

The Guidelines – A reprise for Government servants: What they are and Why are they important?

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Background note about Legislation Advisory Committee (“LAC”)

- LAC was established by the Minister of Justice (Rt Hon Geoffrey Palmer, now Sir Geoffrey) in February 1986;
- LAC is serviced by the Ministry of Justice and generally meets every six weeks.

Part 1 : What the LAC Guidelines are

Broadly speaking, the LAC Guidelines —

- Are guidelines on the process and content of legislation, and are a guide to making good legislation;
- Are designed to set out central aspects of the process and elements of the content of legislation that should always be addressed when creating legislation;
- Have been written by members of the LAC and experts from outside the LAC;
- Have been approved by Cabinet, and require Ministers to indicate (to Cabinet) whether legislative proposals comply with the Guidelines.

Part 1: Content of Guidelines – Section 1

Section 1: The Process of Developing Legislation

Chapter 1 Means of achieving the policy objective

Has the policy been clearly defined? Is legislation necessary? Has there been appropriate consultation within and outside Government?

Chapter 2 Understandable and accessible legislation

People affected by legislation are entitled to know what their rights and obligations are.

Part 1: Content of Guidelines – Section 2

Section 2: Consistency with Basic Principles and Existing Law

Chapter 3 Basic principles of New Zealand's legal and Constitutional system

What are the fundamental common law principles? Are vested rights altered?

Chapter 3a Statutory interpretation

The rules and conventions applied by the Courts in interpreting legislation; the Interpretation Act 1999

Chapter 4 New Zealand Bill of Rights Act 1990 and Human Rights Act 1993

Is the legislation consistent with these Acts?

Section 2 cont'd

Chapter 5 Principles of the Treaty of Waitangi

Consultation, identification of conflicts, identification of affected rights and interests

Chapter 6 International obligations and standards

Are there relevant obligations and standards? Does the legislation properly implement them?

Chapter 7 Relationship to existing law

How does the legislation fit with the Interpretation Act 1999, other relevant legislation, and the common law? Are there savings and transitional issues?

Part 1: Content of Guidelines – Section 3

Section 3: Particular Issues

Chapter 8 Creation of a new public power

Is it necessary? Who should hold it? What is the process for exercising it?

Chapter 9 Creation of a new public body

What are the options (eg, Crown entity or department)? Do the Ombudsmen Act 1975, Official Information Act 1982, and Public Finance Act 1989 apply?

Section 3 cont'd

Chapter 10 Delegated legislation (new chapter)

What's the distinction between primary and secondary legislation? What's appropriate for each class?

Chapter 10a The exercise of delegated legislative power

What are the public law rules about delegated legislation?

Section 3 cont'd

Chapter 11 Remedies

Should existing remedies be applied? Are new remedies or processes to be established?

Chapter 12 Criminal offences

Is a new offence needed? Does the new offence have a mental element?
Is the offence to be summary or indictable? What's an appropriate range of penalties?

Chapter 13 Appeal and review

Should a right of appeal be provided? What's the appropriate appellate body? How is judicial review affected?

Section 3 cont'd

Chapter 14 Powers of entry and search

Are these powers necessary? Have appropriate safeguards been included?

Chapter 15 Powers to require and use personal Information

Are there Privacy Act and Official Information Act considerations?

Chapter 16 Cross border issues

Are there cross-border issues and how is it proposed to deal with them?

Section 3 cont'd

Chapter 17 Bills after introduction

Are the department's recommendations to the select committee appropriate? Have amendments in any SOP been prepared in accordance with the Guidelines?

Chapter 18 Alternative dispute resolution (new chapter)

Should an ADR mechanism be included? What are the standard provisions?

Part 1: Content of Guidelines - Appendices

Appendix 1 Requirements for instructions
for preparation of legislation

Appendix 2 New Zealand Bill of Rights Act 1990

Appendix 3 Treaties

Appendix 4 Principles for incorporation by
reference

Appendix 5 Controls over regulations

Appendix 6 Some existing statutory provisions for
ADR (new appendix)

Part 2 : Why are the LAC Guidelines Important?

- 2.1 Nature of “legislation”**
- 2.2 Legislation is abundant**
- 2.3 Legislation is important**
- 2.4 Legislation is powerful**
- 2.5 Legislation is serious**
- 2.6 Best practice guide**

Part 2.1 – Nature of legislation: definition

- The source –
The Parliament of New Zealand continues to have full power to make laws [[Section 15, Constitution Act 1986](#)]

Legislation covers –

- The enactment of laws;
- The whole body of enacted laws (“the statute book”);
- Enactment of laws by the Parliament or by a delegate of the Parliament.

Part 2.1 – Nature of legislation: Principal types

- Primary: Acts
 - Public – Unsolicited Electronic Messages Act 2007
 - Local – Wellington Regional Council (Stadium Empowering) Act 1996
 - Private – Mildred Elaine Smyth Divorce Act 1926
- Delegated: instruments
 - Orders in Council – Electoral Regulations 1996, Supreme Court Rules 2004, Wildlife (Canada Goose) Order 1973
 - Ministerial – Transport (Breath Tests) Notice 1989 (No 2)
 - Other – Securities Act (Agri Private Capital Fund Limited) Exemption Notice 2007, Land Transport (Driver Licensing) Rule 1999

Part 2.1 – Nature of legislation: distinguishing features

- Usually changes the LAW in some respect (eg, creating new law or amending existing law by adding, substituting, or inserting);
- NZ legislation is generally expressed in a detailed narrative style with distinctive format and numbering;
- Although current style is to use plain language, legislation needs to be more precise than most other forms of writing, otherwise may not achieve its intended legal effect;
- Audience differs from audience affected by private legal documents (eg, contracts, leases, wills);

Part 2.1 – Nature of legislation: distinguishing features

- Legislation is not intended or designed to entertain, inform, explain, provide argument or stimulate in the way other forms of writing do (compare: novels, magazines, newspapers, pamphlets);
- If legislation imposes obligations on you, then you have a legal duty to comply;
- The consequences of non-compliance with legislation (sanctions) vary depending on what the legislation provides (if anything). Don't assume that there are no "legal" consequences if none are specifically provided. See section 107(1), Crimes Act 1961.

Section 107(1), Crimes Act 1961

Every one is liable to imprisonment for a term not exceeding one year **who, without lawful excuse, contravenes any enactment by wilfully doing any act which it forbids, or by wilfully omitting to do any act which it requires to be done, unless—**

- (a) Some penalty or punishment is expressly provided by law in respect of such contravention as aforesaid; or
- (b) In the case of any such contravention in respect of which no penalty or punishment is so provided, the act forbidden or required to be done is solely of an administrative or a ministerial or procedural nature, or it is otherwise inconsistent with the intent and object of the enactment, or with its context, that the contravention should be regarded as an offence.

Part 2.1 – Nature of legislation: example 1

- Entry into the internal waters of New Zealand by any ship whose propulsion is wholly or partly dependent on nuclear power is prohibited.
- Section 11, New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987

Part 2.1 – Nature of legislation: example 2

- The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.
- Article 3.1, United Nations Framework Convention on Climate Change: as set out in Schedule 1 of Climate Change Response Act 2002

Part 2.1 – Nature of legislation: example 3

- All animals are equal

But some animals are more equal than others.

- A “commandment” in *Animal Farm*, by George Orwell

Part 2.1 – Nature of legislation: example 4

- The present Government recognises that Maori for a number of years have not been obtaining fair market rents for their land. This is an issue that has to be addressed by the present Government in the future. It is an issue that will be dealt with by the present Government as part of its consideration of historical grievances.
- [Schedule 5, Maori Reserved Land Amendment Act 1997](#)

Part 2.2 – Legislation is abundant

In the calendar year 2006, –

- Parliament enacted 91 Acts published in 4 volumes (3,308) pages
- 400 statutory regulations were made and published in 7 volumes (5,518 pages) (not counting subordinate legislation published outside the Statutory Regulations Series).

Part 2.3 – Legislation is important

- “Legislation is central to our legal system. It is the principal source of new law. It has an essential and pervasive role in our national life...” [Paragraph 1 of the Law Commission’s Report No 17: A New Interpretation Act – To avoid “Prolivity and Tautology” (December 1990)]

Part 2.4 – Legislation is powerful: example 1

- All accident insurance contracts in force at the close of 30 June 2000 are cancelled at the close of that date. [Section 5(1), Accident Insurance (Transitional Provisions) Act 2000]

Part 2.4 – Legislation is powerful: example 2

- No compensation is payable by the Crown to any person for any loss or damage arising from the enactment or operation of this Part.
[Section 7, Forests (West Coast Accord) Act 2000]

Part 2.4 – Legislation is powerful: example 3

- **Commissioner may disregard scheme in making declarations**
For the purposes of making a declaration under this Subdivision, the Commissioner may:
 - (a) treat a particular event that actually happened as not having happened; and
 - (b) treat a particular event that did not actually happen as having happened... ; and
 - (c) treat a particular event that actually happened as...having happened at a time different from the time it actually happened....

[Section 165.55, A New Tax System (Goods and Services Tax) Act 1999
– Australia]

Part 2.4 – Legislation is powerful: example 4

- No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of ... personal injury covered by this Act...or by the former Acts.

[Section 317(1), Injury Prevention, Rehabilitation, and Compensation Act 2001]

Part 2.4 – Legislation is powerful: example 5

- The rule of law known as the rule in *Bain v Fothergill* (limiting the damages recoverable in respect of a breach of a contract for the sale and purchase of land where the breach arises out of the vendor's inability to provide good title to the land) is hereby abolished. [Section 62A, Property Law Act 1952.]

Part 2.5 – Legislation is serious

- When seeking approval to introduce a Bill or to submit regulations to the Governor-General in Council, a Minister must indicate to the relevant Cabinet Committee (and to Cabinet) whether the Bill or regulations comply with the Guidelines and indicate the reasons for any non-compliance (the Cabinet’s “Step by Step Guide” on Cabinet and Cabinet Committee processes);
- This is more than a matter of form – Ministers are responsible for the contents of their Cabinet papers and rely on officials when giving such indications to Cabinet Committees and to Cabinet;

Part 2.5 – Legislation is serious

- Legislation is expected to endure – Governments expect their legislation to give effect to their policies and to last;
- Once the legislation is enacted, it's a bit late to say “it doesn't give effect to the policy intent”;
- Don't expect the Courts to fill in gaps;
- Frequent requests for amending legislation will not be welcomed;

Part 2.5 – Legislation is serious

- Legislation has “legal effect”: it may create legal obligations that are enforceable in the Courts against the Crown or others (eg, give rise to civil action for breach of statutory duty);
- Legislation often requires the expenditure of public money for its administration and imposes compliance costs on users;
- Let’s get it right before it’s enacted.

Part 2.6 – Best practice guide

- The Guidelines take a principled approach to development of legislation;
- Application of the Guidelines can achieve greater consistency across the statute book, less adhoc legislation, better fit with rest of statute book and common law;
- The Guidelines assist the development of clear and effective legislation;

Part 2.6 – Best practice guide

- The process in the Guidelines is designed to improve the quality of legislation, and increase its acceptance by the community, by clarifying its objectives, determining how best to achieve the objectives, and ensuring that affected persons are properly consulted;
- If this process is followed, the costs of poor quality legislation (including uncertainty and confusion, the need to get legal advice, and litigation) should be largely avoided.