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 1990). 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[31] identifies the following factors to take into account when assessing whether or not it is appropriate to bind the Crown:

- whether any operations or activities relating to the special functions of the

[31] Cabinet Office Circular *CO (02) 4: Acts Binding the Crown: Procedures for Cabinet Decision* (2002).

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.[32]

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.

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

[32] Treasury *A Guide to the Public Finance Act* (2005).

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.[33]

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 1999): If possible legislation should be "future-proofed" by ensuring that it is flexible enough

[33] The Legislation Bill currently before the House will repeal the Interpretation Act 1999 and replicate most of its key provisions.

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.

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.

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.