

9. Dealing with conduct, people and things outside New Zealand

In general, New Zealand law does not automatically apply to activities, people or property that are 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's territory, or for those attempting to apply New Zealand law to people or property outside New Zealand. This chapter will assist in identifying if particular legislation will have any cross-border implications, and how these might be addressed.

A failure to identify and address cross-border issues when developing legislation can lead to uncertainty, litigation, and potentially a failure to fully achieve the policy objective or the purpose of the legislation. This chapter will help officials to identify where new legislation raises cross-border issues and, if so, how to address those issues.

Where 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?

Addressing these questions can involve complex issues of international law and international relations. Also, despite the fact that legislation may have a strong policy justification and domestic support, as well as authority under international law, fully enforcing the legislation may be impractical due to the particular legal environment in other countries or their diplomatic relationship with New Zealand. So seeking legal advice is vital if cross-border issues arise. MFAT and the Ministry of Justice should also be consulted to ensure those issues are identified and properly addressed.

9.1. Do any cross-border issues need to be addressed?

Cross-border interactions and/or links relevant to the proposed legislation and policy should be identified.

An essential first step in identifying and addressing cross-border issues is to consider the circumstances in which they might arise. The following cross-border interactions and links commonly give rise to cross-border issues:

- cross-border dealings in goods or services;
- people outside New Zealand whose conduct affects people in New Zealand;
- crimes and civil breaches that have a link to or affect New Zealand or its people but occur in cyberspace;
- people in New Zealand whose conduct affects people outside New Zealand;
- civil proceedings in New Zealand that involve overseas parties;
- whether cooperation with other governments is needed to give effect to the policy;
- whether there are applicable treaties or other international obligations
- civil proceedings in New Zealand concerning dealings governed by foreign law;
- civil proceedings overseas that raise issues of New Zealand law;
- information or evidence required for the detecting and investigating breaches of the law, and for enforcing the law that takes place overseas.
- whether the determinations of New Zealand courts or other authorities will be recognised or enforced overseas and vice versa;
- criminal conduct outside New Zealand by people or businesses connected to New Zealand.

9.2. What is the intended scope of the legislation?

Legislation should set out the factors that determine whether or not New Zealand law applies.

Where cross-border issues do arise, legislation must provide clear guidance on whether New Zealand's rules or another country's rules will apply, and which country or body will have the jurisdiction to make decisions.

The following factors may suggest that New Zealand law should apply in a particular context:

- certain conduct or events occurred in New Zealand;
- certain property is situated in New Zealand;
- a particular transaction is governed by New Zealand law or has a New Zealand element;
- a person is a New Zealand citizen or permanent resident of New Zealand;
- a person is resident or otherwise present in New Zealand at the time of certain events or at the time that civil or criminal proceedings are commenced against them, or any relevant proceedings are commenced against them;
- certain consequences occur in New Zealand, and the person had knowledge as to whether or not those consequences would occur in New Zealand.

International law (including international agreements such as the Hague Convention) affects the extent to which New Zealand law can apply in other jurisdictions. This is a complex and

sometimes controversial area and advice should be sought from MFAT, legal advisers and, where relevant, the department with responsibility for implementing a particular treaty.

9.3. Should the legislation provide for recognition or enforcement of overseas decisions in New Zealand or vice versa?

Legislation should address whether or not foreign decisions are recognised or enforceable in New Zealand.

In some cases it may be necessary to recognise or enforce a decision of an overseas agency or court in New Zealand or vice versa, to ensure the legislation achieves its purpose. Express statutory authority will be required for foreign decisions to be recognised in New Zealand, and will generally form part of a wider cross-border regulatory regime.

9.4. Are special procedural rules required for civil proceedings?

Legislation that creates new civil proceedings should state the procedures for commencing proceedings and enforcing judgments against overseas defendants, if relevant.

The High Court Rules⁶², and the District Court Rules⁶³ contain default rules regarding the commencement of proceedings against overseas parties. There must be good reasons for departing from these procedures. Where a tribunal or other body is created, legislation should expressly provide for an analogous procedure.

The Trans-Tasman Proceedings Act 2010⁶⁴ sets out a framework to facilitate the resolution of civil disputes and the enforcement of civil judgments where there is a trans-Tasman element. Further guidance on trans-Tasman proceedings can be found on the Ministry of Justice website.⁶⁵

9.5. Are special procedural rules required for criminal proceedings?

New criminal offences should be subject to the rules on territorial application in sections 6 and 7 of the Crimes Act 1961.

Sections 6 and 7 of the Crimes Act 1961⁶⁶ 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 where only one part of the conduct amounting to an offence occurs in New Zealand.

These 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.

⁶² <http://www.legislation.govt.nz/act/public/1908/0089/latest/DLM147653.html>

⁶³ <http://www.legislation.govt.nz/regulation/public/2009/0257/latest/DLM2300101.html>

⁶⁴ <http://www.legislation.govt.nz/act/public/2010/0108/latest/DLM2576223.html>

⁶⁵ <http://www.justice.govt.nz/services/information-for-legal-professionals/trans-tasman-proceedings-regime>

⁶⁶ <http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

In addition, the following issues 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 (s25(e) NZBORA).⁶⁷
- New Zealand courts do not conduct criminal proceedings in respect of breaches of the criminal laws of another country. The alleged offence must be a criminal offence in New Zealand. However, it is possible for evidence in criminal and civil proceedings overseas to be taken in New Zealand under special legislation—see, for example, the provisions of the Mutual Assistance in Criminal Matters Act 1992⁶⁸.

9.6. Will any cross-border issues impair the ability of the relevant agency to perform its functions?

Legislation should include sufficient powers to enable enforcement agencies to request and use information from overseas agencies.

The investigative powers of New Zealand agencies can generally only be exercised within New Zealand 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 where cross-border issues are involved.

The Mutual Assistance in Criminal Matters Act 1992 provides a basic framework to enable countries to provide assistance to, and request assistance from, New Zealand in respect of criminal investigations and prosecutions. For non-criminal regulatory regimes, it may be necessary for the legislation to authorise the agency to enter into information sharing and assistance arrangements with foreign regulators.

⁶⁷ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁶⁸ <http://www.legislation.govt.nz/act/public/1992/0086/latest/DLM273057.html>