

LEGISLATION ADVISORY COMMITTEE

GUIDELINES ON PROCESS AND CONTENT OF LEGISLATION

INTRODUCTION

- 1 The LAC Guidelines are in 2 volumes – the 2001 edition and the 2003 supplement. The supplement contains additional material, and replaces some of the content in the 2001 volume. The Guidelines are available in electronic format at <http://www.justice.govt.nz/lac/index.html>. Make sure you are using the latest version.
- 2 The Guidelines are guides to making *good* legislation. They deal with both process and content.
- 3 The Guidelines have been written by members of the LAC and experts from outside the committee. They have been approved by Cabinet, which requires that proposals for legislation comply with them.
- 4 If a bill is introduced which does not comply with the Guidelines it risks attack in Parliament and in submissions to select committee. If legislation is passed which does not comply there can be consequences. For example:
 - The legislation may give rise to problems which have to be resolved in the courts, and not always with the outcome which the framers had hoped for.
 - The legislation may give rise to problems in implementation
 - The legislation may lose the respect of those subject to it.
 - The legal system as a whole may suffer in the eyes of both the national and international communities.
- 5 The Guidelines are in three parts. The first deals with process; the second with consistency between the legislation in question and the rest of the legal system; the third with some issues which can give rise to particular difficulty.
- 6 The chapters of the Guidelines all follow a similar pattern:
 - Background explanation
 - A statement of the issues
 - An analysis of each issue in turn:
 - outline of the issue
 - comment on the issue
 - guidelines as to how the issue should be handled.

- 7 In the front of the volume is a checklist so that those concerned with the preparation of the legislation can ensure that all relevant matters have been attended to.

SECTION I - PROCESS

Chapters 1 and 2 deal with matters of desirable process. Some of the main points are:

- The policy objectives of the legislation must be clearly defined.
- Is this legislation necessary? Could the objectives be achieved without it?
- Has there been adequate consultation within government and with those likely to be affected by the proposals?
- Has adequate time been allowed to prepare the legislation properly?
- Have the departmental lawyers been appropriately involved?

SECTION II – CONSISTENCY WITHIN THE SYSTEM

This is an extremely important consideration. The new act must share a bed with many other inhabitants. It should fit comfortably with those others, and not cause conflict or inconsistency.

This means that those who prepare legislation must be thoroughly familiar with the other law in the area. So:

(i) Other statutes

The new act should be in harmony with other relevant acts.

- Other acts may perform a similar function, so that some of the proposed legislation is unnecessary. There is no point in repetition.
- Other acts may be inconsistent with the proposed legislation. One or the other needs to be changed. Other acts, although not outright inconsistent, may have different philosophies or approaches. Consideration may need to be given to amending them.
- There may be a number of different acts all doing essentially the same job in different contexts in a variety of different ways. It needs to be considered which of the ways is most appropriate to the proposed legislation. In the long term attention may have to be given to tidying up the whole area, otherwise the public may get the impression that there is no principle in it. (For example, there is currently a cacophony of provisions providing in various ways for alternative dispute resolution; another group laying down procedures for disciplinary tribunals; another set regulating entry and search. It is hard to see much pattern in them).

(ii) Some special acts

- Other legislation should be consistent with the New Zealand Bill of Rights Act 1990. There are currently vetting procedures involving the Ministry of Justice or (where the Ministry's own bills are concerned) Crown Law.
- The Interpretation Act 1999:
It is not possible to overstate the importance of this Act. It is not entirely, or even principally, about interpretation. It also contains:
 - Standard definitions of common terms, so that there is no need to repeat them in other acts.
 - Default rules about such things as the effect of repeal, which operate in the absence of express transitional provisions.
 - Important rules about such things as appointment to office; the exercise of powers before an act comes into force; and the source of authority of regulations.

(iii) Common law

The interaction between common law and statute is a difficult topic. Acts such as our contract and crimes legislation show a very uneasy relation between the legislation and the common law which has supposedly been replaced by them.

It has proved very difficult, indeed impossible, to abolish or curtail the inherent jurisdiction of the court (eg, in matters such as the granting of bail, and publicity of court proceedings).

(iv) Fundamental principle

Our legal system has at its heart some basic values; individual liberty, the sanctity of private property, natural justice, access to the courts, the importance of vested rights, the antipathy to retrospective legislation. Legislation should not, without the very best of reasons, depart from these principles. If it does (a) it will not be respected and (b) a court will usually try to interpret it narrowly so as to cause as little damage as possible to those principles.

(v) Treaties

Many acts implement international treaties; other are on topics which are covered by international treaties. Care must be taken to ensure that such acts are not inconsistent with our international obligations. A court will strive to interpret them so that they are consistent. The same is true of the Treaty of Waitangi.

(vi) Statutory interpretation

When preparing and drafting legislation it is important to bear in mind the way a court is likely to interpret it should there be litigation. Chapter 3A deals with that subject. The courts these days try to interpret an act in accordance with its purpose: thus any purpose, or object, sections are of great importance. Headings and marginal notes can now be used for interpretation purposes. Courts attempt to interpret acts consistently with Bill of Rights and other fundamental values and with New Zealand's treaty obligations. They also frequently refer to extrinsic methods such as explanatory notes and select committee commentaries: people preparing those need to be mindful of this.

SECTION III – PARTICULAR ISSUES

There are a number of perennially difficult issues. The last section of the Guidelines takes some of them and offers guidance as to how to deal with them, and lists the things which should be taken into account in preparing legislation which involves them.

The objective of this section is to ensure that the resulting legislation is in accordance with natural justice, fair treatment and sound principle. The list of topics covered in this section will grow as the LAC adds to the Guidelines:

Currently the topics covered are:

- Creation of a new public power
- Creation of a new public body
- Delegation of a lawmaking power
- The exercise of delegated powers
- Remedies
- Criminal offences
- Appeal or review
- Powers of entry and search
- Powers to require and use personal information.

The typical approach of each chapter is to formulate the issues which present themselves in that topic, the things to be taken into account in dealing with them, and guidelines to ensure that sound principle is followed. Some of the topics are of considerable importance, and involve basic issues of the rule of law.

I shall take as an example chapter 10, which deals with delegated legislation. The issues with which it deals are:

- Part 1: Is it appropriate for primary legislation to contain a delegation of legislative power?
- 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 “subdelegation” 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?

One of the most important of these issues is part 4, which deals with “deemed regulations”. It outlines the criteria to which regard should be had in deciding whether delegated legislation should be “traditional” regulation or not. These are the 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.

It goes on to give some of the reasons which may justify a regulation not being a “traditional” regulation, and then discusses the controls that must be considered if that happens. They include the need for publication and accessibility: there are detailed guidelines about that.

The chapter on delegated legislation is one of the most detailed in the book, and the part on “deemed regulations” is the longest in that chapter. That is a reflection of its complexity. Other chapters, and the various parts of them, have not always needed to be so detailed.

Thus, for example, part 4 of chapter 8, which deals with the need to define clearly the scope of a new public power, contains short and simple guidelines as follows:

- 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 be considered?
- For what purposes may or must the power be exercised, and what purposes are improper?

The Guidelines on different topics differ in specificity, depending on their subject matter. Some are quite prescriptive rules; some are more in the nature of recommendations; some list factors to be taken into account when deciding on an appropriate legislative provision.

However the topics covered in these “Particular Issues” chapters are all important. In many cases they are of fundamental constitutional significance and go to ensure that power is properly controlled; in others they touch on basic issues of human rights and fairness. If the Guidelines are not complied with, the resulting legislation will be open to objection. It is likely to be attacked in select committee and the House; if it is eventually enacted it is likely to cause difficulty and resentment in those affected by it, and may be the subject of adverse decision in the courts.

DISCUSSION

- 1 The Guidelines are aimed at a wide audience: everyone involved in the preparation of legislation, from the earliest stages of policy formulation to the final drafting. Early elimination of problems ensures smoother passage. It is not good practice to assume that if there is something amiss in a proposal it will be sorted out further down the chain. It may be not.

So everyone should be aware of the Guidelines, and it is incumbent on every department and agency to have a few staff who are thoroughly versed in them.

- 2 The Guidelines are not hard to use. In both hard copy and electronic versions there is a table of contents. The electronic version has clear subheadings at the start of each chapter. There will soon be a comprehensive index.
- 3 The checklist at the beginning of the Guidelines (the revised version is at the start of the 2003 supplement) is an essential reference. At each stage of the preparation of a piece of legislation it should be consulted, and the relevant items checked off. It is easy to tick a column mechanically. That is not what is required: it is essential that the items be carefully considered before they are signed off. In other words *apparent* compliance is not enough; there must be *real* compliance.

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