

Legislation Guidelines 2018 edition: Checklist for officials

When to use this Checklist

All Cabinet papers seeking approval to introduce bills or submit regulations to the Executive Council require Ministers to indicate whether the legislation complies with the [Legislation Guidelines \(2018 edition\)](#). Papers must state whether there are any aspects of the legislation that depart from the principles in the Guidelines, and provide justification for any variation.

This Checklist has been developed to assist officials developing policy and legislation, and to support Ministers in meeting the requirements for Cabinet papers. It is not a compliance exercise, and should be utilised as a tool for achieving high quality legislation.

The Guidelines will have the greatest impact when considered as a whole at the outset of the policy development process. They should then be referred to as new issues arise and the policy and associated legislation develop. The Checklist is intended to be iterative and should be updated regularly throughout development of the policy and legislation, with a view to the Checklist ultimately supporting the responsible Minister in indicating compliance with the Guidelines.

The Checklist is relevant to all legislation, regardless of whether it has been referred to the Legislation Design and Advisory Committee (LDAC). However, where LDAC is advising on a legislative proposal, officials should expect to provide a working-draft Checklist ahead of first meeting with LDAC. Officials should then provide revised working-drafts as necessary and a final Checklist to LDAC, along with a copy of the draft legislation, around the same time the legislation is sent for vetting against the New Zealand Bill of Rights Act 1990.

How to complete this Checklist

LDAC considers that the default principles in the Guidelines should be followed. The default principles are the *italicised* text in the Guidelines and are reflected in the Checklist. 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 the principle and only depart from it if there is a clear justification. Officials must indicate whether legislation is consistent with a principle by writing “Yes” or “No”. If legislation departs from the principle, officials must explain and justify the departure. Explanations should be clear and concise with the aim of providing transparency about how the Guidelines issues have been addressed and any trade-offs made in the process.

If a particular principle is not applicable to the proposed legislation, write “NA”. If a whole chapter is not applicable, write “NA” in the chapter title and delete the principles in the chapter (but keep the principles if there is a possibility that the chapter may become relevant as the policy develops).

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Guideline	Principle	Principle applicable (Yes/No)	Complied with (Yes/No)	Notes / Justification for any departure
Chapter 1: Good legislative design				
This chapter contains no default principles.				
Chapter 2: Defining the policy objective and purpose of proposed legislation				
2.1	<i>The policy objective must be clearly defined and discernible.</i>			
2.2	<i>The provisions of the proposed legislation should be consistent with its purpose and the policy objective that underlies it.</i>			
2.3	<i>Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective.</i>			
2.4	<i>All relevant government departments should be consulted at an early stage.</i>			
2.5	<i>Public consultation should take place.</i>			
Chapter 3: How new legislation relates to the existing law				
3.1	<i>Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified.</i>			

3.2	<i>Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation.</i>			
3.3	<i>New legislation should not restate matters already addressed in existing legislation.</i>			
3.4	<i>Relevant common law rules and principles and tikanga should be identified.</i>			
3.5	<i>Any conflict or interaction between new legislation and the common law should be explicitly addressed in the new legislation.</i>			
3.6	<i>New legislation should not address matters that are already satisfactorily dealt with by the common law.</i>			
3.7	<i>Precedents from existing legislation should only be used if they are consistent with the scheme and purpose of the new legislation.</i>			
Chapter 4: Fundamental constitutional principles and values of New Zealand law				
4.1	<i>Legislation should be consistent with fundamental constitutional principles, including the rule of law.</i>			
4.2	<i>Legislation should be consistent with the principles of the Treaty of Waitangi.</i>			
4.3	<i>Legislation should be consistent with the dignity of the individual and the presumption in favour of liberty.</i>			
4.4	<i>New legislation should respect property rights.</i>			

4.5	<i>Legislation should be consistent with the right to natural justice.</i>			
4.6	<i>Legislation should not restrict the right of access to the courts.</i>			
4.7	<i>Legislation should not affect existing rights and should not criminalise or punish conduct that was not punishable at the time it was committed.</i>			
4.8	<i>Legislation needs to clearly authorise the raising, spending, and borrowing of money.</i>			
4.9	<i>Legislation should comply with New Zealand's international obligations.</i>			
4.10	<i>Legislation that overrides fundamental rights and values must use clear and unambiguous wording.</i>			
Chapter 5: The Treaty of Waitangi, Treaty settlements, and Māori interests				
5.1	<i>Māori interests that will be affected by the proposed legislation should be identified.</i>			
5.2	<i>New legislation must not be inconsistent with an existing Treaty settlement.</i>			
5.3	<i>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.</i>			
5.4	<i>The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori.</i>			

5.5	<i>Consultation must target Māori whose interests are particularly affected.</i>			
5.6	<i>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.</i>			
5.7	<i>Clear language is required where legislation is intended to be inconsistent with the principles of the Treaty.</i>			
Chapter 6: New Zealand Bill of Rights Act 1990				
6.1	<i>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.</i>			
6.2	<i>Any unjustified limitation should be restricted to that which is necessary to achieve the policy objective.</i>			
Chapter 7: Discrimination and distinguishing between different groups				
7.1	<i>Legislation should not discriminate on any of the prohibited grounds.</i>			
7.2	<i>Any discrimination should be no greater than is necessary to achieve the policy objective.</i>			
7.3	<i>Consult the Human Rights Commission early in the policy development process.</i>			

7.4	<i>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.</i>			
Chapter 8: Privacy and dealing with information about people				
8.1	<i>Legislation should be consistent with the requirements of the Privacy Act 1993, in particular the information privacy principles.</i>			
8.2	<i>The design of new legislation must take account of any applicable code of practice.</i>			
8.3	<i>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.</i>			
8.4	<i>New legislation should use the existing complaints process under the Privacy Act 1993 unless there is a good reason not to do so.</i>			
8.5	<i>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.</i>			
Chapter 9: Treaties and international obligations				
9.1	<i>New legislation must not be inconsistent with existing international obligations.</i>			

9.2	<i>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.</i>			
9.3	<i>Legislation which implements a treaty should provide easy access to the treaty that it implements.</i>			
Chapter 10: Dealing with conduct, people, and things outside New Zealand				
10.1	<i>Significant cross-border issues relevant to the policy area should be identified.</i>			
10.2	<i>Legislation should expressly state when it applies to cross-border situations if these situations are significant and likely to arise often.</i>			
10.3	<i>Generally, the existing rules of court procedure for commencing proceedings against someone overseas should apply.</i>			
10.4	<i>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.</i>			
10.5	<i>Legislation should expressly authorise a regulatory agency to work with overseas counterparts if that is necessary for the agencies to carry out their functions.</i>			
10.6	<i>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.</i>			

Chapter 11: Applying an Act to the Crown				
11.1	<i>Legislation must state whether or not it binds the Crown.</i>			
11.2	<i>Legislation should apply to the Crown unless there are good reasons for it not to do so.</i>			
11.3	<i>Any immunity from civil liability should be separately justified and should not be overly broad.</i>			
11.4	<i>Government departments may be liable to criminal prosecution only if there are compelling reasons.</i>			
Chapter 12: Affecting existing rights, duties, and situations and addressing past conduct				
12.1	<i>Legislation should not have retrospective effect.</i>			
12.2	<i>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.</i>			
12.3	<i>Potential transitional or savings issues should be identified early in the policy development process.</i>			
12.4	<i>Legislation should not include specific transitional provisions if the generic provisions in the Interpretation Act 1999 satisfactorily address the issues.</i>			
12.5	<i>All transitional or savings issues that have been identified should be addressed.</i>			

12.6	<i>All transitional provisions should be contained in the new legislation.</i>			
Chapter 13: Statutory interpretation and the Interpretation Act 1999				
13.1	<i>The primary rules of statutory interpretation should be considered when designing legislation.</i>			
13.2	<i>Legislation should be consistent with the Interpretation Act 1999.</i>			
13.3	<i>Legislation should apply the definitions in Part 5 of the Interpretation Act 1999. New legislation should not restate those definitions.</i>			
Chapter 14: Delegating law-making powers				
14.1	<i>Legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act.</i>			
14.2	<i>The empowering Act should clearly and precisely define the permitted subject matter of secondary legislation and the purposes for which it may be made.</i>			
14.3	<i>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.</i>			
14.4	<i>All secondary legislation should be subject to an appropriate level of scrutiny, a good process, publication requirements, and review.</i>			
14.5	<i>If secondary legislation may have retrospective effect, the empowering provision must clearly authorise that in clear and unequivocal terms.</i>			

14.6	<i>If secondary legislation may be made by a subdelegate, that must be clearly authorised in the empowering provision.</i>			
14.7	<i>Legislation should not empower secondary legislation that is inconsistent with the New Zealand Bill of Rights Act 1990.</i>			
Chapter 15: Some specific types of empowering provisions				
15.1	<i>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.</i>			
15.2	<i>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.</i>			
15.3	<i>Incorporation by reference should be used only if there are clear benefits to doing so or it is impractical to do otherwise.</i>			
Chapter 16: Granting powers of exemption				
16.1	<i>There must be good reasons to grant a power of exemption.</i>			
16.2	<i>Legislation must specify appropriate safeguards to apply to powers of exemption.</i>			

16.3	<i>Legislation should clearly identify whether the power of exemption will be subject to the disallowance and/or publication procedures in the Legislation Act 2012.</i>			
16.4	<i>Legislation must contain express authority to impose conditions on an exemption.</i>			
Chapter 17: Authorising the charging of fees and levies				
17.1	<i>Fees should be charged only if the nature of the service or function is appropriate and the fee can be quantified and efficiently recovered.</i>			
17.2	<i>Levies should be imposed only if it is appropriate for a certain group to contribute money for a particular purpose.</i>			
17.3	<i>Legislation must include an empowering provision that specifically authorises the Executive to prescribe a fee or levy.</i>			
17.4	<i>Legislation must set out the manner by which the fee should be determined.</i>			
17.5	<i>Legislation must set out the manner by which the levy is determined.</i>			
17.6	<i>Legislation must clearly identify who may be charged the fee or levy and the circumstances in which it may be waived or refunded.</i>			
17.7	<i>Legislation should identify any procedural requirements that must be satisfied in connection with the fee or levy.</i>			

Chapter 18: Creating a new statutory power

18.1	<i>A new statutory power should be created only if no suitable existing power or alternative exists that can achieve the policy objective.</i>			
18.2	<i>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.</i>			
18.3	<i>Legislation should state the extent to which a new power can be delegated.</i>			
18.4	<i>Legislation should not create a power that is wider than necessary to achieve the policy objective.</i>			
18.5	<i>Legislation should identify what the power is and for what purposes, and in which circumstances, it may be exercised.</i>			
18.6	<i>Legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision.</i>			
18.7	<i>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.</i>			

Chapter 19: Requiring decision-makers to consult				
19.1	<i>Legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice.</i>			
19.2	<i>An obligation to consult should clearly identify who must be consulted.</i>			
19.3	<i>The specific requirements for consultation should be set by legislation if certainty is needed on the scope or timing of the obligations.</i>			
19.4	<i>Judicial review should generally remain available as a means of challenging the adequacy of a consultation process.</i>			
Chapter 20: Creating a new public body				
20.1	<i>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.</i>			
20.2	<i>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.</i>			
20.3	<i>Legislation should ensure appropriate accountability arrangements best suited to the relevant functions.</i>			
20.4	<i>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.</i>			

20.5	<i>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).</i>			
Chapter 21: Creating powers of search, surveillance, and seizure				
21.1	<i>New search powers should be granted only if the policy objective cannot be achieved by other means.</i>			
21.2	<i>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.</i>			
21.3	<i>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.</i>			
21.4	<i>New search powers should apply the rules and procedures set out in Part 4 of the Search and Surveillance Act 2012.</i>			
21.5	<i>Search and surveillance powers should be held by a person with the appropriate level of expertise and accountability.</i>			

Chapter 22: Ways to achieve compliance and enforce legislation				
22.1	<i>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.</i>			
22.2	<i>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.</i>			
22.3	<i>The role, functions, and powers of a regulator should be linked to the purpose of the regime in which it operates.</i>			
Chapter 23: Creating new, or relying on existing, civil remedies				
23.1	<i>Existing civil remedies should be relied on if they are adequate and appropriate for the purposes of enforcement.</i>			
23.2	<i>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.</i>			
Chapter 24: Creating criminal offences				
24.1	<i>Compelling reasons must exist to justify applying the criminal law to conduct.</i>			
24.2	<i>Legislation must precisely define the prohibited conduct.</i>			

24.3	<i>Legislation should state the mental element (mens rea) required for an offence to be committed.</i>			
24.4	<i>Legislation should identify any specific defences that are available.</i>			
24.5	<i>The burden of proving both the actus reus and the mens rea should remain on the prosecution.</i>			
24.6	<i>Legislation must identify who will be liable to criminal conviction and in what circumstances they will be liable.</i>			
24.7	<i>Legislation must state the maximum fine and/or term of imprisonment.</i>			
Chapter 25: Creating infringement offences				
25.1	<i>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.</i>			
25.2	<i>Infringement offences must be in or authorised by an Act.</i>			
25.3	<i>Section 21 of the Summary Proceedings Act 1957 should apply to all new infringement offences.</i>			
Chapter 26: Pecuniary penalties				
26.1	<i>Pecuniary penalties are not appropriate to address truly criminal conduct.</i>			
26.2	<i>Pecuniary penalties should be imposed by a court.</i>			

26.3	<i>The limitation periods in the Limitation Act 2010 should apply to pecuniary penalties unless there are good reasons for different periods.</i>			
26.4	<i>The legislation should describe any defences that are available.</i>			
26.5	<i>The burden of proving all the elements of a contravention that results in a pecuniary penalty should be on the enforcement agency bringing proceedings.</i>			
26.6	<i>Legislation should provide guidance to the court about how to determine the amount of the penalty.</i>			
26.7	<i>Legislation should specifically protect against the risk of double jeopardy.</i>			
26.8	<i>Legislation should prohibit indemnity or insurance for a pecuniary penalty only if that would be consistent with the underlying policy objectives.</i>			
Chapter 27: Imposing time limits for enforcement				
27.1	<i>The limitation periods in the Criminal Procedure Act 2011 should apply to all new criminal offences.</i>			
27.2	<i>The limitation periods in the Limitation Act 2010 should apply to all new civil proceedings.</i>			
27.3	There is no default principle for this part.			
Chapter 28: Creating a system of appeal, review, and complaint				
28.1	<i>Legislation should not restrict the right to apply for judicial review.</i>			

28.2	<i>A person affected by a statutory decision should have an adequate pathway to challenge that decision.</i>			
28.3	<i>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.</i>			
28.4	<i>Appeals to existing appeal bodies should be governed by the generic procedures that apply to appeals to those bodies.</i>			
28.5	<i>The rights to bring first and subsequent appeals should not be unreasonably limited.</i>			
28.6	<i>Legislation should identify the type of appeal procedure to be adopted where existing appeal procedures cannot be relied on.</i>			
28.7	<i>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.</i>			
28.8	There is no default principle for this part.			
28.9	<i>All bodies that exercise public functions should be subject to the Ombudsmen Act 1975 unless compelling reasons exist for them not to be.</i>			
Chapter 29: Including alternative dispute resolution clauses in legislation				
29.1	<i>ADR provisions should be included in legislation where the potential nature of the dispute is suitable for determination by ADR.</i>			

29.2	<i>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.</i>			
29.3	<i>Legislation should include those elements of the ADR scheme necessary to ensure that the appropriate desired outcomes and procedures are adopted.</i>			