Legislative Change

Guidelines on Process and Content

Report by the
Legislation Advisory Committee

Department of Justice
August 1987

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Report by the
N.Z. Legislation Advisory Committee
released by the Minister of Justice,
the Hon. Geoffrey Palmer

August 1987

ISBN 0-477-07226-7

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Preface by the Minister of Justice

Legislation is a vital function of government. Government uses it to introduce its policies for the protection and promotion of the rights and interests of New Zealanders under the law, to raise taxes, to authorise spending, to regulate relations between individuals and between individuals and the state, and for many other purposes.

Experience teaches that both the process for the making of legislation and the content of legislation can be improved. This paper, prepared at my request by the Legislation Advisory Committee, is designed to set out central aspects of that process and elements of the content of legislation that should always be addressed. It is my intention to seek the Government's approval of the report as soon as practicable. The intention is that Ministers, departments and other bodies responsible for legislation would be guided by the paper.

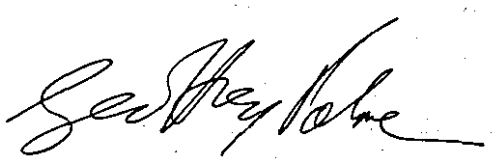
The message is clear. If we need legislation—a matter which should not be taken for granted—we must follow proper procedures in preparing it and we must, in the absence of good reason, comply with established principles.

The message in this paper is for the whole of government—for ministers, for senior officials, for departmental lawyers, and for all others concerned with the preparation of legislation. The introduction, part I and part IIA are of general significance, while the remainder is of more specific interest to the lawyers involved in the preparation of legislation.

The guidelines will also be of interest and value to the many other New Zealanders who participate in the legislative process. They would be able to use the guidelines in commenting on proposed legislation. For that reason and to enable comment on the Report, I have decided to publish the Report.

This paper is one of a number of steps that the Government is taking to improve the quality of legislation. The Law Commission Act 1985 states a commitment to making our law as simple, understandable and accessible as practicable. I have asked the Law Commission to report on the language and structure of legislation, arrangements for its monitoring, and the law about its interpretation, and it has just published a paper on the Acts Interpretation Act 1924. The Government has introduced the Imperial Laws Application Bill to provide a definitive list of the English and British

Statutes which remain part of the law of New Zealand. The Legislation Advisory Committee is playing a valuable role in testing the need for legislative proposals and checking them against principle. Parliamentary Select Committees which have an increasingly important part in reviewing Bills have been strengthened. The Regulations Review Committee has been established to supervise on behalf of Parliament the exercise of the legislative power Parliament has delegated. And the Government Printer has taken and is taking measures to improve the availability to the public of legislation and other official documents.



Geoffrey Palmer

July 1987

Letter of transmittal

LEGISLATION ADVISORY COMMITTEE

23 July 1987

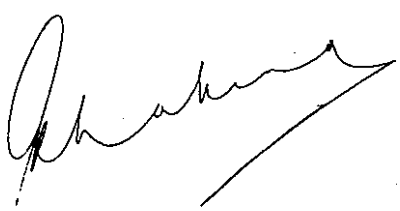
Rt Hon Geoffrey Palmer M.P.
Minister of Justice
Parliament House
WELLINGTON

Dear Minister

At your request, the Legislation Advisory Committee has prepared a report on guidelines to be followed within the government on the preparation of legislation.

The report is enclosed.

Yours sincerely



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Introduction

1. Legal rules are essential to the functioning of our society. Increasingly they are to be found in legislation. They cover a broad range of subject area and activities. They include rules:
   (a) for maintaining the structure of society (e.g., the criminal law and the electoral law);
   (b) for regulating relations between individuals (e.g., family law and the law of contract);
   (c) for regulating activities in a modern industrial society (e.g., safety codes and industrial relations);
   (d) for providing and maintaining essential services beneficial to the development of society (e.g., health, education and welfare legislation);
   (e) to facilitate private activity (e.g., company law and partnership);
   (f) for the gathering of taxes to finance the provision of public services; and
   (g) establishing the institutions to carry out these activities.

2. This body of rules imposes restraints on individuals and groups within society and regulates the way they exercise various freedoms. But at the same time it both confers and protects important rights, liberties and benefits. As a system it works only if the great majority of society and all major sections within it see the system as a whole as supporting and protecting their interests.

3. The balances in society are constantly changing and the legal rules are therefore in need of constant review and adjustment. At any one time the bulk of the law will remain the same. But the Government of the day must assume responsibility for assessing changes in the political, economic and social environment and determining whether adjustments to the law are needed in response to those changes. Where such adjustments are proposed they will be unlikely to gain broad acceptance unless they have been developed through an adequate *process* including appropriate consultation. There are also certain important *legal principles* relating, among other things, to fairness and the preservation of individual liberty that need to be complied with if the legislation is to prove acceptable. In addition to being acceptable new legislation must also be *effective*. This means it must be technically sound and fit into the general fabric of the existing law. It should also be *accessible* and *understandable*.

4. This paper sets out some of the more important matters relating to both process and content that need to be considered in the promotion of legislative change, whether it is to be effected by statute or by regulation. Adequate *process* includes
   — the need to involve lawyers early in the policy formation stage
   — the need to decide at an early point with whom, when and in what manner consultation should be undertaken and

— compliance with the various rules, procedures and guidelines that have been laid down for the preparation of legislation.

5. The section on *content* outlines first the general questions that must be addressed to ensure that the legislation

— is necessary and achieves the objective of its proponent
— fits appropriately into the general body of the law
— complies with basic principles
— is as accessible and understandable as possible and
— meets certain other basic requirements.

The section then discusses an extensive set of more specific matters that should be considered with a view to establishing that the proposed legislative measure is both technically sound and consistent with legal principle.

Application of the guidelines

6. How are the guidelines to be applied? What can be done to ensure that they do not just gather dust? There are 2 answers to those questions, one more general, the other specific. The general answer looks to the overall process for the preparation and enactment of legislation. Those who have a hand in the preparation of legislation—within departments, other Government bodies, and the Parliamentary Counsel Office—have a major responsibility for giving effect to the guidelines. No doubt some of those who make submissions on bills will also call attention to instances where they consider the guidelines have not been followed. It will then be for the relevant Select Committee and for Parliament itself to decide on the application of the guidelines. The result of ignoring the guidelines will be poor legislation and often political and administrative embarrassment.

7. The specific answer looks to those who have the principal responsibility for legislation—its content and form and the method of its preparation. That responsibility is of course with Ministers. They look to their departmental officials to satisfy them that the guidelines have been applied or, when they have not been, that they have at least been carefully considered and departed from only for good reason. The Legislation Advisory Committee recommends that, to ensure proper accountability for this process, Ministers submitting draft Bills to the Cabinet Legislation Committee for introduction should also submit a paper which

(1) outlines the policy to be implemented by the legislation and explains why the Bill in the form proposed is needed to give effect to that policy,

(2) sets out the process followed in the preparation of the Bill, and in particular enumerates the bodies inside and outside government that have been consulted in the preparation of the Bill, outlines the manner of consultation and its results, and states whether or not there are any other bodies that might have an interest in the Bill that have not been consulted,

(3) where there has been any departure from the guidelines set out in this paper, indicates the departure and the reason for it, and
(4) notes what matters in the Bill are likely to be contentious.

The full and proper consideration of those matters and the preparation of the paper are seen as central to the Minister's responsibility for the Bill.

8. In the case of regulations, the Legislation Advisory Committee recommends that the above matters should be included in the memorandum to Cabinet proposing the making of the regulations.

9. The Legislation Advisory Committee can aid this process in three ways. The legislative proposal may be referred to it by the Minister of Justice before the Cabinet Legislation Committee approves the Bill for introduction. The Cabinet Committee may also refer issues to the Advisory Committee. And the Advisory Committee may, at the request of a Cabinet Committee or on its own initiative, make submissions on the Bill once introduced into the House, if there are matters proposed which contravene relevant principle or in other ways call for comment.

I The Process of Developing Legislation

10. There are many ways in which a proposal for legislative change may emerge. They range from proposals of long standing that are included in a political party's manifesto before it wins the government benches to proposals that are introduced in response to some form of emergency.

11. The way these proposals are handled will inevitably vary. In particular the nature, extent and timing of consultation may differ from case to case. What follows, is a set of questions which should be answered in respect of any proposal and which should help to ensure it is developed appropriately.

Are legal skills being involved in both the development of the policy and the formulation of legislation?

12. It is highly desirable to involve lawyers in the development of a legislative proposal from the beginning rather than wait until the policy has been defined clearly and in detail. It is not the primary function of lawyers to contribute to the formation of policy but they can frequently play a useful role in that process. They can do so more effectively if they are privy to policy-making discussions when legislative proposals are first contemplated.

13. Lawyers can in the first place advise whether the carrying out of a policy requires legislation and if so what particular approach might be employed. Too often it is incorrectly assumed that new legislation is the only possible answer to a problem. In many situations the common law (including the prerogative) or existing legislation may be adequate. Lawyers can also advise whether a policy option being considered will later founder on a rock of fundamental legal principle, and how the policy can be achieved consistently with legal principle.

14. In addition—and this is a point of some importance—lawyers can often analyse and hence help to clarify the real issues in any debate over policy. They can also help to avoid the all-too-common situation where a compromise is struck on language or on procedure which cannot be given effect in law or which makes it difficult to achieve efficient or effective law.

15. This kind of input at an early stage in policy formation can, at a minimum, avoid significant inefficiencies of time and effort. It may eliminate defects which may otherwise be revealed later in the legislative process and prove to be more difficult to correct at that stage. In many cases it is also a prerequisite to the next matter discussed—effective consultation. Unless issues have been properly clarified, consultation about them is unlikely to be productive.

Has all appropriate consultation been carried out?

16. The point has already been made that the broad acceptability of a legislative measure can be influenced significantly by the consultation that is undertaken. This relates particularly to consultation with sections of the community most likely to be affected, with special interest groups and with professional organisations, trade bodies and so on. Such consultation can also materially enhance public compliance with new law. There is, however, another kind of consultation that has to do more with the efficiency and effectiveness of the legislation. This is consultation within government, that is within the initiating department and between that department and other departments.

Consultation within government

17. The need for consultation within the initiating department relates back in part to the point about involving lawyers at an early stage in policy formation. Beyond that, however, the lateral thinking necessary to ensure that all appropriate perspectives have been brought to bear on a legislative proposal can usefully begin with consultation with other relevant divisions or directorates within the initiating department.

18. Consultation with other departments is the next step and a very important part of the overall process. It is an efficient use of time and resources. It ensures that possible problems are identified early in the development of a proposal and it can help to produce a positive and constructive approach towards the proposal on the part of those consulted. This can be important in the search for solutions to any problems that subsequently emerge. Conversely a failure to consult appropriately with other relevant departments can lead to substantial loss of time and a lot of unnecessary work in resolving problems and disagreements that could have been readily avoided at an early stage before the initiating department became wedded to a particular approach.

19. Another advantage of early consultation with other departments is that it can help in identifying the groups and organisations outside the government that should be consulted about the proposal.

20. It is not possible to establish criteria or checklists for deciding which departments should be consulted on which issues. The list of relevant departments must be determined in each case according to the subject matter of the proposal. In many cases the list of the principally interested departments should be fairly obvious. Thus the Department of Justice has broad responsibility in respect of such matters as criminal law, fair procedures and constitutional and human rights matters. The role of the Department of Maori Affairs is perhaps now better recognised (and see further paras 38–40 below). Departments whose possible interest in a particular proposal may be less obvious include Women's Affairs, Pacific Island Affairs, Environment, Conservation, Consumer Affairs, State Services

Commission (machinery of government and staffing implications), Treasury (economic policy and financial implications), and Foreign Affairs (compatibility with international legal obligations and foreign policy implications).

Consultation in the wider community

21. In many cases the groups, organisations and sections of the community outside government that need to be consulted will be as obvious as the principally interested departments. They may range from very small bodies to larger bodies such as professional organisations, to major pressure groups like the Federation of Labour, Manufacturers Federation, Federated Farmers or the Combined State Unions, to major sections of the community and in particular the Maori people as the tangata whenua. The reasons for the consultation will vary. In some cases the group or organisation will have knowledge and experience about the issues without the input of which it will not be possible to develop the proposal adequately. In other cases early understanding and support for the proposal by the organisation concerned will be essential to its political acceptability.

22. All Bills, except money Bills, are now referred to Select Committees and public submissions can be made at that stage. (Indeed some money Bills are now considered by Select Committees as well.) This ensures that all groups now have at least that opportunity for registering their views on a proposed piece of legislation. But while this opportunity alone may well represent sufficient consultation with some groups on some proposals, it will be essential in many cases that the consultation is begun much earlier. Moreover the volume and pace of legislation can make it difficult for some groups to prepare written submissions to Select Committees on all the Bills in respect of which they may have a contribution to make. And some groups may not be familiar or comfortable with the use of written submissions as a means of consultation.

23. Again it is not possible to lay down absolute rules about when and in what manner the various groups and organisations should be consulted. But some guidance can be given. The first point about consultation is that it must be genuine: those engaged in the process must give those consulted a fair opportunity to present relevant information and opinion, and must listen to and consider any responses. As already noted some proposals will not be able to be adequately developed without the early input of a particular group or organisation. In other cases the discussion of a proposal with a group or groups at a very early stage and in quite general terms may be a necessary part of developing the political support without which the proposal will be doomed to failure.

24. The essential point in all this is that it is necessary at the earliest stage to address the questions of with whom, when and in what manner consultation should be undertaken in the consideration of an idea for a legislative proposal. It is also worth noting that although it is commonly thought that extensive consultation may make the development of a legislative proposal

more difficult and time consuming, experience suggests that the reverse is more often the case.

Are the appropriate rules, procedures and guidelines within the government system being followed?

25. All who are involved in the preparation of the legislation must familiarise themselves with the rules, procedures and guidelines that have been laid down in respect of this process. In particular they should take account of the matters dealt with in the Cabinet Office Manual and of the guidelines and requirements of the Parliamentary Counsel Office about the preparation of instructions for the drafting of legislation. The latter are set out in Appendix A which consists of extracts from a paper by Chief Parliamentary Counsel.

II The Content of the Legislation

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A General Matters

26. The previous section identifies a critical question: is legislation needed at all? (See para 13.) If it is, the next question follows:

> Is the government's will being done in the proposed legislation?

That question does not however stand alone. Much of the remainder of this paper looks to the proposal in its wider context:

> Is the government's will being done *consistently with the principles and body of the law?*

There can be a tension between the answers to the two questions: the government's will might, for instance, require a departure from established principle. Those two matters are now considered.

1. Does the legislation implement the policy of its proponent?

27. This question is of course critical. It should probably not need stating. But there is no harm in repeating the obvious. The question relates back to essential aspects of the process discussed under the previous heading, especially the need for the legislation, the clarification of the policy in issue, the determination of the means to give effect to the policy, the carrying out of consultations and the preparation of clear instructions for Parliamentary Counsel. The answer to the question will often be at a number of levels of generality, for at the most detailed level those proposing the legislation may not—very likely will not—have a precise knowledge of all the situations that might arise. On the face of the legislation itself, the answer might be partly given by a statement of the policy, for instance in the title, a preamble, or an early substantive provision or set of provisions (as respectively in the Matrimonial Property Act 1976, the Treaty of Waitangi Act 1975, and the Official Information Act 1982). Such an emphasis on the policy might also help with the presentation of the legislation to those it affects and accordingly with its effectiveness.

2. How does the legislation relate to the general body of the law?

28. A statute is not complete and entire unto itself. It is in greater or lesser degree part of a larger legal continent. It may have to be read with

(a) the statute which it amends (as almost all do—even if they are not themselves entitled as Amendment Acts),

(b) statutes which apply to it (by their own express terms, or implicitly, or because the new statute so provides),

(c) the general body of the law of statutory interpretation (which in part comes within (b)), and

(d) relevant aspects of the general law.

29. These issues are in part technical. They can also raise important issues of policy. That can be illustrated by one aspect of the last item on the list.

Assume a statute which places a duty on individuals and provides for a criminal penalty for breach of the duty. Is that statutory provision exhaustive? Or is the general law of remedies relevant? What, for instance, is the position of a person claiming to be a beneficiary of the rule which imposes that duty? Can that person

- be released from a contract entered into in breach of the law
- seek an injunction to enforce the law (and earlier an *Anton Piller* order to preserve the position)
- seek damages for breach of the law
- have upset a decision made in favour of another person in breach of the law
- bring a prosecution for the breach?

(Enforcement is further considered in paras 105–111 below.)

30. The policy answer to that set of questions may be implemented at the technical level, for instance by providing for remedies and expressly stating them to be exhaustive, by expressly invoking remedies outside the legislation, or by recognising that the legislation will operate within the scope of other legislation (such as the Illegal Contracts Act 1969).

31. The enforcement issue is but one of many points of contact between the particular piece of legislation and the rest of the law. Thus the rest of the law determines or at least deals with such matters as

- the *territorial scope* of the law (territorial waters, contiguous zone, Antarctica, Tokelau . . . .)
- the *personal scope* of the law (does it apply to the Crown and to legal persons)
- the *temporal scope* of the law (retroactivity, effect of repeals on existing legal situations, criminal law)
- the association of *powers* (for instance a statutory power of appointment usually attracts a power of dismissal)
- *controls* on the exercise of powers (for instance through the principles of natural justice or by way of appeal, under general provisions of the Court statutes, the Ombudsmen, the Controller and Auditor General, the Official Information Act, or local government legislation) or
- *other consequences* of the breach of legislation (is the action done in breach invalid, or can it be validated, or does the breach have no effect?)

Some of these matters are considered later, and are as well discussed in some detail in Preliminary Paper 1 of the Law Commission on the Acts Interpretation Act 1924 and related legislation e.g., parts III, VII, VIII and X. This heading is to be related to the next, which introduces an evaluative element.

3. Does the legislation comply with basic principles of our legal and constitutional system?

32. Over a very long period, basic principles, stated by the courts, Parliament, and more diffusely (for example in appeals to the Rule of Law, democratic principle, the principles of the Treaty of Waitangi, or justice) have become established. They may have a specific application in the way indicated in paragraph 29: the example discussed there is about the principle that where there is a right there is a remedy. It emphasises the proposition that the history of freedom is largely the history of procedural safeguards.

33. The principles also have—or should have—impact at the stage of the formulation of the policy of the legislation and its development. Much of the remaining part of this paper is about those principles. An example or two can be given here. The principle that only Parliament should impose taxes—established in the 17th century—is obviously relevant to the preparation of taxing and other regulatory statutes. Any delegation of that power by Parliament to the executive must be carefully justified. And the principle that liberty should not be taken except under the due process of law—which can be taken back to Magna Carta in the 13th century—obviously informs much of our law including criminal law. The draft Bill of Rights, also reflecting international obligations and specially the International Covenant on Civil and Political Rights, gives greater detail to that broad principle and goes beyond it.

34. As indicated, the principles, especially in their detail, are to be discovered not only in the common law but also in legislation, some of it contemporary (as with the detail of powers of entry considered in para 95 below, for instance).

4. Is the legislation as understandable and accessible as practicable? Is its expression and content as simple as practicable?

35. These questions use the words of the Law Commission Act 1985. The second recalls Albert Einstein: make things as simple as possible but not simpler. They relate back to the first question in this part—to the possibility of statements of policy, and to the need as well in some cases to give precise directions. Precision, involving greater detail, may make simplicity more difficult to achieve. In a more general sense the questions recall the rules stated by George Orwell, a great exponent of the English language in his Essay on *Politics and the English Language*:

(i) Never use a metaphor, simile or other figure of speech which you are used to seeing in print.

(ii) Never use a long word where a short one will do.

(iii) If it is possible to cut a word out, always cut it out.

(iv) Never use the passive where you can use the active.

(v) Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.

(vi) Break any of these rules sooner than say anything outright barbarous.

36. The matter is of course very much one for Parliamentary Counsel—but not exclusively so. It is the words of the legislation that carry the main burden, at least at first, of stating the policy the legislator wants on the statute book. All of those concerned with the preparation of legislation have a responsibility to see to it that the policy is articulated in it.

5. Does the legislation have the necessary financial approvals?

37. If legislation will involve public expenditure then the appropriate approvals must be sought and obtained.

6. Does the legislation comply with the principles of the Treaty of Waitangi?

38. Cabinet on 23 June 1986—

(i) agreed that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;

(ii) agreed that departments should consult with appropriate Maori people on all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary; and

(iii) noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports.

39. This decision emphasises once again the central importance of consultation in the legislative process, in the particular context of Maori and Treaty issues. Priority must be given by those involved in preparing legislation to ensure that Maori interests are identified promptly, consultation with the relevant community or communities is undertaken at an early stage, the consultation is carried out in a manner and context with which Maori people are comfortable, the consultation is seen to have clear results, and there is feedback to the Maori community.

40. The content of legislation may reflect the Treaty in a variety of ways. So, the Treaty might be mentioned specifically or the reference might be more general (as in references to the resources of the tangata whenua). The reference might be to the principles or to the Treaty itself. The Treaty (or its principles) might be given a certain priority or it might be a matter to be considered along with others. Legislation over the last year relating to fishing, conservation, state-owned enterprises and the environment as well as the Treaty of Waitangi Act 1975, the Town and Country Planning Act 1977 and the draft Bill of Rights provide such models.

7. Does the legislation comply with relevant international obligations and standards?

41. In a very wide and increasing range of areas, New Zealand is committed by its treaty obligations or by customary international law to make particular

provision in its domestic laws. Appendix B is a first attempt at the preparation of a list of primary legislation which on first impression appears to raise treaty issues. Any proposal to amend that legislation should prompt the question whether there is a treaty which must be taken into consideration. Even where there is no direct obligation there might be an international standard, especially in the human rights area, which is relevant to the preparation of new legislation and to the replacement and amendment of the old. It may also be relevant to the interpretation of legislation.

B Public Powers

1. *General*

(a) Is the particular proposed power needed?

42. How does it relate to existing and proposed powers? Is it stated sufficiently broadly or subjected to sufficient restraints and controls? The questions are large and important ones. Their brief statement here should not disguise that. The discussion under later headings is relevant to them.

(b) Who should have the power?

43. The legislation in general will make the choice between
- The Governor-General in Council, the Governor-General, a Minister, a permanent head, a named (independent) statutory officer
- State-owned enterprises or other forms of public corporation with a greater or lesser degree of independence from the central government
- Local government bodies
- The Courts—District Court, High Court or Court of Appeal; Special Courts
- Arbitration
- Tribunals
- Other special bodies.

In some cases more than one officer or body may be involved, one of them perhaps with advisory powers rather than powers of decision. (Appeals are dealt with later in paragraphs 112–116.)

44. The choice should take account of such matters as
- The importance of the individual rights and interests involved: compare for example serious criminal or disciplinary processes with a power to confer benefits to which there is no entitlement
- The importance of the public or state interest involved
- The character of the issues to be decided (for instance fact, policy, discretion, law)
- The expertise to be expected of the decision-maker
- The context, including the administrative, in which the issue is to be resolved
- The existence of other safeguards
- The procedure commonly used by the proposed decision-maker
- The advantage or disadvantage of having a body independent of the government and other public controls making the decision or carrying out the function.

45. Many different examples can be given. A contemporary one is immigration legislation. Under the Immigration Act 1987,
- a variety of decision-makers—

  the Governor-General in Council, the Minister of Immigration, immigration officers, the Courts (the District Court, High Court

(including the Administrative Division) and the Court of Appeal) and a tribunal (the Deportation Review Tribunal)

— following a variety of procedures—
  administrative, on the papers, following a full hearing
— by reference or not to express standards or limiting criteria—
  humanitarian grounds, administrative error, fraud, unlawful residence, national security, criminal offending, terrorism . . .
— may make a variety of decisions relating to admission to, and deportation from, New Zealand.

46. In general, the more serious the consequence of the decision for individual rights and interests the greater the protection for the person affected—in terms of
— the independence of the decision-maker (court or tribunal rather than executive) or the seniority of the decider (Minister or even Governor-General rather than officials)
— the procedure to be followed (a right to be heard and to call witnesses etc rather than no express procedural protections at all)
— the specific standards and criteria for decision, and
— rights of appeal and review.

The principal qualification to this is when a broader public interest is seen to prevail over particular private interest (for instance in the determination of general immigration policy or in the national security deportation case). Some of these matters are further considered in paras 59–64 and 106–107 below.

(c) How should the power be exercised?

47. What procedure should be followed? Should the decision-maker
— give a fair hearing?
— consult?
— give public notice and invite comment? or
— decide on a more summary basis?

48. If the answer to the first or second question is yes, there is a further question: who should be entitled to be heard or to be consulted? There are those directly affected, those less directly affected, and those who might be able to represent some relevant part of the public interest or otherwise aid the decision maker. The environmental legislation provides examples of the last, wide category, e.g. Town and Country Planning Act 1977, s.2(3), and Water and Soil Conservation Act 1967, s.20B(2).

49. What should the particular content of the obligation to give a hearing be? The decision-maker must in general indicate to the persons affected what the issues are, disclose the information it holds relevant to the exercise of the power, and give the persons the opportunity to present their case and to rebut material put forward to their detriment. It might vary from a full court process as a maximum to a "hearing" on papers as a minimum. The

more particular answer whether it should be full or more limited depends very much on the matters listed in para 44 and the choice of decision-maker which is appropriate in the particular case. The detail of the answers should also be helped by the provisions applying in general to tribunals, paras 70–86 below.

50. In general those making decisions should be obliged to disclose the principles and policies they apply and to give reasons for their decisions, when asked by those affected. This principle already binds those subject to the Official Information Act 1982. See also para 84 (about tribunals) and para 118 below.

51. The answers to several of the above questions may be affected by the existence of rights of appeal. Any power in the original decision-maker to reconsider the matter may also be relevant; see too the Acts Interpretation Act 1924, s.25. The existence of such safeguards *may* mean that procedural safeguards need not be accorded in the first instance.

(d) How should the power be stated?

52. The statute must as a minimum state the *thing to be done*, for instance, to grant (or revoke) a licence, to confer (or cancel) a benefit, to permit a non-New Zealander to be in New Zealand (or to deport that person) . . . . That statement will often include a *qualification or condition* (for instance of age for a benefit, or non-citizenship for migration). That qualification or condition might be complex: thus the principal deportation power can be exercised only if the person in issue has committed certain offences and has done that within a particular period of becoming a resident. That is, the thing can be done only to certain persons and only in certain circumstances.

53. The legislation might (impliedly as well as expressly) gloss the power in at least two further ways. It might indicate the *purpose* or objective or aim of the power (or it might indicate purposes, objectives or aims which are *not* to be considered). And it might indicate the *matters* or factors to be considered (or not to be considered) by those exercising the power. The decision-maker might be obliged or permitted to consider the purposes or matters and the statutory lists might be interpreted as not exhaustive.

54. Finally, the legislation might set a *test* which has to be satisfied in respect of the exercise of the power. Once again the immigration legislation provides an example.

55. In this area clear policy decisions and instructions are critical:

(1) What is the power?

(2) In what circumstances can it be exercised? That is to say, what judgments must the decider make before exercising the power? Is the exercise of the power discretionary or mandatory once the circumstances are established?

(3) What matters are to be or may be or must not be considered?

(4) For what purposes may the power be exercised and what purposes are improper?

56. So far as possible, those matters should be addressed and clearly answered. The matters are important. (There is for instance a critical difference between (2) and (3): (2) states a prerequisite to action and must be established in the mind of the decision-maker, while under (3) the matter must merely be considered.) That is the technical matter.

57. The policy matter is this: in what circumstances should limiting purposes and factors be indicated? The standard and preferred approach is to state the purposes and factors as tightly as practicable. There may be a difference between situations where restraints are being imposed (for example by way of regulations) or things are being taken away, on the one side, and, on the other, those situations where benefits are being conferred without there being any question, at least as yet, of entitlement.

58. Sometimes legislation will require judgments to be made on two or more distinct matters in the particular case—for instance on the need for a new operator in a licensed industry and on the qualifications of particular applicants, or on whether a restrictive trade practice exists and whether it is contrary to the public interest. Once again these matters should be addressed clearly in the legislation—with the probable consequence that they will be addressed in separate provisions.

2. Tribunals

(a) Why should a tribunal be used (and not the courts on the one side or the government on the other)?

59. This question is partly touched on in paras 44–46 above. The choice depends on (1) the issues to be resolved and the other characteristics of the function, (2) the qualities and responsibilities of the decision-maker, and (3) the procedure to be followed.

60. The *issues* can vary greatly. At one end are confined matters involving precise rules of law being applied to particular points of fact usually occurring in the past and which might be in dispute. At the other, are broad issues of policy and discretion often relating to an evolving situation. Compare for example a prosecution of the owner of a television set for not having a licence on some past date with the power to grant a television channel by reference to virtually unconfined public interest grounds. The broader the policy element the more appropriate it may be for the matter to be settled by Ministers who are responsible to Parliament, and ultimately to the electorate. Such a political process might be complemented by a tribunal or even a court, for instance (1) by Ministers determining the general policy by direction and the tribunal applying the policy to particular applications, or (2) by a tribunal having a power to investigate a matter and make recommendations to Ministers. (An alternative is that the directions might be given by, or the advice might be directed to, Parliament.) The

latter power of recommendation is to be found for instance in the environmental area. It is most unusual for a recommendatory power to be conferred on a court. It can be seen to be contrary to its constitutional function of *deciding*—especially in disputes between the Crown and individuals.

61. In some cases Parliament might settle the broad policy and decide that a single body, independent of the executive, is best able to apply it consistently on a country wide basis and, where appropriate, develop it by reference to a changing perception of the public interest. Such a function might be thought better suited to a single tribunal than to the judges of a court of general jurisdiction. (That is not to deny a role for the courts in respect of questions of law and related matters, see paras 112–114 below.)

62. A large volume of relatively unimportant matters might provide a quite different reason for using a special tribunal rather than a general court. This relates to the third of the general matters noted above—the procedure to be followed (see para 64).

63. The second matter—the *qualities and responsibilities of the decision-maker*—ties back into the characteristics of the issues and function and, indeed, forward into the procedure. Thus the nature of the issues might require special expertise (which the tribunal members might have on appointment or might acquire by concentrating on that matter), possibly across several areas (thereby justifying multi-member panels); consider for example the statutory provisions about members of the Indecent Publications Tribunal and the Commerce Commission. The issues on the other hand might be such that Judges in courts of general jurisdiction are the appropriate people to determine them, or there might be a case for specialisation within the general court. By contrast to the foregoing, the character of the issues and of the function might be such that Ministers should take responsibility. This would be so, for instance, if the policy and public interest component of the decision is significant.

64. The three categories of decision-makers—courts, tribunals, and the government—of course have their standard *procedures*, to come to the third of the matters listed above. Those procedures, it can quickly be seen, are more apt for dealing with some issues than with others. A court process is designed, for example, to resolve, through adversary presentation and testing of evidence and argument, disputes about facts and law. The much less formal processes of Ministerial decision making, extending as they can to the relevant sources of information and opinion (expert and political) in the community, are better able to determine, say, the nature and characteristics of a taxation regime. Procedures *within* courts and *within* tribunals can of course vary greatly (and that is even more true within the executive). They can be more or less formal, more or less speedy and more or less costly. Those considerations may also though justify the use or establishment of a tribunal instead of a court. Thus the Small Claims Tribunal was established to deal in an expeditious, informal and less costly way with small claims which otherwise come within the regular court jurisdiction.

65. The Legislation Advisory Committee is considering further the bases on which choices should be made between courts, tribunals and government.

(b) How should the tribunal be constituted?

66. In general the members of the tribunal should be, and should be seen to be, independent of the parties. That independence arises from their qualifications, the method of appointment, their relation to the parties, their term of office, and the provision for termination of their appointment.

67. Some statutes indicate criteria relevant to appointment (e.g. para 63 above). The matter might be stated as a prerequisite or simply as something to be considered. Many statutes, although not invariably, require that a lawyer chair multi-member tribunals. That requirement, recommended by the Public and Administrative Law Reform Committee in its first report, is to be justified on at least 2 grounds—the experience of tribunal procedure, and the interpretation of the legislation governing the tribunal's work.

68. In general the members should be appointed by the government without any formal role for the parties. Industrial tribunals—where two of the three members are often appointed or nominated by the unions and employers—may be an exception. So too usually is arbitration where the emphasis is on the autonomy of the parties. The independence of the tribunal is also enhanced by making the appointment on the recommendation of, or at least following consultation with, the Attorney-General or Minister of Justice.

69. The appointment should in general be for a term of at least 3 years and terminable only for cause. The reason for this is that Parliament has decided that the power in issue is to be exercised by an independent body and not by a body subject to government directions.

(c) What procedure should the tribunal follow?

70. This matter has already been addressed in a general way in paras 44–51 and 59–64 above. There are two basic considerations—the general importance of process and the particular requirements and characteristics of the tribunal in question. The general point has two aspects to it. The tribunal is likely to come to a better decision if its procedure is such that those affected have a reasonable opportunity to present their cases and to answer anything prejudicial to their interest. To turn that around, the parties affected are also likely to consider the decision a fairer one if they have had such an opportunity.

71. As already noted, tribunal characteristics and powers vary greatly. They might decide or merely recommend. They might recognise and protect existing rights or they might confer and perhaps withdraw discretionary privileges. They might make decisions affecting the whole community or just one or two individuals. They might actively develop and promote policies or they might wait passively for the parties and apply established

rules. The reasons for their establishment, as we have seen, also vary greatly.

72. Nevertheless, the basic principles are broadly agreed, and much tribunal legislation covers the same set of matters in identical or similar ways. That common ground as set out in paras 73, 75–85 is taken from a draft Tribunals Procedure Bill prepared by the Department of Justice. That draft (to the preparation of which the Public and Administrative Law Reform Committee contributed) is based in part on the Commissions of Inquiry Act 1908, a statute which applies to a large number of tribunals. The draft—available from the Department of Justice—also regulates the membership of tribunals. See also paras 15–50 of the Sixth Report of the Public and Administrative Law Reform Committee (1973).

73. *Draft Bill: Notice*—(1) A tribunal shall give reasonable notice of the time, place and purpose of a hearing—

(a) To the persons who are parties in any proceedings; and

(b) To such other persons as it thinks fit.

(2) A notice of a hearing shall include:

(a) A statement of such particulars as will fairly inform the persons to whom it is given of the substance of the matters to be dealt with at the hearing;

(b) A reference to the relevant provision of the Act or regulations under the authority of which the hearing will be held;

(c) A statement of where information on the procedures of the tribunal may be obtained; and

(d) A statement warning each person to whom the notice is given that if that person does not attend at the hearing, the tribunal may decide in that person's absence.

[The draft goes on to regulate the method of service of the notice.]

74. Time limits give rise to the following matters among others:

(1) Proposed time limits are often too short. People must have sufficient time to gather information about a proposal or decision which may be subject to objection or appeal to enable them to decide whether they wish to take the matter further. They may have to assess the case and take legal advice.

(2) Time limits are frequently expressed in absolute terms for example, within 28 days, and no provision is made for an extension of that time. In many cases there is no policy reason for creating so strict a time limit and it can cause problems if, for example, a submission or application is received a few days late. In terms of the statute such a submission or application may not be able to be considered even if it contained valuable information. There might be no power to waive the limit. To avoid this difficulty the tribunal should be given power to extend the time limit.

(3) Statutes use a variety of ways to compute time. Statutes increasingly use the concept of the working day to express all time periods prescribed by the particular statute. This practice is to be encouraged as it ensures that if, for example, the time in which to lodge a notice of appeal involves the Christmas period, a potential appellant is not unfairly disadvantaged. The statute does this by stating that Saturdays, Sundays, public holidays and the period between 25 December and 15 January are not to be counted in the computation of time. For an example of this formula see section 2 of the Public Works Act 1981.

75. *Draft Bill: Non-attendance at hearing after due notice*—Where notice of a hearing has been given to a person in accordance with [para 73] and that person does not attend at the hearing, the tribunal may hear and decide the matter in the absence of that person.

76. *Draft Bill: Witness summons*—(1) For the purpose of a hearing of any proceedings a tribunal may of its own motion, and shall, on the application of any party to the proceedings, issue in writing a summons requiring the person named in the witness summons to attend at the time and place specified in the summons and to give evidence, or to produce any document or thing in that person's possession or under that person's control, relevant to the proceedings.

[The draft regulates the issue and service of the summons.]

77. *Draft Bill: Right of audience*—(1) A party to proceedings before a tribunal shall be entitled to be heard either personally or by that party's barrister, solicitor, or agent.

(2) At a hearing of a tribunal every party to the proceedings shall be entitled to attend and be heard, to call evidence and to examine, cross-examine, and re-examine witnesses.

(3) Any other person served with notice of the hearing under [para 73] subsection (1)

(a) Shall be entitled
  (i) To be heard either personally or by that person's barrister, solicitor or agent; and
  (ii) To call evidence and examine witnesses; but
(b) May only cross-examine witnesses with the leave of the tribunal.

78. *Draft Bill: Protection of persons appearing*—No civil proceedings shall lie against any party, or any witness giving evidence, or any barrister, solicitor, or agent, or any other person appearing before a tribunal, for anything such a person may say in the course of the proceedings before the tribunal.

[The draft includes a related provision about the members of the tribunal.]

79. *Draft Bill: Evidence*—(1) A tribunal shall not have the power to administer an oath but may require a person giving evidence at a hearing to make a statement promising to tell the truth.

(2) Where a witness is required to make a statement pursuant to *subsection (1)* of this section a member or officer of the tribunal shall put to the witness the following questions, or words of similar effect, to which the witness shall indicate assent:

"Do you promise to tell the truth? And do you understand that if you fail to tell the truth you will be liable to prosecution for giving false evidence?"

(3) A tribunal may permit a party or witness to give evidence by tendering, or tendering and reading, a written statement and, if the tribunal so requires, stating it to be the truth.

(4) A tribunal may call for and receive as evidence any statement, document, information, matter or thing that in its opinion may assist it to deal effectively with the matters before it, whether or not the same would be admissible in a court of law.

(5) A tribunal shall have power to exclude irrelevant or repetitive evidence or submissions.

(6) Every person appearing before a tribunal shall have the same privileges as witnesses have in courts of law in relation to—

(a) the giving of any evidence and the answering of any questions; and

(b) the furnishing to the tribunal of any information or statement; and

(c) The production to the tribunal any document or thing.

[It will be seen that this draft departs from the usual provision about administering an oath; the tribunals to which the Bill would apply should no longer have power to administer oaths. Instead a witness will be asked to tell the truth.]

80. *Draft Bill: Notice of facts*—A tribunal may in any proceedings make use of any facts that may be judicially noticed.

81. *Draft Bill: Procedure*—(1) A tribunal or its presiding officer may adjourn a hearing at any time and from time to time and place to place upon the application of any party to the proceedings or of its own motion on such terms as it thinks fit.

(2) A tribunal may on the application of any party:

(a) Extend any time limit; or

(b) If it is satisfied that no party will be detrimentally affected, waive compliance with any other procedural requirement;

prescribed by this Act, or any Act or regulations establishing a tribunal, which relates to the proceedings of a tribunal.

(3) A tribunal may extend any time limit although the application for the extension is not made until after the expiration of the time appointed or fixed.

(4) Except as expressly provided in this or any other Act or by any regulations, a tribunal may regulate its own procedure in such manner as it thinks fit.

82. *Draft Bill: Proceedings usually to be in public*—(1) Except as provided in *subsection (2)*, the proceedings of a tribunal shall be conducted in public.

(2) A tribunal may, of its own motion or on the application of any party to the proceedings, and after having due regard to the interests of all persons concerned and to the public interest, order that the whole or any part of a hearing shall be held in private.

(3) A tribunal may, on the application of any party to the proceedings and after having due regard to the interests of all persons concerned and to the public interest, make an order prohibiting the publication of any report or description of the proceedings or of any part of the proceedings in any hearing, before it (whether heard in public or in private); but no such order shall prohibit the publication of any decision of the tribunal.

(4) Notwithstanding any order made under *subsection (3)* of this section the tribunal may permit a report or description of the proceedings or of any part of the proceedings to be included in any publication that is of a bona fide professional or technical nature.

(5) Every person who acts in contravention of an order made under *subsection (3)* of this section commits an offence and is liable on summary conviction to a fine not exceeding $1000.

83. *Draft Bill: Reference of questions of law to the High Court*—(1) A tribunal may state a case for the opinion of the High Court on any question as to the jurisdiction of the tribunal or on any question of law arising in proceedings before it; and for that purpose may either conclude the proceedings subject to that opinion, or adjourn them until after that opinion has been given.

(2) If a right of appeal from decisions of a tribunal lies to the Administrative Division of the High Court every case stated under *subsection (1)* of this section shall be heard and determined by the Administrative Division of the High Court.

84. *Draft Bill: Decision*—(1) A tribunal shall give its final decision in any proceedings in writing.

(2) A tribunal may in any case and shall if so requested by a party to the proceedings within 20 working days after the date of the notification of the decision or within such further time as the tribunal may allow, furnish a statement in writing setting out:

(a) the findings on material issues of fact; and

(b) a reference to the evidence on which the findings were based; and

(c) the reasons for the decision.

(3) A tribunal shall provide all parties to the proceedings with written notice of the rights of appeal, if any, against its decision when it gives its decision, including any time limits on those rights.

85. *Draft Bill: Rehearing*—(1) A tribunal shall in every proceedings have the power to order a rehearing of the whole or part of the proceedings on the ground that a substantial wrong or miscarriage of justice has occurred or is likely to occur.

(2) The application for a rehearing shall be lodged with the Secretary of the tribunal within 20 working days after the date of notification of the decision or within such further time as the tribunal may allow.

(3) The application shall not operate as a stay of proceedings unless the tribunal so orders.

(4) The application shall be served on the other parties to the proceedings not less than five clear working days before the date fixed for the hearing of the application, and shall state the grounds relied on.

(5) A tribunal may grant the application on such terms as it thinks fit and may in the meantime stay proceedings.

Registry

86. If a government department may from time to time be required to appear as a party before a tribunal, then, where practicable, that same department should not provide administrative services for the tribunal (Public and Administrative Law Reform Committee First Report (1968)). In addition, where a tribunal is hearing appeals from decisions of a government department the same rule should apply. The rule enhances the independence of the tribunal and the appearance of that independence.

Professional discipline

87. One particular application of tribunals is to professional discipline. In its Ninth Report (1976) the Public and Administrative Law Reform Committee formulated general standards that should apply to all statutes dealing with discipline of professionals. In its Tenth Report (1977) it applied these principles to the disciplinary rules of the legal profession. The principles formulated by the committee were:

(a) A representative of the public or lay observer should participate in the disciplinary process.

(b) Investigative and adjudicative functions should be performed by separate bodies.

(c) Both the complainant and the person whose conduct is the subject of the complaint should be given a fair hearing.

(d) The grounds upon which a professional can be disciplined must be appropriate to the particular profession.

(e) Adequate appeal rights must be provided.

Disciplinary legislation increasingly incorporates these principles.

3. *Regulations and other subordinate law making*

88. The law and practice in this area are still evolving with the Government having indicated in April 1987 that it will prepare a Regulations Bill broadly in accordance with the proposals of the Regulations Review Committee.

(a) In what circumstances may law making power be delegated?

89. As the 1962 Delegated Legislation Committee and the Regulations Review Committee in 1986 have said, the practice of law making by delegated authority is necessary in the interests of efficient administration. The line between the primary and the delegated law maker should in general be that between principle and detail, between policy and its implementation. Parliament with its representative composition and through its public process should address and endorse (or not) the policies presented to it by the executive, while acknowledging that matters of less significance or of a technical character, or requiring rapid adaptation or experimentation might be left to subordinate law making. That is to say, the delegation should be in confined terms (see further, para 92). And, to take two specific matters, Parliament should not delegate the power to impose taxation or to amend statutes save in exceptional cases.

(b) On what basis is the choice between regulations and other central government instruments to be made?

90. If subordinate legislation takes the form of regulations it will be subject to the publication and tabling requirements of the Regulations Act 1936 and to the altered Standing Orders which provide for the reference of all regulations to the Regulations Review Committee for testing under the criteria established in Standing Orders. (The Committee has in addition prepared proposals for a new Regulations Bill designed to strengthen parliamentary control over regulations, in particular by providing the House of Representatives with a general power of disallowance: Report of the Regulations Review Committee 1986, *Proposals for a Regulations Bill.*) If the subordinate legislative instrument takes other forms, it will in general escape that publicity and those controls. Whether it should, is a question to be addressed when the provisions empowering the making of subordinate legislation are being prepared. The answer depends on whether the processes, publicity and controls are apt to the power. The choice may relate not only to the level of law making. It may also relate to the character of the law. A number of statutes (especially in the safety area) now provide for the making of codes of practice which have only presumptive significance, but are not binding in all circumstances.

(c) What procedure is to be followed in the making of the regulations?

91. The law usually imposes no procedure other than the basic requirement that the Governor-General by Order in Council make the regulations. There is for instance no general formal requirement of notice and consultation. The procedure required by the first part of this paper does however require an account of the process in fact followed and in particular of consultation. The case for a general legislative requirement for notice and consultation before the making of regulations has not yet been accepted in New Zealand. Rather the Regulations Review Committee has proposed in its report on *Regulation Making Power in Legislation* (1986) para 9.7 that

(i) Requirements about notice and consultation are to be included as appropriate in particular empowering provisions.

(ii) To repeat, those responsible for the preparation of regulations are to give particular attention to the desirability of the fullest consultations with all those likely to be interested in the proposed regulations.

(iii) Administrative directions are to be prepared laying down guidelines on notice and consultation.

(d) How should the empowering provision be drafted?

92. In 1961 the Government directed that a particular empowering provision be used in Bills. (See the Report of the Delegated Legislation Committee 1962 paras 11–15.) In general that provision has been followed since—but not in all cases, and some earlier statutes still contain provisions in the old form. The 1961 formula is designed, by the exclusion of subjective and general wording, to ensure that Parliament states the limits on the law making power as precisely as possible with the consequences that the power does remain subordinate and subject to control by the courts for validity. That formula is to continue to be used unless there is very good reason to the contrary. Further, old broader provisions still on the statute book are to be removed when the relevant statutes are amended.

(e) What additional controls, if any, should there be over regulations once made?

93. In some circumstances, Parliament will reserve to itself greater control over regulations by requiring that it confirm regulations. This additional control will be justified where the delegated power is a significant or broad one, in particular to make

1. emergency regulations
2. regulations imposing a financial charge in the nature of a tax
3. regulations amending the empowering Act or another Act (Henry VIII clauses)
4. regulations which deal with issues of policy under the authority of broad empowering provisions.

The Report of the Regulations Review Committee 1986, *Regulation Making Powers in Legislation* para 8.3–8.4 gives the present instances of such provisions.

(f) What instruments should be identified as regulations?

94. The Regulations Act, legislative practice and the proposals of the Regulations Review Committee indicate that there are three ways in which instruments come within the scope of the Regulations Act: by being called regulations, by being deemed to be regulations for the purposes of the Regulations Act, or by coming within some general formula catching the substantive character of legislation (see s.2(1)(b) of the Regulations Act 1936: ". . . extend or vary the scope of the provisions of any Act"). That matter is also the subject of proposals by the Regulations Review Committee in its 1986 Report on *Proposals for a Regulations Bill*. Whether an instrument should be brought within the scope of the Regulations Act depends on the matters considered in para 90 above, that is on whether the processes, publicity and controls relating to regulations are apt to the particular power.

4. Powers of entry

95. The Public and Administrative Law Reform Committee in its Seventeenth Report (1983) stated the following principles which have been given effect to in many statutes since:

1 A power enabling officials to enter private property should be conferred only if it is essential to achieve a purpose of the Act.

2 A power to enter should be conferred expressly and not by implication.

3 The purpose that justifies an entry should be expressed in terms that are as precise as the subject matter permits.

4 The grounds for an entry should be objective not subjective.

5 Reasonable notice of intended entry should be required except where the giving of notice is likely to defeat the purpose of the entry.

6 Where entry is required for the purpose of ascertaining whether an offence has been committed, the official should obtain a warrant from a judicial officer by written application on oath.

7 Where entry is to be into a dwellinghouse it should be authorised by a warrant from a judicial officer by written application on oath.

8 The exercise of powers of entry should be confined to reasonable times.

9 A power to enter should not be accompanied by a power to use force in the entry unless the absence of such an auxiliary power would frustrate the purpose of the entry.

10 Entrants should carry a warrant of authority to identify themselves, the position they hold, and the source and nature of their authority, which they should produce upon initial entry and if requested at any subsequent time.

11 The acts that the officials may perform, the questions they may ask once they have gained admission, and the use they may make of any information that they acquire following the entry, should be related to

the purpose of the particular entry and should be specified as precisely as possible.

12 The relationship between the privilege against self-incrimination and an official's power to ask questions should be clarified in respect of each separate power, preferably by expressly affirming the privilege.

13 Where, consequent upon a power of entry, individuals are required to carry out work or pay for its completion, should they fail to complete it themselves, they should be entitled to challenge the need for the work, and the cost of it, in the courts.

14 When an enactment provides for compensation for damage occasioned by the entry, and the amount of that compensation is assessed by a Minister or official, then, in case of dispute, the amount should be determined by an independent tribunal or court.

5. Powers to require and use personal information

96. The Official Information Act 1982, s.39, gives the Information Authority functions in respect of personal information. One is to examine existing and proposed government powers to require persons to supply information about themselves and to express its view on whether they are fair and reasonable. The Authority, drawing on standards stated by the Organisation for Economic Cooperation and Development and standards and legislation adopted elsewhere, has established the following principles by which to test the fairness and reasonableness of legislation:

(a) When may information be collected?

97. The power of collection is considered to be fair and reasonable where it complies with the following:

Necessity

Personal information is not collected unnecessarily.

Fair collection

Personal information is obtained and processed fairly and lawfully.

Informing

The person that collects personal information takes reasonable steps to ensure that, before it is collected, or if that is not practicable, as soon as practicable after it is collected, the record-subject is told:—

(a) the purpose for which the information is being collected, unless that purpose is obvious;

(b) if the collection of the information is authorised or required by or under law—that the collection of the information is so authorised or required; and

(c) in general terms of the record-keeper's usual practices with respect to disclosure of personal information of the kind collected.

Precise power

When exercising a statutory power of entry, the acts the officials can perform, the questions that they may ask once they have gained admission and the uses they may make of any information that they acquire following entry, are related to the purposes of the particular entry and are specified as precisely as possible.

Relevance

A person should not collect personal information that is inaccurate or having regard to the purpose of collection is irrelevant, out of date, incomplete or excessively personal.

Question

The relationship between the privilege against self-incrimination and an official's power to ask questions should be clarified in respect of each separate power, preferably by expressly affirming the privilege.

Objective belief

The grounds for collection of personal information should be objective not subjective.

(b) How may the information be used?

98. The use of personal information is proper where it complies with the following:

Relevance

It is used for a purpose to which it is relevant.

Purpose

It is used only for the purpose for which the information is collected, or a purpose incidental to or connected with that purpose unless:—

(a) the record-subject has consented to other use;

(b) the person using the information believes on reasonable grounds that the use is necessary to prevent or lessen a serious and imminent threat to the life or health of the record-subject or of some other person; or

(c) the use is required by or under law.

Accuracy

The person who uses personal information takes reasonable steps to ensure that, having regard to the purpose for which the information is being used, the information is accurate, complete and up to date.

Consent

The record-keeper does not disclose the personal information about the subject to a third person unless:—

(a) the record-subject has consented to the disclosure;

(b) the person disclosing the information believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and

imminent threat to the life or health of the record-subject or some other person; or

(c) the disclosure is required by or under law.

Security

The record-keeper takes such steps as are in the circumstances reasonable, to ensure that personal information held or controlled by the record-keeper is securely stored and is not misused.

(c) What provision should there be for access to the information?

99. The legislation should enable people to find out what personal information is held about them, and provide for the correction of the information.

Right of access

Where officials have in their possession or under their control records of personal information the record-subject should have access to those records.

Power to request correction

Officials who have in their possession or under their control a record of personal information about another person should correct it so far as it is inaccurate, or having regard to the purpose of collection or to a purpose that is incidental to or connected with the purpose, misleading, out of date, incomplete or irrelevant.

Opportunity to know of information held

The subject should be informed of the existence of personal information held, particularly where this information is of a disparaging nature and is to be used in decision making.

Intermediary access

Where direct access is impracticable, or may be harmful to the subject, intermediary or third party access should be available.

100. No doubt exceptions will sometimes have to be made to these principles and it may be that some powers might be excluded from their application if, as the Authority has proposed, they were given general legislative effect. (See Information Authority, *Personal Information and the Official Information Act: Recommendations for Reform* (1987).) As indicated above however the principles are broadly accepted.

6. *Powers to give policy directions to tribunals and independent administrative bodies*

101. The Public and Administrative Law Reform Committee in its Nineteenth Report (1986) made recommendations about such powers of direction. The scope of the report was determined by two matters—

(a) the existence of a statutory power exercised by the Government, usually through a Minister, to give directions; and

(b) the character of the body that receives the direction—a tribunal or independent administrative body established with power to decide or to carry out certain public activities.

102. The first of these characteristics means that the report did not extend to the provisions of the relevant statutes which commonly require such bodies to "have regard" to the policy of the government, on the basis either of the bodies' own knowledge of that policy or of a communication of it from the Government. The particular powers with which the report *is* concerned are powers in effect to make law: particular exercises of the power control the authority of the tribunal or body in question. The tribunal must decide, and the independent administrative body must carry out its function, in accordance with that direction.

103. The second characteristic means that the report is concerned with bodies separate from the Government, set up as tribunals or as independent public agencies with members appointed from outside the executive branch of government. That is to say it is not concerned with the regular relationship between a Minister and the Minister's department and officials. In the normal case that relationship is governed by the legal and constitutional responsibility of the Minister for the work of the department and officials and by the Minister's power to direct the department and officials. Rather the concern is with the situation in which Parliament has established the tribunal or other independent body to make decisions or take actions *on its own responsibility* in a particular area of policy or administration.

104. The Committee recommended as follows:

(a) Directions should be given and signed only by a Minister of the Crown. Authority to give policy directions should be excluded from any power of delegation.

(b) Directions should be given in writing.

(c) Directions should be published in the Gazette and laid before the House of Representatives as soon as practicable after they are given. Exception to this should be made only where the public interest does not require immediate publication and publication would be inimical to economic or commercial interests.

(d) Directions should be restricted to considerations of policy, and should not be given where they might interfere with:

(i) the duty of independent tribunals to act judicially; or

(ii) the determination of individual applications, allegations, or cases which relate to a particular person or organisation.

(e) Before a policy direction is given, the Government should, wherever practicable, consult with individuals and organisations likely to be affected by the direction.

(f) Whenever it is proposed to empower a Minister to give policy directions to a body from whose decisions an appeal lies, consideration should be given to the constitutional status of the direction in the appellate tribunal.

Legislation enacted in the last two years has in general conformed with these principles. The broad thrust of the principles may also be seen in the provisions of the State-Owned Enteprises Act 1986 regulating the relations between the shareholding Ministers and the directors of the enterprises.

C Enforcement Provisions

105. The general part of this paper touches on this in para 29 above. Enforcement may be central to the policy of the legislation—consider for instance labour law and family law. But often those preparing legislation will give much greater attention to the substantive rules and very little to the process for the application and enforcement of the rules.

1. Which of the range of remedies is to be invoked?

106. Very careful attention should be given to the aptness of the particular remedy to the substantive rules being stated. Aspects of this matter have already been considered in paras 44–46 and 59–64 above. The statute book presents a great variety in which the following elements figure:

(1) the compulsory character of the process: usually the parties have no choice but to be subject to the process if one of them initiates it, but, as for instance with some arbitration, that is not always so.

(2) third party involvement or not: usually there is, but the statute sometimes provides for, or requires, negotiation between the parties.

(3) the independent character of the third party: usually the third party is independent of the parties, but that is not always so, for instance in arbitrations or in respect of 2 of the members of certain 3 member industrial tribunals where the legislation enables the parties to appoint or nominate those members.

(4) the binding character of the process: the third party will often have a power of decision, for instance in the usual case of courts, tribunals, and arbitrators, while conciliators, mediators, and the Ombudsmen and in very limited circumstances courts and tribunals may be able only to recommend.

(5) the procedural character of the process: to be contrasted with the formality and adversary character of say a jury trial in a criminal matter is the relative informality of the Family Court and even more the investigatory character of the Ombudsman's office.

(6) the criteria for decision: they can vary from precise rules of law to very broad standards (such as the public interest or the welfare of the child).

107. In addition to the family and labour legislation mentioned above, the legislation relating to the Ombudsmen, discrimination, small claims, the Treaty of Waitangi, arbitration, fisheries, mining and other environmental matters all provide suggestive material.

2. Is a criminal sanction needed?

108. If so,

— what provision if any, should there be for diversion of the matter from the criminal process?

— how should the offence be stated: for instance, should it be one of strict liability; what defences should be provided for?
— when, if at all, should the onus of proof be reversed?
— what should the penalty be?
— should there be any restriction on the power of prosecution? Particular legislation sometimes departs from the general rule that anyone can lay an information for an offence. What is the range of justifications for that?

109. This is obviously a very brief note of a very complex problem. The international standards are relevant to some of the matters. And there is of course much contemporary material on penal policy.

3. Should a specific civil remedy be established?

110. Some (but very few) statutes expressly provide that a breach of a duty stated in them gives rise to an action in tort. A few also empower officials to seek injunctions to prevent breach. For the most part though this matter is left to the uncertainty of the general law; cf. paras 29 and 30 above. Consideration should be given to removing that uncertainty by specific provision.

4. Should new particular remedies or processes be established?

111. Officials may be given powers (sometimes associated with powers of inspection) to attempt to mediate or conciliate a matter or a complaint. As discussed earlier, new jurisdiction might be added to an existing tribunal or a new tribunal with powers of decision might be established.

D Controls After the Event

1. What provision, if any, should the legislation make about appeal and review?

112. The right to seek review exists under the common law. It does not depend on statute, but its scope in particular cases is very much determined by the legislation and the issues to which it gives rise. Aspects of that have already been touched on in the discussion of public power (paras 52–58) and of regulations (paras 89 and 92). The greater the width of the power, the more subjective it is, the wider the purposes or the criteria (even more if they are not stated), the smaller the extent of review.

113. The legislature might also limit review, or attempt to, by so-called privative or ouster clauses. Such provisions should not be included except in the most unusual cases; to the extent that they have effect, they remove part of the power of the courts to enter the legal area as essentially determined by Parliament, an exclusion that is difficult to justify in principle. As the Public and Administrative Law Reform Committee stated in its Sixth Report (1973), in the absence of a right of appeal, a proper distribution of functions between court and government agency should be based on their comparative expertise. The court should be concerned with questions of law and procedure, the latter with matters of discretion and policy. A government agency should not be able to violate the law with impunity.

2. When should provision be made for an appeal on questions of law?

114. In its Sixteenth Report (1982) the Public and Administrative Law Reform Committee recommended that in general those aggrieved by the decision of an administrative tribunal should have the right to appeal to the High Court on a question of law. This was based on the principle, mentioned in the previous paragraph, that questions of law arising in a tribunal should be capable of being taken to the High Court for final determination. The tribunal should not have that final say. The Committee indicated the circumstances in which the principle would not apply—

(a) where the decisions are already subject to appeal (but the appeal decisions might be subject to an appeal on law alone)

(b) where the body has a power to recommend rather than to decide

(c) where the power is largely a policy and executive one rather than a specific adjudicative one.

The Committee also proposed the detail of the procedure for settling the question of law for decision.

3. When should provision be made for a general appeal?

115. Whether there should be a general appeal from the tribunal or departmental decision depends in significant measure on the arguments for having a hearing or a tribunal in the first instance. If the issues and other factors are

such that a right to be heard by an independent tribunal is made out, then the argument for an appeal is a strong one. Thus within the court system there is generally one right of appeal, usually on the whole merits of the matter. And, within the tribunal system, rights of appeal either on law or on the whole merits are usually to be found. They are presumably accorded on the basis that the appeal decision is likely to be a better one, that error will from time to time be corrected, and that as a consequence the cost and delay of the further process can be justified. But there may be good reasons to deny or, more commonly, to narrow a right of appeal. Denial of an appeal might be justified by the relative lack of importance of the matters and the related costs of appeal, by the need for early finality, or by the high quality and expertise of the body making the original decision. The final factor is in general an argument for providing a limited right of appeal, on law alone (as just discussed) or "as if from the exercise of a discretion". These limits recognise the relative expertise of the specialised tribunal on the one side and of the court as a legal body on the other. The latter formula has been used for appeals in broadcasting, indecent publications and immigration matters.

116. The appeal might be to an existing court or tribunal, to a newly established body, or to an *ad hoc* body (established for example by a Judge or practising lawyer as presiding officer possibly with members named by the two parties.) In general existing bodies should be used. A strong argument will be required to establish a new tribunal. In some circumstances, particularly a second appeal, the appeal may not be of right but only with leave.

4. To what new bodies should the powers of the Ombudsmen extend?

117. As a general principle, the Ombudsmen should have jurisdiction over departments and other organisations that make decisions relating to matters of central or local government administration and which affect members of the public. If a new body being set up by or under statute is to come within their jurisdiction, a consequential amendment will be required to the First Schedule to the Ombudsmen Act 1975. There should be consultation with the Office of the Ombudsman about these matters and the next.

5. To what new bodies should the Official Information Act 1982 extend?

118. Whenever a new organisation is created it is necessary to determine whether or not the Official Information Act 1982 should apply to it. In some cases that will follow from it being subject to the Ombudsmen Act. The basic criterion formulated by the Danks Committee that dealt with the Official Information Act 1982 is that bodies carrying out a government or public function should be subject to the Act. That criterion is now to be understood more broadly given the Amendment Act of 1987 and the Local Government Official Information and Public Meetings Act 1987. To a large extent the application of the legislation will depend on the relationship between the organisation and central government. The following factors are relevant:

— The organisation's dependence on central government funding.
— The obligation of the organisation to consult with the Minister on particular matters, respond to ministerial directions, or obtain ministerial approval.
— The existence of ministerial control over appointments in contrast to, for example, elected membership representing relevant interest groups.
— The existence of any government controls on finance, for example, by the Audit Office.
— The public purpose of the organisation.

119. The above set of 5 questions about control is incomplete. As well, attention is often to be given to the potential role of the Controller and Auditor-General and, in the local government and related areas, to the Local Authorities (Employment Protection) Act 1963, Local Authorities Loans Act 1956, Local Authorities (Members' Interests) Act 1968, and Local Elections and Polls Act 1976.

E Relation to Other Law

120. The general passage in paras 28 to 31 above touches on this critical and large matter. Three further particular issues are noted here:

1. What impact is the proposed legislation to have on existing situations?

121. Particular provisions in the criminal law, more general ones in the Acts Interpretation Act 1924, and provisions in particular statutes, as well as general presumptions of the common law, deal with the impact of new legislation on existing situations. The Law Commission in part III of its preliminary paper no.1 on the Acts Interpretation Act 1924 discusses this matter at some length. It refers to the following principles:

1. *effectiveness*—the law cannot be complied with if it is not known at the relevant time
2. *justice*—it may be unjust to apply new law to past situations; consider especially the criminal law
3. *reasonable expectations*—application of new law to past transactions which have a continuing effect may frustrate reasonable expectations
4. *responsibilities of government*—the government's and parliament's assessment might be that the law and related institutions and procedures have to be changed in the public interest and that that change will relate to ongoing relationships and perhaps upset existing expectations
5. *effective administration*—the new institutions and procedures might have to be applied to matters arising earlier.

122. Those principles, as well as the general law to be found in the 1924 Act, in other legislation (including the Criminal Justice Act 1985, s.4, and the Crimes Act 1961, s.10A), and in the common law should be carefully considered by those preparing legislation which will or might have an effect on existing situations. The question may arise whether particular application or savings provisions are required.

2. Is action taken in breach of the legislation to be invalid?

123. Both the Acts Interpretation Act 1924, s.5(i), and the common law provide that a violation of the requirement of a statute does not always mean that the act in question is invalid or without legal consequence. Such savings provisions are also included in many specific statutes in a variety of contexts —for instance in respect of appointment criteria and processes, vacancies, notice and consultation provisions, and time limits. Attention should be given to the question whether particular provision should be made about that matter or it should be left to the general law.

3. Are there relevant supplementary powers?

124. The Acts Interpretation Act 1924 and the Constitution Act 1986 in effect supplement the provisions of other Acts. Those supplementary provisions are of a general character. The common law may also provide a relevant power, particularly the power of the Crown to negotiate and enter into contracts. And particular statutes already on the statute book may make an additional grant of power unnecessary. That is to say, we have at this point come full circle: is the proposed legislation actually needed?

The Departmental Solicitor and the Parliamentary Counsel Office

(Extracts from a paper by Mr W Iles, Chief Parliamentary Counsel)

1. The prime role of a departmental solicitor in relation to the Parliamentary Counsel Office is to give instructions to that Office for the drafting of Bills and regulations.

2. In addition, the departmental solicitor usually—
   (a) Participates in conferences on the draft Bill or the draft regulations:
   (b) Considers and comments on draft Bills and draft regulations as they are produced by Parliamentary Counsel:
   (c) Acts as a co-ordinator of Departmental comments on the draft Bill or draft regulations:
   (d) Settles the form of the draft Bill or the draft regulations with Parliamentary Counsel:
   (e) In the case of a draft Bill,—
      (i) Attends at the Cabinet Legislation Committee as one of the Departmental team when the draft Bill is considered by that Committee:
      (ii) Participates in the preparation of the Minister's speech notes:
      (iii) Attends in the House on the introduction of the Bill:
      (iv) Attends the hearings of the Select Committee:
      (v) Assists in the preparation of the departmental report to the Select Committee:
      (vi) Settles with Parliamentary Counsel the form of any amendments required by the Select Committee:
      (vii) Attends in the House on the second reading of the Bill:
      (viii) Attends in the House on the Committee stage of the Bill and settles with Parliamentary Counsel the form of any amendments required by the Minister to be made in the Committee of the Whole. (This may require the Departmental Solicitor to give instructions to Parliamentary Counsel for the preparation of a Supplementary Order Paper or to participate on the bench in the House on the preparation of an instant amendment.)
   (f) Establishes or maintains a good relationship both with officials of the Departmental Solicitor's own department and Parliamentary Counsel with a view to participating in the preparation of the Bill or regulations as a member of an effective and harmonious team:
   (g) Gives advance notice to Parliamentary Counsel of any proposed Bill or proposed regulations where the demands placed on Parliamentary Counsel either by the content of the Bill or by time or by both make advance notice necessary or appropriate. Parliamentary Counsel

specialise to some degree and a little advance notice may ensure that the appropriate specialist is available.

The Giving of Instructions

3. A Department may give instructions to the Parliamentary Counsel Office only if—

   (a) In the case of a Bill, the Cabinet Legislation Committee or Cabinet has approved the preparation of that Bill; or

   (b) In the case of regulations, the Minister in charge of the Department has authorised the preparation of the regulations.

Departmental Drafts and the "Pure" View

4. The "pure" view is that the instructions for the preparation of a bill or regulations should be in the form of ordinary narrative prose and should not, in any circumstances, be in the form of a draft bill or draft regulations.

5. The situation in the New Zealand Parliamentary Counsel Office is that it has not been "pure" in this sense for many years. There is probably an historical reason for this. The Parliamentary Counsel Office used to draft all Bills but very few regulations. Regulations were drafted in the departments by the departmental solicitors and vetted by the Crown Law Office. This practice led to a variety of styles. In the 1950s the then Attorney-General became dissatisfied with this variety of styles and he directed that no regulations were to be submitted to Cabinet unless they had been drafted in the Parliamentary Counsel Office. The staff of the Parliamentary Counsel Office was not increased to take account of this influx of work and the departments had in any event been used to preparing drafts of their own regulations. In many cases they continued to send drafts of regulations to the Parliamentary Counsel Office.

6. Professor Elmer A. Driedger has described in *The Composition of Legislation* (2d ed rev 1976) xix to xx the problems that Parliamentary Counsel face on receiving instructions in the form of a draft Bill. Professor Driedger puts it this way:

> "If he receives a draft, he must construe and interpret what may be an imperfect statement, and he may misunderstand what is intended. A draftsman who is presented with a draft measure would not be discharging his duties if he assumed that a proper legislative plan had been conceived and that proper provisions had been chosen to carry it out; he cannot be expected to confine himself merely to a superficial examination of the outward form of the measure. The drafting of legislation does not consist in polishing what others have written. . . .
>
> Even assuming that a perfect bill is submitted to the draftsman, he must still subject it to the complete drafting process, for how else can he discover that it is a perfect bill and satisfy himself that it will

give legislative effect to the intended policy? Draft measures prepared by inexperienced persons are usually defective, and then the draftsman must spend much time in undoing what has been done. This is particularly awkward where the draft has been circulated and discussed before submission to the draftsman, because those who have seen it expect that the final draft will closely resemble it and will resist any attempts to alter its fundamental structure."

7. The English pamphlet, *The Preparation of Bills* (1948), contains at p8 the following pertinent comment:

> "Nothing is more hampering to the Parliamentary Counsel, when the drafting stage is reached, than to be obliged to build what is usually a complex structure round 'sacred phrases' or forms of words which have become sacrosanct by reason of their having been agreed upon in Cabinet or in one of its committees. A still more serious objection to agreed forms of words of this kind is that they often turn out to represent agreement upon words only, concealing the fact that no real compromise or decision has been reached between conflicting views upon some important question."

8. A particular problem that has arisen in New Zealand is where a department prepares its own draft and then agrees on its terms with an interested party.

9. If, as has happened, Parliamentary Counsel points out—
   (a) That part of the draft is nonsense; or
   (b) That part of the draft, in the case of regulations, is ultra vires the empowering Act; or
   (c) That one part of the draft contradicts another; or
   (d) That part of the draft achieves the exact opposite of what the parties intended,—

   the Department which prepared the draft may be embarrassed.

10. Despite these comments, departmental drafts, particularly of regulations, are a fact of life in New Zealand and, in some cases, departments have achieved a good standard. Accordingly it has not been the practice of the Parliamentary Counsel Office to reject instructions that are accompanied by a draft of the proposed Bill or a draft of the proposed regulations.

11. What needs to be remembered is that the submission of a draft Bill or draft regulations is not a substitute for proper instructions. Lengthy drafts accompanied by not one word of explanation concerning the purpose of the draft do not constitute proper instructions to the Parliamentary Counsel Office. They are usually returned to the department.

Proper Instructions

12. This brings me to the question of what constitutes proper instructions. Proper instructions should—

(a) In the case of a Bill, indicate that the drafting of the Bill has been authorised by the Cabinet Legislation Committee or by the Cabinet or, in the case of regulations, indicate that the drafting of the regulations has been authorised by the Minister; in the case of regulations, the authority should preferably be a written authority signed by the Minister;

(b) Indicate the principal objectives intended to be achieved by the Bill or regulations;

(c) Contain all relevant background material relating to the proposals to be included in the Bill or regulations, including all known legal implications and difficulties;

(d) Contain references to any relevant cases, whether or not they agree with the view favoured by the Department;

(e) Be accompanied by copies of any relevant legal opinions that have been obtained, whether or not they agree with the view favoured by the Department;

(f) In the case of an amending Bill or amending regulations, deal separately with each proposed amendment;

(g) If any matters are unresolved, indicate what they are and when the additional instructions in relation to them are likely to be given;

(h) Suggest the penalties to be imposed for any offence;

(i) Indicate existing legislation that will require amendment or consideration to give effect to the proposal;

(j) Indicate any known consequential amendment;

(k) Indicate any transitional or savings provisions required;

(l) If the Bill or regulations are to come into force on a particular date, indicate that date and the reasons for choosing it;

(m) If the Bill or the regulations arise out of a report of a Commission or committee, either refer to the published report of that Commission or committee or, if it has not been published, supply a copy of it or of the relevant portions of it;

(n) If the Bill or the regulations impinge on the activities of another department, indicate the extent to which that department has been consulted;

(o) Give the names of the departmental officers and the departmental solicitor who will be dealing with the matter.

13. Departmental solicitors should remember that Parliamentary Counsel not only have the function of drafting Government Bills and statutory regulations. They have in addition the function of drafting amendments to Government Bills during their passage through the House. Some departmental solicitors have, in making reports to Select Committees, included drafts of proposed amendments to Government Bills. They should not do this. They should instead instruct Parliamentary Counsel to prepare any amendments thought necessary.

14. As a general rule a Bill is liable to be amended only when it is before a Select Committee or before the Committee of the Whole. Parliamentary

Counsel always attend when a Bill is being deliberated on by a Select Committee or when it is being considered in the Committee of the Whole. Parliamentary Counsel attend only some of the hearings conducted by a Select Committee of the submissions made on a Bill. They do not usually attend at any other stages in the consideration of the Bill by Parliament.

Departmental Officers

15. The New South Wales instructions in relation to the drafting of Bills contains the following comments about departmental officers:

> "Departmental officers attending conferences for the settling of Bills should have the detailed knowledge, ability and authority to make decisions on most of the questions that inevitably arise in drafting. If their decisions are to be reviewed by superior Departmental officers, their function becomes not much more than that of a messenger, and the drafting of the Bill is greatly delayed by the draftsman having to await confirmation of their highly tentative decisions. Perhaps even worse is for the draftsman's time to be wasted and the drafting of the Bill consequently delayed because 2 or more Departmental officers attending a conference argue at length about the decision to be given on some question raised by the draftsman. A Departmental officer attending on the settlement of a proposed amending bill should particularly have a detailed knowledge of the provisions and operation of the Principal Act to be amended."

These comments apply with equal force in New Zealand. Continuity within a Department is very important.

Prompt Consideration of Drafts

16. The New South Wales instructions contain the following warning about the prompt consideration by departmental officers of draft Bills:

> "Prompt consideration of these drafts should be given and the draftsman should be quickly advised of any alteration required. It should be realised that the draftsman is usually working on 3 or 4 bills at the same time and that, if queries raised by him or drafts prepared by him are not considered promptly when referred to the department concerned, the continuity of his consideration of the proposed bill is interrupted and subsequent delay occurs in picking up the threads."

This warning applies with equal force in New Zealand.

Estimates of time

17. Departmental instructions should not give estimates of the time that it will take to prepare a draft Bill or a draft set of regulations without consulting with the responsible Parliamentary Counsel in the Parliamentary Counsel Office. The time needed to prepare the draft may be much greater than the

department expects, or the Parliamentary Counsel involved may be required to give priority to other Bills or regulations.

Collaboration

18. The best Bills and the best regulations result from proper collaboration between Parliamentary Counsel and officers of the sponsoring department.

Statutes with possible treaty implications

This is a first, tentative list. It does not include relevant regulations. There are no doubt some omissions, and some statutes have been included from an abundance of caution.

Accident Compensation Act 1982
Admiralty Act 1973
Adoption Act 1955
Agricultural Workers Act 1977
Agriculture (Emergency Powers) Act 1934
Airport Authorities Act 1966
Animal Remedies Act 1967
Animals Act 1967
Antarctic Marine Living Resources Act 1981
Antarctica Act 1960
Antiquities Act 1975
Apprenticeship Act 1983
Arbitration Clauses (Protocol) & Arbitration (Foreign Awards) Act 1933
Arbitration (Foreign Agreements & Awards) Act 1982
Arbitration (International Investment Disputes) Act 1979
Armed Forces Discipline Act 1971
Atomic Energy Act 1945
Aviation Crimes Act 1972
Beer Duty Act 1977
Bills of Exchange Act 1908
Boilers, Lifts, and Cranes Act 1950
Bush Workers Act 1945
Carriage by Air Act 1967
Carriage of Goods Act 1979
Cheques Act 1960
Christmas Island. See 1981, No.110, s.2
Citizenship Act 1977
Citizenship (Western Samoa) Act 1982
Civil Aviation Act 1964
Coal Mines Act 1979
Commonwealth Countries Act 1977
Conservation Act 1987
Construction Act 1959
Consular Privileges & Immunities Act 1971
Continental Shelf Act 1964
Cook Islands Act 1915
Cook Islands Constitution Act 1964
Copyright Act 1962

Crimes Act 1961
Crimes (Internationally Protected Persons & Hostages) Act 1980
Criminal Justice Act 1985
Crown Proceedings Act 1950
Customs Act 1966
Dangerous Goods Act 1974
Defence Act 1971
Designs Act 1953
Diplomatic Privileges & Immunities Act 1968
Disabled Persons Employment Promotion Act 1960
Domicile Act 1976
Education Act 1964
Employment Agents Act 1908
Enemy Property Act 1951
Environment Act 1986
Equal Pay Act 1972
Estate & Gift Duties Act 1968
Extradition Act 1965
Factories & Commercial Premises Act 1981
Family Proceedings Act 1980
Flags, Emblems, & Names Protection Act 1981
Fugitive Offenders Act 1881 (U.K.)
General Agreement on Tariffs & Trade Act 1948
Geneva Conventions Act 1958
Goods and Services Tax Act 1985
Harbours Act 1950
Health Act 1956
Health Benefits (Reciprocity with the U.K.) Act 1982
Holidays Act 1981
Human Rights Commission Act 1977
Immigration Act 1987
Income Tax Act 1976
Indecent Publications Act 1963
Industrial Design Act 1966
Industry Safeguards Act 1987
International Air Services Licensing Act 1947
International Energy Agreement Act 1976
International Finance Agreements Act 1961
Kermadec Islands Act 1887
Labour Department Act 1954
Labour Relations Act 1987
Law Practitioners Act 1982
Machinery Act 1950
Maori Affairs Act 1953
Maori Education Foundation Act 1962

Maori Language Act 1987
Marine Mammals Protection Act 1978
Marine Pollution Act 1974
Marketing Act 1936
Meat Act 1981
Meat Export Control Act 1921–22
Meat Export Prices Act 1976
Medical Practitioners Act 1968
Medicines Act 1981
Mental Health Act 1969
Military Decorations & Distinctive Badges Act 1918
Minimum Wage Act 1983
Mining Act 1971
Ministry of Transport Act 1968
Misuse of Drugs Act 1975
Motor Spirits Duty Act 1961
New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987
Niue Act 1966
Niue Constitution Act 1974
Parental Leave and Employment Protection Act 1987
Passports Act 1980
Patents Act 1953
Pesticides Act 1979
Petroleum Demand Restraint Act 1981
Phosphate Commission of New Zealand Act 1981
Plant Variety Rights Act 1987
Plants Act 1970
Postal Services Act 1987
Public Finance Act 1977
Quarries and Tunnels Act 1982
Race Relations Act 1971
Radiation Protection Act 1965
Reciprocal Enforcement of Judgments Act 1934
Sale of Liquor Act 1962
Sea Carriage of Goods Act 1940
Shearers Act 1962
Shipping & Seamen Act 1952
Shop Trading Hours Act 1977
Social Security Act 1964
Social Security (Reciprocity with Australia) Act 1987
Social Security (Reciprocity with U.K.) Act 1983
Standards Act 1965
State Services Conditions of Employment Act 1977
Telecommunications Act 1987
Territorial Sea & Exclusive Economic Zone Act 1977

Time Act 1974
Tokelau Act 1948
Tokelau (Territorial Sea & Exclusive Economic Zone) Act 1977
Town and Country Planning Act 1977 (see s.115)
Toxic Substances Act 1979
Trade & Industry Act 1956
Trade Marks Act 1953
Trade Unions Act 1908
Transport Act 1962
Treaty of Waitangi Act 1975
United Nations Act 1946
United Nations (Police) Act 1964
Visiting Forces Act 1939
Vocational Training Council Act 1982
War Graves. See 1977, No.75, s.4(1)
War Legislation Act 1917
War, Termination of. See Finance Act 1950, s.41 (reprinted 1979, R.S. Vol.2, p.506)
Waterfront Industry Act 1976
Weights & Measures Act 1987
Western Samoa Act 1961
Workers Compensation Act 1956

V. R. WARD, GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND—1987

74640A—87PT