriminatory under Part 1A of the Human Rights Act 1993. Proceed to consider justifications.**



**5 Justifiable**

- Is the objective of the legislation, policy, practice, or service sufficiently significant and important?
- Is there a rational and proportionate connection between the objective and the means used to achieve it?
- Does the measure impair as little as possible the right in question?



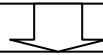
**If you have answered “yes” to all the above questions, then it is likely that the proposed legislation, policy, practice or service will not amount to discrimination under Part 1A of the Human Rights Act 1993.**

**If you answered “no” to any of the above questions, then it is likely that the proposed legislation, policy, practice or service will amount to discrimination under Part 1A of the Human Rights Act 1993.**

## Human Rights Act 1993 – Part II

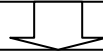
### **1 Ground**

- Does the action or activity directly identify a particular person or group for different treatment?
- Does the action or activity appear neutral, yet have an **indirect**, disproportionate effect on a particular person or group?
- Does that group fit into one or more of the prohibited grounds of discrimination?



### **2 Area**

- Does the different treatment relate to an area of public life covered by Part II of the Human Rights Act 1993, such as the provision of goods and services, and accommodation, or government and public sector actions or activities in relation to employment, alleged racial and sexual harassment, and victimisation?



### **3 Disadvantage**

- Does the action or activity actually disadvantage a person, or people, by treating a particular group more or less favourably?
- Does the action or activity lead to an outcome that is assumed to be disadvantageous by Part II of the Act?



**If you have answered “yes” to one question under each of the above headings, then the action or activity is discriminatory under Part II of the Human Rights Act 1993.**



### **4 Exceptions and Justifications**

- Is there a specific exception in Part II of the Human Rights Act that legitimises the action or activity?
- Is there a general exception in Part II of the Human Rights Act that legitimises the action or activity? For example, is the activity a “measure to ensure equality”, or occupational qualification?
- If the action or activity is indirectly discriminatory, do you have a good reason for it?



**If you have answered “yes” to any of the questions in box 4, it is likely that the action or activity will be consistent with Part II of the Human Rights Act 1993.**



**If you answered “no” to all of the above questions, it is likely that the action or activity is not consistent with Part II of the Human Rights Act 1993.**

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## CHAPTER 5

### PRINCIPLES OF THE TREATY OF WAITANGI

#### INTRODUCTION

##### **Background**

The Treaty of Waitangi does not directly create rights or obligations in law except where it is given effect by legislation. It however has been judicially described as “part of the fabric of New Zealand society” (*Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210) and has become a constitutional standard. Legislation is expected to comply with the principles of the Treaty. Generally the Courts will presume that Parliament intends to legislate in accordance with those principles and that in relevant contexts they should have appropriate application (so that, eg, decision makers may have to take some account of the principles), even perhaps in the absence of any mention of the Treaty in the particular legislation. (See eg the decisions of the Court of Appeal in *Attorney - General v New Zealand Maori Council* [1991] 2 NZLR 129 and *Attorney - General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147.)

The Government’s recognition of the need for legislation to comply with Treaty principles if possible is itself a recognition that, whatever the difficulties, the Treaty is constitutionally important and must (at the least) strongly influence the making of relevant legislation. Thus the Cabinet, in its directive of 23 March 1986, agreed that-

- all future legislation referred to it “at the policy approval stage should draw attention to any implications for recognition of the principles” of the Treaty; and
- “departments should consult with appropriate Maori people on significant matters affecting the application of the Treaty”, the Minister of Maori Affairs to provide any necessary assistance in identifying those people.

It also noted that “the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports”.

The principles of the Treaty, so far as they affect the preparation of legislation, are among those that derive from the basic principles of

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partnership and the need for good faith between the Crown and Māori as parties to the Treaty. The principle of appropriate consultation, in accordance with the Cabinet’s directive just quoted, is especially important where without it Māori interests or values may not be identified or adequately considered. (The Court of Appeal has said that the principle of good faith between the parties to the Treaty “must extend to consultation on truly major issues” (*New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152.) Similarly important matters, arising from the basic principles, are

- the presumption of legislative Treaty compliance mentioned above;
- whether an appropriate provision should be included in the legislation to give some effect to Treaty principles; and
- that in many cases the law and processes (and hence the content of the relevant legislation) should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community, so that no separate consideration of Māori is appropriate.

It must also be borne in mind that some rights covered by Article 2 are also recognised at common law (such as customary rights in land where these are found to exist – see paragraph 5.3.1) and may raise special questions if the legislation is to affect them.

### **Issues discussed**

The following issues are discussed in this chapter:

- Part 1: Should there be consultation with Māori?
- Part 2: Is there a possibility of conflict between the principles of the Treaty and the legislation?
- Part 3: Are any Māori rights and interests affected by the legislation recognised at common law?

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## PART 1

### SHOULD THERE BE CONSULTATION WITH MAORI?

#### 5.1.1 Outline of the issue

Maori should be consulted in some appropriate way if the proposed legislation would affect Maori rights and interests (including the taonga of Maori) protected by Article 2 of the Treaty.

#### 5.1.2 Comment

Consultation is a means by which Maori may make some contribution to the content of proposed legislation. Whether consultation is necessary or appropriate, and if it is what form it should take, are determined in light of -

- the Treaty and in particular of the rights and interests recognised in Article 2; and
- the recognition given to the principle of consultation by the Courts and by government policy.

#### 5.1.3 Guidelines

It will be necessary to identify at an early stage the Treaty issues involved, that is, the significant matters “affecting the application of the Treaty” and Maori rights and interests, that will be the subject of the proposed legislation and necessitate consultation.

Consultation must be with appropriate Maori people or institutions (who may be identified with the help of Te Puni Kokiri<sup>152</sup>), including representatives from any iwi or hapu particularly affected.

Consultation may in the first instance have to extend to identifying the Treaty issues and rights and interests involved and to the matters raised in Part 2 and Part 3 below.

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<sup>152</sup> Te Puni Kokiri is the Government’s principal adviser on the Crown’s relationship with iwi, hapu and Maori and on key Government policies as they affect Maori (see STA (94) 62).

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Consultation should as far as possible be in a form that those consulted regard as appropriate and should have clear results that are communicated by way of feedback to them and their communities.

## PART 2

### IS THERE A POSSIBILITY OF CONFLICT BETWEEN THE PRINCIPLES OF THE TREATY AND THE LEGISLATION?

#### 5.2.1 Outline of issue

As noted in Chapter 1 it is important that legislation be enacted only if necessary. There may be means other than legislation which are appropriate to give effect to Treaty obligations. If identifiable Maori rights and interests protected by the Treaty would be affected by proposed legislation, the question may arise whether there should, as a matter of policy, be some specific recognition or protection of those rights and interests by the inclusion of an appropriate provision in the legislation. In any event there will be a question of the effect of the proposed legislation on those rights and interests, whether or not such a provision is included.

#### 5.2.2 Comment

There is a range of provisions used in existing legislation which vary in the effect they give to the Treaty from the stronger provision of s.4 of the Conservation Act 1987 (the Act to be so “interpreted and administered as to give effect to the principles” of the Treaty) to the weaker one of s.8 of the Resource Management Act 1991 which (put briefly) merely requires persons exercising power under the Act “to take into account” the principles. Provisions such as these may, as well as varying in strength, relate to the interpretation and administration of the Act as a whole or to the manner in which, or to the conditions under which, powers under the Act are to be exercised. The provisions may have the effect of defining the extent to which the Act is to implement the Treaty. But it is also possible that, as regards the non-specific provisions in the range mentioned above, the Courts will use whichever one is chosen simply as a means to ensure that Maori interests are not overlooked, or (at least without fair consideration by the exerciser of power) transgressed, by those exercising the relevant powers.

Where possible the Maori rights or interests affected should be identified in the legislation, together with the specific means of protecting them that is appropriate (such as the obtaining of consents, if consultation is deemed insufficient). If this is not done the Court may have to undertake the dual task itself, as best it can.

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In considering these issues drafters need to bear in mind the general presumption in favour of Parliament's intention to comply with Treaty principles, mentioned above. If the context of the legislation would invite that presumption and it is intended that the legislation should take effect without reference to the Treaty, the legislation (quite apart from not including any provision of the types referred to above) must be drafted to make that intention clear and hence to exclude the presumption. (See, eg, the Radio New Zealand Act (No 2) 1995 and the effect given it, despite Treaty principles, by the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, 168, 174-175.)

### 5.2.3 Guidelines

The following must be ascertained as precisely as possible:

- what, if any, Maori rights and interests protected by the Treaty will be affected by the legislation;
- how the Crown's power to govern (*kawanatanga*) relates to them; and
- how they will be affected, in light of the presumption referred to above.

If the presumption is to be excluded, appropriate wording will be required, possibly assisted (as in the case just referred to) by the context of the legislation and its clear purpose as a whole.

If a provision giving some effect to the Treaty or its principles is to be included, the relevant rights and interests should, if possible, be identified in the legislation and the appropriate provision must be selected, in the knowledge -

- that it may be taken as defining the extent to which the Act gives effect to the Treaty; but also
- that a non-specific provision in the range mentioned above, whichever one is adopted, may simply be used by the Courts to ensure some recognition of Maori interests, as they consider appropriate.

If any of the rights and interests affected by the proposed legislation are also common law rights, special considerations apply. See Part 3 below.

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## PART 3

### ARE ANY MAORI RIGHTS AND INTERESTS AFFECTED BY THE LEGISLATION RECOGNISED AT COMMON LAW?

#### 5.3.1 Outline of issue

Some classes of rights and interests covered by Article 2 of the Treaty have been recognised at common law, quite apart from the Treaty. Being legal rights and interests, they are in a stronger position than Treaty rights and interests not so recognised and are protected by more than the presumption that Parliament intends to comply with Treaty principles. Rights to Māori customary land coming within Te Ture Whenua Māori Act 1993 now appear to be the main such class. The issue here, different from that covered in Part 2 above, is the effect the legislation is to have on any such existing legal rights and interests.

#### 5.3.2 Comment

If the rights and interests in question are recognised at common law and the legislation is to extinguish them or to take effect despite them, the trend of modern authority is to require this to be done especially clearly, in express terms. See, for example, the legislative vesting in the Crown of the beds of Lake Taupo and of the Waikato River down to the Huka Falls, expressly free of Māori customary title, by s.14(1) of the Māori Land Amendment and Māori Land Claims Adjustment Act 1926.

This is the approach described as “well-settled” by Blanchard J in *Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363. An Act may be sufficiently clear to exclude the presumption that Parliament intends to legislate in accordance with Treaty principles but be insufficiently specific to extinguish or otherwise affect existing Māori customary rights and interests at common law.

#### 5.3.3 Guidelines

Where Māori rights and interests are to be affected by legislation, the nature of the rights and interests must always be checked: in particular, whether any of them are, or are arguably, rights or interests recognised at common law.

If the legislation is of general application, whether it is intended to apply to such rights and interests may need special consideration.

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If the rights and interests are to be extinguished or otherwise affected, precise wording to achieve this should be used.

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## CHAPTER 6

### INTERNATIONAL OBLIGATIONS AND STANDARDS

#### INTRODUCTION

##### **Background**

A fundamental principle of international law is the proposition that treaties, regardless of their designation, are binding on the parties to them and must be performed in good faith. This rule is known in legal terms as *pacta sunt servanda*. This rule is reaffirmed in article 26 of the Vienna Convention on the Law of Treaties, 1969, which entered into force for New Zealand on 27 January 1980.<sup>153</sup>

Essentially, New Zealand is bound to comply with the treaties it executes, which requires it to ensure that its domestic laws are consistent with or give effect to them. New Zealand is also required to comply with customary international law. Consequently, as a matter of practice, those involved in preparing any legislation, whether new or amending or subsidiary, should identify and comply with the applicable international obligations and standards. This is achieved primarily by appropriate and timely consultation, particularly with the Ministry of Foreign Affairs and Trade (MFAT).

##### **Issues discussed**

The following issues are discussed in this Chapter:

- Part 1: Are there any international obligations and standards relevant to the legislation?
- Part 2: Does the legislation properly implement the relevant international obligations and standards?

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<sup>153</sup> Article 3 states that the 1969 Convention does not undermine the legality of treaties between States and other subjects of international law or between such subjects. In addition, the Vienna Convention on the Law of Treaties between States and International Organisations, 1986, closely follows the provisions of the 1969 Convention *mutatis mutandis*. New Zealand is not a party to the 1986 Convention, but it appears to reflect customary international law, which does apply to New Zealand.

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## PART 1

### ARE THERE ANY INTERNATIONAL OBLIGATIONS AND STANDARDS RELEVANT TO THE LEGISLATION?

#### 6.1.1 Outline of issue

International law covers a broad and growing range of subjects. Once confined to issues pertaining to the jurisdiction or territory of states, it now deals with many of the issues that were once the exclusive preserve of domestic legislatures. Domestic law is also evolving to remain abreast of the rapid expansion of transnational activities and concerns. Consequently, international law is becoming increasingly important as a source of domestic law in virtually every area. New Zealand's international obligations affect a wide variety of its domestic law (see [Appendix 3](#)). The influence of international law will increase as New Zealand's international obligations grow (which is the current trend).

New Zealand is party to around 900 multilateral and 1,400 bilateral treaties. It has about 700 Acts in force, of which 92 expressly refer to treaties, either specifically or generally. Fifty-one of these Acts refer to specified treaties, of which all but 4 are multilateral (see [Appendix 3](#)). These 51 Acts implement 99 different treaties, in whole or in part (20 deal with more than 1 treaty and several deal with an aspect of the same treaty). Fifty-three of these treaties are set out in schedules to their respective Acts and 2 are set out in schedules to their respective regulations. These treaties are not self-executing because they require the creation of operational machinery or the imposition of duties on individuals within New Zealand's jurisdiction to be effective.

These numbers seem small relative to the number of treaties that apply to New Zealand. However, the 92 Acts contain 32 general references to all treaties to which New Zealand is a party and 30 general references to all treaties on a particular subject to which New Zealand is a party. These Acts also do not include those Acts that implement treaties without referring to them in any way. Furthermore, when New Zealand is considering entering into a treaty, MFAT, in consultation with the relevant agencies, briefs the government of the day on the legislative changes that are necessary to implement the treaty. In many cases, no changes are required, as the existing law conforms to the terms of the treaty.

#### 6.1.2 Comment

The main sources of international law are treaties, international custom, judicial decisions, and academic writings. In addition, international

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transactions are largely facilitated and regulated by rules and practices that arise via contract or acceptance, which are not directly binding on states nor issued or formulated by public authorities. The following publication provides a basic guide to the materials that are used to find, interpret, and understand international law, particularly as it affects New Zealand law: *A New Zealand Guide to International Law and its Sources*, New Zealand Law Commission, Report 34 (1996).

Of these sources, treaties are the most common and tangible manifestation of New Zealand's international obligations. MFAT maintains and occasionally publishes an up-to-date list of the treaties to which New Zealand is a party (see eg, *New Zealand Consolidated Treaty List, Part 1 (Multilateral Treaties)*, New Zealand Treaty Series 1997, No. 1, NZHR, A.263 (1997); *New Zealand Consolidated Treaty List, Part 2 (Bilateral Treaties)*, New Zealand Treaty Series 1997, No. 2, NZHR, A.265 (1997)).

The term **treaties** refers to all international agreements, whatever their form, that are governed by international law and intended by the parties to create obligations of treaty force (ie, are binding on the parties). It covers instruments called treaties, conventions, covenants, protocols, and agreements (including those based on exchanges of letters) between New Zealand and other countries, nations, or international organisations (including those inherited from the United Kingdom).<sup>154</sup> The form of a treaty does not alter its legal effect, but rather provides a means of classifying the treaty. The main classifications are as follows:

- (a) **agreement** is by far the most common term and is often used for treaties regulating trade, or bilateral relations between states in a number of areas such as air transport, fisheries, visa abolition, and extradition;
- (b) **exchange of letters (or notes) constituting an agreement** make up a large proportion of the previous category; as the title indicates, there are two documents rather than one, with the second document responding to the agreement proposed in the first and accepting it;

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<sup>154</sup> Article 2.1(a) of the Vienna Convention on the Law of Treaties, 1969, defines treaty as an "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

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- (c) **convention** is commonly used to refer to multilateral agreements;
  - (d) **covenant** is generally used to refer to multilateral human rights agreements;
  - (e) **protocol** describes agreements that supplement a principal treaty, which may be drawn up at the same time as the principal treaty or at a later stage;
  - (f) **treaty**, in addition to its generic meaning, is often used to refer to major agreements of political importance (eg, treaties of alliance or friendship).

Customary international law is also an important source of New Zealand's international obligations. This is a set of rules that has arisen out of state practice and, in a manner, indicates the extent to which individual states consider themselves bound by the practice. The leading texts on international law and judicial decisions concerning international law are generally a useful starting point in determining state practice in a particular area and the extent to which New Zealand engages in the particular practice, if at all. Many of the rules are codified in treaties, which makes them binding on all parties, regardless of a party's past practice. It is important to recognise that customary international law continues to develop.

There is also a category of instruments that are not binding at international law (often referred to as **soft law**), but to which regard should properly be had, and advice sought as necessary from MFAT as to their legal significance. These may include declarations, resolutions, instruments under negotiation, or international standards (some international standards are in fact binding).

If legislation is required, an essential task is to ensure that it is consistent with New Zealand's international obligations (ie, gives full effect to them). The consequence of not doing so risks placing New Zealand in breach of its obligations. If in breach, the government of the day will have to use some of its precious parliamentary resources to revisit and amend the non-compliant legislation to avoid termination of the relevant treaty, harm to New Zealand's international standing, or the application of sanctions. Producing legislation that is consistent with New Zealand's international obligations at the outset will obviate this waste of resources and avert any difficulties New Zealand may face as a consequence of non-compliance.

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The domestic legal ramifications of non-compliance may also be significant. The courts will not hesitate to look beyond the words embodied in legislation to the relevant international obligations, both to aid interpretation (if necessary and appropriate) and, in the context of judicial review of administrative action, to examine whether decision-makers have taken the relevant considerations into account. Legislation that is consistent with New Zealand's international obligations is less likely to create interpretative or decisional difficulties.

### **6.1.3 Guidelines**

Those preparing legislation should identify all international obligations and standards that are relevant to the legislation. MFAT should be consulted for this purpose.

## **PART 2**

### **DOES THE LEGISLATION PROPERLY IMPLEMENT THE RELEVANT INTERNATIONAL OBLIGATIONS AND STANDARDS?**

#### **6.2.1 Outline**

International obligations may be incorporated into New Zealand law either directly or indirectly. In some cases, the relevant legislation simply reflects relevant obligations without referring to or repeating them. Sometimes legislation gives specific effect to a treaty (particularly in a situation where, were it not for the international obligation, New Zealand would not necessarily have to legislate). More rarely, legislation gives direct legal effect to the treaty itself, by giving it, or specific provisions of the treaty, legal force. Some treaties are designed to be incorporated directly into domestic legislation. The majority are not, and can contain references that are not normally used in New Zealand legislation. Care should be taken, however, in deciding whether or not to replace such references with the more familiar domestic ones, as this may alter the meaning and affect New Zealand's compliance with the relevant international rule.

#### **6.2.2 Comment**

The following drafting methods are used to implement New Zealand's international obligations through legislation – the force of law formula method, the subordination method, and the wording method.

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### *“Force of Law” Formula Method*

The “force of law” formula method sets out the full or partial text of a treaty, usually in a schedule, and uses a formula to proclaim it to have the force of law domestically. The treaty is left to speak for itself. This method is not used very often because the provisions of most treaties tend to be expressed in general terms and require translation into a more specific form to have effect in New Zealand. The purest example of this method is the Sales of Goods (United Nations Convention) Act 1994. Acts using the “force of law” formula method are listed in Part 3 of [Appendix 3](#). In some cases, only specified parts of treaties are given the force of law. The provision may also be qualified (eg, Diplomatic Privileges and Immunities Act 1968, s. 5(1)).

### *Subordination Method*

The subordination method involves drafting a provision in an Act that authorises the making of regulations or rules to give effect to particular treaties. This method is used fairly often, but is generally restricted to treaties that provide for ongoing technical changes that justify the delegation of lawmaking power from Parliament to the Executive (eg, Maritime Transport Act 1994, s. 36(1)). In some cases, regulations are used to trigger the application of the treaty or some part of the treaty (eg, Diplomatic Privileges and Immunities Act 1968, s. 10A(aa)).

In 1994, Parliament extensively revised New Zealand’s intellectual property Acts to comply with the intellectual property provisions of the General Agreement on Trade and Tariffs. These Acts do not expressly indicate that they are implementing these provisions. However, the protections they provide are only available to persons from “convention countries” or “eligible countries”, a designation that is conferred by Order in Council (eg, Layout Designs Act 1994, s. 37; in this case, the Layout Designs (Eligible Countries) Order 2000 is the relevant order, and it simply lists the countries that are eligible countries; the relevant order for the Patents Act 1953, the Designs Act 1953, and the Trade Marks Act 1953 is the Patents, Designs, and Trade Marks Convention Order 2000 ; the relevant order for the Copyright Act 1994 is the Copyright (Application to Other Countries) Order 1995).

Another special case concerns the use of regulations to designate the treaties that are relevant to an Act and its application (eg, Maritime Transport Act 1994, section 2; in this case, the Maritime Transport (Marine Protection Conventions) Order 1999 is the relevant order). Yet another special case concerns the use of regulations to extend the application of treaty provisions implemented in one Act to cover matters dealt with in another Act (eg, Antarctica (Environmental Protection) Act 1994, s. 54).

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Section 2 of the United Nations Act 1946 also constitutes a special case. It allows the making of regulations to enable New Zealand to fulfil its obligations under article 41 of the Charter of the United Nations, that is, to give effect to Security Council decisions to employ certain non-military sanctions. These regulations may override statutes. The United Nations Sanctions (Angola) Regulations 1993 constitute one of 11 regulations made under this provision since 1991. Acts with similar provisions include the following: section 215(1) of the Child Support Act 1991; section 19(1) of the Social Welfare (Transitional Provisions) Act 1990; and section 30 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977. Acts using the subordination method in some way are listed in Part 4 of Appendix 3.

#### *Wording Method*

In many cases, the wording of a treaty is incorporated into the body of the Act. The Act may specify the treaty that it seeks to implement or it may not. In either case, the wording of the treaty is reflected in the Act's provisions. Sometimes the wording is repeated verbatim and sometimes it is translated to accommodate local conditions, which is usually the case when specific operational provisions are required to give effect to general treaty provisions. Sometimes all or most of the provisions of treaties are implemented in this way and sometimes only a few select provisions are implemented in this way. As most treaties tend to be expressed in general language, mainly to achieve agreement, the wording method is used often.

The New Zealand Bill of Rights Act 1990 is probably the purest example of the wording method in which the specific treaty is indicated. The operative provisions of the Act do not refer to the International Covenant on Civil and Political Rights (ICCPR) or any of its components. It simply sets out the rights and freedoms that the ICCPR sets out, albeit using different words and form. The Human Rights Act 1993 is an example of the wording method in which the applicable treaties are not specified, but the types of treaties being implemented are mentioned. The operative provisions of the Act do not refer to any treaties or parts of treaties. Furthermore, the Act sets out a considerable amount of operational detail that is not found in these types of treaties, but is necessary to give effect to their provisions. The Abolition of the Death Penalty Act 1989 is an example in which the Act is silent as to the existence of a specific treaty or types of treaties. The Act implements the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. However, the Act does not refer to any treaties in any way.

Most of the Acts listed in Appendix 3 use the wording method to some

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degree. Given the last example, it is reasonable to conclude that a significant number of Acts not listed also use this method.

### *Hybrids*

In some cases, more than one method may be used. For example, New Zealand's intellectual property Acts use the wording method to set out the relevant treaty rights and protections, but use the subordination method to trigger the application of these provisions. As another example, the Adoption (Intercountry) Act 1997 uses the "force of law" formula method to give the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption the force of law in New Zealand. However, unlike the Sale of Goods (United Nations Convention) Act 1994, it uses the wording method to create the specific mechanisms necessary for the administration of the law embodied in the treaty.

### *Legislation Template*

Many of the Acts that implement specified treaties have some features in common. Some have titles or purpose clauses that indicate that the Act is implementing a particular treaty or set of treaties. Some have clauses that provide a means to prove matters pertaining to treaties. Many have definition clauses that are used to identify and locate particular treaties. Some have future proofing provisions. Most also set out the text of the specified treaty or treaties in a schedule or schedules, but not all do. Ultimately, the various drafting techniques are intended to make an Act implementing a treaty easy to use, especially if ready access to the treaty is required or would be beneficial. The template set out in Part 5 of Appendix 3 suggests provisions that may be of assistance in achieving this objective.

### *Annexing the Treaty*

It is often, but not always, appropriate for the text of the treaty to be annexed to the relevant legislation. Annexation of an entire text is required if the treaty or parts of it are directly incorporated (ie, the formula method). If the legislation does not directly incorporate the provisions of the treaty but the main purpose of the legislation is to give effect to treaty obligations, then it is also usually appropriate to annex the text of the treaty to the legislation. This enables the public, practitioners, and the courts ready access to the primary source of the obligation, which is particularly important if there is a need for interpretation. There may, however, be practical difficulties in annexing the treaty text. Those difficulties should be carefully balanced against the public interest in having the text available together with the legislation. Advice should be sought from MFAT.

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### *Language*

Particular care should be taken with terms that have specific meanings at international law. Examples of these are reference to a “state” (which has a specific legal meaning) and “country” (which is a looser term), and any references to maritime boundaries. In most cases, it is preferable to use the same language as the treaty, but advice should always be sought from MFAT.

### *Treaty-making Process*

New Zealand has adopted a treaty-making process in which all treaties that require ratification, accession, acceptance, or approval (and significant bilateral agreements at the discretion of the Minister of Foreign Affairs and Trade) must be tabled in Parliament and considered by the relevant Parliamentary Committee. Except in rare cases, the Government will not take binding treaty action until this step has been completed. The process is set out in the relevant Cabinet Office Circular. Treaties that require the enactment of domestic legislation before New Zealand can become party to them should be tabled before the legislation is introduced. This provides an opportunity for public consultation and scrutiny.

### **6.2.3 Guidelines**

Several methods are used to implement treaties in New Zealand. If a treaty amounts to a self-contained body of law that does not require any operational machinery to support it, the “force of law” formula method can be used to implement the treaty. If a treaty requires operational machinery to support it or its terms require some form of translation to be effective, the wording method should be used. It can be used in conjunction with the formula method. The subordination method should be used if Parliament wishes to delegate technical matters to the Executive. It can be used in conjunction with the formula and wording methods. Care should be taken to ensure that legislation implementing a treaty is easy to use, that is, provides ready access to the treaty that it implements. The template presented in Part 5 of [Appendix 3](#) sets out the various drafting techniques that are available to help achieve this objective.

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## CHAPTER 7

### RELATIONSHIP TO EXISTING LAW

#### INTRODUCTION

##### **Background**

New legislation is never complete and entire unto itself. It is in greater or lesser degree part of a larger legal continent. It may have to be read with

- the legislation which it amends (as almost all does even if not described as amending legislation);
- legislation which applies to it (by its own express terms, or implicitly, or because the new legislation so provides);
- the general body of the law of legislative interpretation; and
- relevant aspects of the general law.

These issues are in part technical. They can also raise important issues of policy. That can be illustrated by one instance of the last item on the list. Assume a statute which places a duty on individuals and provides for a criminal penalty for breach of the duty. Is the statutory provision exhaustive? Or is the general law of remedies relevant? What, for instance, is the position of a person claiming to be a beneficiary of the rule which imposes that duty? The policy answer to that set of questions may be implemented at the technical level, for instance by providing for remedies and expressly stating them to be exhaustive, by expressly invoking remedies outside the legislation, or by recognising that the legislation will operate within the scope of other legislation (such as the Illegal Contracts Act 1970).

The enforcement issue (considered further in chapters 11 and 12) is but one of many points of contact between a particular piece of legislation and the rest of the law. Thus the rest of the law determines or at least deals with such matters as:

- the *territorial scope* of the law (territorial waters, contiguous zone, Antarctica, Tokelau ...);
- the *personal scope* of the law (does it apply to the Crown and to legal persons);

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- the *temporal scope* of the law (retroactivity, effect of repeals on existing legal situations);
  - the association of *powers* (for instance a statutory power of appointment usually attracts a power of dismissal);
  - *controls* on the exercise of powers (for instance through the principles of natural justice or by way of appeal, under general provisions of the statutes relating to the Courts, the Ombudsmen, the Controller and Auditor-General, the Official Information Act, or local government legislation); or
  - *other consequences* of the breach of legislation (is the action done in breach invalid, or can it be validated, or does the breach have no effect?).

Some of these matters are considered in other chapters of these Guidelines and are also discussed in some detail in Report No 17 of the Law Commission on *A New Interpretation Act* (1990) paras 192-227, 332-438 and pp 215-218.

A careful consideration of how proposed legislation will relate to the existing law will have the following advantages:

- The existing law may already, with or without some modification, provide a means of achieving the policy objective, thus avoiding the need for the proposed legislation;
- The existing law may give useful precedents for achieving the policy objective;
- Inconsistency or overlap between the existing law and the proposed legislation will likely be identified and, as a result, avoided;
- An examination of the existing law may reveal reasons why the proposed legislation should be modified or not proceeded with, or safeguards that should be included (for example, the rule against self-incrimination);
- The inclusion of the proposed legislation in its proper place in, and its consistency with, the existing law should assist public understanding and acceptance of the proposed legislation and of the law as a whole;

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- An examination of the existing law may indicate the need for transitional or savings provisions, particularly if an existing legislative regime is being replaced by another.

### **Issues**

The following issues are discussed in this chapter:

Part 1: Has the Interpretation Act 1999 been considered?

Part 2: Has all other relevant legislation been considered?

Part 3: Has the common law been considered?

Part 4: Are transitional or savings provisions required?

## **PART 1**

### **HAS THE INTERPRETATION ACT 1999 BEEN CONSIDERED?**

#### **7.1.1 Outline of issue**

In general, new legislation should be consistent with the Interpretation Act 1999 and matters that are already provided for in the Interpretation Act 1999 should not be restated in new legislation.

#### **7.1.2 Comment**

The Interpretation Act applies to New Zealand Acts and Regulations except to the extent that the Act or Regulations provides otherwise. The Interpretation Act defines “Regulations” as including most subsidiary legislation.

The Interpretation Act contains provisions relating to, among other things, the following:

- Principles of interpretation;
- Commencement of legislation;
- Exercise of powers granted by legislation;
- Repeals of legislation;

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- Amendment of legislation;
  - Making, amending and revoking regulations;
  - Use of prescribed forms;
  - Application of legislation to the Crown;
  - Meaning of specific terms and expressions in legislation.

The Interpretation Act is set out in Appendix 4 to these Guidelines.

Unless there are good reasons for departing from the provisions of the Interpretation Act, new legislation should be consistent with that Act. In particular, terms defined in the Interpretation Act should generally not be defined to have different meanings in other legislation.

It is generally not desirable to restate in new legislation matters that are already provided for in the Interpretation Act. An exception to this is where it is considered helpful to users of new legislation to restate the meanings of terms defined in the Interpretation Act.

### **7.1.3 Guidelines**

The Interpretation Act should be considered when new legislation is being prepared.

In general –

- new legislation should be consistent with the Interpretation Act;
- terms defined in the Interpretation Act should have the same meanings in the new legislation;
- matters provided for in the Interpretation Act should not be restated in new legislation.

If there is doubt as to the meaning or application of any provision of the Interpretation Act, Parliamentary Counsel should be consulted.

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## PART 2

### HAS ALL OTHER RELEVANT LEGISLATION BEEN CONSIDERED?

#### 7.2.1 Outline

New legislation has to be read in conjunction with any legislation which it amends and other legislation which also applies to the same matters. It is important that new legislation be consistent with existing legislation as far as practicable.

#### 7.2.2 Comment

Almost all new legislation deals with matters that are already governed to a greater or lesser extent by other legislation (including the New Zealand Bill of Rights and the Human Rights Acts referred to in Chapter 4). It is important that new legislation not be in conflict with other legislation. If there is a conflict, the new legislation should make it clear which legislation prevails.

The purpose of new legislation is often to impose or grant duties, powers or restrictions that are similar to those imposed or granted in other legislation. It is desirable that legislative provisions having a similar purpose are as similar as practicable, both as to policy and drafting. It is unhelpful to users of legislation and the Courts if provisions that are intended by Parliament to have the same effect are expressed in different ways, as this allows arguments to the effect that differences in expression were intended to reflect policy differences.

In some cases, existing legislation may or can be used to supplement new legislation, either because the existing legislation is of general application or because it is expressly applied by the new legislation. In general, where existing legislation can be used in this way, it is preferable not to duplicate the relevant provisions of the existing legislation in the new legislation. Duplication often results in unintended differences, especially as legislation is amended over time.

Fortunately, it is now possible to search all existing legislation by electronic means, making it much easier to identify existing legislative provisions that should be considered in the development of new legislation. This searching capability should be used whenever new legislation is being prepared.

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### 7.2.3 Guidelines

Before commencing the preparation of new legislation, those responsible should identify all existing legislation that either relates to the same matters as the new legislation or implements policies that are similar to those of the new legislation.

Unless there are good reasons for not doing so, precedents from existing legislation should be used when new legislation is being prepared. If there are conflicting precedents, the best precedent should be used even if it is not the most recent. In general, avoid “reinventing the wheel”.

In general, new legislation should not restate matters that are already provided for in other legislation. If likely to be helpful for users, new legislation may include a short “flag” provision identifying (but not restating) the relevant provisions of the other legislation.

## PART 3

### HAS THE COMMON LAW BEEN CONSIDERED?

#### 7.3.1 Outline

In addition to legislation, there is a large body of Judge-made law which is usually referred to as the “common law”. Important examples of the common law are the basic principles referred to in Chapter 3.

As noted in Chapter 3, any new legislation should be consistent with the basic principles of New Zealand’s legal and constitutional system. In addition, new legislation should as far as practicable be consistent with the common law. An obvious exception to this is where the purpose of the legislation is to alter the common law.

#### 7.3.2 Comment

Legislation and the common law together form the law of New Zealand. New legislation may of course, and often does, alter the common law, but should be written so as to be consistent with the relevant law that remains. Those preparing new legislation should therefore be as aware as possible of those parts of the common law that relate to the matters to be affected by the new legislation.

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It is not always easy to ascertain how the common law, which is a large and evolving body of law, will apply to particular matters. However, considerable assistance can be obtained from publications such as Halsbury's "Laws of England" and Butterworths "Laws of New Zealand", as well as from specialist texts on particular branches of the law.

Those preparing new legislation should acquaint themselves as far as possible with those parts of the common law that impact on the matters to be covered by the legislation, with a view to ensuring that the legislation –

- will not be inconsistent with the common law, unless this is the clear policy intent; and
- does not address matters that are satisfactorily dealt with by the common law. Duplication of this kind often results in considerable uncertainty in the law.

### **7.3.3 Guidelines**

Before commencing the preparation of new legislation, those responsible should ascertain how the common law applies to the matters to be covered by the new legislation. Publications such as Halsbury's "Laws of England", Butterworths "Laws of New Zealand", and specialist texts should be consulted.

New legislation should not be inconsistent with the common law unless this is the clear policy intent.

In general, matters satisfactorily dealt with by the common law should not also be addressed in new legislation, as duplication of this kind can result in considerable uncertainty in the law.

## **PART 4**

### **ARE SAVINGS OR TRANSITIONAL PROVISIONS REQUIRED?**

#### **7.4.1 Outline**

This chapter concerns enactments that change the law. It is about the 2 kinds of provisions that the enactments might need to deal with situations in existence when the enactments come into force.

### 7.4.2 Comment

One kind of provision is called a savings provision. Section 231 of the Sale of Liquor Act 1989 is an example of a savings provision?

#### “231 Certain licences deemed to be on-licences

- (1) Every licence of a kind to which this section applies that was in force under the Sale of Liquor Act 1962 immediately before the commencement of this Act shall be deemed for the purposes of this Act to be an on-licence.
- (2) This section applies to licences under the Sale of Liquor Act 1962 of the following kinds:
  - (a) Hotelkeepers’ licences:
  - (b) Special hotelkeepers’ licences:
  - (c) Extended hotelkeepers’ licences:
  - (d) Tourist-house keepers’ licences:
  - (e) Tavernkeepers’ licences:

....”.

The other kind is called a transitional provision. Section 142(1) of the Credit Contracts and Consumer Finance Act 2003 is an example of a transitional provision?

#### “142 Election for Act to apply

- (1) A creditor under a credit contract made before the commencement of this section may, after the commencement of this section, elect that this Act apply to the credit contract and any guarantee made in connection with the credit contract from a particular date (**the effective date**).”

#### *Two preliminary points*

The examples illustrate 2 points that it is worth drawing attention to. First, savings and transitional provisions are not always entitled “savings” or

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“transitional”, although sometimes they are. Second, the distinction between savings and transitional provisions is very fine. The second and third questions below define savings and transitional provisions separately to help policy analysts understand why 2 words are used. However, it makes no legal difference whether a provision is, when fully analysed, a savings or a transitional provision.

*When are savings or transitional provisions needed?*

Savings or transitional provisions may be needed in enactments that change the law. An enactment may change the law by—

- amending another enactment
- repealing another enactment
- repealing another enactment and replacing it
- being itself a new enactment.

*What is a savings provision?*

A savings provision saves something that, if it were not saved, would be altered or abrogated by an enactment. Things that might need saving include an existing law or a status provided by an enactment.

An enactment that overturns the effect of a court decision provides an example. The enactment would use a savings provision to make it clear that the overturning does not apply to the case in which the decision was made (see, for example, Commerce (Clearance Validation) Amendment Act 2001, section 3).

Another example is an enactment that restructures an organisation into another organisation. A savings provision would be used to make it clear that the employees of the old organisation are the employees of the new organisation (see, for example, New Zealand Stock Exchange Restructuring Act 2002, section 14).

*What is a transitional provision?*

A transitional provision explains how an enactment applies to circumstances that, having arisen in the past, will be affected by the enactment’s coming into force. Circumstances for which transitional provisions might be needed include the existence, when the enactment comes into force, of persons holding office or proceedings before a court.

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The existence of persons holding office was the subject of *Claydon v Attorney-General* [2002] 1 ERNZ 281. Members of the Employment Tribunal were in office under the Employment Contracts Act 1991 when the tribunal was replaced by the Employment Relations Authority under the Employment Relations Act 2000. Some of the members claimed that they should have the benefits of office until the end of the term of office. The Court of Appeal dismissed the claim because the transitional provisions in sections 249 to 252 of the Employment Relations Act 2000 showed that the legislative intention was to curtail the members' rights as tribunal members on 31 January 2001.

The existence of proceedings was the subject of a series of cases under the Resource Management Act 1991. The cases involved the interpretation of the transitional provisions in section 112 of the Resource Management Amendment Act 2003. The question was whether the provisions required an appeal to be decided under the law as it was before the amendment or the law as it was after the amendment. Two cases decided in favour of the former and two in favour of the latter. (See *New Zealand Nut Producers Limited v Otago Regional Council* EnvC C99/2004).

*Do savings and transitional provisions matter?*

Non-existent or inadequate savings or transitional provisions can result in litigation.

Non-existent transitional provisions was the problem in *Chief Adjudication Officer v Maguire* [1999] 2 All ER 859. The Court of Appeal had to decide whether a person who satisfied the statutory criteria for a particular allowance was entitled to claim it. The statute that provided the allowance had been repealed and the repealing enactment contained no transitional provisions. In his judgment, Clarke L J stated that the case “underlined what was in any event surely quite clear, namely the importance of including clear transitional provisions in statutes of this kind” (page 872).

Inadequate transitional provisions can lead to considerable difficulty, and judges sometimes criticise their drafting in their judgments.

As a reminder of the care which must be taken with savings and transitional provisions, it is worth mentioning 2 cases in which apparently unexceptionable transitional provisions resulted in litigation.

*Foodstuffs (Auckland) Ltd v Commerce Commission* [2004] 1 NZLR 145 is a case heard by the Privy Council. In the High Court and the Court of Appeal

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in New Zealand, the case was argued on the basis that the transitional provision in the Commerce Amendment Act 2001 did not apply because, when it said that nothing in the amendment Act affected “any proceedings commenced” before the commencement of the Act, it meant only court proceedings. It did not include proceedings before the Commerce Commission. However, the Privy Council found that “proceedings” did cover proceedings before the Commerce Commission.

*Dossett v TKJ Nominees Pty Ltd* [2003] HCA 69 is a case heard by the High Court of Australia. The transitional provision in the Workers Compensation and Rehabilitation Amendment Act 1999 provided that the new, restrictive, provisions being put in the principal Act by the Amendment Act did not apply in 2 situations described in the transitional provision. The High Court said that, if the intention was that the restrictive provisions did not apply only in those 2 situations, the transitional provision should have said so. The court held that the new restrictive provisions did not apply in the situation before it, which was not one of the 2 described.

*What process should policy analysts follow?*

Policy analysts developing enactments should follow a 4-step process.

The **first** step is to be aware from the start of the project that savings and transitional issues might arise. Analysts must make sure that the project plan allows them time to give the issues thorough consideration.

The **second** step is to study the Interpretation Act 1999.

Section 7 of the Act, together with the common law, provides that enactments do not have retrospective effect unless given it by express words or clear implication. This means that the basic rule is that an enactment applies only to what happens in the future. If an enactment must apply to things that happened in the past, a transitional provision is necessary to explain how it applies.

Sections 17 to 22 of the Act deal with the effect of the repeal of enactments. In summary, the sections provide that—

- the repeal of an enactment does not affect—
  - an action done before the repeal (section 17(1)(a))

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- an action done under the enactment before its repeal (section 17(1)(e))
  - the operation of the enactment before its repeal (section 17(1)(e))
  - things in existence at the repeal (section 17(1)(b) and (c))
  - the completion of anything under the repealed enactment (section 18(1); see discussion of this below)
  - the bringing or completion of proceedings under the repealed enactment (section 18(1))
  - liability to a penalty for an offence against the enactment before its repeal (section 19)
  - an action done in the exercise of a power under the repealed enactment continues to have effect (section 21)
  - delegated legislation made under a repealed enactment continues in force (section 20)
  - the repeal of an enactment does not affect—
    - an enactment in which the repealed enactment is referred to; if the repealed enactment is replaced, however, the reference is read as a reference to the replacement enactment (section 22)
    - an amendment made by the enactment to another enactment (section 17(1)(d))
  - the repeal of an enactment does not revive—
    - an enactment that has been repealed (section 17(2))
    - a rule of law that has been abolished (section 17(2))
    - any other thing that is not in force or existing at the repeal (section 17(2)).

(See also Chapter 3A Statutory Interpretation).

Sections 7 and 17 to 22 of the Interpretation Act 1999 give rise to the following 4 situations:

- the sections in the Interpretation Act 1999 cover all the savings and transitional issues that the enactment raises
- the sections in the Interpretation Act 1999 cover all the savings and transitional issues that the enactment raises but, for some or all of the issues, in a way that is not satisfactory in the circumstances dealt with in the enactment
- the sections cover some of the savings and transitional issues that the enactment raises but something about the enactment makes it desirable to deal with the rest of the issues in customised savings or transitional provisions
- it is not clear whether or not the sections in the Interpretation Act 1999 cover all the savings and transitional issues that the enactment raises.

In the first situation, the enactment does not need its own savings or transitional provisions.

In the last 3 situations, savings and transitional provisions must be drafted specifically to cover the issues. The specifically drafted provisions will take precedence over the provisions of the Interpretation Act 1999. (Section 4 of

the Act provides that the Act applies to every New Zealand enactment unless the enactment provides otherwise or the context of the enactment requires a different interpretation.)

The **third** step for policy analysts is to decide which situation their enactment is in. To decide this, policy analysts must bring to mind all the relevant circumstances that have arisen in the past and that might be affected by the coming into force of the enactment. They must consider each circumstance carefully against the provisions in the Interpretation Act 1999.

The **fourth** step for policy analysts is to make sure that each circumstance is described by one of the following:

- it is not affected by the coming into force of the enactment and does not need to be covered by a savings or transitional provision
- it is affected and is covered by a provision in the Interpretation Act 1999
- it is affected and is dealt with in their instructions to PCO for a specific provision in the enactment.

*Where do savings and transitional provisions go?*

Savings and transitional provisions are almost always assembled and presented at or near the end of an enactment. However, there are 2 variations on this. The variations are not used often but they are useful for policy analysts to know about.

First, the provisions may be put in an enactment of their own. This option is convenient if a great many savings and transitional provisions are necessary. An example is the Animal Products (Ancillary and Transitional Provisions) Act 1999, which deals with the transition from the Meat Act 1981 to the Animal Products Act 1999.

Second, the provisions may be put in regulations made under the enactment. This option is convenient if it is not possible to foresee all the transitional matters that might arise from an Act. However, it is usually constitutionally improper for regulations, which are made by the executive, to alter an Act, which is made by Parliament. Consequently, an Act may include an empowering provision for such regulations only in rare circumstances and only if the empowering provision contains safeguards. The circumstances and the safeguards are found in reports by Parliament's Regulations Review Committee (see first report (1995) AJHR I. 16C and second report (1996) AJHR I.16G. This material is available on the page for the New Zealand Centre for Public Law at [www.vuw.ac.nz](http://www.vuw.ac.nz)).

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*Are there special cases to be aware of?*

Two special cases are worth mentioning.

First, there is the case of a course of action initiated under a repealed enactment. The question is which enactment it should be completed under - the repealed enactment or the replacement enactment. This is a special case because of the way that the Court of Appeal has interpreted section 18 of the Interpretation Act 1999. Section 18 deals with the issue of things initiated under an enactment that is being replaced. The Court of Appeal has interpreted section 18 as saying that it is only things relating to an existing right, interest, title, immunity, or duty that may be completed under the repealed enactment (see *Foodstuffs (Auckland) Ltd v Commerce Commission* [2002] 1 NZLR 353). Consequently, if the policy is that everything initiated under a repealed enactment is to be completed under the repealed enactment, the replacement enactment needs a transitional provision clearly saying so.

Second, there is the case of income tax enactments. This is a special case because the enactments use the terms “repeal” and “revoke” in a distinctive way. In general legislation, an Act, or a provision of an Act, that is repealed is no longer alive and cannot be amended. In income tax legislation, however, an Act or provision that is repealed stays alive for the tax and income years it covers and so can be amended. This position has been made clear in the Income Tax Act 2004. Section YA 1(1) (**Repeals**) repeals the ITA 1994, but section YA 1(2) specifically states that the repeal applies only to the tax on income derived in the 2005–06 year and later years. The ITA 1994 continues to exist and can be amended in the same way as any other existing statute. (What is said in this paragraph about the repeal of Acts applies equally to the revocation of delegated legislation.)

### **7.4.3 Guidelines**

Policy analysts developing enactments must pay attention, right from the start, to savings and transitional issues. They must allow time for the issues to be considered thoroughly. They must make sure that circumstances affected by the coming into force of the enactment are covered by a provision of the Interpretation Act 1999 or a specific provision in the enactment.

Policy analysts should seek advice on these matters from their departmental lawyers, who should have no hesitation about consulting Parliamentary Counsel.

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## SECTION 3

### PARTICULAR ISSUES

#### CHAPTER 8

#### CREATION OF A NEW PUBLIC POWER

##### INTRODUCTION

##### **Background**

The government of New Zealand is largely carried out through powers conferred on public authorities by legislation. These powers are known as public powers. They give individuals and agencies the discretion to act or not to act, and to decide what particular action to take.

Public powers should be distinguished from public duties. Powers are those that *may* be exercised, and where done so will be held lawful. Duties are those that *must* be performed as a matter of law. Generally, powers are discretionary. However, a public power can be construed as obligatory, when there is a *power* coupled with a *duty* to perform it.

Public powers are an essential element of our democratic government, through the separation of powers. The three branches of government all have public powers that interrelate and complement each other. In simple terms, Parliament has full power to make laws, through the political process. The executive has the governmental power of decision. The judiciary has the power to determine disputes and matters of law. Each of these powers is obviously exercised in different circumstances and processes.

There are numerous types of public power. Aside from general law-making and decision-making powers, there are also law enforcement, investigation, prosecution, and the like.

The most significant powers are those that affect individuals. In general, the greater the potential for public powers to impact on individuals, the greater the protections there should be, in terms of the independence of the decision-maker, the procedure to be followed, the specificity of the criteria for the decision, and the rights of appeal and review available.

##### **Issues discussed**

The following issues are discussed in this Chapter:

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- Part 1: Is a new power needed?
- Part 2: Who is the appropriate person to have the power?
- Part 3: Has a process for exercising the power been established?
- Part 4: Has the power and process been clearly stated?
- Part 5: What protections have been included for those who could be affected by the exercise of the power?

## PART 1

### IS A NEW POWER NEEDED?

#### **8.1.1 Outline of issue**

The first issue is whether the proposed public power is necessary. If it is necessary, then later parts will describe the appropriate procedural and institutional safeguards to use in stating the power, to protect individual rights and freedoms.

#### **8.1.2 Comment**

In creating a public power, care should be taken to ensure that there is protection for individuals dealing with government or otherwise affected by the exercise of the power.

Earlier chapters describe the importance of individuals' inherent rights and freedoms. Among these, the right to personal liberty and freedom from arbitrary imprisonment and detention are particularly important. A key responsibility of the state is not to trespass on these rights and freedoms in the exercise of public powers, unless the public interest in doing so outweighs the relevant private interest.

#### **8.1.3 Guidelines**

Do not create a public power unless it is really needed. Consider whether there are other options for achieving the desired outcome (see Chapter 1). Use these options if possible.

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## PART 2

### WHO IS THE APPROPRIATE PERSON TO HAVE THE POWER?

#### 8.2.1 Outline of issue

Once it has been established that a public power is necessary, a key question is who should have the power. Public powers can be exercised within the three branches of government, under the separation of powers, at various levels according to their particular nature and function. Powers overlap and inter-relate, and some bodies exercise several different powers. For example, in the criminal justice system, courts and tribunals exercise decision-making power over individuals, but there are also considerable public powers being exercised by agencies of the executive (such as the Police and Corrections).

#### 8.2.2 Comment

When conferring a public power, legislation must choose between the executive, legislature and the Courts. There is also a further choice to be made as to the appropriate level *within* the appropriate branch, for instance, in the executive branch, between central and local government and, if central government, between Ministers, officials, and tribunals and other public bodies.

The appropriate holder of a public power will depend on how confined the power is. Does it mainly involve the finding of past facts and the application of precise rules to those facts, or does it require the making of broader judgments, or the exercise of wide discretions, looking to the future and to elements of public interest. Decisions made in respect of individuals do not automatically require that the decision-maker be a court or tribunal. A further consideration is whether the power has a high policy-making content.

Elected representatives and responsible governments are fundamental to our governmental and constitutional system. The main principle of our constitution is that it is democratic; those who for the time being have public power have it within the confines of a democratic system. A central issue is how to draw the line from area to area and time to time between those matters of public decision which are to be handled by those with political responsibility to the electorate and those which are best settled by an independent tribunal or court. The broader the policy element the more appropriate it may be for the matter to be settled by Ministers who are responsible to Parliament, and ultimately to the electorate (or, at a local level, by the relevant local authority whose members are also responsible to the people).

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In some cases more than one officer or body may be involved, with similar or inter-related powers. For example, one body may have only advisory powers (rather than powers of decision), or one can exercise original powers of decision and the other resolves appeals. Many different examples of the spread of public powers can be given. One example is the Immigration Act 1987, which provides for:

- a variety of decision-makers, being the Governor-General in Council, the Minister of Immigration, immigration officers, the Courts (the District Courts, High Court and the Court of Appeal) and a tribunal (the Deportation Review Tribunal)
- a variety of procedures: administrative, on the papers, full hearing
- a variety of decisions relating to admission to, and deportation from, New Zealand
- reference or not to express standards or limiting criteria, such as humanitarian grounds, administrative error, fraud, unlawful residence, national security, criminal offending, terrorism

Aside from the spread of public powers, it is common for Parliament to settle the broad policy and delegate the power of decision-making to an independent specialist body. The specialist body will be best able to develop and apply the policy consistently on a country wide basis. Where appropriate, the policy can be developed by reference to a changing perception of the public interest.

Such a function might be thought better suited to a specialist tribunal with a multidisciplinary and changing membership than to the judges of a court of general jurisdiction. (That is not to deny a role for the courts in respect of questions of law and related matters arising from the exercise of such functions, but the special character of that appellate role also emphasises one difference between court and tribunal.)

A large volume of relatively routine matters might provide a quite different reason for using a specialist tribunal especially at first instance rather than a general court. In some cases, this tribunal might be a public servant acting as an independent officer and usually subject to a full right of appeal to the courts. (This is true of many registration and intellectual and industrial property functions.)

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*How should a tribunal be constituted?*

In general, the members of a tribunal should be, and should be seen to be, independent of parties to matters to be considered by the tribunal. That independence will arise from their qualifications, the method of appointment, their term of office, and the provision for termination of their appointment.

Some statutes indicate criteria relevant to appointment. The matter might be stated as a prerequisite or simply as something to be considered. Many statutes, although not invariably, require that a lawyer chair multi-member tribunals. That requirement, recommended by the Public and Administrative Law Reform Committee in its first report, is to be justified by reference to two features at least of the operation of tribunals - their procedure, and the interpretation of the legislation governing the tribunal's work.

In general the members should be appointed by the Government. The independence of the tribunal is also enhanced by making the appointment on the recommendation of, or at least following consultation with, the Attorney-General or Minister of Justice. Exceptionally parties to matters before a tribunal may have a role in the appointment of the tribunal, for instance, when the legislation adopts arbitration as the means of resolving a dispute.

An appointment should in general be for a term of at least three years and terminable only for good reason such as disability. The reason for this requirement is that the power in issue is to be exercised by an independent body and not by a body subject to particular government direction.

*Procedures commonly used by different decision-makers*

Court, tribunals, and the executive - have their characteristic procedures. Those different procedures, it can quickly be seen, are more apt for dealing with some issues than others.

A court process is designed, for example, to resolve, through adversary presentation and testing of evidence and argument, disputes about facts and law. Sometimes that will require the formal, structured presentation of evidence and arguments.

Tribunal procedure by contrast is usually less formal, with the rules of evidence being relaxed in almost all cases. Tribunals are sometimes expected to take an inquisitorial role in contrast to a more passive court which is dependent on the parties to bring the relevant material before it. Tribunals are still however bound by the principles of natural justice.

The less structured processes of ministerial decision-making may extend out

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to the relevant sources of information and opinion (expert and political) in the community, without rules about notice, disclosure and opportunities for rebuttal. Those processes do not require the kind of organised and complete record that a court and many tribunals must assemble. Those who decide will often not have “heard” all the material relevant to decision.

Procedures within courts and within tribunals can of course vary greatly, and that is even more true within the executive. The procedures can be more or less formal, more or less speedy and more or less costly. Those considerations may also themselves justify the use or establishment of a tribunal instead of a court. Thus the Disputes Tribunal was established to deal in an expeditious, informal, private and less costly way with small claims which otherwise come within the regular court jurisdiction. The issues might by contrast be so significant or difficult that a more elaborate and formal process is required.

Tribunals often are more accessible and less costly and allow a greater range of individual and public participation. In the courts a party who wishes to be represented is usually required to engage a lawyer. Tribunals frequently operate without the assistance of lawyers and indeed the use of lawyers is prohibited or limited in some tribunals concerned with private law matters in the interests of informality and lower costs. However, in some tribunal cases the interests involved will be very large, the issues complex and many, and parties will wish to be represented by counsel and to engage in a relatively formal process - which in consequence may well be, in part, as costly and time consuming as major litigation in the High Court. But in the usual case the procedural advantages will be available. Legal aid can be important in either event and is provided for in the Legal Services Act 2000.

### **8.2.3 Guidelines**

When deciding who should have a public power, the following matters should be considered:

- the importance of the individual rights and interests involved (compare, for example, serious criminal or disciplinary processes with a power to confer benefits to which there is no entitlement),
- the importance of the public or state interest involved
- the character of the issues to be decided (for instance fact, policy, discretion, law),
- the expertise to be expected of the decision-maker

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- the context, including the administrative one, in which the issue is to be resolved;
  - the existence of other safeguards over the exercise of the power;
  - the procedure commonly used by the proposed decision-maker;
  - the advantage or disadvantage of having a body independent of the government and other public controls making the decision or carrying out the function.

## PART 3

### HAS A PROCESS FOR EXERCISING THE POWER BEEN ESTABLISHED?

#### **8.3.1 Outline of issue**

This involves deciding how the public power should be exercised in order to achieve its purpose. It is important to clearly establish some sort of process and guidelines by which the power is to be exercised.

#### **8.3.2 Comment**

The particular method chosen for exercising the public power will depend on the purpose and characteristics of the power, together with the issues to be resolved and the interests affected, the qualities and responsibilities of the decision-maker, and the procedure to be followed.

The procedure to be followed will depend on whether the decision-maker should -

- give a fair hearing
- consult
- give public notice and invite comment
- decide on a more summary basis.

If there is an obligation to give a fair hearing or consult, it is necessary to determine who should be entitled to be heard or to be consulted. This includes those directly affected, those less directly affected, and those who represent some relevant part of the public interest or otherwise may aid the decision-maker.

Where there is an obligation to give a hearing, it is necessary to determine

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what the particular content of that hearing should be. As a matter of natural justice, the decision-maker must indicate to the persons affected what the issues are, disclose the information relevant to the exercise of the power, and give the persons the opportunity to present their case and to rebut material put forward to their detriment. This can vary in extent from a full court process to a “hearing” on papers. Whether there should be full or more limited hearing largely depends very much on the broad public powers considerations, and the appropriate choice of decision-maker. The detail of the answers should also be helped by the provisions applying in general to tribunals (see below).

In general, those with the power to make decisions should be obliged to disclose the principles and policies they apply and to give reasons for their decisions, if asked to do so by those affected. This principle already binds those subject to the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987.

The exact requirements for exercising a public power will be affected by the existence or not of rights of appeal. Any power the original decision-maker has to reconsider the matter will also be relevant. The existence of safeguards such as review or appeal may mean that procedural safeguards need not be accorded at first instance. But that may be a false economy. It is important to aim to get good quality decisions at that stage.

#### *Procedures for tribunals*

The Public and Administrative Law Reform Committee addressed the question of appropriate procedures for tribunals in its sixth report (1973) paras 15-50. The then Department of Justice subsequently reviewed the practice of conferring powers on tribunals by reference to the Commissions of Inquiry Act 1908 and concluded that it was inappropriate to confer powers on tribunals in this way.

If a government department may from time to time be required to appear as a party before a tribunal, then, where practicable, that same department should not provide administrative services for the tribunal (Public and Administrative Law Reform Committee, First Report (1968)). In addition, where a tribunal is hearing appeals from decisions of a government department the same rule should apply. The rule enhances the independence of the tribunal and the appearance of that independence.

#### *Professional discipline*

One particular application of tribunals is to professional discipline. In its ninth report (1976) the Public and Administrative Law Reform Committee formulated general standards that should apply to all statutes dealing with

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discipline of professionals. In its tenth report (1977) it applied these principles to the disciplinary rules of the legal profession. The principles formulated by the Committee were:

- A representative of the public or lay observer should participate in the disciplinary process.
- Investigative and adjudicative functions should be performed by separate bodies.
- Both the complainant and the person whose conduct is the subject of the complaint should be given a fair hearing.
- The grounds upon which a professional can be disciplined must be appropriate to the particular profession.
- Adequate appeal rights must be provided.

### 8.3.3 Guidelines

When determining how a power should be exercised, and what particular method of decision-making should be used, consider the following criteria:

- the characteristics of the power, together with the issues to be resolved and the interests affected (prominent among those interests are the liberty of individuals and their other important rights);
- the qualities and responsibilities of the decision-maker; and
- the procedure to be followed.

Determining the procedure to be used involves deciding whether the decision-maker should:

- give a fair hearing (in which case, the content should be determined);
- consult (in which case, who should be consulted should be determined);
- give public notice and invite comment (in which case, the content and timeframes should be determined);
- decide on a more summary basis (in which case, the criteria the decision should be based on should be determined).

Professional disciplinary legislation should incorporate the standards set out in the ninth report (1976) of the Public and Administrative Law Reform

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Committee.

## PART 4

### HAS THE POWER AND PROCESS BEEN CLEARLY STATED?

#### **8.4.1 Outline of issue**

Once the need for a public power has been determined, together with how and by whom it should be exercised, a remaining issue is how the power should be stated. It is essential that the power be stated clearly in the legislation. This involves being clear about what the purpose of the power is, and how it should be achieved. Other issues include: how does the proposed power relate to existing powers? Is it stated sufficiently broadly to achieve the intended purpose while being subject to sufficient restraints and controls to meet the demands of principle?

#### **8.4.2 Comment**

As a minimum the legislation must state the thing to be done. For example, this may be granting or revoking a licence, conferring or cancelling a benefit, permitting non-New Zealanders to be in New Zealand, or deporting such persons.

The statement of what is to be done will often include a qualification or condition (such as age for a benefit, or status for migration). The qualification or condition can be complex, for example where the principal deportation power can be exercised only if the person in issue has committed certain offences and has done that within a particular period of becoming a resident.

The legislation can set a test that has to be satisfied in the exercise of the power. Once again the immigration legislation provides examples. The appeal tribunal may cancel an order issued for the removal of an overstayer if satisfied, first, that because of exceptional circumstances of humanitarian character removal would be unjust or unduly harsh and, second, that allowing the person to remain would not be contrary to the public interest.

The legislation can (impliedly as well as expressly) put a “gloss” on the power in at least two further ways. It can indicate the matters or factors to be considered (or not to be considered) by those exercising the power. And it can oblige or permit the decision-maker to consider (or not to consider) certain purposes of the power or legislation.

The legislation should state, as far as possible, broadly what the power is; in

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what circumstances it can be exercised; what matters can be considered; and what is the purpose of the power. These matters are important in both technical and policy senses. In a technical sense, there is a critical difference between the *circumstances* in which the power can be exercised and the *matters for consideration*. The former states a prerequisite to action and must be established in the mind of the decision-maker, while the latter indicates matters that must or may merely be considered.

In a policy sense, the issue is: in what circumstances should limiting purposes and factors be indicated? The best approach is to state the purposes and factors as clearly as practicable. There can be a difference between situations where restraints are being imposed on individuals' freedom of action (for example by way of regulations) or things are being taken away from them, and there can be situations where benefits are conferred without any question of entitlement.

The legislation should clearly state whether judgments need to be made on two or more distinct matters in the particular case. This may be addressed in separate provisions. For instance, there may be a need for a new operator in a licensed industry and if so, then the qualifications of particular applicants. Or perhaps a restrictive trade practice exists, and if so, the grounds for whether this is contrary to the public interest.

### 8.4.3 Guidelines

Clear policy decisions are critical to ensure that the power is stated clearly in the legislation. The legislation should state -

- What the power is.
- In what circumstances can it be exercised? (What judgments must be made before exercising the power? Is the exercise of the power discretionary or mandatory once the circumstances are established?)
- What matters should, may, or must not be considered?
- For what purposes may or must the power be exercised, and what purposes are improper?

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## PART 5

### WHAT PROTECTIONS HAVE BEEN INCLUDED FOR THOSE WHO COULD BE AFFECTED BY THE EXERCISE OF THE POWER?

#### 8.5.1 Outline of issue

Part 1 of this chapter requires policy makers to ensure that a public power is necessary, before introducing it. Subsequent Parts discuss the importance of ensuring the policy behind the public power is properly elaborated and applied. Finally, it is critical to consider the individuals affected by the exercise of the power.

#### 8.5.2 Comment

How important are the individual rights and interests which may be affected by the exercise of the power? Is personal liberty involved? Do the rights justify or require elaborate and careful protections by a formal process supervised and applied by a body which is clearly independent of the government? Against that may be important public interests which suggest that the government should have a substantial or final power of decision.

As the public powers to interfere with individuals' rights and interests grow, many statutes have required greater procedural protections (sometimes using the phrase "principles of natural justice"). The courts have long shown themselves willing to "supply the omission of the legislature" if a statute which confers public power to affect rights and interests is silent about procedural protections.

The right to personal liberty, and especially to freedom from arbitrary imprisonment and detention, of course falls within such principles. But the range of rights and interests to be protected by institutional and procedural safeguards may vary from one context and time to another as the assessment of the value of these rights and interests varies.

The Bill of Rights Act 1990 reaffirms the broad principle: 'Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law' (s 27(1)).

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### 8.5.3 Guidelines

In general, the more serious the consequence of the decision for individual rights and interests then the more protection should be given the persons affected. This “protection” should take the form of:

- the independence of the decision-maker (court or tribunal rather than executive or, if it is to be the executive, the seniority of the person with power of decision (Minister or even Governor-General rather than officials));
- the procedure to be followed (rights to provide submissions, to be heard and to call witnesses rather than no express procedural protections at all);
- the specificity of standards, criteria and rules for decision; and
- rights of appeal and review.

The main qualification to this is when a broader public interest prevails over an individual right or interest.

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## CHAPTER 9

### CREATION OF A NEW PUBLIC AGENCY

#### INTRODUCTION

##### **Background**

The previous chapter treats the executive (within the choice between the executive, Parliament, and Courts) as a single entity. It is not, of course. There is the choice between central government and local government. Within the latter there are further choices. This chapter relates to the bodies established within central government (although the question as to whether a particular function should be carried out by a local body should not be ignored).

There is a continuum of bodies exercising public power at the level of central government. At one end is the standard Minister—department relationship and along it various forms of independent or partly independent power. The legal structures should reflect that continuum and the reasons for greater or lesser autonomy. This chapter addresses 5 distinct categories of entity:

- departments of State (often called Ministries)
- State-owned enterprises
- Crown entities
- agencies listed in Schedule 4 of the Public Finance Act 1989
- Offices of Parliament.

The first 4 categories are identified variously in the State Sector Act 1988, the Public Finance Act 1989, the Crown Entities Act 2004, and the State-Owned Enterprises Act 1986. It is convenient to consider Offices of Parliament here, although they are not, of course, part of the executive government. Offices of Parliament are set up under individual enabling Acts.

There are also other statutory agencies (eg the Queen Elizabeth the Second National Trust and the Nursing Council of New Zealand) with which the Crown has some involvement, which are not in any of the above categories. Such agencies are not addressed in this chapter.

Some of the agencies referred to in this chapter are part of the “State services”. This means they are “instruments of the Crown in respect of the Government of New Zealand” (s 2 of the State Sector Act 1988). The Public Service departments, some of the non-Public Service departments, and all Crown entities (with the exception of tertiary education institutions and their subsidiaries) are within the “State services”. State-owned enterprises, Offices of Parliament, and agencies of the legislature, such as the Office of the Clerk, are not. Whether

or not an agency is within the State services is important for a number of reasons, apart from symbolic ones. The State Sector Act 1988 largely limits the State Services Commissioner's role to agencies within the State services. An example is the Commissioner's responsibility for issuing advice and guidance to State servants on their integrity and conduct.

This chapter is in addition to other guidelines. For example, see Annex C to CAB (00) M19/II(1), which is a diagrammatic summary of how to choose an organisation form. This is contained in Appendix 6 of these Guidelines.

### **Issues discussed**

The following issues are discussed in this chapter:

Part 1: Should the agency be a department of State?

Part 2: Should the agency be a State enterprise?

Part 3: Should the agency be an Office of Parliament?

Part 4: Should the agency be a Crown entity and, if yes, what sort?

Part 5: Should the agency be listed in Schedule 4 of the Public Finance Act 1989?

Part 6: Is it clear whether the Ombudsmen Act 1975, the Official Information Act 1982, and the Local Government Official Information and Meetings Act 1987 apply to the agency?

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## PART 1

### SHOULD THE AGENCY BE A DEPARTMENT OF STATE?

#### 9.1.1 Outline of issue

Should the agency be a department (or Ministry)?

Departments (including Ministries) are legally part of the Crown. They do not have separate corporate status. They are usually funded from public money, although some may acquire money from other sources. All money (other than trust money) held by a department is “public money” for the purposes of the Public Finance Act 1989, irrespective of whether it comes directly from the Crown or from third parties. Departments cannot incur expenses, or spend public money, other than in accordance with an appropriation or other authority under an Act of Parliament.

#### 9.1.2 Comment

Schedule 1 of the State Sector Act 1988 lists the departments of the Public Service. They have a variety of names, and a great variety of functions with differing balances between advisory, operational or service provision functions. Public Service departments come under the aegis of the State Services Commissioner. The Commissioner appoints their chief executives (if the Commissioner’s recommendation is accepted by the Executive Council), and is responsible to the appropriate Minister for reviewing their performance, and that of the departments. Schedule 1 of the State Sector Act 1988 can be amended by Order in Council if a department is abolished, newly created, or its name has changed. If a department has been established by an Act of Parliament, it still cannot be abolished without a repealing Act (s 30A of the State Sector Act 1988).

The Public Finance Act 1989, however, uses a different definition of “department”. Section 2 refers to “a department or instrument of the Government”, the Office of the Clerk of the House of Representatives, and the Parliamentary Service, but excludes “a body corporate or other legal entity that has the power to contract” and an Office of Parliament. Thus, agencies such as the Office of the Clerk of the House of Representatives, the Parliamentary Service, the New Zealand Defence Force, the New Zealand Security Intelligence Service, the Police, and the Parliamentary Counsel

Office are departments under the Public Finance Act 1989, but are not departments of the Public Service. The origins of most of the non-Public Service departments like those listed above lie quite a long way back in history. On the one hand, some of them have a different legal and constitutional relationship with the Government to that of a standard public service department. Their distinctive features include—

- the Police have constabulary independence. The Commissioner of Police acts in certain respects with original (as opposed to Ministerially delegated) authority;
- the defence prerogative applies in the case of Defence.

On the other hand, it is important that agencies such as these remain owned by the Crown and, particularly in the case of the Police and Defence Force, remain subject to oversight from, and accountability to, Ministers. However, there is a strong presumption that any new department would be established as a public service department, and that there would have to be very compelling reasons for establishing a new department on any other basis— reasons related to the distinctively different relationship with the Government and the lack of fit with the State Sector Act 1988.

While there is a responsible Minister for each department, the Ministerial power and responsibility varies. In the case of departments with policy and many operational functions, the responsibility is extensive. Where departments or officers within them have independent statutory functions (eg the Inland Revenue Department) the Minister's responsibility may be more limited.

The reforms of the 1980s led to departments having a greater emphasis on policy and related roles — those subject to greater Ministerial scrutiny — and to other roles being transferred to State-owned enterprises or Crown entities. But the operational role of departments is still major and critical in respect of, for instance, natural resources (such as the Department of Conservation) or transfers of money (such as the Ministry of Social Development).

Constitutional principles and legislation relating to the Public Service support several broad propositions. Members of the Public Service are:

- to act in accordance with the law;
- to be imbued with the spirit of service to the community;
- to give free and frank advice to Ministers;
- to give effect to lawful Ministerial instructions;
- when the law so provides, to act independently in accordance with the terms of the law.

The Legislation Advisory Committee's report on *Departmental Statutes* (1989, Report 4) has largely been accepted by successive Governments and acted on in practice by Parliament. The report arose out of the common (but not invariable) practice of Parliament enacting statutes that established departments of State. The Committee reached the general conclusion that such legislation is usually not necessary and stated the following conclusions and recommendations:

- Departmental statutes and related legislative provisions should not in general be enacted.
- Legislation should not in general confer functions on departments; rather it should confer functions on the Governor-General (in Council), Ministers, or officials.
- Legislation should not in general name specific Ministers or relate officials to particular departments; rather, the reference should be general (“a Minister of the Crown”, “the Registrar appointed under the State Sector Act 1988”). In some cases, particular Ministers are, however, quite properly specified as having a statutory power.
- Parliament should have to approve the addition of new departments to the list of departments scheduled to the State Sector Act 1988, as well as deletions and alterations. This recommendation has not been adopted.

A fifth recommendation for the publication of a table of functions of Ministers, departments, and statutes for general information purposes has been implemented — see website: <http://www.dpmc.govt.nz/cabinet/portfolios/index.html>.

### 9.1.3 Guidelines

The Public Service departmental form is likely to be preferred where one or more of the following apply:

- the agency will exercise coercive powers of the State (eg prisons or tax collection);
- the agency will provide policy advice to Government;
- other special powers will reside in the agency or its officials;
- the agency will carry out multiple functions, particularly where the functions potentially conflict;
- the complexity of the activities makes it difficult to “contract” for their provision by a Crown entity;
- Ministerial desire to control the process and outcome of the activity, including frequently reviewing its objectives;
- constitutional conventions indicate a need for close Ministerial oversight or direct Ministerial responsibility;

A Ministerial desire to control the process and outcome of the activity, including frequently reviewing its objectives, is indicated by:

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- its significance and importance to the Government; or
  - the high public and political expectations associated with the activity; or
  - the nature of the risks posed to the Crown.

## PART 2

### SHOULD THE AGENCY BE A STATE ENTERPRISE?

#### 9.2.1 Outline of issue

Should the agency be a State enterprise? The basic principle is that commercial activities of the Government should be carried out by agencies (generally companies) with commercial objectives.

#### 9.2.2 Comment

Government trading agencies have operated for much of New Zealand's history. The State-Owned Enterprises Act 1986 provides the general legal framework for most of those which operate at the moment. According to its Title, it is:

“An Act to promote improved performance in respect of Government trading activities and, to this end, to—

- (a) Specify principles governing the operation of State enterprises; and
- (b) Authorise the formation of companies to carry on certain Government activities

and control the ownership thereof; and

- (c) Establish requirements about the accountability of State enterprises, and the responsibility of Ministers”.

By section 4(1), the principal objective of every State enterprise is to “operate as a successful business and, to this end, to be—

- (a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
- (b) A good employer; and

- 
- (c) An agency that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so”.

The Act recognises that the enterprise may have non-commercial roles, but requires Ministers to enter into an agreement with the agency to pay for any goods or services that they wish an SOE to provide to any person.

The Act establishes systems of accountability of the enterprises, for instance to Parliament (including audit by the Auditor-General) and by being subject to the Ombudsmen Act 1975 and the Official Information Act 1982.<sup>155</sup>

### 9.2.3 Guidelines

The State enterprise form is most likely to be appropriate where:

- there are identifiable commercial objectives and the agency can operate as an efficient and profitable business;
- nevertheless, the Crown wants the business to be operated by an agency that will exhibit a sense of social responsibility by having regard to the interests of the community in which it operates (ie the Government has a policy of retaining ownership of the business itself, as opposed to sale or cessation).

## PART 3

### SHOULD THE AGENCY BE AN OFFICE OF PARLIAMENT?

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<sup>155</sup> The continued application of those Acts to the enterprises was reviewed after two years and the Government accepted the relevant select committee’s recommendation that the Acts should continue to apply, with some amendment — among other things, by extension to subsidiaries of the enterprises (Report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee 1990 AJHR I.22A).

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### 9.3.1 Outline of issue

Should the agency be an Office of Parliament? Officers of Parliament are rarely created — there are currently only three. Officers of Parliament are not part of executive government. In effect, they discharge functions (scrutiny of the executive) that the House of Representatives itself might carry out.

### 9.3.2 Comment

The Public Finance Act 1989 identifies three offices as Offices of Parliament — the Auditor-General, the Office of the Ombudsmen; and the Office of the Parliamentary Commissioner for the Environment.

The Finance and Expenditure Committee reported on Officers of Parliament in 1989.<sup>156</sup> The Committee defined their primary function as “a check on the Executive, as part of Parliament’s constitutional role of ensuring accountability of the Executive” (para 5.1.1).

Their distinctness from the other categories of public bodies is emphasised by the provisions in the Public Finance Act 1989 and by the practice of the House for the handling of their estimates of revenue and expenditure. The relevant chief executive submits the estimates directly to the House and they are considered by an Officers of Parliament Committee, chaired by the Speaker.

The special character of such offices is also reflected in the method of appointment. The procedure for appointment is that set out in the Report of the Officers of Parliament Committee (2002) I.15A.

### 9.3.3 Guidelines

The recommendations of the Finance and Expenditure Committee in 1989 are appropriate guidance:

- An Office of Parliament must only be created to provide a check on the arbitrary use of power by the executive.

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<sup>156</sup> 1989 AJHR I.4B and 1987—1990 AJHR I.20 p 113.

- An Office of Parliament must only be created to discharge functions that the House of Representatives itself, if it so wished, might carry out.
- Parliament should consider creating an Office of Parliament only rarely.
- Parliament should review from time to time the appropriateness of each Office of Parliament's status as such.
- Each Office of Parliament should be created in separate legislation principally devoted to that Office.

## PART 4

### SHOULD THE AGENCY BE A CROWN ENTITY AND, IF YES, WHAT SORT?

#### 9.4.1 Outline of issue

Should the agency be a Crown entity, rather than a department or a State enterprise? If the agency should be a Crown entity, what category or type should it be? Crown entities are those agencies defined as such in the Crown Entities Act 2004. They include a range of forms and functions.

#### 9.4.2 Comment

Crown entities are a significant part of Government. Much of the activity of central government is carried out by agencies that are not departments — usually either Crown entities or State enterprises. Crown entities dominate service delivery in areas such as health, education, transport, and science.

The term “Crown entity” encompasses a wide range of different agencies, such as school boards of trustees, tertiary education institutions, the Commerce Commission, the Foundation for Research, Science, and Technology, and the New Zealand Symphony Orchestra. They differ from each other in terms of legal form, function, source of funding, and the relationship they have with their Minister.

Crown entities carry out a wide variety of functions and include:

- purchase or funding bodies (eg New Zealand Tourism Board)
- service delivery bodies (eg District Health Boards and the New Zealand Fire Service Commission)
- advisory bodies (eg Law Commission)
- trading bodies that are not State enterprises under the 1986 Act (eg Crown Research Institutes, TVNZ, Public Trust, and the Lotteries Commission)

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- administrative tribunals with some quasi-judicial functions (eg Commerce Commission)
  - control and supervisory bodies, other than Offices of Parliament or tribunals (eg Police Complaints Authority)
  - financial institutions (eg Guardians of New Zealand Superannuation)
  - Crown entities are now classified into:
    - statutory entities — these are listed in Schedule 1 of the Crown Entities Act 2004. They are statutory bodies corporate, legally separate from the Crown. Subject to legislation, they have the powers of a natural person as well as statutory functions and powers under their “entity’s Act”. Each statutory entity has an entity’s Act and the Crown Entities Act 2004 prevails over the entity’s Act in the event of a conflict between them, except to the extent that the entity’s Act expressly provides otherwise. Statutory entities each have a board, which in most cases is a governing body of board members. However, in the case of corporations sole, such as the Privacy Commissioner, the sole member is the board. Statutory entities are further subdivided on the basis of closeness to the Crown into:
      - Crown agents — those entities required to give effect to the policy of the Government of the day communicated by direction of the Minister responsible for the entity (eg Land Transport New Zealand);
      - Autonomous Crown Entities (ACEs) — those entities required to have regard to the policy of the Government of the day communicated by direction of the Minister responsible for the entity (eg the New Zealand Film Commission);
      - Independent Crown Entities (ICEs) — typically, quasi-judicial or investigative bodies, such as the Children’s Commissioner, that clearly require greater independence from the Crown;
    - Crown entity companies — These are listed in Schedule 2 of the Crown Entities Act 2004. They are companies established under the Companies Act 1993 that are wholly owned by the Crown. They generally carry out a mixture of commercial and other functions and are distinct from State-owned enterprises under the State-Owned Enterprises Act 1986. Examples are TVNZ and Crown Research Institutes;
    - Crown entity subsidiaries — these are subsidiaries controlled by other Crown entities;
    - school boards of trustees — these are constituted under Part 9 of the Education Act 1989. The Crown Entities Act 2004 applies to them to the extent specified in Schedule 3 of that Act;
    - tertiary education institutions — these are established under Part 14 of the Education Act 1989. The Crown Entities Act 2004 applies to them to the extent specified in Schedule 4 of that Act.

The Crown Entities Act 2004 developed a more coherent and consistent set of governance and accountability arrangements for Crown entities, while allowing for genuine differences in function. Some governance and accountability features were applied to practically all Crown entities (eg being subject to the Official Information Act 1982 and Ombudsmen Act 1975, and being required to produce basic accountability documents).

Different governance and accountability provisions apply to each category of Crown entity. Some key differences are set out in the table below. However, the particular entity's Act may vary the standard approach set out in the Crown Entities Act 2004 and in the table below:

<b>Governance Arrangements</b>	<b>Crown Agents</b>	<b>Autonomous Crown entities</b>	<b>Independent Crown entities</b>	<b>Companies</b> (as per the Companies Act 1993)
Reference to government policy of the day <sup>157</sup>	Give effect to	Have regard to	No general legislative provision	No general legislative provision

<sup>157</sup> The Crown Entities Act 2004 does not authorise a Minister to direct a Crown entity, or a member, employee, or office holder of a Crown entity:

- (a) in relation to a statutorily independent function; or
- (b) requiring the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons.

Appointment of board members <sup>158</sup>	By responsible Minister		By Governor-General on the recommendation of responsible Minister	By shareholding Ministers
Dismissal of board members <sup>159</sup>	By responsible Minister, entirely at the Minister's discretion	By responsible Minister, for any reason that in the Minister's opinion justifies the removal	By Governor-General for just cause on the advice of responsible Minister after consultation with Attorney-General	Directors serve at shareholders' prerogative
Tenure	Term up to 3 years, renewable		Term up to 5 years, renewable	Term up to 3 years, renewable
Setting of remuneration	By responsible Minister under fees framework.  By Remuneration Authority, in the case of a member of a corporation sole		By Remuneration Authority	By shareholding Ministers generally under Crown Company Monitoring Advisory Unit's Framework

The Minister of State Services and the Minister of Finance may jointly direct Crown entities to comply with whole of Government directions (see s 107 of the Crown Entities Act 2004).

<sup>158</sup> All appointments subject to Cabinet protocol on 'significant appointments'.

<sup>159</sup> Elected members of Crown agents or ACEs can only be dismissed for just cause by the responsible Minister. Special rules apply to Judges who are serving as members of Crown entities. The Companies Act 1993 provisions are included for comparative purposes.

There is a requirement to consult the Minister of State Services before Cabinet considers any proposal to establish an entity that could be in the Government reporting entity (as defined in section 2 of the Public Finance Act 1989) (other than a department or a State enterprise) (CAB (00) M19/11(1)). Although some of the agencies comprising the Government reporting entity are legally separate from the Crown, the Crown has an ownership interest in them, reflected in the requirement that the annual financial statements of each agency must be consolidated into the financial statements of the Crown. As well as departments, Crown entities, Schedule 4 Public Finance Act 1989 entities, State enterprises, the Reserve Bank of New Zealand, the Offices of Parliament, and Parliamentary agencies such as the Parliamentary Service, any other agencies that are required to provide annual financial statements for consolidation are part of the Government reporting entity (s 27(3) Public Finance Act 1989).

### 9.4.3 Guidelines

A public agency should be a Crown entity <sup>160</sup> where:

- its activities are part of executive government; and
- the activities fall outside the core functions of government, or there are other compelling reasons for them to be performed at arms length from the Minister (eg placement outside the legal Crown is critical, or a governance board is necessary, or the Minister should have a clearly defined or limited scope for involvement); and
- it does not have clear commercial objectives, or if it does, there are other reasons (such as social objectives) which make the State enterprise form inappropriate.

The primary considerations for assignment to one of the categories are:

- are the functions of the new entity “commercial” in nature — which would indicate the company form;
- should decision-making be subject to Ministerial direction?
- if decision-making should be subject to Ministerial direction, is it necessary to place the function in an organisation that is required to give effect to the policy of

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<sup>160</sup> The Finance and Expenditure Committee has proposed this test for determining whether an agency should be a Crown entity:

Crown-owned entities are those bodies corporate other than State enterprises:

- in which the Crown owns a majority of the voting shares; or
- for which the Crown has the power to dismiss a majority of the members of the governing agency or, where no such agency exists, has the power to dismiss the chief executive, and replace the governing agency or the chief executive with a governing agency or a chief executive which is primarily responsible to the Crown; or
- for which the Crown has the right to more than fifty percent of their net assets on their disestablishment; or
- in respect of which the Crown would be expected to assume any residual liabilities other than pursuant to a guarantee; or
- which Parliament considers to be owned by the Crown and deems to be Crown-owned entities.

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the government of the day (a Crown agent), or is it sufficient to place it in an organisation that is required only to have regard to that policy (an ACE)?

- if decision-making need not be subject to Ministerial direction:
  - is it necessary for reasons of public confidence in certain decisions (eg regulatory decisions in individual cases or the issuing of certain benefits) to place decision-making in a Crown agent or an ACE as a “statutorily independent” function, ensuring freedom from Ministerial influence or control and protection for the independence of decision-makers? or
  - is it necessary, because absolute public confidence is paramount, to place the function(s) in an ICE that is not required to give effect or have regard to the policies of the government of the day?

## PART 5

### SHOULD THE AGENCY BE LISTED IN SCHEDULE 4 OF THE PUBLIC FINANCE ACT 1989?

#### 9.5.1 Outline of Issue

Should the agency be listed in Schedule 4 of the Public Finance Act 1989?

#### 9.5.2 Comment

Entities listed in Schedule 4 of the Public Finance Act 1989 are organisations that are part of the Government reporting entity in terms of section 27 of the Public Finance Act that are not Crown entities or State enterprises (or the Reserve Bank of New Zealand).

Before the enactment of the Crown Entities Act 2004, all Crown entities were listed on Schedule 4 of the Public Finance Act 1989. With the passage of the Crown Entities Act 2004 (which now defines what agencies are Crown entities) and the Public Finance Amendment Act 2004, Schedule 4 of the Public Finance Act now lists a range of other agencies included in the Government reporting entity. Some of these agencies were formerly Crown entities, but no longer have that status. This change in categorisation has been necessary because the full governance and accountability framework applying to Crown entities in the Crown Entities Act 2004 did not mesh well with those features specifically applying to the entities under their establishing Acts or with those entities that are trusts. In some cases, this is because of the small or

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local nature of the entity's operations (eg Reserves Boards look after local cemeteries and signage in camping grounds). In other cases, the establishing Act gives the entity features that do not mesh with the requirements in the Crown Entities Act 2004, such as the New Zealand Lottery Grants Board, which is not a body corporate and has a board of which half of the members are required to be Members of Parliament (2 Ministers of the Crown and the Leader of the Opposition).

Entities now listed on Schedule 4 are subject to some (mainly) financial provisions in Part 4 of the Crown Entities Act 2004. They may be required, for example, to provide a yearly statement of intent.

### **9.5.3 Guidelines**

If the entity is a Crown trust or has other distinctive features making Crown entity status unsuitable, it may be categorised as an entity in Schedule 4 of the Public Finance Act 1989.

## **PART 6**

**IS IT CLEAR WHETHER THE OMBUDSMEN ACT 1975, THE OFFICIAL INFORMATION ACT 1982, AND THE LOCAL GOVERNMENT OFFICIAL INFORMATION AND MEETINGS ACT 1987 APPLY TO THE AGENCY?**

### **9.6.1 Outline of Issue**

When a new public agency is being created, the application to that agency of the Ombudsmen Act 1975, the Official Information Act 1982, and the Local Government Official Information and Meetings Act 1987 should be considered.

### **9.6.2 Comment**

As a general principle, the Ombudsmen should have jurisdiction over departments and other agencies that make decisions that relate to matters of central or local government administration and which affect members of the public. The factors to be taken into account are the relationship between the agency and central or local government and its public purpose. There should be consultation with the Office of the Ombudsmen about these matters.

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Whenever a new agency is created, it is also necessary to determine whether or not the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 should apply to it. In some cases the 1982 Act will apply since the agency is subject to the Ombudsmen Act 1975. The basic criterion formulated by the Danks Committee that proposed the Official Information Act 1982 is that bodies carrying out a government or public function should be subject to that Act. The criterion is now to be understood more broadly, given the Amendment Act of 1987 and the Local Government Official Information and Meetings Act 1987. To a large extent the application of the legislation will depend on the relationship between the agency and central government. The following factors are relevant:

- the agency's dependence on central government funding;
- the obligation of the agency to consult with the Minister on particular matters, respond to ministerial directions, or obtain ministerial approval;
- the existence of ministerial control over appointments in contrast to, for example, elected membership representing relevant interest groups;
- the existence of any government controls on finance, for example, by the Auditor-General;
- the public purpose of the agency.

As well, attention is often to be given to the potential role of the Auditor-General and, in the local government and related areas, to the Local Government Act 2002, Local Authorities (Members' Interests) Act 1968, and Local Electoral Act 2001.

### **9.6.3 Guidelines**

In general, the Ombudsmen Act 1975 and either the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 should apply to a public agency. If it is proposed that a public agency not be subject to those Acts, the Office of the Ombudsmen should be consulted.

In the case of Crown entities, the Official Information and Ombudsmen Acts should apply to all newly established entities, and to entities with legislation under review. An exception is where the entity's functions are judicial in nature — such as where the members of the entity examine evidence on oath and make determinations affecting individual interests or rights on the basis of that evidence (eg the Police Complaints Authority).

With one exception, the Ombudsmen Act 1975 applies to all statutory entities and Crown entity companies listed on Schedules 1 and 2 of the Crown Entities Act 2004, and to all other Crown entities — school boards of trustees, tertiary education

institutions, and Crown entity subsidiaries (s 131 of the Crown Entities Act 2003). Where the Ombudsmen Act 1975 applies to a Crown entity, the Official Information Act also applies.

## CHAPTER 10

### DELEGATED LEGISLATION

#### INTRODUCTION

##### **Background**

Under section 15(1) of the Constitution Act 1986, Parliament has full power to make laws. Parliament usually exercises this power to pass primary legislation (that is, Acts of Parliament). However, Parliament also has the power to confer its law-making power on another person or body, thus enabling that person or body to make laws. This process is the delegation of Parliament's legislative power, and the resulting laws are known as delegated legislation.

Delegated legislation is a generic term, which includes regulations (as defined in section 29 of the Interpretation Act 1999 and section 2 of the Regulations (Disallowance) Act 1989), deemed regulations (see Part 4 of this chapter), and other delegated legislation (such as Ministerial notices). Delegated legislation is also known as subordinate legislation: that is, the legislation is subordinate to the Act under which it is made. Terms such as "secondary legislation", "regulations", "deemed regulations", and "tertiary legislation" are sometimes used to describe delegated legislation or aspects of delegated legislation. However, to avoid confusion, it is preferable to think of delegated legislation as encompassing all legislation made under the authority of an Act of Parliament. It is important to note, however, that regulations (as defined); is a narrower concept than delegated legislation, because of the limited scope of that definition.

The reasons why Parliament delegates its law-making powers have been summarised as follows:<sup>1</sup>

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<sup>1</sup> Tanner, G and Chen M, Delegated Legislation, NZLS Seminar, May 2002, 95.

There is little doubt that regulations are a necessary part of New Zealand's legal landscape. This has long been the case. It is a simple reflection of the complexity of living in a civilised society and the necessity for so much law containing high levels of technical detail. It would be impossible for Parliament to retain absolute responsibility for all of it.

So, in recognising the practical utility and, in many cases, the necessity for delegated legislation, Parliament routinely delegates its law-making function. However, Parliament must be satisfied that, in each case, the delegation can be objectively justified. Further, there must be sufficient safeguards and constraints to satisfy Parliament that the delegated power will be exercised properly and will not be abused. In particular, the Regulations Review Committee may draw a regulation to the attention of the House on one or more of the grounds specified in standing order 315(2) (see Chapter 10A, Part 6).

The courts also have a role in reviewing delegated powers made under the authority of Parliament (see Chapter 10A, Parts 1 to 5). However, the courts will only become involved in a review if the validity of delegated legislation is challenged in the court.

In all cases, it is vitally important to ensure that—

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- the anticipated scope of the empowering provision has been carefully considered.
- the empowering provision clearly specifies the limits of the delegated power.

- the delegated legislation falls within the scope of the empowering provision.

The delegation of an indeterminate legislative power will never be justified, because Parliament delegates, rather than surrenders, its legislative power.

### **Issues**

The following issues are discussed in this chapter:

Part 1: Is delegation of legislative power appropriate and does the empowering provision contain clear limits on the delegation?

Part 2: What procedures should be specified to control the process of making the delegated legislation?

Part 3: To whom should the delegation be made?

Part 4: Is a provision for “deemed regulations” appropriate?

Part 5: Is a provision for a “sub-delegation” appropriate?

Part 6: Is the use of “incorporation by reference” appropriate?

Part 7: If the legislation includes a power to give policy directions, has the appropriate process been followed?

Chapter 10A concerns the exercise of delegated legislative power and deals with the circumstances in which delegated legislation can be found to be invalid.

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## PART 1

### **IS DELEGATION OF LEGISLATIVE POWER APPROPRIATE AND DOES THE EMPOWERING PROVISION CONTAIN CLEAR LIMITS ON THE DELGATION?**

#### **10.1.1 Introduction**

This Part answers the following questions—

- what is the distinction between primary and delegated legislation?
- what should be included only in primary legislation?
- what may be included in delegated legislation?
- what may be included in either primary or delegated legislation?
- what considerations do not justify the use of delegated legislation?
- does the legislation contain clear limits on the delegation?

#### **10.1.2 What is the distinction between primary and delegated legislation?**

The distinction between primary legislation and delegated legislation is often regarded as the division between principle and detail, or between policy and its implementation. On that analysis, matters of principle and policy are usually found in primary legislation, while detail and implementation are ordinarily the domain of delegated legislation. This is because the politicised Parliamentary process surrounding the passage of primary legislation, and the public participation in that process, is the appropriate forum for the principle and policy of a legislative scheme to be debated and resolved.

Parliament itself recognises that some matters should be included in primary, rather than delegated, legislation. Standing order 315(2)(f) provides that the Regulations Review

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Committee may draw a regulation<sup>2</sup> to the special attention of the House if the regulation “contains matter more appropriate for parliamentary enactment”.<sup>3</sup>

However, the distinction between principle and detail and policy and implementation can be both confusing and circular, not least because there is a significant overlap between those general descriptions. For example, Acts sometimes contain matters of detail and, conversely, delegated legislation may contain matters of principle. Also, the concept of “policy” has a number of facets, ranging from high-level policy (for example, setting out a basic rule at a high level of generality: a matter that would usually be found in an Act) to matters of low-level policy (for example, specifying what items should be included in a form: a matter more appropriate for inclusion in delegated legislation).

An example of high-level policy is the bare prohibition on unsafe motor vehicles being operated on the roads (see section 6(1) of the Land Transport Act 1998). The low-level policy, setting out the various motor vehicle safety standards that apply to that prohibition, is found in the Land Transport Rules (see, for example, Land Transport Rule 32005: Vehicle Lighting 2004, which specifies the safety requirements for vehicle lighting).

Clarifying the true nature of the policy will give useful guidance as to whether it is policy that should be included in an Act or in delegated legislation. For example, is the policy something that would give rise to widespread public interest? If so, then serious consideration should be given to including that matter in an Act. Conversely, if the policy is of a purely administrative, technical, or non-controversial nature, it may well be a matter that could properly be dealt with in delegated legislation.

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<sup>2</sup> Although “regulation” in this context is narrower than the concept of “delegated legislation” (because standing order 3 defines a regulation as meaning “a regulation within the meaning of the Regulations (Disallowance) Act 1989”), one should work on the basis that the same considerations will apply to delegated legislation generally.

<sup>3</sup> See Malone, R, *Regulations Review Committee Digest* (2nd ed), New Zealand Centre for Public Law, Victoria University of Wellington, Wellington, 2006, particularly at pp56-58. The Digest is available online at: [www.vuw.ac.nz/law/Centres/NZCPL/Files/RegsReview/RRC%20Digest.pdf](http://www.vuw.ac.nz/law/Centres/NZCPL/Files/RegsReview/RRC%20Digest.pdf).

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In deciding whether a matter is likely to be controversial, it may be helpful to consider what the likely public and political reaction to the matter would be if it were publicised in the news media.

### 10.1.3 What should be included only in primary legislation?

There are a number of matters that should ordinarily be included only in primary legislation and should rarely, if ever, be included in delegated legislation. Only if there are objectively justifiable reasons should any of the following matters be included in delegated legislation. It will be very rare to find such reasons.

- matters of significant policy should be included in an Act. Although “significance” will vary from case to case, a policy will likely be significant if it has the potential to give rise to controversy (whether political or otherwise). However, it should be noted that a matter that does not appear to be significant when the legislative scheme is being developed may well become significant over time (and vice versa): that factor should be carefully considered, as it may affect the decision as to whether it is placed in primary or delegated legislation.
- provisions which affect fundamental human rights and freedoms should always be included in primary legislation. Examples of these rights and freedoms include—
  - freedom from search and seizure.
  - the right to demand and receive information.
  - rights under the New Zealand Bill of Rights Act 1990 generally.
  - provisions which expropriate property (namely, the taking of property for public use).
  - social and economic rights (which include welfare and ACC rights and the corresponding rates of entitlement).
- rights of appeal from decisions of courts and other tribunals should be established and controlled by primary legislation (see, for example, Part 3 of the Residential Tenancies Act 1986, which establishes and controls the Tenancy Tribunal). However, some appeal provisions are contained in both primary and delegated legislation. See, for example, sections 304 and 305 of the Education Act 1989 (which establish the Student Allowance Appeal Authority and give a right of appeal in relation to student allowances) and Part 6 of the Student Allowance Regulations 1998 (which deals with the process of the appeals, including the lodging of appeals, the evidence that the Authority

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may receive, and matters that the Authority must have regard to in determining the appeal).

- provisions that vary the common law should be included in primary legislation. In particular, any abrogation of a common law right (that is, a right that is to be entirely taken away, or replaced, by legislation) should be implemented only by primary legislation. An example of primary legislation abrogating common law rights is section 317(1) of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (which prevents a person from bringing proceedings for damages arising out of a personal injury covered under the 2001 Act or any former ACC Act).
- offences of a serious nature and significant penalties (criminal and civil) should be included in primary legislation. Penalties imposed under delegated legislation should not include sentences of imprisonment. Fines that are imposed under delegated legislation should be limited by the empowering Act, and should ordinarily be low. However, the concept of proportionality may be appropriate, for example, where a penalty is calculated as a multiplication of the economic gain received from the offending concerned. Larger levels of fine in delegated legislation may be justified if the offender is a corporation, rather than an individual. Forfeiture of property should be authorised only by primary legislation (see, for example, the confiscation of motor vehicles under sections 128 and 129 of the Sentencing Act 2002). Infringement offences and fines may be imposed by delegated legislation, but the infringement regime itself (including the maximum level of fines) should be specified in primary legislation.
- taxes should only be levied by or under primary legislation. This is a well-settled principle, currently stated in section 22(a) of the Constitution Act 1986. This limitation also applies to the borrowing of money and the expenditure of public money (section 22(b) and (c) of that Act). However, although some “taxes” are routinely imposed under delegated legislation, those taxes must be clearly authorised and closely controlled by primary legislation (see, for example, commodity levies imposed by commodity levies orders made under Part 1 of the Commodity Levies Act 1990).
- new agencies and offices should ordinarily be established by primary legislation. However, some bodies with limited powers and functions may justify establishment by delegated legislation (see, for example, Deer Industry New Zealand, a body to represent the interests of those operating in the New

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Zealand deer industry, which was established under regulation 4 of the Deer Industry New Zealand Regulations 2004).

- an Act will normally be amended only by another Act. However, there may be situations in which amendment by delegated legislation is justified (see para 10.1.7, Henry VIII clauses).
- retrospective changes should not be made by delegated legislation. This reflects the general rule against retrospective legislation (see section 7 of the Interpretation Act 1999).

#### **10.1.4 What may be included in delegated legislation?**

It is important to ensure that the purpose of a legislative scheme is not undermined by a failure to be able to implement it, either immediately after the Act becomes law, or at any later time. In developing primary legislation, serious consideration should be given to the need for, and scope of, delegated legislation.

Any delegated law-making power should, therefore, be developed in tandem with the primary legislation, to ensure that the scheme can be implemented fully: there should be no excuse for an inability to implement a legislative scheme simply because of a defective or inadequate power of delegation.

Accordingly, the scope of legislative delegation provisions vary enormously. For example, section 140 of the Coroners Act 2006 is a limited power, permitting regulations to deal with matters such as prescribing fees, allowances, and witness expenses. Conversely, sections 172D to 172K of the Electricity Act 1992 enable regulation of an extensive range of matters relating to electricity governance, including powers to establish wholesale markets and to regulate generation, transmission, and distribution and retail of electricity. In some cases no delegation of the law-making power is considered necessary (see, for example, the Consumer Guarantees Act 1993).

- Traditionally, the following matters have been relied on as justifications for Parliament to delegate its law-making powers: pressure on Parliamentary time.
- technicality of the subject matter.

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- unforeseen contingencies.
  - need for flexibility.
  - opportunity for experimentation.
  - emergency conditions requiring speedy or instant action.

These grounds were first identified in a 1932 United Kingdom report on delegated legislation,<sup>4</sup> and subsequently approved in a 1962 New Zealand report.<sup>5</sup> The grounds remain largely valid today, and are considered in more detail in the following paragraphs.<sup>6</sup>

### *Pressure on Parliamentary time*

Parliamentary time is at a premium, and Parliament will be very reluctant to waste valuable time considering matters that could be efficiently dealt with in delegated legislation. Consequently, consideration should be given to placing less significant matters in delegated legislation.

Examples of matters that Parliament would not ordinarily wish to spend its time on (and which may therefore be included in delegated legislation) include—

- the mechanics of implementing an element of the Act.
- specifying fees and the methods for calculating fees.
- setting out the format and content of forms.
- providing details of procedures necessary to fulfil a requirement in the Act.
- large lists (for example, alteration of the Tariff: see section 9 of the Tariff Act 1988).
- matters that are subject to indexation (for example, indexation of rates of excise duty: see section 79 of the Customs and Excise Act 1996).

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<sup>4</sup> *Report of the Committee on Minister's Powers* (1932), Cmnd 4060.

<sup>5</sup> *Report of the Committee on Delegated Legislation*, AJHR, 1962, I.18.

<sup>6</sup> The “opportunity for experiment” ground is not discussed as a separate ground in the chapter. That ground is discussed as part of the “need for flexibility” ground.

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In short, the greater the number of lower order matters (the matters of detail or implementation) that can legitimately be included in delegated legislation, the greater amount of time Parliament will have to deal with the high level matters (the matters of principle and policy) of the legislative scheme.

*Technicality of the subject matter*

Many modern legislative schemes require the inclusion of a high degree of technical material to enable the scheme to function satisfactorily. Examples include ACC, bio-security, customs, fisheries, and securities legislation.

While it would be possible to include such matters in primary legislation, to do so would make the content of the Bill so complex that it would be impossible for Parliament to debate it in any worthwhile manner. The total time Parliament would need to dedicate to the Bill would also be greatly increased. If Parliament were to concern itself with matters of both broad policy and minor detail, it would result in statutes becoming “cluttered, unreadable, and possibly less effective”.<sup>7</sup> The end result may be that users of legislation would be less able to access and understand the law.

In short, inclusion of a great number of technical or complex matters in a Bill would likely lead to Parliament becoming swamped in a mire of minutiae.

If the legislative material in question can be categorised as technical or complex, then serious consideration should be given to including the material in delegated legislation. Similarly, if the amount of material is extensive, then it may well be appropriate to include it in delegated legislation.

However, if the material is likely to be politically contentious, that may indicate that, despite the technicality, complexity, or amount, consideration should be given to including it (or the contentious parts of it) in primary legislation.

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<sup>7</sup> Tanner, G, “Confronting the Process of Statute-Making” in Bigwood, R, *The Statute: Making and Meaning*, LexisNexis, Wellington, 2004, 85.

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*Unforeseen contingencies*

In designing any legislative scheme, matters may arise that have not been foreseen, but that need to be dealt with as an integral part of the scheme. This may include a scheme that was intended, because of its relative simplicity and the desire to keep the entire regime in one place, to be dealt with entirely in primary legislation. However, it may be that the implementation of the scheme was not as simple as anticipated and that further detail, direction, or clarification is required. That would be difficult to achieve through amendment to the Act, so (assuming an appropriate regulation-making power is available) dealing with those matters in delegated legislation may be appropriate. See, for example, section 360(1)(g) of the Resource Management Act 1991, which authorised delegated legislation that prescribed transitional and savings provisions relating to the coming into force of the Act.

There may also be instances of legislative schemes in which unforeseen contingencies will, or will be likely to, arise during the “life” of the primary legislation. Such an eventuality should be considered and anticipated and, if appropriate, a suitable regulation-making power included in the Act.

*Need for flexibility*

It is invariably simpler to make delegated legislation than to enact primary legislation, so it follows that there is far less flexibility in primary legislation than in delegated legislation. An Act, once passed, requires another Act (involving all the usual, time-consuming, Parliamentary processes) to amend it. Delegated legislation can usually be amended or replaced quickly, and with little difficulty in terms of process.

Although it is possible to amend primary legislation by delegated legislation, that process should be used only in exceptional circumstances (see para 10.1.7, Henry VIII clauses). However, use of Henry VIII clauses may be justified if the matter requiring amendment has been included in primary legislation because of the importance to members of the public generally, but which will require regular updating. For example, the rates of benefits set out in the schedules to the Social Security Act 1964 may be increased (but not decreased) by delegated legislation: see section 61H of that Act.

For these reasons, if it appears that a legislative scheme is likely to need frequent change, then consideration should be given to including the matters that are prone to change in delegated legislation. This may include matters that change frequently to keep up to date with

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changing national and international trends (for example, transport rules), those that change significantly and rapidly because of technological advances (for example, computer and telecommunication technology), and those regimes that may require some experimentation (for example, to test and refine an implementation regime).

Part 3 of the Ozone layer Protection Act 1996 is an example of powers of delegation designed to allow flexibility (including by regulations and by codes of practice) in reducing ozone depleting substances (see also the resulting Ozone Layer Protection Regulations 1996, which prohibit the import, export, manufacture, and sale of certain ozone depleting substances: those regulations have been amended several times, to take account of changing circumstances in this area of science and law).

*Emergency conditions requiring speedy or instant action*

It may be necessary for legislative schemes to be able to take account of emergencies or situations where prompt action is required.

If the legislative scheme inherently involves issues that may require an emergency or other very prompt response, then consideration should be given to making provision in the Act to include those matters in delegated legislation

Primary legislation is generally not capable of responding to this type of event, and so it is necessary to be able to rely on delegated legislation. An example of preparing for an emergency is the Epidemic Preparedness Act 2006. That Act aims to prevent the outbreak of epidemics in New Zealand and, if an epidemic does break out, to respond to both the epidemic and its consequences. The Act makes wide use of delegated powers to deal with these issues. See also section 144 of the Bio-security Act 1993 (which enables the declaration of a bio-security emergency).

Although not strictly “emergency” situations, the following are examples of delegated powers being made available to deal swiftly with changing situations:

- section 2 of the United Nations Act 1946 (which enables measures decided on by the Security Council of the United Nations to be applied in New Zealand).
- Part 4 of the Securities Act 1978 (which enables delegated legislation that takes account of changes in the securities markets).

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An empowering provision permitting emergency regulations should set out clear criteria for the exercise of the power and be time limited. In addition, Parliamentary confirmation of the delegated legislation may be appropriate.

#### *Other matters*

In addition to the established grounds specified above, there may be other, particular, reasons that justify Parliament delegating its law-making power. These grounds are likely to be rare, and will obviously require an appropriate empowering provision in the primary legislation.

An example of such a delegation is the power of the Governor-General, under section 55 of the Maori Trust Boards Act 1955, to make orders validating certain irregularities. For example, see the validation, under the Aorangi Maori Trust Board Order 2005, of the 2004 election of members to the Aorangi Maori Trust Board. See also section 266 of the Electoral Act 1993, which enables validation, by delegated legislation, of any act or omission required under the Act that has been irregularly done.

#### **10.1.5 What may be included in either primary or delegated legislation?**

There will inevitably be cases that do not fall clearly into either the primary or delegated legislation category, and that could potentially be placed in either category. Where there is doubt as to whether primary or delegated legislation is more appropriate for a particular matter, the following guidelines may be helpful:

- if the legislation is directed at a limited audience, regulations may be appropriate (see, for example, the Wine (Grape Wine Levy) Order 2005, which applies only to wineries).
- if the subject-matter is highly technical, regulations may be appropriate (see, for example, the Hazardous Substances (Compressed Gases) Regulations 2004, which specify controls to manage compressed gases under the Hazardous Substances and New Organisms Act 1996).
- if division of the material between primary and delegated legislation would lead to an incoherent legislative regime, primary legislation may be appropriate (see, for example, the Building Act 2004). However, care should be taken to ensure that the primary legislation does not become “cluttered” as a result.

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- matters that one would expect an ordinary person to rely on may be better dealt with in primary legislation (see, for example, the Consumer Guarantees Act 1993).
  - if the matter is likely to be changed or updated at frequent intervals, it may be better to use delegated legislation (see, for example, the Fisheries (Reporting) Regulations 2001. These regulations came into force in October 2001 and, by March 2007, had been amended 16 times).
  - if the matter is likely to be controversial, it may be wise to place it in primary legislation, so as to avoid any risk of successful challenge in the courts (see Chapter 10A for guidance on how delegated legislation may be challenged in the courts). For example, the Forests (West Coast Accord) Act 2000 cancelled an agreement between the Crown and certain other parties and excluded any compensation for the cancellation. Although the same result could probably have been achieved under the general law or under delegated legislation, Parliament dealt with the matter in primary legislation. This made the cancellation and “no compensation” provision immune from successful challenge in the courts.

#### **10.1.6 What considerations do not justify the use of delegated legislation?**

A range of unjustified reasons are sometimes advanced in support of including matters in delegated legislation. Reliance is typically placed on an empowering provision that was not designed for the purpose but which, it appears, is wide enough to encompass that purpose. However, such reasons will rarely (if ever) justify including the matters in delegated legislation.

The following reasons should not be put forward to justify delegated legislation:

- that the policy development was not completed in time. Here, the regulation-making power may be advanced as a method of “filling the gaps” in the primary legislation. Such a legislative safety-net is not permissible. However, if the omission is a genuinely unforeseen contingency, inclusion in delegated legislation may be justified.

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- that as a matter of political expediency, delegated legislation should be used. This could be relied on for a number of reasons, including—
    - to disguise a controversial issue in the legislative regime by placing it in delegated legislation (because that may be perceived as being “less public”): this reason would never be justified.
    - to “get the law through” by placing everything that hasn’t been included in primary legislation in delegated legislation, perhaps to reduce the time the primary legislation takes to pass through Parliament.
  
  - that “it’s always been done this way” and so it should be done this way again. The mere fact that delegated legislation has been used for a particular purpose in the past does not justify it being used in that way again. There may be a number of reasons why it was used in the past, including current practice at the time or simple mistake. Each case must be capable of being objectively justified.

#### **10.1.7 Does the legislation contain clear limits on the delegation?**

Empowering provisions (the provisions in statutes that enable delegated legislation to be made) should be drafted so that the limits of the delegated legislative power are specified as clearly and precisely as possible.

The accepted basic formula for providing for the making of regulations is as follows:

#### **xx Regulations**

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

- (a) ...

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- (b) ...
  - (c) *[Each paragraph should specify the purpose as clearly and precisely as possible, with the following final standard paragraph included in every case.]*
  - (d) providing for any other matters contemplated by this Act or necessary for its administration or necessary for giving it full effect.

In addition to the basic formula, it may be appropriate to provide that certain prerequisites must be satisfied before the Governor-General makes the regulations. See, for example, section 170 of the Health Practitioners Competence Assurance Act 2003, which provides that:

The Governor-General may, by Order in Council made on the advice of the Minister given after consultation by the Minister with any authority affected by that advice, make regulations for any or all of the following purposes:

### **10.1.8 Henry VIII clauses**

Another issue in this area is the power to amend, suspend, or override the empowering Act or any other Act (Henry VIII clauses). The Regulations Review Committee has recently noted that:<sup>161</sup>

An empowering provision that enables legislation to be amended by regulation provides the Executive with the power to override Parliament. The committee

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<sup>161</sup> Report on the Inquiry into the Resource Management (Transitional) Regulations 1994 and the principles that should apply to the use of empowering provisions allowing regulations to override primary legislation during a transitional period [1995] AJHR I16C.

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believes that this power should be granted by Parliament rarely and with strict controls.

As the supreme law-making body, Parliament may occasionally consider that a Henry VIII clause is justified. For example, for the purpose of ensuring a smooth transition from one “old” Act to a new replacement Act, the empowering provision may enable regulations to be made to negate or amend the old Act (see section 360(1) (g) of the Resource Management Act 1991).

When considering whether a Henry VIII clause is justified, the following should be taken into account:

- a provision allowing for the making of regulations to amend the empowering Act should only be used in exceptional circumstances and should not be used routinely in reforming legislation:
- a complex reform involving the amalgamation of a large number of statutes may justify the use of an empowering provision allowing for regulations to override the primary legislation. Technical amendments or a rewrite of an existing Act that does not amount to a substantial change in the principles and context do not justify such use:
- a regulation-making provision that provides for regulations to override primary legislation should be drafted in the most specific and limited terms possible and must at all times be consistent with and support the provisions of the empowering Act:
- that any such provisions should be limited in time. Statutory provisions permitting primary legislation to be modified by transitional regulations should generally be subject to a sunset clause of 3 years:
- regulations made under such a provision should also be subject to the sunset clause set out in the empowering provision or, where that is not considered feasible, subject to confirmation by Parliament:
- a provision for consultation may be appropriate.

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### 10.1.9 Commencement orders

Another issue in this area concerns when it is appropriate for primary legislation to provide for the commencement of the legislation by Order in Council. In providing for commencement by Order in Council, Parliament delegates the power to decide on a commencement date to the Executive.

As a general principle, the commencement of legislation should not be delegated because of the risk that the will of Parliament may be frustrated by an Executive that no longer supports the policies in an Act. There is also the risk that, by delegating the power, the courts will be drawn into the process if it is sought to review the Executive action or inaction in bringing legislation into force. Accordingly, as a general principle, legislation should have a fixed commencement date.

These provisions must be clearly justifiable. For example, commencement of legislation by Order in Council may be justifiable in the following situations:

- where legislation implements an international treaty or convention and the commencement of the legislation needs to be co-ordinated with ratification by other States:
- when delegated legislation may need to be made:
- if administrative action is required. For example, appointments may need to be made, and implementation and training programmes may be needed:
- where certain preconditions may have to be satisfied. For example, the approval of a constitution for a body or a scheme for amalgamation or vesting of an undertaking.

There may be uncertainty as to when these matters may be completed.

### **10.1.10 Guidelines**

Matters of policy or principle should be included in primary legislation. Policy and principle are the matters that set out the basic rule in relatively basic terms. Those matters may well be controversial. In deciding whether a matter is likely to be controversial, it may be helpful to consider what the likely public and political reaction to the matter would be if it were publicised in the news media.

Matters that fill in the detail of a legislative scheme or are part of its implementation will usually be included in delegated legislation.

Examples of matters that should ordinarily be included in primary legislation are those that affect fundamental human rights, change the common law, create serious offences, impose significant penalties (particularly imprisonment), impose taxes, amend Acts, or make retrospective changes to the existing law.

Examples of matters that should ordinarily be included in delegated legislation are those that deal with the mechanics of implementing an Act, impose fees, specify forms, provide details of procedures, include long lists, or provide for indexation.

The empowering clause in a statute that provides for regulations should follow the accepted basic formula. Each paragraph in the empowering clause should specify the purpose for which regulations may be made as clearly and precisely as possible. The final standard paragraph should be included in all cases. In certain cases it may be appropriate for an empowering provision to require certain prerequisites to be satisfied before the regulations are made.

Henry VIII clauses should only be used in exceptional circumstances.

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## PART 2

### WHAT PROCEDURES SHOULD BE SPECIFIED TO CONTROL THE PROCESS OF MAKING THE DELEGATED LEGISLATION?

#### 10.2.1 Outline of issue

The empowering statute does not generally prescribe the procedure for making delegated legislation. Consideration should be given in each case as to whether a procedure, or any aspect of the procedure, should be specified.

#### 10.2.2 Comment

The empowering statute does not usually impose a procedure in relation to the making of regulations other than the requirement that the Governor-General make the regulations by Order in Council, acting by and with the advice and consent of the Executive Council. There is usually no requirement in the empowering statute for notice and consultation.

The *Cabinet Manual* specifies requirements in relation to the process for making regulations. Those requirements include—

- consultation; and
- drafting by Parliamentary Counsel; and
- when the regulations are to come into effect (the 28 - day rule).

The additional controls set out in Appendix 5 of these Guidelines also apply to regulations (except where the empowering legislation provides otherwise).

In some circumstances, the empowering legislation will provide that Parliament must confirm the regulations. In the absence of that confirmation, the regulations will lapse. This additional control may be necessary where the delegated power is a significant one.

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The desirability of including a confirming provision in the empowering statute should be examined when the power to make the following kinds of regulations is being provided:

- emergency regulations:
- regulations imposing a financial charge in the nature of a tax:
- regulations amending the empowering statute or another statute:
- regulations that deal with issues of policy under the authority of broad empowering provisions.

For examples of confirming provisions in the empowering statute, see section 61H of the Social Security Act 1964 and section 80 of the Customs and Excise Act 1996.

If the empowering statute is to provide that the delegated legislation may be made other than by regulations, consideration should be given as to whether the empowering Act should specify-

- any consultation procedure for that delegated legislation; and
- when the delegated legislation may come into effect; and
- whether all or any of the controls specified in Appendix 5 should apply.

If the delegated legislation is to be made by way of regulations, a prescribed consultation procedure may be desirable if-

- a particular organisation or person (other than the person to whom the delegation is made) has special knowledge, experience, or skills in connection with the subject matter of the regulations. In these circumstances consultation may help to resolve any technical problems with the regulations; or
- a particular group of persons will be affected by the regulations. In these circumstances, consultation may help to win the support of that group and

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increase acceptance by those affected.

For examples of empowering provisions requiring consultation, see section 29(3) of the Fair Trading Act 1986 and section 41A(3) of the Weights and Measures Act 1987.

See Chapter 1, Part 4 and Chapter 10A, Part 1 for further information concerning consultation.

### **10.2.3 Guidelines**

Consideration should be given when providing for delegated legislation as to whether any requirements for notice and consultation, or confirmation of the secondary legislation, should be included in the provisions delegating legislative powers.

Consideration should be given when providing for delegated legislation, other than regulations, whether any or all of the controls set out in Appendix 5 should apply.

## **PART 3**

### **TO WHOM SHOULD THE DELEGATION BE MADE?**

#### **10.3.1 Outline of issue**

Law making involves the exercise of a power involving a significant degree of expertise. The persons to whom the power is given should have an appropriate degree of expertise.

#### **10.3.2 Comment**

Within central Government, law-making powers are delegated to the Governor-General in Council, Ministers, or officials. Local authorities have extensive bylaw-making powers under the Local Government Act 2002 and other Acts. Legislative powers are also given to occupational and professional bodies.

When the law-making power will potentially impact on individual rights and liberties (such as by the creation of offences), careful consideration must be given as to the person who should exercise the power. In that event, it may be appropriate for the

Governor-General in Council to exercise the power.

If the law-making power involves prescribing technical matters which will not impact upon individual rights, an official may be the appropriate person to exercise the power.

The expertise of the lawmaker is also a significant factor. One factor in giving law-making power to local authorities and professional bodies is that they have the requisite knowledge and experience to make local bylaws or develop rules for professional bodies. See, for example, section 51C of the Judicature Act 1908, which provides that the High Court Rules can only be made with the concurrence of the Chief Justice and any 2 or more of the members of a rules committee, of whom at least 1 must be a Judge.

The exercise of the power may also be of such significance that it should be exercised by the Governor-General in Council or by a Minister of the Crown in such a way that the controls referred to in Appendix 5 apply to that delegated legislation.

### **10.3.3 Guidelines**

When deciding who to delegate a legislative power to, consideration should be given to—

- the importance of the power; and
- the relevant expertise of the lawmaker; and
- the controls over the exercise of the power.

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## PART 4

### IS A PROVISION FOR “DEEMED REGULATIONS” APPROPRIATE?

#### 10.4.1 Outline of issue

A form of delegated legislation has developed over recent years where some, but not all, of the controls in Appendix 5 apply to that delegated legislation (“deemed regulations”). In particular, this delegated legislation has not been—

- drafted by Parliamentary Counsel; or
- subjected to Cabinet approval; or
- included in the Statutory Regulations (SR) series.

The issue concerns whether the lack of these controls is appropriate.

#### 10.4.2 Comment

There are 3 main types of deemed regulations. These types are as follows:

- instruments that are regulations for the purposes of both—
  - the Acts and Regulations Publication Act 1989 (i.e., must be published in the SR series); and
  - the Regulations (Disallowance) Act 1989 (i.e., subject to disallowance):
- instruments that are only regulations for the purposes of the Acts and Regulations Publication Act 1989 (i.e., must be published in the SR series but are not subject to disallowance):

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- instruments that are only regulations for the purposes of the Regulations (Disallowance) Act 1989 (i.e., subject to disallowance, but do not have to be published in the SR series).

The language used in the Act will determine the type of instrument. For example, the Act may specify that a particular instrument is deemed to be a regulation for the purposes of the Regulations (Disallowance) Act 1989, but not for the purposes of the Acts and Regulations Publication Act 1989.

In deciding the appropriate status for a piece of delegated legislation, regard should be had to the following criteria:

- the number of people affected and the impact on these people. If the legislation will have a material effect on the rights of a large group of people then “traditional” regulations may be more appropriate:
- the process (including consultation) that should be followed in making the delegated legislation:
- the need for certainty of obligations (clear drafting and consistency), having regard to the consequences of a breach of the obligations:
- the desirable methods of publication of, and accessibility to, the delegated legislation:
- the need for Parliamentary control over the delegated legislation:
- the desirability of having the delegated legislation made by a person other than the Governor-General in Council.

The above criteria, except the last, will usually be best met by requiring the delegated legislation to be “traditional” regulations rather than deemed regulations.

A Parliamentary Counsel certifies “traditional” regulations before they are submitted to Cabinet. The regulations will not be given an unqualified certificate if the Parliamentary Counsel—

- 
- has doubts concerning the vires of the regulations; or
  - considers that the regulations are inconsistent with general legal principles:
  - considers that some condition precedent, or procedural requirement, set out in the empowering provision in the Act has not been complied with:
  - considers that the regulations do any thing referred to in Standing Order 382 (the grounds on which the Regulations Review Committee draws attention to a regulation).

Another important control over “traditional” regulations made by Order in Council is that they are approved by Cabinet and, accordingly, are subject to checks and balances that apply to Cabinet decision-making.

These protections and controls indicate that a strong case should have to be made for an item of delegated legislation not to be a “traditional” regulation. The following reasons may justify the regulation not being a “traditional” regulation:

- the subject matter is not important enough to warrant consideration by Cabinet:
- the subject matter may be highly technical, and thus best dealt with solely by an expert body:
- the subject matter may be of interest only to a limited audience:
- the subject-matter may be the internal rules of an organisation that have minimal effect on members of the public:
- the relevant legislation may wish to promote self-regulation in an industry (in such a case, it may be appropriate to give that industry “ownership” of the rules it enacts):
- there may be strong policy reasons for a particular institution to be able to control the content of rules without intervention by the Government:

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- the person or body empowered to make rules may have an independent statutory function and not be accountable to Cabinet, for example, the Privacy Commissioner:
  - it might be desirable in the interests of international uniformity to adopt verbatim rules formulated in another country:
  - the rules may be of an urgent or temporary character:
  - the changing nature of the subject matter may be such that a mechanism for rapid amendment and updating is required.

If consideration is being given to creating deemed regulations, consideration should be given to which of the controls set out in the Appendix 5 should apply. The Government also recently endorsed the following principles recommended by the Regulations Review Committee for considering the controls that should be in place:

- deemed regulations should be published in the SR series unless there is good reason for separate publication:
- separate publication of a deemed regulation is not justified if the regulation imposes obligations that are of general application or interest to the public:
- separate publication of a deemed regulation may be justified if—
  - the regulation contains technical matters relevant to a particular group, and the benefits of separate publication outweigh the costs of separate publication:
  - the regulation implements detailed provisions of international agreements or standards:
  - the regulation is a short-term or emergency measure:
- every submission to Cabinet seeking approval for the introduction of a Bill that provides for separate publication should state the reasons for separate publication:

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- every Bill that provides for separate publication should state the reasons for separate publication in the explanatory note:
  - a provision for separate publication should specify—
    - that notice must be given in the *Gazette* and any other publication relevant to the individuals or organisations affected:
    - that the regulation is available for inspection free of charge and for purchase at a reasonable price (wherever possible):
    - that notice is given of the places where the instrument can be inspected or purchased.

### 10.4.3 Guidelines

Generally, it is desirable for secondary legislation to be in the form of “traditional” regulations and subject to all the controls set out in Appendix 5. In determining whether traditional or deemed regulations should be created, the criteria described above should be taken into account. If deemed regulations are to be created, consideration should be given to which controls set out in Appendix 5 should apply.

## PART 5

### IS A PROVISION FOR A “SUBDELEGATION” APPROPRIATE?

#### 10.5.1 Outline of issue

The issue in this Part concerns the circumstances in which it is appropriate for an empowering provision to permit delegated legislation to delegate a law making power.

### **10.5.2 Comment**

In general, the person to whom the power to legislate is delegated cannot in turn delegate that power to another person. In other words, a delegate cannot delegate. Accordingly, a sub-delegation without legislative authority will be invalid.

Instruments made under a sub-delegation are not usually subject to any of the controls in Appendix 5. It will, therefore, generally be appropriate for an Act to authorise a sub-delegation only if it involves technical or rapidly changing requirements and does not impact upon the rights and interests of individuals.

For further information concerning unlawful sub-delegations, see Chapter 10A, Part 3.

### **10.5.3 Guidelines**

A sub-delegation should generally be authorised only in the circumstances set out above. If it is authorised in other circumstances, consideration should be given to applying some or all of the controls set out in Appendix 5.

## **PART 6**

### **IS THE USE OF “INCORPORATION BY REFERENCE” APPROPRIATE?**

#### **10.6.1 Outline of issue**

The term “incorporation by reference” refers to the creation or definition of rights, powers, and obligations by a reference in an Act of Parliament or delegated legislation to another document the provisions of which are not set out in the legislation. When should an empowering provision permit the use of incorporation by reference?

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### 10.6.2 Comment

The issue of incorporation by reference can be considered in relation to the following principles of making or amending any law (other than the common law):

- Parliament must make or authorise the law:
- Parliament should have control over delegated legislation:
- an appropriate process, including consultation, should be followed in making the law:
- the obligations imposed by legislation should be certain and understandable by those affected:
- all legislation should be published in a form and manner that enables ready access by those affected.

Incorporation by reference is, to a certain extent, inconsistent with these principles of good law making. Accordingly, incorporation by reference should only be used where it is impracticable to do otherwise.

### 10.6.3 Guidelines

When considering whether to use incorporation by reference, the principles set out in Appendix 4 should be complied with.

## PART 7

IF THE LEGISLATION INCLUDES A POWER TO GIVE POLICY DIRECTIONS, HAS  
THE APPROPRIATE PROCESS BEEN FOLLOWED?

### 10.7.1 Outline of issue

It may, at times, be appropriate for legislation to give the Government the ability to

give policy directions to a body or person. This is similar to delegating an ability to make law.

### **10.7.2 Comment**

If the Government has a statutory power to give policy directions to a body or person, that body or person must carry out its functions in accordance with that direction. The rights, duties, and interests of those affected by the decisions of the body or person may accordingly be altered by the direction.

Directions should be required to:

- be given in writing and signed only by a Minister of the Crown; and
- be published in the *Gazette* and laid before the House of Representatives as soon as practicable after they are given (exceptions to this may be made where the public interest does not require immediate publication and publication would prejudicially affect economic or commercial interests); and
- be restricted to considerations of policy; and
- not be given where they might interfere with the duty of independent tribunals to act judicially in the determination of individual matters which relate to a particular person or organisation.

For example, see section 26 of the Commerce Act 1986 (Commerce Commission to have regard to the economic policies of Government) and sections 10 and 11 of the Sport and Recreation New Zealand Act 2002 (compliance with Government policy).

### **10.7.3 Guidelines**

Any power of the Government to give policy directions to administrative tribunals should comply with the requirements set out above.

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## CHAPTER 10A

### THE EXERCISE OF DELEGATED LEGISLATIVE POWER

#### INTRODUCTION

##### **Background**

Chapter 10 concerns the safeguards and constraints that are necessary to ensure that the power to make law is delegated only in acceptable circumstances.

This chapter concerns the exercise of delegated legislative power and deals with the circumstances in which delegated legislation can be found to be invalid.

Delegated legislation may be held to be *ultra vires* or invalid on the following grounds:

- a failure to comply with any legal rules that control the making of the delegated legislation:
- the delegated legislation is not authorised by the empowering provision:
- the delegated legislation contains an unlawful subdelegation:
- the delegated legislation is inconsistent with Acts other than the empowering Act:
- the power to make the delegated legislation has been exercised for an improper purpose:
- the delegated legislation is uncertain in its application.

##### **Issues**

The following issues are discussed in this chapter:

Part 1: Have the terms of the empowering provision and the general law been complied with when making the delegated legislation?

Part 2: Is the proposed delegated legislation beyond the power conferred by the empowering provision?

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Part 3: Does the proposed delegated legislation contain an unlawful subdelegation?

Part 4: Is the proposed delegated legislation invalid by reason of repugnancy to any other enactment?

Part 5: Is the proposed delegated legislation invalid by reason of uncertainty?

Part 6: Does the proposed delegated legislation infringe any of the grounds set out in Standing Order 382?

## PART 1

### HAVE THE TERMS OF THE EMPOWERING PROVISION AND THE GENERAL LAW BEEN COMPLIED WITH WHEN MAKING THE DELEGATED LEGISLATION?

#### **10A.1.1 Outline of issue**

Empowering provisions often contain preconditions that must be satisfied before the delegated legislative power can be exercised. For example, the provision might require the delegated legislation to be made only on the recommendation of a Minister.

The general law also contains a number of rules that restrict or control the exercise of the delegated legislative power. The issue in each particular case is whether these preconditions or rules have been complied with.

#### **10A.1.2 Discussion**

##### *Empowering provision in force*

One of the main rules of the general law that controls the exercise of the delegated legislative power is that the empowering provision must be in force when the power is exercised.

However, section 11 of the Interpretation Act 1999 provides that a power conferred by an enactment to make delegated legislation may be exercised before the enactment comes into force or takes effect. The power may be exercised only if the exercise of the power is necessary or desirable to bring, or in connection with bringing, an enactment into operation. The power may

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not be exercised if anything that results from exercising the power comes into force or takes effect before the enactment itself comes into force unless the exercise of the power is necessary or desirable to bring, or in connection with bringing, the enactment into operation.

See Part 2 of Chapter 3A “Statutory Interpretation” for further information concerning section 11.

*Retrospective delegated legislation*

Delegated legislation that has retrospective effect must be expressly authorised by the empowering statute.

*Consultation*

There is no formal legal requirement of consultation in New Zealand before delegated legislation is made. However, empowering provisions often contain requirements relating to consultation.

Consultation must be meaningful. A duty to consult requires that the person or body consulted is given sufficient opportunity to state their views “before the mind of the executive becomes unduly fixed”.

In considering whether a consultation requirement has been satisfied, the following principles should be taken into account:

- consultation does not require agreement or even negotiations towards agreement:
- more than mere notification is required:
- for consultation to be meaningful, sufficient information must be made available to enable the other party to be adequately informed so as to be able to make intelligent and useful responses.

For further information concerning the principles relating to consultation, see *Wellington International Airport Limited v Air New Zealand* [1993] 1 NZLR 671.

Some statutes that contain a consultation requirement contain an additional provision, that specifies that a failure to comply with the consultation requirement does not invalidate the delegated legislation. The purpose of the provision is to save delegated legislation where someone was missed out in

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the course of a genuine consultation process. It is not intended to protect against a deliberate decision not to consult.

*Other preconditions*

The empowering provision may provide for the delegated legislation to be made only on the recommendation of a specified Minister or other person or body. There is a distinction between “on” and “in accordance with” and “following” a recommendation. Different formulations can affect the extent to which delegated legislation can depart from what has been recommended.

There may be a statutory requirement for approval of, confirmation of, concurrence in, or consent to the instrument. See, for example, section 51C of the Judicature Act 1908, which only allows the Governor-General in Council to make High Court Rules with the concurrence of the Chief Justice and any 2 or more of the members of the Rules Committee, of whom at least 1 must be a Judge.

If the empowering provision prescribes any preconditions, these are usually referred to in the regulations. Section 24(1) of the Interpretation Act 1999 provides, however, that it is not necessary for a regulation to refer to facts, circumstances, or preconditions that must exist or be satisfied before the regulation can be made. Accordingly, a failure to refer to any preconditions does not invalidate the regulations.

### **10A.1.3 Guidelines**

Before the power to make delegated legislation is exercised, a check should be made to ensure that any preconditions have been satisfied and, if appropriate, referred to in the enacting statement.

## **PART 2**

### **IS THE PROPOSED DELEGATED LEGISLATION BEYOND THE POWER CONFERRED BY THE EMPOWERING PROVISION?**

#### **10A.2.1 Outline of issue**

Delegated legislation is *ultra vires* and invalid if that legislation is outside of the scope of the empowering provision. The issue concerns whether the delegated legislation is within the “four corners” of the empowering provision.

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### 10A.2.2 Comment

Every empowering provision should be interpreted in accordance with section 5(1) of the Interpretation Act 1999. Section 5(1) provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose. This requires consideration of the object and scheme of the Act as a whole.

If the empowering provision enables delegated legislation to be made to “regulate” an activity or matter, then an instrument made under that provision that “prohibits” the activity or matter may be invalid.

Delegated legislation should not narrow an objective set out in the Act that the delegated legislation is intended to implement.

The broader the powers conferred under an empowering provision, the less possibility there is of a court finding that the delegated legislation exceeds the power laid down in the statute. A general power to make regulations to implement an express policy will be liberally interpreted on the basis that the legislature has intended a wide and general power for contingencies whose exact nature it was unable to foresee at the moment of passing the Act.

However, a wide empowering provision does not give the Executive an unfettered power. Such a power is to be used to promote the objects and policy of the Act (*Transport Ministry v Alexander* [1978] 1 NZLR 306). The test is whether the delegated legislation is necessary or expedient for the general purpose of the Act. A tenuous or remote connection would not be enough, and would invite the inference that the regulations had not really been made for the purpose authorised by Parliament (*Brader v Ministry of Transport* [1981] 1 NZLR 73).

*Providing for any other matters contemplated by this Act, necessary for its administration, or necessary for giving it full effect*

Empowering provisions usually include a standard general power to make regulations at the end of a list of more specific purposes. This provision may provide, for example, as follows:

- (z) providing for any other matters contemplated by this Act, necessary for its administration or necessary for giving it full effect.

These general words should be interpreted with caution. They will be

construed by the courts in their context and with regard to the purposes of the Act in which they appear. They will cover matters that are incidental or ancillary to what is enacted in the statute itself, but will not support a widening of, or a departure from, the general intent and purpose of the Act. In *Shanhan v Scott* (1957) 96 CLR 245, the Australian High Court, after examining authorities, concluded that—

... such a power does not enable the authority by regulations to extend the scope or the general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying it out or depart from or vary the plan which the legislature has adopted to attain its ends.

#### *Unreasonableness*

The Court of Appeal in *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 388 said that—

It is elementary that the Court is not concerned with the wisdom or otherwise of regulations, nor with whether the Court considers them necessary, nor with assessing the comparative values of social policies ... The Court is concerned with whether, on the true interpretation of the parent Act, regulations are within the powers conferred by Parliament. They will be invalid if they are shown to be not reasonably capable of being regarded as serving the purpose for which the Act authorises regulations. If the only suggested connection with that purpose is remote or tenuous, the Court may infer that they cannot truly have been made for that purpose. That would not necessarily mean bad faith. It may simply and more probably be that the makers of such regulations have misconceived the scope of their powers.

However, other judgments appear to suggest that, if delegated legislation is unreasonable, it may be invalid as being outside the contemplation of Parliament. McGechan J in *Turners & Growers Exports Limited v Moyle* (Unreported, High Court Wellington, CP 720/88, 15 December 1988) said that—

... regulations can be attacked as *ultra vires* an empowering statute if the regulations are so unreasonable that their making would not have been contemplated by Parliament as empowered by that statute ... Such extreme situations will not be frequent. If, by contrast, a regulation does not fall into such an extreme

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category, and is within possible Parliamentary contemplation, then it is not open to attack on the basis it is ‘unreasonable’ ... A regulation prohibiting employment of all teachers with red hair would be an example.

Ultimately, this issue is a question of statutory interpretation. Does the empowering provision authorise the making of the instrument? If it is extreme in its effect or plainly unreasonable, then it will not be within the ambit of the provision.

### 10A.2.3 Guidelines

Before the power to make delegated legislation is exercised, a check should be made to ensure that the proposed delegated legislation is within the power conferred by the empowering provision.

## PART 3

### DOES THE PROPOSED DELEGATED LEGISLATION CONTAIN AN UNLAWFUL SUBDELEGATION?

#### 10A.3.1 Outline of issue

The power to make delegated legislation must only be exercised by the person or body on whom it is conferred. The issue concerns whether the delegated legislative power has been unlawfully subdelegated to another person.

#### 10A.3.2 Comment

A power to make delegated legislation cannot be subdelegated unless the empowering provision expressly permits this.

In *Hawke’s Bay Raw Milk Producers Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218,—

- the primary legislation provided that the Governor-General by Order in Council may fix prices at which milk may be bought or sold:
- the Governor-General made an order which provided that “the Minister [of Agriculture] may, after consultation with the Board, from time to

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time by notice to the parties concerned fix the town milk producer price”.

The Court of Appeal held that—

- the order did not do what the statute authorised it to do, but instead purported to empower the Minister to perform the authorised act. It subdelegated the legislative power; and
- the empowering provision contained no express or implied power of delegation; and
- the rule against delegation does not prevent the making of regulations that confer on another person or body the authority to make decisions and exercise discretionary powers within the limits prescribed by the regulations, but the legislative power itself cannot be delegated; and
- an empowering provision should make it clear beyond doubt if a power of subdelegation is given, and to whom, and any limits to that power.

*Hookings v Director of Civil Aviation* [1957] NZLR 929 is another leading case on subdelegation. In that case, the High Court identified a distinction between the subdelegation of a *legislative power* and the subdelegation of the *administration* of validly made regulations. The mere subdelegation of the *administration* of validly made regulations does not create a *vires* problem.

See also the Court of Appeal decision in *The Official Assignee, Vautier Shelf Company No 14 Limited and Others v The Chief Executive of the Ministry of Fisheries and the Minister of Fisheries* (Unreported, Court of Appeal, CA 165/00, 167/00, 170/00, 171/00, and 193/00, 11 October 2001).

### 10A.3.3 Guidelines

Before the power to make delegated legislation is exercised, a check should be made to ensure that the proposed delegated legislation does not contain a subdelegation of a legislative power that is not authorised by the empowering provision.

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PART 4

IS THE PROPOSED DELEGATED LEGISLATION INVALID BY REASON OF  
REPUGNANCY TO ANY OTHER ENACTMENT?

**10A.4.1 Outline of issue**

Delegated legislation cannot override primary legislation. As Lord Goddard CJ said in *Powell v May* [1946] KB 330, 335, “Obviously [a bylaw or regulation] cannot permit that which a statute expressly forbids nor forbid that which a statute expressly permits ...”. The issue concerns whether the proposed delegated legislation is inconsistent with any other Act.

**10A.4.2 Comment**

*Alan Johnston Sawmilling Limited v Governor-General* [2002] NZAR 129 illustrates this issue.

Clause 4 of the Customs Export Prohibition Order 1996 (now revoked) prohibited the export of timber products except:

- indigenous timber and indigenous timber products subject to section 67C of the Forests Act 1949 exported in accordance with that section; and
- any other indigenous timber and indigenous timber products exported with the consent of the Minister of Forestry and subject to conditions imposed by the Minister.

Clause 4 was made under section 56(1) and (2) of the Customs and Excise Act 1996, which provided as follows:

**56 Prohibited exports**

- (1) It is unlawful to export from New Zealand goods the exportation of which is prohibited by an Order in Council made under subsection (2) of this section.
- (2) The Governor-General may from time to time, by Order in Council, prohibit the exportation from New Zealand of—
  - (a) Any specified goods; or

(b) Goods of a specified class or classes,—

if, in the opinion of the Governor-General, the prohibition is necessary in the public interest.

The empowering provision appeared to authorise the making of the order.

However, section 67A(1)(b)(i) of the Forests Act 1949 provided that nothing in Part IIIA of that Act applied to any indigenous timber from, or on, any land originally reserved or granted under the South Island Landless Maori Act 1906 (“the 1906 Act”). Part IIIA contains various provisions relating to indigenous forests and includes export controls prohibiting the export of indigenous timber except in certain circumstances.

The *Alan Johnston* case concerned timber from land reserved or granted under the 1906 Act. This timber was not “subject to section 67C of the Forests Act 1949” for the purposes of clause 4(1)(a) of the Customs Export Prohibition Order 1996. Accordingly, under clause 4(1)(b), the export of that timber was prohibited, except with the consent of the Minister of Forestry, and subject to any conditions that the Minister thought fit to impose.

The key elements of Wild J’s decision are:

- section 67A(1)(b)(i) of the Forests Act 1949 created an exemption for timber from land reserved or granted under the 1906 Act from export controls. In effect, in promulgating clause 4 of the Customs Export Prohibition Order 1996, the Executive sought to remove or defeat the section 67A(1)(b)(i) exemption. The land concerned was exempt from the sustainable management regime for forests in Part IIIA of the Forests Act 1949. Clause 4 sought to make them subject to the regime by a different mechanism. The clause was accordingly repugnant to Parliament’s expressed intention and was invalid:
- the order breached Article 1 of the Bill of Rights Act 1688 (Imp) because it suspended the law (section 67A(1)(b)(i) of the Forests Act 1949) by regal authority without the consent of Parliament:
- the order was not made for the purpose authorised by the empowering statute. It was made for an improper purpose and was therefore invalid.

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Extraneous or improper purposes or considerations will not invalidate a regulation if the dominant or substantial purpose was a proper one. The test is whether the regulation would have been made “but for” the improper purpose. Although less clear cut, the order had been made for an improper purpose.

The decision is significant because it requires an examination, not just of the Act under which the delegated legislation is made, but of the statute book as a whole.

*Inconsistency with the New Zealand Bill of Rights Act 1990*

The Court of Appeal has recently said in *Drew v Attorney-General* [2002] 1 NZLR 58 that if an empowering provision does not authorise the making of a regulation that is inconsistent with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), a regulation that is inconsistent with the Bill of Rights Act will be *ultra vires*.

The facts in *Drew* are as follows:

- Drew was an inmate who appealed against a conviction at a superintendent’s hearing of a disciplinary offence under the Penal Institutions Act 1954:
- his case had been heard by a deputy superintendent who found that the offence had been proved:
- Drew appealed to the Visiting Justice:
- regulation 144 of the Penal Institutions Regulations 1999 entitled an inmate in an appeal to a Visiting Justice to contact a lawyer but stated that “the legal adviser may not represent the inmate at the appeal.”
- regulation 144 was purportedly made under section 45(1)(19) of the Penal Institutions Act 1954, which enabled regulations to be made for:
  - “(19) Ensuring the discipline of inmates, including (without limitation) regulating the laying of complaints relating to offences against discipline and prescribing the procedures for the hearing of such complaints”:
- at the hearing before the Visiting Justice, Drew was

refused permission to be represented by a lawyer. The Visiting Justice found that the case was proved:

- Drew applied for a judicial review and argued that regulation 144 was *ultra vires* section 45(1)(19).

Blanchard J, delivering the majority judgment, said at para 66 that:

It would have been permissible under section 45(1)(19) to make a regulation which denied legal representation where that was appropriate to the particular circumstances and the particular inmate, but this empowering provision cannot have been intended by Parliament to authorise the making of a regulation which, in its operative effect, results in some hearings which may be conducted in a manner contrary to the principles of natural justice ... we are satisfied that this is bound to occur if legal representation is *always* denied to an inmate regardless of the seriousness of the charge, the complexity of the case or the analytical ability of the inmate ... We accordingly conclude that reg 144 is *ultra vires* the regulation-making power in section 45.

The Court of Appeal said that it had reached this conclusion by applying common law principles of construction, guided by principles of natural justice. The Court felt that there was no need to refer to section 27(1) of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act). Section 27(1) provides as follows:

Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

Section 4 of the Bill of Rights Act provides as follows:

#### **4 Other enactments not affected**

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) Decline to apply any provision of the enactment—

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by reason only that the provision is inconsistent with any provision of this Bill of Rights.”.

Section 29 of the Interpretation Act 1999 defines “enactment” as meaning “the whole or a portion of an Act *or regulations*”.

On the face of it, because regulations are “enactments”, the courts cannot, by virtue of section 4, hold that the regulations are revoked, or in any way invalid or ineffective by reason only of an inconsistency with the Bill of Rights Act.

However, the Court felt that the argument that section 4 protected the regulations was “so plainly erroneous that it is desirable that we despatch it in the present case rather than leave any lingering doubt that it might have validity”. To the extent that it was necessary to refer to the Bill of Rights Act, the regulation was invalid because the empowering section, in accordance with section 6 of the Bill of Rights Act, does not authorise the regulation. In other words, the Court gave section 45 of the Penal Institutions Act 1954 a meaning consistent with section 27 of the Bill of Rights Act which, in accordance with section 6 of the Bill of Rights Act, is to be the meaning preferred over all other meanings.

What this means is that if a particular regulation is inconsistent with the Bill of Rights Act there will be an issue as to whether it is *ultra vires* its empowering provision. If Parliament wants to authorise the Executive to make regulations that are inconsistent with the Bill of Rights Act, then the empowering provision needs to expressly permit this. The empowering provision itself would then be inconsistent with the Bill of Rights Act and a report from the Attorney-General would need to be made to Parliament under section 7 of that Act.

Although *Drew* can be viewed as a straightforward *ultra vires* case (the empowering provision did not authorise a denial of legal representation), its significance in the context of the Bill of Rights Act cannot be underestimated. Consider the implications for delegated legislation that may arguably infringe other protected rights and freedoms, such as the freedom of expression (section 14) and freedom from discrimination (section 19).

### **10A.4.3 Guidelines**

Before the power to make delegated legislation is exercised, a check should

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be made to ensure that the proposed delegated legislation is not inconsistent with any other enactment (especially the Bill of Rights Act).

## PART 5

### IS THE PROPOSED DELEGATED LEGISLATION INVALID BY REASON OF UNCERTAINTY?

#### 10A.5.1 Outline of issue

It is a fundamental principle of good law making that the obligations imposed by legislation should be certain and understandable by those affected. The issue concerns whether the proposed delegated legislation is invalid by reason of uncertainty.

#### 10A.5.2 Comment

The leading case on uncertainty of delegated legislation in New Zealand is the Court of Appeal case of *Transport Ministry v Alexander* [1978] 1 NZLR 306. In that case-

- regulation 34(1)(a) of the Civil Aviation Regulations 1953 provided that except in the case of emergencies no aircraft may land or take off from an authorised or licensed aerodrome unless prior approval had been obtained:
- from the government department or other public body controlling or administering that place or *administering the Noxious Animals Act 1956 in respect of that place*; or
- if there was no such controlling or administering authority, from the occupier of the land:
- the defendant landed in a helicopter on a piece of land without the permission of the occupier and was charged with a breach of regulation 34.

The Court noted that there was a difficulty with the words “*administering the Noxious Animals Act 1956 in respect of that place*” in regulation 34(1)(a)(i) in that it could not accurately be said that any government department or

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public body administered the Noxious Animals Act 1956 in respect of a place.

The Court added that this:

brings one into the realm of voidness for uncertainty ... That there is in theory a separate ground of uncertainty for which regulations may fail, as distinct from ordinary *ultra vires*, was denied by Dixon J in *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184. Be that as it may, there is a persistent tendency for courts to accept, as indeed was accepted in the *King Gee* case itself, that in considering regulations claimed to be justified by a particular statutory power the stage may be reached of concluding that the regulation is so ambiguous that Parliament cannot have meant the power to cover it. We think such a stage is reached here ... To *regulate* civil aviation is to lay down rules to be observed by those participating in the activity: the reference to the Noxious Animals Act in reg 34(a)(i) is so obscure that it does not lay down a reasonably ascertainable rule. Consequently it is invalid.

It is interesting to note however that the invalidity did not extend to regulation 34(1)(a)(ii), which concerned landing with the consent from the occupier of the land. The conviction stood because the invalidity of regulation 34(1)(a)(i) did not bring down regulation 34(1)(a)(ii) with it.

### 10A.5.3 Guidelines

Before the power to make delegated legislation is exercised, a check should be made to ensure that the rights and obligations set out in the proposed delegated legislation are certain and understandable.

## PART 6

DOES THE PROPOSED DELEGATED LEGISLATION INFRINGE ANY OF THE  
GROUNDS SET OUT IN STANDING ORDER 382?

### 10A.6.1 Outline of issue

Standing Order 382 sets out the grounds on which the Regulations Review Committee may consider whether it ought to draw a regulation to the special

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attention of the House. The issue concerns whether the delegated legislation infringes any of those grounds.

### 10A.6.2 Comment

#### *General objects and intentions of the statute*

The first ground is that the regulation “is not in accordance with the general objects and intentions of the statute under which it is made”. In relation to this ground, the Statutes Revision Committee has noted that—

- the ground “is not intended to open the Regulations Review Committee to discussion on matters of policy. It is intended that the Committee deal only with the policy as written in general terms”;<sup>162</sup>
- the ground is distinct from a question of whether or not the regulations are *ultra vires*.

In considering the ground, the Regulations Review Committee has regard to—

- the objects and intentions of the statute and whether the regulation is consistent with those objects and intentions; and
- whether the regulation has been authorised by the empowering provision.

#### *Trespass on rights and liberties*

The second ground is that the regulation “trespasses unduly on personal rights and liberties”. This ground involves the Regulations Review Committee having regard to whether the regulations trespass on a personal right or liberty and, if there has been a trespass, whether it is undue.

There is some uncertainty as to whether or not a “right” must be a right that is enforceable by the courts or otherwise recognised at law. It is possible that the Regulations Review Committee may accept that international treaties or conventions may establish a “right” for the purposes of this ground. (See, for

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<sup>162</sup> First Report on Delegated Legislation, Report of the Statutes Revision Committee [1985] AJHR 15A, 8.

example, the Investigation into the Citizenship Regulations 1978, Amendment No 6, Promulgated under the Citizenship Act 1977 and their Impact on Children of Families Granted to New Zealand on Humanitarian, Reunification, or Refugee Grounds, Report of the Regulations Review Committee [1996] AJHR I16H.)

Whether or not the trespass is undue may involve consideration of—

- the nature and degree of the trespass; and
- the public interest that the regulations are designed to achieve; and
- whether an unreasonable duty has been created.

*Unusual or unexpected use of the powers conferred*

The third ground is that the regulation “appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made”.

In considering whether this ground is infringed, regard should be had to the objects and intentions of the statute. Given these objects and intentions, have the powers been used in an usual or unexpected way?

*Makes rights and liberties dependent on administrative decisions which are not subject to review on their merits*

The fourth ground is that the regulation “unduly makes the rights and liberties of persons dependent on administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal”.

The Regulations Review Committee has indicated, that if an administrative decision can affect a person’s legal rights, privileges, or legitimate expectations, there should be a right of appeal to, or review by, an independent body or person.

A right to judicially review a decision may not be enough as this remedy may not examine the merits or substance of the decision.

*Excludes the jurisdiction of the courts*

The fifth ground is that the regulation “excludes the jurisdictions of the courts without explicit authorisation in the enabling statute”.

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This ground may apply in circumstances where a regulation is made that impacts on the rights or obligations of parties to litigation proceedings that have been commenced.

*More suited to Parliamentary enactment*

The sixth ground is that the regulation “contains matters more appropriate for Parliamentary enactment”. This would include matters of policy and principle that should be considered by Parliament.

*Retrospective*

The seventh ground is that the regulation “is retrospective where this is not expressly authorised by the empowering statute”.

This ground is designed to protect rights and obligations that exist immediately before the regulation comes into force.

*Notification and consultation*

The eighth ground is that the regulation “was not made in compliance with particular notice and consultation procedures prescribed by statute”.

This ground involves the Committee—

- identifying what notice and consultation requirements have been prescribed in the empowering provision; and
- determining, in any particular case, whether those requirements have been complied with.

In terms of consultation it is important to ensure that the persons consulted are given sufficient time and information to ensure that the consultation is meaningful. See Part 1 for further details concerning consultation.

*Form or purport of regulations calls for elucidation*

The final ground is that the regulation “for any other reason concerning its form or purport, calls for elucidation”.

This ground may be breached if a particular regulation is unclear or uncertain. The Regulations Review Committee has noted in relation to this ground that:

We agree with the Crown that findings of substantive unreasonableness are not appropriate under this ground ... Findings should be restricted to the

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clarity of the language of the [regulation] itself, rather than the substance of the [regulation].<sup>163</sup>

### **10A.6.3 Guidelines**

Before the power to make delegated legislation is exercised, a check should be made to ensure that the delegated legislation does not infringe any of the grounds set out in Standing Order 382. For further information concerning Standing Order 382, see the Regulations Review Committee Digest at [www.vuw.ac.nz/nzcpl](http://www.vuw.ac.nz/nzcpl).

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<sup>163</sup> Complaint Relating to Land Transport Rule 32012 - Vehicle Standards (Glazing), Report of the Regulations Review Committee [1988] AJHR I16K.

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## CHAPTER 11

### REMEDIES

#### INTRODUCTION

##### **Background**

The question of how, or even whether, legislation is to be enforced is often central to the design of the legislation. Different methods of enforcing compliance with legal rules will be appropriate in different contexts, and it may be desirable to create new institutions or agencies to take part in or oversee that role. Examples of the use of different mechanisms for enforcement through subject specific institutions include family law, employment law and environmental law.

As part of the policy development process, policy advisers need to consider whether there needs to be any regulatory regime in order to achieve a desired policy objective, or only a limited regulatory regime. In some contexts there will be other alternatives to the creation of enforceable legal rules which achieve similar or better results in attaining desired policy objectives.

Choosing an appropriate method of enforcing a particular piece of legislation will not of itself ensure the success of the legislation. Voluntary compliance with the requirements of the legislation by those to whom it applies is the preferred outcome. Important factors in achieving a high level of voluntary compliance include the following:

- (a) adequate prior consultation with affected persons:
- (b) compliance of the legislation with important legal principles:
- (c) ensuring that the legislation is fair and reasonable by commonly accepted standards:
- (d) ensuring that the legislation is technically sound and able to be understood (undue complexity and inaccessibility present an obstacle to intelligent compliance with the law):
- (e) well-targeted public education about the legislation.

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**Issues discussed**

The following issues are discussed in this chapter:

Part 1: If remedies are required, which of the range of remedies is appropriate?

Part 2: Should an existing civil remedy be applied?

Part 3: Should new remedies or processes be established?

**PART 1****IF REMEDIES ARE REQUIRED, WHICH OF THE RANGE OF REMEDIES IS APPROPRIATE?****11.1.1 Outline of issue**

This Part discusses some issues to be considered in determining what remedies are to be invoked. This includes consideration of some prior questions such as whether enforceable legal rules are needed, whether the State has any role in the enforcement of the legislation, and if so what.

**11.1.2 Background**

A range of mechanisms are available to achieve desired policy outcomes (see Chapter 1). New Zealand policymakers have traditionally concentrated on the use of legislation to enforce specific legal rules or standards, backed by the use of the criminal law or civil law remedies to ensure compliance. This model is sometimes described as “command control” regulation. There are a number of other regulatory instruments that can be used to achieve desired policy outcomes. These include—

- allowing self-regulation by occupations or trades (with or without legislative intervention);
- encouraging voluntary compliance by the public or specific groups with the desired standards of behaviour;
- public education programmes;
- information standards (eg, corporate reporting, product certification and

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information standards);

- provision for arbitration of disputes; and
- economic instruments (eg, the creation of property rights in some resources, charging systems, performance bonds, systems requiring deposits and refunds, and the removal of inappropriate economic incentives for misbehaviour).

Different forms of regulatory instruments have different strengths and weaknesses. For example, self-regulation or voluntary compliance regimes work best if it is in the self-interest of those subject to those regimes to comply.

Other important questions to be addressed are—

- does the State have any role to play in the enforcement of legal rules; and
- can the enforcement of the rules be left to the individual concerned?

Some areas of law involve a mixture of private and public enforcement of the relevant legal rules. For example -

- Employment law, where the parties to an employment contract are generally responsible themselves for enforcement, but the State labour inspectorate has certain responsibilities in relation to the enforcement of the Holidays Act 1981, the payment of minimum wages, and other compliance issues;
- Trade practices law and securities law, where civil and criminal remedies are both available.

As a generalisation, the criminal law has little role to play if the enforcement of legal rules is to be left to the parties themselves. The primary question in these circumstances is whether existing civil law remedies are adequate, or whether new remedies or processes are needed.

Very careful attention should be given to the aptness of the particular remedy to the substantive rules being stated. The statute book presents a great variety of processes and remedies in which the following elements figure:

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- The compulsory availability of the process: usually the parties have no choice but to be subject to the process if one of them initiates it; but, sometimes, as for instance with some arbitration, the parties might agree to the process.
  - Third party involvement: usually there is third party involvement, but the statute may provide for, or require, negotiation between the parties.
  - The independent character of the third party: usually the third party is independent of the parties, but that is not always so, for instance in the usual case of arbitration in New Zealand the parties choose the tribunal; or in respect of two of the members of certain three-member tribunals where the legislation enables the parties to appoint or nominate those members.
  - The binding character of the process: the third party will often have a power of decision, for instance in the usual case of courts, tribunals, and arbitrators, while conciliators, mediators, and the Ombudsmen and in very limited circumstances courts and tribunals may be able only to recommend.
  - The procedural character of the process: to be contrasted with the formality and adversary character of, say, a jury trial in a criminal matter is the relative informality of the Family Court and even more the investigatory processes of the Ombudsmen.
  - The criteria for decision: they can vary from precise rules of law to very broad standards (such as the public interest or the welfare of the child).

Legislation relating to family matters, employment law, the Ombudsmen, discrimination, small claims, the Treaty of Waitangi, arbitration, resource management, fisheries, mining and other environmental matters all provide material for consideration.

### **11.1.3 Guidelines**

When considering how to obtain a desired policy outcome, consider the full range of regulatory instruments available (usually the best outcomes will be achieved by using a mixture of regulatory instruments).

Consider the nature of the process required for enforcement, and in particular whether, and to what extent, the State has a role in enforcement of the legal

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rules established by the legislation.

Consider whether any specialist institution or agency needs to be created to oversee or assist in the enforcement of the legislation.

Consider the criteria set out in chapter 12.2.3 (which concern the use of criminal sanctions). If those criteria indicate that a criminal sanction is not necessary, consider what civil remedies are appropriate.

## PART 2

### SHOULD AN EXISTING CIVIL REMEDY BE APPLIED?

#### 11.2.1 Outline of issue

This Part discusses the criteria to be applied in determining whether a specific civil remedy should be established.

#### 11.2.2 Comment

The key question to be addressed under this heading is whether applicable civil remedies of general application under the common law or statute law are sufficient to ensure that the legal rules contained in the particular legislation can be adequately enforced. Are those remedies sufficient, or do they require some modification for the purposes of the legislation, or is it necessary to create entirely new processes or remedies? The latter possibility is addressed in Part 3.

In order to answer this question, the policy adviser should consider the various civil remedies of general application available under the common law and the general statute law that are available to either the State or individual parties, and assess their adequacy. An example of a modification to an existing civil remedy is contained in section 81 of the Commerce Act 1986, which specifies a range of circumstances in which the High Court may grant an injunction to restrain certain behaviour. The section enlarges the range of circumstances in which the existing remedy would be available under the common law, and clarifies the application of the remedy.

In summary, it may be necessary to deal specifically with the issue of civil remedies in legislation if there is uncertainty as to whether a particular remedy is available, or it is thought necessary to vary some element of the

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remedy to make it effective in the particular context.

### **11.2.3 Guidelines**

Consider whether existing civil remedies available under the common law or the statute law are applicable, and if so, whether they are adequate and appropriate for the purposes of enforcement.

If there is some uncertainty as to application of an existing remedy or a specific modification is needed to make the remedy more effective, specific legislative provision is desirable.

## **PART 3**

### **SHOULD NEW REMEDIES OR PROCESSES BE ESTABLISHED?**

#### **11.3.1 Outline of issue**

This Part discusses when it may be appropriate to create new particular remedies or processes.

#### **11.3.2 Comment**

A decision to create a new remedy or process may arise from one or more of the following circumstances—

- the demonstrated inadequacy of existing civil remedies in achieving the desired policy objective:
- difficulties in modifying existing remedies to improve their utility:
- a desire to experiment with new processes in order to reduce costs, achieve better compliance, or achieve better co-operation with industry etc:
- a perception that new institutions would be better able to manage matters requiring resolution under the substantive law because of—
  - the need for specialist knowledge
  - the desirability of less formality in proceedings than is the practice of the ordinary courts

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- the desirability of different fact finding procedures or other procedures such as mediation which may not be available through the ordinary courts
  - other reasons.

### **11.3.3 Guidelines**

If policy advisers are considering a new remedy or process, it is wise to—

- (a) undertake prior consultation with persons knowledgeable in the operation of the process or remedy to ascertain the likely pitfalls; and
- (b) consider whether the proposed process or remedy will create anomalies or inconsistencies in the operation of the law generally (ie whether the innovation is desirable in principle as well as effective in practice); and
- (c) check whether control agencies and other agencies with similar legislation have concerns about the implications of the proposed new remedy or process (if there is widespread opposition to the proposed new process or remedy from other governmental agencies, this is a significant indication that the proposal is flawed or poses problems of principle).

Policy makers should not copy provisions from other New Zealand or overseas legislation, without considering whether the precedent is workable or desirable.

## **PART 4**

### **SHOULD A SPECIAL LIMITATION PERIOD BE ESTABLISHED?**

#### **11.4.1 Outline of issue**

This Part summarises the law relating to limitation in civil proceedings, outlines some of the competing considerations involved in setting appropriate limitation periods, and discusses when it may be appropriate to create special rules governing limitation periods.

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### 11.4.2 Comment

The present law on limitation is complex. It relies not only on the provisions of the Limitation Act 1950 but also on specific limitation periods in other statutes and the relevant common law and procedural rules. The position is discussed in the 1988 Report of the New Zealand Law Commission, *Limitation Defences in Civil Proceedings* (NZLC R6), and also updated in the discussion paper (Preliminary Paper 39) *Limitation of Civil Actions* (NZPP 39), issued by the Commission in February 2000.

In general, the following time limits (usually measured from the date of the accrual of a right of action) apply in civil proceedings:—

- 2 years in the case of an action to recover any “penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment”:
- 6 years in the case of the majority of actions; including actions in contract or tort, any sum recoverable under any enactment (other than a penalty or forfeiture), and arrears of interest on a judgment debt:
- 12 years in the case of an action on a deed or a judgment, and certain other actions relating to wills, estates, land and the recovery of sums secured by a mortgage or charge.

The Limitation Act 1950 provides for the extension of limitation periods in certain circumstances, in particular—

- if the claimant is under 20 years or is mentally impaired:
- if the claimant is unable to discover the existence of a cause of action because of fraud or mistake:
- where the case relates to bodily injury, if the intended defendant consents or the court grants leave to bring the proceedings on an application.

The Limitation Act 1950 provides for no period of limitation in certain cases (for example, in the case of fraud or conversion of trust property by a trustee).

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Under the Limitation Act 1950, limitation periods do not act as a bar to the bringing of proceedings, but operate as a defence that can, but need not, be invoked by defendants.

A number of actions fall outside the scope of the Limitation Act 1950; most importantly, actions for the recovery of tax, duty, or interest on tax or duty. Where no limitation period is set by statute, the defence known as laches may be invoked by a defendant, if there is undue delay on the part of the plaintiff in bringing the claim after becoming aware of the right to bring the claim. Any change of position on the part of the defendant will be considered by the Court in determining whether, in the circumstances of any particular case, the defence can be invoked.

There is a substantial body of case law on the question of what constitutes the date of accrual of a right of action. Traditionally that date has been treated as the date “when there is in existence a person who can sue and another who can be sued, and when there are present all the facts that are material to be proved to entitle the plaintiff to succeed” (28 Halsbury’s Laws of England (4th ed) para 622).

However, in certain classes of case (for example, in building cases) the date of accrual of an action is the date on which the defect becomes known or with reasonable diligence is discoverable. This principle has been recently confirmed by the Privy Council and has also been extended by the New Zealand courts to certain claims based on historic sexual abuse and claims relating to negligent professional advice.

The facts to be proved differ depending on the nature of the claim involved. A claim for breach of contract accrues on the date of breach; a claim in negligence, in contrast, does not accrue until damage results from a breach of duty. A continuing series of events can give rise to a separate accrual and a separate limitation period in respect of each event.

There are a number of competing considerations when it comes to devising an appropriate limitation period for the bringing of civil proceedings. Some of the main considerations are—

- it is desirable that there be an end to litigation and that defendants not be exposed to stale claims:

- litigation should be commenced while the evidence is available and fresh. Defendants may be at a particular disadvantage because a person who feels aggrieved is more likely to recall clearly and gather evidence at an early stage:
- claimants should have a reasonable time to investigate what may be wrongful conduct, consult, and file claims. If limitation periods are too short there may be insufficient time for this to be completed or for discussions or negotiations leading to a settlement to be completed.

### 11.4.3 Guidelines

When applying any existing remedy or creating a new remedy enforceable by civil proceedings, consider whether there is any reason why the limitation period for the bringing of those proceedings should be shorter or longer than those applicable under the Limitation Act 1950. Relevant considerations will include the following:

- in general, the Crown should be placed in the same position as other litigants in relation to the setting of particular limitation periods (it should neither be in an advantageous or disadvantageous position). However, the Crown may be in a different position than other defendants when it comes to the question of whether to invoke a limitation defence in any particular case. There may be situations where, for reasons of public policy or in recognition of the Crown's responsibilities to the public as a whole, it is not appropriate for the Crown to invoke an available limitation defence. For this reason it is appropriate in practice for the Attorney-General to make decisions on whether to invoke a limitation defence on behalf of the Crown:
- there may also be public policy reasons for having a different period of limitation from that applicable under the Limitation Act 1950. For example, a standard limitation period of 6 years from the date of accrual of a right of action may be too long in the following cases:—
  - where the wrong or thing complained of is relatively trivial or ephemeral in nature (some regulatory requirements are in the former category while defamation is an example of the latter):
  - where having a shorter period of limitation serves an important objective (for example, encouraging a clean break between parties

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after the dissolution of marriage by limiting the period during which property relationship claims may be brought):

- where early resolution or finality is essential to ensure that the Government or some other body or regime can operate effectively (this is the reason for allowing very short periods of time to lodge an electoral petition):
- a period of 6 years from the date of accrual of a right of action may be too short in the following cases:-
  - in cases where it is obvious from the outset that the wrong or thing complained of is serious and unlikely to be discovered for some years after the relevant act or omission occurred:
  - in cases where prejudice to the defendant either does not arise or is of less significance than usual, in the event of substantial delay in bringing proceedings (for example, delays in bringing actions to enforce a judgment of a court are, in general, less prejudicial to a defendant than delays in bringing the action that lead to the judgement):
- a complete exemption from any period of limitation is undesirable in principle because it does not acknowledge the desirability of bringing finality to litigation at some point.

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## CHAPTER 12

### CRIMINAL OFFENCES

#### INTRODUCTION

##### **Background**

Almost every society with a legal system draws a distinction between conduct that is treated as a criminal offence and conduct that, while regarded as wrongful, is regulated only by the civil law. However, it is often difficult to determine whether or not any particular conduct requires the intervention of the criminal law.

##### **Issues discussed**

The following issues are discussed in this Chapter:

- Part 1: Is it necessary to create a new offence?
- Part 2: Has the appropriate mental element been determined?
- Part 3: Are appropriate defences available?
- Part 4: Is the offence a summary or indictable offence?
- Part 5: Is the offence an infringement offence?
- Part 6: Has an appropriate range and level of penalties been determined?

#### PART 1

##### IS IT NECESSARY TO CREATE A NEW OFFENCE?

###### **12.1.1 Outline of issue**

This Part discusses the purposes of the criminal law, the distinctions between criminal law and civil law, and guidelines on when it may be appropriate to create a criminal offence.

###### **12.1.2 Comment**

One modern statement of the purpose of the criminal law is found in the American Law Institute's Model Penal Code, where it is suggested that those

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purposes are:

- “(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
- (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
- (c) to safeguard conduct that is without fault from condemnation as criminal;
- (d) to give fair warning of the nature of the conduct declared to be an offence;
- (e) to differentiate on reasonable grounds between serious and minor offences.”

As a generalisation, the criminal law does three things. It tells citizens that certain conduct is prohibited. Secondly, it provides for the investigation and prosecution of those who are alleged to have broken the rules. Those who are proved to have broken the rules are (in general) convicted. They are also punished, and a variety of penalties specific to the criminal law are available for that purpose.

The criminal law is concerned with the punishment of offenders and the deterrence of others from wrongdoing. It is not primarily concerned with compensation, which is the province of the civil law. In contrast, the civil law is not primarily concerned with punishment. The remedies provided by civil law have other purposes (eg, compensation, the remedying of wrongs, stopping unlawful conduct). It must be acknowledged that there are exceptions to this general principle: in particular, the civil remedy of exemplary damages (which is designed to inflict punishment rather than compensate), and the sentence of reparation (which is designed to compensate the victim rather than punish the offender).

The criminal law is intended to punish only that conduct which is in some way blameworthy. This is reinforced by the process of conviction, which is distinctive to the criminal law. Conviction operates as an enduring form of censure by society for the wrongdoing. The wrongdoer is, by the process of conviction, labelled a criminal, and gains a criminal record that may have

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life-long consequences for the person's employment prospects, freedom to travel, and other opportunities. The notion of blameworthiness as an integral feature of the criminal process is longstanding. This is illustrated by the following quotation from Denning LJ, as he then was, who wrote that ever since the time of Henry I:

“In order that an act should be punishable it must be morally blameworthy. It must be a sin.”

The civil law, in contrast, does not, in general, employ concepts of moral fault. An adverse judgment does not necessarily imply a form of moral fault on the part of any person, and does not involve any form of symbolic condemnation of the person or their conduct on the part of society.

In a liberal and pluralistic society the criminal law is primarily used to prevent or punish serious harm caused to other individuals or the wider collective interests of society at large. In order to be credible and accepted in the community, criminal offences:

- must reflect current societal values about the type of conduct which is sufficiently serious to warrant the punishment of the criminal law:
- must define the prohibited conduct with sufficient precision to enable the ordinary citizen to know in advance whether or not his or her conduct will be criminal.

There has been, and will continue to be, ongoing debate about the extent to which the criminal law should be utilised to prohibit behaviour—

- (a) that does not cause identifiable harm to anyone, but causes offence to some; or
- (b) that causes harm only to the perpetrator, and not to others.

There is also a need to balance the interests of the community to be protected from crime and that of the accused to ensure that mental as well as physical elements of the offence are established before a conviction is entered.

Ultimately, it must be acknowledged that the proper scope of the criminal law is a matter involving political and ethical judgments, and there is room for opposing views on the question of whether, and to what extent, the criminal

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law may be utilised to regulate public morals or so-called victimless crimes.

### 12.1.3 Guidelines

Some of the questions which need to be addressed when considering whether to create a criminal offence include the following:

Will the conduct in question, if permitted or allowed to continue unchecked, cause substantial harm to individual or public interests?

Would public opinion support the use of the criminal law, or is the conduct in question likely to be regarded as trivial by the general public?

Is the conduct in question best regulated by the civil law because the appropriate remedies are those characteristic of the civil law (eg, compensation, restitution)?

Is the use of the criminal law being considered solely or primarily for reasons of convenience rather than as a consequence of a decision that the conduct itself warrants criminal sanctions?

If the conduct in question is made a criminal offence, how will enforcement be undertaken, who will be responsible for the investigation and prosecution of the offence, and what powers will be required for enforcement to be undertaken?

If the new offences in question are unlikely to be enforced, or enforced only rarely, the question of whether a criminal sanction is warranted should be examined carefully, because creating offences that are not going to be enforced brings the law into disrepute. If enforcement of the law is going to be left to the Police as part of their general duty to enforce the law, it may be useful to make prior enquiries of the Police as to the likely priority to be given to the new offence or offences being created.

Would it be more economic or practicable to regulate the conduct in question through the use of existing or new civil law remedies?

Does the conduct in question primarily involve the non-payment of fees or other sums of money to the Crown or other statutory bodies? In general, such money should be recovered by use of civil remedies (which may include a specialised civil penalty regime) rather than making non-payment a criminal offence.

Is the conduct that is to be categorised as a criminal offence able to be defined with precision?

Vague expressions are unsatisfactory, as are global expressions to the effect that “failure to comply with any provision of this Act” constitutes “an offence”. The latter approach suggests that there has been little or no analysis of each element of personal conduct regulated by the legislation, for the purpose of deciding whether a criminal sanction is warranted.

## PART 2

### HAS THE APPROPRIATE MENTAL ELEMENT BEEN DETERMINED?

#### 12.2.1 Outline

This Part discusses the different classes of mental element, and specifies criteria to be applied in determining the appropriate mental element for a particular offence.

#### 12.2.2 Comment

*Millar v MOT* [1986] 1 NZLR 660, attempted to simplify the previous complex categorisation of offences into three different classes of offence.

The first class of offence is those offences in which mens rea (the mental element) is an ingredient of the offence and the prosecution is required to prove it.<sup>164</sup>

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<sup>164</sup> The first class of offence was described in *Millar* in the following way:

“Absence of guilty knowledge is like the defences of provocation, automatism self defence and compulsion. There must be some evidence or material, either from the prosecution case or called by the defence to raise the issue. In the absence of foundation for a contrary view the offence will be inferred to have been committed unprovoked, knowingly, not in self defence, free from compulsion. A trial judge should not put a possibility for which there is no foundation in the evidence to the jury. A Judge sitting alone should not take it into account. But if there is a real foundation the Judge’s duty is to direct the jury accordingly or to consider it himself when he is the tribunal of fact; and the prosecution will fail if a reasonable doubt remains”, Cooke J and Richardson J, pages 667–688.

Some commentators have suggested that offences in the first class (where the prosecution has the onus of establishing mens rea) can be further subdivided into 2 categories:

- those in which the prosecution must positively establish mens rea, and is not entitled to the benefit of any inference that an act was committed knowingly; and
- those in which knowledge can be inferred or presumed unless the defence raises evidence or

The second class of offence is those offences that do not require the prosecution to prove mens rea. However, it is a defence for the defendant to prove total absence of fault on the balance of probabilities.<sup>165</sup>

The third class of offence is offences of absolute liability, where it is not necessary for the prosecution to prove mens rea, and total absence of fault is not a defence.<sup>166</sup>

### 12.2.3 Guidelines

There is a presumption that unless there is good reason the prosecution should have the onus of proving mens rea (the mental element). The required mental element can be expressed in a number of ways, including the use of words such as “knowingly”, “intentionally”, or “recklessly”. A mens rea requirement should be imposed if an activity is wrongful in all circumstances and regarded by the general public as “truly criminal”.

An offence may properly be categorised as a strict liability offence (where there is no need for the prosecution to prove mens rea, but there is a defence if the defendant proves total absence of fault) if—

- (a) the offence involves the protection of the public from those undertaking

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material that raises a doubt. If that occurs, the onus of proving knowledge shifts to the Crown.

It is generally acknowledged that there is little difference in practice between these 2 sub-categories.

<sup>165</sup> The second class of offence was described in *Millar* in the following way:

“There are a significant group of statutory provisions, aimed at regulating the carrying on of various trades or activities, where in defining offences Parliament or the regulation-maker has not gone as far as to impose absolute liability in clear terms or by necessary implication, yet it may be unreasonable to read in the ordinary implication of mens rea. For instance, as Richardson J put it delivering the majority judgment in *MacKenzie* at p 81, if personal injury or property damage ensues, truly criminal charges may be brought under the Crimes Act. Or it may be unreasonable to suppose that the prosecutor will be able to acquire any accurate knowledge of the workings of the defendant’s business organisation. The object of this type of provision is best served by imposing liability prima facie if the defendant or his or its servants or agents are shown to have committed the unlawful act, while allowing exculpation if the defence can prove total absence of fault.” Cooke J and Richardson J, page 667.

<sup>166</sup> The court in *Millar* described this class of offence in the following way:

“If, however, there is to be discerned in a statute an intention, for reasons of policy or public safety, to make the doing of an act an absolute offence, that intention should not be defeated by allowing a defendant a way of escape by reversal of the onus of proof. If the argument for absolute liability is that statutory standards can only be maintained by displacing the ordinary presumption of mens rea with one of absolute liability, it is not for the Courts to defeat the underlying concern of the legislature by allowing a defendant a way of escape at the cost of the reversal of the persuasive onus.” McMullin J, page 675.

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risk-creating activities. These offences (commonly described as public welfare regulatory offences) usually involve the regulation of occupations or trades or activities in which citizens have a choice as to whether they involve themselves; and

- (b) the threat of criminal liability supplies a motive for persons in those risk-generating activities to adopt precautions, which might otherwise not be taken, in order to ensure that mishaps and errors are eliminated; and
- (c) the defendant is best placed to establish absence of fault because of matters peculiarly or primarily within the defendant's knowledge.

(The reversal of onus involved in an offence of strict liability can more readily be regarded as a justified limit on the presumption of innocence affirmed by section 25(c) of the New Zealand Bill of Rights Act 1990 in these circumstances. However, the question of justification for the reversal of onus will require consideration on a case by case basis as part of the monitoring process conducted under section 7 of that Act.)

There is very limited scope for the creation of new absolute liability offences in New Zealand (ie those offences where even a total absence of fault is not a defence). Absolute liability offences have been the subject of critical comment on the basis that it is completely inappropriate to subject citizens to the criminal process in any circumstances if they can demonstrate absence of fault. The use of an absolute liability offence should be contemplated only if —

- (a) there is an overwhelming national interest in using the criminal law as an incentive to prevent certain behaviour occurring, regardless of fault; and
- (b) there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault (this will be rare).

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## PART 3

### ARE APPROPRIATE DEFENCES AVAILABLE?

#### 12.3.1 Outline

This Part discusses issues concerning the burden of proof, and the types of defences that should be provided in the case of different classes of offence.

#### 12.3.2 Comment

The questions of the burden of proof and the question of what, if any, defences should be provided are interlinked. The law in this area has become complex owing in part to an apparent conflict between section 67(8) of the Summary Proceedings Act 1957 and section 25(c) of the New Zealand Bill of Rights Act 1990.

Section 67(8) of the Summary Proceedings Act 1957 provides:

“(8) Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section 17 of this Act, need not be negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant.”

There is extensive case law on this, the essence of which is that:

- the section usually applies where the relevant wording makes “the prima facie offence an innocent act”. It does not apply where the relevant words make a prima facie innocent act an offence when done under certain conditions. In the latter case the words of exception constitute the gist of the offence.
- where the section applies the defendant must prove, on the balance of

probabilities, that the relevant exception etc applies.<sup>167</sup>

Section 25 of the New Zealand Bill of Rights Act 1990 provides:

“Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (c) The right to be presumed innocent until proved guilty according to law.”

A summary of the position is that offences which contain neutrally worded qualifications such as “without reasonable excuse or lawful authority” or “without lawful justification or excuse or colour of right” probably cast a different burden on the defendant, depending on whether they are tried summarily or on indictment.<sup>168</sup> In the case of an offence tried summarily, the Courts are likely to apply section 67(8) of the Summary Proceedings Act and impose a legal burden on the defendant to prove, on the balance of probabilities, that the exception applies. In the case of offences tried indictably, the Courts are likely to hold, applying section 25(c) of the New Zealand Bill of Rights Act, and in the absence of any provision similar to section 67(8), that there is only an evidential burden on the defendant to raise a doubt, in which case the legal burden of disproving that the exception

<sup>167</sup> See generally *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, *Sheehan v Police* [1994] 3 NZLR at p 592, which distinguishes *R v Rangi*, discussed subsequently.

<sup>168</sup> The Court of Appeal in the case of *R v Rangi* [1992] 1 NZLR 385 held that section 25(c) of the New Zealand Bill of Rights Act reflects the basic principle of criminal law that the onus of proof remains on the Crown, and that the onus should be carried by the Crown. Accordingly, those offences which require an accused to exculpate him or herself by either proving or leading evidence establishing want of intent or fault appear prima facie to infringe section 25(c) of the Bill of Rights. The Court of Appeal in the case of *R v Rangi* stated that wherever an enactment could be interpreted so as to place an evidential onus as opposed to a legal burden on an accused, that interpretation would be preferred. On this basis, the Court of Appeal in *R v Rangi* held that the words of section 202A(4)(a) of the Crimes Act 1961 making it an offence for a person without lawful authority or reasonable excuse to possess a knife or offensive weapon or disabling substance in a public place, cast only an evidential burden on the accused. (In other words, the accused must raise some foundation for doubt. Having done that, the Crown must then prove beyond reasonable doubt that the accused had no lawful authority or reasonable excuse for the possession of a knife.) Casey J acknowledged that the position would be the opposite if the offence were to be tried summarily, because of section 67(8), which will prevail over the provisions of the New Zealand Bill of Rights Act where there is plain inconsistency. The case of *R v Rangi* can be contrasted with the Court of appeal decision in *R v Phillips* [1990-92] 1 NZBORR6, a case discussing the effect of section 6(6) of the Misuse of Drugs Act 1975. In the case of *R v Phillips* it was held that to interpret the words “until the contrary is proved” in section 6(6) as imposing upon an accused merely an evidential onus of creating a reasonable doubt would be strained and unnatural. Rather, the word “proved” must be interpreted as imposing on an accused an onus of proof on the balance of probabilities.

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applies passes to the Crown.

### 12.3.3 Guidelines

Some guidelines in relation to the use of defences are set out below.

The need for clarity suggests that if legislators wish to impose a legal burden on the defendant to establish an exception or defence, words like “prove” or “proved” should be used.

The rule in section 67(8) of the Summary Proceedings Act **may** be displaced by use of words indicating that there must be “evidence” of some relevant qualification (eg, “in the absence of evidence to the contrary”). This is suggestive that an “evidential” rather than a legal burden is being placed on the defendant.

Words which place a burden on the defendant to prove something generally create a “prima facie” infringement of section 25(c) of the New Zealand Bill of Rights Act. For Bill of Rights vetting purposes the question will be whether the creation of such a burden is a “justified limitation” in terms of section 5 of the Act.

In assessing whether such offence provisions fall within the scope of section 5 of the New Zealand Bill of Rights Act, obvious regard will be had to the likely categorisation of the offence as per *Millar*, the maximum penalty, and questions such as whether the subject matter of the defence is peculiarly within the knowledge of the defendant.

In general, it is preferable to avoid placing a legal burden of proof on a defendant, particularly if the case involves a “truly criminal offence”. If the formulation of a particular offence involves an “exception, exemption, proviso, rule, or qualification”, consideration should be given to placing only an evidential burden on the defendant, or simply requiring the defendant to put the matter in issue (see section 257A(6B) of the Crimes Act 1961).

Subject to the limitations referred to in guidelines 3 and 4, it is helpful to the public and the courts for legislators to identify and spell out specific defences in the case of public welfare regulatory offences, if it is possible to identify such defences as part of the policy development process.

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## PART 4

### IS THE OFFENCE A SUMMARY OR INDICTABLE OFFENCE?

#### 12.4.1 Outline of issue

This Part discusses the distinction between summary offences and indictable offences, and sets out guidelines for describing and categorising offences as summary or indictable offences.

#### 12.4.2 Comment

A series of questions and answers are set out below.

*What is the practical significance of the distinction between summary and indictable offences?*

If an offence is proceeded with on indictment, the defendant cannot elect to have the offence tried summarily (in other words, the offence will almost always be tried by a jury, rather than a Judge alone). On the other hand, if the offence is a summary offence, it will be tried in the District Court by a Judge or lower level judicial officer, unless it is punishable by MORE than 3 months' imprisonment AND the accused elects jury trial.

*What is a summary offence?*

This term is defined in a slightly unhelpful way in section 2 of the Summary Proceedings Act as: “any offence for which the defendant may not, except pursuant to an election made under section 66 of this Act, be proceeded against by indictment; and, where the enactment creating an offence expressly provides that it may be dealt with either summarily or on indictment, includes such an offence that is dealt with summarily”. A summary offence—

- includes minor offences (section 20A of the Summary Proceedings Act):
- includes infringement offences (section 21 of the Summary Proceedings Act):

- generally includes offences punishable solely by a fine<sup>169</sup>;
- generally includes offences punishable by up to three months' imprisonment.

*What is an indictable offence?*

This term is defined in a very indirect way. Section 2(2) of the Crimes Act states in effect, that every offence under the Act is a crime. A crime is defined in section 2(1) as an offence which may be proceeded against by indictment. An indictable offence is therefore:

- an offence under the Crimes Act
- an offence under another enactment specifically declared to be an indictable offence.

An offence with a maximum penalty of greater than 3 months' imprisonment may also be classed as an indictable offence.<sup>170</sup>

*What are the different classes of indictable offence?*

(a) Indictable offences triable summarily

These are listed in the First Schedule to the Summary Proceedings Act and in section 6(2) of the Summary Proceedings Act. Generally they include a range of offences in the Crimes Act (although not all) punishable by between 1 and 10 years imprisonment. There are also a wide range of offences in other statutes listed in the First Schedule. Again indictable offences are not

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<sup>169</sup> One example of indictable offences (committed by bodies corporate) punishable solely by a fine is section 18 of the Overseas Investment Act 1973.

<sup>170</sup> Section 2 of the Summary Proceedings Act defines an indictable offence as any offence for which the defendant may be proceeded against by indictment other than offences which can be proceeded with by way of indictment solely because the defendant has the right to elect jury trial under section 66 of the Summary Proceedings Act. There is some uncertainty about the precise status of offences punishable by more than 3 months' imprisonment, if the offence is not a crime or specifically declared to be an indictable offence. Such an offence *may* be classed as an indictable offence because section 329(1) of the Crimes Act allows any offence with a maximum penalty of greater than 3 months' imprisonment to be the subject of a count in an indictment. There is authority indicating that an offence punishable by 5 years' imprisonment that was not categorised as punishable either summarily or on indictment is a purely indictable offence - *R v Bradshaw* [1996] DCR 873. Presumably, if an offence punishable by more than 3 months' imprisonment is described as punishable on summary conviction, it is to be regarded as a summary offence, although it is also capable of being tried on indictment, as a consequence of section 329 of the Crimes Act.

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generally declared to be triable summarily if the maximum period of imprisonment that might be imposed is greater than 10 years.

**(b) Purely indictable offences**

These are offences which may be tried only on indictment. They comprise those indictable offences not listed in the First Schedule to the Summary Proceedings Act, or in section 6(2) of that Act. There are 3 main categories of purely indictable offence:

- Those triable in the District Court without further direction (those offences described in paras (a) to (d) of section 28A of the District Courts Act).
- Those triable in the District Court on the prior direction of the High Court (para (e) section 28. District Courts Act). *These are called middle band offences.*
- The rest, which are triable solely in the High Court.

**Note:** There is a subsequent ability to transfer proceedings from the District Court to the High Court under Section 28J of the District Courts Act.

There are different rules governing jurisdiction to impose sentence for different classes of offence.

### **12.4.3 Guidelines**

It is helpful to both the legal profession and to the Courts to specify in the legislation whether a particular offence is a summary offence or an indictable offence.

If an offence is punishable by more than 1 year's imprisonment it should generally be categorised as an indictable offence.

If an offence is punishable by more than 1 year's imprisonment but less than 10 years imprisonment, the prosecution should be given an option of trying the offence summarily. This is achieved by including the offence in the list of indictable offences triable summarily in the First Schedule of the Summary Proceedings Act 1957.

In no case should an offence have retrospective effect (ie criminalise conduct

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that was lawful at the time of commission), *R v Poumako*, CA, 31 May 2000.

## PART 5

### IS THE OFFENCE AN INFRINGEMENT OFFENCE?

#### 12.5.1 Outline of issue

This Part discusses infringement offences and sets out guidelines governing their use.

#### 12.5.2 Comment

Infringement offences are offences which may be proceeded against, under section 21 of the Summary Proceedings Act 1957, by serving an infringement notice on a defendant, and, if the infringement fee remains unpaid, by subsequently serving a reminder notice. If the fee remains unpaid, a copy of the reminder notice may be filed in a District Court, and, unless the defendant requests a hearing, an order is deemed to be made that the defendant pay a fine equal to the infringement fee for the offence and any prescribed costs.

There is now an ability for an informant and a defendant to agree to time payments.

Infringement offences involve a substantial element of compromise. No conviction is entered if proceedings for the offence are taken by way of infringement notice. In return, there is no requirement for any court hearing to take place unless the defendant specifically requests it, and, unless a hearing is requested, an order requiring payment for a fine is automatically generated as a consequence of the informant filing of a copy of a reminder notice.

There are a number of statutory hybrids. Two variations are—

- (i) the statutory provisions in the Land Transport Act 1998 that enable the use of “short form” infringement notices (section 138):
- (ii) an infringement notice designed for use for foreign visitors who are expected to be in the country for a short period of time (described as the “accelerated infringement notice procedure”), described in sections 159 and 160 of the Biosecurity Act 1993.

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### 12.5.3 Guidelines

An infringement notice procedure is not suited for use in connection with—

- offences requiring proof of mens rea; or
- offences that are punishable by imprisonment;<sup>171</sup> or
- offences that are not easy to establish (for example, offences relating to the breach of a general statutory duty requiring expert evidence).

An infringement notice procedure is best suited for those offences that—

- are offences of strict liability that are committed in large numbers; and
- involve misconduct that is generally regarded as being of comparatively minor concern by the general public; and
- involve acts or omissions that involve straightforward issues of fact.

An infringement notice procedure is generally only practicable if there are a sufficient number of enforcement officers available dedicated to the task of issuing infringement and reminder notices (a dedicated enforcement team).

Before creating new infringement notice procedures, it is highly desirable to consult with the Department for Courts, as changes may be required to be made to the standard form of reminder notice prescribed in the Summary Proceedings Regulations 1958.

The invention of new hybrid forms of infringement notice procedures is to be discouraged, as new procedures are difficult to perfect in practice. If a non-standard form of infringement notice is required, it is preferable to use one of the 2 hybrids described under **Comment, 12.5.2**, as a model (the Land

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<sup>171</sup> Because of the vastly greater penalties that may be imposed if the defendant wishes to defend the charge, there is an inappropriate incentive for defendants not to defend the proceedings if defending the offence would expose the defendant to imprisonment or community based sentences, instead of an infringement fee.

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Transport Act 1998 model or the Biosecurity Act 1993 model.) Both models took considerable time and expertise to develop, the latter through a process of trial and error.

Reminder notices should in all cases provide a full summary of defences available in respect of the offence, and legislation that empowers the use of reminder notices that are not prescribed under the Summary Proceedings Act 1957 should contain a full statement of the details required to be included in those notices.

The level of infringement fee should generally be less than \$500 (see the discussion in Part 2).

**NOTE: Sections 12.6.2 and 12.6.3 of the 2001 edition of the Legislation Advisory Committee Guidelines refer to the Criminal Justice Act 1985. This Act has now been replaced by the Sentencing Act 2002.**

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## PART 6

### HAS AN APPROPRIATE RANGE AND LEVEL OF PENALTIES BEEN DETERMINED?

#### 12.6.1 Outline

This Part discusses some of the underlying principles of New Zealand's sentencing regime and contains guidelines on appropriate penalties.

#### 12.6.2 Comment

The general approach of Parliament since the late 19th century has been to fix a maximum penalty for an offence but no minimum penalty. The statutory maximum is designed for the very worst type of case falling within the definition of the offence. The determination of the actual sentence to be imposed, which can range from the statutory maximum on the one hand to discharge without conviction on the other hand, is a matter for the sentencing court. The sentencing court, in a very broad sense, sets an appropriate sentence by assessing the offender's culpability.

In conducting a sentencing exercise, the Court is guided by sentencing principles set out in:

- Part 1 of the Criminal Justice Act 1985:
- submissions from the prosecution and the defence at the hearing where sentence is imposed:
- information from probation and reparation reports, and victim impact statements:
- previous judgments of other courts (particularly the High Court and the Court of Appeal), about the principles to be adopted in sentencing generally or about the appropriate range of sentences for the particular offence in question (sometimes "benchmark sentences" are set for particular offences).

There are a number of exceptions to the regime outlined above, including:

- the penalty for murder, which is a **mandatory** sentence of life imprisonment:

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- a number of public welfare regulatory offences which contain provision for mandatory or minimum penalties for certain offences (eg, some offences in the Land Transport Act 1988):
  - offences for which an infringement notice regime is available (infringement offences). These typically involve a fixed penalty (infringement fee).

As a general rule, imprisonment should be used as a penalty for only the more serious offences. In determining whether imprisonment should be a penalty, and if so, the maximum term of imprisonment, the scheme of statutory presumptions regarding the use of imprisonment specified in sections 5 to 7 of the Criminal Justice Act 1985 should be considered.

Under the Criminal Justice Act 1985, community based sentences are available as an alternative to imprisonment (not as an alternative to a fine). Thus, community based sentences should not be made available as a sentencing option if the offence does not itself warrant imprisonment as a maximum penalty, because this is inconsistent with the sentencing regime provided in the Criminal Justice Act 1985, and will create anomalies.

Finally, so far as imprisonment is concerned, the need for an arrest or search warrant power is not by itself sufficient justification for a penalty of imprisonment. If such powers are justified they can be conferred distinctly for the offence. Imprisonment as a penalty must also be matched to the seriousness of the offence, and in particular to its fault element.

### *Fine*

The most commonly imposed sanction in New Zealand is the fine. In many instances, it is the only penalty available to the Courts for a particular contravention of the criminal law.

Provision is made under the Summary Proceedings Act 1957 for fines to be paid immediately, over a time period longer than the standard 28 day period, or by instalment. No fine may be imposed unless the Court is satisfied that the defendant has the financial ability to pay the fine.

A maximum fine should be set at a realistic level in relation to the gravity of the conduct which it is intended to punish. Any factors favouring very high maximum fines have to be balanced against the risk that defendants will simply not be able to pay such penalties.

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If a fine is an appropriate penalty, an issue to be considered is the imposition of daily penalties for continuing offences, such as offences for various types of pollution. Continuing offences with daily penalties introduce the possibility of large, indeterminate fines. Generally, such a penalty will not be desirable, as certainty is a cornerstone of the criminal law. A more appropriate remedy may be an order requiring discontinuance, or some other relief designed to end the unlawful activity.

### 12.6.3 Guidelines

In considering the appropriate penalty for an offence, consideration should be given to the following:

If the offence does not require proof of mens rea by the prosecution, but is either a strict liability offence (where proof of total absence of fault is a defence) or an offence of absolute liability, imprisonment is not generally an appropriate penalty. The level of fault involved in such offences will, in general, warrant only a fine, even if the consequences of the offence are severe.

Mandatory or minimum penalties should generally be avoided unless the offence is properly categorised as an infringement offence, or there are compelling reasons of social policy for providing mandatory or minimum penalties. Mandatory and minimum penalties may restrict the ability of the sentencing court to impose a just sentence (one that has proper regard to the offender's culpability and, in the case of a fine, ability to pay the fine), and also conflicts with the principle that the sentencing court rather than the legislature is the body best equipped to assess the appropriate sentence to be imposed in individual cases.

Increases to a maximum term of imprisonment for any particular offence should generally be contemplated only as a consequence of—

- (a) an international obligation which requires an alteration to domestic law:
- (b) pressing and persistent levels of public concern about the inadequacy of penalty levels for that offence:
- (c) the expression of judicial concern about the adequacy of particular penalties in case law discussing that offence.

It is easy to assert that increasing penalty levels for any given offence will

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succeed in deterring at least some people from committing the offence. Frequently, however, such assertions are not supported by research or detailed consideration of either the nature of the offence or the actual or likely effect of increasing penalties, that would enable a proper assessment to be made of the justification for an increase.

It is inappropriate to increase any maximum penalty with retrospective effect, as this is inconsistent with fundamental principles enshrined in the Criminal Justice Act 1985 and the New Zealand Bill of Rights Act 1990 - *R v Poumako* [2000] 2 NZLR 695.

Some regard must be had to the level of maximum penalties provided across the statute book for similar offences or offences of similar severity. There are limits, however, to the utility of a search for consistency. As a result of the ad hoc development of the criminal law in different contexts, there are disparate maximum penalties for behaviour of similar seriousness on the statute book.

In setting the maximum fine for any offence, consider whether there is any potential for an offender to make a windfall profit from his or her unlawful behaviour. In other words, is the maximum fine sufficient to deter unlawful behaviour? This is a particularly important consideration if the offence will commonly be committed by companies or other corporate bodies.

Standard fees payable in respect of an infringement offence should be set at a low level (generally not exceeding \$500). The reason for this is that a standard mandatory penalty provides no ability for the means or the overall culpability of an offender in respect of the offence to be taken into account.

Careful consideration should be given to the appropriateness of including offences in delegated legislation such as regulations or ministerial rules. There is a substantial body of opinion that all offences should be included in primary legislation. There are, however, many examples of offences created by regulations, and at least in part by ministerial rules. If it is possible to specify the details of an offence with adequate precision at the time when primary legislation is introduced, the offence should be included in primary legislation. If delegated legislation is to create criminal offences, the empowering legislation should specify the maximum permissible penalties and other relevant details. Imprisonment is not an appropriate sanction for offences created by delegated legislation.

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## PART 7

### WHAT IS THE APPROPRIATE LIMITATION PERIOD?

#### 12.7.1 Outline

This Part discusses the limitation period applicable for different classes of offence and specifies criteria to be applied in determining whether there should be a departure from the ordinary rules.

#### 12.7.2 Comment

The standard period of limitation for offences that may only be dealt with summarily is, in the absence of specific provision to the contrary, 6 months from the date of the offence (section 14 of the Summary Proceedings Act 1957). This long standing rule first appeared in section 5 of the Justices of the Peace Act 1866, and in all subsequent New Zealand legislation on the topic. It reflects the understanding that matters punishable on summary conviction are less serious and less significant than matters that can be tried on indictment. Because of this it is, in general, unreasonable and inappropriate to allow the investigation of these offences to extend beyond a period of 6 months from the date of the offence.

In the case of any offence punishable by less than 3 years imprisonment or a fine of less than \$2,000 (whether summary or indictable) and for which no shorter period of limitation is applicable, no proceedings or any further proceedings may be taken more than 10 years from the date of commission of the offence, without the consent of the Attorney-General (section 10B of the Crimes Act 1961).

There is no period of limitation for indictable offences (whether purely indictable or included in the list of offences set out in Schedule 1 of the Summary Proceedings Act 1957 of indictable offences that may be tried summarily).

A large number of Acts authorise the bringing of proceedings for particular summary offences after a much longer period than 6 months (for example, by allowing the bringing of prosecutions within 1, 2, or 3 years after the date of the alleged offence). There has been a trend in recent years to use statutory formulae commencing the relevant limitation period with events such as the date on which the relevant facts become known or should have become

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known to the informant, or were drawn to the attention of the authorities (for example, see section 80(4) of the Building Act 1991, section 109(2) of the Hazardous Substances and New Organisms Act 1996, and section 338(4) of the Resource Management Act 1991).

In general, the only summary offences where there is justification for departing from the “6 month” rule are offences that—

- cause or involve a risk of serious harm to health or safety; or
- involve fraud or other dishonest behaviour that may be difficult to detect.

While formulae employing a “discoverability” test have an advantage in responding to the long latency period that some offences have before the facts constituting the offence become known, the disadvantage is that there is considerable scope for legal argument about when the facts of an offence either become known or ought to have become known. Formulae incorporating concepts of “discoverability” suffer from uncertainty in practice, from the perspective of both prosecutors and defendants.

To promote certainty it is sensible and efficient to extend the limitation period to a specified period from the act or omission constituting the offence, rather than expanding the limitation period by reference to the discoverability test.

### **12.7.3 Guidelines**

In general, public welfare regulatory offences and other strict liability offences should be created as summary offences and not as indictable offences. It is inappropriate to have no period of limitation for this type of offence.

When creating summary offences—

- consider whether the standard period of 6 months running from the date of the alleged offence is sufficient to allow a reasonable opportunity for detection and decision-making as to whether to bring a prosecution. (That period will generally be adequate for most summary offences.):

- if a longer period can be justified as an exception to the general rule it is preferable to provide for a fixed limitation period of 1, 2, 3, or 6 years dating from the date of the alleged offence rather than from the date on which the relevant act or omission was discovered or ought to have been discovered. Dating the period of limitation from the date of the offence avoids the uncertainty involved in a formula based on discoverability:
- if even a limitation period of 6 years from the date of the offence is insufficient to deal with latent offences, consider using a formula consistent with section 10B of the Crimes Act (that is, create a limitation period of 6 years from the date of the offence, but require the Attorney-General to consent to the bringing of a prosecution more than 3 years after the date of the alleged offence):
- ensure that a limitation period is not able to be extended at the discretion of an enforcement officer or informant.

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## CHAPTER 13

### APPEAL AND REVIEW

#### INTRODUCTION

##### **Background**

Where legislation authorises decisions that affect a person's rights, interests, or legitimate expectations, it is generally desirable for persons to be able to challenge such decisions, either by way of appeal or by seeking judicial review. A right of appeal must be created by statute; judicial review exists independently of statute. When preparing legislation, policy-makers should consider whether to provide a right of appeal and should be aware of the possibility of judicial review.

Contingent on how the statute is framed, appellate bodies generally operate in the place of the original decision-maker, and make their own findings of fact or law or both. By contrast, reviewing courts supervise the process by which a decision has been made and determine whether it has been made according to law. They do not decide the matter in the place of the original decision-maker but, if review is successful, they will usually send the matter back to the original decision-maker to be decided again.

Whether a right of appeal should be provided turns on the nature of the decision and the decision-maker at first instance, and the need to ensure subsequent oversight. When a right of appeal is provided, policy-makers should consider the composition of the appellate body and the procedure it will follow in hearing appeals. In certain cases, it may also be advisable to impose constraints on a right of appeal, or provide for a second tier of appeal.

In the absence of an effective ouster clause, judicial review may always be

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used to challenge administrative decisions.<sup>172</sup> The structure of any given piece of legislation may affect the scope and availability of judicial review. Therefore, policy-makers should consider the effect that legislation will have upon judicial review, and the extent to which other supervisory mechanisms are available. In general, legislation should not seek to oust, or unduly restrict, access to judicial review.

### **Issues**

**The** following issues are discussed in this chapter:

- Part 1: Should the legislation provide a right of appeal?
- Part 2: Have the proper criteria for choosing the appellate body been applied?
- Part 3: Have the proper criteria for choosing the type of appeal been applied?
- Part 4: Does the legislation specify the appropriate appellate procedure?
- Part 5: Does the legislation give sufficient guidance for the purposes of judicial review on the grounds of error of law?
- Part 6: Does the legislation give sufficient guidance for the purposes of judicial review on the grounds of breach of natural justice?
- Part 7: Does the legislation unduly restrict judicial review?

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<sup>172</sup> See *Smith v East Elloe Rural District Council* [1956] AC 736.

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## PART 1

### SHOULD THE LEGISLATION PROVIDE A RIGHT OF APPEAL?

#### 13.1.1 Guidelines

It is generally desirable for legislation to provide a right of appeal against the decisions of officials, tribunals and other bodies that affect important rights, interests, or legitimate expectations of citizens. The reasons for providing an appeal are to correct error and to supervise and improve decision-making. However, the value of having an appeal right must be balanced against the following factors:

- cost;
- delay;
- significance of the subject matter;
- the competence and expertise of the decision-maker at first instance; and
- the need for finality.

It will usually be appropriate to respond to concerns about cost and delay by limiting the scope of any right of appeal, rather than denying it altogether.

Where legislation deals with non-justiciable matters, which are generally not subject to judicial review, a right of appeal to a specialist appellate body may be an appropriate means of overseeing the primary decision-maker. A specialist appellate body may also be desirable when the subject matter is particularly technical or where multiple parties have interests that need to be heard and resolved.

#### 13.1.2 Explanation

Natural justice does not require that there should be a right of appeal from every decision<sup>173</sup> and there is no such thing as a common law right of appeal.

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<sup>173</sup> *Ward v Bradford Corporation* (1971) 70 LGR 27.

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However, in most circumstances it will be desirable for legislation to provide a right of appeal against an administrative decision.

Appeals serve a private and a public purpose. The private purpose is to scrutinise and correct specific decisions of first instance decision-makers.<sup>174</sup> The emphasis is on the personal redress of a particular party allegedly wronged by the decision in question. The public purpose of appeals is to maintain a high standard of public administration and public confidence in the legal system. The prospect of scrutiny by a superior body encourages primary decision-makers to produce rulings and judgments of the highest possible quality.

When a public decision impacts on a citizen, legislation typically provides at least one tier of appeal. While judicial review will also usually be available, it is not always a satisfactory remedy. A statutory appeal may be more desirable as it is generally cheaper and speedier. In addition, an appellate body can consider the merits of the decision whereas in judicial review proceedings the court's focus is on the legality of the procedure adopted by the decision-maker.

However, although of great importance, a sound appellate structure cannot ever fully compensate for poor decision-making at first instance. Rights of appeal should be seen as safety devices to deal with occasional errors rather than the main device for preventing errors.<sup>175</sup>

It is also important to note that the general availability of appeals is at odds with the principle of finality.<sup>176</sup> A sequence of appeals can cause objectionable delay and frustration to the parties and may ultimately be counterproductive. Accordingly, the value of having an appeal right must be balanced against factors such as costs, delay and significance of the subject matter. Generally, the cost and delay of the appeal process will not be justified where the matter in issue is relatively unimportant or where there is

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<sup>174</sup> Lord Woolf, *Access to Justice: Final report, the Lord Chancellor's Department, UK, 1996*, Chapter 14, paragraph 2.

<sup>175</sup> Galligan D J, *Due Process and Fair Procedures*, (1996), 400.

<sup>176</sup> Beck A, *Principles of Civil Procedure*, 2001 (2nd ed), 262.

an overwhelming need for finality. Furthermore, the right of appeal may not be justified where the primary decision-maker is a body of high quality and expertise. Even then, however, it would usually be more appropriate to limit a right of appeal, rather than deny it altogether.<sup>177</sup>

Policymakers should also bear in mind that some matters may be non-justiciable and, as a consequence, not subject to judicial review.<sup>178</sup> A matter tends towards non-justiciability as its policy or political content increases.<sup>179</sup> For example, it is generally recognised that considerations of national security are not subject to judicial review. In such cases, it may be desirable to create a statutory right of appeal to ensure that decisions which the courts will not review continue to be subject to oversight.

## PART 2

### HAVE THE PROPER CRITERIA FOR CHOOSING THE APPELLATE BODY BEEN APPLIED?

#### 13.2.1 Guidelines

Generally, legislation should provide for appeals to be heard by either a specialist tribunal (of which at least one member should have legal training), or a court of general jurisdiction. The following factors are relevant to determining which type of body is best suited to hear and decide the appeal:

- the nature of the decision-maker at first instance, and especially the extent to which it performs a specialist function;
- the significance of the decision in question;
- the necessary balance between expeditious resolution of appeals, and procedural rigour; and

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<sup>177</sup> See 13.2.2 and 13.3.2.

<sup>178</sup> Note that the scope of what has been considered non-justiciable has narrowed in recent years: see for example *Burt v Attorney General* [1992] 3 NZLR 672 where the prerogative of mercy was declared to be justiciable.

<sup>179</sup> Aronson M & Dyer B, *Judicial Review of Administrative Action* (1996), 158.

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- the extent to which the issues come within the ordinary scope of the court's work.

In determining the appropriate appellate structure, policy-makers should consider the need for a second right of appeal. To an extent, the character of the original decision-maker and first appellate body will shape the need for a second tier of appeal. Conversely, if legislation provides for a second right of appeal, this will influence the choice of the first appellate body.

The desirability of a second right of appeal will turn on:

- the need to ensure judicial oversight of administrative action, which is contingent on the nature of the first appellate body and the availability of other supervisory mechanisms; and
- the implications of the principle of finality.

If a second tier is considered appropriate, appeals against decisions of specialist appellate tribunals should generally be heard by a court of general jurisdiction. This second right of appeal should usually be limited to important questions of law.

A first right of appeal should generally be as of right. A second right of appeal may properly be limited by the requirement of leave. Time limits on rights of appeal are unobjectionable, although, in general, exceptions to time limits should be provided for.

### 13.2.2 Explanation

Appeals may be heard either by a specialist tribunal or a court of general jurisdiction. Each has its advantages and disadvantages. A specialist appellate tribunal is well placed to hear and determine appeals in a narrow and focused field in an expeditious and cost-effective manner. Often, the members of such a body have technical expertise in the area in question, which is sharpened by constant involvement in the particular field.<sup>180</sup> However, it is possible that the quality of decisions made by specialised appellate bodies may be

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<sup>180</sup> Aronson M & Dyer B, *Judicial Review of Administrative Action* (1996), 887.

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compromised for the sake of prompt resolution.<sup>181</sup> To minimise the incidence of legal errors, it will generally be desirable to ensure that at least one member of the specialist tribunal is legally qualified.

The courts of general jurisdiction, on the other hand, have expertise in the law and follow rigorous procedures to ensure its proper application. The courts also have the legitimacy and public confidence that comes from their permanence and transparency.

The important factors to consider when choosing an appellate body are the nature of the issues likely to be involved and the nature of the decision-maker at first instance (the first instance decision-maker). If the first instance decision-maker is likely to be concerned with fact-sensitive and complex technical determinations, a specialist appellate tribunal may be a more appropriate authority to hear and resolve the appeal. A specialist appellate tribunal has the advantage of expertise, and can efficiently dispose of an appeal. It may consist of a panel of experts whose judgements of the merits deserve confidence, and a lawyer who could guide the tribunal to fair and open process according to law. By comparison, a court of general jurisdiction may not necessarily possess experience and understanding of the subject-matter, and may also take longer to deal with technical matters.

Alternatively, when the first instance decision-maker is a specialist body, and the decision could have a significant impact upon the rights and interests of citizens, it may be desirable to allow appeals directly to a court of general jurisdiction. This is especially so when the subject-matter of the decision appealed from comes within the ordinary ambit of the courts' work.

#### *Second tier of appeal*

Where the first appellate body is a tribunal, policy-makers should consider the utility of creating a second right of appeal to a court of general jurisdiction. Whether a second tier of appeal is needed will turn on the legal competence of the first appellate body, the significance of the matter at stake, and the availability of judicial review. It will often be desirable to restrict the second right of appeal to questions of law. This ensures judicial oversight

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<sup>181</sup> Wade W & Forsyth C, *Administrative Law* (2000, 8th ed), 886.

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over the first appeal, while avoiding the danger of endlessly re-litigating the same factual issues.

*Limiting appeals*

Generally, a first appeal should be as of right: that is, it can be brought without the leave of either the first instance decision-maker or the appellate body. The importance of the principle of finality, which minimises costs and ensures certainty, means that a second right of appeal should be available only with the leave either 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 the interests of justice, and/or the public interest in having an important question of law resolved.

There is nothing objectionable in imposing time limits on rights of appeal. However, it will be desirable to have a provision which allows the appellate body to waive the time limit.<sup>182</sup> The statute should expressly state the criteria, however broad or narrow, that guides this discretion. The time limit should not be waived as a matter of course.<sup>183</sup>

*Example: Sale of Liquor Act 1989*

The Sale of Liquor Act 1989 (“SLA”) illustrates these principles. Section 137(1) of the SLA states that any party to proceedings before a District Licensing Agency who is dissatisfied with a decision of the Agency may appeal to the Licensing Authority. Such appeals are heard by way of rehearing.<sup>184</sup> The Licensing Authority may confirm, modify, or reverse the decision.<sup>185</sup>

Section 138(1) of the SLA provides a second right of appeal to the High Court. However, this appeal is restricted to the sole issue of the suitability of the party to hold a liquor licence. Finally, s 150 of the SLA provides for a third right of appeal, with leave, to the Court of Appeal on a question of law. These rights of appeal are all subject to various time limits.

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<sup>182</sup> *Infra* n 166 and accompanying text.

<sup>183</sup> Beck A, *Principles of Civil Procedure* (2001, 2nd ed), 269

<sup>184</sup> Section 137(6) of the SLA.

<sup>185</sup> Section 137(7) of the SLA.

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## PART 3

### HAVE THE PROPER CRITERIA FOR CHOOSING THE TYPE OF APPEAL BEEN APPLIED?

#### 13.3.1 Guidelines

In the interest of finality, appeal rights may be limited to specifically defined issues, usually questions of law, or questions of fact. However, care should be exercised when considering possible limits on appeal rights because:

- it is sometimes very difficult to distinguish between the questions of law and fact; and
- imposing limitations may in some circumstances effectively leave an individual with no right of recourse.

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 the one hand, and accurate fact-finding and correct interpretation of the law on the other.

#### 13.3.2 Explanation

A statute should explicitly state the scope of any appeal right. A decision may be challenged on appeal on the grounds that the factual findings at first instance are wrong, or that the decision relies on an error of law. However, statutes may, and often do, limit a right of appeal simply to questions of law.

The distinction between law and fact can sometimes be elusive.<sup>186</sup> However, it can generally be said that while questions of fact are concerned with the factual basis on which law is applied,<sup>187</sup> whether a set of facts satisfies a certain legal definition or requirement is a question of law.<sup>188</sup> Every point of

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<sup>186</sup> These issues are comprehensively discussed in T Endicott, "Questions of Law" (1998) 114 LQR 292.

<sup>187</sup> Wade W & Forsyth C, *Administrative Law* (2000, 8th ed), 921.

<sup>188</sup> *Ibid.*

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legal interpretation that arises after the primary facts have been established is a question of law; likewise, the application of the law to a set of facts is a question of law. Where both questions of fact and law are in dispute, the question is called a mixed question of law and fact.

If the purpose of the appeal is to subject administration to the rule of law, and if the appellate body is competent to determine questions of law, then the statute should provide for an appeal on a question of law.

However, where the right of appeal is limited to questions of law, the appellate body is unable to overturn the decision at first instance in the event of factual error. If the purpose of the appeal is to correct factual errors that may have been made by (possibly over worked) first instance decision-makers, the appeal right should not be constrained in this way.

Even where an appeal is not limited to questions of law, it does not follow that the appellate body will comprehensively review all relevant facts. The extent to which the appellate body may inquire into the facts on which the first instance decision rests will depend upon the procedure that the statute specifies.<sup>189</sup>

If imposing limitations would in effect leave an individual with no right of recourse, the right of appeal should not be limited. For example, the scope of the appeal from the Disputes Tribunals to the District Court is extremely narrow and limited to matters of procedural irregularity causing unfairness. The approach of the District Court to appeals from the Disputes Tribunals has been inconsistent, and subject to considerable criticism.<sup>190</sup>

#### PART 4

### DOES THE LEGISLATION SPECIFY THE APPROPRIATE APPELLATE PROCEDURE?

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<sup>189</sup> See 13.6.1 to 13.6.3.

<sup>190</sup> See, for example, Rossiter G P, "Disputes Tribunals: Appeals to District Court" [1991] NZLJ, 267; Beck A, "Appeals from Disputes Tribunals" [1997] NZLJ 279.

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### 13.4.1 Guidelines

Policy-makers must decide what procedure an appellate body is to follow in hearing appeals. There are four broad types of appellate procedure: pure appeals (*stricto sensu*), re-hearings, hearings *de novo*, and appeals by way of case stated.

A statute should make it clear which of these four models of procedure the appellate body is to follow. While the choice of procedure in any given instance turns on the type and purpose of the appeal and the nature of the appellate body, the following observations are generally applicable.

Appeals should not be heard *stricto sensu*. The cumbersome case-stated procedure should also be avoided. Instead, policy-makers should create a right of appeal limited to questions of law.

Appeals should usually be heard by way of re-hearing. In most situations, this procedure strikes an appropriate balance between the flexibility to correct apparent or glaring factual errors and the need for appeals to be expeditiously resolved. It may be appropriate for appeals to be heard *de novo* where the primary purpose of the right of appeal is to correct factual errors, and where there is good reason to avoid a presumption that the decision at first instance is based on accurate factual findings. This procedure is, however, more costly than the available alternatives.

### 13.4.2 Explanation

Appeals may be heard as pure appeals, appeals by way of re-hearing, hearings *de novo*, or appeals by way of case stated.

#### *Pure appeals*

A pure appeal, or an appeal *stricto sensu*, limits the appellate court to substituting a judgment which could have been given at the original hearing on the basis of the evidence presented. Thus, the appellate court is free to depart from the lower body's factual conclusions, but only to the extent that this is consistent with the evidence that was available to the lower body. The appellate body is not able to hear new evidence. This category of appeal is very restrictive and should not be enacted.

*Appeals by way of re-hearing*

On an appeal by way of a re-hearing the appellate body is entitled to reach its own independent findings on the evidence it admits. The appeal is to be heard on the record of evidence given below, subject to discretionary power to re-hear the whole or any part of the evidence or even to receive further evidence.<sup>191</sup> The term “re-hearing” is somewhat misleading. It does not usually mean the court will hear all the evidence again as though it were a new trial. Instead, it simply means that the appellate body is not limited to correction of errors in the judgment below, but may take into account developments since the trial.<sup>192</sup>

While on a re-hearing the appellate body is not restricted by any findings which the lower court or tribunal has made, the appellate body acknowledges the advantage enjoyed by the first instance decision maker, which may have seen and heard the witnesses.<sup>193</sup> There is a presumption that the decision appealed from is correct and ordinarily an appellate body will only differ from the factual findings of the decision-maker at first instance if:<sup>194</sup>

- the conclusion reached was not open on the evidence, that is, where there was no evidence to support it; or
- the lower body was plainly wrong in the conclusion it reached.

This procedure requires the appellate body to refrain from engaging in a general factual retrial. Most appeals in New Zealand are heard this way. For example, s 76 of the District Courts Act 1947 provides that all civil appeals from the District Court to the High Court shall be by way of rehearing.<sup>195</sup>

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<sup>191</sup> *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437, 439.

<sup>192</sup> *Pratt v Wanganui Education Board* [1977] 1 NZLR 476, 490.

<sup>193</sup> *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437, 441.

<sup>194</sup> *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190, 197.

<sup>195</sup> Other examples of appeals by way of re-hearing include: s 45 of the Architects Act 1963; s 346 of the Children, Young Persons, and Their Families Act 1989; s 67 of the Civil Aviation Act 1990; s 31A of the Guardianship Act 1968; s 100B of the Judicature Act 1908.

*Hearings de novo*

Where an appeal is heard *de novo* then the appellate body is not bound by the presumption that the decision appealed from is correct.<sup>196</sup> Essentially, the appellate body may approach the case afresh – the appellant receives an entirely new hearing.<sup>197</sup>

*Appeal by way of case stated*

This is not a re-hearing of a dispute, but rather a procedure whereby a tribunal seeks clarification, usually on points of law, from a court of general jurisdiction.<sup>198</sup> For example, s 107 of the Summary Proceedings Act 1957 allows a District Court Judge to consult the High Court on a question of law via appeal by way of case stated.

This procedure has been criticised on the grounds that it wastes time, weakens the value of the appellant's right of appeal because the tribunal controls the formulation of the question, and is essentially an unduly cumbersome appeal procedure.

*Which is the most suitable?*

An appeal by way of re-hearing is the appropriate procedure in most contexts. It is more expeditious than a hearing *de novo* because of its focus on specific alleged errors, but not as restrictive as an appeal *stricto sensu*. Indeed, an appeal should focus on specific alleged errors. In general, there is no need to provide an opportunity to re-litigate the whole matter, as in a hearing *de novo*, unless there is good reason not to presume that the first instance decision-maker correctly ascertained the facts. The added cost of a complete rehearing generally counts against this procedure. An appeal should not be by way of case stated unless there is some reason why this option is preferable to an ordinary appeal limited to questions of law.

## PART 5

## DOES THE LEGISLATION GIVE SUFFICIENT GUIDANCE FOR THE

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<sup>196</sup> *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437, 440.

<sup>197</sup> Examples of appeals that are to be heard *de novo* include: s 255 of the Customs and Excise Act 1996; s 182 of the Employment Relations Act 2000; R 61C(4A) of the High Court Rules.

<sup>198</sup> *Harris, Simon & Co Ltd v Manchester City Council* [1975] 1 All ER 412.

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## PURPOSES OF JUDICIAL REVIEW ON THE GROUNDS OF ERROR OF LAW?

### 13.5.1 Guidelines

Policy-makers should bear in mind that administrative action is subject to judicial review, which tests the lawfulness of state action. The availability and extent of judicial review turns, in a large part, on the character of the legislation in question. Therefore, policy-makers should structure legislation in order to give clear guidance as to the legal limits to which statutory powers are subject.

The purpose for which a power is given should be included with the empowering provision. It is also useful for empowering provisions to set out the terms on which the discretion may be exercised, and the considerations that must be taken into account in exercising the discretion. Where the criteria are not exhaustive, or if no criteria are specified, a court will look to the statute as a whole, particularly its purpose and subject-matter.<sup>199</sup> Ideally, those contemplating legislation should also set out which criteria are mandatory considerations, and which are permissible. It is also desirable for legislation to clarify the consequences that follow from a breach of a statutory pre-condition.

Even where an inferior body (such as a tribunal) has been given power to determine questions of law, decisions of that body will likely be reviewable by the courts on the grounds of error of law.

Broad powers and expansive statutory language will often be read by the courts as being subject to international law, constitutional rights and freedoms, and the principles of the Treaty of Waitangi. Administrative decision-makers may commit an error of law if their decisions fail to consider or are inconsistent with these implicit conditions on statutory power. Policy-makers should consider relevant international obligations, treaty principles, and individual rights in drafting statutory powers. This will minimise the extent to which the courts' determination of these issues supersedes or frustrates the legislative judgment.

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<sup>199</sup> See generally Joseph P, *Constitutional and Administrative Law in New Zealand* (2001, 2nd Ed).

### 13.5.2 Explanation

Even the most generally worded discretion or power conferred in statute may be subject to the constraints of judicial review. A broadly worded power will be read as being constrained by the purposes of the Act. A court's reading of the purpose of legislation or of a power may be different to that of policy-makers. There are a number of ways to indicate in the statute what policies are intended to inform the exercise of the power:

- state explicitly the purpose(s) of the statute<sup>200</sup> or of the particular power;<sup>201</sup>
- indicate which considerations should be taken into account when exercising the power.<sup>202</sup> The greater the number of considerations, the more they are likely to be considered exhaustive. The more the considerations potentially conflict, the more discretion is being conferred;
- indicate whether some of those considerations should be given more weight than others;
- indicate whether there is a presumption from which the decision-maker should proceed;<sup>203</sup>
- state the preconditions that must be fulfilled for the existence of the power or discretion;<sup>204</sup> and
- indicate any matters that are not to be taken into account.<sup>205</sup>

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<sup>200</sup> See s 5 of the Resource Management Act 1991.

<sup>201</sup> See s 17B of the Acts and Regulations Publications Act 1989, s 21E(1) of the Property (Relationships) Act 1976, and s 139(1AA) of the Criminal Justice Act 1985.

<sup>202</sup> See ss 14D-14E of the Overseas Investment Act 1973 and s 105 of the Immigration Act 1987.

<sup>203</sup> See s 97(3) of the Sentencing Act 2002.

<sup>204</sup> See ss 86-87 of the Sentencing Act 2002, s 32 of the Resource Management Act 1991, and 57(3) of the Bail Act 2000.

<sup>205</sup> See s 9(3) of the Sentencing Act 2002.

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In addition to what is expressly included in legislation, courts will sometimes read in factors that a decision-maker ought to take into account. When deciding how to structure a discretion, policy-makers should take account of the possible effects that various other legal instruments may have on the exercise of that power, for instance:

- relevant international treaties;
- the principles of the Treaty of Waitangi; and
- the New Zealand Bill of Rights Act 1990.

These instruments should of course be considered in formulating policy in the first place. However, policy-makers should be aware that their judgement as to the relevance of Treaty principles or the requirements of the New Zealand Bill of Rights Act 1990 may not coincide with that of the courts. It is desirable, therefore, that where legislation implicates these considerations, policy-makers make explicit their judgement as to how Treaty principles are to be respected or addressed, and as to how, if at all, individual rights are to be limited. This avoids subsequent judicial implication frustrating the legislative purpose or policy on account of a failure to make clear the legislative will.

It is of course possible that a decision-maker may breach one or many of the various preconditions or limits that a statute places on statutory powers. When decisions predicated on an error of law are subsequently reviewed, the courts are forced to determine the consequences, if any, that should follow from the error. This means that they determine, with regard to the scheme and purpose of the statutory rule, whether the rule was intended to be mandatory or directory. A mandatory rule is fundamental and its breach renders illegitimate the exercise of power; a directory rule may be breached without rendering the exercise of power voidable. It is desirable for the legislation to stipulate the consequence that is to follow from breach of the statutory condition. Fundamentally important rules, which go to jurisdiction and authority, should be mandatory; less important limits, or those which

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concern a situation where the public interest requires the exercise of the power be final, should be directory.<sup>206</sup>

## PART 6

### DOES THE LEGISLATION GIVE SUFFICIENT GUIDANCE AS TO THE APPLICABLE REQUIREMENTS, IF ANY, OF NATURAL JUSTICE?

#### 13.6.1 Guidelines

Where a statutory power may significantly affect rights or interests, it is generally desirable for the statutory scheme to specify the protections that decision-makers must accord to those affected. These protections, also termed rules of natural justice, due process or fairness, fall into two broad categories<sup>207</sup>:

- (a) The opportunity to be heard, which will take different forms depending upon the nature of the decision; and
- (b) The rule that a decision-maker be free from bias.

In respect of the first category, it is necessary to consider what, if any, procedural protections are required in respect of a particular statutory power. Common procedural protections include the giving of prior notice to those affected, disclosure of relevant material, the provision of an oral hearing, entitlement to legal representation and/or a right to call and/or cross-examine of witnesses.

In order to determine what, if any, procedural protections ought to apply to a given power, it is necessary to consider:

- the importance of the interests at stake;
- the nature and expertise of the decision-maker;

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<sup>206</sup> For an example of the latter, see *Simpson v Attorney-General* [1955] NZLR 271. For further discussion see J Evans, "Mandatory and Directory Rules" (1981) 1 *Legal Studies* 227.

<sup>207</sup> See generally de Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (5th Ed, 1995), at p 375ff; Fordham *Judicial Review Handbook* (4<sup>th</sup> Ed, 2004), paras. 60.1.6-60.1.7.

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- the value of any given procedural protection to the particular decision; and
  - any constraints upon the decision-making process, such as limited resources, confidentiality or a need for rapid decisions.

On this basis, statutory provisions should specify what, if any, procedural requirements are to apply to a given power. Where there are particular constraints upon a decision, such as those noted, it may also be desirable to expressly exclude a given procedural protection that might otherwise be found to apply by implication. General statutory provisions that do not specify particular protections but simply require the decision-maker to, for example, “act in accordance with the principles of natural justice” should be avoided.

In respect of the second category, it is not generally necessary to specify that the rule against bias applies. In some instances, however, it will be appropriate that a decision-maker may proceed even though he or she has some interest in the decision and that the rule should be expressly qualified or excluded.

### **13.6.2 Explanation**

In situations where a decision is being made which could adversely affect an individual’s rights, interests or legitimate expectations, the principles of natural justice will in most instances entitle that individual to certain procedural protections. Whether particular procedural protections are required will vary according to the nature of the individual’s rights or interests, the value of any particular procedural protection in relation to the decision and the wider context, including such factors as limited resources or requirements of confidentiality.

In some instances, the terms of a statute may indicate whether certain natural justice protections do or do not apply by necessary implication.

Where possible, however, the procedural protections that apply to a particular decision-making power should be specified. If the applicable procedural protections are not specified, it will be necessary for decision-makers or, in judicial review proceedings, the courts to infer what, if any, protections are applicable under the common law, leading to uncertainty, legal risk and

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associated litigation cost and, potentially, the application of more or fewer procedural protections than was intended.<sup>208</sup>

Factors affecting application of procedural protections

In determining whether particular procedural protections ought to apply to a given decision-making power, it is necessary to consider:<sup>209</sup>

- The character of the decision-maker and the decision. For example, broad ministerial powers to make policy or to make extraordinary exceptions will normally warrant more limited procedural protections than decisions by officials in individual cases.
- The nature and importance of the affected rights or interests. In general, the greater the effect and the more important the right or interest in question, the more extensive the procedural protections.
- Whether a particular procedural protection will be beneficial or burdensome to the decision-making process. For example, in considering whether affected individuals should have a right to an oral hearing, it is appropriate to consider whether such a hearing would in fact assist individuals in putting their point of view or whether any benefit is outweighed by the additional costs in time and resources;<sup>210</sup>
- Whether there are other interests beyond that of the individual to be represented. Where a decision involves competing interests of more than one individual, it may be necessary for each to have an opportunity to comment on representations made by the other(s).
- Whether the decision involves the expert evaluation of facts. Some issues, such as determinations of the credibility of conflicting statements, will require a more formal process.
- Whether the decision involves complex legal issues. Where it does, a more formal process is likely to be required.
- Whether the decision is final or preliminary and whether a specific right of reconsideration, appeal or review is provided. Where a decision is

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<sup>208</sup> Fordham, above n. 1, para 60.3; *Laws of New Zealand*, Administrative Law, para 64.

<sup>209</sup> See generally *Laws of New Zealand*, Administrative Law, para 59.

<sup>210</sup> P P Craig *Administrative Law* (Maxwell & Sweet, London, 2003), 425.

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preliminary or subject to a review right, it may warrant comparatively limited procedural protections.<sup>211</sup>

- Whether there are particular reasons for excluding a given procedural protection in relation to the decision-making power. For example, as was noted above, there may be reasons to limit the application of the rule against bias. Similarly, limited resources, the need for rapid decisions or requirements of confidentiality may warrant limiting or excluding particular protections.

### Application of particular procedural protections

#### *Prior notice/preparation time*

People whose rights or interests are affected by the decision should generally be given adequate notice of an impending decision or hearing and adequate opportunity to prepare and present their case<sup>212</sup>. Notice may not be required where it would defeat, or tend to defeat, the purpose of the decision/action, for example where rapid decisions are required, or where notice would be prejudicial, for example in a decision to issue a search warrant<sup>213</sup>.

#### *Should disclosure of relevant material be required?*

In general, decision-makers should be required to disclose, or offer to disclose, all material upon which they may base their decisions so as to enable those affected to comment on that material<sup>214</sup>. This principle is, however, subject to factors such as practicability or confidentiality, which may warrant withholding of some material and/or the provision of a summary or its provision after a decision is made.

More specifically, where decisions are factually complex or there is the potential for immediate irreparable harm consequent upon a decision, it may also be appropriate to provide affected persons with a preliminary indication of the likely decision so as to afford a further opportunity for comment or correction.

#### *Are written representations sufficient or is it necessary to provide an opportunity for oral representations?*

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<sup>211</sup> Craig, above, 426; *Laws of New Zealand*, Administrative Law, para 63.

<sup>212</sup> See de Smith, above, at paragraph 9-004ff; Fordham, above, paras 60.5 & 60.8.1.

<sup>213</sup> See, for example, s 29(a) of the Terrorism Suppression Act 2002.

<sup>214</sup> See Fordham, above, para. 60.7

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In some situations the opportunity to make written submissions will be sufficient. It is necessary to consider whether an oral hearing is necessary for affected people to express their points of view. For example, an oral hearing will be required where a person's credibility is in issue<sup>215</sup>.

*Should legal representation be permitted?*

Where a decision-making procedure includes an oral hearing, it is generally appropriate to permit, or give the decision-maker discretion to permit, legal representation. In deciding whether legal representation is appropriate, consideration needs to be given to factor such as:

- the seriousness of the issue and possible consequences of the decision;
- whether points of law are likely to arise;
- the ability of the party to present the case himself or herself;
- the possibility of procedural difficulties;
- the need for a prompt decision; and
- the need for fairness between the parties<sup>216</sup>.

In some instances, legal representation may be generally excluded where it would be inconsistent with the nature of the decision-making process, as in the dispute resolution procedure of the Disputes Tribunals or otherwise impracticable.

*May parties call witnesses?*

Other than in comparatively formal hearings, for example before a tribunal, it is unusual to provide a right to call witnesses. Such a right should only be considered where there is some particular characteristic of the decision in question that necessitates the calling of witnesses.

*Right to cross-examine witnesses?*

A right to cross-examination will normally arise where witnesses are called although there are some exceptions to this, for instance in the case of a commission of inquiry.

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<sup>215</sup> See Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed 2001), at para. 23.4.4; Fordham, above, para. 60.8.4.

<sup>216</sup> *Drew v Attorney General* [2002] 1 NZLR 58; see also Fordham, above, para. 60.8.3.

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*Should the decision-maker be required to give reasons?*

There is not yet a general legal principle that all decision-makers must give reasons, although such a principle may be developing. However, a statement of reasons can be required under s 23 of the Official Information Act 1982, if that Act applies.

In any event, providing reasons for decisions is generally desirable for reasons of openness, to provide a basis for consideration of the decision in the event of review or appeal and broadly to protect against wrong, arbitrary, inconsistent or biased decisions<sup>217</sup>.

However, where provision of reasons would entail unnecessary formalisation of the decision-making process or require unacceptable cost or delay, it may be appropriate to provide for the giving of reasons on request after a decision is made.

*Provision of interpreter*

There is no general entitlement to be provided with an interpreter other than in criminal proceedings. It may be appropriate to require a decision-maker to provide an interpreter where affected persons are unable to provide their own, for example when in custody.

*Should there be a right of appeal?*

See Chapter 13 of these *Guidelines*.

The rule against bias

In general, decision-makers ought not to decide matters in which they have a financial or other material interest, unless it is so small as to be negligible, or where they have a personal connection with an affected party. It should be noted that the rule does not, in general, require that the decision-maker have no prior view whatsoever.<sup>218</sup>

Depending upon context, it may be appropriate to provide for:

- decision-makers to declare any conflict of interest to the affected parties and continue with their consent; or

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<sup>217</sup> *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA); see also Fordham, above, ch. P62.

<sup>218</sup> See, generally, Fordham, above, ch. P61.

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- to permit decision-makers to have a material interest. For example, a decision-making power given to a representative body made up of members of an industry or profession may in some instances be exempt, by implication, from the bias rule under which decision-makers may not have a financial interest in their decisions.<sup>219</sup>

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<sup>219</sup> See, for example, *NZI Financial Corporation Ltd v New Zealand Kiwifruit Authority* [1986] 1 NZLR 159, 164.

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## PART 7

### DOES THE LEGISLATION UNDULY RESTRICT JUDICIAL REVIEW?

#### 13.7.1 Guidelines

Legislation should not substantively limit the availability of judicial review unless there is a compelling reason to do so. A complete limitation on the right to seek judicial review will nearly always be inappropriate. A compelling need for certainty in a non-justiciable area may justify ousting the courts' jurisdiction to review.

Careful attention should be given to the composition and character of the body that is being excluded from the ambit of judicial review. It may be appropriate to give a person or body that is at the apex of the political system, and which has the competence to interpret legislation correctly, immunity from judicial supervision.

If the decision is made to oust judicial review, notwithstanding the constitutional presumption against doing so, then the ouster clause must be drafted with extreme care if it is to be effective. The nature of the decision that is to be excluded from judicial review, and the rights or interests that it affects, may determine both the constitutional propriety and the likely efficacy of the ouster clause.

It is generally acceptable for legislation to prescribe procedural limitations on judicial review, such as time limits and provisions delaying judicial review until other remedies have been exhausted. It may also be desirable to give the courts power to waive such limitations in certain carefully prescribed circumstances.

#### 13.7.2 Explanation

Judicial review is an essential mechanism for maintaining the rule of law. The ability of citizens to apply to the courts for judicial review of the exercise of public power is immensely important. Its importance is affirmed by s 27(2) of the New Zealand Bill of Rights Act 1990. Legislation should limit this

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right only to the extent the limitation is demonstrably justifiable in a free and democratic society.<sup>220</sup>

Statutes may impose two types of limitation on judicial review. The first is the so-called ouster clause, whereby the courts' jurisdiction is entirely excluded. The second is a procedural restriction, which regulates the courts' power to review. Different considerations apply to each type of limitation.

#### *Substantive restrictions*

Ouster clauses are objectionable because they interfere with the courts' constitutional role as interpreters and expounders of the law.<sup>221</sup> In general, legal obligations are enforceable by the courts. Where judicial review is ousted, it is often argued that the public body whose decisions cannot be reviewed is not subject to the law and therefore has legally unlimited power.<sup>222</sup> The courts' extremely strict approach to interpreting ouster clauses proceeds on the assumption that Parliament cannot have intended those exercising public power to be permitted to act unlawfully.

Strictly speaking, it is incorrect to say that an ouster clause allows a decision-maker to act unlawfully. Legal duties do not necessarily connote judicial enforcement – the obligation of the Privy Council to comply with the law cannot be enforced by a court but it is undoubtedly a legal duty which binds the Privy Council. Moreover, there are other mechanisms beyond judicial review that ensure compliance with the law: for example, specific statutory structures or parliamentary officers. Quite properly, however, the courts presume that Parliament does not intend to entrust a body other than courts of superior jurisdiction with unenforceable or unreviewable legal power. The risk of public power being exercised unlawfully or arbitrarily is too great.

This has two consequences. First, the undoubted normative strength of the presumption against ouster clauses means that Parliament should only seek to oust the courts' review jurisdiction in exceptional cases. Exceptional cases

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<sup>220</sup> Per section 5 of the NZBORA.

<sup>221</sup> *Re Racal Communications Ltd* [1981] AC 374 at 382-383 (HL).

<sup>222</sup> See *R v Shoreditch Assessment Committee; Ex parte Morgan* [1910] 2 KB 859 at 880. See further Aronson and Dyer, *Judicial Review of Administrative Action* (1996).

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may arise where there is an overwhelming need for finality, in respect of a one-off situation. Excluding the courts' power to review is also less objectionable with respect to matters that are generally regarded as non-justiciable.<sup>223</sup>

A successful ouster of judicial review gives a body other than a court final decision-making power (subject to statutory appeal or objection). Parliament must be confident that such a body is competent to exercise this power and can be trusted in strictly observing its legal duties without oversight by the courts. These criteria will rarely be satisfied.

Second, as a practical matter it is very hard to completely oust the courts' jurisdiction. The courts interpret ouster clauses strictly and attempt to limit their effect as much as possible by presuming that Parliament does not intend to empower statutory authorities to conclusively determine questions of law.<sup>224</sup>

The form of an ouster clause appears to make little difference. The courts have continued to review decisions notwithstanding legislative provisions that include the words "no certiorari [no court order]", "finality", "conclusiveness" or "shall not be questioned".<sup>225</sup> The most effect that an ouster clause is likely to have will be to restrict the ambit of judicial review. For example, the ouster clause in s 109 of the Tax Administration Act 1994 was accepted as restricting the scope of review to error of law or bad faith<sup>226</sup>

A constitutionally unobjectionable means of achieving the objectives of an ouster clause – certainty, finality and speedy resolution – is to precisely define the grounds on which a court may review. For example, s 193(1) of the Employment Relations Act 2000 excludes review except on the grounds that the Employment Court lacked jurisdiction. Ordinarily this clause would be of little meaning as the courts have largely collapsed the

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<sup>223</sup> See 13.1.2.

<sup>224</sup> *Bulk Gas Users Group Ltd v Attorney General* [1983] NZLR 129 (CA).

<sup>225</sup> Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed) 765.

<sup>226</sup> *CIR v Ti Toki Cabarets (1989) Ltd* (2000) 19 NZTC 15,874.

jurisdictional/non-jurisdictional distinction.<sup>227</sup> However, s 193(2) proceeds to define in detail when the Employment Court can be said to lack jurisdiction. This maintains the courts' oversight function but significantly reduces the scope for judicial manoeuvre. The Court of Appeal has accepted that this provision restricts their involvement in the employment law field.<sup>228</sup>

### *Procedural limitations*

Procedural limitations prescribe the manner and form through which judicial review may be brought in respect of certain public decisions or actions. Such limits are unobjectionable unless they effectively preclude access to review proceedings.<sup>229</sup>

Time limitations are the most common form of procedural limitation. For example, s 146A of the Immigration Act 1987 establishes a three-month time limit in bringing review proceedings in relation to certain immigration decisions.<sup>230</sup> Time limits create a fixed time period within which to file for judicial review. Outside that period, judicial review is unavailable.

Time limits provide certainty to persons affected by an administrative decision and speed up the process without denying review of unlawful action. As with time limits on statutory appeals, it is advisable to confer a power to extend the time limit on the reviewing court (or appellate body). This mitigates the harsh inflexibility a strict time limit can cause.<sup>231</sup> This need not frustrate the object of finality if the time limit can only be extended for exceptional circumstances relevant to the failure to meet the time limit. A more expansive power to extend the time limit may frustrate this objective.

Another common form of restriction on review is to require the applicant to pursue statutory rights of appeal or objection before seeking review.<sup>232</sup> The

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<sup>227</sup> See *Bulk Gas Users Group Ltd v Attorney General* [1983] NZLR 129 (CA).

<sup>228</sup> *NZ Rail Ltd v Employment Court* [1995] 3 NZLR 179 (CA).

<sup>229</sup> *Cooper v Attorney-General* [1996] 3 NZLR 480, 484.

<sup>230</sup> See also ss 207J, 207P, 207V of the Children, Young Persons, and Their Families Act 1989.

<sup>231</sup> *Steinborn v Minister of Immigration* (O'Regan J, HC Auckland, M 1334-SW01, September 20, 2001).

<sup>232</sup> See for example s 34 of the Official Information Act 1982.

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courts readily give effect to such clauses.<sup>233</sup> Such provisions are a sensible restriction as the statutory appeal or objection process will often be faster, cheaper and better placed to offer appropriate relief than judicial review. Even in the absence of such provisions, the courts will often decline to offer relief where a person has not pursued a statutory right to recourse.<sup>234</sup>

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<sup>233</sup> *R v Cornwall CC; Ex parte Huntington* [1994] 1 All ER 694 (CA).

<sup>234</sup> *Fraser v State Services Commission* [1984] 1 NZLR 116 at 123 (CA). See further Joseph at 977 - 979.

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## CHAPTER 14

### POWERS OF ENTRY AND SEARCH

#### INTRODUCTION

##### **Background**

Substantial consideration has been given to the principles which should govern and the practice which should apply to powers of entry and search. Section 21 of the New Zealand Bill of Rights Act 1990 gives everyone the right to be protected against unreasonable search or seizure of the person, of property or of correspondence. Section 21 reflects New Zealand's international obligations (A17 International Covenant on Civil and Political Rights) as well as provisions in other international instruments such as Article 8 of the European Convention on Human Rights.

The Court of Appeal has described a s 21 inquiry as “an exercise in balancing legitimate state interests against any intrusions on individual interests. It requires weighing relevant values and public interests.” (*R v Grayson & Taylor* [1997] 1 NZLR 399 at 407.) A similar inquiry should be adopted in determining when legislation should confer a power of entry and search and the legislative safeguards applicable to any such power. The principles enunciated and recommendations made by both the Public Administrative Law Reform Committee and the Search and Search Warrants Committee in the 1980's assist in this exercise. Those principles are summarised in the guidelines below.

##### **Issues discussed**

The following issues are discussed in this chapter:

Part 1: Are powers of entry and search necessary?

Part 2: Are the powers conferred justified?

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## PART 1

### ARE POWERS OF ENTRY AND SEARCH NECESSARY?

#### 14.1.1 Outline of issues

An initial question is what constitutes a search. A related question is what is a seizure. The issues arise because, except where an entry on to property or search is by consent or is authorised under a statute or under the common law, it is unlawful and an actionable trespass (*Grayson & Taylor*).

#### 14.1.2 Comment

A search includes an examination of a person or property and a seizure is the taking of that which is discovered. If it is intended that such powers be exercised, it will generally be necessary to provide for that in legislation.

Consideration also needs to be given to whether electronic surveillance, video recording, long distance photography and noise detection constitute a search and require legislative authorisation. The court decisions leave some doubts on these issues. Both participant surveillance (*R v A* [1994] 1 NZLR 429) and video surveillance (*R v Gardiner* (1997) 2 HRNZ 12) have been held to be lawful activities since there is nothing which expressly forbids them and nothing which requires permission to be given (outside of the situations described in Part XIA Crimes Act 1961 and Part II of the Misuse of Drugs Act 1978).

#### 14.1.3 Guidelines

It may be preferable to legislate where it is intended that any powers will be exercised which may be regarded as powers of search or seizure, to avoid any doubts as to lawfulness.

Some activities are so invasive and can be so destructive of individual liberty (for example, the taking of blood samples as dealt with under the Criminal Investigations (Blood Samples) Act 1995) that a detailed procedure should be required by the statutory provisions which empower the intrusion.

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## PART 2

### ARE THE POWERS CONFERRED JUSTIFIED?

#### 14.2.1 Outline of issues

Any search and entry is “an invasion of property rights and intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity. Any search is a significant invasion of individual freedom.” (*Grayson & Taylor* p 407). However, it is also clear that there may be other values and interests, including law enforcement considerations, which justify a statutory power of entry and search. The issues here are when such powers are justified and in what terms should the legislation confer these powers.

#### 14.2.2 Comment

Essentially what is required is a balancing of the relevant interests. The values that may be relevant are an individual’s property rights, privacy interests and individual liberty on the one side, with law enforcement considerations on the other. Privacy values are those held by the wider community and not the subjective values held by the individual in question. Reasonable expectations of privacy may be affected by whether the activity is taking place in a public or private place, in the home or in the surrounding land, and the nature of the activity. The guidelines below identify how the balance should be struck and the desirable form of legislation conferring such powers.

#### 14.2.3 Guidelines

*When should powers of entry on to private property be conferred?*

- Only if it is essential to achieve a purpose of the Act concerned.

*How should powers of entry be expressed?*

- A power to enter should be conferred expressly (in the “plainest” terms – *Choudry v Attorney-General* [1999] 2 NZLR 587).
- The purpose that justifies an entry should be expressed in terms that are as precise as the subject matter permits.
- The grounds for an entry should be objective not subjective.

*When should a warrant be required?*

- Every search should be by consent or under a warrant unless there are compelling reasons to the contrary.

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- All searches of dwelling houses should be by consent or under a warrant.

*General warrants should be avoided*

- The Court of Appeal in Bill of Rights cases has affirmed the law's aversion to general warrants. Warrants should not be able to be used to authorise fishing expeditions.

*Principles relating to warrants*

When a warrant is required and there is a belief that an offence has been committed, -

- the warrant should be issued only after independent judicial consideration of the application;
- an applications for a warrant should be made in writing and on oath;
- persons applying for a warrant should disclose previous applications made in respect of the same matter;
- a warrant should be issued only if there is reasonable ground for believing that an imprisonable offence has been committed or is intended to be committed or where a power of search under a warrant is given by any Act in relation to a non-imprisonable offence;
- the person or persons who are to execute the warrant should be specified by the authority issuing the warrant;
- the issuer of a warrant should be empowered to impose reasonable conditions on the execution of the warrant;
- the warrant should authorise entry for search and seizure on only one occasion at a time reasonable in the circumstances within a determined period from its issue;
- persons executing the warrant should have it with them and produce it upon initial entry and response to any reasonable request thereafter;
- persons executing the warrant should be permitted to have such assistance as is reasonable in the circumstances;

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- persons executing the warrant should be permitted to use such force as is reasonable in the circumstances;
  - persons executing the warrant should be permitted, on reasonable grounds, to search persons present when the warrant is executed;
  - persons executing the warrant should be empowered to search for and seize anything specified in the warrant;
  - persons executing the warrant should be empowered to seize anything else seen that is evidence of an offence for which such a person could have obtained a warrant;
  - information provided to support an application for a warrant should be made available only if a Judge orders.

*Principles relating to searches*

- Where the owner or occupier of the place or thing searched is not present at the time the search is made then that person should be informed promptly of the search unless a Judge, on application, orders otherwise.
- Persons who have searched a place or thing should provide the owner or occupier with a schedule of any items seized, indicating the place from where they were taken and where they are held unless a Judge, on application, orders otherwise.

*Evidence*

- Evidence obtained in breach of the statutory rules of search and seizure should normally be inadmissible.

*Other principles relating to searches*

In all other cases, ie whether or not there is a threshold requirement of reasonable belief that an offence has been committed, the following principles apply:

- The power shall be exercised only at a time which is reasonable in all the circumstances.
- Persons authorised to exercise such a power shall produce a means of

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identification and shall also give notice of the legal source of the power being relied upon before the power is exercised and also in response to any reasonable subsequent request.

- The power shall be exercised in a manner that is reasonable in all the circumstances, having regard to the terms and purpose of the power.
- A power to use force should not be given unless its absence would frustrate the purpose of the entry.
- In any case where the owner or occupier against whom the power is used is absent at the time the power is exercised, a notice must be left at the scene informing that person that the power has been exercised, unless a Judge subsequently confirms that the requirement can be waived because such a notice would unduly prejudice subsequent enforcement activity.
- The relationship between the privilege against self-incrimination and an official's power to ask questions should be clarified in respect of each separate power, preferably by expressly affirming the privilege.
- Where, consequent upon a power of entry, individuals are required to carry out work or pay for its completion, they should be entitled to challenge the need for the work, and the cost of it, in the courts.
- Where an enactment provides for compensation for damage occasioned by entry, and the amount of that compensation is assessed by a Minister or official, then, in case of dispute, the amount should be determined by an independent tribunal or court.
- Within seven days of seizure an inventory of things seized should be supplied to the person from whom the things were seized, unless a Judge orders otherwise because of exceptional circumstances.
- As a general rule, any thing or information obtained in breach of these principles should be inadmissible in evidence.

The Search and Search Warrant Committee in addition recommended generally:

- A constable should be able to search without a warrant a person who

has been arrested and things that person has readily to hand where that is prudent.

- Consensual searches should be recognised.
- A person from whom property has been seized, or who claims to be entitled to it, should be able to apply to the court at any time for the immediate return of the property, subject to such conditions as the court may impose.

Where there needs to be a deviation from any of these principles there should be clear and principled reasons for doing so, which should be set out in supporting documentation.

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## CHAPTER 15

### PRIVACY AND THE FAIR HANDLING OF PERSONAL INFORMATION

#### INTRODUCTION

##### **Background**

The Privacy Act 1993 protects an individual's privacy interest in their personal information. The focus of this Chapter is on providing practical guidance for policy advisers, so they can ensure that new legislation affecting personal information is consistent with the principles and guidelines in the Act. Policy advisers are required to do this by paragraphs 5.35 – 5.36 and 6.44 – 6.53 of the Cabinet Manual and Chapter 7 of the Step by Step Guide.

Policy advisers need to justify any departures from the Privacy Act framework, particularly if the policy will result in the collection, use or disclosure of personal information in a way that is inconsistent with the Act, or if the policy will deny individuals the right to access or correct personal information.

##### **What is the purpose of the Privacy Act?**

The Act gives effect to the Organisation for Economic Co-operation and Development (OECD) Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data 1980. The Act establishes legally enforceable principles relating to the collection, use, and disclosure of personal information by public and private sector agencies in New Zealand. The Act enables an individual to access and correct their personal information held by these agencies.

##### **What is 'personal information' under the Privacy Act?**

The concept of 'personal information' is central to the Privacy Act. Section 2 of the Act defines 'personal information' as information about an identifiable individual (including information contained in any register of deaths held under the Births, Deaths, and Marriages Registration Act 1995). There is no requirement that the information be in any particular form in order to be 'personal information' under the Act, provided it is information that is about a natural and identifiable person.

##### **Issues Discussed**

The following issues are discussed in this Chapter:

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Part 1: Does the proposed legislation affect the privacy of personal information?

Part 2: What specific matters need to be considered under the Privacy Act? This Part includes consideration of:

- Consistency with the Information Privacy Principles;
- Personal information in a register that the public can access;
- Codes of Practice;
- The transfer of personal information outside of New Zealand; and
- The Privacy Commissioner's Role.

Part 3: How privacy is dealt with under the Official Information Act 1982.

## PART 1

### DOES THE PROPOSED LEGISLATION AFFECT THE PRIVACY OF PERSONAL INFORMATION?

#### 15.1.1 Outline

If proposed legislation deals with the handling of personal information then it must be considered for compliance with the Privacy Act. The following list suggests some triggers that might alert policy advisers to a privacy issue.

#### 15.1.2 Comment

These triggers indicate when proposed legislation may impact on the privacy of personal information. This is not to say that there will necessarily be a privacy problem, but does indicate that further work and thinking will be required. Policy advisers should note that the references to the Act, made in the list below, are discussed in more detail in Part 3 of this Chapter.

The triggers are:

- i. Does the proposed legislation deal with information about an identifiable individual that is collected or held by a public or private sector 'agency' (as defined under section 2 of the Act)? If so, the Act generally will be relevant;
- ii. Does the proposed legislation require the collection of such personal information? If so, refer to Information Privacy Principles (IPPs) 1 to 4 of the Act;

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- iii. Does the proposed legislation contain a secrecy provision limiting access to personal information by the individual concerned? If so, refer to IPP 6 of the Act;
  - iv. Does the proposed legislation allow an agency to use personal information for a variety of different purposes? If so, refer to IPPs 8 and 10 of the Act;
  - v. Does the proposed legislation require an agency to retain personal information? If so, refer to IPP 9 of the Act;
  - vi. Does the proposed legislation authorise an agency to disclose personal information? If so, refer to IPP 11 of the Act;
  - vii. Does the proposed legislation establish or regulate a system for uniquely identifying individuals – perhaps using a number? If so, refer to IPP 12 of the Act;
  - viii. Does the proposed legislation affect personal information in an area that is covered by a Privacy Commissioner’s code of practice? If so, refer to current codes in force;
  - ix. Does the proposed legislation create a register or database of personal information that is accessible to the public? If so, refer to Part 7 of the Act on public registers;
  - x. Does the proposed legislation allow one agency to match personal information with another agency? If so, refer to Part 10 of the Act;
  - xi. Does the proposed legislation allow one agency to share personal information with another agency? If so, refer to IPP 11 of the Act;
  - xii. Does the proposed legislation deal with the sharing of law enforcement information? If so, refer to Part 11 of the Act; and
  - xiii. Does the proposed legislation allow for the movement of personal information across national borders? If so, refer to section 10 of the Act and the general material on transborder information flows later in this chapter.

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## PART 2

### WHAT SPECIFIC MATTERS NEED TO BE CONSIDERED UNDER THE PRIVACY ACT?

#### 15.2.1 Outline

Below is an introduction to the specific areas of the Act that policy advisers may need to consider when developing legislation. The following areas of the Act are discussed in this Part:

A. The Information Privacy Principles;

- Collection;
- Storage and security;
- Access;
- Correction;
- Accuracy and retention;
- Use;
- Disclosure; and
- Unique identifiers;

B. Public registers;

C. Information matching;

D. Codes of practice;

E. Transborder information flows; and

F. The roles of the Privacy Commissioner.

#### 15.2.2 Comment

***A) Is the proposed legislation consistent with the Information Privacy Principles?***

The twelve IPPs are the cornerstone of the Privacy Act (see section 6 of the Act). They address all aspects of information handling: from collection through storage, retention, use and disclosure, to accuracy and access by the individual concerned.

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In addition to the following material, policy advisers should refer to the full text of the IPPs set out in the Act. All the IPPs are subject to statutory exceptions.

*Collection*

**IPP 1** provides that an agency must not collect personal information unless the information is collected for a lawful purpose connected with a function or activity of the agency, and the collection of the information is necessary for that purpose.

**IPP 2** provides that, subject to the exceptions in IPP 2, when an agency collects personal information it must be collected directly from the individual concerned.

**IPP 3** provides that, subject to several exceptions in IPP 3, when collecting personal information directly from the individual concerned, the agency must take reasonable steps to ensure that the individual is notified of certain matters, including the purpose of the collection, the intended recipients of the information, and the rights of access and correction.

**IPP 4** provides that an agency must not collect personal information by unlawful, unfair, or unreasonably intrusive means.

Together these four collection principles place limits on the information that may lawfully be collected, and ensure that the means of collection are fair. They promote transparency and accountability by requiring agencies to tell the subject what they are doing by specifying relevant matters such as the purpose of collection, and intended recipients at the point of collection.

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Issues with these collection principles commonly arise when personal information is being gathered for statutory purposes, for example, through the use of forms (electronic or otherwise) developed by regulation. It is crucial that agencies focus on what personal information they need to carry out their functions and limit their collection to that information. Collection methods need to comply with principle 3 (when collecting directly from the individual concerned) and principle 4, so that the collection process is transparent and is not unfair or unreasonably intrusive.

Legislation allowing the covert surveillance or the collection of personal information without the individual's knowledge can also encounter issues with the Act. A key consideration with this kind of legislation is that it needs to be a proportionate response to the risk being addressed and that the downstream uses and disclosures of information gathered through surveillance need to be clearly prescribed.

#### *Storage and security*

**IPP 5** provides that an agency that holds personal information must employ reasonable security safeguards to protect the information against loss and unauthorised access, use, modification, or disclosure.

IPP 5 relates to an agency's internal, as well as external, security safeguards for stored personal information. This principle will be important when, for example, proposed legislation:

- introduces new technologies to store personal information;
- includes system specification and design;
- enables personal information to be held on a register or database accessible by the public (see discussion below on public registers).

#### *Access*

**IPP 6** provides that, where an agency holds personal information that is readily retrievable, the individual is entitled to access that information. Good reasons for agencies to refuse such requests are outlined in Part 4 of

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the Act.

A clear justification must be made if proposed legislation is to restrict or remove individuals' right to access their personal information. The right of access is a fundamental privacy protection and must not be limited in the absence of compelling policy justifications. Non-disclosure provisions, which are also known as secrecy provisions, need to be clearly expressed and tightly defined so that the restriction on individual's right of access to their personal information is as small as possible.

#### *Correction*

**IPP 7** entitles the individual concerned to request the correction of personal information held by an agency.

When new legislation includes system specification and design, the specific capacity to add correction statements should be part of that design. There may however be appropriate limits placed on the ability of an individual to correct information that exists as part of the public record. Separate statutory regimes often exist for that type of correction.

#### *Accuracy and retention*

**IPP 8** provides that an agency that holds personal information must not use that information without taking reasonable steps to ensure it is accurate, up to date, complete, relevant, and not misleading.

If legislation is proposing that personal information be held, then these two IPPs require consideration. IPP 8 requires agencies to take care with data quality and verification.

**IPP 9** provides that an agency that holds personal information must not keep that information for longer than is required for the purposes for

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which the information may lawfully be used.

IPP 9 may conflict with proposals to retain personal information for a lengthy or indefinite period. All retention periods must be linked to an identifiable purpose.

*Use*

**IPP 10** provides that personal information obtained in connection with one purpose must not be used for any other purpose unless the agency believes, on reasonable grounds, that one of the listed exceptions in IPP 10 applies.

If the proposed legislation will allow an agency to use personal information for a purpose which differs from the purposes for which the information was originally obtained, this may conflict with IPP 10. Difficulties can often be avoided through clearly identifying, at an early stage of the policy and legislative development, the purpose for which the information is being obtained.

The difference between use in IPP 10 and disclosure in IPP 11 is important. Use of information in IPP 10 refers to how an agency itself makes use of the personal information. Conversely disclosure, although it may be closely aligned to use, refers to the release of the personal information to another agency, body, or person.

*Disclosure*

**IPP 11** provides that an agency holding personal information must not disclose that information to a person, body, or agency, unless it believes on reasonable grounds that one of the listed exceptions in IPP 11 applies.

If the legislation will authorise or require an agency to disclose personal information to another person, body, or agency, then policy advisers must consider the requirements of IPP 11.

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‘Disclosure’ as it is used in the Act includes the ‘sharing’ of personal information. It is becoming increasingly common for legislation to include a power for public sector agencies to disclose personal information to other agencies. Policy advisers should consider whether this disclosure is permitted by IPP 11, or whether a specific information sharing regime needs to be established.

If the proposed legislation wants to promote the sharing of personal information, it must be precise about who makes the decisions on the release of the information, and should limit the sharing to specific types of personal information, being disclosed for a specific purpose, to a specific agency.

Special care is required where the legislation proposes the mandatory collection of personal information. With such mandatory collection, careful limits should be placed on the use of the information and disclosure of that information to other agencies.

Lastly, when proposed legislation includes the sharing of personal information, consideration should also be given to the use of the other disclosure mechanisms in the Act. The main example relates to law enforcement information, which is discussed in Part 11 and Schedule 5 of the Act, and which allows certain law enforcement agencies to share certain information despite the restrictions in the IPPs. (See also Information Matching under D) below)

#### *Unique identifiers*

**IPP 12** imposes four requirements relating to unique identifiers:

- An agency must not assign a unique identifier unless it is necessary to enable the agency to carry out its functions efficiently;
- An agency must not knowingly assign an individual a unique identifier that has been assigned to that individual by another agency;
- An agency that assigns unique identifiers must ensure that such identifiers are only assigned to individuals whose identities have been clearly established; and
- An agency must not require an individual to disclose a unique identifier, unless this is one of the purposes for which the unique

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identifier was assigned.

If the legislation proposes assigning an identifier to an individual – usually in the form of a customer or agency number – and that identifier will be unique to that individual, then consideration must be given to IPP 12. IPP 12 provides a valuable privacy safeguard against any unique identifier potentially amounting to a de facto universal identifier.

### 15.2.3 Guidelines

Policy advisers developing legislation should:

- strive to develop legislation that is compliant with the IPPs;
- consider, if an aspect of the proposed legislation appears to be inconsistent with an IPP, whether one of the exceptions contained in the IPPs themselves or one of the exemptions included elsewhere in the Act to the IPPS might apply;
- consider, if no exception or exemption in the Act applies to the inconsistent provision, –
  - using an alternative measure in the legislation which will better protect privacy interests through complying with the IPPs; or
  - making the inconsistency with the IPP as narrow as possible, and preparing a full explanation for the relevant Cabinet Committees why an inconsistency with an IPP might be necessary in the proposed legislation in order to achieve the policy goals.

### 15.2.4 Comment

***B) Does the proposed legislation put personal information in a register that the public can access?***

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Registers (or databases) holding personal information are often created for official administrative purposes and use. The information held on such registers is sometimes open to all or a section of the public to search. This may involve personal information about a large number of people, which can be searched electronically. The Privacy Act therefore places particular safeguards around the personal information held on these ‘public registers’.

### 15.2.5 Guidelines

Policy advisers should note that a register with personal information, which gives the public a right to search, should be created as a ‘public register’ under Part 7 of the Act. This will mean that the protections in the Act’s four Public Register Privacy Principles (PRPP) will apply (see section 59). These principles address search references, uses for the information (including its electronic transmission), and charging for register access. In addition, public registers are subject to Part 6 of the Domestic Violence Act 1995, which covers the non-publication of certain personal information on public registers.

Proposed legislation containing a public register should address the following matters:

- **Purposes:** Include in the legislation statements of purpose – for creating the register and for making it open to search by the public – to guide the operation of the register and assist in reconciling privacy with desired policy objectives;
- **Include necessary personal information only:** Take care to ensure that only necessary information is both placed on the register and accessible to the public (there may be no need, for example, to provide unlimited public access to any or all personal information held);
- **Search references:** Ensure that personal information will be made available from the public register only by appropriate search references – which should be included in the legislation (see PRPP 1);
- **Control bulk access:** Consider how accessible the register should be to requests from agencies for many or all of the entries on the register – this is a major privacy concern as the personal information may then be used for secondary purposes, such as direct marketing (Section 52(1)(f) of the Rating

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Valuations Act 1998 provides a useful example of a way to restrict the bulk provision of information from a register);

- **Other safeguards:** If the public can search a register in an unrestricted manner, then consider incorporating other safeguards in the legislation, such as allowing certain people to have some personal details suppressed (residential addresses, for example), and placing controls on the subsequent use of personal information that an agency has obtained from a public register.

The Office of the Privacy Commissioner has prepared a document entitled *Drafting Suggestions for Departments Preparing Public Register Provisions*, which is available at [www.privacy.org.nz](http://www.privacy.org.nz).

### 15.2.6 Comment

#### *C) Does the legislation propose information matching (data matching)?*

Information matching involves the comparison of one set of computerised records held by one agency with those held by another, to find records in both sets of data that belong to the same person. Parliament decided that government information matching should be monitored to ensure continued public trust in government and to prevent abuses. The Privacy Act, to address these risks, regulates the practice of information matching in the public sector. It does this through controls directed at:

- Authorisation – requiring the Privacy Commissioner to weigh proposed programmes against public interest criteria (see section 13(1)(f) of the Act);
- Operation – imposing statutory rules ensuring that programmes are operated fairly and accurately (see sections 99 to 103 and Schedule 4 of the Act);
- Monitoring – subjecting programmes to periodic reviews and possible cancellation. Agencies must report on their matching operations to the Commissioner, who in turn reports on the results to Parliament. The Commissioner periodically assesses whether an information matching provision should be allowed to continue (see sections 104 to 106 of the Act)

Agencies who undertake information matching that is not authorised under the Act may run the risk of being found non-compliant with the Act, as information

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matching often breaches IPPs 2, 10 and 11. Authorisation places a matching programme under the controls of Part 10 and Schedule 4 of the Act.

### 15.2.7 Guidelines

Government data matching programmes must be established in legislation. The provision establishing the information matching programme must be specified in Schedule 3 of the Act (as an “information matching provision”), and the agencies involved in the matching must be listed within section 97 of the Act (as a “specified agency”).

Policy advisers proposing legislation that involves information matching should address the following:

- The legislation should state explicitly that personal information will be disclosed for a specific purpose e.g. “to enable the (specified department) to disclose (specified information) to verify the entitlement to (a particular benefit or service);
- The type of personal information to be disclosed should be clearly defined, for example, “an applicant’s full name, date of birth, residential address, and tax file number”. The meaning of agency or industry specific key terms should be made clear;
- Where a generic term such as “beneficiary information” is used, there should be a further description of what that information includes. Note that the least amount of personal information should be disclosed in order to fulfil the purpose of the matching programme.

For further details on information matching, refer to the Office of the Privacy Commissioner’s *Guidance Note for Departments Seeking Legislative Provision for Information Matching*, which is available at [www.privacy.org.nz](http://www.privacy.org.nz).

### 15.2.8 Comment

*D) Are Codes of Practice relevant to the proposed legislation?*

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The Privacy Commissioner issues codes of practice, which modify or replace the application of the IPPs to personal information in certain areas, such as health or credit reporting. Codes do this by, for example:

- prescribing more stringent standards than the IPPs;
- exempting a particular action from the IPPs (see Part 6 of the Privacy Act); or
- prescribing how an agency is to comply with an IPP (see sections 46 and 50 of the Act).

Codes can be found on the Privacy Commissioner's website (at [www.privacy.org.nz](http://www.privacy.org.nz)).

### 15.2.9 Guidelines

When policy advisers are developing legislation, as well as having regard to the IPPs, codes should be checked to see whether they are relevant to the subject matter of the proposed legislation. If a code is relevant, then compliance with that code will be the first step (see section 53 of the Act).

Legislation can also make reference to codes. For example, codes are referred to in section 35(5)(f) of the Dog Control Act 1996, and section 22C(1)(b) of the Health Act 1956. Policy advisers should also consider whether a new code might be an appropriate response to a policy issue.

### 15.2.10 Comment

#### *E) Does the legislation propose to transfer personal information out of New Zealand?*

Occasionally legislation expressly authorises the transfer of categories of personal information about New Zealanders to another country. If a case has been made to transfer the personal information overseas, the personal information will have lost the protections of the Privacy Act. Additional safeguards should therefore be incorporated into the authorising legislation, especially if there is no equivalent privacy law in the receiving jurisdiction.

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The legislation should require that, if information is to be disclosed, it is disclosed subject to an agreement between the New Zealand agency and the foreign recipient agency. The legislation should specify the matters to be addressed in the agreement and require consultation with the Privacy Commissioner on the terms of the agreement.

The agreement should state:

- its purpose
- the information to be disclosed
- method and form of disclosure
- uses that can be made of the information by the receiving party
- conditions on which the receiving party may on-disclose
- the agencies that can receive the personal information.

The legislation should expressly state the information that may be disclosed pursuant to an agreement. The legislation can also state review requirements (i.e. the agreement must be subject to reviews or the Privacy Commissioner may be able to require reviews).

The Customs and Excise, Immigration, and Passports Acts provide examples of such provisions. All require departmental consultation with the Privacy Commissioner in certain cases before transborder information disclosure agreements are entered into.

#### **15.2.11 Guidelines**

If the proposed legislation is to transfer personal information to an overseas organisation, policy advisers should consider the inclusion of additional privacy safeguards. In some cases, these safeguards may include a specific role for the Privacy Commissioner.

#### **15.2.12 Comment**

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***F) What are the privacy commissioner's roles?***

Many of the Privacy Commissioner's statutory functions – under Part 3 of the Act – are relevant to the development of legislation. For example:

- To examine proposed legislation that makes provision for the collection and disclosure of personal information, including where personal information is used for the purpose of an information matching programme (see section 13(1)(f) of the Act);
- To provide advice to a Minister or an agency on the operation of the Act (see section 13(1)(l));
- To examine proposed legislation or policy that may affect the privacy of individuals (see section 13(1)(o)); and
- To monitor the use of unique identifiers (see section 13(1)(c)).

The Office of the Privacy Commissioner has legal and policy advisers available to assist policy advisers from other organisations (subject to Office resource and timing constraints).

*Is an additional role for the Privacy Commissioner required in the proposed legislation?*

If the proposed legislation involves a matter with significant and ongoing privacy impacts so that special protections are warranted, then consideration should be given to a specific role for the Privacy Commissioner. To date, the Privacy Commissioner has been given functions under legislation (other than the Privacy Act) in six categories:

- Scrutiny or approval of information sharing regimes / arrangements;
- Consultation on rule making or standard setting;
- A complaints investigation role;
- Consultation on privacy complaints handled by other agencies;

- Appointment to other bodies to provide a privacy viewpoint; and
- Audits of information practices.

A major source of these additional functions is currently in the area of information sharing between New Zealand agencies, and between New Zealand and overseas agencies (see above under E)).

### **15.2.13 Guidelines**

Policy advisers should be aware of the role of the Privacy Commissioner in relation to proposed legislation which affects privacy. Given the Commissioner's statutory functions, and the requirements set by the Cabinet Manual, the Privacy Commissioner would expect to be consulted by policy advisers developing new policies and legislation that may affect the privacy of individuals.

For a project with significant effects on privacy and the handling of personal information, consideration should be given at an early stage of policy development to conducting a Privacy Impact Assessment (PIA). PIAs can form the basis of consultation with the Privacy Commissioner. Publications offering guidance on how to carry out a PIA are available from the Office of the Privacy Commissioner.

The Office of the Privacy Commissioner can provide policy advisers with assistance, and also provides a variety of interpretative resources on the Act, provides training workshops, and runs a general helpline (0800 803 909 and see [www.privacy.org.nz](http://www.privacy.org.nz)).

Proposed legislation which warrants special privacy safeguards may include an additional role for the Privacy Commissioner (see current examples in the Annual Report of the Privacy Commissioner on [www.privacy.org.nz](http://www.privacy.org.nz)).

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Part 3

HOW IS PRIVACY DEALT WITH IN THE OFFICIAL INFORMATION ACT 1982?

**15.3.1 Comment**

The Official Information Act 1982 provides that a good reason exists to withhold information if withholding is necessary to protect the privacy of natural persons, including that of deceased natural persons (see section 9(2)(a)). This is not a conclusive reason to withhold and may be outweighed by other considerations in the public interest.

**15.3.2 Guidelines**

The Office of the Ombudsmen has indicated that the key issue under the Official Information Act is to determine whether or not it is necessary to withhold the information in order to protect an individual's privacy. In making this determination, factors to be taken into account are:

- The nature of the information that would be disclosed;
- The circumstances in which the information was obtained and held;
- The likelihood of the information being information that the person concerned would not wish to be disclosed without consent;
- The current relevance of the information; and
- The extent to which the information at issue has already been made public.

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## CHAPTER 16

### CROSS-BORDER ISSUES

#### INTRODUCTION

##### **Background**

People, assets and information move ever more easily and more frequently across borders. These trends have been accelerated by the Internet and other developments in information and communications technology, which enable New Zealand consumers and businesses to access a wide range of goods and services from overseas suppliers, and to supply goods and services to purchasers overseas.

These developments have important consequences for policy making and legislation. In many areas, policies and the legislation that gives effect to them must take into account the likelihood that cross-border issues will arise: issues relating to persons outside New Zealand, activities outside New Zealand, acts done in New Zealand that have effects overseas, and cross-border recognition or enforcement of regulatory or judicial decisions. Issues of this kind are important in many fields, including family law, employment law, criminal law and business law.

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

- Which rules apply? New Zealand law, or the law of another country?
- Who will make decisions in particular cases? 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?

The starting point for addressing cross-border issues in any policy process is to identify the nature and significance of the cross-border linkages that are relevant to the policy being developed, at present and in the foreseeable future. The next step is to identify the proposed scope of application of the New Zealand regime in the light of those linkages, the international law principles concerning jurisdiction, and

practical issues in relation to enforcement. When should the New Zealand rules apply? When should a New Zealand court or decision-maker determine an issue? How will New Zealand decisions be made effective? What is the status and effect of an overseas decision?

Legislation can then be designed to reflect the proposed scope of the regime, drawing on a range of techniques for specifying the scope of application of legislation, and for giving effect to rules with cross-border implications.

The increasing frequency with which cross-border issues are encountered sometimes leads policy makers to attempt to provide for New Zealand laws to apply despite the presence of such issues – since otherwise the effect of the legislation will be reduced. But there are some important limits on how far New Zealand legislation can go in addressing these issues, both as a matter of principle and from a practical perspective. International law principles limit the extent to which it is appropriate for New Zealand legislation to regulate matters occurring outside New Zealand, or to provide for determinations to be made which affect the rights and obligations of persons outside New Zealand. From a practical perspective, the ability to enforce civil and criminal judgments and regulatory decisions remains essentially territorial. So attempts to regulate conduct outside New Zealand, or to determine the rights or obligations of people outside New Zealand, may not be practically effective.

This chapter explores the implications of cross-border issues for legislation, and identifies techniques for addressing cross-border issues in a manner that:

- supports the policy goals of the legislation;
- reduces uncertainty and unnecessary costs;
- is consistent with international law principles in relation to the circumstances in which it is appropriate for New Zealand laws to govern extraterritorial conduct (jurisdiction to prescribe), or for domestic courts or other bodies to determine the rights and obligations of persons abroad (jurisdiction to adjudicate);
- is as practically effective as possible.

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**Issues discussed**

The following issues are discussed in this chapter:

Part 1: Are there cross-border issues that should be addressed?

Part 2: What is the intended scope of the NZ legislative regime?

Part 3: Are special rules required for civil claims with cross-border elements?

Part 4: Are special rules required for criminal offences with cross-border elements?

Part 5: Will any regulatory agency responsible for the regime be able to perform its role effectively in cross-border cases?

Part 6: Should the legislation provide for recognition or enforcement of overseas decisions in New Zealand, or vice versa?

**PART 1****ARE THERE CROSS-BORDER ISSUES THAT SHOULD BE ADDRESSED?****16.1.1 Outline of issue**

At an early stage in any policy development exercise, it is important to identify whether there are any significant cross-border issues that are relevant to the policy goals that have been identified, or the proposed methods of giving effect to those policy goals.

**16.1.2 Comment**

Some policies are concerned almost exclusively with events and people within New Zealand. For example, a law prohibiting smoking in public transport vehicles in New Zealand has no direct implications for conduct outside New Zealand, and enforcement activities are likely to be limited to people in New Zealand. Even if the vehicles are owned and operated by a company incorporated overseas, it will be carrying on business in New Zealand, so it can be served with criminal or civil proceedings, and enforcement activity can be directed against its assets in New Zealand.

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But such cases are increasingly rare. Even issues that superficially appear to be concerned with events in New Zealand can have cross-border implications, at least at the enforcement stage. Consider, for example, legislation establishing a new dispute resolution tribunal to hear claims relating to defective buildings. All the building work will have occurred in New Zealand. But what happens if the builder has moved to Queensland – can the builder be required to defend the claim before the tribunal? And what happens if a builder claims that an overseas supplier of materials failed to provide proper instructions on the use of the materials – can that supplier be required to participate in the hearing, and be bound by the outcome? Is the answer different if the supply contract is governed by foreign law, or if it contains an arbitration clause providing for arbitration overseas?

The starting point for addressing cross-border issues in any policy exercise is to identify whether acts done outside New Zealand, or cross-border dealings, or the location of certain people or assets outside New Zealand, need to be taken into account in developing the policy and preparing legislation. This Part provides a checklist of the types of cross-border linkage that are most common, to assist with this process. It is important to ask whether these linkages are present now – and also to look forward, and ask whether such linkages are likely to develop, or become more important, over the life of the proposed legislation.

#### *Distinguishing between substance and jurisdiction*

When working through the checklist, it is helpful to bear in mind the two principal contexts in which a decision-maker may need to consider whether or not to apply a New Zealand statute, where cross-border elements are present.

First, there may be issues of jurisdiction – the “who decides” question. A New Zealand court or regulator may need to decide whether, in the circumstances of a particular case, that decision-maker has the power to act – or whether their power is limited to cases which do not have the foreign elements in question. For example, can a New Zealand court grant a divorce where the applicant, but not the respondent, is resident in New Zealand? Can the Securities Commission prohibit publication of a deceptive advertisement about an investment scheme, if it is published by a New Zealand company in an Australian newspaper? Can a New Zealand court try allegations of bribery of a foreign judge by a New Zealand citizen, if all the relevant events occurred overseas?

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Second, there may be issues of substantive law – the “which rules apply” question. In civil law cases, courts distinguish between questions of jurisdiction and questions of applicable law.<sup>235</sup> It does not follow automatically from the fact that an issue is being decided by a New Zealand court that the court will apply the substantive law of New Zealand to all the issues before it. In some cases, significant links between the substantive dispute and another country will result in the court applying the law of another country to resolve particular issues. Courts look to private international law principles to determine when foreign law should be applied, and when domestic law should be applied, where there are relevant overseas linkages. Private international law is a body of New Zealand law, mostly common law, which addresses (among other things) these “choice of law” issues. In the absence of express provisions in a statute, the courts will apply these choice of law rules, and general principles of statutory interpretation, to ascertain whether a New Zealand statute should be applied to a case with a foreign element. Thus for example in contract disputes a New Zealand court will apply the “proper law” or “governing law” of the contract to determine a wide range of issues including the substantive validity of the contract, its interpretation, and the rights of the parties where there is a breach. If New Zealand law is not the proper law, the provisions of the New Zealand contract statutes which address these issues will not apply.

Similarly, there are civil cases which come before foreign courts where issues fall to be determined by reference to New Zealand law. If New Zealand law is applicable in accordance with that foreign country’s rules of private international law, a relevant New Zealand statute will be applied. The foreign court has jurisdiction, but that court will treat New Zealand law as the relevant substantive law.

#### *Checklist*

The following cross-border issues often arise, and can raise difficult questions (which rules apply? who decides? how will the decision be made effective?):

- dealings across borders;

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<sup>235</sup> But not in criminal cases, where New Zealand courts only apply New Zealand law.

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- persons outside New Zealand whose conduct affects persons in New Zealand;
  - persons in New Zealand whose conduct affects persons overseas;
  - civil proceedings in New Zealand involving overseas parties;
  - civil proceedings in New Zealand concerning dealings governed by foreign law;
  - civil proceedings overseas raising issues of New Zealand law;
  - information or evidence overseas required for the purpose of detection and investigation of breaches, and enforcement action;
  - whether New Zealand determinations will be recognised or enforced overseas, and vice versa;
  - whether cooperation with other States is needed to give effect to the policy;
  - whether there are applicable treaties, or other international obligations.

Each of these is discussed in more detail below.

#### *Dealings across borders*

Where legislation seeks to regulate transactions entered into by private citizens or businesses, or communications between them, it is important to identify whether the relevant transactions or communications take place solely within New Zealand, or whether a significant number of such dealings take place between people in New Zealand and people overseas. If the legislation relates to consumer protection, for example, cross-border issues will arise as a result of the increasing frequency with which consumers in New Zealand purchase goods or services from overseas suppliers (including via the Internet), and also as a result of the supply of goods and services by New Zealand businesses to consumers overseas. Legislation concerned with publication of certain classes of information (eg pornography, or the identity of victims of certain crimes, or advertisements for prescription medicines) needs to take

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into account the movement of such material to and from New Zealand, both physically (eg magazines) and electronically (eg via the Internet).

Where dealings frequently occur across borders, questions will arise in relation to both jurisdiction and substantive law. Policy makers should take care to identify which dealings the legislation is intended to apply to, from each perspective. The answer may not be the same: for example, substantive rules about employment contracts in New Zealand employment legislation could apply to employment contracts which are governed by New Zealand law, or which relate to work to be performed in New Zealand; but the exclusive jurisdiction of the employment institutions could extend to any dispute about an employment relationship that comes before a New Zealand court, whether or not the employment contract is governed by New Zealand law or relates to work to be performed in New Zealand.

In any context where cross-border dealings are common, it is necessary to consider the scope of application of New Zealand legislation that is required to give effect to the underlying policy, and the scope of application that is practically achievable. This leads into the important question of selection of connecting factors, discussed in section 16.2 below.

*Persons outside New Zealand – conduct affecting New Zealand*

A closely related set of issues arises where the legislation seeks to regulate certain activities with adverse effects in New Zealand, and the persons engaged in those activities may be situated outside New Zealand. Do the policy goals extend to the conduct of persons outside New Zealand? To conduct that occurs partly within, and partly outside, New Zealand? To conduct outside New Zealand by New Zealand citizens or residents, or persons with some other link to New Zealand? Are the substantive rules in the legislation intended to apply in such cases? Are any offence provisions intended to apply in such cases? If any powers are conferred on a New Zealand court or regulator, are those powers intended to be available in such cases?

Consider, for example, insider trading by persons outside New Zealand in respect of shares issued by a New Zealand company, and listed on the New Zealand stock exchange. The policy of the legislation clearly extends to such conduct. To what extent does New Zealand law apply? What steps can be taken in New Zealand by the Securities Commission, the company or an aggrieved shareholder? What orders can a New Zealand court make in such cases? How will any direction given by the

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Securities Commission, or a court, be enforced if a person outside New Zealand does not comply? There are significant cross-border issues in this context.

*Persons in New Zealand – conduct affecting persons overseas*

Conversely, does the policy extend to regulation of the conduct of persons in New Zealand engaged in activities which have adverse effects outside New Zealand? Do the substantive rules in the legislation apply in such cases? Are any offence provisions intended to apply in such cases? If coercive powers are conferred on a New Zealand court or regulator, are those powers intended to be available in such cases?

Although the answer in the past has often been that New Zealand is not concerned to regulate conduct in New Zealand that has no adverse effects within this country, it is becoming more common for such conduct to be covered by New Zealand legislation.

The principal reason is that this can facilitate cross-border cooperation in enforcement activities. For example, if the New Zealand Securities Commission can take action against wrongdoers in New Zealand targeting Australian investors, it is more likely that the Australian Securities and Investments Commission will be willing to take action against Australian firms targeting New Zealand investors, against whom the New Zealand Securities Commission would otherwise be powerless. This sort of international cooperation is increasingly important, if regulatory regimes are to be effective. Ensuring that a New Zealand regime extends to cases where the conduct occurs in New Zealand, but the adverse effects are felt elsewhere, provides an important foundation for such cooperation. Cooperation arrangements of this kind are discussed in section 16.5 below.

A second reason is that in some cases, failure to regulate externally directed conduct can affect the reputation of all New Zealand suppliers in a market. In some areas, for example, regulation of externally directed conduct may be justified to ensure that legitimate New Zealand suppliers of a product are not disadvantaged by the actions of unregulated suppliers who give New Zealand a reputation for poor quality or dangerous products.

*Civil proceedings in New Zealand involving overseas parties*

If the legislation creates rights of action before the courts or a tribunal, or rights to apply for certain benefits to a decision-making body, is it likely that people overseas

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will seek to exercise those rights, or that people in New Zealand will seek to make claims against persons overseas? In addition to the question of whether the substantive rules in the legislation apply if one party is not in New Zealand at the relevant time, important questions arise in relation to jurisdiction – is the court, tribunal or decision-maker expected to make decisions affecting the rights and obligations of persons outside New Zealand?

Bear in mind that even if all the relevant events have occurred in New Zealand, parties may have been temporarily present in New Zealand, or may have left the country to live abroad before the issues emerge, or are resolved. Consider, for example, a road accident in New Zealand involving tourists from overseas. Recognising that cross-border issues will arise reasonably often, the ACC regime contains rules which determine when overseas visitors are covered by ACC, whether they receive the same compensation as New Zealand residents, whether costs incurred overseas can be recovered, and whether they can bring proceedings in New Zealand or overseas (and the implications of any recoveries for entitlement to compensation in New Zealand). The ACC legislation also addresses other cross-border issues, such as the position of a New Zealand resident injured abroad.

In some contexts, in particular where legislation establishes a new specialist court or tribunal, special rules may be needed to enable overseas parties to be joined in the proceedings. This is discussed in more detail in section 16.3 below.

*Civil proceedings in New Zealand concerning dealings governed by foreign law*

If the legislation sets out substantive rules affecting contracts, trusts or other transactions, is it intended to apply to transactions governed by foreign law? Is it necessary for the legislation to apply in such cases, in order to achieve its objectives?

Where legislation is concerned with aspects of contract law, or trust law, it will usually be confined to transactions governed by New Zealand law.<sup>236</sup> If an Act

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<sup>236</sup> The “governing law” or “proper law” of a contract is the law chosen by the parties or, in the absence of an express choice, the system of law with which the contract is most closely connected. This does not mean that New Zealand legislation can be evaded simply by inserting a choice of law clause in a contract, which specifies that the contract is governed by foreign law. New Zealand courts will not give effect to a choice of law provision that is not included in a contract in good faith, but rather for the purpose of avoiding the application of New Zealand law. The Credit

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dealing with such matters is silent on whether or not it applies to foreign law transactions, courts will generally conclude that it was intended to be limited to New Zealand law transactions. This approach reflects one of the core goals of private international law, which is to ensure that the same substantive rules are applied to determine a dispute wherever it may be litigated – if a foreign court considering the matter would not generally apply New Zealand law where the contract or trust is governed by foreign law, difficulties can arise if New Zealand courts take a different approach.

On the other hand, some policy goals require New Zealand legislation to be applied by a New Zealand court regardless of a contract's governing law – for example, certain provisions in insurance contracts are rendered unenforceable by the Insurance Intermediaries Act 1994 (s 7), whether or not the contract is governed by New Zealand law.

Where legislation affects a class of transactions some of which will be governed by foreign law, it is generally desirable to specify whether or not the legislation is intended to apply to transactions governed by foreign law. Legislation which affects substantive rights, as opposed to procedural matters, should be extended to such transactions only if it is necessary to do so to achieve the policy goals of the legislation, as doing so can create a risk of inconsistent outcomes depending on where a dispute is determined. That risk is significant where the likelihood of litigation overseas is real – it is less of a concern if any disputes are, realistically, likely to be decided in New Zealand.<sup>237</sup>

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Contracts Act 1981 only applies to credit contracts governed by New Zealand law (s 7). But a New Zealand court would not give effect to a choice of foreign law in a purely domestic credit contract, between two New Zealand parties, where there was no good faith reason for the choice of foreign law.

<sup>237</sup> Consider, for example, the New Zealand statutory management legislation, which (among other things) suspends rights of action against an entity under statutory management. A claim for payment of a debt governed by foreign law would almost certainly be treated as suspended by a New Zealand court, applying this provision. But if proceedings were brought in a foreign court, that court would be most unlikely to give effect to the New Zealand law moratorium in respect of a foreign law obligation. So for entities with substantial assets outside New Zealand, the outcome of litigation will differ depending on where the claim is brought, and statutory management may not achieve its intended effect.

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*Civil proceedings overseas raising issues of New Zealand law*

If the legislation sets out substantive rules governing certain activities, is it likely that disputes in connection with activities to which the statute applies will come before foreign courts?

If so, would the foreign courts before which such disputes are likely to be tried apply the New Zealand statute, or would private international law rules in the relevant country or countries point to other systems of law? Answering this question may involve some research – but if litigation overseas in relation to the issues in question is likely, this is an important issue which is relevant to the integrity and effectiveness of the legislative scheme.

*Information or evidence overseas*

How likely is it, in the context in question, that a regulator or decision-maker will require access to information situated overseas – documents, or information from persons overseas?

Obviously New Zealand legislation alone cannot provide for access to overseas information. But if access to information overseas is likely to be critical to the effectiveness of a regulatory regime, it may be appropriate to provide for the New Zealand regulator to have the ability to receive information from, and provide information to, agencies with corresponding functions overseas. It may also be desirable to go further and provide for the exercise of information-gathering powers at the request of overseas agencies, with a view to establishing reciprocal arrangements. Information sharing regimes are discussed in more detail in section 16.5 below.

*Will New Zealand determinations be recognised or enforced overseas, and vice versa?*

Is it likely that the regime will only be effective if determinations made under the New Zealand regime are recognised or enforced overseas? Are there existing recognition or enforcement regimes that apply to such determinations, the continuation of which may be affected by changes to the New Zealand regime? Is it desirable to develop such regimes in the near future, to enhance the integrity and effectiveness of the scheme?

For example, under the Trans-Tasman Mutual Recognition Arrangement (TTMRA), a person entitled to practise a registered occupation in New Zealand is entitled to

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practise that occupation in Australia. A modification of the standards for registration in New Zealand has implications for the corresponding profession in Australia, and for the TTMRA more generally, which need to be taken into account.

Part 3A of the Children, Young Persons, and Their Families Act 1989, which deals with trans-Tasman transfer of protection orders and protection proceedings, is a recent example of a regime designed to ensure that determinations by certain officials and by the courts can be made effective throughout Australasia. These provisions are intended to ensure that child protection regimes are effective in an environment where families can and do move readily between New Zealand and Australia.

To take another example, consider child support payments. While the regime can operate without cross-border enforcement, the frequency with which New Zealanders travel and settle abroad means that the integrity of the regime would be enhanced considerably if there were appropriate reciprocal enforcement arrangements with other countries. There are already some bilateral arrangements, and a multilateral agreement has been proposed. It makes sense to design a New Zealand regime to accommodate these possibilities, by providing for requests to be made for enforcement overseas, and for giving effect to requests from other countries.

*Is cooperation with other States needed to give effect to the policy?*

An issue closely related to the topics of recognition and enforcement, and information sharing, is the question of regulatory reach. In some contexts, the need for cross-border cooperation in information gathering and enforcement activity is so great that it is not possible to achieve the relevant policy goal without a high degree of international cooperation. In any given policy context, it is important to ask whether New Zealand can regulate the relevant issues unilaterally, or whether coordination with other States is required to achieve the policy goals. If coordination is necessary, then coordination initiatives should be pursued prior to, or in tandem with, domestic legislation, and domestic legislation should be designed to facilitate that coordination.

*Applicable treaties and other international obligations*

Where cross-border issues arise, it is particularly important to check whether there are any treaties or other international law obligations which are relevant to the development of the New Zealand legislation. Chapter 6 of the Guidelines addresses this topic in more detail. It is important to bear in mind that treaties and other international obligations may be relevant in two ways:

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- they may be directly concerned with the subject-matter of the legislation – for example, the Climate Change Response Act 2002 is intended to enable New Zealand to implement the Kyoto Protocol to the UN Convention on Climate Change;
  - they may address general “overarching” issues that are relevant in many different policy contexts – to take two very different examples, consider the International Covenant on Civil and Political Rights, which is relevant whenever legislation affects the basic rights protected by that instrument, and the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, which is relevant whenever New Zealand legislation seeks to prescribe a particular method of resolving disputes that may involve cross-border elements, as it requires New Zealand courts to give effect to international arbitration agreements.

### **16.1.3 Guidelines**

At an early stage in any policy process, it is important to identify the nature and significance of the cross-border linkages in that field. Consideration should be given to whether the following factors (described in more detail in section 16.1.2) are relevant to the policy goals, and should be taken into account in developing the policy and any implementing legislation:

- dealings across borders;
- persons outside New Zealand whose conduct affects persons in New Zealand;
- persons in New Zealand whose conduct affects persons overseas;
- civil proceedings in New Zealand involving overseas parties;
- civil proceedings in New Zealand concerning dealings governed by foreign law;
- civil proceedings overseas raising issues of New Zealand law;
- information or evidence overseas required for the purpose of detection and investigation of breaches, and enforcement action;

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- whether New Zealand determinations or New Zealand law obligations will be recognised or enforced overseas, and vice versa;
  - whether cooperation with other States is needed to give effect to the policy;
  - whether there are applicable treaties, or other international obligations.

## PART 2

### WHAT IS THE INTENDED SCOPE OF THE NZ LEGISLATIVE REGIME?

#### 16.2.1 Outline of issue

Where there are significant cross-border linkages in a particular area, it is usually desirable for legislation to set out expressly its intended scope of application, by reference to the relevant cross-border factors – for example, whether the legislation applies to contracts governed by New Zealand law, or which relate to certain work to be carried out in New Zealand, or which fall to be litigated before a New Zealand court. In particular, the legislation should usually provide clear answers to the questions:

- when do the (substantive) rules in the legislation apply?
- when can any decision-making powers in the legislation (of a court, or a regulator, or any other person) be exercised?

Failure to specify the relevant connecting factors which determine whether or not the Act applies in cross-border cases can lead to unnecessary uncertainty and costs, and may result in outcomes which are inconsistent with the policy underpinning the legislation.

#### 16.2.2 Comment

##### *Connecting factors*

Some New Zealand statutes expressly set out their scope of application. The most important example of this is the Crimes Act 1961, which provides in sections 6 and 7 that:

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- no act done or omitted outside New Zealand is an offence under New Zealand law, unless the Crimes Act 1961 or another enactment expressly provides for an act or omission outside New Zealand to constitute an offence under New Zealand law;
  - for the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence is deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

Sections 7 to 8A go on to provide for jurisdiction in respect of certain offences committed outside New Zealand, in certain circumstances. Other provisions of the Crimes Act address cross-border issues in the context of particular offences. For example, sections 105C to 105E of the Crimes Act 1961 specify the circumstances in which the bribery of a foreign public official constitutes an offence under New Zealand law.

Further examples of statutory provisions that expressly address their scope of application are found in the Credit Contracts Act 1981, which provides that it only applies to contracts governed by New Zealand law, the Insurance Intermediaries Act 1994, which provides that certain provisions apply whether or not the relevant contracts are governed by New Zealand law, and Part II of the Children, Young Persons, and Their Families Act 1989, which provides that certain matters establish that a child or young person is in need of care or protection whether or not the relevant conduct occurred in New Zealand.

In each of these cases, the drafters of the statute have identified the potential for cross-border issues to arise, and have anticipated that these will raise questions about whether or not the legislation applies where that cross-border element is present. In the context of the Crimes Act 1961, the cross-border linkage that has been identified is that there will be cases where conduct that meets the description of an offence under the Act has occurred wholly abroad, or partly abroad and partly in New Zealand. The Act anticipates the question “when does this Act apply, if some or all of the relevant conduct occurred overseas?” In the context of the Credit Contracts Act 1981, the linkage identified is that some credit contracts that are litigated before a New Zealand court may be governed by foreign law. The Act anticipates the question of whether its substantive provisions were intended to apply to such contracts.

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Each of the statutes referred to above addresses the anticipated cross-border issues by expressly setting out the *connecting factors* that determine what sort of connection with New Zealand is (or is not) required in order for the statute's provisions to apply. They either point the user of the statute to particular connecting factors that are required (as in the Credit Contracts Act 1981), or make it clear that the statute applies whether or not a particular connecting factor is present (as in the Insurance Intermediaries Act 1994 and the Children, Young Persons, and Their Families Act 1989).

*The importance of expressly addressing connecting factors*

In any policy exercise where there are significant cross-border linkages, identifying the connecting factors that must be present in order for the policy to apply is an important step in the policy development process. The answers should usually be set out expressly in the legislation – the more likely it is that cross-border issues will arise, the more important it becomes to anticipate them and provide for them in the legislation.

Where connecting factors are not set out expressly, the courts will attempt to ascertain whether or not the Act was intended to apply from general principles of private international law, and from the overall scheme and purpose of the Act (see, eg, Dicey & Morris (13th ed) paras 1-032 to 1-059). However where an Act contains no clues as to its application in cases with a foreign element, this is a rather uncertain and unsatisfactory process. If it is clear that issues of this kind are likely to arise, it is preferable that they be addressed in the legislation.

Failure to specify connecting factors in legislation can result in significant uncertainty and cost. It also creates a risk of outcomes inconsistent with the policy underpinning the legislation. The absence of express connecting factors in one New Zealand statute enacted in 2000 led to its application being litigated on four separate occasions over a period of two years, with different Judges reaching different conclusions on whether the Act did or did not apply.

These questions may also fall to be considered by foreign courts. In cases where it is not clear whether or not the New Zealand statute was meant to apply to cases before foreign courts, or with other links to foreign countries, the foreign court will obtain considerable assistance from express connecting factors in the New Zealand statute.

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Different connecting factors may be appropriate in relation to different aspects of an Act, in particular where the Act includes both substantive rules and rules relating to determination of disputes. The example of employment legislation was given earlier in this chapter – the connecting factor for the substantive rules is different from the connecting factor for the jurisdiction of the employment institutions.<sup>238</sup>

*Common connecting factors*

Connecting factors which are referred to in New Zealand statutes include:

- whether certain conduct or events occurred in New Zealand;
- whether a person is present/resident/habitually resident/ordinarily resident/domiciled in New Zealand at the time of certain events, or at the time proceedings (civil or criminal) are commenced against them, or the relevant process is served on them;
- whether a person is a New Zealand national;
- whether a transaction is governed by New Zealand law;
- whether certain property is situated in New Zealand;
- whether certain consequences occur in New Zealand, and the level of knowledge of the person concerned as to whether those consequences would occur in New Zealand.

*International law principles relevant to selection of connecting factors*

International law, and in particular international customary law, limits the extent to which it is appropriate for New Zealand to assert jurisdiction in respect of matters which take place outside New Zealand, or persons outside New Zealand. These limits take the form of principles, rather than precise rules. They are derived from

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<sup>238</sup> This is not provided for expressly in the legislation, but was held to be the position in *Bowport Ltd v Alloy Yachts International Ltd* (High Court, Auckland Registry CP 159-SD01, 14 January 2002, Elias CJ).

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fundamental principles concerning the legal competence of States, and from the practice of States.

It is helpful to consider jurisdiction to prescribe (ie jurisdiction in respect of substantive matters) and jurisdiction to adjudicate separately.

Jurisdiction to prescribe is essentially territorial. The starting point is that New Zealand legislation can always properly impose requirements in respect of conduct occurring within New Zealand territory.<sup>239</sup> This includes conduct that occurs partly within and partly outside New Zealand, so long as there is a real and substantial connection with New Zealand.<sup>240</sup>

It is also consistent with international law principles for New Zealand law to impose requirements in respect of conduct outside New Zealand of New Zealand nationals, and others owing allegiance to the Crown. However the potential for overlapping jurisdiction in such cases requires the exercise of restraint in the assertion of this ground of jurisdiction.

It is also increasingly widely accepted that a State can properly apply its law to matters occurring outside the State that produce effects within it, though the parameters of this doctrine remain controversial in some respects. Considerable restraint is however appropriate in applying New Zealand legislation to conduct occurring wholly outside New Zealand, solely on the grounds of effects produced in New Zealand: such rules have the potential to interfere with the domestic jurisdiction of other States, and can place those subject to them in the difficult position of being subject to multiple overlapping legal requirements, or worse still to inconsistent

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<sup>239</sup> Subject of course to any immunities to which a defendant may be entitled either at common law or under statute: see in particular the Diplomatic Privileges and Immunities Act 1968 and the Consular Privileges and Immunities Act 1971. See generally *Laws of New Zealand* “Conflict of Laws: Jurisdiction and Foreign Judgments” paras 33–35.

<sup>240</sup> The question of where relevant conduct occurs is often far from simple, especially where cross-border communications are involved – see for example the discussion of this issue in *Lipohar v The Queen* [1999] HCA 65 (9 December 1999) and *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 (10 December 2002). When considering what the scope of application of New Zealand legislation ought to be, it is often more productive to focus on whether there is a real and substantial connection with New Zealand than to embark on a more or less artificial inquiry about where certain types of conduct should be seen as occurring.

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requirements. It is generally preferable to limit the application of laws of this kind, with extraterritorial application, to cases involving an element of conduct directed at New Zealand, or at the least to conduct where it is foreseeable that effects will result in New Zealand.

A closely related principle is the “protective” or “security” principle, under which many States assume jurisdiction in respect of acts done abroad (whether or not by their nationals) which affect the security of the State – a concept described by one leading commentator as extending to currency, immigration and economic offences.<sup>241</sup>

In some cases, treaties to which New Zealand is a party permit or require New Zealand to exercise jurisdiction in respect of matters occurring outside New Zealand. For example, the OECD Anti-Bribery Convention provides for States which are parties to exercise jurisdiction to prosecute their nationals for bribery of a foreign public official that occurs abroad. Section 105D of the Crimes Act 1961 gives effect to this commitment. In some cases, treaties simply provide for jurisdiction to be exercised in circumstances that are consistent with established principles of international law. The treaty is not itself a source of jurisdictional competence. In a very few cases, the treaty itself provides the authority for jurisdiction to be exercised in circumstances where this would not otherwise be appropriate. There are obvious limits on how far a treaty can go in this respect, in particular so far as the interests of non-party States are concerned. Where jurisdiction is asserted in accordance with a treaty provision of this kind, it is important that the legislation accurately reflects the parameters of the jurisdiction provided for in the treaty.

International law also recognises universal jurisdiction in respect of certain crimes, such as piracy, war crimes, and crimes against humanity. Crimes that fall into this category may be punished by any State which obtains custody of the accused. New Zealand law provides for jurisdiction in certain cases falling within this category – see in particular the International Crimes and International Criminal Court Act 2000, the Geneva Conventions Act 1958, and sections 92 to 97 of the Crimes Act 1961.

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<sup>241</sup> See Ian Brownlie, *Principles of International Law* (5th ed, 1998, Oxford University Press) p 307.

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Special jurisdictional regimes apply in certain contexts, in particular on the high seas, the continental shelf, the exclusive economic zone, Antarctica, and outer space.<sup>242</sup>

It is generally inappropriate for New Zealand law to seek to impose requirements on a person resident abroad that would require that person to take action in another country that would be contrary to the laws of that country. This limit, which reflects the general international law principle of non-intervention in the territorial jurisdiction of other States, is important where New Zealand law is applied to conduct outside New Zealand on the grounds of effects produced in New Zealand, or on the grounds of nationality. New Zealand legislation generally goes further still, and requires that the conduct be unlawful in the country in which it takes place.<sup>243</sup> This ensures that there is no inconsistency between the requirements of New Zealand law and the requirements of the local law, and that persons overseas acting lawfully under the local legal regime, which they reasonably believe governs their conduct, are not unwittingly exposed to criminal sanctions under New Zealand law. Exceptions to this “double criminality” requirement are rare – in cases where there is no explicit double criminality requirement, either the person whose conduct is in issue should reasonably expect New Zealand law to govern their conduct even though they are outside New Zealand, or the conduct in question is unlawful under international law, so can be treated as unlawful everywhere without the need for reference to national laws.

Although the principles in relation to jurisdiction to prescribe outlined above are usually referred to in the context of criminal law, they are equally applicable to civil law to the extent that it seeks to impose liability as a consequence of certain conduct, or to compel persons to engage in (or refrain from) certain conduct. Competition/antitrust law is one field in which there has been an active debate in

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<sup>242</sup> See the definition of “New Zealand” in the Crimes Act 1961, and see the Antarctica Act 1960. See also Brownlie *op cit* p 314 for further references on these special regimes.

<sup>243</sup> Section 105E of the Crimes Act 1961 contains a variant on this approach – it is a defence to a charge of bribing a foreign public official that the act alleged to constitute the offence was not an offence under the laws of the country of which that person is an official. The rationale for this provision is that the lawfulness of dealings with an official should be determined by the laws of that official’s country, and not by the geographical location of the alleged act of bribery – a place which may be incidental to the conduct in question, and which could be manipulated by the parties. This example underlines the importance of ensuring that appropriate conditions are identified for the exercise of New Zealand jurisdiction in each case, as these will vary depending on the context.

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recent years over the extent to which a State can properly assert jurisdiction based on the adverse economic effects in that State of conduct occurring outside that State.

Jurisdiction to adjudicate is also essentially territorial. It is consistent with international law principles for New Zealand legislation to provide for jurisdiction in civil or criminal matters to be exercised against persons who are present in New Zealand when the proceedings are commenced against them (which in New Zealand is effected by the issue of the relevant process and its service on the defendant).<sup>244</sup>

It is also consistent with international law principles for New Zealand legislation to provide for civil proceedings which affect a person's rights and obligations to be commenced against that person despite their absence from New Zealand at the time of service, where they have agreed to submit to New Zealand jurisdiction, or where there is some other real and substantial connection between the person and New Zealand sufficient to justify an assertion of jurisdiction.<sup>245</sup> New Zealand law makes general provision for service of High Court and District Court proceedings outside New Zealand in appropriate cases: for when the general rules are adequate, and when special rules are required, see section 16.3 below.

New Zealand law does not provide for criminal proceedings to be brought against persons outside New Zealand by serving the proceedings on them abroad and conducting a trial in their absence (natural persons who commit serious offences in New Zealand may however be extradited to New Zealand to stand trial, in accordance with the procedure set out in the Extradition Act 1999).<sup>246</sup> But New Zealand law does provide for New Zealand courts to exercise criminal jurisdiction against persons

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<sup>244</sup> Subject to any immunities to which a defendant may be entitled at common law or under statute: see fn 191 above. A distinction is drawn for some purposes between jurisdiction to adjudicate and jurisdiction to enforce. Thus for example a waiver of sovereign immunity in respect of jurisdiction to adjudicate does not entail a waiver of immunity in respect of enforcement. But for present purposes, the limits on when it is appropriate for New Zealand legislation to provide for adjudication or enforcement in New Zealand are coextensive, and the distinction is not directly relevant.

<sup>245</sup> See Brownlie *op cit* pp 312-314.

<sup>246</sup> The only significant exception to this principle is the extraterritorial application of the Armed Forces Discipline Act 1971, and the corresponding extraterritorial jurisdiction of a court-martial under that Act.

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found in New Zealand in respect of conduct occurring wholly outside New Zealand, in certain circumstances. Questions of jurisdiction to prescribe and jurisdiction to adjudicate overlap in this context in New Zealand, as a consequence of the combined operation of sections 6 and 9 of the Crimes Act 1961. These issues are discussed in more detail in section 16.4 below.

*Practical issues relevant to selection of connecting factors*

The selection of connecting factors in any legislation should also reflect the practical limits on New Zealand's ability to apply and enforce New Zealand laws. There is not much point in designing a regulatory regime that requires enforcement against persons overseas if it is to operate effectively, and providing for the extraterritorial application of the regime (for example, by reference to harm caused in New Zealand) on paper, in the absence of practical mechanisms for enforcement (for example, through cooperation with other States).

### **16.2.3 Guidelines**

In any context where cross-border factors are significant, and are likely to arise reasonably frequently, it is usually desirable to set out expressly in the legislation the connecting factors that determine whether or not the legislation will apply, where cross-border factors are present. Connecting factors referred to in New Zealand statutes include:

- whether certain conduct or events occurred in New Zealand;
- whether a person is present/resident/habitually resident/ordinarily resident/domiciled in New Zealand at the time of certain events, or at the time proceedings (civil or criminal) are commenced against them, or the relevant process is served on them;
- whether a person is a New Zealand national;
- whether a transaction is governed by New Zealand law;
- whether certain property is situated in New Zealand;

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- whether certain consequences occur in New Zealand, and the level of knowledge of the person concerned as to whether those consequences would occur in New Zealand.

Connecting factors should be consistent with international law principles in relation to jurisdiction to prescribe and jurisdiction to adjudicate. A clear justification is needed for the application of substantive New Zealand law (civil or criminal) to conduct occurring outside New Zealand, or for the exercise of civil jurisdiction against persons outside New Zealand in novel circumstances (see section 16.2.2). The Ministry of Justice and the Legal Division of the Ministry of Foreign Affairs and Trade (MFAT) should be consulted where new rules of this kind, extending the application of New Zealand law or providing for service of proceedings abroad, are proposed. In selecting connecting factors, it is also important to bear in mind the practical limits on New Zealand's ability to apply and enforce New Zealand laws.

### PART 3

#### ARE SPECIAL RULES REQUIRED FOR CIVIL CLAIMS WITH CROSS-BORDER ELEMENTS?

##### 16.3.1 Outline of issue

Where New Zealand legislation creates civil rights of action, and cross-border issues are likely to arise, the statutory liability regime should accommodate these cross-border issues either by ensuring that existing general rules apply, or by making specific provision for those issues. In particular, it is necessary to consider whether the regime makes adequate provision for:

- the jurisdiction of New Zealand courts or tribunals – can claims be pursued against persons situated outside New Zealand, in appropriate cases?
- the possibility of claims under the New Zealand statute being pursued in overseas courts (for example where the defendant is outside New Zealand, and a judgment obtained in New Zealand could not be enforced against the defendant where the defendant resides).

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### 16.3.2 Comment

#### *Jurisdiction in civil proceedings*

Where legislation creates a civil right of action that can be pursued in the High Court or the District Court, proceedings can be brought by any person in those courts, whether or not that person is resident in New Zealand. There are general rules governing when proceedings can be brought against a person overseas: see High Court Rules, rules 219, 220; District Court Rules, rules 242-243; *Laws of New Zealand*, “Conflict of Laws: Jurisdiction and Foreign Judgments” paras 14-17.

In most cases the general rules will be appropriate, and legislation need not address these issues expressly. In particular, where legislation provides for proceedings to be brought in the High Court or the District Court, there would need to be very clear reasons to depart from the standard rules on service of proceedings outside New Zealand.

However if a new tribunal or court is being established, the question of jurisdiction becomes very important. The basic common law rule is that civil proceedings before a domestic court or tribunal cannot be served on any person outside New Zealand unless this is expressly authorised by legislation. Courts do not have any inherent jurisdiction to authorise service against persons situated abroad.<sup>247</sup> So if a new court or tribunal is being established, and claims may be made against persons overseas, the legislation should expressly provide for service abroad. To ensure that service abroad only occurs in appropriate cases, it is often desirable to require the prior approval of the new court or tribunal, or of the High Court.

#### *Delinking substantive rights and jurisdiction to adjudicate*

Where New Zealand legislation creates new civil rights of action, issues arise in relation to both substantive rights and jurisdiction. Some statutes address these issues separately, creating a right to recover damages or obtain other relief in certain circumstances in one provision, and specifying in another provision the court or tribunal in which this right can be enforced. Other statutes merge these issues, by

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<sup>247</sup> See *Eyre v Nationwide News Pty Ltd* [1967] NZLR 851 at 852.

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providing that application can be made to a designated court or tribunal for specified relief. The merged approach is appropriate where the issues are purely domestic, and there is no real likelihood of the rights created by the statute being enforced in proceedings in overseas courts. However this approach is less appropriate where it is desirable to allow proceedings under the statute to be brought overseas, for two reasons.

First, reference to a particular New Zealand court raises questions as to whether the rights can be enforced overseas at all, or whether they can only be enforced in New Zealand before the specified court or tribunal. If it is consistent with the policy of the Act for the rights to be enforceable overseas, it is preferable to avoid any uncertainty on this point. It is better to set out the right to relief in one provision, and then to provide separately that if relief is sought in New Zealand, a specified court or tribunal has jurisdiction to hear the claim.<sup>248</sup>

Second, difficulties will arise in proceedings before a foreign court if a New Zealand provision confers a broad remedial discretion, rather than creating a right to certain relief in specified circumstances. Even if the provision on its face purports to give that discretion to any court or tribunal before which the matter falls to be determined, many overseas courts will not exercise a discretion conferred by the legislation of another country, in the absence of express authority to do so in domestic legislation. So the provision may not operate effectively outside New Zealand, rendering the rights conferred unenforceable in practice in cases where the defendant is not amenable to New Zealand jurisdiction.<sup>249</sup> The more likely it is that the statutory claims will need to be pursued outside New Zealand, the more desirable it becomes to

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<sup>248</sup> See for example the definition of “court” in s 2(1) of the Securities Act 1978 and the jurisdiction provision in s 65A, as inserted by the Securities Amendment Act 2002.

<sup>249</sup> Even if New Zealand legislation provides for proceedings to be brought against a person abroad, any judgment that results will not be enforceable against that person in most overseas countries unless they appear in and defend the New Zealand proceedings, or have previously agreed to submit to the jurisdiction of the New Zealand courts. In most cases where proceedings are issued against a defendant overseas and that defendant does not appear, a judgment given by the New Zealand court will be of no practical effect. It is also important to bear in mind that foreign countries do not enforce New Zealand judgments awarding non-money relief – in order to obtain effective injunctive relief against a defendant situated abroad, with no assets in New Zealand, it is usually necessary to bring the proceedings abroad.

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provide for rights to relief, rather than relying solely on broad remedial discretions conferred on a designated New Zealand court or tribunal.

For example, significant difficulties could arise in seeking compensation for a breach of the Fair Trading Act 1986 before a foreign court, as s 43 confers a very general discretion to grant relief. This can be contrasted with the corresponding provision in Australia, section 82 of the Trade Practices Act 1974 (Cth), which provides that a person who suffers loss or damage as a result of a breach of certain provisions of that Act may bring an action to recover the amount of that loss or damage. No discretion is involved in an action based on s 82, and there would be no difficulty in bringing such an action in a foreign court, where Australian law was the applicable law in accordance with the private international law rules applied by that court.<sup>250</sup>

### 16.3.3 Guidelines

Where New Zealand legislation creates civil rights of action, and cross-border issues are likely to arise, careful consideration should be given to questions of jurisdiction, and the relationship between substantive rights and jurisdiction.

Proceedings should be capable of being commenced against defendants outside New Zealand in appropriate cases, either under the general regimes for service abroad that apply in the High Court and District Court, or under a special regime provided for in the legislation. The Ministry of Justice should always be consulted where a special regime for service abroad is proposed.

If it is likely that claims under the legislation will be pursued in overseas courts, the liability regime should be designed to accommodate this possibility, by delinking provisions conferring substantive rights to relief and provisions conferring jurisdiction on a New Zealand court or tribunal to award relief. Where possible, broad remedial discretions should be avoided as foreign courts are generally unwilling to exercise discretions of this kind under another country's laws.

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<sup>250</sup> Sections 82 and 84A of the Commerce Act 1986 follow the same approach as the Australian provision, avoiding the difficulties posed by s 43 of the Fair Trading Act 1986 in relation to proceedings outside New Zealand.

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PART 4

ARE SPECIAL RULES REQUIRED FOR CRIMINAL OFFENCES WITH CROSS-BORDER ELEMENTS?

**16.4.1 Outline of issue**

The Crimes Act 1961 sets out default rules in relation to the territorial application of New Zealand criminal law. These rules will be appropriate in most cases. However in some contexts where there are significant cross-border factors, and the policy of the legislation requires a broader scope of application, special provisions may be required. Any such provisions should be consistent with the relevant international law principles, and should take into account the practical limits on New Zealand's ability to enforce its laws outside New Zealand.

The Mutual Assistance in Criminal Matters Act 1992 provides for certain specified forms of assistance in connection with criminal matters to be provided to, and sought from, foreign countries. The Act establishes a set of fairly limited default rules that is appropriate in most cases. But where legislation contemplates a high degree of cross-border cooperation, in particular in operating a regulatory regime, it may be desirable to provide for simplified and enhanced cooperation arrangements in connection with investigation and enforcement activities.

**16.4.2 Comment**

*Territorial application*

As noted above, sections 6 and 7 of the Crimes Act 1961 set out the general principles that govern the territorial application of substantive New Zealand criminal law. New Zealand criminal law does not generally apply to conduct occurring wholly outside New Zealand. However New Zealand law does contain a number of exceptions to this general rule, where jurisdiction to prescribe is exercised in respect of acts done outside New Zealand, based on:

- the nationality or allegiance to the Crown of the person in question;
- the effect on New Zealand's interests of the conduct in question, in particular where it is prejudicial to New Zealand's security;

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- universal jurisdiction in respect of conduct recognised as an offence under international law;
  - the provisions of a treaty authorising the exercise of jurisdiction in particular circumstances.

The general rules in the Crimes Act 1961 in relation to jurisdiction to prescribe should only be departed from in exceptional cases, where there is a clear case for New Zealand law to apply, and where it is reasonable to expect the persons to whom the legislation will apply to comply with New Zealand law (because of their links with New Zealand, or the links between their conduct and New Zealand), or with international standards which are reflected in New Zealand law.

So far as jurisdiction to adjudicate is concerned, two issues need to be borne in mind. The first is that as noted above, New Zealand law does not provide for criminal proceedings to be commenced against a person abroad and to proceed in their absence following notification to that person abroad.<sup>251</sup> The person must be present in New Zealand at the time when they are notified of the proceedings, and for the trial.<sup>252</sup> This is a very basic rule which is intended to respect the territorial jurisdiction of other States, and to protect the accused's right to a fair trial. It should not be departed from, except:

- pursuant to an arrangement with another State under which that State consents to the service of New Zealand criminal process in the territory of that State; and
- subject to safeguards designed to protect the right of the accused to the minimum standards of criminal procedure protected by section 25 of the New Zealand Bill of Rights Act 1990, and in particular the right to be present at the trial and to present a defence.

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<sup>251</sup> However, as noted above, proceedings before courts-martial can be initiated and conducted outside New Zealand.

<sup>252</sup> Though their presence may result from an extradition request made by New Zealand to another State in accordance with the Extradition Act 1999, which results in the person's return to New Zealand. Extradition is not however available against corporate defendants, or in relation to offences punishable by less than 12 months imprisonment.

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The second issue is that New Zealand courts do not hear criminal proceedings for breach of the laws of another country (this is an important difference from the civil context: New Zealand courts can, and do, hear civil claims in respect of wrongs that would not be actionable if they occurred in New Zealand). New Zealand law must provide that the conduct in question is an offence against New Zealand law even though it occurred outside New Zealand, if there is to be a trial before a New Zealand court.<sup>253</sup>

*Cross-border investigation and enforcement activity*

The information gathering and enforcement powers conferred by New Zealand legislation on the police and other agencies can generally only be exercised for the purpose of investigating, and taking action in relation to, breaches of New Zealand laws. In some cases with cross-border elements, this gives rise to practical problems where critical evidence required in another country is situated in New Zealand (or vice versa), or where the proceeds of a crime committed abroad are situated in New Zealand (or, again, vice versa).

The Mutual Assistance in Criminal Matters Act 1992 provides a general mechanism for addressing some of these difficulties, in connection with serious criminal offences. It enables requests to be made for assistance on a case by case basis, from other countries to New Zealand and from New Zealand to other countries. That Act and the Proceeds of Crime Act 1991 also provide for certain orders to be made in New Zealand in relation to proceeds of serious crime situated in this country, where criminal proceedings are pending abroad or where certain types of court orders in respect of those proceeds have been made abroad.

In some contexts, however, the general regime in the Mutual Assistance in Criminal Matters Act 1992 is too narrow, or too slow and cumbersome. In particular, where

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<sup>253</sup> For an example of an extension of this principle to enable certain offences committed overseas to be tried in New Zealand even though they may not have constituted an offence under New Zealand law at the time of their commission abroad, see s 8 of the International Crimes and International Criminal Court Act 2000. Note however that these acts would have constituted crimes under international law, and that s 8 applies the additional requirement that the conduct would have been an offence under New Zealand law at the time it occurred, had the conduct taken place in New Zealand.

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New Zealand and one or more other countries have closely coordinated regulatory regimes, the integrity and effectiveness of those regimes will often be enhanced by more extensive cooperation in investigation and enforcement activities, and shared policy objectives and cooperation arrangements remove the need for many of the substantive and procedural safeguards provided for in the 1992 Act.

Options for information sharing and cooperation in the exercise of information gathering and investigation powers are discussed in section 16.5 below. The possibility of more extensive provision for cross-border enforcement of regulatory decisions and court-imposed sanctions is discussed in section 16.6 below.

### **16.4.3 Guidelines**

The general rules in relation to criminal jurisdiction should only be departed from in exceptional cases. New Zealand legislation should not provide for jurisdiction to prescribe or jurisdiction to adjudicate in criminal matters in respect of acts done outside New Zealand, unless there is a clear case to do so. Any special jurisdictional rules should be consistent with the principles of international law outlined in section 16.2.2 above. The Ministry of Justice and the MFAT Legal Division should always be consulted before making special provision for New Zealand courts to have criminal jurisdiction in respect of matters occurring outside New Zealand.

In some cases it may be appropriate to supplement the general rules in relation to cross-border assistance in criminal matters with tailored regimes for cooperation in investigation and enforcement activity. Special regimes of this kind are most appropriate in the context of cross-border regulatory arrangements with other countries. These issues are discussed in more detail in sections 16.5 and 16.6 below.

## **PART 5**

### **WILL ANY REGULATORY AGENCY RESPONSIBLE FOR THE REGIME BE ABLE TO PERFORM ITS ROLE EFFECTIVELY IN CROSS-BORDER CASES?**

#### **16.5.1 Outline of issue**

Where legislation establishes a regulatory agency, or confers new responsibilities on a regulatory agency, it is important to consider whether the agency is likely to encounter cross-border issues which the legislation should take into account. Appropriate mechanisms should be included in the legislation to facilitate cooperation

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between regulators and cross-border enforcement activities, to support the integrity of the regulatory regime.

### **16.5.2 Comment**

The increasing ease of communications and dealings across borders has significant implications for many areas of regulation. Dealings that were almost exclusively domestic as little as a decade ago are now often carried out across borders – consider gambling, the provision of financial intermediary services, and purchase by consumers of goods and services using the Internet. These developments emphasise the limits of the regulatory reach of any one State, and require policy makers to explore the mechanisms that are available to achieve the goals of regulatory regimes despite these limits on regulatory reach.

Many New Zealand statutes provide for information sharing by New Zealand regulators with their overseas counterparts. The regulator is expressly authorised to provide information which it holds to corresponding agencies, subject to certain safeguards, and to receive and use information provided by those agencies. This represents a basic level of cooperation with overseas regulators, that should normally be provided for in the absence of clear reasons to the contrary. Regimes of this kind work reasonably well where the conduct that is being investigated by the overseas agency also falls within the purview of the New Zealand regulator.

However sophisticated parties can circumvent regimes of this kind, by locating their operations in one country and targeting their activities at one or more other countries. The result is frequently that the conduct is unlawful in the targeted country, but none of the investigative or enforcement powers conferred under the law of that country can be exercised in practice; in the country where effective action could be taken, on the other hand, there is no breach of the law. Prior to the 2002 amendments to the Securities Act 1978, for example, a firm in New Zealand offering investments to Australian investors without a prospectus in either country would be in breach of Australian law, but not New Zealand law. The Australian Securities and Investments Commission (ASIC) could not use its powers to obtain evidence, as all the relevant persons and documents would be in New Zealand. The New Zealand Securities Commission could not take any enforcement action in New Zealand to assist ASIC, as there was no breach of New Zealand laws, and the enforcement powers conferred by the Securities Act could only be used to investigate and prevent breaches of the New Zealand Act.

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A number of legal mechanisms are available to address these difficulties, where they impair the integrity and effectiveness of a regulatory regime. One response which is often appropriate is to provide that the New Zealand regulator's powers to obtain information can be exercised at the request of a corresponding overseas regulator, whether or not there has been a breach of the New Zealand regulatory regime. The provision of such assistance should generally be discretionary, and subject to appropriate safeguards including:

- a requirement for prior Ministerial consent, either on a case by case basis or in respect of classes of requests;
- provisions which ensure that the rights conferred by the New Zealand Bill of Rights Act 1990 are respected. In particular, the privilege against self-incrimination should be taken into account where coercive powers are used to require a person to provide information in New Zealand for use overseas. Either the person should be permitted to assert the privilege and decline to answer questions, or assurances should be obtained from the overseas agency as to the use to which the information will be put.<sup>254</sup>

In some contexts, it may be appropriate to go further and provide that certain conduct in New Zealand targeted at overseas countries falls within the scope of the New Zealand regulatory regime, and is unlawful. This has the effect of enabling both investigative and enforcement action in New Zealand. This approach is generally appropriate only where the conduct is always unlawful, and is not capable of being authorised by the regulator in the foreign country. Thus, for example, it may be desirable to extend a prohibition on misleading or deceptive advertisements concerning investments to advertisements published by a New Zealand company that are directed at overseas investors. But it would not be appropriate to extend a prohibition on offering securities to the public without a prospectus to offers from New Zealand to overseas investors, as if the offer is lawful in the target jurisdiction, it is positively undesirable to criminalise such conduct in New Zealand and restrict lawful cross-border commercial activities.

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<sup>254</sup> See for example sections 69F to 69I of the Securities Act 1978, as inserted by the Securities Amendment Act 2002.

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Provisions of this kind often need to be coupled with practical arrangements for cooperation between the New Zealand regulator and key overseas regulators (generally governed by memoranda of understanding between those regulators). Where cooperation arrangements will be essential if the regulatory regime is to operate effectively, it may be desirable to signal this in the legislation by expressly providing for the agency to have the power to enter into such arrangements.

Where coordination with one or more other countries is essential for the effective operation of a regulatory regime, it may also be appropriate to provide for:

- a power to prohibit actions taken in New Zealand that do not contravene New Zealand law because they are directed at persons outside New Zealand, but which would contravene the New Zealand regime if they were directed at New Zealanders. For example, it may be appropriate to enable a regulator to prohibit, or to seek a court order prohibiting, certain offers of goods or services to overseas consumers;
- enforcement in New Zealand of sanctions imposed in the other country for breach of a regulatory regime that corresponds closely with the New Zealand regime. This is only likely to be appropriate in the context of specific cooperation arrangements with another country. For example, the Securities Act 1978 provides for recognition regimes to be entered into with other countries, and contemplates mutual enforcement arrangements being entered into in conjunction with those regimes.<sup>255</sup>

### 16.5.3 Guidelines

Where legislation establishes a regulatory agency, or confers new responsibilities on a regulatory agency, it is important to consider whether the agency is likely to encounter cross-border issues which the legislation should take into account. In particular, if it is likely that the agency will need assistance from overseas regulators, and will receive requests for assistance from overseas regulators, appropriate mechanisms should be included in the legislation to facilitate cooperation that will

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<sup>255</sup> See Part 5 of the Securities Act 1978, and in particular sections 80-90.

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support the integrity of the regulatory regime.<sup>256</sup> It may also be appropriate to provide for application of the regulatory regime to cross-border activities, and for cross-border enforcement arrangements.<sup>257</sup>

The Ministry of Justice should be consulted in relation to any legislation providing for a cross-border assistance regime. Where the issue affects cross-border business activities, the Ministry of Economic Development should also be consulted.

## PART 6

### SHOULD THE LEGISLATION PROVIDE FOR RECOGNITION OR ENFORCEMENT OF OVERSEAS DECISIONS IN NEW ZEALAND, OR VICE VERSA?

#### 16.6.1 Outline of issue

One increasingly common response to the prevalence of cross-border issues is to provide for recognition or enforcement of decisions made by officials, regulators or courts in other countries. Recognition regimes serve a number of policy goals:

- they can reduce compliance costs, by providing that compliance with requirements in an overseas country will be recognised as satisfying the corresponding New Zealand requirements. This provides direct benefits to the persons who would otherwise be subject to multiple regulatory requirements. It also assists in providing New Zealanders with better access, at lower cost, to goods and services from overseas suppliers;
- they can reduce legal uncertainty and costs and remove incentives for forum shopping by providing that a determination on a particular issue in an overseas country will be recognised as determining that issue in New Zealand;

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<sup>256</sup> For an example of cross-border assistance provisions, see sections 69F to 69I of the Securities Act 1978, as inserted by the Securities Amendment Act 2002.

<sup>257</sup> For an example of a statutory recognition and application regime, which also provides for enforcement of penalties imposed under corresponding overseas regimes, see Part 5 of the Securities Act 1978, as inserted by the Securities Amendment Act 2002.

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- they can enhance the integrity of a statutory regime where cross-border issues impede enforcement activity, by facilitating cross-border enforcement of orders for compliance, or sanctions for breach.

### 16.6.2 Comment

Recognition and enforcement regimes are not new. The common law has for many centuries recognised foreign decisions affecting a person's status (marriage, adoption etc) and certain decisions of foreign courts in civil cases. There are also generic statutory regimes for the recognition and enforcement of some decisions of foreign courts in civil cases (see the Reciprocal Enforcement of Judgments Act 1934), and for the enforcement in New Zealand of a limited class of orders made in criminal proceedings (see the Mutual Assistance In Criminal Matters Act 1992).

In recent years, however, the increasing frequency with which cross-border issues arise has led to a renewed focus on the benefits of recognition and enforcement regimes.

#### *Recognition regimes to increase certainty and reduce compliance costs*

In some cases, New Zealand law provides for unilateral recognition of regulatory outcomes in other countries – for example, in relation to safety of electrical appliances. If appropriate standards are applied in other countries, it is often unnecessary to require a separate testing and certification process in New Zealand – the outcomes of the Australian or Canadian or European or United States regimes can simply be accepted as meeting the New Zealand standards.

In other cases, recognition regimes are founded on bilateral arrangements with another country. The most far-reaching example is the Trans-Tasman Mutual Recognition Arrangement, under which New Zealand and Australia permit goods to be sold in one jurisdiction if they can lawfully be sold in the other, and provide for a person carrying on a registered occupation in one jurisdiction to be entitled to be registered to carry on that occupation in the other. Mutual recognition arrangements of this kind depend on a reasonable degree of convergence of the regulatory regimes of the participating jurisdictions – while the domestic regimes may differ in matters of detail and in procedural requirements, it is generally necessary for the minimum mandatory standards underpinning those regimes to be substantially equivalent.

Where New Zealand legislation prescribes standards or establishes regulatory requirements, consideration should always be given to whether there are corresponding regimes in other countries, and if so, whether compliance with those regimes should be treated as satisfying the New Zealand requirements, either without more, or with some limited “top-up” requirements. Because the countries to which recognition is extended and the terms of that recognition may vary over time, it is often appropriate to provide for regulations to be made implementing recognition regimes of this kind.

#### *Enforcement regimes*

The limits on the regulatory reach of New Zealand and other countries were discussed earlier in this chapter. Cooperation in the detection and investigation of breaches of regulatory regimes can make a significant contribution to addressing those limits, and enhancing the effectiveness of domestic legislation. However difficulties also arise in the cross-border enforcement context where relief is obtained in one jurisdiction, but it cannot be effectively enforced in that jurisdiction. Enforcement regimes go some way to addressing these difficulties.

In the civil context, some final money judgments from other countries can be enforced in New Zealand at common law or under general statutory regimes. But New Zealand law does not generally provide for enforcement of foreign judgments in the nature of penalties, orders of an interim nature (as opposed to final judgments), or injunctions and other forms of non-monetary relief. In some contexts, it may be desirable to provide for enforcement of a wider range of foreign civil orders and judgments, or for the grant of interim relief in New Zealand in support of proceedings abroad. For example, there is a special enforcement regime in the context of certain trans-Tasman breaches of competition legislation, under which a wide range of orders made by the Federal Court of Australia (including interim orders, civil penalty orders, and non-money judgments) can be registered and enforced in New Zealand.

There are also special regimes for trans-Tasman transfer of protection orders and protection proceedings, and for enforcement of maintenance payments and child support payments due under the laws of certain other countries. The child support regime illustrates the potential for enforcement regimes to extend beyond court orders, to obligations imposed by legislation or by some other decision-maker exercising a statutory power.

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If a special scheme for cross-border enforcement of decisions made under a statutory regime will significantly enhance the effectiveness of that regime, steps should be taken to negotiate appropriate arrangements with Australia or other relevant countries, and legislation should provide for an appropriate recognition and enforcement regime. Where it is likely that arrangements will be entered into with a number of countries over time, it is often desirable to set out the core recognition and enforcement regime in the legislation, with the ability to specify in regulations the countries and the types of orders to which the regime applies.

Criminal sanctions imposed in New Zealand are not generally enforceable abroad, or vice versa.<sup>258</sup> The only significant exception to this rule is found in the Mutual Assistance in Criminal Matters Act 1992 and the Proceeds of Crime Act 1991, which together provide for enforcement in New Zealand of certain foreign orders relating to the proceeds of serious crimes. In some contexts, especially where New Zealand establishes a cooperative regulatory regime with Australia or another country, it may be appropriate to go further than this general legislation and make specific provision for enforcement of interim orders made by a regulator or the courts in connection with a breach of the regime, and of sanctions imposed for a breach of the regime. It is not likely to be appropriate to provide for enforcement in New Zealand of custodial orders made abroad, but fines and a wide range of remedial orders imposed by foreign courts could in principle be enforced in much the same manner as foreign civil judgments.

A tailored regime of this kind may be appropriate where the integrity of the cooperative regime requires the regime to be effective across borders, and in particular where:

- a regulator in one country has jurisdiction to make orders against a person based in the other country to prevent or remedy breaches of the regime, and in the event of non-compliance enforcement action will be needed in the latter country; or

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<sup>258</sup> Although where a person sentenced to a term of imprisonment has absconded from New Zealand, it may be possible to seek to extradite that person to New Zealand, and vice versa.

- court action in one country is likely to be followed by enforcement against persons or assets in the other country.

### **16.6.3 Guidelines**

Where New Zealand legislation prescribes standards or other regulatory requirements, consideration should be given to providing for recognition of corresponding regimes in other countries.

Where legislation provides for civil remedies, and it is likely that enforcement will be required outside New Zealand, consideration should be given to the need for special arrangements for cross-border recognition and enforcement of orders made by the court in order to ensure that the legislation achieves its policy goals. If an enhanced cross-border recognition and enforcement regime is appropriate, the legislation should provide for such a regime, and steps should be taken to enter into appropriate arrangements with other countries.

Where the integrity of a regulatory regime requires the regime to be effective across borders, consideration should be given to the need for a tailored regime for enforcement of orders made by regulatory bodies to prevent or remedy breaches, and of criminal sanctions (fines, and certain other non-custodial orders) imposed by courts in respect of breaches of the regime. If a cross-border enforcement regime is appropriate, the legislation should provide for such a regime, and steps should be taken to enter into appropriate arrangements with other countries.

The Ministry of Justice and the MFAT Legal Division should be consulted before embarking on the design of a cross-border recognition and enforcement regime, or entering into discussions with officials from other countries about reciprocal enforcement arrangements. Where the issue affects cross-border business activities, the Ministry of Economic Development should also be consulted.

## CHAPTER 17

### BILLS AFTER INTRODUCTION

#### INTRODUCTION

##### **Background**

After a Bill is introduced, it will proceed through several stages, both in the House and in select committee. After it has passed its third reading, it becomes law when the Sovereign or the Governor-General assents to it and signs it in token of that assent.<sup>259</sup> It is then an Act of Parliament. Its provisions come into force at the time or times specified in the “commencement” section; otherwise, on the day after the Royal assent.<sup>260</sup>

A Bill’s main stages are its introduction, first reading, select committee process, second reading, committee of the whole House, and third reading, followed by the Royal assent. Each of these, for a Government Bill, is discussed briefly below in turn.

The emphasis of the discussion of issues in this chapter is on how departmental advisers can facilitate a Bill’s progress after introduction, with particular reference to what happens at select committee and the committee of the whole House, as it then that officials are most intensely engaged with the passage of the Bill.

New Zealand has a unicameral legislature. Unlike legislatures overseas, there is no Second Chamber or Upper House to scrutinise legislation. This crucial role is carried out in New Zealand by select committees. It will often only be at the stage that a Bill comes before a

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<sup>259</sup> See section 16 of the Constitution Act 1986.

<sup>260</sup> See section 8 of the Interpretation Act 1999.

select committee that members of Parliament and the public get an opportunity to examine the Bill in detail. Almost all Bills are referred to subject select committees. Both the policy and detailed provisions of Bills are robustly tested in the select committee process. Bills can be altered radically as a result of consideration by select committees. Bills may also be changed significantly during the Committee of the Whole House stage. Both the select committee and committee stages bring officials into direct contact with the legislative process. This is both challenging and fascinating. It is important that officials understand the processes and their role.

A Bill may have to change to accommodate the political realities of MMP, which require acceptable compromises of policy, especially in non-core areas of a Bill's policy objectives. Pressure for changing a Bill is felt most at its select committee and committee of the whole House stages.

Not all Bills pass through all the usual stages, and there are variations of the procedures a Bill may follow.<sup>261</sup> For a full explanation of what may happen to a Bill after introduction, as well as of the roles played by select committee members, the Office of the Clerk, officials, parliamentary counsel and others, see—

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<sup>261</sup> For example, if a Bill is passed under urgency, it may not be referred to a select committee. Appropriation Bills and Imprest Supply Bills are not referred to a select committee. Occasionally, with the agreement of the Business Committee or leave of the House, the committee of the whole House stage of a Bill is omitted.

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- Standing Orders of the House of Representatives (2005):
  - Speakers' Rulings (2005):
  - Parliamentary Practice in New Zealand, David McGee, 3rd edition, 2005, Wellington: Dunmore Publishing Ltd:
  - Public Servants and Select Committees – Guidelines (State Services Commission):
  - Step by Step Guide (Cabinet Office):
  - Cabinet Manual (2001):
  - Statute Law in New Zealand, J.F. Burrows, 3rd edition, 2003, Wellington: LexisNexis:
  - Parliamentary Counsel Office Drafting Manual (when publicly available):
  - Guide to working with the Parliamentary Counsel Office, 2nd edition, 2005.

#### *A Bill's introduction into the House*

The Clerk of the House announces to the House the introduction of a Bill.<sup>262</sup> Notice must be given to the Clerk of the intention to introduce the Bill.<sup>263</sup>

When a Bill is introduced, it is in a printed version which has an explanatory note preceding the text of the Bill.<sup>264</sup> The explanatory note contains an explanation of the policy that the Bill implements (the “general policy statement”), prepared by officials, and a clause-by-clause analysis of the Bill, prepared by the drafter from Parliamentary Counsel Office (“PCO”) who drafted the Bill. If a Business Compliance Cost Statement has been prepared for the Bill, it will be included in the explanatory note, along with the Regulatory Impact Statement.

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<sup>262</sup> See SO 281

<sup>263</sup> See SO 275

<sup>264</sup> See SO 258

A Bill's introduction to the House is followed by a pause before it has its first reading, which is no sooner than the third sitting day after the Bill's introduction<sup>265</sup>.

The purpose of both the pause and the explanatory note is to allow Members to become familiar with the Bill, understand its content, and prepare for debate on it.

At the time a Government Bill is introduced, the Attorney-General brings to the attention of the House any apparent inconsistency between its provisions and the New Zealand Bill of Rights Act 1990.<sup>266</sup>

### *First reading*

The first reading debate provides an opportunity for the Minister in charge of the Bill to describe the Bill's purpose, propose its referral to a particular select committee, and indicate whether any special instruction should be given to the select committee which is to consider the Bill; for example, to report the Bill back to the House by a particular date.<sup>267</sup> The first reading debate, limited to 2 hours, is usually on the general principles of the Bill. If the House agrees with the motion that the Bill be read a first time, it is then referred to a select committee.

### *A Bill at select committee*

Nearly all Bills are referred to a select committee. The New Zealand legislature is unusual in its routine referral of Bills to select committees, and the extent to which Bills may be subject to change in select committee.

The following observation is particularly apposite: "It is not unknown for bills to emerge from select committees almost totally rewritten ..... Close attention to legislation has occurred under minority governments since the majority of committee members is frequently not from the government."<sup>268</sup>

The purpose of the select committee process is essentially—

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<sup>265</sup> See SO 282

<sup>266</sup> See section 7(a) of the New Zealand Bill of Rights Act 1990. Such a report is called a "section 7 report". Another benefit of the pause between introduction and first reading is that the Attorney-General can examine the provisions of any non-Government Bill for consistency with the Act, so as to report to the House as soon as practicable any apparent inconsistency: See section 7(b) of the New Zealand Bill of Rights Act 1990.

<sup>267</sup> See SO 284

<sup>268</sup> Bridled Power, Geoffrey Palmer and Matthew Palmer, 4<sup>th</sup> edition, 2005, Melbourne, Oxford University Press, page 197

- to provide an opportunity for the House to scrutinise a Bill, through a specialist subject committee:
- to recommend whether it should be passed and any changes<sup>269</sup>, from tidying-up of minor errors to substantive changes:
- to consider public submissions:
- to obtain the advice of the department responsible for the Bill and the Minister, if appropriate, on any aspects of the Bill.

The default time period a Bill spends in select committee is limited to 6 months<sup>270</sup>. During that time, the select committee will—

- call for and hear public submissions on the Bill:
- receive an initial briefing on the Bill from the department responsible for the Bill:
- consider a report from the department recommending changes to the Bill:
- decide whether to request those or other changes to the Bill:
- consider the draft of the amendments requested:
- decide whether it agrees with those amendments as drafted:
- determine whether to recommend to the House that the Bill be passed:
- prepare a report to the House on the Bill with a commentary on the amendments to it that the committee has agreed upon:
- report the Bill back to the House in its amended form, along with the committee's report.

Under MMP, select committees often do not have a Government majority, and may not have a Government or coalition chairperson. It cannot be expected that a Bill will pass unchanged through the select committee process simply on the basis that the Bill's provisions represent settled Government policy. It has been noted that "(s)elect committees without government majorities are more prone to accept amendments than they were under FPP. It is possible to re-litigate aspects of the policy quite fundamentally at select committees on occasion".<sup>271</sup>

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<sup>269</sup> See SO 287(1)

<sup>270</sup> See SO 291: The time for the report may be extended by the Business Committee. Occasionally, if a measure is regarded as urgent, the time for reporting may be much sooner than 6 months. Prior to this default time period, Bills could remain at select committee for lengthy periods.

<sup>271</sup> See page 374 of the 4<sup>th</sup> edition (2005) of Geoffrey Palmer and Matthew Palmer's *Bridled Power*.

Select committees often recognise however that there is a high probability that a Government Bill will pass and consequently put their efforts into making the legislation of as high a standard as possible, whether or not they support the overall policy of the Bill.

The select committee calls for public submissions on the Bill, and it usually requests submissions to be made within a month after the first reading. The purpose of public submissions on a Bill is to provide an opportunity for interested organisations and individuals to give their opinions of the Bill.

While some submissions may express support for the Bill and seek no changes to it, the submission process is valuable for its ability to draw out those submissions which put issues or concerns raised by a Bill before the committee, with a view to persuading the committee to recommend changes to the Bill.

Submissions are made in writing, but submitters can indicate whether they wish also to appear before the committee and make further oral submissions to it. Depending on the topic of the Bill, there may be a handful of submissions, hundreds, or even thousands.

It is part of the role of the departmental advisers to summarise the submissions made on the Bill, advise the committee on them, and recommend to the committee any appropriate changes based on those submissions. Select committees also frequently request advice and reports from officials on particular issues raised by a Bill.

Submissions may encourage non-Government committee members to take issue with Government policy in the Bill as introduced. Not having been privy to the policy iterations preceding the Bill's introduction, those committee members may be persuaded by what is, to them, a novel argument. They may be unaware that its weight had already gone into the scales during the balancing exercise of policy development. Officials should ensure that they remain aware of how policy decisions reflected in the Bill were reached, to prepare for challenges to a Bill's underlying policy.

The departmental report<sup>272</sup> forms the basis for most of the amendments the select committee requests be made to a Bill. The select committee considers the

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<sup>272</sup> See Part 1, below, for a discussion of the departmental advisers' role in regard to the departmental report.

departmental report and decides by voting whether to accept each of its recommendations. PCO prepares a draft of the amendments to which the select committee has agreed and goes through it with the departmental advisers to ensure it reflects what the committee has requested.

When PCO and the departmental advisers have settled the draft, the select committee examines it with the assistance of the drafter. This process is called “consideration”. The select committee votes on whether or not to accept the draft amendments, in a process called “deliberation”. Any proposed amendment must receive a majority of the votes: tied votes are equivalent to a rejection of the amendment. There is no proxy voting during deliberation or at any other select committee meetings.

When a select committee reports back to the House on a Bill, it states whether or not it recommends that the House pass the Bill, and provides a commentary to explain what changes it has recommended be made to the Bill, and the reasons for those changes<sup>273</sup>. Minority views may be stated as such in the commentary.

The reported-back version of the Bill (called the “revision-tracked” Bill) shows amendments by marking the proposed textual changes, in the form of crossed-out text or inserted text, into the version of the Bill as it was introduced. Each amendment is shown as either one which has been agreed to unanimously by the committee, or by a majority<sup>274</sup>. Both the commentary and the method of showing amendments to the text are designed to make it clear to Members how the select committee has agreed that the Bill as introduced should be amended<sup>275</sup>.

The department responsible for the Bill acts as adviser to the select committee as it considers the Bill. Typically, this will require officials to—

- provide the committee with an initial briefing on the Bill before the committee begins to hear submissions:
- provide advice and reports on particular issues raised by the Bill or that arise from public submissions:
- provide a departmental report which summarises and comments on submissions, and makes recommendations for changes to the Bill arising from the submission process or from any changes the Government wishes to

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<sup>273</sup> See SO 287

<sup>274</sup> See SO 288

<sup>275</sup> Prior to changes to the Standing Orders in 1996, the House was informed of amendments proposed by the select committee by its Chair addressing the House and describing the changes which the committee proposed. Textual amendments consisted of slips of paper pasted into a copy of the Bill as introduced.

- make:
- work with PCO on the drafting of amendments to the Bill:
  - check the draft commentary prepared by the Clerk's Office for its accuracy in describing amendments made by the committee.

The "hands on" approach to the scrutiny of Bills and the extent of changes has obvious strengths, but also disadvantages. The Bill may become less coherent if new policy matters are added or changes are made to secure individual or party support. Changes to one area of a Bill may sit awkwardly with some of its other provisions. While a select committee can examine the Bill to decide whether it is desirable to amend it on the basis of an adverse section 7 report from the Attorney-General, amendments proposed by the select committee are not checked routinely for consistency with the principles of the New Zealand Bill of Rights Act 1990 and may be inconsistent with them.

Officials should check whether changes proposed to a Bill in select committee create internal inconsistency, or conflict with other legislation. Every effort should be made to ensure that the Bill remains consistent with the Guidelines.

### *Second Reading*

Again, after the Bill is reported back, there is a pause before the second reading, in order that Members can become familiar with the commentary of the select committee and the Bill as reported back by it. The second reading does not take place before the third sitting day after the Bill has been reported back<sup>276</sup>.

The second reading debate may last up to 2 hours. The issues discussed by Members during the debate may give officials an indication of what remains contentious about the Bill, indicating what further amendments to it may be proposed by Members for the committee of the whole House stage, or what the Minister may need to clarify further for the House about the Bill's policy and provisions.

All unanimous amendments recommended by the select committee are agreed to by agreeing to the Bill's second reading, and agreement to all majority amendments is treated as the subject of a single question<sup>277</sup>.

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<sup>276</sup> See SO 292

<sup>277</sup> See SO 294

*Committee of the whole House*

The debate at the committee of the whole House stage provides an opportunity for the House to consider and debate the Bill in detail. The purpose is to determine whether the Bill meets the principles and objects of the Bill as read a second time<sup>278</sup>.

The Government may propose further changes, which may be substantive and represent a new policy objective or may be minor technical changes to correct flaws in the Bill. There is no time limit on this debate, and it presents the last opportunity to amend the Bill, by Supplementary Order Paper (“SOP”)<sup>279</sup> or by “table”<sup>280</sup> amendment.

This debate represents a final chance for the Government to undo amendments made at select committee: “...the government can, and often does, try to assert itself again at the Committee of the Whole where the opinion of the select committee does not reflect the opinion of the majority in the House.”<sup>281</sup>

Officials attend the House during this stage to advise the Minister in charge of the Bill about any points concerning the Bill which arise during the debate and also on any amendments proposed by Members. The PCO drafter also attends to advise on drafting issues, whether or not there is an SOP containing proposed amendments.

Bills are debated Part by Part or, if the Bill is not divided into Parts, clause by clause. Thus, division of a Bill into a small number of Parts reduces the House time needed to debate it, a factor encouraging that organisation of a Bill’s contents, given the constraints on House time. There is also a separate debate, usually the final debate, on the “preliminary” clauses of the Bill, that is, the Title clause and the commencement clause. Any Schedule is debated along with the Part or clause to which it relates.<sup>282</sup>

A Bill which is to become 2 or more Acts, such as a Statutes Amendment Bill which amends several statutes, is divided at the end of the committee of the whole House stage into its component Bills, by means of a “break-up” SOP.

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<sup>278</sup> See SO 297

<sup>279</sup> A Supplementary Order Paper: See Part 2, below for a discussion of what officials need to consider in relation to SOPs.

<sup>280</sup> A proposed amendment which is not printed. These may be photocopies of manuscript proposed amendments. They are brought to the attention of the House by placing them on the table in the House.

<sup>281</sup> See page 374 of the 4<sup>th</sup> edition (2005) of Geoffrey Palmer and Matthew Palmer’s *Bridled Power*.

<sup>282</sup> See SO 298

Occasionally a Bill may have to go back into the House prior to its third reading for a further committee of the whole House stage. This is called “recommittal”.<sup>283</sup> Recommittal may be preferable to later amendment of an Act, and it is only ever undertaken to correct an error in a Bill, because amendment is not possible during a Bill’s third reading. Officials should check the Bill carefully before and during the committee of the whole House stage for anything which may need correction, to avoid recommittal, if possible. For example, a Bill may have spent so long in the stages after its introduction that the original commencement date has passed.

It may be desirable for the House to depart from the usual sequential debate on clauses and Parts, and to vote on the clauses or Parts of the Bill in an order other than the one in which they occur in the Bill. For example, an earlier Part of the Bill, such as an outline of a Bill’s Parts, may be affected by a proposed change to a later Part. Officials should raise the matter with the Minister in charge of the Bill and the Clerk of the House as soon as the need for a different sequence of debate becomes a possibility.

### *Third reading*

When the chairperson’s report is adopted by the House, the Bill is set down for its third reading on the next sitting day. If the House is not proceeding with the remaining stages of the Bill under urgency, the Bill will be reprinted prior to its third reading with the amendments agreed to by the House in the committee of the whole stage.

The third reading debate may be up to 2 hours on the Bill. Debate is limited to general principles, and debate on previously proposed but unsuccessful amendments is out of order.<sup>284</sup> There is little for officials to do at this stage in regard to the Bill’s passage, other than to assist the Minister’s office in the preparation of any planned media release about the new statute.

A Bill is passed by the House when the House has agreed that the Bill be read a third time.<sup>285</sup>

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<sup>283</sup> See SO 307

<sup>284</sup> See page 390 of the 3<sup>rd</sup> edition (2005) of David McGee’s *Parliamentary Practice in New Zealand*.

<sup>285</sup> See SO 310

*Royal assent to a Bill*

A Bill becomes an Act of Parliament when it receives the Royal assent. The Clerk of the House is responsible for preparing a copy of the Bill for the Royal assent. In practice, the Office of the Clerk prepares a “proof assent”, that is, a proof copy of the Bill incorporating all the changes made to the Bill as introduced by the House in the select committee and the committee of the whole stages. The proof assent copy is carefully checked by the Office of the Clerk and by the PCO.

In preparing the Bill for assent, amendments of a verbal or formal nature may be made and clerical or typographical errors may be corrected by the Clerk.<sup>286</sup> For example, a Bill that has been amended extensively during its passage through the House may require renumbering and changes to internal cross-references. Preparation of the proof assent can be time-consuming, especially for long and complex Bills and it is not uncommon for there to be several versions of a proof assent copy of a Bill. The PCO may provide a proof assent copy of a Bill to the instructing department to check, particularly if it is long and complex.

The Clerk presents 2 copies of the Bill to the Governor-General for Royal assent. When the Bill has received the Royal assent, the Clerk deposits one copy with the Registrar of the High Court at Wellington and retains the other.<sup>287</sup>

**Issues**

During the stages through which a Bill passes after introduction and before becoming an Act of Parliament, the following issues may arise and are discussed in this chapter:

Part 1: Are the recommendations in the departmental report and in any supplementary report appropriate?

Part 2: Have amendments to the Bill in any Government SOP been prepared in accordance with the Guidelines?

Part 3: Have any scope issues been anticipated and addressed?

Part 4: Do the financial veto provisions of the Standing Orders apply?

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<sup>286</sup> See SO 312

<sup>287</sup> See SO 313

## PART 1

## ARE THE RECOMMENDATIONS IN THE DEPARTMENTAL REPORT AND IN ANY SUPPLEMENTARY REPORT APPROPRIATE?

**17.1.1 Outline of issue**

After the select committee receives and hears submissions on a Bill, the department responsible for the Bill writes a report, called “the departmental report”, for the committee.<sup>288</sup> Officials should ensure that this report’s discussion of issues and its recommendations, and those in any supplementary report, assist the select committee in deciding what changes should be made to the Bill.

**17.1.2 Comment**

Departmental reports can take a variety of forms. The departmental report usually contains an overview of the topics traversed in the submissions. The report should also summarize the submissions made on each clause, with discussion and analysis of the issues raised by the submissions, and make a recommendation or recommendations with regard to each of the issues and the changes proposed generally and for each clause. It is on the basis of the select committee’s acceptance or rejection of the recommendations in the departmental report that PCO prepares a “revision-tracked” version of the Bill, reflecting changes which the select committee has requested.

The departmental report provides an opportunity for the department to make recommendations beyond those suggested by the submitters. The submissions themselves, or the time for reflection afforded by the period between introduction of the Bill and the closing date for submissions, may suggest

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<sup>288</sup> If more than 1 department is responsible for administering an Act, or different parts of an Act, providing the departmental report will be a shared task also.

some further possible refinement of the policy objectives in the Bill as introduced. Officials should consult their Minister about new ideas. A further Cabinet decision may be required if an amendment may be necessary on which no Cabinet decision has been made or which does not accord with an earlier Cabinet decision.

Drafts of the departmental report should be shown to the PCO drafter, who will provide comments to the department. The report should always contain a standard recommendation that PCO be authorised by the committee to make any changes of a technical or drafting nature that may be required. This allows PCO to fine-tune such matters as punctuation and drafting style. It is helpful for PCO, and as a means of reference during the Committee's later consideration of draft changes to the Bill, if the recommendations are numbered individually.

Officials should always avoid recommending particular wording for suggested changes, unless done in conjunction with PCO. As with the drafting of the Bill itself, it is important to convey what the proposed changes are intended to achieve, and leave it to the PCO drafter to determine how this is best achieved.

The provisions proposed in recommendations in the departmental report should themselves conform to the Guidelines. For example, officials should be aware of a possible conflict with the principles of the New Zealand Bill of Rights Act 1990 when proposing new powers of detention and of possible adverse retrospectivity problems.

#### *Supplementary reports*

After officials present the departmental report to the select committee, the committee members may require officials to provide the committee with further reports on various questions or issues which arise. These questions may cover a wide range of topics. For example, the committee may request a report on the current case law on an existing legislative provision, the statistical incidence of a particular condition or event, or the feasibility of another approach to a problem the Bill is trying to address.

Officials should give objective advice about alternative approaches. Officials should also point out any foreseeable difficulties which would be caused by an alternative approach, for example, any inconsistency between a possible approach and any Cabinet policy approvals, or a potential conflict with other legislation.

When preparing supplementary reports, officials should bear in mind generally the same considerations and constraints that apply to departmental reports, and specifically those which apply to the recommendations in departmental reports, as discussed above.

### 17.1.3 Guidelines

Officials should ensure that recommendations in a departmental report or supplementary report for changes to a Bill—

- are consistent with the Bill's overall policy objectives as agreed to by Cabinet:
- are within the scope of the Bill, or of the Act it amends (if it is an amending Bill).<sup>289</sup>
- conform to the LAC Guidelines, including such matters as conformity to principles in the New Zealand Bill of Rights Act 1990
- have no more than a minor effect on the government's fiscal aggregates or any Vote.<sup>290</sup>

## PART 2

### HAVE AMENDMENTS TO THE BILL IN ANY GOVERNMENT SOP BEEN PREPARED IN ACCORDANCE WITH THE GUIDELINES?

#### 17.2.1 Outline of issue

An SOP is a proposal to amend a Bill after introduction. The amendments in the SOP are additional to, or instead of, any changes that may be recommended by the select committee considering the Bill.

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<sup>289</sup> See Part 3.

<sup>290</sup> See Part 4.

### 17.2.2 Comment

An SOP is a supplement to the House's Order Paper. It is a printed document containing proposed amendments to a Bill that has already been introduced.

SOPs can be prepared and tabled in the House at any time up to and including the committee of the whole House stage of a Bill. Government SOPs are always drafted by PCO in consultation with the department responsible for the Bill, and are usually moved by the Minister in charge of the Bill at the committee of the whole House stage.

In the preparation of any SOP, officials must revisit the LAC Guidelines Checklist, as the same questions arise for an SOP as for the Bill itself. For example, officials should be aware of the need to ensure consistency with the principles in the New Zealand Bill of Rights Act 1990, the Treaty of Waitangi, other legislation in the same area as the Bill, and general legal principles, such as avoiding retrospectivity.

An SOP may also be referred to the select committee to which the Bill has been referred and be considered along with the Bill. This procedure is more likely if the SOP contains new policy matters. Public submissions on the SOP may be called for by the committee. It will also receive the same sort of scrutiny that the Bill itself must receive. For example, if the SOP proposes any regulation-making powers, the Regulations Review Committee may examine it and report on it. An SOP before a select committee may even be subject to a Bill of Rights Act vetting additional to that undergone by the Bill prior to its introduction.<sup>291</sup>

Once a Bill is back in the House, any Member can table an SOP on the Bill. The Minister in charge of the Bill may table an SOP containing amendments the Government wishes to make to the Bill. These may range from substantial changes to minor technical changes of a tidying up nature.

An SOP which is introduced after the Bill is reported back to the House may come from a Member from one of the opposition or other minority parties, with the aim of making amendments on specific issues viewed as crucial by

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<sup>291</sup> See [www.justice.govt.nz/bill-of-rights](http://www.justice.govt.nz/bill-of-rights) for a Bill of Rights vet in October 2004 of an SOP, the "Restricted Substances" SOP to the Misuse of Drugs Amendment Bill (No 3).

that party. The Government may wish to lend its support to such an SOP, either because the Government agrees with the amendment proposed by that Member, or the support of that other party is necessary to the Government so that the Bill can pass. The latter situation is more likely to occur in an MMP Parliament than previously. When the Government supports such an SOP, it may direct PCO to draft it, and officials may also be required to advise.

Officials should examine any SOP which they have not prepared, but to which it seems possible that the House may agree, to see whether the amendments proposed in it will create inconsistencies with the rest of the legislative scheme of the Bill, and in turn require further amendment to be made to the Bill. Although often very little time is available to officials for analysis, it is worth using some of that time to go through the LAC Guidelines Checklist.

### **17.2.3 Guidelines**

An SOP should conform to the LAC Guidelines for a Bill, and officials should use any time available to them for considering an SOP to check its conformity with the Guidelines, its consistency with the rest of the Bill, and its conformity to other relevant legislation and to general legal principles, as well as identifying whether the SOP will in turn require further amendment to be made to the Bill.

## **PART 3**

### **HAVE ANY SCOPE ISSUES BEEN ANTICIPATED AND ADDRESSED?**

#### **17.3.1 Outline of issue**

A proposed amendment can be on any topic, so it may well raise questions of scope. The scope of a Bill is the topic, or range of topics, it covers<sup>292</sup>. A question of scope is one about a proposed amendment's relevance to the subject matter of the Bill. Any amendment to a Bill which is proposed at any

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<sup>292</sup> For a comprehensive discussion of this concept, see page 376 of the 3<sup>d</sup> edition (2005) of David McGee's *Parliamentary Practice in New Zealand*.

time after its introduction should be within the scope of the Bill as introduced. That is to discourage Parliament from passing laws on topics other than those that have been signalled clearly to the public, and to the House itself, without proper scrutiny.

### **17.3.2 Comment**

If a question of scope arises when a Bill is before the select committee, the Chair of the committee refers the question to its clerk, who will seek advice from the Office of the Clerk. Officials can also ask for a provisional opinion of a proposal in outline, before it is drafted.

However, even an amendment which appears to be on much the same topic as the Bill itself may not be within its scope. For example, an SOP to an amending Bill, dealing with one Part of the Act which the Bill amends, may be outside the scope of a Bill which, as introduced, deals only with another Part of that Act.

If an SOP contains amendments to a Bill that are out of scope, the House must technically instruct the committee of the whole to consider the SOP. This is a debatable motion on which there is no time limit, although the House can agree to a time limit. The House can, and sometimes does, by leave agree to consider an SOP that is out of scope without requiring an instruction and associated debate. Typically, this occurs if the amendments, although out of scope, are technical, uncontroversial, or otherwise have the complete support of the House.

Whether proposed amendments are within the scope of a Bill can give rise to difficult questions. If there is any doubt, the advice of the Office of the Clerk should always be sought. Parliamentary Counsel can also advise departments. The final decision on scope issues, however, is made by the Speaker who will receive advice on the matter from the Clerk of the House.

Questions of scope may arise whenever an amendment to a Bill is proposed, including when a select committee is preparing to recommend amendments to a Bill. If a question as to scope arises when a Bill is still before the select

committee,<sup>293</sup> the Chair of the committee will refer the question to the Committee Clerk, who will seek advice from the Office of the Clerk. The Chair will then rule on the matter.

### 17.3.3 Guidelines

Always seek advice early as to whether an SOP or other proposed amendment may be out of scope. If it is, consider the following possibilities:

- the amendments may have to be part of a later Bill;
- it may be possible for the House to give leave for the SOP to be considered without a debate or with a time-limited debate;
- the Government may wish to proceed even though leave is not likely to be given.

## PART 4

### DO THE FINANCIAL VETO PROVISIONS OF THE STANDING ORDERS APPLY?

#### 17.4.1 Outline of issue

Any amendment to a Bill proposed by a select committee and any amendment to a Bill proposed after the Bill is reported back to the House may risk incurring a financial veto if its effect would be to have more than a minor impact on the Government's fiscal aggregates or the composition of a Vote.<sup>294</sup> It is important to be aware, therefore, of the financial consequences of any proposed amendment, whatever its form (such as SOP, or "table" amendment) or source (such as select committee, Government Member, or other Member).

#### 17.4.2 Comment

The financial consequences of a Bill, both to the Government and to the public, are assessed as part of the policy development associated with the

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<sup>293</sup> A select committee may recommend only amendments that are relevant to the subject matter of the Bill: see SO 288. The same is true for the committee of the Whole House: See SO 297.

<sup>294</sup> See SO 318 to SO 322.

Bill. Cabinet agrees to a Bill on the basis of its known likely costs. The same is not always true for amendments to a Bill proposed after it is introduced. Those amendments may be suggested by a select committee or by Members in the committee of the whole House stage.

In addition to the many other matters which need to be considered when statutory provisions are developed, a proposed amendment to a Bill may have fiscal consequences if it is passed. Examples include any amendment which would create a new department or a further demand on the resources of an existing Government-funded agency. Any Vote which will be affected by the amendment is also relevant to a potential financial veto. The Standing Orders set out the details of the financial veto provisions at SO 318 to 322.

Officials should not overlook the possible fiscal consequences of amendments proposed by a select committee, or proposed after the Bill is returned to the House, or even passed by the committee of the whole House. Cabinet Office Circular CO (07) 2 sets out in full the financial veto procedure and the actions required of officials should the situation arise that the veto may need to be invoked.

A financial veto can be exercised when amendments to a Bill are proposed by a select committee and before they are agreed to by the House. During the committee of the whole House stage, the veto can be exercised as soon as notice is given of the relevant amendment. Although it is possible to issue a financial veto certificate for a whole Bill, this is unlikely in the case of a Government Bill. Any financial veto certificate relating to a Bill may only be given when the Bill is awaiting its third reading.<sup>295</sup>

In the committee of the whole House stage of a Bill, if it seems that a proposed amendment may have more than a minor effect on the fiscal aggregates, at least 24 hours' notice must be given by the Member proposing the amendment in the committee of the whole House. Unless notice is given, the amendment is usually out of order. However, officials should be particularly alert when the House, under urgency, proceeds to the committee of the whole House stage immediately after the second reading, as in such circumstances the 24-hour notice period is not required. It is not only the

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<sup>295</sup> See SO 320

department responsible for the Bill that may be affected by a proposed amendment. Thus, every department is required to have processes to monitor parliamentary initiatives, such as the passage of Bills and proposed amendments to them, to identify amendments that have the potential to effect changes to that department's Vote.

When it is clear that a proposed amendment may be a candidate for a financial veto, the department concerned should approach the Treasury about the issue. The Treasury will co-ordinate the response and arrange for the issue of a veto certificate, if appropriate.

### **17.4.3 Guidelines**

Officials should follow the procedures in Cabinet Office Circular CO (07) 2. In summary, the main actions required are:

Have processes in place for monitoring developments in the House and select committees affecting your Minister's portfolio, and for identifying and advising promptly on proposed amendments which may impact on the government's fiscal aggregates or the composition of a Vote.

Be aware that notice of an Amendment can be given the day before it is moved and in some circumstances with less than 24 hours' notice.

Check whether a proposed Amendment, either in the form of a "table" Amendment or an SOP, if it is passed, will affect any Vote or have more than a minor impact on the government's fiscal aggregates.

If so, alert the portfolio Minister, the Minister of Finance, and the Treasury immediately so that the Treasury can co-ordinate a response and arrange for the issue of a financial veto certificate, if appropriate.

## CHAPTER 18

### ALTERNATIVE DISPUTE RESOLUTION CLAUSES IN LEGISLATION

#### INTRODUCTION

##### **Background**

This chapter deals with methods of dispute resolution that can be included in legislation. It uses the term “alternative dispute resolution” (ADR) as a collective description for any form of dispute resolution, other than methods for pursuing relief through a court or tribunal or under the Arbitration Act 1996 or its predecessor.

##### *History: ADR in legislation*

Dispute resolution processes have traditionally been practised in addition to the process of litigation by individuals, corporations, or States wishing to negotiate their differences, whether the dispute relates to the neighbours fence or high-level international affairs. Apparently, in reaction to the high cost and delays associated with conventional

litigation, there has, over the last 20 years, been a conscious development of alternatives to litigation. Though often using the techniques of negotiation, these alternatives offer a more structured approach than negotiation. Alternative dispute resolution has been acknowledged as an efficient means of providing effective remedies for parties in dispute.<sup>296</sup>

The growing awareness of the value of resolving disputes by methods other than through the courts is apparent in various ways in New Zealand. The time-honoured alternative to litigation was arbitration under the Arbitration Act 1908 (and now under the 1996 Act). However, policy makers in government have picked up on the notion of including provisions for alternative forms of dispute resolution in statutes other than under the Arbitration Act 1996. A survey of the New Zealand statute book indicates that ADR options have increasingly been adopted by the New Zealand Parliament and that the range of options is wide.<sup>297</sup>

The rules of court have also given an impetus to the use of ADR, for example, by requiring engagement in case management, to help deal with problems of court

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<sup>296</sup> Michael Supperstone QC, Daniel Stilitz, and Clive Sheldon, AADR and Public Law, *Public Law* [2006], 299C319.

<sup>297</sup> See Appendix 1 for a brief survey of statutory provisions for ADR in the New Zealand statute book.

congestion and delay.<sup>298</sup> Moreover, the courts have encouraged the use of ADR in a variety of contexts, not just where the relevant statute or contract provides for its use.<sup>299</sup>

*What are the advantages of providing for ADR?*

ADR processes offer some or all of the following benefits:

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<sup>298</sup> For example, rule 429 of the High Court Rules made under the Judicature Act 1908 allows the court to consider the option of a form of alternative dispute resolution in the context of a case management conference (see Schedule 5, clause 10). Rule 442 provides for the court, with the consent of the parties, to direct the parties to enter into mediation or other agreed forms of alternative dispute resolution. See also rules 433 and 434 of the District Courts Rules 1992. Fast-tracked District Court cases are routinely directed to judicial settlement conferences under rule 438 of the District Courts Rules 1992.

In the United Kingdom, the trend towards using ADR has been given a positive impetus by the Woolf reform of civil procedure, in particular with the civil courts being given the power to refer proceedings to compulsory mediation. There, the parties are obliged to consider ADR before issuing proceedings, while the courts must encourage and facilitate parties to use an ADR process where that is appropriate: Civil Procedure Act 2005, section 26; Civil Procedure Rules 1997, Part 1, and Practice Direction (Pre-action) Protocols (41st amendment of 2006).

<sup>299</sup> See *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (CA) at [110]; *Electricity Corporation of NZ Ltd v NZ Electricity Exchange Ltd* [2005] 3 NZLR 634 (CA) at [82]; *Commerce Commission v Fonterra Co-operative Group Ltd* 4 May 2006, Hammond, Goddard, and Gendall JJ, CA 175/05, at [73].

(i) *Process benefits*

ADR-

- is more accessible to the parties than litigation:
- allows the flexibility to resolve complex issues not readily adaptable to adjudication:
- gives the parties a “voice” by enabling them to articulate their grievances and have their concerns listened to:
- can give the parties the choice in the selection or appointment of an impartial third person to assist in the process:
- promotes co-operative and problem-solving approaches to disputes:
- may permit clarification of the facts and issues and so enable resolution without further intervention by a third person:
- provides an opportunity for the parties to negotiate settlements that meet their needs and interests (and not just their rights):
- may meet psychological needs, for example, if an apology or explanation is important to 1 or more of the parties:
- permits a speedier resolution of a dispute:
- can accommodate confidentiality:
- can counteract the trend towards “judicialisation” of disputes:
- overall, is a less stressful and less confrontational process.

(ii) *Outcome benefits*

ADR-

- provides savings in cost and time:
- may promote a sense of achieving better access to justice:
- is conducive to the preservation of relationships (if this is an important consideration):
- empowers parties to buy into and participate in the outcomes:
- offers better scope than is possible in litigation for a wider and more flexible range of remedies that are tailored to the circumstances of the case and the interests of the parties:
- enables privacy to be protected:
- can accommodate an equitable outcome for both or all parties (not just the winner):
- where a dispute involves a number of parties with the same complaint, promotes equity among the parties (for example, where the parties have a common concern in a planning or environmental dispute):
- as a matter of public interest, promotes access to justice by enabling more efficient management of the resources of the courts.

ADR complements the resolution of disputes that takes place within the court system. It provides processes that can either stand in their own right or can be used as an adjunct to litigation. Having recourse to an alternative process to litigation enables parties to select dispute resolution procedures that are appropriate to individual situations; before or after a dispute arises, and allows parties to have greater control over resolving the issues between them.

Even if complete resolution is not achieved at the end of an ADR process, the issues may well have been clarified, with a resulting reduction in the time and costs of any litigation that may follow.

*Is ADR always appropriate?*

It may not always be appropriate to adopt ADR methods. For example, ADR may not generally be suitable for-

- criminal cases:
- cases where a point of law has to be determined, such as the meaning of a statutory provision:
- cases where the law needs to be clarified:
- cases where it is desirable to establish a general norm or precedent:

- cases where the critical facts are in issue and need to be determined:
- cases where safety issues arise, as in sexual harassment and family violence, unless appropriate security arrangements are available.

*Is ADR appropriate in the public law context?*

Traditionally, a cautious approach has been taken to resolving public law disputes by ADR. However, even that barrier is now questioned. Unless there is a legal principle dividing the parties, or a better result can be achieved through litigation than by ADR, ADR should be considered as an option for public law disputes.

In the United Kingdom, the courts have endorsed the use of ADR (mediation in particular) to settle disputes arising in the public law arena, by ruling that they should not permit judicial review proceedings to proceed “if a significant part of the issues between the parties could be resolved outside the litigation process”.<sup>300</sup> As Lord Woolf stated in *Cowl*, “Today, sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible”.

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*Cowl v Plymouth CC* [2001] EWCA Civ 1935; [2002] 1 WLR 803; *Dunnett Railtrack Plc* [2002] EWCA Civ 303; [2002] 1 WLR 2434; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002. See discussion of these cases in AADR and Public Law@ (see footnote 1 above).

Those cases indicate that, provided the powers underpinning the decision-making are discretionary, ADR offers a realistic approach in the public law context, even if-

- the facts of the case are complex:
- the decision-maker is a public body and the decision-making is complex and polycentric:
- the dispute focuses on matters such as financial transactions, environmental planning, or the delivery of public services such as education or social services:
- there is a large number of parties with the same concerns, such as in planning and environmental cases.

Undoubtedly there are limits to the resolution of public law claims outside the legal framework of the courts. For example, ADR may be unsuitable if-

- an important question of public interest or public policy arises:
- the dispute turns on a point of law such as the interpretation of statutory provisions:
- a case is concerned with fundamental individual rights or points of principle:
- a case involves an allegation of an abuse of power:
- the outcome sought would involve the public body acting outside its statutory powers (*ultra vires*).

The approach advocated by the English Court of Appeal has been used in New Zealand in the context of public law disputes, despite the differences in civil procedure between

the 2 jurisdictions. Indeed, in a number of public law areas, Parliament has expressly legislated for the resolution of disputes by ADR rather than by litigation, or as a prerequisite to court action.<sup>301</sup>

### *ADR options available*

There are various forms of ADR. Each of the ADR processes has advantages and disadvantages, making a process suitable for some cases but not others. For example, mediation and hybrid procedures provide a framework of informal procedures in which an impartial third person facilitates dialogue and assists the parties to gather information, clarify and narrow issues, smooth out personal conflicts, identify options, and test the reality of their separate views.

### **Issues discussed**

The following issues are discussed in this chapter:

Part 1: Is there a need for an alternative dispute resolution mechanism?

Part 2: Which dispute resolution processes are most suitable for the disputes likely to arise?

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See, for example, Part 7 of the Fisheries Act 1996; Part 3 of the Human Rights Act 1993; Part 5 of the Injury Prevention, Rehabilitation, and Compensation Act 2001; section 13 of the Māori Television Service (Te Aratuku

Part 3: What are the principles of ADR that need to be incorporated into statutory provisions?

Part 4: How may a statutory dispute resolution process be designed?

## PART 1

### IS THERE A NEED FOR AN ALTERNATIVE DISPUTE RESOLUTION MECHANISM?

#### **18.1.1 Outline of issue**

The first issue is whether, in the particular statutory context, an ADR mechanism should be included. This will depend on whether, in the scheme of the statute, there is scope for disputes. If there is, consider whether an ADR process would be useful to assist with the better realisation of the policy intent.

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Whakaata Irirangi M~ori) Act 2003; section 16 of the Local Government Act 2002; section 99A and Schedule 1 of the Resource Management Act 1991; and section 19 of the Telecommunications (Interception Capability) Act 2004.

The appropriate mechanism will depend on the nature of the dispute, the parties involved, the need for confidentiality, and the goals for resolution. If, on analysis, an ADR mechanism appears to be useful, there is guidance in later parts of this chapter on how to determine an appropriate process to ensure that the goals for resolution can be attained.

### **18.1.2 Comment**

The following analysis must underpin all other considerations in determining whether to include ADR provisions in an enactment and, if they are to be included, what form they should take.

### **18.1.3 Guidelines for determining whether or not to include ADR provisions**

The matters set out in this part are relevant to the question of whether to provide for a dispute resolution process.

*Is there scope for disputes to arise?*

- Consider the kinds of disputes that may arise:

- are they internal to the organisation?
- are they between an organisation and outside parties such as clients, contractors, or competitors?
- will the dispute involve a large group of individuals or entities?
- will the dispute be in the public arena, involving a government agency or other public body?
- Does the dispute involve -
  - a conflict of values?
  - relationship issues?
  - disparity in access to information?

An affirmative answer to any of these questions is an indication that an ADR process is likely to be useful as a means of permitting the interests as well as the rights of the parties to be met.

There may be additional matters to take into account. In some cases, the dispute will involve safety issues for one or other party, as in cases of sexual harassment or family violence. In others, the underlying statute may be one intended primarily to establish rights that are the subject of dispute.<sup>302</sup> At first glance these factors might seem to indicate that ADR is less appropriate than formal court procedures. However, in practice,

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<sup>302</sup> See, for example, Part 3 of the Human Rights Act 1993.

the adversarial nature of court procedures can prove unsuitable for determining disputes over delicate matters or matters where there are fundamental differences in the parties' points of view. In such cases, ADR may better permit the needs of the parties to be met through a process that has an educative or conciliatory effect for the parties. This cannot usually be achieved in the "winner-takes-all" context of conventional court proceedings.

*Are there costs associated with the current approach to dispute resolution?*

- How are disputes currently resolved?
- What are the costs of the current approach to resolving disputes, in terms of-
  - resources, time, and money?
  - productivity loss (both staff and management)?
  - cohesiveness of the entity?
  - public and client perception of how the dispute is handled?
  - the political impact of the conflict?
  - the impact on business, professional, organisational, or personal relationships?
- If any of these costs arise, could the cost be removed or mitigated by a statutory requirement for ADR?

*What are the goals of resolution?*

- Consider whether the goals of dispute resolution would be to-
  - maximise the opportunities to settle disputes?
  - minimise the costs associated with a dispute (costs both to the parties and to

the taxpayer)?

- minimise social disruption and disharmony?
- avoid litigation?
- maintain confidentiality?
- preserve relationships?
- ensure that agreements are fair to all the parties involved?
- ensure that the parties have had the opportunity to communicate with each other?
- ensure that the needs or interests of the parties are met (as far as possible)?
- meet the needs of unrepresented persons such as children or employees?
- give parties control over the outcome?
- encourage compliance with agreements, without further legal process?
- assist resolution by the involvement of an impartial third person?
- provide for all of the above?

An affirmative answer to any of these questions is another indication that an ADR process could be useful.

### *Summary*

All these matters need to have been considered to answer the question:

**Would it be useful to include an ADR process within the statutory**

**framework to assist with the better realisation of the policy overall?**

## PART 2

### WHICH DISPUTE RESOLUTION PROCESSES ARE MOST SUITABLE FOR THE DISPUTES LIKELY TO ARISE?

#### **18.2.1 Outline of issue**

Once it has been established that it is desirable to include an ADR mechanism in the statute, it is necessary to determine which process would be most suitable.

#### **18.2.2 Comment**

There are many forms of ADR. Among ADR practitioners, there is debate about the extent to which the processes should be defined. The prevailing view of practitioners is that clients' confusion as to which ADR process to use and how the various processes

work would be reduced if legislation defined and used ADR terminology consistently.<sup>303</sup> Definitions based on best practice and reputable usage are proposed here for convenience, but in some processes there may be an overlap that cannot readily be captured in a definition.

### 18.2.3 The options for ADR

The ADR processes most likely to be suitable for inclusion in legislation can be divided into 3 broad categories:

- **Facilitative processes** involve an impartial third person with no advisory or determinative role who provides assistance in managing the process of dispute resolution.
- **Evaluative processes** involve an impartial third person who investigates the dispute, advises on the facts and possible outcomes, and assists in its resolution.
- **Determinative processes** involve an impartial third person who investigates the dispute and makes a determination that is legally enforceable.

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*Acorn Farms Ltd v Schnuriger* [2003] 3 NZLR 121 illustrates the perils of misusing or misunderstanding the terminology of ADR (in that case, there was confusion as to whether the process agreed to was mediation, conciliation, or arbitration).

*Facilitative processes*

Facilitation Facilitation indicates a process in which the parties, with the assistance of a facilitator, identify problems to be solved, tasks to be accomplished, or disputed issues to be resolved. Facilitation may conclude there, or it may proceed, like mediation, to endeavour to reach agreement.

Negotiation Negotiation is a process of mutual discussion and bargaining, involving putting forward and debating proposal and counter-proposal, persisting, conceding, persuading, threatening, all with the objective of reaching what will probably be a compromise that the parties are able to accept and live with.<sup>304</sup>

Mediation Mediation is a flexible process conducted confidentially, in which a neutral third person actively assists parties in

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<sup>304</sup> *Capital Coast Health Ltd v NZ Medical Laboratory Workers Union Inc* [1996] 1 NZLR 7, at 19, per Hardie Boys J.

working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of the resolution.<sup>305</sup>

### *Evaluative processes*

**Conciliation** This process, though similar to that of mediation, is usually found in a statutory context, as a compulsory process. The conciliator has an interventionist role within the responsibilities laid down by the statute or the agency. The conciliator may make suggestions for resolution, give expert advice on likely settlement terms, and actively encourage resolution. Should the conciliation not reach a settlement, a tribunal will resolve the matter.

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<sup>305</sup> Centre for Effective Dispute Resolution (London), [www.cedr.co.uk](http://www.cedr.co.uk). Or consider this definition of mediation from Folbert J and Taylor A, *Mediation-A Comprehensive Guide to Resolving Disputes without Litigation*, San Francisco 1984, p 7:

The process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.

Impartial expert evaluation or case appraisal      In this process the parties to the dispute present their arguments and evidence to an expert who gives advice as to the facts of the dispute and its likely outcome if put before a court, with a view to encouraging settlement between the parties.

*Determinative processes*

Adjudication      This is a dispute resolution mechanism in which arguments and evidence are presented to an impartial third person with the relevant specialist qualification or experience in the subject matter of the dispute. The third person has authority to make binding decisions (e.g., Part 3 of the Construction Contracts Act 2002).

Arbitration      This is a system in which the procedures and arbitrator are chosen by the parties to the dispute, and in which the arbitrator makes a binding decision, subject to some limited scrutiny from the courts. The Arbitration Act 1996 governs most arbitration in New Zealand, but there are exceptions

(e.g., section 155 of the Employment Relations Act 2000).

In some limited jurisdictions (e.g., in the police employment context), “final offer” arbitration is an ADR mechanism. The process involves each party presenting a “bottom line”, with the arbitrator being left to choose between one or the other. The arbitrator has no discretion to compromise or modify the positions advanced.

Expert  
determination

This is a process in which the parties agree to refer a question between them for a binding determination by an expert who may hear from the parties, but will rely on his or her own knowledge, skill, and investigations to determine the question.

Expert determination differs from arbitration in that:

- in arbitration, a dispute is referred to the arbitrator:
- in an expert determination, a question is referred to the expert.

Because parties are not permitted to contract out of the Arbitration Act 1996, it can be both important and difficult to distinguish whether a process is an arbitration or an expert determination.

*Combined facilitative and determinative (“hybrid”) processes*

The processes outlined above may be combined into a hybrid system for a particular purpose. For example,-

- elements of arbitration and mediation can be combined (often called “med-arb”). This process begins with mediation and, if this does not resolve the dispute, continues with binding arbitration:
- in some circumstances a mediator may, with the parties’ agreement, make a unilateral determination: see, for example, the use of an “arbitrating body” (as in Schedule 3 of the Police Act 1958):
- counselling can be used in conjunction with mediation:
- expert appraisals can be used during the course of mediation and arbitration.

Particular attention must be paid to procedural matters if a combination of processes is to be used. Clear rules must be established for a hybrid process before it is commenced. These need to cover matters such as:

- how the principles of natural justice will be adhered to:
- caucusing (i.e., private sessions with an impartial third person):
- confidentiality:
- the status of any information, admissions of fact, or offer of settlement terms disclosed in the course of the process:
- appellate rights.

Because of the difficulties likely to be encountered in reaching a common understanding of, and agreement to, such detailed process arrangements, hybrid forms of dispute resolution need to be approached with caution and are not generally recommended.<sup>306</sup> If, however, the desired approach is to allow for a hybrid form of ADR, at the very least, it should be a requirement that the impartial third person who has conducted a facilitative process must not proceed to determine the dispute.

#### **18.2.4 Choice of process: some guidelines**

##### *Considerations pointing to the use of a facilitative process*

The decision as to which dispute resolution process is best suited to the particular context is likely to be determined in light of a range of considerations. A “Yes” answer to any of

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<sup>306</sup> The problems that can arise from attempting to conduct a hybrid process are illustrated in *Acorn Farms Ltd* (see footnote 8 above), where the High Court accepted that limited aspects of mediation could successfully be engrafted onto an arbitration, if handled with care, but doubted whether the converse could be true, given the critical importance of the rules of natural justice to an arbitration.

the following questions is a strong indication that it is appropriate to adopt a **facilitative process**:

- Is it preferable for the parties to retain control over the outcome?
- Is a self-determined, consensual outcome preferable to a prescribed decision?
- Would there be benefit in parties being able voluntarily to enter into and exit from the process?
- Is confidentiality desirable?
- Would a flexible and informal procedure assist the parties?
- Are issues of cost and speed of resolution important?
- Would it be advisable to call on the help of an impartial third person?
- Is maintenance of a relationship (for example, a personal, professional, or contractual relationship) significant?
- Is it important to deal with factors that will affect the future as well as with present and past matters?
- Is the dispute best resolved by a remedy not available in litigation?
- Would it be useful to obtain input into the resolution from persons who may not be involved if the matter were dealt with in legal proceedings?
- Would the parties benefit from achieving finality by avoiding the prospect of appeal and enforcement procedures?

*Considerations pointing to the use of an evaluative or determinative process*

The provision of an evaluative or determinative process may be indicated if the answer is “yes” to any of the following questions:

- Is a legal precedent required (such as a declaration of the meaning of a statute)?
- Is a rights-based determination required (not just desired)?
- Must rights be determined beyond those of the immediate parties?
- Does the case involve an issue of high public policy?
- Is there a high degree of public interest in the outcome?
- Is there a need for the process of resolution to be public for accountability reasons?
- Is there a need for the impartial third person to have particular expertise?
- Is there a need for the impartial third person to be more directive and the process less self-directed?
- Must the process permit finality?

### **18.2.5 Balance of power between parties**

The relative power of the parties is a question that gives rise to both ethical and practical considerations. In a facilitative process the impartial third person may have a role in managing any imbalance of power between the parties.

Commentators vary as to how they assess the importance of the issue. Some see the availability of a swift and inexpensive opportunity to present a grievance across the table as a means of levelling the playing field in favour of the weaker party. Others regard the party with the greater power as being able to take advantage of the informality of the mediation process to exercise that power, to the disadvantage of the weaker party.

Power imbalance is certainly a factor to be aware of, but the extent to which it plays out in each case is not clear. Experience shows, however, that many disputes arising in

“power relationships” are successfully mediated under existing statutory schemes, as in the employment and family law environments.

Where there is a significant power imbalance issue, or where sensitive interests are at stake and there is a risk of feelings boiling over during the ADR process, it may be necessary to consider what arrangements should be made for the physical security of the parties. Analogies can be drawn with arrangements made in courts for dealing with the risk of outbursts by parties to a dispute. High sensitivity issues are litigated generally without heavy-handed security. Nevertheless, security is a factor to which attention should be paid when designing a process for dealing with sensitive disputes.

The factors discussed in this Part need to be considered before answering the question:

**Which dispute resolution process or processes are most suitable for the types of dispute that are likely to arise in the particular policy context?**

## PART 3

### WHAT ARE THE PRINCIPLES OF ADR THAT NEED TO BE INCORPORATED INTO STATUTORY PROVISIONS?

#### **18.3.1 Outline of issue**

It is important for the rigour of the process and the protection of parties that, if ADR provisions are included in legislation, the statute recognises and incorporates the relevant principles.

#### **18.3.2 Comment**

In formulating and designing dispute resolution provisions for legislation, a number of important principles must be considered, bearing in mind the particular context in each case.

##### *Facilitative processes*

This is an evolving area in terms of the relevant principles, but the following matters are likely to be key in any statutory scheme setting up a facilitative form of ADR:

- The processes that are facilitative are generally entered into on a voluntary, consensual basis. However, given the advantages of using a facilitative process, a

form of compulsion should not inevitably be avoided. The statute should always identify whether the process is to be voluntary or compulsory.

- If the statute is to make a facilitative process compulsory for the resolution of disputes, then the cost of the process should not be a barrier to entering the process.
- An impartial third person (such as a mediator) is not a decision-maker. Decision-making powers should not be vested in the impartial third person unless specific provision is made for the process and rights of natural justice (see “*Combined facilitative and determinative (“hybrid”) processes*”, pages 13-14).<sup>307</sup>
- No form of pressure or coercion may be included that would require the parties, once within the facilitation process, to reach an agreement.
- When parties agree to enter a facilitative process, they should always retain the right to withdraw.
- Costs or other sanctions should not generally be imposed if a party refuses to enter a facilitative process or to continue the process to an agreement, although in some contexts there is now a trend to displace this principle.<sup>308</sup>

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307 See, for example, the orders made under the Commodity Levies Act 1990. The scheme included in all the orders requires the mediator who has organised and presided over a conference between the parties to also resolve the dispute. The Commodity Levies Act 1990 provides for a right of appeal against a mediator=s decision.

308 Schedule 3 of the Employment Relations Act 2000, for example, provides a discretion for both the Employment Court and the Authority to award costs.

In the United Kingdom the rules of civil procedure enable the courts to impose cost sanctions on a party that is unreasonably refusing to enter into mediation in circumstances where it would have been appropriate (but without

- Provision should be made for procedural matters to be agreed, including matters as to confidentiality, privilege, and costs.
  - Care should be taken to use the correct terminology to describe the impartial third
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going so far as to displace the general rule that costs follow the event): see, for example *Dunnett v Railtrack Plc* [2002] EWCA Civ 303; [2002] All ER 850; *Halsey v Milton Keynes General NHA Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002; *Burchell v Bullard*[2005] EWCA Civ 358.

The utility of costs sanctions as a means of promoting procedural discipline has come under scrutiny: see *Grovit v Doctor* [1997] 2 All ER 417 (HL) and discussion by Paul Michalik, "Justice in Crisis-England and Wales", *Civil Justice in Crisis-Comparative Perspectives of Civil Procedure*, ed A A S Zuckerman, Oxford University Press, Oxford, 1999, pp 126-129.

person.<sup>309</sup>

- It is generally desirable that parties have the right to nominate their own impartial third person, although if the parties are meeting the costs of a facilitative process, the right to nominate an impartial third person such as a mediator is imperative.<sup>310</sup>
- If the impartial third person must report on the outcome of an ADR process, it should only be as to whether the matter was settled or not, the terms of the agreement, and, if necessary, matters outstanding. The positions of parties should remain confidential.
- Provision should be made to exclude the personal liability of the impartial third person for things done or omitted from being done (provided that person acted in

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<sup>309</sup> See, for example, the misleading use of the term “Rural Fire Mediator” in section 64A of the Forest and Rural Fires Act 1977, where it denotes a National Rural Fire Officer whose job it is to investigate and determine matters in relation to rural fire control and make “final and conclusive” decisions, using a procedure that the officer deems fit.

<sup>310</sup> On the other hand, if a scheme is funded by 1 of the parties or by an outside agency (as under the Weathertight Homes legislation) there is likely to be criteria for the selection of the panel of mediators, and there may well be good reasons for the parties not to be given the right to nominate the mediator.

good faith).

*Evaluative processes*

These processes are not dealt with in detail here, because there are elements of evaluation within both the facilitative and determinative processes. Definitions of these processes were included in Part 2 for the sake of completeness, recognising that both processes are used in practice and that the term “conciliation” is found in a number of statutory contexts, especially internationally.<sup>311</sup>

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<sup>311</sup> See, for example, the Sharemilking Agreements Act 1937; Arbitration (International Investment Disputes) Act 1979; Family Proceedings Act 1980; Crown Minerals Act 1991, Resource Management Act 1991; Human Rights Act 1993; Antarctica (Environmental Protection) Act 1994; Schedule 3 of the Police Act 1958; Care of Children Act 2004; Health Practitioners Competence Assurance Act 2003; Lawyers and Conveyancers Act 2006.

### *Determinative processes*

The principles and rules applying to the **arbitration** process, including the international aspect of arbitration, are set out in the Arbitration Act 1996. For this reason, it is not proposed to deal with arbitration in detail in this chapter.

Adjudication and expert-determination processes may also be proposed as alternatives to litigation through the courts. They are usually designed very specifically to suit the needs of the situation for which they have been created.

The appropriate principles for a determinative process will emerge from considering the following matters:

- the principles that apply in deciding whether to adopt a facilitative process; and
- the type of dispute for which the resolution process is designed; and
- the principles of natural justice, the application of which is critical in a determinative process, namely-
  - that a decision-maker should have no bias or interest in the outcome of the dispute; and
  - that a party has a right to be heard by the person who will decide the dispute; and
  - that to make this right effective, each party must have-
    - notice of the case made against it by the other party; and
    - the opportunity to present its own case and answer the case presented by the other party; and
  - that determinative powers are best exercised in public, with the decision-

maker explaining the reasons for his or her decision (openness encourages accountability and minimises the opportunity for corruption); and

- that, generally, appeal rights from alternative determinative procedures are limited, so as to ensure that the procedure remains truly an alternative to court action, and does not become merely a first step that extends the litigation for which it is meant to be a substitute.

## PART 4

### HOW MAY A STATUTORY DISPUTE RESOLUTION PROCESS BE DESIGNED?

#### 18.4.1 Outline of issue

This part deals with what needs to be considered in drafting legislation that includes dispute resolution provisions. In the main it returns to matters dealt with in the preceding parts of this chapter.

#### 18.4.2 Guidelines for designing an ADR process: a checklist

After the most suitable dispute resolution process has been decided upon, the next step is to consider which elements to include in legislation. In designing the process, review and be guided by the consideration as to whether ADR is appropriate or needed, as raised in Part 1, the options discussed in Part 2, and in the principles set out in Part 3. It is important to be thoroughly familiar with those matters.

The following 6 matters are suggested as a checklist that might usefully be considered for a statutory scheme for ADR:

(i) *The process to be used*

- Does the process need to be defined?

- If it does, be very clear as to the process that is intended and use terms consistently with best practice and reputable usage.<sup>312</sup>

(ii) *Parties*

- Who are the parties that need to participate?
- Is there a need to ensure that persons entering an ADR process have authority to settle?
- Will there be a requirement for the parties to consult with particular people or groups such as stakeholders?

(iii) *Getting an ADR process underway*

- Will entry into the process be compulsory or voluntary?
- What is the effect of these options on the parties:
  - will voluntary entry merely delay attempts at resolution?
  - will compulsory entry affect the desire of the parties to participate?

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Claire Baylis, "Reviewing Statutory Models of Mediation/Conciliation in New Zealand: Three Conclusions" (1999) 30 VUWLR 279, at 280-285.

- What is the optimum stage at which intervention by ADR should occur?<sup>313</sup>
- How, when, and where will the process be initiated?
- Is there a need to stop time running in any court proceedings to allow ADR to be attempted?

(iv) *Impartial third person*

- Would it be advisable to use an impartial third person?
- Should the parties have the choice of the impartial third person?
- How is an impartial third person appointed if the parties do not agree on a person?<sup>314</sup>

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<sup>313</sup> This is a factor that can impact on the costs of dealing with a dispute. For example, compare the option for a pre-hearing meeting in section 99 of the Resource Management Act 1991 and the process for District Court fast-tracked cases promoted by the Court. Section 99 creates the option for a pre-hearing meeting, an intervention that may come at a relatively late stage in the consent process when the parties are ready for a hearing; whereas the District Court practice is to require fast-track cases to attend a judicial settlement conference on a date that must not be later than 4 weeks after the filing of the statement of defence, and well before the parties will have undertaken the preparation necessary to bring the matter to trial.

<sup>314</sup> There are statutes that provide for the nomination of an impartial third person, as by the principal office holder of a relevant body such as the New Zealand Law Society, the Arbitrators' and Mediators' Institute of New Zealand Inc, or LEADR. (This latter acronym stands for "Leading Edge Alternative Dispute Resolution New Zealand", formerly known as "Lawyers Engaged in Dispute Resolution New Zealand"); see, for example, clause 147 of the Schedule of the Sharemilking Agreements Act 1937, section 43 of the New Zealand Horticulture Export Authority Act 1987, section 76 of the Ngai Tahu Claims Settlement Act 1996, Schedule 1 of the Maori Television Service Act 2003.

- Should provisions be considered for setting up a panel of independent mediators to complement the statutory regime and facilitate its implementation?
- Is there a need to identify any particular expertise or qualifications required of an impartial third person or set out the scope of that person's role in the process?
- Is it necessary to provide for the impartial third person to deal with any imbalance in the resources or bargaining strength of the parties?
- Although mediators do not have an advisory or determinative role, would it be useful to provide the mediator with the discretion to express a view to the parties (but no more than that)?
- Has the personal liability of the impartial third person been excluded in respect of his or her actions in the ADR process?

(v) *Matters to include in the process*

- Is there an existing process that would be appropriate to follow?<sup>315</sup>
- What features should the process have?
- Should there be screening at the pre-mediation stage, for example, with a filtering mechanism such as a substantive threshold test or criteria, so as to avoid the inappropriate use of mediation (particularly if mediation is to be compulsory).
- Should there be a time frame within which constructive dialogue must take place?
- To improve cost-effectiveness, would it be useful to include a facilitative process, for example, as a pre-condition for entry into-
  - litigation or into another adjudicative process?<sup>316</sup> or
  - another ADR process?<sup>317</sup>
- Has the need to observe the principles of natural justice been covered off?

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315 For example, the LEADR Mediation Agreement or the Arbitrators' and Mediators' Institute of New Zealand Mediation Protocol. For contact details, see Appendix 2.

316 For example, as may be required under the case management system: rule 429 and Schedule 5 of the High Court Rules.

317 For example, see sections 50A-50I of the Employment Relations Act 2000.

- Has it been clarified that the process is confidential and privileged?
- In the circumstances, it is appropriate for the process to be confidential, or should it be public for accountability reasons?
- Is it necessary to provide for (or exclude) representation for the parties?
- Who provides and pays for the facilities used for the process?
- Who pays the impartial third person?

(vi) *Providing for resolution*

- Should any resolution agreement be legally binding?
- How will an agreement be enforced?
- What happens if there is no resolution at the end of the process?
- If ADR fails, wholly or in part,C
  - will there be recourse to another process?
  - how may entry to another process (e.g. court proceedings) be initiated?
- Is legal aid, or its equivalent, available?
- Is there relevant legislation that needs to be considered C that is,C
  - is there a need to clarify how the provisions fit with other legislation?
  - is there a need to save particular statutory provisions from being overridden by the ADR provisions?

Finally, to test the scheme, ask the questions:

- **Are the requirements of the proposed ADR scheme all workable and appropriate in the particular context?**
- **Does the scheme reflect the fundamental principles underpinning the chosen form of ADR?**

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## CONTACT DETAILS

For the materials referred to in footnote 20 or advice referred to in footnote 7 to the model clauses:

Arbitrators and Mediators Institute of New Zealand

P O Box 1477

Level 3, Hallenstein House

276-278 Lambton Quay

Wellington

Telephone: 64 4 4999 384

Facsimile: 64 4 4999 387

Email: [institute@aminz.org.nz](mailto:institute@aminz.org.nz)

Website: [www.aminz.org.nz](http://www.aminz.org.nz)

LEADR NZ (Association of Dispute Resolvers)

PO Box 10991

Level 8 Terrace Legal House, The Terrace,

Wellington

Phone: +64 4 470 0110

Fax: +64 4 470 0111

Email: [leadrnz@xtra.co.nz](mailto:leadrnz@xtra.co.nz)

Website: [www.leadrnz.co.nz](http://www.leadrnz.co.nz)

New Zealand Law Society (Wellington. office)

PO Box 5041, Lambton Quay,

26 Waring Taylor Street

Wellington 6145

Telephone: 64 4 472.7837

Facsimile: 64 4 473.7909

Email: [inquiries@lawyers.org.nz](mailto:inquiries@lawyers.org.nz)

Website: [www.nz-lawsoc.org.nz](http://www.nz-lawsoc.org.nz)

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## APPENDIX 1

### REQUIREMENTS

#### FOR INSTRUCTIONS FOR PREPARATION OF LEGISLATION

Instructions for the preparation of legislation should –

##### *Policy approvals*

- State that appropriate policy approvals have been obtained and indicate what those approvals are:
  - In the case of Bills, this ordinarily means that the Bill has been approved as part of the legislative programme, and that the policy content of the Bill has also been approved by a Cabinet committee and Cabinet. Cabinet will sometimes authorise the drafting of a Bill after the legislative programme has been settled.
  - In the case of subordinate legislation, this means either that the underlying policy has been approved by a Cabinet committee and Cabinet or, in the case of routine subordinate legislation that does not involve new policy decisions, that the Minister has authorised the sending of the drafting instructions.
- Include copies of relevant Cabinet or Cabinet committee minutes

##### *Policy Proposals*

- Indicate the principal objectives intended to be achieved by the legislation
- List any other proposals that relate to the main proposal. These might be matters that have already been given effect to, or are in other proposed legislation, are concurrent with the main proposal, or are proposed for future legislative action. The related proposal might be one for another department's legislation
- Mention any politically sensitive aspects of the proposals

##### *Background information*

- Contain all relevant background material relating to the proposals to be included in the legislation, including all known legal implications
- If the legislation arises out of a report of a Commission or committee, either refer to the published report of that Commission or committee or, if it has not been published, supply a copy of it or of the relevant portions of it

- Mention any known legal or other difficulties with the proposal. Known legal problems with departmental initiatives must, if possible, be sorted out before the instructions are sent to the drafter. Examples of difficulties that must be drawn to the attention of the drafter include the following:
  - in relation to proposed regulations, an ultra vires issue, or any aspect of their content that might attract the attention of the Regulations Review Committee
  - a problem with compliance with the NZ Bill of Rights Act 1990
  - any departures from acceptable practice, and the justification for this. In particular, this includes any departure from the LAC Guidelines
  - any other matters that are likely to raise problems, such as regulations that purport to be retrospective, or penalties for offences that are unusually high
- Contain references to any relevant cases, whether or not they agree with the view favoured by the department
- Be accompanied by copies of any relevant legal opinions that have been obtained, whether or not they agree with the view favoured by the department
- In the case of amending legislation, deal separately with each proposed amendment
- If any matters are unresolved, indicate what they are and when the additional instructions in relation to them are likely to be given
- Indicate any matters that the instructor has investigated and that the instructor considers need not be dealt with. This may save the drafter from needlessly investigating the same issues and coming to the same conclusion
- Suggest the penalties to be imposed for any offence

*Consequential amendments and savings*

- Indicate existing legislation that will require amendment or consideration to give effect to the proposal
- Indicate any known consequential amendment
- Indicate any transitional or savings provisions required

*Timing*

- If the legislation is to come into force on a particular date, indicate that date and the reasons for choosing it

*Consultation*

- If the legislation impinges on the activities of other departments, or other departments have a legitimate interest in the legislation,—
  - list those departments
  - indicate the extent to which those departments have been consulted
  - give the name and contact address of any persons in those departments with whom the instructor has already had dealings in relation to the matter.

## APPENDIX 2

## NEW ZEALAND BILL OF RIGHTS ACT 1990

## ANALYSIS

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1990, No. 109

**An Act –**

**(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and**

**(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights**

**1. Short Title and commencement—**

(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.

(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

## PART I - GENERAL PROVISIONS

**2. Rights affirmed—**

The rights and freedoms contained in this Bill of Rights are affirmed.

**3. Application—**

This Bill of Rights applies only to acts done—

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

**4. Other enactments not affected—**

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
- (b) Decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

**5. Justified limitations—**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**6. Interpretation consistent with Bill of Rights to be preferred—**

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.

**7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights—**

Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

- (a) In the case of a Government Bill, on the introduction of that Bill; or
- (b) In any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

**PART II - CIVIL AND POLITICAL RIGHTS**

*Life and Security of the Person*

**8. Right not to be deprived of life—**

No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

**9. Right not to be subjected to torture or cruel treatment—**

Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

**10. Right not to be subjected to medical or scientific experimentation—**

Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

**11. Right to refuse to undergo medical treatment—**

Everyone has the right to refuse to undergo any medical treatment.

*Democratic and Civil Rights*

**12. Electoral rights—**

Every New Zealand citizen who is of or over the age of 18 years—

- (a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
- (b) Is qualified for membership of the House of Representatives.

**13. Freedom of thought, conscience, and religion—**

Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

**14. Freedom of expression—**

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

**15. Manifestation of religion and belief—**

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

**16. Freedom of peaceful assembly—**

Everyone has the right to freedom of peaceful assembly.

**17. Freedom of association—**

Everyone has the right to freedom of association.

**18. Freedom of movement—**

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

*Non-Discrimination and Minority Rights*

**19. Freedom from discrimination—**

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

**20. Rights of minorities—**

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

*Search, Arrest, and Detention*

**21. Unreasonable search and seizure—**

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

**22. Liberty of the person—**

Everyone has the right not to be arbitrarily arrested or detained.

**23. Rights of persons arrested or detained—**

(1) Everyone who is arrested or who is detained under any enactment—

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) Arrested; or

(b) Detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

**24. Rights of persons charged—**

Everyone who is charged with an offence—

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

**25. Minimum standards of criminal procedure—**

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

(b) The right to be tried without undue delay:

(c) The right to be presumed innocent until proved guilty according to law:

(d) The right not to be compelled to be a witness or to confess guilt:

- (e) The right to be present at the trial and to present a defence:
- (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
- (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
- (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
- (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

**26. Retroactive penalties and double jeopardy—**

- (1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
- (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

**27. Right to justice—**

- (1) Every person has the right to the observance of the principles of natural justice

by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

**PART III - MISCELLANEOUS  
PROVISIONS**

**28. Other rights and freedoms not affected—**

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

**29. Application to legal persons—**

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

This Act is administered in the Ministry of Justice

## APPENDIX 3

### TREATIES

**This appendix lists the Acts that expressly implement treaties (and a few that do not). Part 1 lists the Acts that specify the particular treaties that they implement and lists these treaties. Part 2 categorises and lists the Acts that do not specify the particular treaties that they implement. Part 3 lists the Acts that use the formula method. Part 4 lists the Acts that use the subordination method. Part 5 sets out a template for legislation that implements a treaty.**

#### PART 1

##### ACTS IMPLEMENTING SPECIFIED TREATIES

###### *Key*

\* The Act contains a long title or a purpose clause or both that states that it implements a specified treaty or a part of a specified treaty

^ The Act contains provisions defining or locating specified treaties or both.

(text) The text of the treaty can be found in the Act or in another Act.

###### **Accident Insurance Act 1998**

*ILO Convention 42, 1934*

###### **Adoption Act 1955**

*Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993 (reference to text in Adoption (Intercountry) Act 1997)*

###### **Adoption (Intercountry) Act 1997\*^**

*Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993 (text)*

###### **Antarctic Marine Living Resources Act 1981\*^**

*Convention on the Conservation of Antarctic Marine Living Resources, 1980 (text)*

###### **Antarctica Act 1960^**

*Antarctic Treaty, 1959 (text)*

###### **Antarctica (Environmental Protection) Act 1994\*^**

*Protocol on Environmental Protection to the Antarctic Treaty*, 1991 (text)

*Convention for the Conservation of Antarctic Seals*, 1972 (no text)

*Convention on the Conservation of Antarctic Marine Living Resources*, 1980  
(reference to text in Antarctic Marine Living Resources Act 1991)

*Antarctic Treaty*, 1959 (reference to text in Antarctic Act 1960)

**Anti-Personnel Mines Prohibition Act 1998\*^**

*Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 1997 (text)

**Arbitration Act 1996\***

*Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law*, 1985 (no text)

*Protocol on Arbitration Clauses*, 1923 (text)

*Convention on the Execution of Foreign Arbitral Awards*, 1927 (text)

*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958  
(text)

**Arbitration (International Investment Disputes) Act 1979\*^**

*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1965 (text)

**Aviation Crimes Act 1972\*^**

*Convention for the Suppression of Unlawful Seizure of Aircraft*, 1970 (no text)

*Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, 1971 (no text)

*Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, 1988 (no text)

*Convention on Offences and Certain Other Acts Committed on Board Aircraft*, 1963  
(no text)

**Chemical Weapons (Prohibition) Act 1996\*^**

*The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on the Destruction Contents*, 1993 (text)

**Citizenship (Western Samoa) Act 1982\***

*Protocol to the Treaty of Friendship*, 1982 (no text)

*Treaty of Friendship between New Zealand and Western Samoa*, 1962 (no text)

**Civil Aviation Act 1990**<sup>^</sup> [see also Civil Aviation Amendment Act 1999\*<sup>^</sup> and Carriage by Air Act 1967\*]

*Convention on International Civil Aviation*, 1944 (no text)

*Convention for the Unification of Certain Rules relating to International Carriage by Air*, 1929 (text)

*Additional Provisions of the Hague Protocol affecting the Warsaw Convention*, 1955 (text)

*Additional Provisions of Additional Protocol No. 1 affecting the Warsaw Convention*, 1975 (text)

*Additional Provisions of Additional Protocol No. 2 affecting the Warsaw Convention*, 1975 (text)

*Additional Provisions of Protocol No. 4 affecting the Warsaw Convention*, 1975 (text)

*Guadalajara Convention, supplementary to the Warsaw Convention, for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person other than the Contracting Carrier*, 1961 (text)

**Consular Privileges and Immunities Act 1971**\*<sup>^</sup>

*Vienna Convention on Consular Relations*, 1963 (text)

**Continental Shelf Act 1964**<sup>^</sup>

*United Nations Convention on the Law of the Sea*, 1982 (no text)

**Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980**\*<sup>^</sup>

*Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents*, 1973 (no text)

*Convention Against the Taking of Hostages*, 1979 (no text)

*Convention on the Safety of United Nations and Associated Personnel*, 1994 (no text)

**Crimes of Torture Act 1989\*^**

*Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, 1984 (no text)

**Crown Minerals Act 1991**

*Convention on Wetlands of International Importance*, 1971 (no text)

**Diplomatic Privileges and Immunities Act 1968\*^**

*Vienna Convention on Diplomatic Relations*, 1961 (text)

**Driftnet Prohibition Act 1991\*^**

*Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific*, 1989 (no text)

**Family Proceedings Act 1980^**

*United Nations Convention for the Recovery of Maintenance Abroad*, 1956 (no text)

**Fisheries Act 1996^**

*Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 1982 (text)

**Food Act 1981\***

*Australia - New Zealand Joint Food Standards Agreement*, late 1990s (no text):

**Geneva Conventions Act 1958\*^**

*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949 (text, not including the annexes to the Convention)

*Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*, 1949 (text, not including the annex to the Convention)

*Geneva Convention relative to the Treatment of Prisoners of War*, 1949 (text, not including the annexes to the Convention)

*Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 1949 (text, not including the annexes to the Convention)

*Protocol Additional to the Conventions and relating to the protection of victims of international armed conflicts*, 1977 (text, not including the annexes to the Protocol)

*Protocol Additional to the Conventions and relating to the protection of victims of non-international armed conflicts, 1977 (text)*

**Guardianship Amendment Act 1991\*^**

*Convention on the Civil Aspects of International Child Abduction, 1980 (text)*

*International Covenant on Civil and Political Rights, 1966 (no text)*

*International Covenant on Economic, Social, and Cultural Rights, 1966 (no text)*

**Health Benefits (Reciprocity with Australia) Act 1999\*^**

*Agreement on Medical Treatment for Temporary Visitors between the Government of New Zealand and the Government of Australia, 1998 (text)*

*Agreement on Medical Treatment, 1986*

**Health Benefits (Reciprocity with the United Kingdom) Act 1982\*^**

*Agreement on Health Services between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland, 1982 (text)*

**Immigration Act 1987^**

*Convention relating to the Status of Refugees, 1951 (text)*

*Protocol relating to the Status of Refugees, 1967 (text)*

**Income Tax Act 1994**

*Convention on Social Security between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand, 1969 (text in Schedule to the Social Security (Reciprocity with the United Kingdom) Order 1990)*

**International Crimes and International Criminal Court Act 2000\*^**

*Rome Statute of the International Criminal Court, 1998 (text)*

**International Energy Agreement Act 1976\***

*Agreement on an International Energy Program, 1974*

**International Finance Agreements Act 1961\*^**

*Articles of Agreement of the International Monetary Fund, 1945 (text)*

*Articles of Agreement of the International Finance Corporation, 1945 (text)*

*Articles of Agreement of the International Finance Corporation, 1955 (text)*

*Resolution of Board of Governors Setting Forth the Terms and Conditions Governing Admission to Membership in the International Monetary Fund, 1961 (text)*

*Resolution of Board of Governors Setting Forth the Terms and Conditions Governing Admission to Membership in the International Bank for Reconstruction and Development, 1961 (text)*

*Resolution of Board of Governors Setting Forth the Terms and Conditions Governing Admission to Membership in the International Finance Corporation, 1961 (text)*

**International War Crimes Tribunals Act 1995\*^**

*Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (text) [incorporates the Geneva Conventions of 1949 and the Convention on the Privileges and Immunities of the United Nations, 1946]*

**Maritimes Crimes Act 1999\*^**

*Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (no text)*

*Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (no text)*

**Maritime Transport Act 1994^**

*International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (text)*

*Protocol to International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (text)*

*Protocol to International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1979 (text)*

*International Convention on Salvage, 1989 (text; operative provisions not yet in force)*

*International Convention for the Prevention of Pollution from Ships, 1973 (no text)*

*Protocol to the International Convention for the Prevention of Pollution from Ships,*

1978 (no text)

*Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*, 1972 (no text)

*Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter*, 1996 (no text)

*Convention on Civil Liability for Oil Pollution Damage*, 1969 (no text)

*International Convention on Tonnage Measurement of Ships*, 1969 (no text).

*International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 1971 (no text)

#### Maritime Transport (Marine Protection Conventions) Order 1999

*International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 1969 (no text)

*International Convention for the Prevention of Pollution from Ships*, 1973 (no text)

*International Convention on Civil Liability for Oil Pollution Damage*, 1992 (no text)

*International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, 1992 (no text)

*United Nations Convention on the Law of the Sea*, 1982 (no text)

#### **Misuse of Drugs Act 1975<sup>^</sup>**

*United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988 (no text)

*Single Convention on Narcotic Drugs*, 1961 (no text)

*Protocol to the Single Convention on Narcotic Drugs*, 1972 (no text)

*Convention on Psychotropic Substances*, 1971 (no text)

#### **Mutual Assistance in Criminal Matters Act 1992**

*Convention on the Prevention and Punishment of Crimes Against Internationally*

*Protected Persons, Including Diplomatic Agents, 1973 (no text)*

*Convention Against the Taking of Hostages, 1979 (no text)*

*Convention on the Safety of United Nations and Associated Personnel, 1994 (no text)*

*United Nations Convention Against Illicit Traffic in Narcotic Drugs Psychotropic Substances, 1988 (no text)*

*Single Convention on Narcotic Drugs, 1961 (no text)*

*Protocol to the Single Convention on Narcotic Drugs, 1972 (no text)*

*Convention on Psychotropic Substances, 1971 (no text)*

*Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984 (no text)*

*Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (no text)*

*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971 (no text)*

*Protocol for the Suppression of Unlawful Acts of Violence at Airport Serving International Civil Aviation, 1988 (no text)*

*Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (no text)*

*Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (no text)*

**New Zealand Bill of Rights Act 1990\***

*International Covenant on Civil and Political Rights, 1966 (no text)*

**New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987\*^**

*South Pacific Nuclear Free Zone Treaty, 1985 (text)*

*Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963 (text)*

*Treaty on the Non-Proliferation of Nuclear Weapons, 1968 (text)*

*Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean floor and in the Subsoil Thereof*, 1971 (text)

*Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 1972 (text)

**Niue Act 1966**

*Single Convention on Narcotic Drugs*, 1961 (no text)

*Protocol to the Single Convention on Narcotic Drugs*, 1972 (no text)

*Convention on Psychotropic Substances*, 1971 (text)

**Nuclear-Test-Ban Act 1999\*^**

*Comprehensive Nuclear-Test-Ban Treaty*, 1996 (text)

**Ozone Layer Protection Act 1996\*^**

*Vienna Convention for the Protection of the Ozone Layer*, 1985 (text)

*Montreal Protocol on Substances that Deplete the Ozone Layer*, 1987 (text in Schedule 5 of the Ozone Layer Protection Regulations 1996)

**Patents Act 1953^**

*Patent Cooperation Treaty*, 1970 (the text of which, as amended on the 2nd day of October 1979 and modified on the 3rd day of February 1984, is set out in the First Schedule to the Patents Amendment Act 1992)

**Patents Amendment Act 1992**

*Patent Cooperation Treaty*, done at Washington on June 19, 1970, amended on October 2, 1979, and modified on February 3, 1984 (text)

*Regulations under the Patent Cooperation Treaty*, 1992 (text)

**Plant Variety Rights Act 1987^**

*International Convention for the Protection of New Varieties of Plants*, late 1990s (no text)

**Radiocommunications Act 1989^**

*Convention on International Civil Aviation*, 1944 (no text)

*International Convention for the Safety of Life at Sea*, 1974 (no text)

*Radio Regulations annexed to the International Telecommunication Convention*, 1982 (no text)

**Sale of Goods (United Nations Convention) Act 1994\*<sup>^</sup>**

*United Nations Convention on Contracts for the International Sale of Goods*, 1980 (text)

**Tariff Act 1988**

*International Convention on the Harmonised Commodity Description and Coding System*, 1983 (no text)

**Trade in Endangered Species Act 1989<sup>^</sup>**

*Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1973 (no text)

**Transport Accident Investigation Commission Act 1990<sup>^</sup>**

*Convention on International Civil Aviation*, 1944 (no text)

**United Nations Act 1946**

*Article 41 of the Charter of the United Nations*, 1946 (no text)

**United Nations Convention on the Law of the Sea Act 1996<sup>^</sup>**

*United Nations Convention on the Law of the Sea*, 1982 (no text)

***Miscellaneous***

The Contributory Negligence Act 1947 has a note appended to it that states:

2. This Act is part of the law of New Zealand in actions pursuant to the Warsaw Convention (as amended on 28/9/55); see s.12 of the Carriage by Air Act 1967

Parliament repealed section 12 of the Carriage by Air Act 1967. The relevant provision is now section 91F of the Civil Aviation Act 1990. Section 4 of the Death by Accidents Compensation Act 1952 sets out a related provision, but the Act does not have a note indicating its relationship to the Warsaw Convention or its implementing legislation. Section 22 of the Carriage by Air Act 1967 was the relevant provision. Parliament replaced it with section 91E of the Civil Aviation Act 1990.

PART 2

ACTS IMPLEMENTING UNSPECIFIED TREATIES

*Key:*

\* The provision does not limit subject matter

^ The provision limits subject matter

**Type 1: take into account/have regard to**

A number of the Acts that do not specify a treaty require Ministers or officials, in exercising certain functions, powers, and duties, to “have regard to” or “take into account” New Zealand’s international obligations. Most of these do not expressly limit the subject matter of the treaties that must be taken into account. For example, section 15A(3) of the Dairy Industry Restructuring Act 1999\* states:

In giving any consent pursuant to this section, the chief executive of the new Ministry shall take into account New Zealand’s international obligations under any international treaty, agreement, convention, or protocol.

An example of the subject matter being limited can be found in section 298(3) of the Maritime Transport Act 1994^, which states:

In preparing or reviewing the national plan under section 297 of this Act, the Director shall consider the following matters:

- (a) New Zealand’s obligations under international conventions and agreements in relation to responses to marine oil spills in the internal waters of New Zealand or New Zealand marine waters:

Provisions of this type can be found in the following Acts:

Agricultural Compounds and Veterinary Medicines Act 1997, s. 20\*  
Animal Welfare Act 1999, s. 118 (2)\*  
Biosecurity Act 1993, ss. 22,\* 57\*  
Dairy Industry Restructuring Act 1999, s. 15A(3)\*  
Food Act 1981, s. 11E\*  
Hazardous Substances and New Organisms Act 1996, s. 6\*  
Maritime Transport Act 1994, s. 298(3)^  
Privacy Act 1991, s. 14\*

**Type 2: consistent with**

Some of the Acts that do not specify a treaty contain provisions that require action that is “consistent with” New Zealand’s international obligations. For example, section 5 of the Fisheries Act 1996^ states:

This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with—

- (a) New Zealand's international obligations relating to fishing;

The Manapouri-Te Anau Development Act 1963\* is a special case. The Schedule to the Act sets out an agreement between the Crown and company to build a hydroelectricity generation facility. Clause 20 of the Agreement gives the company the right to import free of sales tax and all duties except in cases in which the freedom would conflict with New Zealand's international obligations.

A few Acts have provisions that give the Minister to direct or specify Crown entities to act in ways that are consistent with or would give effect to New Zealand's international obligations. For example, section 12 of the Wool Board Act 1997\* states:

- (1) The Minister of the Crown who (under the authority of any warrant or with the authority of the Prime Minister) is in charge of international trade may give the Board a written notice, specifying–
  - (a) A particular international obligation of New Zealand; and
  - (b) An element of the performance of the Board's functions or the exercise of the Board's powers to which, in the Minister's opinion, the obligation is relevant.
- (2) Until the notice is revoked, the Board must ensure that its performance or exercise of the element is consistent with the obligation.

Acts with these kinds of provisions include the following:

Crown Research Institutes Act 1992, s. 15\*  
Dairy Industry Restructuring Act 1999, ss. 12\*, 35\*  
Fisheries Act 1996, s. 5^  
Human Rights Act 1993, Long Title^  
Manapouri-Te Anau Development Act 1963, Schedule (cl. 20)\*  
Meat Board Act 1997, s. 12\*  
New Zealand Antarctic Institute Act 1996, s. 6\*  
Pork Industry Board Act 1997, s. 12\*  
Temporary Safeguard Authorities Act 1987, s. 6(1)\*  
Wool Board Act 1997, s. 12\*

### **Type 3: “give effect to” and the subordination method**

A number of the Acts that do not specify a treaty have provisions that evidence the use of the subordination method. For example, section 28(1)(g) of the Marine Mammals Protection Act 1978 states:

The Governor-General may, from time to time by Order in Council, make regulations for all or any of the following purposes:

- (g) Giving effect to the terms of any international agreement to which New Zealand is a party:

Acts with this type of provision include the following:

Apple and Pear Industry Restructuring Act 1999, 25(1)(u)\*  
Child Support Act 1991, s. 215(1)^  
Copyright Act 1994, s. 232^  
Designs Act 1953, s. 20\*  
Enemy Property Act 1951, s. 3(1)(c)^  
Fisheries Act 1983, s. 89(5)\*  
Geographical Indications Act 1994, s. 20(m)^  
Kiwifruit Industry Restructuring Act 1999, 26(1)(u)\*  
Land Transport Act 1998, ss. 154(k), 164(1), 169(3)^  
Layout Designs Act 1994, s. 37\*  
Marine Mammals Protection Act 1978, s. 28(1)(g)\*  
Resource Management Act 1991, s. 360(2B)^  
Social Security Act 1964, s.77^  
Social Welfare (Transitional Provisions) Act 1990, s. 19(1)^  
Tariff Act 1988, s. 9(2)\*  
Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, ss. 9(4)\*, 30^  
Tokelau Act 1948, s. 3B(1)(c)\*  
Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, s. 7(3)  
Trade Marks Act 1953, s. 72\*

A few of the Acts that do not specify a treaty simply state that they are designed to give effect to New Zealand's international obligations. For example, the Long Title of the Submarine Cables and Pipelines Protection Act 1996^ states that it is:

An Act–

- (b) To continue, or enable, the implementation of obligations on New Zealand under various international conventions relating to protection of submarine cables and pipelines;

#### **Type 4: intellectual property (GATT)**

Some of the Acts that do not specify a treaty give effect to the intellectual property provisions of the GATT, which refers to various treaties dealing with different aspects of intellectual property law, although these Acts do not indicate that this is the case. These Acts include the following:

Copyright Act 1994<sup>^</sup>  
Designs Act 1953\*  
Geographical Indications Act 1994<sup>^</sup>  
Layout Designs Act 1994\*  
Trade Marks Act 1953\*

### **Type 5: definitions**

A number of the Acts that do not specify a treaty have provisions that define terms in a way that indicates that the Acts are concerned, at least in part, with New Zealand's international obligations generally. For example, section 2(1) of the Extradition Act 1999<sup>^</sup> states:

“Extradition treaty” or “treaty”–

- (a) Means any treaty or agreement for the time being in force between New Zealand and any country or countries for the surrender of persons accused or convicted of offences; and
- (b) Includes a treaty described in paragraph (a) that applies in respect of part only of a country:

Section 296H of the Fisheries Act 1996<sup>^</sup> provides a more involved example. It states:

“Intellectual property”–

- (a) Has the meaning provided for in Article 2 of the Convention establishing the World Intellectual Property Organisation done at Stockholm on 14 July 1967 and in the World Trade Organisation Agreement on the Trade Related Aspects of Intellectual Property Rights done at Marrakesh on 15 April 1994; and
- (b) Includes all intellectual property rights, including (without limitation) rights relating to circuit layouts and semi-conductor chip products, confidential information, copyright, geographical indications, patents, plant varieties, registered designs, registered and unregistered trade marks, and service marks:

Acts with these kinds of provisions include the following:

Armed Forces Discipline Act 1971, s. 93A<sup>^</sup>  
Child Support Act 1991, s. 214<sup>^</sup>  
Citizenship Act 1977, s. 3<sup>^</sup>  
Copyright Act 1994, ss. 2(1)<sup>^</sup>, 169<sup>^</sup>

Extradition Act 1999, s. 2(1)<sup>^</sup>  
Fisheries Act 1996, s. 296H<sup>^</sup>  
Geographical Indications Act 1994, s. 2(1)  
Income Tax Act 1994, s. BH 1  
Marine Mammals Protection Act 1978, s. 2(1)  
Niue Act 1966, s. 689A<sup>^</sup>  
Tax Administration Act 1994, s. 173B<sup>^</sup>  
Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s. 2(1)\*  
Trans-Tasman Mutual Recognition Act 1997, s. 2(1)<sup>^</sup>

Section 77 of the Trans-Tasman Mutual Recognition Act 1997<sup>^</sup> is a unique provision, which subordinates the Act to several Acts that implement specific treaties. It is based on section 44(1) of the Trans-Tasman Mutual Recognition Bill 1996 (Aust). It states:

This Act does not affect the operation of any law, or any provision of any law, specified or described in a category in Schedule 1.

The relevant provision in Schedule 1 states:

This category concerns laws relating to international obligations, to the extent that those laws would be affected by the Trans-Tasman mutual recognition principle in relation to goods. The laws specified or described below are excluded from the operation of this Act:

United Nations Act 1946  
Trade in Endangered Species Act 1989  
Ozone Layer Protection Act 1990

### **Type 6: obligations**

Some of the Acts that do not specify a treaty have provisions that authorise action or permit the imposition of various requirements in terms of New Zealand's international obligations. For example, section 5 of the Defence Act 1990<sup>^</sup> states:

The Governor-General may, in the name and on behalf of the Sovereign, continue to raise and maintain armed forces, either in New Zealand or elsewhere, for the following purposes: ...

- (c) The contribution of forces under collective security treaties, agreements, or arrangements:
- (d) The contribution of forces to, or for any of the purposes of, the United Nations, or in association with other organisations or States and in

accordance with the principles of the Charter of the United Nations:

Acts with these kinds of provisions include the following:

Customs and Excise Act 1996, ss. 116,\* 281,^ 282\*  
Customs Law Act 1908, s. 204^

**Type 7: silent**

A number of the Acts that implement treaties provide no indication that they do so. The Abolition of the Death Penalty Act 1989 is an example in which the Act is silent as to the existence of a specific treaty or type of treaty. The Act implements the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, 1989. However, it does not refer to any treaties in any way. Article 1 of the Protocol states:

1. No one within the jurisdiction of a State party to the present Protocol shall be executed.
2. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction.

To give effect to this article, the Act amended the Crimes Act 1961 (removed the death penalty for treason), the Armed Forces Discipline Act 1971 (removed the death penalty for treachery), the Extradition Act 1965 (created the power to decline extradition to face the death penalty), and the Fugitive Offenders Act 1881 (UK) (created the power to decline extradition to face the death penalty).<sup>318</sup> None of these Acts mention the Protocol. The language used in the amendments to these Acts give effect to article 1, but they do not mirror its wording, largely as they take the form of amending provisions. For example, section 5(3) of the Abolition of the Death Penalty Act 1989 reads as follows:

Section 24(1) of the principal Act is hereby amended by omitting the words “be sentenced to death”, and substituting the words “imprisonment for life”.

The New Zealand/Singapore Closer Economic Partnership Act 2000 is another example.

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<sup>318</sup> The Extradition Act 1999 has replaced the Extradition Act 1965 and the Fugitive Offenders Act 1881 (UK).

## PART 3

### ACTS THAT USE THE “FORCE OF LAW” FORMULA METHOD

Acts that use the “force of law” formula method include the following:

Adoption (Intercountry) Act 1997, s. 4  
Arbitration (International Investment Disputes) Act 1979, s. 10  
Civil Aviation Act 1990, ss. 91C(1)-(2), 91O(3)  
Consular Privileges and Immunities Act 1971, s. 4  
Diplomatic Privileges and Immunities Act 1968, s. 5  
Maritime Transport Act 1994, ss. 209, 216  
Sale of Goods (United Nations Convention) Act 1994, s.4

## PART 4

### ACTS THAT USE THE SUBORDINATION METHOD

The following Acts use the subordination method in some way (the ones marked with an asterisk (\*) specify a treaty, and the ones marked with a caret (^) implement various parts of the intellectual property provisions of the GATT). Some of these Acts have empowering provisions that, by implication, appear to allow the making of regulations that override any parliamentary enactment (the ones marked with a hashmark (#)):

Antarctica (Environmental Protection) Act 1994, s. 54\*  
Apple and Pear Industry Restructuring Act 1999, s. 25(1)(u)  
Child Support Act 1991, s. 215(1)#  
Civil Aviation Act 1990, s. 91T\*  
Copyright Act 1994, s. 232^  
Customs and Excise Act 1996, ss. 116, 281, 282  
Customs Law Act 1908, s. 204#  
Defence Act 1990, s. 5  
Designs Act 1953, s. 20^  
Diplomatic Privileges and Immunities Act 1968, ss.5#, 10A(aa)\*#  
Driftnet Prohibition Act 1991, s. 2  
Enemy Property Act 1951, s. 3(1)(c)  
Extradition Act 1996, ss. 11#, 12#, 15#, 105#  
Fisheries Act 1996, s. 297(1)(o)  
Fisheries Act 1983, s. 89(5)  
Geneva Conventions Act 1958, s. 9  
Geographical Indications Act 1994, s. 20(m)^  
Income Tax Act 1994, s BH 1#  
International Energy Agreement Act 1976, s. 4\*#, 5#

Kiwifruit Industry Restructuring Act 1999, 26(1)(u)  
 Land Transport Act 1998, ss. 154(k), 164(1), 169(3)  
 Layout Designs Act 1994, s. 37^  
 Marine Mammals Protection Act 1978, s. 28(1)(g)  
 Maritime Transport Act 1994, s. 36(1)(b) and (u)(i)\*  
 Mutual Assistance in Criminal Matters Act 1992, s. 65\*#  
 Ozone Layer Protection Act 1996, s.16\*  
 Patents Act 1953, s. 77\*^  
 Plant Variety Rights Act 1987, s 38(n)  
 Resource Management Act 1991, s. 360(2B)  
 Social Security Act 1964, s. 77  
 Social Welfare (Transitional Provisions) Act 1990, ss. 4#, 19(1)#  
 Tariff Act 1988, s. 9(2)  
 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977,  
 ss. 9(4), 30#  
 Tokelau Act 1948, s. 3B(1)(c)  
 Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977, s. 7(3)  
 Trade Marks Act 1953, s. 72^  
 United Nations Act 1946, s. 2(1)\*#  
 Visiting Forces Act 1939, s. 4(4)-(5)

Some of the Acts implementing specified treaties contain provisions that are designed to allow for changes to the treaties that they implement. These future proofing provisions take 2 basic forms: those that have an interpretation provision that defines the treaty being implemented as the treaty including any changes made to it; and those that provide a regulations making power that allows the Executive to update the text of the treaty as set out in the Act. Acts that have these types of provisions include the following (the ones marked with an asterisk (\*) have the interpretation type of provision, and the ones marked with a caret (^) have the regulations type provision):

Antarctica (Environmental Protection) Act 1994, s. 55^  
 Anti-Personnel Mines Prohibition Act 1998, ss 2(1)\*, 26^  
 Chemical Weapons (Prohibition) Act 1996, ss. 2\*, 29^  
 Civil Aviation Act 1990, ss. 2\*, 91T^  
 Driftnet Prohibition Act 1991, s. 2\*  
 International Energy Agreement Act 1976, s. 2\*  
 Maritime Transport Act 1994, ss. 2(1)\*, 222\*, 225\*, 257\*, 342\*, 370\*  
 Misuse of Drugs Act 1975, s. 4(4)^  
 Nuclear-Test-Ban Act 1999, ss. 2\*, 22^  
 Ozone Layer Protection Act 1996, ss. 2(1)\*, 20^  
 Patents Act 1953, s. 2\*  
 Radiocommunications Act 1989, s. 2(1)\*  
 Tariff Act 1988, s. 2(1)\*  
 Transport Accident Investigation Commission Act 1990, s 2\*

## PART 5

### TREATY LEGISLATION TEMPLATE

1. **Title.** The title of the Act could indicate that it deals with a treaty. For example, the Act implementing the United Nations Convention on the Law of the Sea is entitled the United Nations Convention on the Law of the Sea Act 1996.

2. **Interpretation.** The interpretation section of the Act could define and locate the treaty being implemented. For example, section 2 of the Sale of Goods (United Nations Convention) Act 1994 states:

In this Act, “Convention” means the United Nations Convention on Contracts for the International Sale of Goods done at Vienna on the 11th day of April 1980, a copy of the English text of which is set out in the Schedule to this Act.

3. **Purpose.** The Act could have a clause that states that the purpose of the Act is to implement a specified treaty. For example, section 5(1) of the Anti-Personnel Mines Prohibition Act 1998 states:

The purpose of this Act is to implement New Zealand’s obligations under the Convention.

4. **Powers.** The Act could have a clause that indicates that the relevant functions, powers, and duties of Ministers or officials that the Act confers should be exercised in accordance with or with regard to the treaty being implemented. For example, section 5(2) of the Anti-Personnel Mines Prohibition Act 1998 states:

Every person exercising a power or discretion conferred under this Act must have regard to New Zealand’s obligations under the Convention.

5. **Proving.** The Act could have a clause that provides a mechanism for proving matters pertaining to treaties. For example, section 15 of the Arbitration Act 1996 states:

A certificate purporting to be signed by the Secretary of Foreign Affairs and Trade, or a Deputy Secretary of Foreign Affairs and Trade, that, at the time specified in the certificate, any country had signed and ratified or had

denounced, or had taken any other treaty action under, the Protocol on Arbitration Clauses (1923) or the Convention on the Execution of Foreign Arbitral Awards (1927) in respect of the territory specified in the certificate is presumptive evidence of the facts stated.

6. **Future.** The Act could have a clause or two that future proofs the Act. For example, section 2(1) of the Anti-Personnel Mines Prohibition Act 1998 states:

“Convention” means the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, done at Oslo on 18 September 1997 (a copy of the English text of which is set out in the Schedule); and includes any amendments to the Convention made in accordance with Article 13 of the Convention that are, or will become, binding on New Zealand from time to time.

Section 26(2) of the Act states:

The Governor-General may from time to time, by Order in Council,—

- (a) Amend the Schedule by making such amendments to the text of the Convention set out in that schedule as are required to bring that text up to date:
- (b) Revoke the Schedule, and substitute a new schedule setting out in an up-to-date form the text of the Convention.

7. **Subordination.** In cases in which technical matters are involved, the Act could delegate powers enabling implementation of the treaty or to enable New Zealand to become a party to another treaty. For example, section 36(1) of the Maritime Transport Act 1994 states:

The Minister may ... make maritime rules for all or any of the following purposes:

- (b) The implementation of technical standards, codes of practice, performance standards, and other requirements of the conventions:
- (u) Prescribing or providing for such matters as may be necessary—

- (i) To enable New Zealand to become a party to any international convention, protocol, or agreement relating to maritime transport:

8. **Schedule.** The Act could have a schedule that sets out the treaty being implemented. Alternatively, the Act could have a clause that indicates that the treaty is set out in the schedule to another Act.
9. **Notes.** The compare notes to the provisions of the Act could indicate the treaty provisions to which the provisions of the Act relate.

## APPENDIX 4

### PRINCIPLES FOR INCORPORATION BY REFERENCE

The following principles should apply to any use of incorporation by reference in Acts of Parliament or delegated legislation:

1. *Use incorporation by reference only if impractical to do otherwise*  
 As the use of incorporation by reference is inconsistent with some important law-making principles, it should be used only where it is impractical to do otherwise. Examples of circumstances where it may be appropriate to incorporate a document by reference are<sup>319</sup>-
  - the document is long or complex, covers technical matters only, and few persons 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 that has been 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 (for example, motor vehicles) manufactured by it.
  
2. *Authorisation by Act*  
 The use of incorporation by reference should be expressly authorised by an Act. The Regulations Review Committee should review the authorising provision before it is enacted. If the Act authorises the use of incorporation by reference in delegated legislation-

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319 In some cases it may be appropriate to incorporate only part of a document. The word "document" in this Appendix should be read as including "part of a document".

- the authorising provision may describe in general terms the document or documents, which may be so incorporated, if their form is not known at the time the Act is passed;
- the agency responsible for the legislation should discuss the use of that authority with the Regulations Review Committee at the time when the first such delegated legislation is made.

3. *Document to be clearly identified*

A document incorporated by reference should exist at the time of incorporation and be clearly identified in the Act or delegated legislation concerned. A copy of the document should be signed and held as evidence by the agency responsible for the Act or delegated legislation.

4. *Amendments to document*

Subsequent amendments to a document incorporated by reference should not have legal effect in New Zealand unless a relevant Act (or delegated legislation authorised to do so by a relevant Act) expressly provides that subsequent amendments may have such effect.

Furthermore, subsequent amendments should not have legal effect in New Zealand until the fact that the document has been amended, together with either the amendments or the document as amended has been publicly notified in a manner specified in the Act or delegated legislation (for example, by means of the Internet or a notice in the *Gazette*).

A copy of every amendment having legal effect in New Zealand, or of the document as amended, should be signed and held as evidence by the agency responsible for the Act or delegated legislation concerned.

The principles set out in paragraphs 5 to 10 should apply, with all necessary modifications and to the extent practicable,<sup>320</sup> to an

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For example, the legislation may provide that consultation is not necessary before an amendment of a technical nature is made, but access to the amendment once made should be provided as stated in paragraph 8.

amendment to a document incorporated by reference (being an amendment that is to have legal effect in New Zealand) as if the amendment were a new document.

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference, should consider publishing on the Internet a brief description of all amendments having legal effect in New Zealand that have been made to the document since it was incorporated.

5. *Regulations (Disallowance) Act 1989 to apply* To enable the House of Representatives to disallow or amend the legal effect in New Zealand of a document incorporated by reference in delegated legislation, all such documents should be regarded as regulations for the purposes of the Regulations (Disallowance) Act 1989.<sup>321</sup> The Regulations Review Committee should obtain copies of, and scrutinise, any such document only if it wishes to do so or is expressly requested to do so by any person. Tabling of such a document in the House of Representatives should not be required unless the House or the Regulations Review Committee so orders in any particular case.

In reviewing any document required to implement a treaty, the Regulations Review Committee should of course have regard to whether altering the legal effect in New Zealand of that document would place New Zealand in breach of its international obligations.

6. *Consultation before incorporation*

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference should-

- in the case of delegated legislation, before the delegated legislation is finalised consult the persons likely to be affected by the document to the same extent as if the content of the document had been set out in the delegated legislation;

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But not for the purposes of the Acts and Regulations Publication Act 1989.

- ensure that-
- a reasonable number of hard copies of the document are readily available in New Zealand for a reasonable period before the Act or delegated legislation is enacted or made, for inspection free of charge by persons likely to be affected by or interested in the document; and
- if the document is not in a New Zealand official language, a high quality translation is similarly available; and
- copies of the document are readily available free, or for purchase at a reasonable cost, for a reasonable period before the Act or delegated legislation is enacted or made; and
- the address/es of the place/s in New Zealand where copies of the document can be inspected, and of the place/s (whether in New Zealand or elsewhere) where copies of the document can be obtained, are publicly notified in New Zealand in an appropriate manner.
- endeavour to make the document available free of charge on the Internet before the Act or delegated legislation is enacted or made.

7. *Document to be clearly drafted*

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference should, to the extent practicable, ensure that the document is clearly drafted and understandable by those who have to comply with it and is consistent with other applicable law. To this end-

- the legislation or the document should clearly distinguish between rights, powers, and obligations, which have legal effect on the one hand and guidelines and descriptive and other explanatory material on the other, and the legislation should state that explanatory material is not to have legal effect;
- the document should not include unnecessary or confusing material;

- the document may be written with the intended audience in mind, for example, a document may use unusual terminology or an unusual structure if those who have to comply with it will understand it.

8. *Access to incorporated document*

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference should ensure that-

- a reasonable number of hard copies of the document (or, if the document has been amended, the most up to date version of the document) is readily available in New Zealand at all times while the document has legal effect in New Zealand, for inspection free of charge by persons likely to be affected by or interested in the document; and
- if the document is not in a New Zealand official language, a high quality translation is similarly available; and
- copies of the document (or the most up to date version) are readily available free, or for purchase at a reasonable cost, at all times while the document has legal effect in New Zealand; and
- the address/es of the place/s in New Zealand where copies of the document can be inspected, and of the place/s (whether in New Zealand or elsewhere) where copies of the document can be obtained, are either stated in (or in a note to) the Act or delegated legislation or publicly notified in New Zealand in an appropriate manner. In the latter case, the Act or delegated legislation or a note thereto should indicate the manner of public notification; and
- if practicable, a copy of the document (or the most up to date version) is available free of charge on the Internet.

9. *Accountability to Minister*

The agency responsible for delegated legislation that incorporates a document by reference should, at the time when the delegated legislation is made, report to its Minister on how the principles in this

Appendix have been or will be complied with in relation to the document.

10. *Annual list of incorporated documents*  
Each agency responsible for Acts of Parliament or delegated legislation that incorporate documents by reference should publish on the Internet each year a list of all documents incorporated in legislation for which it is responsible.
  
11. *Incorporation by reference not to be used if principles cannot be complied with*  
If any of the principles in paragraphs 1 to 10 cannot be complied with in any particular case for copyright or other reasons, incorporation by reference should not be used in that case.

## **APPENDIX 5**

### **CONTROLS OVER REGULATIONS**

#### **Outline of controls**

The controls over “regulations” include those found in:

- the Acts and Regulations Publications Act 1989;
- the Regulations (Disallowance) Act 1989;
- the Standing Orders of the House of Representatives (especially those Standing Orders relating to the Regulations Review Committee); and
- the Cabinet Office Manual.

#### **Nature of Regulations**

“Regulations” for the purposes of these controls are:

- regulations, rules or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown;
- an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment;
- an Order in Council that brings into force, repeals, or suspends an enactment;
- regulations, rules or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand;
- an instrument that is a regulation or that is required to be treated as a

regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or this Act;

- an instrument that revokes regulation, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e).

### **Nature of controls**

All regulations must (unless legislation provides otherwise):

- be approved by Cabinet;
- be drafted by Parliamentary Counsel;
- be published in the SR series;
- be laid before the House of Representatives; and
- stand referred to the Regulations Review Committee.

The House of Representatives may disallow, amend or substitute regulations laid before it.

The Regulations Review Committee provides technical scrutiny of regulations and decides whether to draw the special attention of the House to the regulation on the ground or grounds that the regulation:

- is not in accordance with the general objects and intentions of the statute under which it is made;
- trespasses unduly on personal rights and liberties;
- appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

- unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
- excludes the jurisdiction of the courts without explicit authorisation in the enabling statute;
- contains matter more appropriate for parliamentary enactment;
- is retrospective where this is not expressly authorised by the empowering statute;
- was not made in compliance with particular notice and consultation procedures prescribed by statute;
- for any other reason concerning its form or purport, it calls for elucidation.

## APPENDIX 6

### SOME EXISTING STATUTORY PROVISIONS FOR ADR

The New Zealand statute book contains clauses of various kinds to provide for resolution of disputes other than by, or in addition to, litigation in the courts. Leaving aside provisions prescribing arbitration under the Arbitration Act 1996, statutory provisions for ADR fall into 2 broad categories:

#### **A Enactments providing for use of ADR, but without prescribing procedures**

In this category, there are 3 subgroups:

- (i) enactments that provide for the use of ADR, but without prescribing the procedure or giving guidance on how the process is to be conducted;<sup>1</sup> examples include:

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<sup>1</sup> The statute may permit a decision-maker to refer a matter to ADR, as in s 99A Resource Management Act 1991; or it may include a discretionary prompt by requiring a decision-maker to have regard to the desirability of using a specified (or unspecified) method of ADR instead of legal proceedings, for example, Commonhold and Leasehold Reform Act 2002 (UK).

- Education Act 1989, section 115
- School Trustees Act 1989, section 22
- Resource Management Act 1991, section 99A (pre-hearing) and Schedule 1, clauses 3A and 8AA
- Privacy Act 1993, sections 74, 76
- Injury Prevention, Rehabilitation, and Compensation Act 2000, section 296
- Local Government Act 2002, section 16
- Telecommunications (Interception Capability) Act 2004, section 19

(ii) enactments that provide for delegated legislation to prescribe dispute resolution:

- Police Act 1958, section 64
- Commodity Levies Act 1990, section 11
- Electricity Act 1992, section 172D
- Gas Act 1992, section 43G
- Industry Training Act 1992, section 48
- Modern Apprenticeship Training Act 1992, section 22 (code of practice)
- Bio-security Act 1993, sections 96, 142
- Animal Products Act 1999, section 118
- Wine Act 2003, section 89

(iii) enactments empowering a court or tribunal to propose, order, or assist with ADR, for example:

- Treaty of Waitangi Act 1975, Schedule 1

- High Court Rules, rules 429, 442
- Resource Management Act 1991, sections 267-268
- District Courts Rules 1992, rules 443, 434
- Te Ture Whenua Maori Act 1993, sections 26A-26ZA
- Employment Court Regulations 2000, regulation 54
- Family Courts Rules 2002, rules 52, 292-296, 349-351

## **B Enactments that are prescriptive**

Enactments that set up a process for resolution of disputes that is, to varying degrees, prescriptive and more or less self-contained include the following:

- Sharemilking Agreements Act 1937, section 3 and Schedule
- Police Act 1958, Schedule 3
- Forest and Rural Fires Act 1978, sections 64-65
- Family Proceedings Act 1980, Part 2
- Residential Tenancies Act 1986, sections 86-90
- Children, Young Persons, and their Families Act 1989, sections 170-177
- Education Act 1989, section 10
- Human Rights Act 1993, Part 3
- Health and Disability Commissioner Act 1994, section 61
- Fisheries Act 1996, Part 7
- Employment Relations Act 2000, sections 144-155
- Injury Prevention, Rehabilitation, and Compensation Act 2001, Part 5

- Construction Contracts Act 2002, Part 3
- Weathertight Homes Resolution Services Act 2002, sections 13-55
- Maori Television Service Act 2003, section 17, clauses 13-20 Schedule
- Social Workers Registration Act 2003, sections 71-73
- Retirement Villages Act 2003, Part 4

- Building Act 2004, section 398 (linked to Construction Contracts Act 2002 and Weathertight Homes Resolution Services Act 2002)
- Maori Fisheries Act 2004, Part 5 (linked to Te Ture Whenua Maori Act 1993)
- Maori Commercial Aquaculture Settlement Act 2004, sections 52-55 (linked to Te Ture Whenua Maori Act 1993)
- Health Practitioners Competence Assurance Act 2004, sections 82, 126

The examples listed above illustrate the variety of ways in which Parliament has provided for the resolution of disputes other than by recourse to litigation. Analysis of the relevant provisions also indicates that the development of statutory schemes for the use of ADR, though of fairly long standing, has been ad hoc. A number of problems have been identified, including the inconsistent use of labels to identify various forms of ADR, significant and misleading divergence among the various schemes, even when labelled by the same name, and a lack of substantive detail to guide the conduct of the ADR process.<sup>2</sup>

Boulle L and Wade J, *Masters Mediation Workshop*, Workshop Papers, Bond University, Dispute Resolution Centre, Queensland, 2002

Boulle L, Jones J, and Goldblatt V, *Mediation: Principles, Process, Practice*, Butterworths, Wellington, 1998

CDR Associates, “Developing Effective Dispute Management Systems” Training Manual for workshop delivered for LEADR NZ 19B21 June 1997, Colorado, 1997

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