

# **Legislation Design and Advisory Committee**

## **Legislation Guidelines**

**2018 Edition**

**Legislation Design and Advisory Committee**

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**Note: These Guidelines will be amended from time to time.**

**The latest version will be available at [www.ldac.org.nz](http://www.ldac.org.nz).**

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## WHAT IS THE LEGISLATION DESIGN AND ADVISORY COMMITTEE?

The Legislation Design and Advisory Committee (LDAC) was established in 2015 to build on the work of the former Legislation Advisory Committee (which existed from 1986 to 2015). Its members are appointed by the Attorney-General and consist of senior public service officials and external advisers from the private sector who have expert policy and legislative skills and backgrounds in law, economics, policy and academia.

LDAC meets approximately every six weeks to consider legislative proposals and provide advice to government agencies that are developing policy and legislation. LDAC may also make submissions to select committees, usually on Bills it has not considered before their introduction. LDAC's terms of reference are to:

- (a) provide advice to departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared, including to:
  - focus on significant or complicated legislative proposals, basic framework/design issues, instrument choice, consistency with fundamental legal and constitutional principles and impact on the coherence of the statute book;
  - assist departments with the allocation of provisions between primary, secondary and tertiary legislation;
  - provide advice on delegated legislative powers;
  - provide advice on the appropriateness of exposure draft bills;
- (b) report to the Attorney-General on departures from the LDAC Guidelines in legislative proposals;
- (c) advise the Attorney-General on any other topics and matters in the field of public law that the Attorney-General from time to time refers to it;
- (d) help improve the quality of law making by helping to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LDAC Guidelines and discouraging the promotion of unnecessary legislation;
- (e) scrutinise and make representations to the appropriate body or person on aspects of bills which raise matters of particular public law concern;
- (f) undertake training and education work, relating to LDAC's role and the LDAC Guidelines.

### WORKING WITH LDAC

Officials should not wait until legislation is drafted to speak to LDAC. The Committee is available to discuss legislative design issues, including possible departures from these Guidelines, with departments and parliamentary counsel at all stages of the policy and legislative development process. LDAC encourages departments to do so early in the development of policy and legislation, before policy development is too advanced or actions, such as policy decisions or announcements,

are made that are difficult to reverse. LDAC may review bills after introduction through its external advisers; however, by this stage it is often too late to address significant design issues. As a result, select committee time will be used to address issues that might otherwise have been avoided.

LDAC assesses legislative proposals and new bills against these Guidelines. It may also comment on any matter relating to a legislative proposal or Bill that it considers appropriate in the interests of encouraging high quality legislation.

Further information about working with LDAC is available on its website.

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## WHEN AND HOW TO USE THESE GUIDELINES

Guidance on legislative standards is a vital thread in the fabric of New Zealand’s policy and legislative development framework. The first edition of these Guidelines was published in 2001 and rewritten in 2014 by the former Legislation Advisory Committee.<sup>1</sup> This edition was published in 2018 by the Legislation Design and Advisory Committee. The Guidelines are endorsed by Cabinet and may be supplemented by LDAC.

A number of the considerations in these Guidelines are also addressed as part of the various existing government requirements relating to the policy and legislative development process. [Disclosure statements](#), [Regulatory Impact Assessments](#), [New Zealand Bill of Rights Act 1990 \(NZBORA\) vets](#), and compliance with the [Cabinet Manual](#) will all have their own procedures and requirements.

For guidance on developing policy advice more generally, see the Department of the Prime Minister and Cabinet ‘The Policy Project’: <https://dpmc.govt.nz/our-programmes/policy-project>.

### WHEN TO USE THESE GUIDELINES

These Guidelines are designed as a tool to guide thinking by those involved in making legislation and to support transparency about the exercise of law-making power. It is the role of officials to follow good processes and provide clear advice to inform decisions made by Ministers and Parliament to ensure that they are made with knowledge of the principles, the significance of any proposed departure, and the competing interests to be balanced.

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

At a minimum, these Guidelines should be explicitly addressed at the following stages:

- **If policy decisions are sought**—If policy decisions that will/may involve legislation raise design issues or depart from the principles in these Guidelines, these should be clearly explained and the advantages and disadvantages identified and assessed in policy papers to ensure Cabinet decision making is fully informed. It is also good practice to note under “legislative implications” in policy papers whether the proposal is likely to raise any further Guidelines issues during drafting and whether officials have worked or will work with LDAC on the proposals.
- **When draft legislation is submitted to the Cabinet Legislation Committee**—The final step in designing legislation is to thoroughly check draft legislation as a whole against the principles in the Guidelines once it is close to introduction. This will help to identify any unintentional or unexpected issues that may have crept in during development. Ministers must indicate compliance with these Guidelines in Cabinet

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<sup>1</sup> The 2001 and 2014 editions are available on the [LDAC website](#).

papers seeking approval to introduce a bill or to submit regulations to the Executive Council. Papers should explain and justify any departures from the Guidelines, as set out below.

## **HOW TO USE THESE GUIDELINES**

Each chapter of these Guidelines contains a general introduction to the issue and a series of questions, principles (*italicised*), and some brief explanatory text. From time to time, LDAC will add to these Guidelines with supplementary material to assist officials to address questions or issues raised in the Guidelines, provide legislative examples to assist officials to make decisions at the margins of issues, and provide guidance on areas not covered by the Guidelines.

The [checklist](#) available on the LDAC website sets out the *italicised* principles from the Guidelines. The checklist should be used iteratively throughout policy and legislative development and will assist officials and their Ministers to indicate compliance, and clearly explain and justify any departures, in Cabinet papers.

LDAC considers that the principles (reflected by the *italicised* text) should be followed. In some cases, the principles simply call for informed judgement and provide guidance on that. Officials should be able to clearly explain their judgement. In other cases, principles set a default position where the presumption is to meet that principle and only depart from it if there is a clear justification. Officials must include clear explanations and justification in supporting material and in Cabinet papers seeking approval to introduce a bill or to submit regulations to the Executive Council.

# EARLY DESIGN ISSUES

## Chapter 1 Good legislative design

### **Good design matters ...**

Legislation is one of the key ways by which governments seek to change behaviour and outcomes for society. Legislation creates and removes rights, powers, and obligations, sets up or disestablishes institutions, gives governments the means to raise and spend money, and enables citizens to hold decision makers to account. Legislation significantly affects both the everyday lives of New Zealanders and their future choices. It affects individual and collective rights, the use of property, the way in which markets operate, the risks to the environment or human safety that are acceptable, and how wealth is distributed in society.

Ensuring that legislation is well designed is important for 3 key reasons.

Poorly designed legislation will often not achieve its goals. Even if the main goals are delivered, legislation that gives rise to significant unintended consequences or fails to adapt to meet society's needs over time may impose unnecessary costs and undermine wider government aims for society.

High quality legislation is also critical to the functioning of New Zealand's democracy. Legislation involves coercive power, and law making comes with responsibility to make legislation that is proportionate, reasonable, rational, and consistent with New Zealand's constitutional principles. Legislation that overreaches can do significant harm by inhibiting freedoms or undermining important values or institutions of our society. The quality of the law-making processes can either reinforce or undermine the legitimacy of a particular piece of legislation, and the State and legislation more generally.

Lastly, good legislation saves significant costs for the system. Making legislation is time-consuming and expensive. The costs come not only from the time needed for Parliament, officials and the public to develop and pass legislation, but also for administrators and the public who need to make changes to implement it. As a result, legislation can be difficult to change once made.

### **... and it is easy to get it wrong.**

The responsibility to make high quality legislation is difficult to discharge well. No one person alone can ensure the quality of legislation, and many things can undermine it. Those involved have diverse and interdependent roles and interests. There are many pressures in terms of politics, time, conflicting interests, agency agendas, and poor co-ordination that can result in poor legislation.

### **A common goal and set of principles is critical ...**

For all these reasons, it is important both that we (those involved in making legislation) are committed to a shared goal of having high quality legislation for New Zealand and that there is a common set of principles by which we measure that quality.

The Guidelines set these common principles. They are intended as a tool to guide thinking by those involved in making legislation. They do not provide absolute rules. Some set default principles where

the presumption should be to meet that principle and only depart from it if there is a clear justification. Others call for informed judgement and the role of the principles is to assist. Sometimes it is only possible to achieve “good enough” legislation, for instance, where there is limited time or information available, or where there are matters outside officials’ control, whether policy, political, or pragmatic.

However, this does not lessen the value of the principles or officials’ responsibility to address them. The work of individual policy and legal advisers, legislative drafters, and other officials is critical to the quality of the decisions made by Ministers and Parliament (and people to whom the power to make legislation is delegated). It is the role of officials to follow good processes and provide clear advice to inform these decisions and so ensure that they are made with knowledge of the principles, the significance of any proposed departure, and the competing interests to be balanced. The public sector increasingly sees itself as the long-term steward of the legislative system for the benefit of New Zealand. Stewardship should be at the forefront of law makers’ minds. Good design and these Guidelines support departments and departmental chief executives to discharge their regulatory and legislative stewardship obligations under the [State Sector Act 1988](#).

These Guidelines are also designed to support transparency about the exercise of law-making power. They support the parliamentary process by enabling members of select committees and other MPs to assess the quality of the legislation that comes before the House. Having a common set of principles also enables the public to assess legislation against one standard, and so hold law makers to account. Officials’ work in ensuring that justifications or judgements are transparently made is vital.

**... and reflects 3 core objectives for high quality law.**

The principles set out in these Guidelines focus on three fundamental objectives of high quality legislation:

Legislation should be **fit for purpose**—it should be used only when necessary, but when used it should be effective for that purpose (including by minimising unintended costs). In order to achieve this, that purpose needs to be clearly defined early and robustly tested (see [Chapter 2](#)). Legislation should be designed to provide certainty as to rights and obligations but also build in sufficient flexibility to enable them to last. Legislation should be comprehensive enough to deal with likely scenarios. Legislation is part of wider regulatory systems and must work effectively within them (including, increasingly, the international legal system) as well as integrating with the existing body of legislation and common law (see [Chapters 3, 9, 10, and 13](#)).

Legislation should be **constitutionally sound**—by this we mean that legislation should reflect the fundamental values and principles of a democratic society (see [Chapters 4 to 8, 11, and 12](#)), including in the processes by which it is made (see [Chapter 19](#)). It should also be consistent with the Treaty of Waitangi (see [Chapter 5](#)).

Legislation should be **accessible** for users—legislation should be able to be easily found by citizens, and easy to navigate and understand. As a result, those involved in making legislation must think about how users will find and access it.

These core objectives are mutually reinforcing. If citizens cannot find the legislation that applies to them or if that legislation cannot be understood, then both the efficacy of the legislation and the rule of law itself are undermined. If legislation is vague about the obligations it imposes or leaves too much to people’s discretion, it will create confusion and inconsistency. This places significant costs on those who are regulated. This also causes constitutional concern about the lack of legal clarity over rights and obligations.

These objectives also need to be balanced. For example, to enable legislation to be sufficiently flexible (and so fit for purpose for the future), Parliament may delegate the power to make secondary legislation to the Executive. But too much delegation of significant policy matters will undermine certainty and the legitimacy of legislation. The extent of delegation that is appropriate always needs to be judged according to the particular context and safeguards should be included to address risks posed (see [Chapters 14](#) and [16](#)).

No one-value judgement works for every piece of legislation. The Guidelines do not provide “one size fits all” answers. That said, they aim to provide default approaches, inform judgements, and enable transparency about how that judgement has been exercised. The Guidelines can raise a red flag on proposals that are unusual or otherwise call for particular attention. It is important that, where a default principle is departed from, or judgement is exercised, there is clarity both within and outside government about the underlying rationale.

### **How to use these Guidelines to achieve good legislative design**

This rest of this chapter sets out some key advice on how to approach good legislative design using these Guidelines.

### **Before starting ...**

#### **Provide enough time to get the answers right**

Good legislative design is complex and requires time. If it’s done too quickly, it often fails. Of course, sometimes legislation must be produced quickly of necessity. But experience has demonstrated that speed often results in design flaws. Make sure to allow sufficient time for analysis, testing, consultation, revision, drafting, and quality assurance. Talk to legal advisers and the [Parliamentary Counsel Office](#) (the PCO) before setting timing expectations.

#### **Consult and work with the right people**

Legislation is complex and requires multiple perspectives to design it well—policy, legal, drafting, and operational experience can inform all the above questions. Legislation is best done when a dedicated multi-disciplinary team work together with agreed understandings on these matters. Seek help from LDAC and others experienced in legislation. The PCO also has an important role to play in developing legislation and officials should not hesitate to seek advice from the PCO. The PCO will help to turn policy ideas into legislation that is drafted in plain language, is easy to use, and is accessible to all who will need to use it. Guidance on instructing and working with the PCO can be found on the PCO website.

Policy is also better when it is informed by genuine consultation. Legislation is information-intensive

and ensuring it is effective and reducing the risk of unintended consequences requires consultation at all stages. Consultation also assists the public to plan for change and supports the legitimacy of the law-making process. [Chapter 2](#) sets out some core principles for consultation.

## Know the regulatory system

Legislation does not exist in a vacuum. Legislation intersects and depends on many other pieces of legislation. Consider legislation of general application (for example, the [Official Information Act 1982](#), the [Privacy Act 1993](#), or the [Crimes Act 1961](#)) and specific legislation that overlaps in the particular legislative area (for example, the many Acts that overlap in the resource management context).

Legislation is part of a regulatory system. The [Government Expectations for Good Regulatory Practice \(2017\)](#) have defined regulatory systems as the set of formal and informal rules, norms, and sanctions, given effect through the actions and practices of designated actors, that work together to shape people's behaviour or interactions in pursuit of a broad goal or outcome. This definition may feel more apt for some contexts (for example, food regulation) than others (for example, privacy, which cuts across many systems) and can feel vague. But whatever the definition, the important thing is to think deeply about the area that is being regulating and to talk to those involved to understand what really shapes their behaviour.

This may sound like a tall order, but the concept of knowing the practical and legal context in which the legislation operates is important to achieve legislation that is well-designed to be fit for purpose, constitutionally sound, and accessible to users. For example, without this context, advisers cannot identify the costs needed to inform a regulatory impact assessment, set appropriate criteria to ensure statutory powers are exercised effectively and transparently, or know how stakeholders will access and work with the legislation.

The key questions to assess a regulatory system or context before starting are:

- What is the purpose of the current regulatory system? What is it trying to achieve? Who is the system trying to protect or help (for example, consumers)?
- What are the costs and benefits of the current regulatory system? What works and what doesn't?
- Who is being regulated within the system? What are their incentives for compliance? How do they behave within this system? How much flexibility vs certainty does this system require? This is important for the issues discussed in [Chapters 14 to 17](#) and [22](#).
- Who are the regulators within the system? What roles do they play? What are their relationships? Is a new regulator required? What co-ordination is required and where will overlap be problematic? This is important to the issues discussed in [Chapters 18](#) and [20](#).
- What is the existing law (both legislation and common law) in the system on which the proposed legislation depends, or where does it currently interact or overlap?

Knowing this enables you to address the issues discussed in [Chapters 3](#) and [12](#).

## Know the purpose

Being clear about the policy objective or purpose of the legislative change sought is fundamental to every subsequent design question (see [Chapter 2](#)). The purpose may change over the course of the policy's development as the policy problem becomes clearer through consultation, research and analysis. A current understanding of the problem should always underpin analysis of the possible solutions.

Understanding the purpose is fundamental to assessing:

- What is needed (or not needed) in the legislation to implement the policy objective and solve the policy problem (see [Chapter 2](#))—remember to step back and assess whether legislation is really needed and make sure to look at whether the existing regime, common law, or non-legislative solutions are already apt to meet the purpose.
- The necessary building blocks of the legislation (see below). Do they go further than is needed to solve the policy problem?
- How to design discretions to make secondary legislation (see [Chapters 14](#) to [17](#)) or exercise powers (see [Chapter 18](#)).
- How to design any new regulators or other bodies that may regulate or exercise powers in the system (see [chapter 20](#)).

The purpose of the legislation will continue to have an ongoing key function once the legislation is enacted as it will govern how regulators organise themselves and exercise powers under legislation, and how the courts interpret the legislation. A well-articulated purpose should be capable of explaining the regime, guide interpretation of its provisions when there is uncertainty, and act as a test for decision making. See [Chapter 2](#) for more detail on defining the policy objective and purpose of the legislation.

## Choose the building blocks of the legislation carefully

The building blocks of any piece of legislation are the rules, powers, institutions, and enforcement structure contained in it. These Guidelines provide many key principles to assist in designing these building blocks in ways that will achieve legislation that is well-designed, fit for purpose, and accessible. However, some key points should be highlighted:

- Well-intentioned legislation may have unintended consequences. The highest risk is often not legislation that is intended to undermine fundamental rights or override Treaty obligations but legislation that does wrong unintentionally or overreaches carelessly. To safeguard against this risk, it is important to know the basics, which are set out in [Chapters 4](#) to [9](#).
- Consider past models but be careful. In applying these Guidelines, it helps to look at

examples known to do a similar job. Assess these existing examples against the regulatory purpose of the proposed legislation and the wider goals of high quality legislation. Look at how they have resolved issues raised by these Guidelines. However, don't borrow uncritically, as the proposed legislation has its own context and past solutions may need adjusting. For example, overseas models need to be adapted for a New Zealand context. See [Chapter 3](#).

- A key design question is “where the rules get set” in the system. The detail of what is required to comply with legislation may be set in the Act itself (through prescriptive requirements), delegated to regulators or other bodies (to be decided through administrative or legislative tools), or be left for individual actors to decide (if the legislation sets only open-ended principles or outcomes leaving a discretion as to how to comply). These choices have implications for certainty compared to flexibility, risk tolerance, and who ultimately decides what is required to comply. See [Chapters 14](#) to [17](#), which will assist with how to appropriately allocate material between Acts and secondary legislation.
- Another key question is whether the State needs to enforce the legislation and, if so, what tools are needed for enforcement. There are key trade-offs between criminal and civil tools and other softer compliance methods, which need to be considered alongside questions about who will enforce the legislation. See [Chapter 22](#) and onwards.
- It is also important to look at the issue of *who* will enforce or have other regulatory roles under the legislation, particularly in light of the answers to the questions about roles and responsibilities of the existing regulatory system. Who will do what now? Do they have the tools? Has their mandate been set in a way that supports the purpose of the legislation? How is co-ordination provided for so that there are no gaps in the regime or unworkable overlaps? See [Chapters 18](#) and [20](#).
- Consider how to move from the current world to the new world. What transitional and savings arrangements are needed to move from the old law to the new law in an orderly, fair, and efficient manner that avoids retrospective effects? See [Chapter 12](#).
- What changes may be needed to other legislation to ensure that the new law becomes part of an integrated system of law?

## Think about the long term

To design high quality legislation, we need to think about the demands that will be placed on the legislation over the medium to long term and actively consider the big picture. How will it operate in the transition? How will that be different once it is fully implemented? How will the legislation be regarded in 20, 30, 40 years' time? Is there sufficient durability and flexibility? It's important to consider the regulatory system in this context, including the extent of likely technological advances or other changes.

This means designing a system that can adapt to change and allow for continuous improvement. We

need to consciously design mechanisms to guard against a “set and forget” tendency for legislators.

Think beyond the present proposed change. Are the existing regulatory and legislative systems healthy? If there is an existing Act, is it better to substantially rewrite or replace the Act in addition to, or instead of, amending it? This is particularly important where existing legislation is heavily amended and inaccessible. See [Chapter 3](#).

### **Think about the whole legislative package**

Acts and secondary legislation should together create a coherent legislative package. To achieve this, the Act and any secondary legislation that is essential to implement the Act should be developed in tandem as much as possible. Officials should at least have fully considered the content of secondary legislation by the time a Bill is at select committee. This will allow MPs and the public to consider the full legislative regime, and is particularly valuable where secondary legislation contains important operational and technical policy detail.

### **Think about how users will find and navigate the legislation**

Designing legislation that users can find and use easily is critical for both the rule of law and its efficacy. So it is worth thinking about whether legislation should be amended or replaced, how it overlaps with other laws, and whether the legislation is multi-layered or fragmented in terms of these needs.

### **Use these Guidelines to help**

The Guidelines are a valuable tool and will help users to work through matters touched on in this chapter, and much more. See the preliminary material at the front of these Guidelines about when and how to use them.

### **Reflect and learn for next time**

Finally, don’t set and forget. Reflect on what worked, what didn’t, and what might be done differently next time. Feed back into the public service’s stewardship and good design goals by letting LDAC know if there are areas in the Guidelines that are missing or would benefit from supplementary material.

## Chapter 2 Defining the policy objective and purpose of proposed legislation

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

### Guidelines

#### 2.1 Is the policy objective and purpose of the legislation clearly defined?

*The policy objective must be clearly defined and discernible.*

Achieving the policy objective should drive the design of the legislation and all the detailed decisions made when drafting. Therefore, the broad underlying objective (the policy it is implementing or the reason for it) should be clearly defined before substantive work begins and clearly discernible in the legislation and policy documents (including the Cabinet policy papers and the departmental disclosure statement).

While it is not necessary to determine every detail of the policy at the beginning, it is highly desirable to settle as much policy detail as possible prior to writing drafting instructions and undertaking consultation on the proposed legislation. Providing more policy detail will enable others to properly assess the effects of the proposal and the ultimate legislation.

It may be helpful to look at examples of similar legislation to determine the level and nature of the policy analysis required. When developing policy, officials may also find it helpful to produce an outline of the key elements of the proposed bill as this can sometimes assist in identifying issues, especially more detailed ones, that need to be addressed.

#### 2.2 Do all the provisions of the proposed legislation clearly relate to the policy objective and purpose of the proposed legislation?

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

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

#### 2.3 Is legislation the most appropriate way to achieve the policy objective?

*Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective.*

Unnecessary legislation should be avoided because it involves significant costs.<sup>2</sup> Those costs

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<sup>2</sup> Cabinet Office [Cabinet Manual 2017](#) at 7.23.

take various forms, including:

- the costs of enacting the legislation itself, including its preparation (drafting, consulting, and reviewing); the process through the House (including House sitting time and the costs of the select committee process); and the publication of the legislation;
- the costs of complying with the legislation (including learning about it and adjusting processes); and
- the costs in administering, implementing, and enforcing it.

There is also a range of indirect costs of legislation. For example, new legislation can add size and complexity to the statute book resulting in costs to accessibility. It can also make the policy inflexible because amendments when circumstances change will require new legislation.

These costs should be considered in every proposal for legislation to ensure that the benefit of a legislative solution outweighs the costs. Particular caution should be taken when:

- the policy can be implemented equally well by non-legislative means;
- obligations are proposed without consequences or an intention that they will be enforced;
- obligations already in the common law or other statutes are proposed to be included in new legislation for an educative purpose; or
- legislation will provide a power to do something that can be achieved without legislation for example, providing a power for the Crown to acquire shares.

Legislation or provisions in legislation that expressly provide they have no legal effect or that are not intended to be enforced risk needless expenditure of public funds and bringing the law into disrepute. If material that does not have a legal effect is enacted in legislation, possible risks to the clarity or certainty of the legislation should be identified and considered. For example, is there a risk that a court may subsequently read in a legal effect to the provision that was not contemplated by the law maker?

In many cases, a number of alternatives to creating new legislation will exist. The policy objective might be achieved more effectively through the use of education programmes, reliance on the common law or existing legislation, or reliance on existing civil remedies (see [Chapter 22](#)). Where legislation is preferred over another suitable, non- legislative alternative, this decision should be capable of justification. It is a [Cabinet Manual](#) requirement that unnecessary legislation is avoided.<sup>3</sup>

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<sup>3</sup> Cabinet Office *Cabinet Manual 2017* at 7.23.

## 2.4 Has there been appropriate consultation within the government?

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

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

Effective and appropriate consultation within government is a [Cabinet requirement](#).<sup>4</sup> The [CabGuide](#) also provides some useful guidance on who to consult within the government.

## 2.5 Has effective consultation with the public occurred?

*Public consultation should take place.*

Public consultation is key to ensuring that the Government has all the information it requires to make good law. Information should be made available to the public (those outside the government) in a manner that enables people affected by the proposed legislation to make their views known. Public consultation can help to better identify the nature of the policy problem and more effective solutions for that problem. It also contributes to the legitimacy of the legislation in the eyes of the public and those affected. An effective consultation programme can increase public acceptance of the legislation, increase compliance with it, and lower the administration costs of implementing and enforcing it.

Public consultation is not required or possible in all cases. However, a failure to consult may result in valuable perspectives and information being overlooked and also risks unintended consequences. It may also result in a failure to identify alternative means of achieving the policy objective. Public consultation should occur as early as possible in the process of developing the legislation, preferably in the early stages of the policy development. At the least, it should occur at a point when it can still make a difference to the outcome.

Further information on planning and carrying out effective consultation is found in the Treasury's Guidance Note on [Effective Consultation for Impact Analysis](#).

[Link to supplementary material: [Exposure draft Bills](#)]

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<sup>4</sup> Cabinet Office *Cabinet Manual 2017* at 7.27.

## Chapter 3 How new legislation relates to the existing law

New legislation must fit into the existing body of law in a coherent way. A failure to properly address existing legislation or the common law may make the law difficult to understand in its full context or lead to uncertainty or errors. Those problems may, in turn, lead to higher rates of non-compliance, litigation, or remedial legislation.

New legislation will interact with the existing body of law (found in both legislation and the common law) in a variety of ways. Some statutes are relevant to all new legislation (such as the [Interpretation Act 1999](#) and the [New Zealand Bill of Rights Act 1990](#)). Other statutes also apply generally, but operate only in relation to certain subject matter (such as the [Search and Surveillance Act 2012](#) and the [Official Information Act 1982](#)).

Lastly, for any new legislation there will likely be specific existing legislation that is affected or connected to the new legislation.

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

It is necessary to have as thorough an understanding as possible of the relevant existing body of law before undertaking substantial work on the legislation. This is especially important where the intention is to reverse a particular judicial decision or trend that has developed through a line of decisions.

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

### Guidelines

#### 3.1 Has all relevant existing legislation been identified and considered?

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

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

If existing legislation is to be heavily amended (or it is already old or heavily amended), consideration should be given to replacing it instead. A key factor to consider is accessibility. If multiple amendments will cause the resulting law to be so complex it becomes difficult to understand, replacing the legislation should be preferred. Complexity can arise through grafting new policies onto existing frameworks so that the overall coherence of the

legislation is lost. On the other hand, accessibility should be balanced against any disadvantage in disrupting settled understandings of the law. Advice on this matter should be sought from the [Parliamentary Counsel Office](#) (the PCO).

[Link to supplementary material: [Bespoke legislative solutions](#)]

**3.2 Are any conflicts or interactions between new legislation and existing legislation addressed?**

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

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

**3.3 Are any matters addressed by the new legislation covered by existing legislation?**

*New legislation should not restate matters already addressed in existing legislation.*

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

In some cases, existing legislation can be used to supplement new legislation. Some Acts are of general application (the [Interpretation Act 1999](#)). Others must be expressly applied by the new legislation (see the [Ombudsmen Act 1975](#)).

Where appropriate, flag provisions may be used in the new legislation to identify (but not restate) the relevant provisions of the other legislation (see, for example, section 8 of the [Local Government \(Auckland Council\) Act 2009](#) or section 30B(3) of the [Receiverships Act 1993](#)).

**3.4 Have all relevant common law rules and principles and tikanga been identified and considered?**

*Relevant common law rules and principles and tikanga should be identified.*

New legislation should, as far as practicable, be consistent with fundamental common law principles and tikanga (which may require appropriate consideration of Māori language, customs, beliefs and the importance of community, whānau, hapū and iwi). Some of the fundamental common law principles are discussed in [Chapter 4](#).

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

to identify the extent to which the common law still applies.

**3.5 Have any interactions between the common law and the new legislation been identified and addressed?**

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

New legislation can alter, work in parallel with, or entirely override the common law. However, the new legislation must clearly identify whether or not it is doing so. If the legislation is not intended to affect the common law, then this should also be explicitly set out in the new legislation.

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

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

New legislation should only address matters already covered by the common law where it can result in improvement (such as increased clarity or a policy change). The common law is able to evolve flexibly and so is more adaptable than legislation. The cost and the potential risks of legislating should not outweigh the benefits of the new legislation.

**3.7 Are there any precedents in existing legislation?**

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

The following matters should be considered before deciding to follow an existing precedent:

- The search for appropriate precedents should not be limited to legislation administered by the particular department that is developing new legislation (the courts will often consider the legislation of other departments when seeking to identify precedents).
- The reasons for following a particular precedent, or for not following an apparently suitable precedent, must be considered and articulated in the policy documentation.
- If there is an intention for a provision to have the same effect as a provision in other legislation, then this should be articulated in the policy documentation and instructions to the PCO.
- New legislation must not copy New Zealand or overseas precedents without first considering whether the precedent will be efficient and effective having regard to the circumstances of the new legislation.
- If following a precedent where the outcome is to be duplicated, be wary of making inconsequential amendments (such as the reordering of words or

provisions to no substantive effect) in case there are unintended consequences.

- If a precedent is being used from foreign legislation (for example, where implementing trans-Tasman or other international agreements), the terminology used in foreign legislation must be appropriate for the New Zealand context.

# CONSTITUTIONAL ISSUES AND RECOGNISING RIGHTS

## Chapter 4 Fundamental constitutional principles and values of New Zealand law

Constitutions are concerned with public power. They confer (and also limit and regulate) the power of a State over its people. Fundamental constitutional principles and values in New Zealand law and practice run so deep that the courts will often draw on them when interpreting legislation or otherwise deciding cases. If new legislation is inconsistent with or challenges one of these fundamental principles, it will become the subject of concern and increased scrutiny by Parliament, the public, and often the courts.

Many of New Zealand's constitutional principles exist in the common law and are reflected in legislation such as the [Constitution Act 1986](#), the [New Zealand Bill of Rights Act 1990](#) (NZBORA), and the [Public Finance Act 1989](#). Other principles are found in constitutional conventions, the [Standing Orders of the House of Representatives](#), and in the [Cabinet Manual](#) (supplemented by the [CabGuide](#)). While New Zealand does not have a written constitution, these principles, together with important statutes and documents such as the Treaty of Waitangi (the Treaty) and ancient English statutes such as the [Magna Carta 1297](#) and the [Bill of Rights 1688](#), form the constitution of New Zealand.

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

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

### Guidelines

#### 4.1 Fundamental constitutional principles and the rule of law

*Legislation should be consistent with fundamental constitutional principles, including the rule of law.*

Legislation should be consistent with fundamental constitutional principles. Officials should carefully consider the impact of fundamental constitutional principles on proposed legislation, particularly when the legislation will:

- change or reshape State power (for example, by creating or removing new powers for the State, significantly shifting power between branches of the State, or removing powers from the State);
- change the relationship between citizens and the State in a fundamental way (for example, by encroaching on the operation of democratic processes, individual dignity or liberty, equality before the law or access to the courts);

- modify the fundamental structures or functions of the State (for example, by altering the scope or operation of representative democracy, altering the scope of parliamentary sovereignty, not observing the separation of powers, conferring law enforcement functions or powers on private sector bodies, or affecting judicial independence and impartiality); or
- modify or remove safeguards and limitations imposed on the exercise of State functions (for example, the rule of law, human rights, the spirit and principles of the Treaty of Waitangi, or natural justice).

The following are some of the most important constitutional principles in New Zealand law.

**The rule of law:** The full scope of the rule of law is the subject of debate, but at its core are the following principles:

- **Everyone is subject to the law, including the Government**—People and institutions that wield power must do so within legal limits, and be accountable for their actions; everybody is equal before the law and is subject to it. The application of legislation to the Government itself is considered in more detail in [Chapter 11](#).
- **The law should be clear, and clearly enforceable**—The law should be publicly accessible and able to be easily understood by all to whom it applies. Rights and obligations need to be matched with enforcement mechanisms (civil or criminal) and remedies so that people and/or the State can enforce it.
- **There should be an independent, impartial judiciary**—Certain decisions must be made by judges who are independent of the government. Judges interpret legislation and develop the common law. They decide disputes between individuals and between individuals and the Government. Courts are the only institutions that should impose criminal convictions or sentence people to imprisonment.

To properly perform these functions and to maintain public confidence in the judicial system, judges must be impartial in respect of the matter before them, and be independent of the Executive and Legislature. Legislation that affects a judge’s appointment, tenure in office, or financial security will potentially affect judicial independence.

There should also be effective access to justice and redress for individuals (access to courts is the subject of a specific guideline below).

**Representative democracy and free and fair elections**—Members of the House of Representatives are chosen through regular free and fair elections in which almost all citizens and permanent residents may vote and put themselves forward for election (subject to some restrictions in the [Electoral Act 1993](#)). Parliament’s role as a forum of democratic participation and debate gives it the strongest contemporary justification for asserting sovereign law-making status (see parliamentary sovereignty below). Any attempt to affect either the process by which elections are conducted or the eligibility criteria to vote or stand

as a candidate will be the subject of considerable scrutiny.

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

**Separation of powers**—Each branch of Government (executive, legislature, and judiciary) must perform only those functions associated with that branch and not intrude into, or assume the functions of, another branch. This principle helps to prevent the concentration of power in one branch of government and helps to reduce the potential for abuse by ensuring those responsible for making the law cannot direct how that law will be enforced against themselves, and by ensuring those responsible for enforcing the law cannot change the law to remove procedural safeguards. While the executive and legislative branches share a common membership in New Zealand (Ministers must be members of Parliament), there is still a functional separation between the two branches that means the legislature can hold the Executive to account. Separation between the legislature and the judiciary requires that legislation should not direct the punishment and guilt of named or identifiable people without due process of law. Legislation that does so appropriates judicial power and undermines judicial independence, as well as offending against the rule of law. Stringent protections must be maintained to keep the judiciary separate and independent from the other branches to enable proper judicial scrutiny.

#### **4.2 The spirit and principles of the Treaty of Waitangi**

*Legislation should be consistent with the principles of the Treaty of Waitangi.*

The Treaty is of vital constitutional importance. The development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty. [Chapter 5](#) sets out guidelines to help ensure legislation is consistent with the principles of the Treaty of Waitangi.

#### **4.3 The principle of legality—the dignity of the individual and the presumption in favour of liberty**

*Legislation should be consistent with the dignity of the individual and the presumption in favour of liberty.*

All law is made (and, when enacted, will be construed by courts) against a matrix of values and principles that are regarded as fundamentally important to our legal system. These values and principles can be expressed at differing levels of abstraction. Fundamentally, they concern human dignity and liberty but these terms embrace a broader set of rights and freedoms that include:

- the right not to be deprived of life;
- physical integrity of one’s body, including freedom from medical treatment or scientific experimentation without consent;
- freedom from torture, or cruel, degrading, or disproportionately severe treatment or punishment;
- freedom from discrimination based on immutable characteristics;
- physical liberty, in the sense of freedom from arbitrary arrest or restraint;
- freedom of conscience, religion, expression, association, assembly, and movement;
- liberty, in the sense of freedom to make fundamental personal choices as to how one lives one’s life; and
- procedural fairness, often referred to as natural justice.

The expectation is that legislation will be construed and applied in light of these abiding values. This has been called the “principle of legality”.

Most of these fundamental rights and freedoms have, since 1990, been affirmed in [NZBORA](#). Section 7 of that Act requires, as part of the process of law making, that the Attorney-General advise the House of Representatives if any provision in a bill appears to be inconsistent with rights and freedoms in NZBORA. For its part, section 5 of NZBORA recognises that limits on rights and freedoms may be appropriate if they are no more than “reasonable limits” that can be “demonstrably justified in a free and democratic society”. [Chapter 6](#) provides guidance on developing legislation that impacts on rights.

#### **4.4 Respect for property**

*New legislation should respect property rights.*

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

The law may allow restrictions on the use of property for which compensation is not always required (such as the restrictions on the use of land under the [Resource Management Act 1991](#)).

#### **4.5 Natural justice**

*Legislation should be consistent with the right to natural justice.*

Section 27(1) of [NZBORA](#) provides a right to the observance of natural justice in a broad range of circumstances—for example, whenever a tribunal or other public authority makes a determination in respect of a person’s rights, obligations, or interests that are protected or recognised by law. The requirements of natural justice vary depending on the particular context of the case, having regard to the importance of the rights and interests involved, but its purpose is to ensure people are dealt with fairly. First, decision makers must be unbiased in respect of the matter before them. Second, decision makers must provide those affected by the decision with the opportunity to be heard. Natural justice operates at its highest level in the case of criminal trials, with strict procedural requirements; the requirements of natural justice in civil matters (for example, a licensing decision) may be less stringent. See [Chapter 6](#) for more guidance on legislation that impacts on rights.

#### **4.6 Access to the courts**

*Legislation should not restrict the right of access to the courts.*

The ability of the courts to review the legality of government action or to settle disputes is a key constitutional protection. Legislation that seeks to limit this right must be justified, and will generally be given a restrictive interpretation by the courts (see [Chapter 28](#) for guidance on creating a system of appeal, review, and complaint). This principle does not prohibit a mandatory requirement to attempt a resolution by alternative dispute resolution (ADR) or review processes before bringing court proceedings in appropriate cases (see [Chapter 29](#) for guidance on designing legislation involving ADR).

#### **4.7 The presumption against retrospectivity**

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

This presumption is part of the rule of law. The general rule is that legislation should have prospective, not retrospective, effect ([Chapter 12](#) provides guidance on legislation that has a retrospective effect).

#### **4.8 Parliamentary authority is required to spend or borrow money, or levy a tax**

*Legislation needs to clearly authorise the raising, spending, and borrowing of money.*

Government departments can only spend those funds that Parliament specifically grants them each year. Departments that run over budget must seek approval from Parliament for more funds. Only Parliament can authorise the borrowing of money by the Government, and only Parliament has the power to authorise the raising of money by way of new or increased taxes. The granting of powers to charge fees and levies is discussed in [Chapter 17](#).

#### **4.9 International obligations**

*Legislation should comply with New Zealand’s international obligations.*

There is a presumption that New Zealand will act in accordance with its international obligations, and that legislation will comply with those obligations ([Chapter 9](#) provides

guidance on designing legislation to implement treaties and international obligations).

#### **4.10 The clear statement principle**

*Legislation that overrides fundamental rights and values must use clear and unambiguous wording.*

If any of these principles are intended to be departed from in a particular case, Parliament must use clear and unambiguous language to do so. Without clear words to the contrary, courts will presume that general words in legislation are intended to operate consistently with the principles. As to rights, this clear statement principle is reflected in section 6 of NZBORA: “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.” It follows that if a meaning *inconsistent* with the Bill of Rights is intended this will need to have been expressed very clearly. (Recall, however, that the Bill of Rights contemplates that rights may be limited so long as the limitations are “reasonable” and “demonstrably justified in a free and democratic society”—meaning that a law imposing only reasonable limits on rights is not inconsistent with NZBORA).

## Chapter 5 The Treaty of Waitangi, Treaty settlements, and Māori interests

The Treaty of Waitangi (the Treaty) has been described as “part of the fabric of New Zealand society” and is of vital constitutional importance.<sup>5</sup> The development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty.

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

The nature of the Treaty partnership between the Crown and Māori is evolving as increasing numbers of grievances are settled and the Treaty partners move into new post-settlement relationships. This means that the maintenance of the ongoing relationship between the parties to the settlement is a key part of any obligation to consult in this context and may require a different approach to consultation than in other contexts. Te Puni Kōkiri (TPK) has information on its [website](#) explaining how and why to engage with Māori as part of the policy process.<sup>6</sup>

Due to its constitutional significance, in the absence of clear words to the contrary, the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and interpret legislation accordingly. The [Cabinet Manual](#) requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Treaty.<sup>7</sup>

### Guidelines

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

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

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

The Treaty is a living document. This refers to the common understanding that the intent and application of the Treaty will change as society and circumstances evolve, and that the interests of Māori to be protected under the Treaty are not only those that existed when the Treaty was signed. A Māori interest may arise in respect of the right to develop a resource

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<sup>5</sup> *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

<sup>6</sup> Te Puni Kōkiri *Building Relationships for Effective Engagement with Māori* (2006).

<sup>7</sup> Cabinet Office *Cabinet Manual 2017* at 7.65(a).

that was either undiscovered or unexploited at the time the Treaty was signed. Interests might also be affected by the use of new technology, such as the ability of Māori to have access to television and radio broadcasts to promote culture and language. A Māori interest may also arise in issues where Māori are disproportionately affected.

The [Crown Law Office](#) should be consulted early to assist the identification of interests that will be affected.

## **5.2 Does the proposed legislation impact Crown commitments made under any Treaty settlement?**

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

The Government negotiates and, on behalf of the Crown, is party to a number of Treaty of Waitangi settlements with iwi, hapū, collectives of iwi or hapū, and other groupings to provide redress for historical breaches of the Treaty or its principles by the Crown and to make provision for ongoing relationships between the parties.

Individual Treaty settlements are final, meaning the historical claims they settle and the settlement itself (with the exception of disputes over interpretation) may not be the subject of a further historical claim to the Waitangi Tribunal or the courts. The detail of each settlement is reflected in a Deed of Settlement that is given effect by legislation.

Thorough consultation must take place with the relevant post-settlement governance entity if new legislation has the potential to adversely impact an existing Treaty settlement, or damage the relationships between that entity and local or central government established through the Treaty settlement. The [Office of Treaty Settlements](#) (OTS) and the [Post Settlement Commitments Unit](#) (PSCU) should also be consulted in these circumstances. OTS is a unit within the [Ministry of Justice](#) responsible for negotiating Treaty settlements on behalf of the Government. PSCU was established to support the durability of Treaty settlements.

## **5.3 Does the legislation potentially affect rights and interests recognised at common law or practices governed by tikanga?**

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

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

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

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

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

Care should be taken where legislation may affect practices governed by tikanga. As a matter of practicality, such practices will likely be identified by the steps taken under [5.1](#).

#### **5.4 Should Māori be consulted?**

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

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

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

#### **5.5 Who should be consulted?**

*Consultation must target Māori whose interests are particularly affected.*

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

TPK, through its directory [Te Kāhui Māngai](#), provides a comprehensive list of post-settlement groupings and areas of interest.<sup>8</sup> If an iwi has not yet settled its historical claims, OTS will be able to advise on which groups have a mandated body recognised by the Crown for Treaty settlement purposes.

The [CabGuide](#) notes that departments should consider consulting TPK on proposals that may have implications for Māori as individuals, communities, or tribal groupings; and the Crown Law Office for constitutional issues, including Treaty issues.<sup>9</sup>

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<sup>8</sup> Te Puni Kōkiri *Te Kāhui Māngai (Directory of Iwi and Māori Organisations)*.

<sup>9</sup> Cabinet Office *CabGuide* "[Cabinet paper consultation with departments](#)" (2017).

Also, the Ministry of Justice (through PSCU) is developing a central register of all settlement commitments. The Ministry should be consulted to determine whether proposals for legislation will affect treaty settlements.

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

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

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

- **General measures**—These provisions relate to the manner in which the legislation is administered or the way a power is exercised. For example:
  - section 4 of the [Conservation Act 1987](#) provides: “This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi”;
  - section 9 of the [State-Owned Enterprises Act 1986](#) provides: “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”; and
  - section 4 of the [Crown Minerals Act 1991](#) provides: “All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)”.

Even subtle differences in the wording of legislation (for example, the contrast between “give effect to” and “have regard to”) may have significant effects and must be carefully considered with the benefit of legal advice.

- **Specific measures**—In these provisions, the Treaty and its principles are tied to specific mechanisms by which they are recognised in the legislation. For example, section 4 of the [Environmental Protection Authority Act 2011](#) provides:

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

  - (a) section 18 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and
  - (b) the EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under the Act.”

Other examples include section 4 of the [New Zealand Public Health and Disability Act 2000](#)

and section 7 of the [Public Records Act 2005](#).

Specific measures have been the usual approach since 2000. They have the advantage of demonstrating that the Government has actively worked through what is required in order to recognise and safeguard what the principles of the Treaty mean in the particular context. In doing this, the provisions provide greater certainty than general measures.

#### **5.7 Does Parliament intend to legislate inconsistently with the principles of the Treaty of Waitangi?**

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

In rare cases, the Government may wish to achieve an outcome that risks being held by a court to be inconsistent with the principles of the Treaty. In such circumstances, great care must be taken to express the policy intention as clearly as possible, both in the legislation itself, and in the policy documentation underlying the Act. If the intention is not clear, the courts will presume that Parliament intended to legislate consistently with the principles of the Treaty. This may yield results inconsistent with the intended policy outcome.

## Chapter 6 New Zealand Bill of Rights Act 1990

The [New Zealand Bill of Rights Act 1990](#) (NZBORA) is expressed to “affirm, protect and promote human rights and fundamental freedoms in New Zealand”, and to “affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”. NZBORA applies to the executive, legislature, and judiciary, as well as to acts done by any other person or body in the “performance of a public function, power, or duty conferred or imposed ... by or pursuant to law”. Its purpose is to set basic standards that all these people and bodies ought to observe. Actions of Government and public actors ought to comply with the Bill of Rights. So too, new legislation should be consistent with the rights and freedoms contained in NZBORA. The Ministry of Justice has produced detailed guidance for the public sector regarding NZBORA.<sup>10</sup>

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

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

Many of these rights and freedoms are discussed in [Chapter 4](#). As discussed there, most have long histories. They are deeply rooted in the common law and reflected in the detail of our legislation. There is also a developed body of case law concerning NZBORA and the interpretive approach taken by courts when applying legislation that implicates rights in NZBORA (in the sense described in [6.1](#)).

Section 7 of NZBORA is of special relevance to the development of legislation. It requires the Attorney-General, upon the introduction of a Government bill, to bring to the attention of the House of Representatives any provision in that bill that he or she considers to be inconsistent with a right or freedom in NZBORA. In discharging that duty, the Attorney-General is assisted by advice given by officials in the Ministry of Justice. If the relevant bill was developed by the Ministry of Justice, that advice is supplied instead by Crown Law.

If the Attorney-General considers a bill to be consistent with NZBORA (so that no report under section 7 is required), the relevant legal advice is subsequently published on the Ministry of Justice website. If the Attorney-General considers a provision to be inconsistent (so that a section 7 report is made), that report is tabled in the House and a link made available from the Ministry website.

Because of the importance of ensuring consistency of legislation with NZBORA, legal advice should be sought at an early stage to ensure that legislative proposals give proper regard to rights and

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<sup>10</sup> Ministry of Justice *Introduction to the Guidelines*

<http://www.justice.govt.nz/assets/Documents/Publications/Guidelines-to-Bill-of-Rights-Act.pdf>

freedoms in NZBORA. Any restrictions on rights and freedoms—or “limits”, as they are called in NZBORA—must be able to be “demonstrably justified” as “reasonable limits” in a “free and democratic society” (see section 5 of NZBORA).

If proposed legislation is to limit NZBORA right, every attempt should be made to eliminate the inconsistency or ameliorate its impact so that the limit meets the standard of reasonableness set out in section 5. A full explanation as to why the limitation was necessary will need to be given to the relevant Cabinet committee and select committee. The [Cabinet Manual](#) requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, NZBORA.<sup>11</sup> It also provides that possible inconsistencies with NZBORA should be identified by the agency developing the bill at the “earliest possible stage”.<sup>12</sup>

## Guidelines

### 6.1 Has the option that imposes no limit or no more than a reasonable limit on a particular right been selected?

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

The first question that must be answered is whether a right or freedom in the Bill of Rights is implicated by a legislative proposal. Making this determination requires an awareness of all the rights and freedoms set out in NZBORA. (The particular case of rights against discrimination in section 19 of NZBORA is dealt with in the next chapter.) The initial inquiry is into whether a right is “implicated”—in the sense of being likely to be affected in some way by proposed legislation. This requires an understanding of what falls within the scope of a right. Sometimes rights will be implicated in ways that are not obvious at first.

The scope of a right in NZBORA, and hence whether it is implicated by a particular legislative proposal, is ultimately a legal question. It is important to identify the rights potentially in issue at an early stage in the policy process and, when in doubt, seek and proceed on the basis of legal advice.

If a right is implicated, then the manner in which that right would be affected by the proposed legislation needs to be considered. If it is possible to attain the legislative goal without limiting a protected right or freedom, then that should be the preferred option. That possible option might arise through adopting a different legislative approach or relying on non-legislative alternatives (see [Chapter 22](#)).

But NZBORA also recognises that rights are not always absolute. Section 5 of NZBORA says that rights may be subject to limits so long as those limits are “reasonable” and are able to be “demonstrably justified in a free and democratic society”. Legislation that imposes no more than reasonable limits on protected rights and freedoms is therefore consistent with

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<sup>11</sup> Cabinet Office *Cabinet Manual 2017* at 7.65(b).

<sup>12</sup> *Ibid* 7.67.

NZBORA. Determining whether a limitation is “justified in a free and democratic society” involves an inquiry that can be summarised as follows:<sup>13</sup>

- (a) Does the proposed limit on a right serve a purpose sufficiently important to justify limiting a right?
- (b) (i) Is the limiting provision rationally connected to its purpose?
  - (ii) Does the proposed limit impair the right no more than is reasonably necessary for sufficient achievement of its purpose?
  - (iii) Is the limit proportionate to the importance of the objective?

In many cases there will be a range of reasonable options that may be taken, and there will be consistency with NZBORA if the chosen option is within this range.

Officials must therefore work closely with their legal advisers when conducting this assessment. For their part, legal advisers will need information on the policy objectives and the impact of the selected means of implementing those objectives (and whether there are any more rights-consistent alternative modes of implementing them). The aim should be to attain the least possible limit on a right that is consistent with attaining the legislative purpose (and certainly no more than a “reasonable” limit on that right, with reasonableness being determined in the manner set out above).

**6.2 If the limit on a right cannot be justified, but remains the only possible way to achieve the policy objective, is the limit drawn as narrowly as possible to achieve that objective?**

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

There may be cases where the Government wishes to proceed with legislation that results in an unjustified limitation on an NZBORA right—one that cannot be regarded as a reasonable limit on that right. This ought to be very rare. In these situations, great care must be taken to ensure the legislative intent of the bill is very clearly stated. Section 6 of NZBORA requires that wherever an enactment can be given a meaning that is consistent with rights and freedoms contained in NZBORA, that meaning shall be preferred to any other meaning. It follows that clear and unambiguous language must be used to confirm a rights-infringing (and thus inconsistent) intention.

Section 4 of NZBORA makes it clear that courts are prevented from striking down, or refusing to apply, legislation that is inconsistent with NZBORA. However, that provision must not be seen as an invitation to develop legislation inconsistent with NZBORA. Such legislation can have serious consequences:

- First, the Attorney-General is required by section 7 of NZBORA to notify

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<sup>13</sup> This summary paraphrases the approach set out by Tipping J of the Supreme Court in *R v Hansen* [2007] 3 NZLR 1 at [104].

Parliament if he or she considers a bill imposes a limitation on an NZBORA right that is not a reasonable limit demonstrably justified in a free and democratic society.

- Secondly, [Standing Order 265\(5\)](#) requires the Attorney-General's report to be referred to a select committee. The inconsistency may then be the subject of adverse comment during the select committee process, which might attract negative publicity.
- Thirdly, while the courts are not empowered to strike down an Act, they may declare the existence of the inconsistency in their judgments.
- Finally, legislation that is inconsistent with NZBORA will place New Zealand at risk of breaching its international human rights obligations (under the International Covenant on Civil and Political Rights and possibly other instruments) and expose it to adverse comment from the international treaty monitoring body, which may have negative political consequences.

In any event, all possible steps must be taken to ensure that any unjustified limitation of rights is the least limitation required to achieve the policy objective. Additional procedures or safeguards that might further mitigate the limitation should also be considered.

## Chapter 7 Discrimination and distinguishing between different groups

Unjustified discrimination causes harm to people and may stigmatise already vulnerable groups. This chapter will assist in identifying whether proposed legislation might unjustifiably discriminate on its face or in its application, and how that might be avoided.

Section 19(1) of the [New Zealand Bill of Rights Act 1990](#) (NZBORA) affirms that everyone has the right to freedom from discrimination on the 13 grounds of discrimination set out in section 21 of the [Human Rights Act 1993](#). Those grounds are:

- Sex (including pregnancy, childbirth, and gender identity)
- Marital status
- Religious belief
- Ethical belief
- Colour
- Race
- Ethnic or national origins
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation

Some of these terms are further elaborated on and defined in the Human Rights Act 1993, which also contains various exceptions and modifications.

The starting point is that it ought to be rare for legislation to differentiate between people on the basis of these characteristics. That said, some of the grounds—especially age—may well be used to make important distinctions necessary to the very policy of the statute. Examples include making special provisions in criminal justice and family law for children and young people, and creating minimum age thresholds in various other areas of life (as with driving, voting, ability to marry, and purchasing tobacco and alcohol).

The courts have established that a law (or a policy or practice) unjustifiably discriminates when:

- it draws a distinction on one of the prohibited grounds of discrimination;
- the distinction involves a material disadvantage to the affected person or group; and
- making that distinction cannot be justified, in terms of section 5 of NZBORA, as a reasonable limit on the right to be free of discrimination that is “demonstrably justified in a free and democratic society” (refer to Chapter 6).

Be alert for both *direct* and *indirect* discrimination. The former occurs when a legislative provision discriminates on its face, by expressly treating a group differently on the basis of a prohibited ground of discrimination. Indirect discrimination occurs when a provision is not on its face discriminatory

because it does not expressly contravene a prohibited ground, but its *effect* is that a group is disadvantaged. For example, a generally expressed provision may not include any reference to a person's religion yet impose some requirement or restriction that impacts differently on people of a particular religious belief. In both cases, there is a need to consider whether the difference in treatment involves a material disadvantage and, if so, whether it is capable of justification.

The Ministry of Justice holds policy responsibility for matters related to NZBORA and the Human Rights Act 1993 and provides detailed [guidance](#) for the public sector on its website.<sup>14</sup>

The [Cabinet Manual](#) requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Human Rights Act 1993.<sup>15</sup>

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

## Guidelines

### 7.1 Does the legislation affect the right to freedom from discrimination in section 19 of NZBORA?

*Legislation should not discriminate on any of the prohibited grounds.*

The starting point is that legislation should not discriminate on any of the prohibited grounds. However, it is not unlawful to discriminate by taking steps in good faith to assist or advance those disadvantaged by discrimination (section 19(2) of NZBORA). It will generally be important to take legal advice on the application of section 19(2), having regard to its requirement that the measures must be premised on assisting or advancing those disadvantaged due to discrimination.

Where discrimination by a State sector organisation on a prohibited ground is the only means of achieving an important policy objective, clear language must be used in the legislation and the limitation must be justified in a free and democratic society (refer to the general discussion on limiting NZBORA rights in [Chapter 6](#)). The courts will presume that Parliament has intended to legislate consistently with NZBORA and will interpret the legislation as such in the absence of clear indicators in the legislation.

Particular care should be exercised in social policy areas such as welfare, health, or education, where it is often necessary to treat groups differently to achieve a positive outcome for those groups. For example, it may be necessary to consider and treat people differently by reason of age, sex, marital status, and certain other characteristics. Early consultation with legal advisers is recommended for officials working in such areas.

The Human Rights Act 1993 also contains a number of exceptions to the right to freedom

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<sup>14</sup> Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector: Guidelines on how to apply the standards and who is covered* (March 2002).

<sup>15</sup> Cabinet Office *Cabinet Manual 2017* at 7.65(b).

from discrimination that may be relevant to legislation. For example:

- it is not unlawful to exclude people of one sex from participating in competitive sporting activity in which the strength, stamina, or physique of competitors is relevant (section 49(1)); and
- it is not unlawful to provide goods, services, or facilities at a reduced fee, charge, or rate on the ground of age, disability, or employment status (section 51).

Seeking legal advice is important when the exceptions will be relied upon.

## **7.2 Has the option that results in the least amount of discrimination been selected?**

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

When faced with multiple options for achieving the policy objective, an option that achieves the policy objective without discriminating on a prohibited ground should be selected. If differential treatment is required by the policy, the option that results in the least discrimination should be preferred and additional measures to reduce the infringement of rights and freedoms or promote accountability and transparency should be considered. [Chapter 6](#) provides a list of the types of measures that may be appropriate.

## **7.3 Has the Human Rights Commission been consulted?**

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

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

## **7.4 Have all the consequences of non-compliance with NZBORA and the Human Rights Act 1993 been considered?**

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

The consequences that may result where legislation is inconsistent with NZBORA are described in [Chapter 6](#).

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

## Chapter 8 Privacy and dealing with information about people

The Government should respect privacy interests of people and ensure that the collection, use, and disclosure of information about identifiable people is done consistently with those interests. The unnecessary collection, misuse or perceived misuse, or unauthorised disclosure of personal information erodes the community's trust in the Government and other institutions, and can make it harder to collect information in the future. Further, other countries may be reluctant to share information with New Zealand if our law does not give proper respect to privacy rights.

If new policy is being developed that proposes the handling of personal information (that is, information about a person that either identifies or is capable of identifying that person), officials must first consider whether the proposed action is governed by the [Privacy Act 1993](#). That Act applies to both public sector and private sector agencies and establishes a set of information privacy principles for the handling of personal information. The two key concepts in the Act are purpose and transparency. If the personal information is already held by a public body for another purpose, officials must consider whether the proposed use falls within the purposes for which the personal information was originally collected, and whether those purposes have been communicated to the individuals concerned, before developing legislation that permits a new use or disclosure of that information.

Any policy development that affects personal information should include a [Privacy Impact Assessment](#)<sup>16</sup> at an early stage to assess the extent of the impact on privacy and how that impact can be managed in the policy development process.

If the proposed handling of personal information is not authorised by the Privacy Act 1993 or other legislation (and authorisation under an approved information sharing agreement under that Act would be insufficient or inappropriate),<sup>17</sup> new legislation may be required. In designing legislation, officials must know what they want to do and what personal information is required to do it. Legislation relating to personal information needs to clearly set out the particulars of the information to be collected, the purpose or purposes for which the information may be used, and to whom the information may be disclosed and why.

While this chapter focuses on how public sector agencies handle personal information, the Privacy Act 1993 and codes of practice also apply to private sector agencies. This chapter will therefore be relevant to legislation that affects or authorises the handling of personal information by private sector agencies.

### Guidelines

#### **8.1 Is the legislation consistent with the requirements of the Privacy Act 1993 and that Act's 12 information privacy principles?**

*Legislation should be consistent with the requirements of the Privacy Act 1993, in particular the information privacy principles.*

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<sup>16</sup> Privacy Commissioner *Privacy Impact Assessment Toolkit* (2015).

<sup>17</sup> A more detailed discussion of approved information sharing agreements later in this chapter at [8.3](#).

The 12 [information privacy principles](#) are the cornerstone of the Privacy Act (and can be found in section 6). They address how agencies may collect, store, use, and disclose personal information. They also allow a person to request access to and correction of their personal information. Many of the information privacy principles have in-built exceptions, and Part 6 of the Privacy Act has further exemptions.

The policy objective will sometimes justify an inconsistency with the privacy principles. Section 7 of the Privacy Act provides that legislation that is inconsistent with the privacy principles will take precedence. There is then no need for legislation overriding the Act to contain an express override provision. However, any override of the Act requires a policy decision and the reasons should be clearly identified in the Cabinet papers.<sup>18</sup>

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

The design of any legislative provision that overrides the privacy principles, in particular principles 10 and 11 (relating to the use and disclosure of personal information), should reflect as necessary the principles of specificity, proportionality, and transparency. Consultation with the [Office of the Privacy Commissioner](#) and the [Ministry of Justice](#) will help to identify the necessary design features.

The [Cabinet Manual](#) requires Ministers to draw attention to any aspects of a bill that have implications for, or may be affected by, the principles in the Privacy Act 1993, when submitting bids for bills for the legislative programme. Similarly, it requires Ministers to confirm compliance with those principles when subsequently submitting the bill to the Cabinet Legislation Committee for approval for introduction.<sup>19</sup>

## **8.2 Does the new legislation comply with any relevant code of practice issued by the Privacy Commissioner?**

*The design of new legislation must take account of any applicable code of practice.*

The Privacy Commissioner issues codes of practice, which may modify or apply the information privacy principles to any specified information, agency, activity, industry, profession, or calling (or class of such thing). Codes of practice are disallowable instruments but not legislative instruments and are enforceable through the Privacy Commissioner's investigation and complaints process and proceedings in the Human Rights Review Tribunal.

A list of the currently applicable codes of practice can be found on the Privacy Commissioner's [website](#).

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<sup>18</sup> Previously, the Guidelines indicated that if proposed legislation would be inconsistent with the information privacy principles that should be explicitly stated in the legislation. That advice has been amended because it could be misleading.

<sup>19</sup> Cabinet Office *Cabinet Manual 2017* at 7.65 – 7.66.

### **8.3 Does the legislation authorise information sharing?**

*New legislation should only provide authority for information sharing where the sharing cannot be undertaken using one of the existing mechanisms in the Privacy Act 1993 (for example, an approved information sharing agreement), or where using those mechanisms is not sufficient for the policy purpose.*

Disclosing information about identifiable individuals between agencies for the purposes of delivering public services can be appropriate provided the privacy risks are managed well. However, information sharing to deliver public services must have clear legal authority. That authority may already be provided under the Privacy Act by the exceptions to the information privacy principles or by a code of practice.<sup>20</sup> For example, information may be disclosed for a purpose directly related to the purpose for which it was obtained or when disclosure is necessary to prevent or lessen a serious threat to public health or public safety. There may also be existing authority under Part 10 (information matching), Part 10A (identity information), or Part 11 (law enforcement information) of the Privacy Act.

If there is no such authority, or the available authority is partial or uncertain, an approved information sharing agreement (AISA) under Part 9A of the Privacy Act 1993 may provide the necessary authority without the need to resort to a new Act. AISAs are information sharing agreements approved by the Governor-General, by Order in Council on the recommendation of the relevant Minister. An AISA may grant an exemption to, or modify, one or more of the privacy principles or a code of practice (except in respect of principles 6 and 7 relating to access and correction rights). The Office of the Privacy Commissioner has published [guidance](#) for creating AISAs.<sup>21</sup> Departmental legal advisers, the Office of the Privacy Commissioner, and the Ministry of Justice should be consulted to ascertain whether there is already authority for information sharing or whether an AISA could provide that authority.

If there is no existing authority for proposed information sharing between agencies and an AISA would be insufficient or inappropriate, new legislation may be required. Generally, a new Act to authorise information sharing will only be required to overcome a statutory prohibition or restriction preventing it. However, in some cases, a new Act may be justified in other circumstances, for example where an Act would provide greater transparency than for the disclosure to be regulated under 1 or more AISAs. However, this should be weighed against the risk that a specific legislative disclosure regime will forgo the flexibility inherent in the Privacy Act, the safeguards provided by that Act, and the benefit of case law developed around it.

### **8.4 Does the legislation require a complaints process?**

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

The Privacy Act 1993 provides a comprehensive system for dealing with complaints arising

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<sup>20</sup> Privacy Act 1993, Parts 2 and 6.

<sup>21</sup> Privacy Commissioner *Approved Information Sharing Agreements (AISAs)* (2015).

from alleged breaches of the information privacy principles. This includes a complaints investigation process by the Commissioner and proceedings before the [Human Rights Review Tribunal](#).

New legislation should adopt the Privacy Act complaints procedure. Such new legislation should include clear words that incorporate the complaints procedure (see section 66 of the [Human Assisted Reproductive Technology Act 2004](#)). Good reasons must exist to create any new complaints and review procedures.

#### **8.5 Have the Privacy Commissioner, the Ministry of Justice and the Government Chief Privacy Officer (GCPO) been consulted?**

*The Privacy Commissioner, the Ministry of Justice and, when appropriate, the GCPO should be consulted when developing new policies and legislation that may affect the privacy of individuals.*

The Privacy Commissioner and Ministry of Justice should always be consulted where policy and legislative proposals potentially affect the privacy of individuals.<sup>22</sup> In addition, the following uses of information raise specific issues on which further advice should also be sought from legal advisers, the Privacy Commissioner, and the Ministry of Justice:

- **Public register**—A database or register that contains personal information and that members of the public can search through.<sup>23</sup>
- **Personal information sharing**—Including either approved information sharing agreements (under Part 9A of the Privacy Act) or information matching regimes (under Part 10 of the Privacy Act).<sup>24</sup>
- **Transfer out of New Zealand**—Sending information by any method to a body outside New Zealand (such as the sending of passport data to the border agencies of other countries or authorising banking records to be held overseas). Information sent outside New Zealand may no longer have the protection of the Privacy Act 1993 or other New Zealand laws or values. Also, the receiving jurisdiction may not have comparable safeguards to those found in New Zealand law. An appropriate level of additional safeguards should therefore be provided.

If the proposed legislation involves the management and governance of privacy in the provision of State services, the [GCPO](#)<sup>25</sup> should be consulted.<sup>26</sup>

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<sup>22</sup> The Privacy Commissioner has a number of functions in respect of privacy, including examining proposed legislation that makes provision for the collection of personal information by any public sector agency or the disclosure of personal information by one public sector agency to another: Privacy Act 1993, section 13(1). The Ministry of Justice administers the Privacy Act 1993.

<sup>23</sup> Privacy Commissioner [Drafting suggestions for departments preparing public register provisions](#) (2007).

<sup>24</sup> Privacy Commissioner [Approved Information Sharing Agreements](#) (2015); Privacy Commissioner, [Privacy Commissioner's Views On The Information Matching Guidelines](#) (2006).

<sup>25</sup> The GCPO leads an all of Government approach to privacy, including setting standards, developing guidance, building capability within agencies, and providing assurance to Government.

[Statistics New Zealand](#), which leads the government’s work on data and analytics, should be consulted on proposed approved information sharing agreements.

Finally, if legislation is to propose sharing court information, the Ministry of Justice should be consulted and consideration given to consulting the judicial branch (through the Ministry of Justice).<sup>27</sup>

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<sup>26</sup> Note the Cabinet Manual departmental consultation expectation: Cabinet Office *Cabinet Manual 2017* at 5.19-5.20; Cabinet Office *CabGuide* ‘[Cabinet paper consultation with departments](#)’.

<sup>27</sup> “Court information” means information held by the Ministry of Justice on behalf of the Court, as described in Schedule 2 of the [Senior Courts Act 2016](#) and in Schedule 1 of the [District Court Act 2016](#).

# INTERNATIONAL ISSUES

## Chapter 9 Treaties and international obligations

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

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

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

All multilateral treaties and bilateral treaties of particular significance (as the Minister of Foreign Affairs determines) are required to undergo parliamentary treaty examination. This process includes a National Interest Analysis.<sup>28</sup>

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

The [Ministry of Foreign Affairs and Trade](#) (MFAT) is the Government’s principal adviser on matters relating to treaties and international relations. MFAT maintains the official database of New Zealand’s binding treaty obligations at international law and should be consulted if a department is considering signing any international instrument that may impose obligations on New Zealand.<sup>29</sup>

The [Cabinet Manual](#) requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, international obligations.<sup>30</sup>

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<sup>28</sup> [Standing Orders of the House of Representatives 2017](#), SO 397(2) and 398.

<sup>29</sup> New Zealand Treaties Online [www.treaties.mfat.govt.nz/](http://www.treaties.mfat.govt.nz/)

<sup>30</sup> Cabinet Office *Cabinet Manual 2017* at 7.65(d).

## Guidelines

### 9.1 Are any pre-existing treaties or international obligations relevant to the proposed legislation?

*New legislation must not be inconsistent with existing international obligations.*

MFAT, the [Crown Law Office](#), and the particular department that has responsibility for the relevant existing treaty should be consulted to identify any relevant international obligations and whether the proposed legislation will result in any inconsistency.

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

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

If legislation relates to the sale of goods or occupational registration, the Trans-Tasman Mutual Recognition Arrangement may be relevant and should be considered. That non-treaty arrangement, implemented in New Zealand in the [Trans-Tasman Mutual Recognition Act 1997](#), overrides other legislation unless specifically excluded. More information can be found on the [Ministry of Business, Innovation & Employment website](#).

### 9.2 Is a treaty being implemented?

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

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

The language in treaties is often ambiguous. This is so that a diverse group of governments can reach agreement. Any terms or language that may be ambiguous should be identified and parliamentary counsel should be consulted to determine whether the language needs to (or can) be adjusted in the proposed legislation, and what method of incorporation is most appropriate.

The text following is intended only as a brief summary of the main methods of incorporation

(further advice should be sought from legal advisers, MFAT and the [Parliamentary Counsel Office](#) as to which method is the most appropriate):

- **Wording method**—This is the most common method. The wording of the treaty is reflected in the body of the legislation, although the legislation may or may not specify the treaty that it is incorporating. The wording may be reflected verbatim or, if necessary, translated to more accurately reflect local conditions. This method is useful if it is necessary to translate the wording of a treaty to reflect local conditions or if the treaty requires additional steps to be taken in New Zealand law (for example, one purpose of the [New Zealand Bill of Rights Act 1990](#) was to implement the [International Covenant on Civil and Political Rights](#)).
- **Formula method “force of law”**—The full or partial text of the treaty is set out in the legislation, usually in a schedule. The legislation will use a form of words to proclaim that the treaty has the “force of law” and will apply domestically. This method is rarely used, but it is useful if the treaty amounts to a self-contained body of law that does not require any operational structures to support it (see sections 202 – 206 of the [Contract and Commercial Law Act 2017](#)).
- **Subordination method**—The legislation contains a provision that authorises the making of regulations or rules that give effect to the treaty or particular parts of it. This method is useful if the treaty provides for, or will require, ongoing technical changes that are appropriate to delegate to the Executive, or in rare cases that require implementation under strict and compressed timetables (see section 36(1) of the [Maritime Transport Act 1994](#)).
- **Hybrid method**—In some cases, more than one method may be used. For example, legislation may use the wording method to set out the relevant treaty rights and protections, but use the subordination method to trigger the application of those provisions. Another example is where the formula method is used to give the treaty force of law in New Zealand, but the wording method is used to create the specific mechanisms necessary for the administration of the law. The [Adoption \(Intercountry\) Act 1997](#) is an example of this.

If the purpose of legislation is to implement a treaty, it is best practice for the purpose clause of the legislation to explicitly state that to help interpretation.

### 9.3 Does the legislation provide ready access to the treaty that it implements?

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

People must have ready access to the primary source of the legislation (for example, in a schedule of an Act). However, treaties can be amended from time to time; so there must be clarity about the effect of any subsequent change to the referenced document, and how to best identify and provide access to the authoritative version of the treaty following any amendment.

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

## Chapter 10 Dealing with conduct, people, and things outside New Zealand

In our globally connected world, it is very common for issues arising under legislation to involve a cross-border element. Perhaps most commonly, a person who breaches the law within New Zealand may be overseas when it is enforced. Alternatively, there may occasionally be sound policy reasons for New Zealand to regulate the behaviour of New Zealanders when they are overseas.

New Zealand law does not automatically apply to activities, people, or property that is not within New Zealand's territory. This poses a number of difficulties for those attempting to regulate matters that take place wholly or partly outside New Zealand and for those attempting to apply New Zealand law to people or property outside New Zealand.

Not identifying and addressing cross-border issues when developing legislation can lead to uncertainty, litigation, and potentially a failure to fully achieve the policy objective of the legislation. This chapter will help officials to identify and, if appropriate, address cross-border issues in the policy development and legislative design process.

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

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

It is important to identify the nature and significance of any current or future cross-border issues at an early stage of the policy development process. The next step is to determine how New Zealand law might apply to those situations to help ensure that the policy objective of the legislation is achieved. The approach taken to the application of New Zealand law needs to be consistent with accepted international law principles concerning jurisdiction (the question of who decides) and take account of practical issues with enforcement. Seeking specialist advice is vital if cross-border issues arise. The [Ministry of Foreign Affairs and Trade](#) (MFAT) and the [Ministry of Justice](#) (MOJ) should also be consulted on proposed solutions.

### Guidelines

#### 10.1 Do any cross-border issues need to be addressed?

*Significant cross-border issues relevant to the policy area should be identified.*

Officials should identify whether the legislation needs to take into account conduct outside New Zealand, people or assets outside New Zealand, or cross-border transactions. This includes assessing the potential for these situations to arise or increase in the future. The following are the sort of cross-border matters that may need to be addressed if they will

have a significant impact:

- cross-border transactions (such as the sale and purchase of goods or services, including online transactions);
- people outside New Zealand whose conduct affects people in New Zealand;
- people in New Zealand whose conduct affects people outside New Zealand;
- civil proceedings in New Zealand that involve overseas parties (for example, overseas suppliers who have all their assets overseas);
- civil proceedings in New Zealand concerning transactions governed by foreign law;
- civil proceedings overseas that raise issues of New Zealand law;
- information or evidence overseas required for detecting, investigating, and enforcing breaches of New Zealand law;
- whether the determinations of New Zealand courts or decision makers will be recognised or enforced overseas and vice versa;
- whether co-operation with other Governments is needed to give effect to the policy;
- whether there are applicable treaties or other international obligations; and
- criminal conduct outside New Zealand by people or businesses connected to New Zealand.

## **10.2 What is the intended scope of the legislation?**

*Legislation should expressly state when it applies to cross-border situations if these situations are significant and likely to arise often.*

If significant cross-border issues do arise, legislation must provide clear answers to questions about when the rules in the legislation apply and when decision-making powers can be exercised. It should do so by reference to relevant cross-border or connecting factors.

The following are connecting factors that are commonly used to determine when New Zealand law applies:

- whether certain conduct or events occurred in New Zealand;
- whether certain property is situated in New Zealand;
- whether a particular transaction is governed by New Zealand law or has a New Zealand element;
- whether a person is a New Zealand citizen or permanent resident of New

Zealand;

- whether a person is present, resident, habitually or ordinarily resident, or domiciled in New Zealand at the time of certain events, at the time that civil or criminal proceedings are commenced, or at the time that the relevant court process is served on the person; and
- whether certain consequences could occur in New Zealand, and the knowledge of the person involved as to whether those consequences would occur in New Zealand.

International law principles affect the extent to which it is appropriate for New Zealand law to attempt to apply to conduct that takes place, or to people who are, outside New Zealand. Those principles affect the choice of connecting factors. Practical limits on New Zealand's ability to apply and enforce New Zealand law on people outside New Zealand also affect the choice of connecting factors. This is a complex area and specialist advice should be sought, including from MFAT, legal advisers, and MOJ.

### **10.3 Are special procedural rules required for civil claims with a cross-border element?**

*Generally, the existing rules of court procedure for commencing proceedings against someone overseas should apply.*

The [High Court Rules](#) and the [District Court Rules](#) contain standard rules about when civil proceedings can be commenced against someone overseas. There must be good reason for departing from these rules, particularly if the proceedings will be commenced in the High Court or the District Court. If a new judicial body, such as a tribunal, is created and may need to hear claims against someone overseas, the legislation should expressly provide for analogous procedural rules.

The [Trans-Tasman Proceedings Act 2010](#) sets out a framework to facilitate the commencement and resolution of civil disputes if there is a trans-Tasman element, such as an Australian party. Further guidance on trans-Tasman proceedings can be found on the Ministry of Justice [website](#).

If legislation creates substantive rights to redress, such as the right to recover damages, the likelihood of the legislation being applied in proceedings before overseas courts should be considered. If that is likely, provisions conferring jurisdiction to award redress should not be linked to a specifically New Zealand-based court or tribunal (for example, by defining reference to court as being to the New Zealand High Court). This ensures that the power to award redress can be exercised by a foreign court. Provisions should also avoid broad remedial discretions if possible, as foreign courts are generally unwilling to exercise discretions of this kind when applying another country's laws.

### **10.4 Are special rules required for criminal proceedings with a cross-border element?**

*New criminal offences should be subject to the rules on territorial application in sections 6 and 7 of the Crimes Act 1961, unless there are special circumstances.*

Sections 6 and 7 of the [Crimes Act 1961](#) limit the application of the Crimes Act and any other criminal offences (unless otherwise stated) to conduct that occurs within New Zealand. The criminal law will still apply if only part of the conduct amounting to an offence occurs in New Zealand.

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

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

- Generally, New Zealand law does not provide for a criminal trial or hearing to be held in respect of a defendant who is outside New Zealand (section 25(e) of the [New Zealand Bill of Rights Act 1990](#)). Natural persons who commit serious offences in New Zealand may be extradited to New Zealand to stand trial (see the [Extradition Act 1999](#)).
- New Zealand courts do not hear criminal proceedings in respect of breaches of the criminal laws of another country. New Zealand law must provide that the conduct that constitutes the overseas offence is a criminal offence in New Zealand, even though the conduct occurred outside New Zealand, before there can be a trial before a New Zealand court.

The Ministry of Justice and the MFAT Legal Division should always be consulted before making provision for New Zealand courts to have criminal jurisdiction in respect of conduct occurring outside New Zealand.

There can be practical enforcement problems in criminal cases with a cross-border element. Critical evidence required for a criminal proceeding in New Zealand may be located in another country, and vice versa. The proceeds of a crime committed in New Zealand may be located overseas, and vice versa. General mechanisms like the [Mutual Assistance in Criminal Matters Act 1992](#) (MACMA) and the [Criminal Proceeds \(Recovery\) Act 2009](#) can help if serious criminal offending is involved. Subpart 1 of Part 4 of the [Evidence Act 2006](#), which provides for taking evidence remotely between Australia and New Zealand, applies to criminal proceedings.

However, there will be situations, such as when New Zealand and another country or countries have closely co-ordinated regulatory regimes, where more extensive co-operation may be required. How to deal with this is discussed in the next section.

#### **10.5 Will any cross-border issues impair the ability of a regulatory agency to perform its functions?**

*Legislation should expressly authorise a regulatory agency to work with overseas counterparts if that is necessary for the agencies to carry out their functions.*

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

MACMA provides a basic framework to enable countries to provide assistance to, and request assistance from, New Zealand with criminal investigations and prosecutions.

For civil regulatory action, or if the framework in MACMA is insufficient for criminal matters, the legislation should specify powers to request that an overseas counterpart obtain information for the New Zealand regulator and vice versa (or otherwise specify that they should provide assistance to each other), if that is necessary for the regulators to perform their functions.

#### **10.6 Should the legislation provide for recognition or enforcement of overseas decisions in New Zealand?**

*Legislation should provide for decisions made by overseas courts or regulators to be recognised or enforced in New Zealand if that would support the policy objective.*

In some cases, it may be necessary to recognise or enforce a decision of an overseas agency or court in New Zealand to ensure that the legislation achieves its purpose or that broader policy goals are met. Broader policy goals may include reducing compliance costs, reducing legal uncertainty, removing incentives for forum shopping and enhancing the integrity of a statutory regime by ensuring that it is effective across borders.

The common law already recognises some overseas decisions affecting a person's status (such as marriage) and some decisions of overseas courts in civil cases. There are also generic statutory regimes for recognition and enforcement. The [Trans-Tasman Proceedings Act 2010](#) provides for the recognition and enforcement in New Zealand of a broad range of Australian court decisions and some tribunal decisions. Other examples include the [Reciprocal Enforcement of Judgments Act 1934](#) (for some decisions of foreign courts) and the MACMA (for a limited class of orders made in criminal proceedings).

New Zealand legislation cannot provide for the recognition or enforcement of New Zealand decisions overseas, but that could be provided for in a recognition regime based on a bilateral arrangement with another country (such as the Trans-Tasman Mutual Recognition Arrangement).

# ISSUES RELEVANT TO ALL LEGISLATION

## Chapter 11 Applying an Act 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 section 27(3) of the [New Zealand Bill of Rights Act 1990](#). 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 1988](#), the New Zealand Defence Force, and the New Zealand Police. 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 (*see* section 27 of the [Interpretation Act 1999](#)). 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

#### 11.1 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 be appropriate for only certain parts of the Crown to be bound or exempted (such as the armed forces and police, which are excluded from the [Arms Act 1983](#)). In these instances, clear words are required to establish which provisions bind the Crown and which provisions do not. The same can apply to secondary legislation (*see*, for example, section 153 of the [Local Government Act 2002](#), which specifies the kinds of local authority bylaws that bind the Crown).

#### 11.2 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 secondary legislation made under it, unless the application of a particular Act to the Crown would impair the efficient functioning of government. Mere convenience is an insufficient justification for not binding the Crown. Legislation that does not bind the Crown should not grant the Crown an unfair benefit or unexpectedly or adversely affect third parties.

[Cabinet Office Circular CO \(02\) 4](#)<sup>31</sup> identifies the following factors to take into account when assessing whether or not it is appropriate to bind the Crown:

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<sup>31</sup> Cabinet Office Circular *CO (02) 4: Acts Binding the Crown: Procedures for Cabinet Decision* (2002).

- 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 people; and
- the financial costs of making the Crown subject to the Act.

The [Public Finance Act 1989](#) contains provisions relating to the kinds of financial liabilities the Crown can incur. The Treasury has produced further [guidance](#) on the Public Finance Act 1989.<sup>32</sup>

### **11.3 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. If immunities are given, consideration should be given to other ways in which those exercising a power can be held to account.

Section 86 of the [State Sector Act 1988](#) 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 example, 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 section 179A of the [Reserve Bank of New Zealand Act 1989](#)) in legislation can reduce the likelihood of the courts imposing liability, but sufficient justification must exist for doing so.

### **11.4 Should the Crown be subject to criminal liability?**

*Government departments may be liable to criminal prosecution only if there are compelling reasons.*

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<sup>32</sup> Treasury *A Guide to the Public Finance Act* (2005).

Important practical and legal policy issues have made it generally inappropriate to subject the Crown to criminal liability. There is a particular conceptual problem in the Crown punishing itself. Therefore, exposing the Crown to criminal liability is rare. Cabinet Office Circular CO (02) 4 provides further guidance on imposing criminal liability on the Crown.

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 2002](#)). 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 an 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.

Note that the conceptual problem applies to Crown organisations, not necessarily to individuals employed by the Crown. Individuals employed by the Crown should be subject to the same criminal liability as the equivalent people employed in the private sector. If such criminal liability might be inappropriate, that may suggest that the offence provisions should be redesigned for all.

Criminal offences are discussed more generally in [Chapter 24](#). Judicial review is discussed in more detail in [Chapter 28](#).

## 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.

## Chapter 13 Statutory interpretation and the Interpretation Act 1999

In reaching an interpretation of an Act, a court will rely on certain rules and conventions of statutory interpretation as well as the fundamental principles of law (see [Chapter 4](#)). The [Interpretation Act 1999](#) is the primary source of the rules of statutory interpretation in New Zealand, although some of its provisions are supplemented by the common law.<sup>33</sup>

An awareness of the general principles of statutory interpretation and also the specific provisions of the Interpretation Act 1999 will assist in providing sufficient interpretive aids in the legislation and reduce the risk of an unexpected judicial interpretation.

### Guidelines

#### 13.1 Have the key principles of statutory interpretation been considered?

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

The meaning of an enactment must be ascertained from its text and in light of its purpose (see section 5 of the Interpretation Act 1999). So:

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

Some Acts, such as Treaty settlement Acts (see [Chapter 5](#)) and the [Parliamentary Privilege Act 2014](#), have specific provisions that direct the reader how to interpret them.

An enactment applies to circumstances as they arise (see section 6 of the Interpretation Act

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<sup>33</sup> The [Legislation Bill](#) currently before the House will repeal the Interpretation Act 1999 and replicate most of its key provisions.

1999): If possible legislation should be “future-proofed” by ensuring that it is flexible enough to properly address foreseeable developments in technology or society generally.

An enactment does not have retrospective effect (see section 7 of the Interpretation Act 1999 and [Chapter 12](#)). Interpretation consistent with the [New Zealand Bill of Rights Act 1990](#) is to be preferred wherever possible (see [Chapter 6](#)).

**Common law rules of statutory interpretation**—Although many of the fundamental principles of statutory interpretation are reflected in the Interpretation Act 1999, a number continue to exist in the common law. One such principle is that if a list of specific things is followed by a general description of those things, the general description is presumed to be restricted to the same class as the specific references. This principle is referred to as *ejusdem generis*. Another example is the presumption that Parliament will intend to legislate consistently with fundamental human rights and New Zealand’s international obligations.

[Link to supplementary material: [Designing purpose provisions and statements of principle](#)]

### **13.2 Have the specific provisions of the Interpretation Act 1999 been considered?**

*Legislation should be consistent with the Interpretation Act 1999.*

The following paragraphs are intended to raise awareness of the kinds of issues that the Interpretation Act 1999 provides for and that therefore do not need to be restated in the new legislation. The paragraphs do not analyse the provisions of the Interpretation Act 1999 in depth, nor explain how the common law supplements those provisions.

The Interpretation Act 1999 contains provisions relating to:

- the date and time of day when Acts and regulations come into force (sections 8 to 10);
- the circumstances in which a power granted by an Act may be exercised before that Act comes into force (section 11);
- when a power may be exercised by a delegate (examples include what powers are deemed to be held by someone granted the power to appoint a person to an office, the power to make or issue secondary legislation and when a person may exercise a power to correct minor errors in the prior exercise of that power) (sections 12 to 16);
- the effect of repealing legislation on existing rights, powers and situations, including on things done under the repealed legislation (for example, rules concerning the fate of enactments made under the repealed legislation, powers previously exercised under the repealed enactment, and how to treat references to the repealed enactment in other legislation) (sections 17 to 22);
- the fact that legislation will not bind the Crown unless the enactment expressly says so (although the practice in New Zealand is for all legislation to apply to the Crown) (section 27) (see [Chapter 11](#));

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

[Link to supplementary material: [Guidance on commencement clauses](#)]

### **13.3 Have the specific definitions and meanings of expressions in Part 5 of the Interpretation Act 1999 been considered?**

*Legislation should apply the definitions in Part 5 of the Interpretation Act 1999. New legislation should not restate those definitions.*

Part 5 of the Interpretation Act 1999 defines what certain words and phrases mean. It is not necessary to restate these rules in new legislation, although it may be helpful to readers to include a flagging provision identifying that the following words and phrases will have the meaning given to them by the Interpretation Act 1999:

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

Again, particular Acts can define these words and phrases differently but only if necessary. See, for example, the definition of “public notice” in section 5 of the [Local Government Act 2002](#) and the many different statutory definitions of “working day”, including several that exclude the period from Christmas to mid-January.

Part 5 also includes rules for the interpretation of:

- words that denote the masculine gender used in enactments before enactment of the Interpretation Act 1999;

- the use of parts of speech and grammatical forms of words;
- the use of plural and singular words; and
- the calculation of time and distance.

# ISSUES PARTICULARLY RELEVANT TO EMPOWERING SECONDARY LEGISLATION

## Chapter 14 Delegating law-making powers

Parliament makes laws by enacting primary legislation (Acts of Parliament). However, it is often not appropriate or possible for an Act to include all the details necessary for it to have its intended effect. For this reason, Parliament will often include in an Act a provision that delegates to another person or body, often part of the Executive, the power to prescribe these necessary details.

The Act that delegates this law-making power is known as the “empowering Act”. The specific provision containing the power is the “empowering provision”. The product of the exercise of this power is known, generically, as “delegated legislation” or “secondary legislation”.<sup>34</sup> This chapter refers to it all as “secondary legislation” as this is the label adopted by the [Legislation Bill](#). Although many other names are used (for example, regulations, proclamations, Orders in Council, bylaws, rules, codes), these names do not, by and large, provide a principled way of distinguishing between different types of secondary legislation. The key questions with secondary legislation are *what* can be delegated, *who* exercises the delegated power, and what *safeguards* apply.

The following competing considerations need to be balanced in determining what is appropriate for Parliament to delegate under an Act:

- **The legitimacy of the law**—Important policy content should be a matter for Parliament to determine in the Act through an open democratic process. Too much delegation, or having delegated powers that are too broad or uncontrolled, undermines the transparency and legitimacy of the law. However, it is not necessary for Parliament to do everything—as Parliamentary time is scarce, this time is best spent on the policy issues, not details.
- **The durability and flexibility of the law**—Delegation can be important to how a law (and the regulatory system it is part of) performs over time in terms of responding to changing or unforeseen circumstances or allowing minor flaws to be addressed. Delegation can give an opportunity for experimentation. Delegation can also allow emergencies to be dealt with quickly, which can be important at least for short-term solutions.
- **The certainty or predictability of the law**—If too much policy content is delegated or delegations are given to different decision makers without clearly scoped mandates, clarity about what is required by the law can be undermined.
- **The transparency of the law**—Layers of secondary legislation can create complexity and fragmentation in a regime, making it difficult for readers to find and understand

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<sup>34</sup> Note that the Legislation Bill will remove a distinction sometimes made between secondary and tertiary legislation on the basis that it is unhelpful as often so-called “tertiary” legislation is empowered directly by an Act.

the law. However, too much technical detail in an Act might make it difficult to navigate.

Particular attention should be paid to empowering provisions that empower a delegate to augment or override or authorise exemptions from, primary legislation. Such empowering provisions should be assessed in the context of the general principles governing secondary legislation. However, they can increase the risk of undermining the separation of powers and so always require careful consideration to ensure that they are both needed and appropriately circumscribed. This is dealt with further in [Chapter 15](#).

One important check on secondary legislation within Parliament itself is the Regulations Review Committee (RRC). When a Bill is before another committee, the RRC may consider any empowering provision in that Bill and report on it to that committee. Officials preparing legislation must therefore be prepared to justify why a power is proposed to be delegated and the scope of that power.

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

## Guidelines

### 14.1 Is the matter appropriate for secondary legislation?

*Legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act.*

As a general rule, matters of significant policy and principle should be included in an Act. Secondary legislation should generally deal with minor or technical matters of implementation and the operation of the Act. However, there are difficult choices on the continuum between significant policy and technical detail.

Some matters, such as those that affect fundamental human rights in a significant way, are clearly appropriate only for an Act. However, the decision will not always be clear-cut, and some matters may be appropriate for both primary and secondary legislation. Secondary legislation often involves some policy, but this should be at a lower level than the policy in the Act.

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

- matters of significant policy;
- matters significantly affecting fundamental human rights;
- the creation of significant public powers such as search and seizure or confiscation of property;
- the granting or changing of appeal rights;

- variations to the common law (especially when a common law right is to be entirely taken away, or replaced, by legislation);
- the creation of serious criminal offences and significant penalties;
- the authorization of the levying of a tax, borrowing money, or spending of public money;
- the creation of a new public agency; and
- procedural matters if they, in effect, set the fundamental policy of a legislative scheme.

Most of the items above are subsets of the basic idea that significant policy should be in an Act. Although “significance” will vary from case to case, some indicators are that the policy answers the key questions in the problem addressed by the legislation, that the policy has the potential to give rise to controversy (whether political or otherwise), or that (without this policy decision being made) it would be otherwise unclear what the overall implications of the Bill are.

The following matters should also generally be addressed in an Act but in limited circumstances (as discussed further below) may also be appropriate for secondary legislation:

- amendments to another Act; and
- retrospective changes to the law.

The following are examples of subject areas that may be appropriate for secondary legislation:

- the mechanics of implementing an Act, such as prescribing fees, the format and content of documents, or certain lower-level procedures;
- large lists and schedules of minor details;
- technically complex matters;
- commencement dates;
- subject matter that requires flexibility or updating in light of technological developments in an area;
- material required to respond to emergencies or other matters requiring speedy responses; and
- material that requires input from experts or key stakeholders.

It is *not* appropriate to empower secondary legislation:

- to fill any gaps in an Act that may have occurred as a result of a rushed or

unfinished policy development process;

- to avoid full debate and scrutiny of politically contentious matters in Parliament;
- solely to speed up a Bill's passage through Parliament; or
- simply to follow a past practice of using secondary legislation on that subject.

#### **14.2 For what purposes may the power to make secondary legislation be exercised?**

*The empowering Act should clearly and precisely define the permitted subject matter of secondary legislation and the purposes for which it may be made.*

It is normal to specify in an empowering provision that the named delegate is empowered to make regulations (or rules, bylaws, etc) on a defined range of subject matters and for defined purposes. This ensures that the resulting secondary legislation is within the limits intended by Parliament. Before settling an empowering provision, it is advisable to consult those who will implement the Act and make the secondary legislation. This will help to identify the extent of the powers that are needed and in what circumstances those people anticipate exercising the powers. Generally, officials should have a clear idea of the scope and content of secondary legislation when the empowering provision is being developed.

A power to create secondary legislation should be wide enough to enable an Act to be effectively implemented. Some flexibility in an empowering provision is often justified as it can be difficult to be sure exactly how the Act's requirements will be legally operationalised. However, flexibility needs to be balanced against the need to have clear boundaries about the scope of the power so that it is not unfettered. RRC may criticise an empowering provision if it is drafted so broadly that its boundaries are uncertain.

A rushed or unfinished policy development process does not justify a broad or relatively unfettered empowering provision.

#### **14.3 Who will hold the power to make secondary legislation?**

*The person authorised to make secondary legislation must be appropriate having regard to the importance of the issues and the nature of any safeguards that are in place.*

There are no absolute rules as to who should be authorised to make secondary legislation. Traditionally, secondary legislation is often made by the Governor-General on the advice of Ministers, or is made by the relevant portfolio Minister(s). Key factors to take into account are the extent of policy or value judgements required, the expertise required of the person making the secondary legislation, the degree of political accountability required (reflected in the importance of the issues in question), and what safeguards would apply as a consequence (for example, publication, disallowance, Cabinet scrutiny, or drafting and certification by the [Parliamentary Counsel Office](#) (PCO)).

The more significant the power, the more likely it is that it should be exercised by the Governor-General in Council. That will ensure that a full range of safeguards will apply (including Cabinet scrutiny and drafting and certification by the PCO). The more technical the

exercise of the power, or the more limited the group it applies to, the more likely it is to be appropriate for delegation to another agency (see [Chapter 18.2](#), which also deals with this issue).

#### **14.4 Is the secondary legislation subject to appropriate safeguards?**

*All secondary legislation should be subject to an appropriate level of scrutiny, a good process, publication requirements, and review.*

Safeguards provide a vital check on the exercise of the delegated power. The level of safeguards considered appropriate will increase with the significance of the delegated power. The proper purposes of safeguards are to promote:

- a good law-making process (through, for example, requirements to have regard to certain matters or being satisfied that a test is met);
- transparency (through transparent processes and decisions);
- participation (through consultation or requiring confirmation, concurrence, or consent); and
- accountability (through, for example, disallowance via the RRC).

Safeguards can take a variety of forms. They can be substantive preconditions or procedural requirements. They can apply before a power is exercised or provide a remedy after it is exercised.

Safeguards are not, however, a substitute for clearly and precisely defining the permitted subject matter of the secondary legislation and the purposes for which it may be made (see [14.2](#)). Safeguards are not a sufficient remedy for a vague and sweeping empowering provision that gives the decision maker too much discretion.

Standard safeguards that generally apply to secondary legislation are:

- review by the RRC and potential disallowance by Parliament (this applies to secondary legislation that is a “disallowable instrument”); and
- publication (if the legislation is a “legislative instrument”, publication is automatically done on the [New Zealand legislation website](#), but otherwise needs to be stated in the legislation).

Additional safeguards apply automatically to secondary legislation that is made by the Governor-General by Order in Council. It must be drafted and certified by the PCO, will receive Cabinet scrutiny, and will be subject to the 28-day rule (meaning that the legislation must not come into force earlier than 28 days after its notification in the *Gazette*).

For secondary legislation other than an Order in Council, the empowering Act should usually expressly provide for whether or not it is a disallowable instrument or a legislative instrument, or both.

Other bespoke safeguards may also be appropriate. However, these can increase the complexity of the process (particularly the time and cost) and so need to be carefully designed to ensure that the benefits are captured without too much cost. Examples of these safeguards include:

- The instrument may be made only on the recommendation of a Minister (or on the recommendation, approval, confirmation, concurrence, or consent of some other person) and safeguards may also be attached to that recommendation (for example, the Minister or other person may be required to consult with certain people before making the recommendation, to have regard to certain principles or other matters, or to be satisfied that certain criteria are satisfied).
- The decision maker itself may be required to have regard to certain matters or be satisfied that a certain test is met.
- Preconditions may be included that require that certain things are shown, or certain circumstances exist, before the instrument is made.
- Consultation requirements may be included (see [Chapter 19](#)).
- A “sunset” clause may be included (that is, the legislation only remains in force for a limited period of time).
- Provision may be made for the legislation to lapse after a certain period if not confirmed by Parliament through a confirmation Bill (although protection offered by this safeguard may be somewhat limited).
- The reasons for the exercise of the power may be required to be given.

#### **14.5 Will the secondary legislation have retrospective effect?**

*If secondary legislation may have retrospective effect, the empowering provision must clearly authorise that in clear and unequivocal terms.*

If secondary legislation is intended to have retrospective effect, the reasons for that must be capable of clear articulation and the empowering provision must authorise that effect in clear and unequivocal terms.<sup>35</sup>

#### **14.6 Will the maker of the secondary legislation be able to subdelegate some of the legislation?**

*If secondary legislation may be made by a subdelegate, that must be clearly authorised in the empowering provision.*

The identity or office of the person to whom the power to make secondary legislation is given is a key factor in the particular legislative scheme. Careful consideration should therefore be given as to whether that person should be able to subdelegate a legislative

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<sup>35</sup> See [Chapter 12.1](#) for guidance on legislation having retrospective effect.

power. If the power to make secondary legislation is able to be subdelegated, the empowering provision must clearly identify that intent.

**14.7 Will the secondary legislation be inconsistent with rights in the New Zealand Bill of Rights Act 1990?**

*Legislation should not empower secondary legislation that is inconsistent with the New Zealand Bill of Rights Act 1990.*

Secondary legislation that is inconsistent with the [New Zealand Bill of Rights Act 1990](#) (NZBORA) will generally be invalid because it falls outside the empowering provision. This is because an empowering provision will generally be interpreted, in accordance with section 6 of NZBORA, to empower only such secondary legislation as is consistent with NZBORA. The only circumstance in which secondary legislation might be valid despite inconsistency with NZBORA is if the empowering provision unequivocally, or by necessary implication, permits rights-infringing secondary legislation. In such a case, the empowering provision (and the secondary legislation it empowers) will prevail over NZBORA because of section 4 (which says that provisions inconsistent with NZBORA are not for that reason invalid or ineffective).

## Chapter 15 Some specific types of empowering provisions

This chapter provides guidance on three specific types of empowering provisions—those that delegate a power to amend or override an Act; those that delegate the commencement of legislation; and those that enable material to be incorporated by reference. These types of empowering provisions must always be considered in light of the principles for all secondary legislation described in [Chapter 14](#), but give rise to specific issues that need to be dealt with in the empowering Act.

### Guidelines

#### 15.1 The interaction of secondary legislation with primary legislation

*Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.*

The nature of secondary legislation is that it generally takes effect *subject to* all primary legislation. It is possible, however, for secondary legislation to amend or override an Act. This requires that Parliament enact an empowering provision expressly authorising secondary legislation with that effect. Empowering provisions of this nature are sometimes called “Henry VIII clauses”.

By virtue of the fact that this type of empowering provision enables the Executive to override Acts of Parliament, these provisions create a risk of undermining the separation of powers. However, such clauses come in various types and, although each must be carefully considered, they do not all raise the same level of constitutional concern.

Towards one end of the spectrum are powers to adjust legislation in such a narrowly circumscribed way that the policy for the adjustment is fully or largely set by Parliament and the subject matter would in any case be appropriate for secondary legislation. Examples include adjusting an amount to reflect changes in the New Zealand Consumer Price Index, adding to a list of types of people under a test set by an Act or, one step further, defining terms that do not set the scope of the Act (so are not central to the policy or principle of the Act). That type of empowering provision amends an Act by augmenting it. If the power is appropriately limited and the matter is otherwise appropriate for secondary legislation, it augments the Act in a manner that is consistent with Parliament’s intention and that does not pose significant constitutional risk.

At the other end of the spectrum is an empowering provision that permits secondary legislation to override an Act in ways that affect its policy or, more significantly still, that amends *other* Acts. Examples include emergency powers created for post-earthquake responses or epidemics. These types of powers pose more risk, require strong justification, and need very careful designing of appropriate safeguards.

In each case, the questions to be asked are:

- Why delegate this power? What is the need or benefit that justifies delegating

the power to amend the Act? Examples of a justification include that there is:

- an emergency that requires a quick response;
  - a complicated transition between two statutory regimes; or
  - a benefit to the public in having an amount (or list) stated (and so easily accessible) in the Act but also able to be easily adjusted over time.
- If there is a need, what is the extent of delegation that is being permitted? What is the significance of the policy being delegated? How does that compare to what would generally be appropriate for delegation under [14.1](#)? As noted above, there is a spectrum. The larger the delegation, the greater the constitutional risk or significance, and so the greater must be the justification or need for the power. If it is judged that the power is needed, the empowering provision must be drafted in the most limited terms possible to address the need, and it must be consistent with and support the provisions of the empowering Act.
  - If the power is justified, what additional safeguards are needed? Safeguards should be designed to address the risks posed by the actual provision. Safeguards may include:
    - requiring consultation with people or bodies likely to be affected;
    - providing that the power to make the secondary legislation is exercised by the Governor-General in Council (so at the highest level of delegation);
    - for broader powers:
      - limiting the time period within which secondary legislation that amends primary legislation is possible (for example, including a “sunset clause”, so the power exists only for the reasonable period of a transition from one regime to another);
      - establishing a review panel to consider and report to Parliament or the Minister on the use of the power; or
    - making the use of the power subject to parliamentary approval (rather than only disallowance).

## 15.2 Commencement

*If the commencement of legislation is to be delegated, the need for that delegation must be justified and there should generally be a backstop commencement date.*

Commencement dates may be set by Orders in Council but only if flexibility is needed for good reason. Otherwise, delegation of commencement risks the will of Parliament being thwarted by an executive that no longer supports the policies of the Act or (on a more

practical level) large amounts of latent legislation creating, over time, increased uncertainty and complexity. For this reason, if commencement is delegated, the Government should have a realistic timetable for bringing legislation into force.

### 15.3 Does the legislation authorise “incorporation by reference”?

*Incorporation by reference should be used only if there are clear benefits to doing so or it is impractical to do otherwise.*

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

The issue of incorporation by reference can be considered in relation to principles of good law making. There are four main issues with incorporation by reference:

- **Quality**—There is a risk that the material incorporated is not sufficiently certain or understandable to be appropriate for legislation. This is particularly important if the material is the basis for offences and is a common problem if the material incorporated was developed for another purpose (for example, guidance).
- **Accessibility**—Legislation should be easy to find, use, and understand. The incorporated material needs to be accessible to the same extent as the legislation that incorporates it.
- **Legitimacy**—If it is possible to change the incorporated material and for those changes to automatically flow through into the legislation, Parliament or the other law maker does not have control over the content of the secondary legislation. Subdelegation of this kind needs to be carefully considered and specifically authorised.
- **Good process**—An appropriate process should be followed in making the law and if incorporation by reference enables the usual process to be bypassed, this can be problematic.

Incorporation by reference is, to a certain extent, inconsistent with these fundamental principles of good law making (particularly if it allows for amendments to the document incorporated to be automatically part of the law). Accordingly, incorporation by reference should be used only if there is a strong need or benefit from doing so or it is impracticable to do otherwise.

The possible benefits from incorporation by reference are:

- It can enable the law to be shorter, simpler, and more consistent. It can remove significant technical detail that undermines the ease of finding and using the core requirements. It can simplify compliance by allowing users to rely on material they are already complying with in another context.

- It can allow rules to be developed by people who have specialist knowledge or expertise, which improves the quality of the law. Those who work in the affected area may then better understand the rules.
- It can facilitate convergence and consistency of standards being used and enable rules to remain up to date with international and national standards.

Practical examples of the cases where incorporation by reference may be appropriate, after considering the risks above, are:

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

Part 3 of the [Legislation Act 2012](#) provides general authority for secondary legislation to incorporate by reference certain types of material and prescribes rules that apply when this general authority is relied on. The rules include a range of standard safeguards that address some of the above risks and issues. For example, amendments to the incorporated material do not become part of the law unless the amendments are specifically incorporated by a later instrument. Further, consultation is required on the proposal to incorporate material and there are rules about how the material must be held and made available.

Section 30 of the [Standards and Accreditation Act 2015](#) provides general authority for New Zealand Standards (which include joint AS/NZS standards) to be incorporated by reference into secondary legislation, including bylaws. Section 29 deems a reference to a New Zealand standard in legislation to be a reference to the latest New Zealand Standard with that citation, together with any modifications to it, promulgated before the enactment in which it is cited was passed or made. This means that, consistent with the Legislation Act 2012, amendments to a standard do not take effect until specifically incorporated by a later instrument.

Legislation should not repeat the provisions of the Legislation Act 2012 or the Standards and Accreditation Act 2015 and those provisions should not be overridden in other legislation unless a different policy approach is necessary.<sup>36</sup> Any different policy approach may need to

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<sup>36</sup> For example, if the standard maker is an expert body and it is critical to the policy that there be consistency with those standards, it is more likely to be appropriate for an Act to permit amendments to apply automatically as part of the secondary legislation or with a simpler updating process.

be justified to the Regulations Review Committee.

In addition, each decision to incorporate material under the general authority in Part 3 of the Legislation Act 2012 or section 30 of the Standards and Accreditation Act 2015, needs to be justified on its own merits—ie, that there are sufficient benefits in the particular case as described above to justify the costs in terms of the risks described above.

## Chapter 16 Granting powers of exemption

In some cases, requiring a particular person to comply with legislation might be impractical or result in hardship to that person. In such cases, it may be necessary to empower a government body (including Crown entities and other State sector bodies) or office holders to exclude or exempt a particular person or class of people, transactions, or things from the application of an Act or regulations (*see*, for example, section 220 of the [Health and Safety at Work Act 2015](#)).

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

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

A power of exemption is a form of delegated power (*see* [Chapter 14](#)), although at times the distinction between a power of exemption and a discretion is hard to identify.

### Guidelines

#### 16.1 Should legislation grant a power of exemption?

*There must be good reasons to grant a power of exemption.*

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

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

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

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

- an Act relates to a complex and rapidly developing field such that the boundaries may be difficult to foresee;

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

## 16.2 What safeguards apply to the exercise of the power of exemption?

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

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

A power of exemption should generally be subject to the following safeguards:

- **Consistency with purpose of the Act**—The power must be exercised consistently with the purpose of the Act. The circumstances in which the exemption may be granted or the criteria for the exercise of the power should also be consistent with the purpose of the Act. This is often incorporated into the criteria (*see next point*).
- **Criteria for exercise of power**—Legislation should set out the criteria for granting the exemption. Clear criteria will reduce the likelihood of a successful judicial review of the decision to grant or refuse an exemption.
- **Reasons**—Legislation should include a requirement to give reasons for the exemption, although this requirement may not be necessary for minor or trivial exemptions.
- **Judicial review**—The ability to seek judicial review of the exercise of an exemption power is an important safeguard. This right should not be unreasonably restricted (*see [Chapter 28](#)*).
- **Process review**—Usually there should be a process (which need not be in the legislation, but may be expected by Ministers or select committees) to review exemptions at regular intervals to identify a need to amend the Act.

Two additional safeguards may also be appropriate: sunsets or reviews, and annual

reporting requirements:

- **Sunsets or reviews**—The empowering Act may provide that an exemption may continue in force for not more than a certain period (for example, five years) (and is treated as revoked at the end of that period) or may require that exemptions be reviewed. This may be appropriate if exemptions under the Act are expected to be mainly of a short-term or temporary nature. It may also be appropriate if there is a special reason for requiring a regular review of exemptions (rather than leaving a review as matter of administrative discretion). A review may include assessing whether the Act itself should be amended. Providing for revocation is unnecessary if the legislative design of the Act contemplates exemptions that are relatively long-term or permanent in nature or if it is best left to administrative discretion as to when and how to prioritise reviews.
- **Annual reporting requirements**—The person or body that exercises the power may be required to submit a report to Parliament detailing the number of times and circumstances in which a power of exemption was exercised.

### **16.3 Will the power be subject to the publication or disallowance procedures in the Legislation Act 2012?**

*Legislation should clearly identify whether the power of exemption will be subject to the disallowance and/or publication procedures in the Legislation Act 2012.*

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

### **16.4. Will the exemption be subject to conditions?**

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

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

## Chapter 17 Authorising the charging of fees and levies

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

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

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

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

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

Fee-setting and levy-setting regulations made under the empowering provision are secondary legislation. As such, the considerations in [Chapter 14](#) will apply and the regulations will be reviewable by RRC. A discretion to waive a fee is, in effect, an exemption power (see [Chapter 16](#)).

Two essential pieces of guidance to review at an early stage are the Treasury's [Guidelines for Setting Charges in the Public Sector \(2017\)](#), and the Office of the Auditor-General's guidance [Charging fees for public sector goods and services \(2008\)](#).

### Guidelines

#### 17.1 Should the service or function be subject to a fee?

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

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

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

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

Whether the courts find that a particular charge is a fee or a tax will involve considering:

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

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

## **17.2 Should the objective or function be subject to a levy?**

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

A levy does not relate to a specific good or service. It is usually charged to a particular group to help fund a particular government objective or function. Accident Compensation Corporation levies, for example, are factored into the costs of petrol and vehicle licensing to

help cover the cost involved in treating people who are injured in motor vehicle accidents. The person paying might never benefit personally from the government service, but it is desirable that they contribute to the cost.

Another example is where the members of a particular industry pay a levy to cover the costs of a regulator or promoter of that industry. A particular member may have little direct contact with the regulator or may not directly benefit from the promotion, but it is appropriate that the member contribute towards the costs. If the [Commodity Levies Act 1990](#) applies, it is usually not acceptable to enact (by Act) a parallel scheme for a particular industry.

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

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

### **17.3 Does the legislation provide authority to prescribe a fee or a levy?**

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

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

### **17.4 How is the fee amount determined?**

*Legislation must set out the manner by which the fee should be determined.*

The empowering provision should state the basis by which to prescribe the fee. Fees for a service or function should normally be determinable in advance by the payer before the service is provided or the function is performed, unless the Act contemplates otherwise. Often a fee or levy will be a fixed amount. However, if a fee is to be determined by a particular method or calculation (such as a fee calculated by reference to an hourly rate), this should be authorised in the empowering provision.

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

Any authority given to charge a fee is, therefore, implicitly capped at the level of cost recovery. Specific authority in the Act would be required to charge a fee that would recover

more than the cost of providing the service because of an intention to impose a penalty, to limit access to, or demand for, a service or to meet a social objective. It is good practice that the relevant Cabinet papers provide a clear justification for the level of the fee.

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

#### **17.5 How is the levy amount determined?**

*Legislation must set out the manner by which the levy is determined.*

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

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

#### **17.6 Who will pay the fee or levy and in what circumstances can it be waived or refunded?**

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

Fees should only be charged to those people who benefit from the service or function. The fee should not be used to offset the cost of future users of the service or to attempt to recover any deficit that may have occurred as a result of previous under-recovery. A fee that does either of those things will risk being declared unlawful.

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

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

#### **17.7 Should there be a special process in connection with prescribing the fee or levy?**

*Legislation should identify any procedural requirements that must be satisfied in connection*

*with the fee or levy.*

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

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

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

# NEW POWERS AND ENTITIES

## Chapter 18 Creating a new statutory power

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

The power to do something may be granted by legislation (statutory powers) or the common law. It may also stem from the fact that the chief executive or another agency head is a legal person and so has the natural powers of a legal person and is capable of contracting with other parties, subject to those powers being used within the limits of their functions.

Where a public body acts without power, or acts in a way that is inconsistent with the powers given to it, that body will be deemed to have acted unlawfully, or *ultra vires* (beyond powers). This may result in costly and time-consuming litigation, and the body may be required to remake the decision. The legislation must therefore clearly articulate the scope of the power, who will exercise it, and how it will be exercised.

### Guidelines

#### 18.1 Is a new statutory power required?

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

If there is already clear authority in existing legislation, it is inappropriate to grant the same power in new legislation because it would lead to duplication and a lack of certainty in the law. This is particularly true where only one Act is amended because it may result in an unintended distinction between two provisions (see [Chapter 3.3](#)).

If there is an existing common law power, careful consideration must be given to whether or not it is sufficient. If it is not sufficient, consideration should be given to replacing it with a statutory power. If the intention is to limit or extinguish the common law power, the new legislation must clearly state that (see [Chapter 3.6](#)).

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

#### 18.2 Who should hold the new power?

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

There are two aspects to this issue. The first aspect is which branch of government will hold the power. Powers are usually granted to the Executive. In cases where a power of a judicial nature is involved, it should be granted to the appropriate court or tribunal. The second

aspect is which level within that branch will exercise the power. A power may be vested in the Executive, but a decision must still be made about whether the power is to be exercised by officials, the chief executive, Minister or another statutory office holder.

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

- the character of the issues involved and the nature of the power, including:
  - whether the power is appropriate for delegation;
  - the importance of the individual rights and interests involved;
  - the importance of the government interests involved;
  - whether the power contains a broad policy element; and
  - whether the power should be exercised independently of government control or the control of the governance body of the organisation;
- the characteristics of the person who holds the power, including:
  - the expertise required of the decision maker;
  - whether the new role will conflict with an existing role; and
  - the level of accountability desired of the decision maker;
- the process by which the power will be exercised, including:
  - the context in which the issues are to be resolved (such as by administrative decision);
  - the procedure commonly used by the decision maker;
  - whether the power involves the finding of facts and the application of precise rules to those facts; and
  - whether the power requires the making of broad judgements or the exercise of wide discretion;
- practical matters, including:
  - the ability of the decision maker to access relevant information; and
  - the existence of safeguards (such as the [Ombudsmen Act 1975](#) and the [Official Information Act 1982](#)).

In general, decisions relating to more significant issues should be taken by a person with an appropriate level of seniority and accountability. For reasons of simplicity, it is usually preferable to place a power with the person who has ultimate accountability for the decision (such as a chief executive or Minister). The person exercising the power must have sufficient

expertise in the area in which they are exercising the power. If a tension arises between the need to place a power with a suitably senior or accountable person, one option is to require the decision maker to have regard to, or act on, the recommendation of a subject-matter expert.

### **18.3 Will the new power be delegable?**

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

The reality of public administration often means that it is impractical (or impossible) for the person to whom a power is granted to exercise that power. In these cases, a power to delegate the power may be advantageous. If a statutory power is to be delegated to another person, an express provision allowing this is required in the Act. To avoid uncertainty and litigation, legislation must be clear about who may exercise the delegated power and when it may be exercised by that person.

Some powers are of such importance that they should only ever be exercised by the person granted them and no delegation should be permitted. Examples include powers to make subsidiary legislation, borrow money, and grant warrants of appointment.

Section 14 of the [Interpretation Act 1999](#) provides that a power conferred on the holder of an office (other than a Minister) may be exercised by that person's deputy. The provisions of the Interpretation Act 1999 will apply unless legislation indicates otherwise. The [Crown Entities Act 2004](#) contains default provisions providing for delegation by Crown entities. The [State Sector Act 1988](#) contains standard delegation provisions for the Public Service, and Schedule 7 of the [Local Government Act 2002](#) specifies what a local authority may and may not delegate. These default provisions should be relied on unless there are good reasons not to do so.

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

### **18.4 Is the power no wider than is required to achieve the policy objective and purpose of the legislation?**

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

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

### **18.5 What is the power and how will it be exercised?**

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

A clear statement of the power and how it will be exercised will assist those exercising the power, those people subject to it, and those who may be responsible for settling any dispute over the exercise of it. That statement should also reduce the risk of litigation

regarding the particular exercise of a power.

The following matters should be specified in the legislation:

- any pre-requisite circumstances or procedural steps (such as consultation) that must be taken before exercising the power;
- the appropriate process for exercising the power (which will depend on the purpose and characteristics of the power, the issues to be resolved, the interests affected, and the qualities and responsibilities of the decision maker);
- whether the power is to be exercised independently (which should be made clear either from the context or by explicit provision—for example, the Crown Entities Act 2004 has a “statutorily independent function” regime that should be referenced in appropriate cases); and
- whether the exercise of the power requires the taking into account or exclusion of certain matters (those matters should be identified, and it should be explicit whether or not those matters make up an exhaustive list).

See, for example, section 7 of the [Major Events Management Act 2007](#).

## 18.6 What safeguards are provided in the legislation?

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

Prescribed limits as to the extent and exercise of the power (see 18.5) are key safeguards; however, it may be necessary to include additional safeguards to ensure that the rights and interests of individuals are protected. An additional consideration is ensuring that the safeguards that apply are appropriate, having regard to the full range of people who are affected. The safeguards and procedures that are appropriate may differ where the people affected are mostly people with little access to legal representation (as opposed to corporate entities).

The level of protection that is considered adequate increases as the interference with the rights of individuals increases. The rules of natural justice (see [Chapter 4](#)) apply; however, the flexible nature of the doctrine means that it is good practice to explicitly identify the specific protections that apply so as to avoid any uncertainty. The following protections should normally apply to the exercise of a statutory power:

- The rules and criteria by which the power will be exercised should be specified in the legislation.
- A fair procedure should apply (this may include the right to make submissions, the right to be heard, and the right to produce evidence in support).
- Decisions that affect a person’s rights or interests should be reviewable in some way (see [Chapter 28](#)).

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

#### **18.7 Will a new power be given to a specialist tribunal?**

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

Specialist tribunals perform adjudicative functions in a defined specialist jurisdiction. They are independent of the Executive, and their decisions will generally be appealable to the courts of general jurisdiction (see [Chapter 28](#)).

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

The [Ministry of Justice](#) must be consulted if new powers are being given to an existing tribunal or if a new tribunal is being created (see [Chapter 20](#)).

The Ministry of Justice has produced detailed guidance for departments that are considering whether to create a new tribunal or improve an existing tribunal. The [guidance](#) includes information about the powers and procedures that may be appropriate for a tribunal.<sup>37</sup>

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<sup>37</sup> Ministry of Justice *Tribunal Guidelines—Choosing the Right Decision-making Body; Equipping Tribunals to Operate Effectively* (2015).

## Chapter 19 Requiring decision-makers to consult

Although several decades ago government policy tended to be developed behind closed doors, now, transparency and accountability are accepted norms and consultation is a standard part of most significant policy decisions. In fact, in some contexts, the expectation may extend beyond consultation to include stakeholder involvement or collaboration in the decision-making process (for example, in the Treaty of Waitangi context).

Consulting the public or affected stakeholders on significant decisions has the following benefits:

- It increases the transparent and inclusive nature of decisions, which improves their legitimacy.
- It improves the quality of decisions by ensuring that decision makers take into account the perspectives of those affected by them.
- It helps promote public understanding and acceptance of the decision (and so is likely to improve compliance).
- It enables those to whom the legislation or policy decision will apply to plan and adjust systems or processes appropriately.

Consultation often occurs simply because it is good practice or because there is an administrative requirement to consult (for example, the [Cabinet Manual](#) requires consultation prior to many Cabinet decisions).<sup>38</sup> Imposing a legislative obligation to consult is often not necessary. However, there may be good reasons to include obligations to consult in the legislation, particularly if the decision is delegated below the level of Cabinet or has a significant impact on others (and others' perspectives need to be transparently included), or if additional certainty is required about the scope of the obligation.

In this chapter, we discuss the question of whether legislation conferring decision-making powers should impose an express requirement to consult on those decisions. Those decision-making powers cover two main cases:

- administrative-type decisions that set or implement some government policy (for example, a decision, under section 236(1) of the [Land Transfer Act 2017](#), of the Registrar-General of Land to set standards and issue directives in relation to the administration and operation of the register of land); and
- decisions to make secondary legislation (for example, a Minister's decision, under section 201 of the [Health and Safety at Work Act 2015](#), to recommend the making of regulations for a funding levy).

This chapter does not cover circumstances where a person has a right to be heard in accordance with natural justice because the decision affects his or her rights or obligations (for example, a

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<sup>38</sup> Cabinet Office *Cabinet Manual 2017* at [5.14]. More detailed guidance on consultation requirements is found in the [CabGuide](#) and Treasury [Guidance Note: Effective Consultation for Impact Analysis](#) (June 2017).

licensing decision or the power to remove a person from office). Those types of decisions are discussed further in [Chapter 18](#).

If there is a duty to consult, the common law provides the details of how consultation should be conducted when the legislation itself is silent on that detail. The 1993 Court of Appeal decision in *Wellington International Airport Ltd v Air New Zealand* describes the nature of the consultation obligation, which applies except to the extent that legislation specifically provides otherwise:<sup>39</sup>

- Consultation includes listening to what others have to say and considering the responses.
- The consultative process must be genuine and not a sham.
- Sufficient time for consultation must be allowed.
- The party obliged to consult must provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses.
- The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in mind.

It is important to bear the nature and scope of this duty in mind in deciding whether to include a legislative obligation to consult.

## Guidelines

### 19.1 When should legislation include requirements to consult?

*Legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice.*

There is a wide spectrum of decisions made under legislation where consultation may be expected but is not required by the legislation. In general, decisions made by Cabinet can be expected to be made in accordance with the Cabinet Manual requirements for consultation. However, in some circumstances, it may be useful to include a legislative requirement to consult.

Officials should identify the stakeholders affected by the particular decision and consider the significance of the decision, the nature of (and controls otherwise applying to) the decision-maker, and the need for transparency and accountability in the particular context. A legislative requirement to consult may be necessary to:

- provide additional assurance and certainty to people affected by a decision that their views can be presented. This may be important in securing support for the legislation or in addressing concerns about the delegation of decision-making

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<sup>39</sup> *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671, as described by Asher J in *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

powers. If there are conflicting perspectives, it may be important to ensure that they are given a clear opportunity to be included;

- set clear processes around what is required for consultation (to give certainty to decision makers and clarity to stakeholders);
- ensure consistency of consultation practice for similar decisions (particularly where there are multiple decision-makers and consistency of expectations and practice is important); or
- address concerns that consultation obligations from other sources (such as the common law or Cabinet Manual) are inaccessible to many people or do not apply.

However, there are some risks with solidifying the requirement to consult in legislation rather than leaving it up to good administrative practice. Including procedural requirements in legislation always risks reducing flexibility to tailor requirements to circumstances and potentially creates more complex legislation.

In assessing the risks, the following factors may limit the kind of consultation required by the legislation or may justify not including an obligation to consult:

- if, given the minor nature of the decision, consultation would add too much cost to the process;
- if, where the decision is required to be made urgently, consultation would create inappropriate delay; or
- if meaningful consultation could expose information that should remain confidential.

Officials should note that, in some cases, the common law provides a duty to consult (but usually only if the effect of a decision on an individual is significantly different to its effect on the general public). The common law duty to consult may occur where there is a legitimate expectation of consultation arising from a promise, past practice, or a combination of both on the general ground of fairness or because a duty can be implied into the statute.<sup>40</sup> However, in general, this is sufficiently rare or uncertain that it would not weigh against including a legislative obligation to consult if one would otherwise be advisable for the reasons given above.<sup>41</sup>

## **19.2 Who should be required to be consulted?**

*An obligation to consult should clearly identify who must be consulted.*

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<sup>40</sup> See *Nicholls & Anor v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 369-370; *Talleys Fisheries Ltd v Cullen & Ors* (HC Wellington, CP 287/00, 31 January 2002 (Ronald Young J)).

<sup>41</sup> This situation should be distinguished from the situation where natural justice applies. In that case, statute law commonly relies with confidence on this duty applying to decisions affecting individual rights at common law.

The particular circumstances of the policy will determine how the legislation should describe who must be consulted. The two main concerns here are that the description:

- captures the key people or organisations likely to be interested in or affected by the decision; and
- is sufficiently certain, without unnecessarily restricting the requirements or being too inflexible to cater for change (for example, changing organisations).

Naming or describing the people or organisations to be consulted provides the greatest level of certainty about who must be consulted (for example, the Privacy Commissioner). Officials should, however, consider whether the description of the person or organisation is likely to change over time or be superseded, making the legislation obsolete.

The people or organisations to be consulted can also be described by category (for example, registered architects or “entities to which this decision applies”) or by their representative nature (for example, “organisations representing the interests of journalists”). In those cases, officials should consider whether the class of people included within a description is sufficiently confined so that the decision maker can be certain of satisfying the obligation.

Often, it will not be possible to name or describe in advance all the people who should be consulted. In that case, a “catch-all” description may also be added (for example, “any other person likely to be substantially affected by the decision” or “any other person that the [decision-maker] considers is likely to be affected by the decision”). Catch-all descriptions can result in more risk around decision-making processes (because they require a judgement about who must be consulted and that decision may be challenged). However, that risk should be balanced against the countervailing risk of being under-inclusive or allowing too much discretion. Those risks may be reduced by allowing consultation with the representatives of the people who are substantially affected.

### **19.3 What aspects of the consultation process should be prescribed?**

*The specific requirements for consultation should be set by legislation if certainty is needed on the scope or timing of the obligations.*

As mentioned earlier, if legislation does not specify the process to be followed in consultation, the common law will fill in the detail. Specifically, the principles outlined in the *Wellington International Airport* case apply. Generally, it is better to rely on the common law as it is sufficient to ensure meaningful consultation and minimises the risks that come from excessive legislation of detailed processes.

However, in some contexts, there may be advantages in imposing more specific (and possibly circumscribed) obligations in place of the standard common law duty. Those advantages may exist when express consultation provisions could:

- ensure consistent consultation practice across multiple decisions or decision-makers;
- provide certainty to decision-makers and affected people about the process that

should be followed; or

- provide assurance to decision makers about the limits of their obligations to consult.

Aspects of the consultation process that could be specified in legislation include:

- the timing of the consultation obligation as part of the decision-making process;
- the way in which notice of the consultation opportunity should be given; and
- the information that must be provided to inform interested parties.

However, any prescribed consultation process should be crafted in a way that takes account of the degree of flexibility decision makers are likely to need in the particular context.

Officials should note that if the legislation confers an obligation to “consult”, it is not necessary to go on to impose specific obligations, such as to “have regard to the views of”, “consider the views of” or “request people to comment” (which are inherently part of the obligation to consult).

#### **19.4 What should be the consequences of failing to consult?**

*Judicial review should generally remain available as a means of challenging the adequacy of a consultation process.*

Generally, any failure to comply with the legislative process for making a decision (including a failure to consult) can be challenged by judicial review. If the failure involves a decision to make legislation, a failure to comply with a consultation obligation can also be queried by the Regulations Review Committee.<sup>42</sup>

Sometimes, consultation provisions in legislation contain a provision stating that a failure to comply with the requirement to consult before making a decision does not affect the validity of that decision. The purpose of this protection is to save a decision from an attack on its validity due to a minor or technical error in the course of a genuine consultation process (perhaps because a particular person missed out on being consulted or some minor information was not communicated). It does not generally protect against a deliberate decision not to consult in the face of a statutory obligation. Also, it does not save the decision if the lack of consultation means that relevant considerations were not taken into account or irrelevant considerations were taken into account.

However, this type of concern can often be addressed in other ways, for example, by clearly specifying the consultation process or by giving the decision maker some discretion as to how far to go in determining which members of a group need to be consulted. A validating provision may still be appropriate to ensure that minor or technical failures do not affect the validity of the decision. However, the scope of the validating provision should be clear.

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<sup>42</sup> [Standing Orders 2017](#) 319(2)(h).

## Chapter 20 Creating a new public body

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

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

If a new public body will be a regulator, this chapter should read together with the guidance in [22.3](#) on linking the role, functions, and powers of the body to the purpose of the regime in which it operates.

### Guidelines

#### 20.1 Is a new public body required?

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

Creating a new public body involves considerable expense and should occur only if no pre-existing bodies are capable of performing the new function. As part of the internal government consultation exercise, those public bodies that may have an interest in a particular subject and might be capable, with or without amendment to their structure or powers, of carrying out the new functions should have been identified. In most cases, it is more efficient to give new powers to an existing public body, even if it requires further structural change, than it is to create a new body. (For more information on creating a new public power, see [Chapter 18](#)).

#### 20.2 Is legislation required to create a new public body?

*Legislation should be used to create a new public body only when it is necessary in order to ensure that the body possesses the necessary powers, authority, and appropriate governance arrangements.*

Legislation is required to establish a new tribunal, Crown agent, autonomous crown entity, or independent crown entity (see [20.3](#) for a discussion of these forms). However, it is not always necessary to establish a public service department, a departmental agency, or any of the other organisational forms mentioned below. Whether or not legislation is required must be assessed on a case-by-case basis, having regard to the need to:

- confer a particular function (whether statutory or otherwise);

- grant the entity powers it would not otherwise have by virtue of being a legal person;
- establish appropriate governance and accountability arrangements;
- give effect to international obligations;
- give statutory recognition to the body; and
- establish a statutory officer within a public sector agency who will have the task of exercising specific statutory functions or powers.

### 20.3 What form should a new public body take?

*Legislation should ensure appropriate accountability arrangements best suited to the relevant functions.*

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

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

Sometimes it may be appropriate to adopt an existing proven regime, such as the [Crown Entities Act 2004](#), but to exclude the application of any particular provisions that are not appropriate (see, for example, the provisions of the [Heritage New Zealand Pouhere Taonga Act 2014](#)).

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

**Public service departments**—Public service departments are also known simply as departments or ministries. Some, such as the Crown Law Office and the Treasury, are named differently. Departments are directly accountable to a Minister and are part of government. All public service departments are listed in Schedule 1 of the [State Sector Act 1988](#).

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

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

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

**Crown entities**—Crown entities perform much of the operational business of government and are governed by the Crown Entities Act 2004. They are usually the appropriate form when there is a compelling need to have the function performed at arm’s length from Ministers or under the authority of a governance board. Crown entities can take a variety of forms, each of which vary slightly from each other in respect of their legal form, function, source of funding, and their relationship with Ministers:

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

Schedules 1 and 2 of the Crown Entities Act 2004 contain examples of CAs, ACEs, ICEs, and CECs.

**State-owned Enterprise (SOE)**—An SOE is designed to be run as a commercial enterprise and be independent of government influence over the SOE’s day-to-day operations. The

Government is the sole shareholder and is therefore able to ensure that the business is run according to the values and interests of the community in which it operates. SOEs are governed by the [State-Owned Enterprises Act 1986](#).

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

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

**Officer of Parliament**—An officer of Parliament is accountable to the House, not to Ministers. This organizational form is used for roles that act as a check on the Executive’s use of power and resources. However, in performing that function, an officer of Parliament must only discharge functions that the House of Representatives, if it so wished, might carry out. Offices of Parliament are rarely created; at present only three exist.<sup>43</sup>

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

The State Services Commission maintains an [up-to-date list](#) of all the organisations in the State Sector, categorised by their organisational form.<sup>44</sup> It has also produced [guidance](#) on how to identify the organisational form that is most appropriate to the particular functions concerned.<sup>45</sup>

#### 20.4 Will the new public body be a tribunal?

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

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

A tribunal may be the appropriate body to determine questions or disputes that affect people’s rights, particularly if an independent assessment of facts and the application of specialist judgement or legal principles are required. Proceedings before a tribunal are generally more accessible and cost effective and allow greater scope for individual and

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<sup>43</sup> The Offices of Parliament are the Office of the Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment. See [New Zealand Parliament Offices of Parliament](#).

<sup>44</sup> State Services Commission [New Zealand’s State sector – the organisations](#).

<sup>45</sup> State Services Commission [Approach to choosing organizational form](#) (2007).

public participation than proceedings before a court. The procedures adopted are generally flexible enough to enable non-legally qualified people to represent themselves.

Any new tribunal should have, as a minimum:

- actual and perceived independence from the Executive, in particular, any department or agency that is likely to appear before the tribunal or that conducts an investigatory function relevant to the matter before the tribunal;
- members appointed in accordance with set criteria (such as minimum qualifications) including a requirement to appoint at least one legally qualified member;
- a clearly defined jurisdiction, usually in a specialist field;
- a procedure appropriate to the subject matter of the dispute and flexible enough to accommodate the range of parties likely to come before it;
- powers necessary to perform its function and ensure a fair hearing, such as powers to adjourn, summons witnesses, require the production of documents, administer oaths and affirmations, take sworn evidence and, in appropriate cases, close proceedings and suppress evidence or identities (the powers given to inquiries under the [Inquiries Act 2013](#) may provide a suitable precedent); and
- a right of appeal to a court of general jurisdiction (see [Chapter 28](#)).

The Ministry of Justice should be consulted before any substantive policy work is undertaken to create a new tribunal or alter an existing tribunal's powers or functions. The Ministry of Justice has produced detailed [guidance](#) for departments that are considering whether to create a new tribunal or improve an existing tribunal. The guidance provides the starting point for any department that is considering creating a new tribunal.<sup>46</sup>

## **20.5 Will the public body be subject to certain key Acts that hold government bodies accountable?**

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

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

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<sup>46</sup> Ministry of Justice *Tribunal Guidance—Choosing the right decision-making body; Equipping tribunals to operate effectively* (2015).

be consulted when considering whether to apply the following Acts to a government body:

- **The [Ombudsmen Act 1975](#), the [Official Information Act 1982](#), and the [Local Government Official Information and Meetings Act 1987](#)**—The Department of Internal Affairs and the Office of the Ombudsman;
- **The [Public Audit Act 2001](#)**—The Treasury and the Office of the Controller and Auditor-General; and
- **The [Public Records Act 2005](#)**—The Department of Internal Affairs and Archives New Zealand (Te Rua Mahara o te Kāwanatanga).

## Chapter 21 Creating powers of search, surveillance, and seizure

Powers of entry, search, surveillance, and seizure (referred to in this chapter as “search powers”) must be authorised by an enactment or the common law (provided that the Government’s actions do not breach section 21 of the [New Zealand Bill of Rights Act 1990](#) (NZBORA)), or be carried out by consent.

Search powers balance important sets of values. On one hand is respect for liberty, dignity, bodily integrity, privacy, and the right to peaceful enjoyment by people of their property. These values are affirmed by the right in section 21 of NZBORA to be secure against unreasonable search and seizure. However, what constitutes a “search” within that right can be difficult to define. The Court of Appeal has expressed the view that a “search” involves state intrusion into reasonable expectations of privacy.<sup>47</sup> Although the exact ambit of that concept has yet to be determined, it may capture a range of activities that might not automatically come to mind—for example, undertaking routine inspections; using a dog to detect concealed forbidden items; using thermal imaging equipment to detect heat inside a building; requiring a person to answer questions; requiring a company to disclose information about its customers; using under-cover officers to obtain information; and accessing the contents of a computer from a distant location by hacking.

On the other hand, and balanced against that right are regulatory and law enforcement objectives underlying particular powers. Searches for regulatory purposes aim to promote compliance with the law through inspections, monitoring, and enforcing compliance with legislative regimes that regulate particular industries or activities (particularly where serious harm can occur from non-compliance, such as physical harm to people, the environment, or the economy). In contrast, searches for law enforcement purposes aim to gather evidence for the prosecution of offences. Search powers for these two purposes occur on a spectrum and there is no clear demarcation between them.

A well-designed set of search powers will strike a balance between respecting individual rights and providing an agency with the vital tools it needs to give effect to a policy or Act. Generally, the more intrusive the search power is, or the more significant the consequences for the individual of the use of the power, the greater the need is for both a strong policy justification and safeguards on the exercise of the power. Safeguards can include prerequisites for the exercise of the power (such as a warrant), conditions on how the power is exercised, or limits on who may exercise the power. More intrusive powers should be restricted to classes of people with higher levels of accountability (see [Chapter 18](#) for more guidance on who should hold a legislative power). Poorly designed search powers may be unjustifiably intrusive or insufficient. They may be difficult to use, be inconsistently exercised, and be subject to challenge in the courts. In such cases, it may be necessary to urgently amend the legislation to rectify defective search powers.

The [Search and Surveillance Act 2012](#) reformed the law of search and seizure. It consolidates the existing Police powers that were previously contained in multiple enactments. It also provides a detailed set of procedural rules and safeguards that apply to the exercise of Police powers in Parts 2 and 3, and the majority of the powers held by non-Police regulatory agencies (which remain in agency-specific legislation, but are listed in the Schedule of the Act).

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<sup>47</sup> *Lorigan v R* [2012] NZCA 264 at [22].

The Search and Surveillance Act 2012 strikes a balance between the competing rights discussed above. Therefore, the procedural rules contained in Part 4 of that Act should generally be the starting point for those intending to create new search powers. Part 4 is discussed in more detail at [21.4](#). Legal advisers and the Ministry of Justice (who play an important “gate keeping” role in respect of search powers) should be consulted to ensure that any proposed departures from the Act are justified.

## Guidelines

### 21.1 Should new search powers be granted?

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

If the information or evidence concerned can be obtained by means other than by granting new search powers (for example, by recourse to the common law, consent, or existing powers), those alternatives should be used. If new search powers are required, the approach that results in the least limitation on privacy rights should be adopted.

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

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

Search powers must be proportionate to their objective. Consequently, search powers connected to lower-level offending give rise to concerns. Advice should be sought from the Ministry of Justice if there is a proposal to provide search powers in respect of lower-level offences. These types of powers require clear justification and careful scoping.

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

In some cases, the effective exercise of search powers might necessitate the inclusion of a power to require information to be produced (such as codes to access computers) or questions to be answered. However, these powers are likely to be used in situations where prosecutions are likely to follow, and the privilege at general law (and in the [Evidence Act 2006](#)) against self-incrimination should be respected. If grounds exist to override that privilege, then the overriding of the privilege should be explicitly stated. If not, then the privilege should be affirmed.

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

### **21.2 Is a warrant required for the exercise of new search powers?**

*All searches for law enforcement purposes should be carried out under a warrant unless there are good reasons why a warrant should not be required.*

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

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

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

In the regulatory context, it may be appropriate to allow warrantless inspections to take place without notice if it is the only effective way to ensure that certain regulatory standards are being adhered to (for example, the inspections of restaurants). Regardless of the context, all search powers must be proportionate to their objectives and all searches must be carried out by properly authorised and trained officers.

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

### **21.3 How should the search powers be framed?**

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

In the law enforcement context, legislation should set out the thresholds that must be satisfied before a search power is exercised. The default thresholds below are based on the search powers of the Police in section 6 of the Search and Surveillance Act 2012 and should apply to any new search powers:

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

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

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

#### **21.4 What procedure should apply to the exercise of the search power?**

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

The starting point is that legislation that creates new search powers should contain a specific statutory provision that applies Part 4 of the Search and Surveillance Act 2012.

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

The rules and procedures in Part 4 should be specifically assessed for their relevance and applicability to the new search powers. Legal advice should be sought for this assessment. In many cases, Part 4 will need to be applied with modifications to suit the particular circumstances of the new powers. However, applying the rules in Part 4, with or without modifications, should be preferred over creating new bespoke provisions. Good reasons are required for not applying or for modifying the procedures in Part 4. Those reasons might include the need for a more specialised or technically complex set of rules and procedures (see, for example, the [Animal Welfare Act 1999](#)).

#### **21.5 Who should exercise search and surveillance powers?**

*Search and surveillance powers should be held by a person with the appropriate level of expertise and accountability.*

In general, the more invasive the search or surveillance power is, the more expertise and accountability the person holding the power should have. At a practical level, the person exercising the power must have access to the information and means to exercise the power (such as sufficient facts to determine whether the prerequisite conditions for exercising the power have been met) and sufficient expertise (perhaps demonstrated by training, qualifications, and experience) to exercise any discretion.

In relation to accountability, officials must consider whether the person exercising the power will be subject to sufficient safeguards, appropriate to the nature of the decision and

proportionate to the invasiveness of the power. Safeguards could include 1 or more of the following:

- oversight or supervision of the exercise of the power by a person with higher levels of accountability;
- requirements to publicly report on the exercise of the powers;
- being potentially subject to investigation by the Ombudsmen or subject to the [Official Information Act 1982](#).

# COMPLIANCE AND ENFORCEMENT

## Chapter 22 Ways to achieve compliance and enforce legislation

Compliance with legislation is often addressed by setting out offences for breaches (that is, criminal liability). However, a range of options exist that help regulate behaviour and address non-compliance in different ways. The options include education initiatives, warnings, self-regulation, relying on or modifying existing civil remedies, pecuniary penalties, infringement offences, management bans, enforceable undertakings, and other civil orders.

Creating a fully developed compliance model that is effective in dealing with the many forms of non-compliance often requires a combination of options. The combination of options should form an effective system, and each option should be proportionate to the form of non-compliance it is intended to address. Officials should also consider who will monitor compliance with, and enforce, the legislation. In many circumstances, the role of achieving compliance and enforcement is given to an expert regulator. A regulator can take many forms.

This chapter, when read with [Chapters 24 - 26](#), will help identify which of the most common regulatory options for achieving compliance are available and in which circumstances they may be appropriately used. [Chapter 20](#) provides advice on the options for the form of the regulator.

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

### Guidelines

#### 22.1 How will the legislation be enforced?

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

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

The Government's role will vary depending on what the Act sets out to do. An Act may grant legal rights or make use of existing rights that are left to the parties to a dispute to resolve (by the courts or otherwise) (see [Chapter 23](#)). At the other end of the spectrum is the criminal law, where the full weight of the government's powers are brought to bear on an individual through the investigation and prosecution of crime and the administration of sentences (see [Chapter 24](#)).

Legislation often provides for registration and discipline of professions, but the Government has little or no ongoing involvement in administering the Act—that is left to registration bodies and the profession concerned.

In general, the Government should have little involvement in areas where the reliance on private enforcement of legal rights and obligations is sufficient to address harm caused by non-compliance and provide sufficient deterrents (for example, where the legislation modifies common law rights within the existing framework, such as a sale of goods between commercial traders).

However, in many contexts, the private enforcement of legal rights and obligations will be insufficient. For example, the damages from a civil action may be an insufficient deterrent. This may be because loss is not an adequate measure of the harm caused by the conduct (eg, because the harm done is diffused) or because civil suits are not a realistic likelihood (eg, because of the costs of bring private actions or insufficient private benefit in doing so), or both. If the law will not reliably be enforced, then this can cause the regime to fail, which is worse than having no regulation at all.

In addition, if the context is complex, a wider range of compliance methods and more proactive approach may be needed. For example, a regime may involve education, guidance, licensing, authorisation, or approval functions. In this case, consideration should be given to the regulatory options needed for compliance and also to the role of a regulator, which could be the administering department or a specific entity (often a Crown entity—see [Chapter 20](#)).

## **22.2 If government enforcement is required, what are the most appropriate regulatory tools?**

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

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

If it is decided that the Government needs to monitor and enforce the legislation, the choice between enforcement options (for example criminal law, infringement offences, pecuniary penalties, injunctions, or management bans) must be based on a robust and transparent assessment of how appropriate the option is in relation to the purpose of the legislation and the particular circumstances and regulatory system in which it will operate. The relevant factors include:

- **The harm caused and the nature of the conduct involved**—The option must be appropriate in light of the conduct it relates to. For example, it will generally be inappropriate to use the criminal law to address matters relating to a simple breach of a commercial contract or a failure to pay a private debt. By contrast, conduct that involves deliberate and significant physical harm to a person should generally be subject to the criminal law.

- **Enforcement objective**—Will the option achieve the desired enforcement objective? For example, if deterrence is the primary objective, issuing a \$1,000 infringement notice to a large corporation may have little deterrent effect. If the objective is to compensate someone for loss or damage, criminal remedies will generally not be sufficient.
- **Practical considerations**—Is the option workable having regard to the circumstances in which it is intended to operate? For example, it would be impractical and not provide effective deterrence to require local authorities to pursue every instance of illegal parking through a criminal prosecution or a civil debt recovery processes. It's important here to consider the characteristics of the regulated group, what are the range of reasons for non-compliance and the incentives affecting behaviour, and design enforcement options accordingly.
- **Fairness considerations**—What are the characteristics of the regulated group—how homogenous are they? What is their ability to challenge unfair decisions? These considerations affect both what enforcement tools, or combination of tools, are likely to be appropriate (as well as effective) and the nature of the procedures and protections that are needed to ensure appropriate safeguarding of rights and interests (for example, the need for low-cost internal review processes—see [Chapter 28](#)).

### 22.3 If a regulator is required, what roles should it have?

*The role, functions, and powers of a regulator should be linked to the purpose of the regime in which it operates.*

Regulators are usually required to play different roles in complex regulatory regimes that use a number of regulatory options and require many actors.

Legislation establishing the role of a regulator should set out the regulator's functions, powers and, sometimes, objectives and how it is expected to perform them. These provisions should expressly link the roles of the regulator to the purpose of the regime it operates within.

If multiple regulators operate within a regime, the legislation needs to be designed with the relationship between the regulators in mind. This includes considering what might be required in legislation to ensure that the relationship operates effectively and to determine what can be left to non-legislative mechanisms or administrative co-operation.

A regulator may need a range of powers and tools to fulfil its role within the regime it operates within. Consideration should be given to the following matters and to the extent to which the legislation needs to provide for them:

- **Monitoring**—A regulator needs to understand the system that it operates within. This may mean it needs the ability to gather information, monitor trends and advise on changes that might be required. See [Chapter 21](#) on issues relating to monitoring regimes.

- **Compliance and enforcement**—A regulator should have available to it, and effectively deploy, a range of tools for achieving compliance in a range of situations. See the rest of the guidance in this chapter about designing enforcement systems, and [Chapters 23](#) to [26](#) for guidance on specific enforcement options.
- **Guidance**—A regulator may need to issue guidance to those regulated by the regime. Although this can often be done without a legislative basis, there may be reasons to make it clearly part of the regulator’s role. The nature and status of guidance should be appropriate to achieve the policy objective (for example, consideration should be given to whether it is legislative or administrative, and the consequences of reliance on, or failing to comply with, guidance).
- **Licensing, authorisations, or approval**—It may be appropriate for a regime to include an ability for the regulator to grant licences, authorisations, or approvals. See [Chapter 18](#) for guidance on statutory powers and decision making. Consideration should also be given to the practical, operational, and resourcing requirements of administering a licensing or approval scheme.
- **Transparency**—A regulator should carry out its role transparently (for example, by publishing its compliance strategy) and with regard to the costs as well as benefits of regulatory action.
- **Accountability**—There should be mechanisms to hold a regulator to account. A well-designed regulatory system will ensure that a regulator has the tools and powers it requires to fulfil its role and is accountable without disproportionately restricting the regulator in legislation. Consideration should be given to whether non-legislative or existing accountability mechanisms (for example, those in the [Crown Entities Act 2004](#)) can be relied on.

## Chapter 23 Creating new, or relying on existing, civil remedies

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

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

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

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

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

### Guidelines

#### 23.1 Should existing civil remedies be relied on?

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

Existing civil remedies should be used if they can apply to the circumstances of the new legislation and are efficient and effective mechanisms for the purposes of enforcement. If there is uncertainty as to whether an existing civil remedy will apply, or if it is necessary to modify it in some way to better suit the purposes of the legislation (such as making a new or different kind of remedy available), this must be made explicit in the legislation. Legal advisers will be able to identify existing civil actions and whether they are adequate.

#### 23.2 Should a new civil remedy be created?

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

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

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

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

## Chapter 24 Creating criminal offences

One purpose of the law is, by creating offences, to punish, deter, and publicly denounce conduct that society considers to be blameworthy and harmful. Criminal offences carrying conviction can have a serious impact on individuals, and new criminal offences can have a significant resource impact on the criminal justice system. They should be included in legislation only if they are necessary to achieve a significant policy objective (which is likely to be the avoidance of harm to society generally or to particular classes of people).

Offences are one of a variety of alternative mechanisms for achieving compliance with legislation and should not be seen as the default response to breaches of legislation. Before settling on enforcement by criminal offence, officials must conduct an analysis as to whether the policy objective can be achieved effectively:

- without state intervention, for example, where it can be achieved by self-regulation by the applicable industry, or through civil claims or civil complaints investigation processes;
- by non-criminal state measures, such as education campaigns, informal warnings, or other methods of persuasion, such as codes of practice or national standards; or
- by other forms of State enforcement, such as civil remedies (including pecuniary penalties or taking action under a licensing regime).

[Chapters 22](#), [23](#), [25](#), and [26](#) provide more detailed guidance on alternatives.

In addition to determining that a criminal offence is necessary, a number of other matters should be thoroughly assessed before a criminal offence is included in legislation:

- What conduct should be prohibited? (the “physical element”, or actus reus).
- When should the person be held responsible? What is the required culpability? (the “mental element”).
- What defences, if any, should be available?
- On whom should the burden of proof lie?
- Who should be punished (for example, an individual or a company)?
- What maximum penalty should apply?

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

If an offence is the preferred approach, thought needs to be given to the type of offence. Offences generally fall into one of three categories:<sup>48</sup>

- **Offences requiring mens rea**—Mens rea (the mental element) is an ingredient of the offence and the prosecution is required to prove it (along with the physical element, the actus reus, of the offence).<sup>49</sup> It requires the prosecution to prove that not only did a defendant engage in a prohibited act, but that the defendant did so with the specified intent: the defendant's state of mind is important in assessing culpability. Offences requiring mens rea are still the most common offences, and the mental element is particularly important for serious offences.
- **Offences of strict liability**—The prosecution is not required to prove mens rea, but the defendant can escape liability if he or she can show the existence of a defence or an absence of fault. Strict liability offences are used to enforce requirements of regulatory regimes, such as regulating an occupation or commercial activity.
- **Offences of absolute liability**—Liability is established once the prosecution proves the act beyond reasonable doubt because the option of proving a defence or absence of fault is not open to the defendant. These offences are almost never used: it is rarely justifiable to create an offence for which there is no defence. The starting point is always to consider what defences should be open to the defendant.

## Guidelines

### 24.1 Should the conduct be subject to the criminal law?

*Compelling reasons must exist to justify applying the criminal law to conduct.*

The authors of *Principles of Criminal Law* make the following point:<sup>50</sup>

[...] even though a prima facie case can be made in favour of criminalising an activity, for example because it is harmful to others, it does not follow that criminal legislation is the best response. Other forms of intervention need to be considered; sometimes, it may be best not to legislate at all. The criminal law is a powerful, expensive, and invasive tool. It should not be used lightly.

Imposing criminal sanctions is a serious matter that has significant consequences. For example, making an action subject to the criminal law may authorise the Police or other enforcement agencies to search and arrest an individual and to search and seize their property for the purpose of investigating or preventing the commission of a crime. Depending on the seriousness of the misconduct, a person subject to a criminal conviction

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<sup>48</sup> Simon France (ed) *Adams on Criminal Law—Offences and Defences* (online looseleaf ed, Thomson Reuters) at CA 20.12.

<sup>49</sup> Mens rea is the latin phrase used in the criminal law to refer to the element of an offence that encapsulates the fault or moral blameworthiness of the defendant, typically that the defendant intended to do the prohibited act or had knowledge of it.

<sup>50</sup> AP Simester, WJ Brookbanks *Principles of Criminal Law* (4<sup>th</sup> ed, Thomson Reuters, 2012) at 21.7.2.

may experience a loss of liberty (imprisonment or home detention), a loss of property (confiscation, fines, or reparation), or both. A person who is convicted acquires the stigma of a criminal conviction, which may affect future employment or overseas travel.

Because of the possible consequences, criminal offences should be created with care, and with convictions being possible only if imposed by a court where the offence is proved by the prosecution to the standard of “beyond reasonable doubt” following a fair process (including the minimum standards of criminal procedure set out in the [New Zealand Bill of Rights Act 1990](#)).

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

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

It is undesirable to further criminalise conduct that is already addressed by the criminal or civil law unless doing so would serve a goal that is not currently served by the law.

## **24.2 What conduct is to be prohibited?**

*Legislation must precisely define the prohibited conduct.*

Criminal law marks the legal boundary of individual liberty. Offences must be defined clearly so that people know what is and what is not prohibited. Therefore, it is necessary to consider exactly what conduct (called the *actus reus*) is prohibited by a criminal offence.<sup>51</sup> The description of the conduct should be precise and rationally connected with the harm targeted by the policy objective.

An imprecise statement of the prohibited conduct may lead to inconsistent enforcement of the law, uncertain application of the law, unintended changes in behaviour, or failure to

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<sup>51</sup> Actus reus is the latin phrase used in the criminal law to refer generally to the conduct that is prohibited by an offence (and which may encompass behaviour, consequences, or circumstances).

preclude conduct that it was intended to prohibit.

General provisions (such as “every breach of this Act is an offence”) are not acceptable as they may capture a range of conduct that is too wide and not intended to be subject to the criminal law.

Any proposal to apply the criminal law to conduct occurring outside New Zealand (extraterritorial conduct) should be discussed with the Ministry of Justice early in the policy development process because this is relatively unusual and subject to unique considerations.

### **24.3 When should the person be held responsible?**

*Legislation should state the mental element (mens rea) required for an offence to be committed.*

It is important to consider why, and in what circumstances, a person who has committed the physical act should be considered culpable and deserving of punishment for having committed that act. As a general rule, a person should be liable for a criminal offence only if he or she is at fault for the prohibited conduct. This concept of moral responsibility for the conduct is reflected in the mental element of the offence (the mens rea). That mental element can be framed in many different ways (for example, the defendant “intentionally”, “recklessly”, or “knowingly” performed the prohibited conduct). Each of these formulations has subtle differences as explained in judicial decisions.

A criminal offence should include a mental element unless there are compelling policy reasons to relieve the prosecution from the burden of proving a mental element and require the defendant to prove some essential element to avoid liability. In such a case, an offence may be framed as a strict liability offence, meaning the prosecution must prove only the physical element of the offence.

Policy reasons for strict liability offences may exist in the regulatory context if:

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

In those cases, officials should be able to provide reasons why strict liability offences are justified in the particular regulatory context. They should also consider what defences would be appropriate.

If legislation is silent as to the mental element or the defences available, the courts will generally infer a mental element, but that can create uncertainty. This is undesirable because a person is entitled to know *before* engaging in conduct whether it is prohibited and, if so, in what circumstances.

#### **24.4 What defences, if any, should be available?**

*Legislation should identify any specific defences that are available.*

It is important to consider whether any factors that exonerate the defendant from criminal liability should be specified in legislation. Certain general defences, such as self-defence, will exist without needing to be specified or cross-referenced.

However, particularly when strict liability offences are justified, it is necessary to specify any defences that a defendant is entitled to raise in the relevant statutory context that, if accepted, would result in acquittal.

#### **24.5 On whom should the burden of proof lie?**

*The burden of proving both the actus reus and the mens rea should remain on the prosecution.*

The default position is that the prosecution must prove beyond reasonable doubt both the existence of the prohibited conduct (actus reus) and the requisite mental element (mens rea). This is described as a *legal burden* of proof. There is no obligation on the defendant to negate those elements of the offence.

If the legislation specifies a justification or excuse (for example, lawful authority or reasonable excuse) for certain conduct, but does not require the defendant to prove its existence, the defendant must raise credible evidence to bring the matter into issue before the court. This is described as an *evidential burden*—it is not a burden of proof. If the defence satisfies the evidential burden, the prosecution must then disprove the existence of the defence beyond reasonable doubt (the legal burden).

There may sometimes be good policy reasons for placing a legal burden of proof on the defendant. An example is where a strict liability offence is justified (as described in [24.3](#)). In that case, the prosecution must prove only the physical element of the offence and, to avoid liability, the defendant must prove the existence of a statutory defence or total absence of fault on the lesser standard of the balance of probabilities. However, shifting the burden in this way will constitute a limitation on the presumption of innocence (see section 25(c) of the New Zealand Bill of Rights Act 1990) so there must be compelling justification for departing from the default position and consideration must be given to what defences should be available to the defendant.

Legislation must be very clear if it is intended to place a legal burden of proof on the defendant. If the legislation is not clear, the court may interpret the provision as placing only an evidential burden on the defendant.

#### **24.6 Who should be punished?**

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

Legislation should be very clear about which people are potentially liable for the criminal offence—that is, whether “any person” is potentially liable or only a particular subset of people.

Criminal liability may be imposed on an individual or a body corporate. The meaning of “person” includes, by default, a corporation sole, a body corporate, and an unincorporated body, unless specific case law or legislation states differently.<sup>52</sup>

In relation to corporate liability, unless the legislation specifies otherwise, the general rule is that a director or member of a corporation (for example, a shareholder of a company) is not vicariously liable for the acts of the corporation (but could be liable as a secondary party if he or she knew of the offending and encouraged or assisted it). However, a corporation may be vicariously liable for the acts of its employees or agents. A corporation can also be directly liable if the acts of an employee or agent can be attributed to it.

#### **24.7 What is maximum penalty that will apply?**

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

Once legislation comes into force, the decision as to precisely what penalty will be imposed in a particular case rests solely with the courts. When imposing a sentence, the courts have regard to the maximum penalty available, the particular facts of the case, and the guidance and principles set out in the [Sentencing Act 2002](#). The courts also have regard to any additional sentencing guidance provided by the legislation and higher courts.

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

The maximum penalty affects the procedure that the courts adopt, including whether the High Court can hear the case and whether the defendant has the right to elect trial by jury. Section 6 of the [Criminal Procedure Act 2011](#) provides more detail as to how the maximum penalty will affect the procedure that is adopted.

If offending is in a commercial context, it may be appropriate to provide for a variable fine, such as a fine linked to the commercial benefit derived from the offending. Proposals for such penalties should be discussed with the Ministry of Justice and the [Ministry of Business, Innovation and Employment](#) (MBIE) at an early stage. Since those types of fines can result in very large, indeterminate penalties being imposed in a criminal context, there should be compelling justification for a commercial gain penalty.

References to precedents and similar offences must be made with care. Subtle differences may exist as to the elements of the offence, such as the required mental element, justifying a higher penalty in one context but not in another. This can be the case even if the same

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<sup>52</sup> [Interpretation Act 1999](#), section 29.

general subject is covered by both the existing offence and the proposed offence, or the harm to be addressed is similar. However, penalties for some offences may be unduly low simply because of the age of the Act.

Basing proposed offences on overseas legislation can be particularly problematic. The whole statutory context, common law (particular legal terms may be interpreted differently in different countries), and sentencing framework need to be considered before taking an offence from another jurisdiction and proposing it for inclusion in New Zealand law.

## Chapter 25 Creating infringement offences

Infringement offences are a subset of criminal offences that do not result in criminal convictions. They usually involve low-level infringement fees (less than \$1,000) and are often imposed by the issuing of an infringement notice (such as the Police issuing a fine for an unwarranted motor vehicle or issuing a speed camera fine). The purpose of infringement offences is to deter conduct that is of relatively low seriousness and that does not justify the full imposition of the criminal law. Infringement offences prevent the courts from being overburdened with a high volume of relatively straightforward and low-level offences. Without them, the law may otherwise not be enforced because it is unlikely a prosecution would be in the public interest. The criminal courts will generally become involved only if the infringement fee is not paid or if the recipient of the infringement notice challenges it.

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

### Guidelines

#### 25.1 Is it appropriate to deal with the prohibited conduct as an infringement offence?

*Infringement offences should be reserved for the prohibition of conduct that is of concern to the community, but which does not justify the imposition of a criminal conviction, significant fine, or imprisonment.*

The Ministry of Justice has produced [guidelines](#), approved by Cabinet, on the development of infringement schemes, which departments should adhere to.<sup>53</sup>

Infringement penalties may be appropriate if:

- the conduct represents a minor contravention of the law;
- large numbers of strict or absolute liability offences are committed in high volumes on a regular basis;
- the conduct involves straightforward issues of fact that can be easily identified by an enforcement officer;
- a fixed penalty can achieve a proportionate deterrent effect because contraventions of the particular prohibition are reasonably uniform in nature (if individual culpability can vary widely, the conduct is unlikely to be suitable to be dealt with by infringement offence); or
- identifying actual offenders is not practicable (for instance, in relation to parking, speed cameras, or toll road offences), but liability may be attributed

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<sup>53</sup> Ministry of Justice *Policy framework for new infringement schemes*.

to the person who has prima facie responsibility for the item used in the offending (such as the owner of the vehicle that is found speeding or illegally parked).<sup>54</sup>

Infringement penalties are generally not appropriate for mens rea offences, cases that involve complex factual situations, or conduct that may warrant more serious consequences (for example, more than a \$1,000 fee or a non-monetary penalty).

Any aspect of an offence that provides an incentive to a person issued with an infringement notice to challenge the matter in court (for example, a high fee or the potential to prove some matter to escape liability) defeats the purpose of the infringement regime to keep minor infringements of the criminal law out of court and therefore should be avoided.

It is generally undesirable to have identical conduct specified to be both an infringement offence and a separate criminal offence. Wherever possible, some differentiation as to mens rea or the specific type of conduct should exist between infringement offences and other offences in the same legislation. If a low-level fixed fee is considered insufficient to punish or deter the prohibited conduct, the conduct is likely to be too serious to be dealt with as an infringement offence.

## **25.2 Is there authority for the infringement regime?**

*Infringement offences must be in or authorised by an Act.*

An infringement offence must either be specified in the Act or be clearly authorised by the Act. Secondary legislation may address some matters, but the Act must contain an appropriate empowering provision (see [Chapter 14](#)).

At a minimum, the Act must:

- establish the infringement offence scheme;
- establish the maximum penalty provisions;
- establish who can issue infringement notices; and
- identify the entitlements to revenue that prosecuting agencies receive from infringement fees.

The Act must specify whether the fee will be paid to the enforcement body or to the Crown Bank Account. Generally, infringement fees collected by central government agencies should be paid to the Crown Bank Account, but territorial and local authorities may be entitled to retain all or some of the revenue. If the fee is to be split, that must be provided for in the Act. Treasury advice should be sought on these matters.

It is standard practice for the Act to authorise details of the specific infringement regime to

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<sup>54</sup> This is subject to the person issued with the infringement notice being able to raise his or her lack of involvement in the offending with the issuer and to challenge it in court.

be provided for in secondary legislation, including:

- the specific act or omission constituting an infringement offence;
- the specific penalty levels for each infringement offence; and
- the form of the infringement notice and reminder notice to be issued.

In general, infringement fees should not exceed \$1,000, although, in cases with significant financial incentives for non-compliance, a higher fee may be justified to achieve the deterrent effect. If fees are to be set by secondary legislation, the empowering provision should specify the upper limit for the fees. Fees of more than \$1,000 should be stated in the Act. In some cases, the Act will need to specify a maximum fine for an infringement offence, as well as an infringement fee. This should be discussed with the Ministry of Justice if infringement offences are proposed.

### **25.3 What procedures apply to new infringement penalties?**

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

Section 21 of the [Summary Proceedings Act 1957](#) sets out a generic process by which a person may challenge an infringement notice. It also provides a process by which an agency may issue reminder notices, enter into instalment arrangements, and, if necessary, bring a person before the court and have an unpaid infringement penalty converted to a fine plus the associated court costs.

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

For section 21 of the Summary Proceedings Act 1957 to apply, legislation should contain an express provision to the effect that the new offence is an infringement offence for the purposes of section 21 of the Summary Proceedings Act 1957. Ideally, the infringement regime should also be included in the list of regimes in section 2 of the Summary Proceedings Act 1957 under the definition of “infringement notice”.

## Chapter 26 Pecuniary penalties

Pecuniary penalties are non-criminal monetary penalties imposed by a court in civil proceedings that apply the civil standard of proof (“the balance of probabilities”). They are one of a range of enforcement tools available to those designing legislation.

Although pecuniary penalties are not criminal sanctions, they can have serious reputational and financial effects on a person or entity. Pecuniary penalties are civil remedies imposed by the courts, so it cannot be assumed that the protections of the criminal law will apply. The lack of automatic protection needs to be thought through and, if necessary, specifically provided for in the empowering legislation.

This chapter will help to identify the issues that should be considered when designing a pecuniary penalty regime. In addition, other chapters of these Guidelines provide guidance on other aspects of a pecuniary penalty regime:

- [Chapter 22](#)—in relation to selecting the appropriate regulatory tool for enforcement;
- [Chapter 24](#)—particularly, in relation to setting the maximum penalty;
- [Chapter 11](#)—in relation to determining whether the Crown should be subject to the pecuniary penalty (see the section on making the Crown subject to criminal liability, which may be relevant by analogy); and
- [Chapter 27](#)—in relation to the relevant limitation period for a pecuniary penalty.

Legal advisers and the Ministry of Justice should be consulted early in the policy development process if new pecuniary penalties are proposed or an existing provision is to be altered in some way (including an increase in the penalty).

In 2014, the Law Commission published a report on pecuniary penalties that thoroughly canvassed issues in the design of pecuniary penalties.<sup>55</sup> That report discussed whether pecuniary penalty provisions should include a privilege against compelled self-exposure to the pecuniary penalty. That issue is not covered in this chapter because, at the time of writing, the Government’s policy work to determine its position on that issue remains ongoing. Instead, that issue is covered in supplementary material.

### Guidelines

#### 26.1 Should the conduct be subject to a pecuniary penalty?

*Pecuniary penalties are not appropriate to address truly criminal conduct.*

Pecuniary penalties may be an appropriate alternative to criminal offences when a monetary penalty would deter breaches of a regulatory regime and the nature of the offending conduct does not warrant the denunciatory and stigmatising effects of a criminal conviction

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<sup>55</sup> Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (2014) NZLC R133.

or imprisonment. To date, pecuniary penalties have usually been imposed as part of regulatory regimes targeting commercial behaviour in a particular industry. They may be an alternative to a strict liability criminal offence in cases where civil enforcement is more appropriate than criminal enforcement.

Pecuniary penalties are not appropriate for the type of conduct sometimes described as “truly criminal”, such as violence, emotional harm, or significant harm to property, the economy, the environment, or the administration of law and justice. Officials should consider whether the contravention should include an element of fault or moral blameworthiness. To date, most pecuniary penalty provisions do not contain a mens rea element.<sup>56</sup> If fault or moral blameworthiness is an element of the conduct, it may be more appropriate for the contravention to be addressed by a criminal offence, rather than in civil proceedings.<sup>57</sup>

Pecuniary penalties may also be inappropriate if there is an imbalance of power between the enforcement agency and defendants, which would require the procedural protections of the criminal law.

There must be an adequately resourced enforcement body or agent to implement pecuniary penalties. Usually, this is a statutory body with investigatory and prosecutorial responsibility for the particular regime, but a department or ministry (or its chief executive) may also be appropriate.

Finally, pecuniary penalties are enforced as civil debts. The same tools for enforcement of criminal fines (such as the seizure of property and compulsory deductions from income or bank accounts) are available for pecuniary penalties, but enforcement must be initiated by the enforcement body. Officials should think about the practicalities of enforcing civil debts as part of determining whether pecuniary penalties are the appropriate enforcement mechanism.

## 26.2 Who should impose pecuniary penalties?

*Pecuniary penalties should be imposed by a court.*

Generally, decisions about liability for pecuniary penalties and the amount of the penalty should be made by a court, and not the enforcement agency. Judicial imposition of the penalty provides open and transparent consideration of liability and any aggravating or mitigating circumstances, and the avoidance of allegations of a conflict of interest by the enforcement agency (if the enforcement agency is both the complainant and the judge).

In very limited circumstances, penalties could be imposed by an independent non-judicial body. Current examples are the quasi-judicial Rulings Panels established under the [Gas Act 1992](#) and the [Electricity Industry Act 2010](#). This model may be appropriate if specialist knowledge is absolutely essential to the decision on liability and penalty or if there is a

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<sup>56</sup> An exception is section 33M(c) of the [Takeovers Act 1993](#), which includes a requirement that “the person knew or ought to have known of the conduct that constituted the contravention”.

<sup>57</sup> The Law Commission discussed the inclusion of mens rea in pecuniary penalty provisions. See Law Commission [Pecuniary Penalties: Guidance for Legislative Design](#) (2014) NZLC R133, Chapter 11.

particular need for a fast and efficient enforcement system. Such models should have a process for appeal and review. Consideration should also be given to requiring the chair or other members of the body to have legal expertise.

### **26.3 What limitation period should apply to pecuniary penalties?**

*The limitation periods in the Limitation Act 2010 should apply to pecuniary penalties unless there are good reasons for different periods.*

If a pecuniary penalty statute does not deal specifically with limitation periods, the normal rules for civil proceedings in the [Limitation Act 2010](#) apply. Officials should consider whether there are good reasons to deviate from that default position, for example, if the penalties are being retrofitted into a regime with its own limitation provisions. There may also be a concern that the long-stop extension in the Limitation Act 2010, which allows periods to be extended if the damage is not discoverable, will extend the period of potential liability for 15 years from the date of the actions.

An analysis of limitation periods should take into account the following factors:

- the time period within which breaches of the regulatory regime ought to be discoverable;
- the time period within which enforcement agencies ought to be able to make decisions to bring proceedings;
- fairness to potential defendants in relation to knowing whether or not proceedings will be commenced (it is possible that the larger the potential pecuniary penalty, the greater the need for certainty); and
- the public or market expectations of prompt prosecutorial action.

### **26.4 What defences should be specified?**

*The legislation should describe any defences that are available.*

Officials should consider what circumstances may provide a defence. Examples include:

- the contravention was necessary (for example, to save or protect life or health, or prevent serious damage to property);
- the contravention was beyond the person's control and could not reasonably have been foreseen, and the person could not reasonably have taken steps to prevent it occurring;
- the person did not know, and could not reasonably have known, of the contravention;
- the contravention was a mistake or occurred without the person's knowledge;
- the contravention was due to reasonable reliance on information supplied by

another person; and

- the contravention was due to the default of another person, which was beyond the first person's control, and that first person took precautions to avoid the contravention.

## **26.5 On whom should the burden of proof fall?**

*The burden of proving all the elements of a contravention that results in a pecuniary penalty should be on the enforcement agency bringing proceedings.*

Generally, the party initiating proceedings, usually the enforcement agency in the case of pecuniary penalties, should have the legal burden to prove the elements of the case, because that party seeks the penalty from the court.

Sometimes, there may be good reasons for placing a burden of proof on a defendant in relation to a defence. These might include cases where the party initiating proceedings would face serious difficulty in proving the matter or would incur significant expense to do so, but the matter is likely to be within the particular knowledge of the defendant or can be proved by the defendant cheaply and easily.

The Ministry of Justice should be consulted as to whether a burden of proof on the defendant is appropriate and, if so, whether it should be a legal burden to prove the matter or an evidential burden to raise credible evidence to make the matter relevant.

## **26.6 How should the court determine the penalty to be imposed?**

*Legislation should provide guidance to the court about how to determine the amount of the penalty.*

Legislation should state the maximum penalty that could be imposed by the court. That maximum penalty should reflect the worst class of case in each particular category. More assistance for determining the maximum penalty can be found, by analogy with criminal offences, in [Chapter 24](#).

Acts should also provide guidance to the court about how to determine the amount of a penalty in specific cases. Although the list of factors to consider should be tailored to the circumstances of the regime, the following factors should be considered:

- the nature and extent of the breach;
- any loss or damage caused by the breach;
- any financial gain made, or loss avoided, from the breach;
- the level of calculation involved in the breach; and
- the circumstances in which the breach took place.

## 26.7 Is there a risk of double jeopardy that should be addressed in the statute?

*Legislation should specifically protect against the risk of double jeopardy.*

The criminal law has long provided protection against people being punished twice for the same conduct (section 26(2) of the [New Zealand Bill of Rights Act 1990](#); section 10(4) of the [Crimes Act 1961](#)). There are two aspects to the double jeopardy rule—a prohibition on being subjected to more than one penalty for the same conduct, and a prohibition on requiring a person to defend themselves against simultaneous or multiple penalty actions for the same conduct.

Although those rules apply only to criminal proceedings, the underlying rationale of the rules usually applies equally to pecuniary penalties. Therefore, on the basis of fairness, similar prohibitions should be specifically included in legislation so that a person is not subject to both criminal proceedings and civil proceedings that seek a pecuniary penalty for the same conduct. If the legislation is silent on this matter, it will be left to the court to use its existing power to stay or strike out the second proceedings if it considers there is an abuse of process.

## 26.8 Should insurance or other indemnity be able to cover a pecuniary penalty liability?

*Legislation should prohibit indemnity or insurance for a pecuniary penalty only if that would be consistent with the underlying policy objectives.*

The effect of insurance and indemnification on the deterrent effect of pecuniary penalties is not necessarily clear. On the one hand, insurance mitigates the financial risk so it may undermine deterrent and punitive goals of the legislation. On the other hand, insurance companies can motivate their clients to minimise their risk of non-compliant behaviour through the threat of increased premiums.

There are some statutory restrictions on indemnities and insurance against criminal liability. For example, section 162 of the [Companies Act 1993](#) prohibits a company from indemnifying or effecting insurance for a director or employee of the company for criminal liability. This tricky issue should be considered by officials, but a prohibition on indemnity or insurance is justified only if it is necessary to achieve the underlying policy objective. The following factors may be relevant:

- **The nature and gravity of the illegal conduct**—Are there public policy reasons why indemnification or insurance in respect of the breach should be barred? For example, is the conduct so morally reprehensible that punishment should be borne personally?
- **The deterrent effect of the penalty**—Would the availability of indemnification significantly dilute the deterrent effect of a pecuniary penalty provision? Or does the disciplinary effect of indemnification and insurance contribute to the deterrence objectives of the pecuniary penalty regime? Similarly, would those

insured prefer to allow the breach and recover their loss under their insurance policies rather than avoid the breach altogether?

- **Interests of innocent third parties**—Will the penalty be diverted for reparative purposes or to fund education to prevent future breaches? If so, will the contravener be able to pay the penalty if the indemnity is not allowed?

Other relevant considerations are the potential impact of insurance and indemnification on penalty imposition by the courts and the impact on the personal liability of directors and managers.

## Chapter 27 Imposing time limits for enforcement

Imposing time limits on enforcement action for breaches of legislation involves balancing two strong public interests:

- the prompt enforcement of legislative sanctions or disposal of civil claims; and
- ensuring that someone who has committed a serious unlawful act does not escape punishment because their actions remained undetected for many years.

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

In such cases, any delay in bringing proceedings may mean that the defendant finds it hard to present a full defence or otherwise respond to allegations. This may compromise the person's right to a fair hearing. In the commercial context, there are also financial implications for businesses or people if they are subject to the open-ended possibility of civil claims.

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

### Guidelines

#### 27.1 Are new or amended criminal offences subject to a limitation period?

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

Section 25 of the [Criminal Procedure Act 2011](#) provides a standard set of time limits by which a criminal prosecution must be brought after an offence is committed. The limitation periods differ subject to the category of offence and the maximum penalty that can be imposed. The most serious offences (category 4) have no limitation period.

Strong policy reasons that are particular to the circumstances of the legislation must be present to justify a departure from the rules in the Criminal Procedure Act 2011 and legal advice should be sought.

The time within which an agency may issue an enforcement notice for an infringement offence is limited in practice by the requirements of section 21 of the Summary Proceedings Act 1957 (which should apply to all new infringement offences). Under section 21(5), if the agency wishes to enforce an unpaid infringement notice through the court, it must provide particulars of the reminder notice to the court within 6 months from the date on which the infringement offence is alleged to have been committed.

## **27.2 Are new civil proceedings subject to a limitation period?**

*The limitation periods in the Limitation Act 2010 should apply to all new civil proceedings.*

The [Limitation Act 2010](#) provides a generic set of time limits (and exceptions to those limits) that apply to civil claims. The Limitation Act sets limitation periods in respect of a variety of civil claims (such as money claims, land claims, and claims relating to wills or judgments of awards). Legal advisers should be consulted to establish whether or not the particular civil proceeding relied on falls within the Limitation Act.

The limitation periods in the Limitation Act apply to those claims it covers unless another enactment expressly provides for another limitation period or otherwise sets a deadline by which a claim must be made. Good policy reasons that are particular to the circumstances of the legislation must be present to justify a departure from the Limitation Act.

## **27.3 Are new pecuniary penalties subject to a limitation period?**

The limitation period for pecuniary penalties (non-criminal monetary penalties imposed by a court in civil proceedings) will be the limitation period in the Limitation Act unless the legislation provides otherwise. In every case, officials should consider whether that period is appropriate. Further guidance for the setting of a limitation period for pecuniary penalties can be found in [Chapter 26](#).

# APPEAL AND REVIEW

## Chapter 28 Creating a system of appeal, review, and complaint

Where a public body or agency makes a decision affecting a person's rights or interests, that person should generally be able to have the decision reviewed in some way. The ability to review or appeal a decision helps to ensure that those decisions are in accordance with the law. Also, the prospect of scrutiny encourages first-instance decision makers to produce decisions of the highest possible quality.

There are two general processes that allow for reconsideration of a decision. Judicial review (the inherent power of the High Court to review the lawfulness of decisions taken under statutory powers) will be available regardless of whether a statutory appeal or other complaint mechanism is provided for. However, judicial review is limited to examination of the lawfulness of decisions that are made. In contrast, and depending upon how the right is framed, an appeal may allow the appellate court or tribunal to stand in place of the original decision-maker and re-make findings of fact or law, or both. A right of judicial review exists unless excluded by legislation. A right of appeal however will only exist if legislation provides for it.

This chapter is primarily concerned with the second process, a statutory right of review or appeal. It discusses the following questions:

- Should there be a right of appeal?
- If so, who should hear the appeal?
- What should be the nature of the appeal?
- Should there be any limits on the appeal?
- What procedure should apply?

This chapter starts however by discussing legislation that seeks to limit the right to seek judicial review.

### Guidelines

#### 28.1 Does the legislation seek to exclude or limit the right to apply for judicial review?

*Legislation should not restrict the right to apply for judicial review.*

New Zealand courts do not have jurisdiction to invalidate legislation passed by Parliament, but do have the right to judicially review the legality of decisions made by Ministers, officials, or others under that legislation. This is a fundamental part of New Zealand's constitutional settings. The right to apply to the High Court for judicial review of a decision exists independently of any statutory appeal rights and is affirmed by s 27(2) NZBORA.

In judicial review proceedings, the court will determine whether the decision was made in accordance with the law and within the range of reasonable decisions that could have

been made. The court may set an unlawful or unreasonable decision aside, to be re-made by the decision maker. In rare circumstances, the court may substitute its own decision.

The requirement that decision-makers act within the law is fundamental to the rule of law. Ouster clauses (sometimes called privative clauses) remove or limit (either substantively or through procedural limits) the ability of the courts to judicially review the decision. As a result, they interfere with the courts' constitutional role as interpreters of the law and so undermine the rule of law. The inclusion of ouster clauses also needs to be very carefully considered as they raise issues as to whether legislation is consistent with s 27(2) NZBORA.

Because ouster clauses undermine fundamental principles of constitutional law, the courts give them a narrow interpretation to preserve their ability to review decisions in at least some circumstances. As a result, ouster clauses may not be fully effective even if included.

[Link to supplementary material: [Excluding or limiting the right to judicial review](#)]

## **28.2 Should the legislation provide a right to appeal a statutory decision affecting a person's rights or interests?**

*A person affected by a statutory decision should have an adequate pathway to challenge that decision.*

Determining whether an adequate pathway to challenge a decision should involve an internal review or appeal (or both), or merely judicial review, turns on the nature of the decision and the decision-maker.<sup>58</sup>

In the case of criminal proceedings, the need to provide for a right of appeal is dealt with by the Criminal Procedure Act 2011. New legislation should rely on these existing appeal rights, and not create bespoke appeal rights.

For most other decisions, the starting point is that legislation should provide a right of appeal if the rights or interests of a particular person are affected by an administrative decision. An appeal enables the merits of a decision to be re-examined through an assessment of questions of fact and the application of judgement to those facts (rather than just an assessment of the process by which the decision was made, which is what is examined in a judicial review). Therefore, an appeal should be available unless there are factors that would make an appeal inappropriate.

The value of an appeal must be balanced in the particular circumstances against a consideration of the potential costs, implications of delay, significance of the subject matter, competence and expertise of the decision-maker in the first instance, and the need for finality. However, concerns about cost and delay should usually be dealt with by limiting the right of appeal, rather than denying it altogether.

## **28.3 Who should hear an appeal?**

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<sup>58</sup> See [28.8](#) for a discussion of internal review.

*Legislation should identify which courts or specialist bodies will hear any appeal or complaint and new tribunals or appeal bodies should not be created if appeals or complaints could be heard by an existing entity.*

Where a right of appeal from a decision (or from the internal review of that decision) is intended, the legislation should identify the body which will hear the appeal. The two general classes of appeal body are the courts of general jurisdiction (District Court, High Court, Court of Appeal, and Supreme Court) and specialist bodies and courts (such as the Social Security Appeal Authority, Environment Court, and Employment Court).

Courts of general jurisdiction are more appropriate for second appeals from specialist courts, or for first appeals where general matters of criminal or civil law are involved. A specialist body will generally be appropriate for first appeals from decision makers in narrow fields or in cases that require technical expertise on the part of the decision maker.

New specialist tribunals are rarely created. Officials should work closely with their legal advisers and the Ministry of Justice before deciding whether to create a new specialist tribunal or expand the jurisdiction of an existing tribunal. The creation of new tribunals and the granting of new powers to existing tribunals are discussed in Chapters [18](#) and [20](#). In 2015, the Ministry of Justice produced detailed guidance for departments considering whether to create a new tribunal or improve an existing tribunal. This guidance provides the starting point for any department that is considering creating a new tribunal.<sup>59</sup>

Similarly, a range of statutory office holders are also empowered to investigate complaints relating to specific fields. Examples include the Commerce Commission, the Privacy Commissioner, the Health and Disability Commissioner, the Human Rights Commissioner, and the Electricity Authority. Existing commissioners and statutory office holders with relevant jurisdiction should be relied on rather than creating new jurisdictions, unless there are good reasons not to do so. Good reasons for not relying on an existing body might include the fact that the body lacks the necessary powers, independence, or governance arrangements to properly address the issue. Also, the new powers or jurisdiction granted may conflict with the existing functions of the body. If consideration is being given to extending the jurisdiction of an existing body, that body should be consulted at an early stage.

#### **28.4 What rules or procedures should apply to appeals?**

*Appeals to existing appeal bodies should be governed by the generic procedures that apply to appeals to those bodies.*

The District Court Rules and High Court Rules establish the appeal procedures that apply to civil appeals to those courts. Those procedures provide default rules covering a range of

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<sup>59</sup> Ministry of Justice *Tribunal Guidance - Choosing the right decision-making body Equipping tribunals to operate effectively* (2015) <http://www.justice.govt.nz/assets/Documents/Publications/tribunal-guidelines-201511.pdf>.

issues, including the time frame for commencing an appeal,<sup>60</sup> the nature of the appeal,<sup>61</sup> and requirements for leave to appeal.<sup>62</sup> Subsequent appeals (that is, those to the Court of Appeal and Supreme Court) should be governed by the respective rules of those courts.

The Criminal Procedure Act 2011, and the associated rules, provide a comprehensive appeal procedure in respect of criminal appeals.

Other bodies that hear appeals, such as Tribunals, will also have an established set of procedural rules.

New legislation should rely on existing procedures unless there are compelling reasons to create new procedures. The next four parts of this chapter concern the design of those special procedures, if they are required.

## 28.5 Should the right to bring an appeal be limited?

*The rights to bring first and subsequent appeals should not be unreasonably limited.*

Limiting the right to bring an appeal is a way of encouraging finality and avoids the prolonging of litigation. However, any limits must be reasonable and not so restrictive as to render the right to appeal worthless. Common limitations that promote finality are as follows:

- **Time limits** on when an appeal must be brought (on first and subsequent appeals). Exceptions to a time limit are appropriate as long as the criteria for granting an extension are expressly set out and it is clear that extensions should not be granted as a matter of course.
- **Limiting the subject matter of second and subsequent appeals to questions of law.** First appeals should generally include a right of appeal on the facts. In some cases, second and subsequent appeals are limited to questions of law. Limiting the scope of appeal to questions of law (that the decision-maker applied the law correctly) excludes examination of whether the decision erred in the conclusions as to the facts (to which they applied the law). This makes it similar to judicial review. However, the distinction between questions of fact and questions of law can be elusive, and any limitation should be based on the purpose of the appeal, the competence of the appellate body, and the appropriate balance between finality, accurate fact-finding and correct interpretation of the law.
- **Leave (permission) requirements** on subsequent appeals. A second right of appeal should generally be available only with the leave of the first or second appellate body. Typically, the criteria considered in granting leave will include either the interests of justice or the public interest in having an important question of law resolved.

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<sup>60</sup> District Court Rules 2014, 18.4; High Court Rules, 20.18.

<sup>61</sup> District Court Rules 2014, 18.19; High Court Rules 2016, 20.4.

<sup>62</sup> High Court Rules 2016, 20.3.

## 28.6 What type of appeal should be granted?

*Legislation should identify the type of appeal procedure to be adopted where existing appeal procedures cannot be relied on.*

If new legislation does not rely on an existing appeal procedure, the appeal model that is most appropriate to the context of the legislation should be identified. The most commonly used models are “re- hearings” or “hearings *de novo*”.

- **Re-hearing:** The appeal is heard on the record of evidence considered by the previous decision maker, but the appellate body has the discretion to re-hear some or all of the evidence and to admit new evidence. Re-hearings are generally appropriate where specific legal or factual errors are the focus.
- **Hearing *de novo*:** In a hearing *de novo* (from the beginning again), the appellate body may approach the case afresh and the appellant receives an entirely new hearing. Hearings *de novo* will generally only be appropriate when there is a reasonable possibility that the first instance decision maker may have incorrectly ascertained the facts.

Re-hearings will generally be cheaper and faster than hearings *de novo*, but will still involve significant time and cost.

Two other appeal models are appeals by way of “case stated” and pure appeals (or “*stricto sensu*”). These two models can be restrictive in terms of the evidence that the court can consider and what outcomes can be achieved and it is now very rare to provide for them in statutes. Legal advisers and the Ministry of Justice should be consulted if an appeal model other than either a re-hearing or hearing *de novo* is being considered.

## 28.7 What other procedural safeguards should be built into the appeal or review process?

*The appeal procedure adopted should contain adequate safeguards to protect an individual’s rights and interests and be consistent with the right to natural justice affirmed by section 27(1) NZBORA.*

Some common procedural protections for appeals, many of which are provided for in the Criminal Procedure Act, and the District Court Rules and High Court Rules include:

- independent and impartial decision makers;
- the opportunity to be heard (whether by oral hearing or in writing);
- ensuring parties are aware of things that affect their case (such as notice of hearings and impending decisions);
- disclosure of relevant material;
- the availability of legal representation;
- a right to call and cross examine witnesses;
- a requirement that the decision maker give reasons;
- the provision of interpreters;
- the provision of a further right of appeal.

Most of these protections are inherent in providing an appeal and, even if they are not expressly stated in the legislation, the court may “read them into” the legislation if doing so is necessary to give the legislation a meaning that is consistent with NZBORA.

Some of these protections are more dependent on the particular context (for example, legal representation or the right to call witnesses). In this case, what is appropriate and proportionate should be assessed in light of the character of the decision-maker and the context of the decision that is made. The risk of creating a longer process, increasing costs, or adding complexity needs to be balanced against the need to ensure that an appeal is conducted fairly and in accordance with the principles of natural justice.

## **28.8 Will the legislation provide for a process of internal review?**

In some circumstances the legislation should also include a prior process of internal review of the merits of a decision. Internal reviews are an effective way of identifying and correcting mistakes without the cost and publicity that an appeal to an external body or judicial review may attract. However, they are not a substitute for considering whether or not a right of appeal is appropriate.

Internal reviews are particularly appropriate where there are lots of decisions being made that involve findings of fact and an internal review process will ensure quality and consistency of decision-making across multiple decision-makers (for example, decisions on benefits). Other circumstances that may make a process of internal review appropriate are when the decisions are likely to be delegated or where there are financial or other impediments to accessing review of the decisions through the courts.

Internal review involves empowering a person or body within the department to review a decision after receiving a complaint. The legislation can provide for and set out the procedure for the internal review, any criteria to be applied to the review, and any limits on the scope of the review.<sup>63</sup> Often, legislation will require a person to first apply for an internal review before appealing to an external body. This gives the opportunity to correct any mistakes without formal proceedings.

Providing internal review procedures in legislation has the advantage of providing certainty and transparency for those procedures, but many bodies operate internal review procedures without legislative provision and those advantages should be balanced against any risk that the procedures will become out-of-date.

## **28.9 Will decisions taken under the legislation be subject to a complaint to the Office of the Ombudsman?**

*All bodies that exercise public functions should be subject to the Ombudsmen Act 1975 unless compelling reasons exist for them not to be.*

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<sup>63</sup> Many of the issues described in this chapter that should be considered when designing rights of appeal will be equally relevant to the design of processes for internal review (for example, rules or procedures in [28.4](#); limits on the scope of the review in [28.5](#); and procedural safeguards in [28.7](#)).

Ombudsmen have a general power to investigate the activities of a wide range of bodies (listed in the Ombudsmen Act 1975) and report on the lawfulness or reasonableness of those activities. These opinions are not binding (except in respect of opinions under the Official Information Act 1982). However, they may be forwarded to the House of Representatives if the Ombudsmen do not consider that adequate action has been taken by the public body. In many cases a public body will comply with the opinion of the Ombudsmen, leading to a satisfactory outcome for the complainant. The Ministry of Justice, the Department of Internal Affairs, and the Office of the Ombudsman must be consulted if it is proposed that the right to complain to the Ombudsmen be restricted by legislation.

## Chapter 29 Including alternative dispute resolution clauses in legislation

Litigation can be expensive, time consuming, and damage relationships. In appropriate cases, the negative consequences of litigation can be reduced by providing for Alternative Dispute Resolution (ADR) processes in a statutory scheme.

ADR is a generic term for any form of dispute resolution other than proceedings in a court or a tribunal, and usually involves an independent third party. A range of procedures are available and are discussed in more detail on pages 400 to 410 of the [2001 edition of the LAC Guidelines on Process and Content of Legislation](#). The most common procedures are mediation, expert evaluation, arbitration, and adjudication. Each process has distinguishing characteristics that have to be considered before including them in a statutory ADR scheme.

ADR has advantages over litigation, both in process and in outcome. It is more flexible and generally less confrontational than court proceedings, and it enables the parties to have a greater say in the process. It is usually faster and cheaper than court litigation, and has a greater scope for confidentiality. While court proceedings are generally limited to giving effect to legal rights, ADR processes may allow parties to reach settlements that meet other needs, for example by enabling the parties to receive an apology or explanation.

ADR processes should complement, but not exclude, the ability of the parties to bring court proceedings. ADR can take place before, and in some cases during, court proceedings. ADR already features in a number of New Zealand Acts. The [Arbitration Act 1996](#) is one of the most prominent. It sets out a generic set of rules that apply to arbitrations in New Zealand. Many other Acts incorporate ADR procedures into their statutory scheme to varying degrees.

The [Government Centre for Dispute Resolution](#) at the Ministry of Business, Innovation & Employment has produced detailed guidance for departments considering whether to create new dispute resolution schemes.<sup>64</sup> This [guidance](#) should provide the starting point for any department that is considering creating a new scheme.

### Guidelines

#### 29.1 Should the legislation contain an ADR provision?

*ADR provisions should be included in legislation where the potential nature of the dispute is suitable for determination by ADR.*

Not all disputes can be appropriately addressed by ADR. The resolution of criminal charges, determination of points of law, or cases that require a determination of critical disputed facts are not generally suitable for ADR. ADR is not appropriate if important issues of public policy are at stake, the dispute relates to the content of legislation, a dispute over the meaning of legislation exists, fundamental rights or allegations of abuse of power are involved, or the outcome sought by one of the parties is outside the powers of the decision

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<sup>64</sup> Ministry of Business, Innovation & Employment *Best practice dispute resolution guidance*.

maker concerned.

## 29.2 Which form of ADR should be used?

*The form of ADR adopted should help to achieve the policy objective and be appropriate to the nature of the dispute and the issues in question.*

A range of forms of ADR will be appropriate, depending on the different types of issues. The ADR processes most likely to be suitable for inclusion in legislation can be divided into three broad categories:

- **Facilitative processes (facilitation, negotiation, mediation)**—These involve an impartial third person with no advisory or determinative role who provides assistance in managing the process of dispute resolution.
- **Evaluative processes (conciliation, expert evaluation, case appraisal)**—These involve an impartial third person who investigates the dispute, advises on the facts and possible outcomes, and assists in its resolution.
- **Determinative processes (adjudication, arbitration, expert determination)**—These involve an impartial third person who investigates the dispute and makes a determination that is legally enforceable.

Some key issues to consider, when deciding which process is appropriate for a particular scheme, are noted below.

- **The role of the third party**—Will the third party predominantly help the parties to reach mutual agreement, will they investigate the dispute and advise on potential compromises and outcomes, or will they make a legally enforceable determination?
- **Control over participation and process**—How flexible or formal should the process be? How much of the process should the parties determine? What are the consequences (if any) of parties refusing to engage in, or withdrawing from, the process once commenced?
- **Nature of the outcome**—Will the outcome be confidential and binding on the parties? Will the outcome be appealable to a court under certain circumstances?
- **Administration**—Who will administer the service? Will the Government provide the ADR service? Will the service be free to all parties? How will the third person and location be determined?

Further detailed discussion on selecting the appropriate form of ADR can be found on pages 400 to 410 of the 2001 edition of the Guidelines.

## 29.3 Which elements of the ADR scheme should be included in the legislation?

*Legislation should include those elements of the ADR scheme necessary to ensure that the*

*appropriate desired outcomes and procedures are adopted.*

The flexibility of ADR is one of its great strengths. However, if not properly constrained by the legislation, the processes and outcomes adopted may not accord with the original policy objective and may, in some cases, undermine it. The Parliamentary Counsel Office has produced [model ADR clauses](#) that should be used when designing an ADR process.<sup>65</sup>

An Act that provides for an ADR process should:

- address the purpose and desired general outcome of the ADR process;
- describe the process clearly and consistently;
- set out sufficient safeguards to ensure that the principles of natural justice are adhered to, power imbalances are addressed, and the independence and impartiality of the third party is protected;
- identify the parties and any other bodies and people that might be consulted or involved;
- state whether the ADR process is subject to any legal privileges (such as self-incrimination), and whether the process and outcome are confidential;
- define when and in what manner the ADR process should commence, be suspended, and end;
- define the role, qualifications, powers, and protections of the third party (in particular, the third party should be prohibited from exercising more than one function—if a dispute is initially considered in a mediation, but later turns to formal arbitration, the mediator should not also act as an arbitrator);
- state clearly whether the ADR process is a pre-requisite to any other dispute mechanism (including court proceedings); and
- set out the status of the resolution (for example, whether it will be legally binding or enforceable in court).

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<sup>65</sup> Parliamentary Counsel Office *Model clauses for alternative dispute resolution*.