

11. Affecting existing rights, duties, situations and addressing past conduct

Legislation should have prospective, not retrospective effect. This is reflected principally by the presumption against retrospectivity in s 7 of the Interpretation Act⁸¹ (which will be repealed, with the majority of its provisions incorporated into the Legislation Act following passage of the Legislation Amendment Bill), and, in respect of criminal offences, by s 10A of the Crimes Act 1961⁸² and s 26(1) of NZBORA⁸³.

New legislation that is intended to only affect events that take place after it comes into force can still affect existing situations in a number of different ways.

- 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 in the law, and injustice. Litigation is frequently generated where people are trying to establish the extent to which the law applies to their previous actions. Two general mechanisms will help to address existing situations: savings provisions; and transitional provisions.

- Savings provisions keep the repealed law alive for certain purposes, such as completing proceedings already commenced, or applications already made (see, for example, s 313 of the Local Government Act 2002⁸⁴ or s 399 of the Companies Act 1993⁸⁵). 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.
- Transitional provisions enable movement from an old regime to a new one (see, for example, ss 71–76 of the Financial Markets Authority Act 2011⁸⁶). For example, they may provide that employment is deemed to be continuous even though the person's employer is a new entity.

⁸¹ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

⁸² <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

⁸³ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁸⁴ <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html>

⁸⁵ <http://www.legislation.govt.nz/act/public/1993/0105/latest/DLM319570.html>

⁸⁶ <http://www.legislation.govt.nz/act/public/2011/0005/latest/DLM3231023.html>

Confusingly, “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 will reduce the scope for expensive litigation, or changes to Bills as they progress. 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

11.1. 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 a direct legislative effect when it:

- applies to events or actions that have already taken place;
- prevents a person from relying on a right or defence that existed at the time they undertook the conduct that those rights or defences related to;
- punishes a person or imposes a burden or obligation in respect of past conduct.

The presumption against retrospective legislation is strongest in respect of criminal offences. People should not be made criminally liable for past actions that were not prohibited at the time of commission. Where the penalty that attaches to an offence is increased between commission and conviction, the lesser penalty should also apply.

Retrospective legislation might however be appropriate where it is intended to:

- be entirely to the benefit of those affected;
- validate matters that were generally understood and intended to be lawful, but were in fact unlawful as a result of a technical error;
- decriminalise conduct (for example, s 7 of the Homosexual Law Reform Act 1986⁸⁷);
- address a matter that is essential to public safety;
- provide certainty as a result of litigation (discussed in more detail in 11.4 below);

⁸⁷ <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM2179619.html>

- (in limited circumstances) make changes to tax law or other budgetary legislation.

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

11.2. 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 and savings issues that will require specific provisions. Transitional provisions will be counterproductive where legislation is no longer applicable because circumstances have changed or the policy objective requires the legislation to have a direct retrospective effect.

11.3. 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 17–22 of the Interpretation Act⁸⁸ contain savings provisions and transitional provisions that will apply to all legislation unless express words to the contrary are used or the context of the new legislation requires otherwise.

Where the provisions of the Interpretation Act sufficiently address the issue, they should be used. Where they do not satisfactorily address the issue, or where 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.

11.4. Does the new legislation relate to matters that are the subject of ongoing or prospective litigation?

New legislation should not pre-empt matters that are currently before the courts or deprive successful litigants the benefit of any court decision in their favour.

The separation of powers and the independence of the judiciary require that the executive and legislative branches of government do not interfere with the judicial process. However, in some cases ongoing or prospective litigation may identify an area of the law that requires amendment or new legislation, and it would be inappropriate for the Government to await the outcome of the litigation before taking action.

In these cases it is important that any new legislation is explicit that the new law will not apply to any cases currently before the court or act to deprive those parties (or previously

⁸⁸ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

successful parties) from any benefit they have gained or might gain from a decision of the court. This is sometimes called preserving the “fruits” of the litigation.

If the new legislation is intended to do either of the above, the legislation must contain clear words setting out this intention.

The Crown Law Office should be consulted if the proposed legislation relates to issues which are the subject of current or prospective litigation. The LAC has produced some further guidance on the application of legislation to judgments and pending proceedings; see Appendix 1, Report of the Legislation Advisory Committee, 1 January 1994 – 31 December 1995: Recurring Issues.⁸⁹

11.5. 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 so as to avoid uncertainty. Each transitional issue must be checked to ensure that it is adequately addressed either by the Interpretation Act or specific provisions in the new legislation.

11.6. 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, where the provisions of the Interpretation Act are not relied on, all transitional provisions should be contained in the Act that they relate to. There are two exceptions to this principle which should rarely be used, and only when there is a genuine need to do so.

- In situations with 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.
- In situations where 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 13).

The PCO and legal advisers should be consulted at an early stage if new legislation proposes to rely on one of the above exceptions.

⁸⁹ Available at www.lac.org.nz