

10. Applying the statute to the Crown

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

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

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

Guidelines

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

Legislation must state whether or not it binds the Crown.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10.4. Should the Crown be subject to criminal liability?

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

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

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

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

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

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