

APPENDIX 4

PRINCIPLES FOR INCORPORATION BY REFERENCE

The following principles should apply to any use of incorporation by reference in Acts of Parliament or delegated legislation:

1. *Use incorporation by reference only if impractical to do otherwise*
 As the use of incorporation by reference is inconsistent with some important law-making principles, it should be used only where it is impractical to do otherwise. Examples of circumstances where it may be appropriate to incorporate a document by reference are³¹⁹-
 - the document is long or complex, covers technical matters only, and few persons are likely to be affected;
 - the document has been agreed with one or more foreign governments, cannot easily be recast into an Act of Parliament or delegated legislation, and deals only with technical or operational details of a policy that has been 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 products (for example, motor vehicles) manufactured by it.

2. *Authorisation by Act*
 The use of incorporation by reference should be expressly authorised by an Act. The Regulations Review Committee should review the authorising provision before it is enacted. If the Act authorises the use of incorporation by reference in delegated legislation-

319 In some cases it may be appropriate to incorporate only part of a document. The word "document" in this Appendix should be read as including "part of a document".

- the authorising provision may describe in general terms the document or documents, which may be so incorporated, if their form is not known at the time the Act is passed;
- the agency responsible for the legislation should discuss the use of that authority with the Regulations Review Committee at the time when the first such delegated legislation is made.

3. *Document to be clearly identified*

A document incorporated by reference should exist at the time of incorporation and be clearly identified in the Act or delegated legislation concerned. A copy of the document should be signed and held as evidence by the agency responsible for the Act or delegated legislation.

4. *Amendments to document*

Subsequent amendments to a document incorporated by reference should not have legal effect in New Zealand unless a relevant Act (or delegated legislation authorised to do so by a relevant Act) expressly provides that subsequent amendments may have such effect.

Furthermore, subsequent amendments should not have legal effect in New Zealand until the fact that the document has been amended, together with either the amendments or the document as amended has been publicly notified in a manner specified in the Act or delegated legislation (for example, by means of the Internet or a notice in the *Gazette*).

A copy of every amendment having legal effect in New Zealand, or of the document as amended, should be signed and held as evidence by the agency responsible for the Act or delegated legislation concerned.

The principles set out in paragraphs 5 to 10 should apply, with all necessary modifications and to the extent practicable,³²⁰ to an

320

For example, the legislation may provide that consultation is not necessary before an amendment of a technical nature is made, but access to the amendment once made should be provided as stated in paragraph 8.

amendment to a document incorporated by reference (being an amendment that is to have legal effect in New Zealand) as if the amendment were a new document.

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference, should consider publishing on the Internet a brief description of all amendments having legal effect in New Zealand that have been made to the document since it was incorporated.

5. *Regulations (Disallowance) Act 1989 to apply* To enable the House of Representatives to disallow or amend the legal effect in New Zealand of a document incorporated by reference in delegated legislation, all such documents should be regarded as regulations for the purposes of the Regulations (Disallowance) Act 1989.³²¹ The Regulations Review Committee should obtain copies of, and scrutinise, any such document only if it wishes to do so or is expressly requested to do so by any person. Tabling of such a document in the House of Representatives should not be required unless the House or the Regulations Review Committee so orders in any particular case.

In reviewing any document required to implement a treaty, the Regulations Review Committee should of course have regard to whether altering the legal effect in New Zealand of that document would place New Zealand in breach of its international obligations.

6. *Consultation before incorporation*

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference should-

- in the case of delegated legislation, before the delegated legislation is finalised consult the persons likely to be affected by the document to the same extent as if the content of the document had been set out in the delegated legislation;

321

But not for the purposes of the Acts and Regulations Publication Act 1989.

- ensure that-
- a reasonable number of hard copies of the document are readily available in New Zealand for a reasonable period before the Act or delegated legislation is enacted or made, for inspection free of charge by persons likely to be affected by or interested in the document; and
- if the document is not in a New Zealand official language, a high quality translation is similarly available; and
- copies of the document are readily available free, or for purchase at a reasonable cost, for a reasonable period before the Act or delegated legislation is enacted or made; and
- the address/es of the place/s in New Zealand where copies of the document can be inspected, and of the place/s (whether in New Zealand or elsewhere) where copies of the document can be obtained, are publicly notified in New Zealand in an appropriate manner.
- endeavour to make the document available free of charge on the Internet before the Act or delegated legislation is enacted or made.

7. *Document to be clearly drafted*

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference should, to the extent practicable, ensure that the document is clearly drafted and understandable by those who have to comply with it and is consistent with other applicable law. To this end-

- the legislation or the document should clearly distinguish between rights, powers, and obligations, which have legal effect on the one hand and guidelines and descriptive and other explanatory material on the other, and the legislation should state that explanatory material is not to have legal effect;
- the document should not include unnecessary or confusing material;

- the document may be written with the intended audience in mind, for example, a document may use unusual terminology or an unusual structure if those who have to comply with it will understand it.

8. *Access to incorporated document*

The agency responsible for an Act of Parliament or delegated legislation that incorporates a document by reference should ensure that-

- a reasonable number of hard copies of the document (or, if the document has been amended, the most up to date version of the document) is readily available in New Zealand at all times while the document has legal effect in New Zealand, for inspection free of charge by persons likely to be affected by or interested in the document; and
- if the document is not in a New Zealand official language, a high quality translation is similarly available; and
- copies of the document (or the most up to date version) are readily available free, or for purchase at a reasonable cost, at all times while the document has legal effect in New Zealand; and
- the address/es of the place/s in New Zealand where copies of the document can be inspected, and of the place/s (whether in New Zealand or elsewhere) where copies of the document can be obtained, are either stated in (or in a note to) the Act or delegated legislation or publicly notified in New Zealand in an appropriate manner. In the latter case, the Act or delegated legislation or a note thereto should indicate the manner of public notification; and
- if practicable, a copy of the document (or the most up to date version) is available free of charge on the Internet.

9. *Accountability to Minister*

The agency responsible for delegated legislation that incorporates a document by reference should, at the time when the delegated legislation is made, report to its Minister on how the principles in this

Appendix have been or will be complied with in relation to the document.

10. *Annual list of incorporated documents*
Each agency responsible for Acts of Parliament or delegated legislation that incorporate documents by reference should publish on the Internet each year a list of all documents incorporated in legislation for which it is responsible.

11. *Incorporation by reference not to be used if principles cannot be complied with*
If any of the principles in paragraphs 1 to 10 cannot be complied with in any particular case for copyright or other reasons, incorporation by reference should not be used in that case.