

Chapter 12 Affecting existing rights, duties, and situations and addressing past conduct

Legislation should have prospective, not retrospective effect. This is reflected principally by the presumption against retrospectivity in section 7 of the [Interpretation Act 1999](#) and, in respect of criminal offences, in section 10A of the [Crimes Act 1961](#) and section 26(1) of the [New Zealand Bill of Rights Act 1990](#) (NZBORA).

New legislation that is intended to affect only events taking place after it comes into force can still affect existing situations in a number of different ways. The following matters should be considered:

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

If not addressed, these kinds of situations can lead to uncertainty and injustice. Litigation is frequently generated where people need to establish the extent to which the law applies to their previous actions. The following two general mechanisms help to address existing situations:

- **Savings provisions**—Savings provisions preserve a law, right, privilege or an obligation that would otherwise be affected by the new law. For example, they can enable proceedings already commenced or applications already made to be completed (*see*, for example, section 313 of the [Local Government Act 2002](#) or section 399 of the [Companies Act 1993](#)). Sometimes, savings provisions retain entire regimes to preserve accrued rights. This can result in two or more parallel systems existing for a period of time. However, that can create compliance and accessibility problems over time and so the [Parliamentary Counsel Office](#) (PCO) should be consulted.
- **Transitional provisions**—Transitional provisions describe how the new legislation applies to things that have arisen in the past (*see*, for example, sections 71 to 76 of the [Financial Markets Authority Act 2011](#)). For example, they may provide that employment is deemed to be continuous even though the person’s employer is a new entity.

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

qualified and were appointed under the old Act.

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

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

Guidelines

12.1 Does the legislation have direct retrospective effect?

Legislation should not have retrospective effect.

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

Legislation might have direct retrospective effect if it:

- applies to an event or action that has already taken place;
- prevents a person from relying on a right or defence that existed at the time the person undertook the conduct that the right or defence related to; or
- punishes a person or imposes a burden or an obligation in respect of past conduct.

A person should not be made criminally liable for past actions that were not prohibited at the time of commission. Section 26(1) of NZBORA provides that no one is liable to conviction for any act that was not an offence at the time it occurred. If the penalty attaching to an offence is increased between commission and conviction, the lesser penalty should also apply.

Retrospective legislation might, however, be appropriate if it is intended to:

- be entirely to the benefit of those affected;
- validate matters generally understood and intended to be lawful, but that are, in fact, unlawful as a result of a technical error;
- decriminalise conduct (see for example, section 7 of the [Homosexual Law Reform Act 1986](#));
- address a matter that is essential to public safety;
- provide certainty as a result of litigation (discussed in more detail in [12.2](#)); or
- in limited circumstances, make changes to tax law or other budgetary legislation.

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

presumption that legislation does not have retrospective effect.

12.2 Does the new legislation relate to matters that are the subject of prospective court decisions or current litigation?

Legislation should not deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law or to continue proceedings asserting rights and duties under that law.

Parliament may wish to amend the law in light of a judgment given in court proceedings. Examples would include cases where a court has interpreted a provision in an enactment in a way that departs from previous understandings, or where a particular outcome has been reached in litigation (that the striking of local authority rates, say, was unlawful and the resulting rate demands invalid) and Parliament wishes to countermand it. Parliament may also wish (for the same reasons) to amend the law in light of the *anticipated* outcome of a court proceeding that is still in progress.

The starting point is that Parliament is entitled and empowered to act in this way. Parliament may make and amend any law. That includes altering the law declared in completed court cases, or by amending or otherwise clarifying the law that is likely to arise in pending cases. The mere fact that litigation is on foot or has been concluded does not put the law at issue in a case beyond the reach of legislation. Three important considerations apply, however, to legislation of this type.

The first consideration is the general point made above. All legislation, ordinarily, is prospective. The default setting is that it applies from the date of its enactment and not to events that took place before that date. But there may be good reasons for departing from this principle. For example, the consequences of a particular judgment reached by a court in litigation might be seen by Parliament as contrary to an important public interest.

The second important consideration is the strong convention, arising out of the separation of powers and the principle of comity, that parliamentary legislation should not generally interfere with the judicial process in particular cases before the courts. This second consideration ordinarily means that, even when there are good reasons for a law to apply with retrospective effect and alter the law as determined by a court, it ought not to apply to the particular litigants so as to deprive them the benefits of their victory. In such cases, a saving provision for the actual litigants is appropriate. Attention should then be paid to the details of the saving provision. For example, the legislation might be expressed so as to exempt (from the retrospective effect of the legislation) the actual litigants in a named case or, say, all those who have filed proceedings in court on or before a named date. That date might be the day of introduction of the Bill into Parliament, rather than the date of enactment, since introduction of the Bill will serve as notice of the proposed legislative change.

The third important consideration is the converse of the second. In some situations, there may be good reasons why a law ought to be both retrospective *and* apply even to the litigants in a completed or pending case. That would be so if the policy reasons for enacting retrospective legislation in the first place would be undermined by leaving intact the litigants' victory or

potential victory. Cases of this type are likely to be rare.

In all cases, if legislation is being considered to overturn a court decision, or to alter the law at issue in existing proceedings, [Crown Law](#) should be consulted. Such legislation needs to be justified as being in the public interest and impairing the rights of litigants no more than is reasonably necessary to serve that interest.

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

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

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

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

12.4 Do the provisions in the Interpretation Act 1999 apply?

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

Sections 17 to 22 of the Interpretation Act 1999 contain savings provisions and transitional provisions that apply to all legislation unless express words to the contrary are used or the context of new legislation requires otherwise.

If the provisions of the Interpretation Act 1999 sufficiently address the issue, they should be used. If they do not satisfactorily address the issue, or if there is a good reason for departing from them, it will be necessary to draft specific transitional or savings provisions. Early advice should be sought from legal advisers and the PCO.

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

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

Transitional provisions must be carefully worded to avoid uncertainty. Each transitional issue must be checked to ensure that it is adequately addressed either by the Interpretation Act 1999 or specific provisions in the new legislation.

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

All transitional provisions should be contained in the new legislation.

For reasons of accessibility and clarity, if the provisions of the Interpretation Act 1999 are not relied on, all transitional provisions should be contained in the Act that they relate to. The current approach is for all transitional provisions to be located in the first schedule of an Act.

There are two exceptions to this principle but they should be used rarely and only when there is a genuine need to do so:

- If there are a large number of transitional provisions and savings provisions, it may be appropriate to produce a separate Act to deal with them. However, this can significantly impact the accessibility of the legislation and may introduce undesirable complexity into the statute book.
- If it is not possible to foresee all of the potential transitional and savings issues that might arise, it may be appropriate to create a provision that empowers the Executive to make regulations dealing with transitional and savings issues. This option is not a substitute for a thorough assessment of the potential transitional and savings issues and will likely be the subject of an adverse report from the Regulations Review Committee (see [Chapter 15](#)).

The PCO and legal advisers should be consulted at an early stage if it is proposed that new legislation rely on one of the above exceptions.