LEGISLATIVE CHANGE

Guidelines on Process and Content
revised edition

Report No 6 by the
Legislation Advisory Committee

December 1991

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Report No 6 by the
Legislation Advisory Committee
released by the Minister of Justice,
The Hon Douglas Graham MP

December 1991

The terms of reference of the Legislation Advisory Committee are as follows:

(a) To scrutinise and make submissions to the appropriate body or person upon aspects of Bills introduced into Parliament affecting public law or raising public law issues.

(b) To report to the Minister of Justice or the Legislation Committee of Cabinet on the foregoing aspects of legislative proposals which the Minister of that committee refers to it.

(c) To advise the Minister of Justice on such other topics and matters in the field of public law as the Minister from time to time refers to it.

(d) To monitor the content of new legislation specifically from an "Official Information" standpoint.

In addition to commenting on Bills and other legislative proposals, the Committee has published the following discussion papers and reports:

Administrative Tribunals : A Discussion Paper (January 1988)

Departmental Statutes and other legislation relating to departments : A Discussion Paper (September 1988)

Public Advisory Bodies : A Discussion Paper (September 1990)

Legislative Change : Guidelines on Process and Content (August 1987) (Report No 1)

Report of the Legislation Advisory Committee [on its work to date] (June 1988) (Report No 2)

Report on Administrative Tribunals (December 1988) (Report No 3)

Departmental Statutes (April 1989) (Report No 4)

Report of the Legislation Advisory Committee 1 April 1988 to 31 December 1989 (March 1990) (Report No 5)

The postal address of the Legislation Advisory Committee is PO Box 2590, Wellington, New Zealand.
Telephone: 0-4-473-3453. Facsimile: 0-4-471-0959.

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FOREWORD

Legislation is a vital function of government. The 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 important purposes.

Translating policy proposals into sound and principled legislation is not an easy task. If any of the many steps which make up the overall process of developing agreed policy into legislation are poorly executed, the rights and liberties of individuals and groups may be put at risk and the government's policy may not be given effect to. Unnecessary controversy and litigation and perverse effects on the operation of public and private interests are likely to be the result. There are as well direct costs for the management of the government's business in developing legislation. The costs occur in the development of policy, the Cabinet approval process, the law drafting and approval stage, and the parliamentary approval process. There are costs too for the community in the examination of Bills by individuals and interested groups, and in their making submissions to select committees of the House of Representatives. Lack of care and poor procedure at any of these stages can greatly increase the overall cost of the process, and in the interests of efficiency and effectiveness such unnecessary costs must be avoided.

It is the case that errors are corrected at the select committee stage. But to rely on the select committees of the House to correct ill-conceived legislation is not acceptable. This committee process provides the public with an opportunity to comment on the legislative embodiment of the government's policy and to bring matters which may need further consideration to the attention of Parliament; but it is not a quality inspection process designed to correct poor policy analysis or drafting.

Experience teaches that both the process for the making of legislation and the content of legislation can be improved. This Report, prepared in 1987 and revised in 1991 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.

The message is clear. We must

- ask whether legislation is even needed to give effect to the policy which the Government is planning to implement,

- follow proper procedures in preparing the legislation, in particular by consulting appropriately outside government and within it,

- ensure that the legislation does give effect to the proposed policy, and

- ensure as well that it complies with established principles, unless there is good reason for departing from them.

This Government, like its predecessor, has directed that Ministers and their officials in proposing and preparing legislation are to address the principles of process and content set out in this report. They are required to advise the Cabinet Legislation Committee of the steps they have taken to comply with the principles. These matters are also emphasised in the *Cabinet Office Manual* (1991) ch 5 (Legislation and Related Matters).

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. In that it is assisted by the powers conferred by the Regulations (Disallowance) Act 1989.

Other steps are being taken 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. Parliament has enacted the Imperial Laws Application Act 1988 which provides a definitive list of the Imperial legislation in force in New Zealand. The Acts and Regulations Publication Act 1989 emphasises the duty of the State to make the law available. The Law Commission has proposed a new Interpretation Act; it has made other proposals for the improvement of legislation, and it is preparing proposals on the format of legislation and a Manual on Legislation.

The message in this report is for the whole of government - for Ministers, for senior officials, for departmental lawyers, and for all others concerned with the preparation of legislation. It applies not only to primary legislation but also to secondary legislation such as statutory regulations. 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 are also of interest and value to the many other New Zealanders who participate in the legislative process. They are able to use the guidelines in commenting on proposed legislation.

Douglas Graham
December 1991

9 December 1991

Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

Dear Minister

The report on Legislative Guidelines which was issued by the Legislation Advisory Committee in 1987 has been revised to take account of developments in the law and in the legislative process since that time.

A large number of departmental officials and others have contributed to the preparation of this revision - as to the original report. It also benefits considerably from the interchanges we have had with Ministers, Members of Parliament and officials when we have prepared and made submissions on Bills and legislative proposals.

I would also like to mention here the great contribution which Sir George Laking KCMG made to the work of the Committee as its foundation chairman. That contribution caps a remarkable service, which so far has lasted over 60 years, to New Zealanders and their governments.

The revised report is enclosed.

Yours sincerely

Mervyn Probine
Chairman

Members of the Committee

Professor F M Brookfield
Mr J G Fogarty QC
Mr A R Galbraith QC
Mr W Iles QC CMG
Sir Kenneth Keith
Dr Mervyn Probine CB
Hon Mr Justice Robertson
Judge D F G Sheppard
Mr C J Thompson
Adrienne von Tunzelmann
Rodney Harris (Secretary)

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 areas and activities. They include rules:

- for maintaining the structure of society (eg, the criminal law and the electoral law);
- for regulating relations between individuals (eg, family law and the law of contract);
- for regulating activities in a modern industrial society (eg, safety codes and industrial relations);
- for providing and maintaining essential services beneficial to the development of society (eg, health, education and welfare legislation);
- to facilitate private activity (eg, company law and partnership);
- for the gathering of taxes to finance the provision of public services; and
- 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 it as supporting and protecting their interests.

3 The balances in society are constantly changing and the legal rules, therefore, are 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 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 as *accessible and understandable* as practicable.

4 This report 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*, discussed in part I of the report, includes

- asking the question whether the legislation is needed at all
- considering the need to involve lawyers early in the policy formation stage
- deciding at an early point with whom, when and in what manner consultation should be undertaken and
- ensuring compliance with the various rules, procedures and guidelines that have been laid down for the preparation of legislation.

5 Part II of the report, 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.

Part II 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 What can be done to ensure that the guidelines are applied? There are two answers to that question, 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. To ensure proper accountability for this process, Ministers intending to propose legislation must submit papers to the Cabinet Legislation Committee, first, when seeking approval for the inclusion of the Bill in the legislative programme and, second, when seeking approval to the introduction of the Bill to Parliament. Ministers will also have obtained approval of the policy underlying the proposed legislative change from the appropriate Cabinet committee and Cabinet *before* approval is sought through the Cabinet Legislation Committee for a Bill to be introduced.

8 Each paper must, among other things

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

(2) confirm that the Bill complies with the Treaty of Waitangi and the Bill of Rights Act and international legislation and standards,

(3) where there has been any departure from the guidelines set out in this report, indicate the departure and the reason for it, and

(4) set out the process followed in the preparation of the Bill, and in particular enumerate the bodies inside and outside government that have been consulted in the preparation of the Bill, outline the manner of consultation and its results (especially differences between officials or between Ministers), and state whether or not there are any other bodies that might have an interest in the Bill that have not been consulted, and

(5) note what matters in the Bill are likely to be contentious.

9 The full and proper consideration of those matters and the preparation of the papers are central to the Minister's responsibility for the Bill. Appendix A sets out the heading of the Request for a Bill to be included in the legislative programme and the Cover Sheet for a Draft Bill to be submitted to Cabinet. The revised Cabinet Office Circular makes it clear that the procedures must be followed. The Cabinet Office has been instructed to accept only those submissions which are in the proper format.

10 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.

11 The Legislation Advisory Committee can aid this process in at least 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 or in some instances another Minister may also refer issues to the Legislation Advisory Committee. And the 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

12 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 an emergency.

13 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?

14 Lawyers should be involved in the development of a legislative proposal from the beginning. This step should not wait for the policy to be defined clearly and in detail. It is not generally 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.

15 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. 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.

16 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.

17 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 matter discussed in paras 21-29, effective consultation. Unless issues have been properly clarified, consultation about them is unlikely to be productive.

Is the legislation needed?

18 Practice shows that legislation is proposed and sometimes enacted when it is not needed. This is especially so of legislation conferring powers on Ministers, officials and government bodies. Adequate powers may already exist in the common law (including the prerogative) or elsewhere in the statute book. The Committee's report on *Departmental Statutes* (1989), largely adopted by the Government and by Parliament in practice, emphasises that proposition (see further para 90). Even if the Bill itself is required, particular provisions may not be.

19 Experience also indicates that an apparent urgent need for legislation, when seen in a broader perspective, may not really be pressing. Or at least it may be that the proposed legislation can be held until it can be handled with related amendments. That gathering of related proposals can have the direct advantage that the particular proposal is seen in context and the incidental advantage that the valuable time of all those concerned with legislation is not fragmented.

20 The question asked does not relate simply to the legal necessity for the legislation. There may be good reasons of policy for the government to commit itself in the legislation to a particular course of action, for example, by way of a statement of purpose and of the principles on which the action is based. These can serve a useful public purpose.

Has all appropriate consultation been carried out?

21 The point has already been made that the broad acceptability of a legislative measure can be influenced significantly by the 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

22 The need for consultation within the initiating department relates back in part to 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. Budget night legislation (indeed any legislation accorded urgency) is sometimes an example of good process being avoided. There are two issues: first whether the legislation must be enacted in that way, and, secondly, if it is, whether there has been adequate consultation within the department and more broadly in the government (as there is not the same opportunity for public scrutiny).

23 Consultation with other departments is the next step and a very important part of the overall process. It may be an essential underpinning to the collective responsibility of Cabinet. It is an efficient use of time and resources. It can avoid piecemeal reform. It ensures that possible problems are identified early in the development of a proposal. It may reveal to the initiating department that there are possible conflicts or inconsistencies with legislation being prepared by another department. In this way 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.

24 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.

25 This report is not the place to establish comprehensive 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. The role of the Ministry of Maori Development is now better recognised (and see further paras 40-42 below). Departments with a possible interest in a particular proposal include Women's Affairs, Pacific Island Affairs, Youth Affairs, Environment, Conservation, Consumer Affairs, State Services Commission (machinery of government and staffing implications), Treasury (economic policy and financial implications), and External Relations and Trade (compatibility with international legal obligations and foreign policy implications, see further para 44 below, and the *Cabinet Office Manual* (1991) Chapter 4, Appendix 1).

Consultation in the wider community

26 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 significant pressure groups such as the major employer, employee or industry organisations 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 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.

27 All Bills, except money Bills and when urgency is accorded, are now referred to Select Committees and public submissions can be made at that stage. (Indeed many money Bills are now in practice considered by Select Committees as well.) This practice 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.

28 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.

29 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 considering 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. Proper consultation reduces the need for early amendment to legislation.

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

30 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 B which consists of extracts from a paper by Chief Parliamentary Counsel.

II

THE CONTENT OF THE LEGISLATION

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A GENERAL MATTERS

31 This section considers nine general questions which relate closely to the Cabinet Office circular set out in Appendix A. The previous section has already identified a critical first question: is legislation needed at all (paras 18-20)? 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 report looks to the proposed legislation 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. Can the departure be justified?

Does the legislation implement the policy of its proponent?

32 This question is 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. One important aspect of the process is whether the whole or only parts of the proposed policy is presented in the Bill. The Committee's experience is that piecemeal reform is to be avoided if at all possible. Unnecessary fragmentation leads to errors in legislation and wastes valuable time.

The answer to the question stated in the heading 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. Purpose provisions can serve a valuable public purpose. However, they need to be drafted with restraint and should have regard to the obligations which they place on the Ministers and agencies

responsible for their implementation. Doctrinal essays on non-justiciable concepts do not make the legislation more effective. The matter is further considered in the Report of the Law Commission on *A New Interpretation Act* (1990), para 70.

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

33 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

- the statute which it amends (as almost all do - even if they are not themselves entitled as Amendment Acts),
- statutes which apply to it (by their own express terms, or implicitly, or because the new statute so provides),
- the general body of the law of statutory interpretation, and
- relevant aspects of the general law.

34 These issues are in part technical. They can also raise important issues of policy. That can be illustrated by one instance 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 the 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 statute
- seek an injunction to enforce the law (and earlier an Anton Piller order to preserve the position)
- seek damages for breach of the law
- upset a decision made in favour of another person in breach of the law
- bring a prosecution for the breach?

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).

35 The enforcement issue (considered further in paras 143-152 below) 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)
- 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 (eg, paras 164-165 on retroactivity), and are also discussed in some detail in report No 17 of the Law Commission on *A New Interpretation Act* (1990) paras 192-227, 332-438 and pp 215-218.

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

36 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 para 34: the example discussed there illustrates 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.

37 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 report 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 traced back to Magna Carta in the 13th century, obviously informs much of our law including criminal law. The New Zealand Bill of Rights Act 1990, which also reflects international obligations and especially the International Covenant on Civil and Political Rights, gives greater detail to that broad principle and goes beyond it. 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 and search considered in paras 135-141 below).

Does the legislation comply with the New Zealand Bill of Rights Act 1990?

38 Section 7 of the New Zealand Bill of Rights Act 1990 requires the Attorney-General to bring to the attention of the House of Representatives any provision in any Bill introduced into the House which appears to be inconsistent with the Bill of Rights (set out in Appendix C). The Bill affirms a range of civil and political rights including, in some detail, procedural rights available to individuals in criminal matters and in other disputes with the State. In some cases the Bill of Rights issue will be clear; consider for instance proposed legislation creating retrospective criminal liability. But in other cases the issue may not be obvious; for instance does legislation dealing in a particular way with the Crown's position in litigation conform with the principle of equality stated in s 27(3)? The Bill is referred to at appropriate stages in this report.

39 Procedures have been developed involving the Crown Law Office and the Law Reform Division of the Justice Department for checking proposed legislation by reference to the Bill and for advising the Attorney-General when that is required.

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

40 The *Cabinet Office Manual*, in the forms set out in Appendix A, requires the question in the heading to be answered by Ministers proposing new legislation. On 23 June 1986 Cabinet

(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.

The process and judgments involved in answering the question and the giving effect to the decision are very difficult. Simple majority decision-making is not always the answer. In some situations, autonomous Maori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one another is appropriate. The law may sometimes accord a special recognition to Maori rights and interests such as those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that the Maori belongs, as a citizen, to the whole community. Policy and procedure in this area are still evolving.

41 Consultation and related processes of decision making are critical. 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. Proper consultation within the government is also crucial.

42 The content of legislation may reflect the Treaty in a variety of ways. It is very important that attention is focused on the specific aspects of the Treaty which are relevant. What are the guaranteed rights or interests which are put in question? What is the role of the Crown's right to govern? So, the Treaty might be mentioned specifically or the reference might be more general. 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 recent years relating to fishing, conservation, state-owned enterprises, the environment, and resource management, as well as the Treaty of Waitangi Act 1975, provide such models. Recent relevant legislation is noted in Appendix D.

Should the Ombudsmen Act 1975 or the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 apply to the body in question?

43 When public bodies are being established, these questions should be addressed. As a general principle, the Ombudsmen should have jurisdiction over departments and other organisations that make decisions which relate to matters of central or local government administration and which affect members of the public. Even if the Ombudsmen Act is not applicable to a public body, either of the official information statutes might apply. The factors to be taken into account are the relationship between the body and central or local government and its public purpose. See further paras 160-161.

Does the legislation comply with relevant international obligations and standards?

44 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 E is a list of primary legislation which appears to raise treaty issues. It includes about one quarter of all public Acts. Any proposal to amend that legislation should prompt the question whether there is a treaty which must be taken into consideration. Again, appropriate and timely consultation, especially with the Ministry of External Relations and Trade is essential. 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. Appendix E also includes a note prepared within the Law Commission about treaties: what are they, what do they do, how are they made, and how are they given effect?

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

45 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.

46 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. This matter is to be pursued both in the preparation of particular statutes and more generally, for instance in the Manual on Legislation being prepared by the Law Commission.

Does the legislation have the necessary financial approvals?

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

B PUBLIC POWERS

Introduction

Is the particular proposed power needed?

48 How does the proposed power relate to existing powers? Is it stated sufficiently broadly to achieve the intended purpose or subjected to sufficient restraints and controls to meet the demands of principle? The questions are large and important ones. Their brief statement here should not disguise that. The discussion under later headings is relevant to them.

Who should have the power?

49 The legislation in general will make the choice between

- the Governor-General in Council, the Governor-General, a Minister, a chief executive of a department, a named (independent) statutory officer,
- state-owned enterprises,
- other forms of public corporation with a greater or lesser degree of independence from the central government,
- Crown bodies,
- local government bodies,
- courts: District Courts, 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, or with one exercising original powers of decision and the other resolving appeals. (Appeals are dealt with in paras 156-159.)

50 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 one, in which the issue is to be resolved,
- the existence of other safeguards over the exercise of the power,
- 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.

51 Many different examples can be given. A contemporary one is immigration legislation. Under the Immigration Act 1987, there are

- a variety of decision-makers:
  the Governor-General in Council, the Minister of Immigration, immigration officers, the Courts (the District Courts, High Court 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
- who may make a variety of decisions relating to admission to, and deportation from, New Zealand
- by reference or not to express standards or limiting criteria:
  humanitarian grounds, administrative error, fraud, unlawful residence, national security, criminal offending, terrorism ... .

52 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 or the seniority of the decider
- the procedure to be followed
- 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). The 1990 Bill of Rights reaffirms the broad principle: "Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in

respect of that person's rights obligations or interests protected or recognised by law" (s 27(1)), and applies it in the deportation context: "No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law" (s 18(4)). Some of these matters are further considered in paras 65-84 and 102-110 below.

How should the power be exercised?

53 What procedure should be followed? Should the decision-maker

give a fair hearing?
consult?
give public notice and invite comment?
decide on a more summary basis?

54 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.

55 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 50 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 106-110 below.

56 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 and the Local Government Official Information and Meetings Act 1987.

57 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 by way of review and appeal may mean that procedural safeguards need not be accorded at first instance. But that may be a false economy. It is important to aim to get good quality decisions at that stage.

How should the power be stated?

58 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.

59 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 examples. The appeal tribunal may cancel an order issued for the removal of an overstayer if satisfied, first, that because of exceptional circumstances of humanitarian character removal would be unjust or unduly harsh and, second, that allowing the person to remain would not be contrary to the public interest.

60 The legislation might (impliedly as well as expressly) gloss the power in at least two further ways. It might indicate the matters or factors to be considered (or not to be considered) by those exercising the power. And the decision-maker might be obliged or permitted to consider (or not) certain purposes.

61 In this area clear policy decisions and instructions are critical:

- What is the power?
- 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?
- What matters are to be or may be or must not be considered?
- For what purposes may or must the power be exercised and what purposes are improper?

62 So far as possible, those matters should be addressed and clearly answered. The matters are important in both technical and policy senses. (There is for instance a critical difference between the circumstances in which the power can be exercised and the matters for consideration: the former states a prerequisite to action and must be established in the mind of the decision-maker, while the latter indicates matters which must or may merely be considered.) That is the technical matter.

63 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 on the freedom of action of individuals (for example by way of regulations) or things are being taken away from them, 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.

64 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 if so on the qualifications of particular applicants; or on whether a restrictive trade practice exists and if so whether it is contrary to the public interest. Once again these matters should be addressed clearly in the legislation - with the likely consequence that they will be addressed in separate provisions.

The decision-maker: the choice between courts, tribunals and the government

65 How is the legislature, when conferring a statutory power of decision to allocate the power of decision between the courts, tribunals and the government? A fourth possibility is the use of arbitration to resolve the dispute. Arbitration is usually based on the agreement of the parties and is *supported* by legislation. But in some cases it may be *imposed* by legislation. That possibility is considered later, para 84. There are also of course further choices to be made *within* each of those general answers, for instance, so far as the government is concerned, between central and local government, and then between Ministers (and officials), State-enterprises, or other public bodies. See further paras 85-101. The broad choice has already been touched on in paras 49-52.

The following paragraphs are a slightly adapted version of part of the Report of the Legislation Advisory Committee (No 3 of February 1989) on *Administrative Tribunals*. Cabinet has endorsed the recommendations of that report (paras 82-83 below) and the relevant passage is expressly referred to in the Cabinet Office forms set out in Appendix A.

66 The reasons or criteria for the choice of a particular method of decision-making can be considered under three headings:

- the characteristics of the function or power, together with the issues to be resolved and the interests affected; prominent among those interests are the liberty of individuals and their other important rights;
- the qualities and responsibilities of the decision-maker; and
- the procedure to be followed.

The criteria are based on much relevant practice in New Zealand and other similar jurisdictions and in the writing of official bodies and others about the allocation of authority.

The power, the issues and the interests

67 How confined is the power? Does it mainly involve the finding of past facts and the application of precise rules to those facts? Or does it require the making of broader judgments or the exercise of wide discretions looking to the future and to elements of public interest? Does it have a high policy-making content?

68 Elected representatives and responsible governments are fundamental to our governmental and constitutional system. The main principle of our constitution is that it is democratic. Those who for the time being have public power have it within the confines of a democratic system. A central issue is how to draw the line from area to area and time to time between those matters of public decision which are to be handled by those with political responsibility to the electorate and those which are best settled by an independent tribunal or court. 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 (or, at a local level, by the relevant local authority whose members are also responsible to the people).

69 Such political processes and governmental power of decision need not stand alone. They might be complemented by a tribunal. For instance, (1) Ministers might determine the general policy by way of a public direction (see paras 130-134 below) and the tribunal might then apply the policy to particular cases, or (2) a tribunal or other body, such as a commission of inquiry, might have a power to investigate a matter and make recommendations to Ministers who retain the power of decision. The latter power of recommendation is to be found for instance in the environmental area. (While there are cases in which a recommendatory power is conferred on a court, that is most unusual and is contrary to the constitutional function of a court of deciding - especially in disputes between the Crown and individuals. We might add that the basic understanding of the function of a tribunal is that it too decides - subject of course to any appeal or review. In its original and basic meaning a tribunal is a place of judgment, a place of decision.)

70 A more common procedure than such hybrid executive-tribunal methods will be for parliament to settle the broad policy and decide that a specialist body, independent of the executive and with power of decision, is best able to develop and apply the policy 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 specialist tribunal with a multidisciplinary and changing membership 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 arising from the exercise of such functions, see paras 156-159 below, but the special character of that appellate role also emphasises one difference between court and tribunal.)

71 The preceding three paragraphs look at the matter from the point of view of the state, of those in authority seeing to it that policy is properly elaborated and applied. It is critical as well to consider it from the other end, from the point of view of the individuals affected by the exercise of the power. How important are the individual rights and interests which may be affected by the exercise of the power? Is personal liberty involved? Do the rights justify or require elaborate and careful protections by a formal process supervised and applied by a body which is clearly independent of the government? Against that may be important public interests which suggest that the state should have a substantial or final power of decision. In general however the more serious the consequence of the decision for individual

rights and interests (for example the possibility of imprisonment or detention) the greater the need for the protection of the person affected - in terms of

- the independence of the decision-maker (court or tribunal rather than executive) or, if it is to be the executive, the seniority of the person with power of decision (Minister or even Governor-General rather than officials),
- the procedure to be followed (a right to be heard and to call witnesses rather than no express procedural protections at all),
- the specificity of standards, criteria and rules for decision, and
- rights of appeal and review.

72 Constitutional principles, legislative practice, natural justice as developed and revived by the courts, and relevant international standards all give very strong support to that proposition. Early English translations of the central promise of Magna Carta require "due process" from the state. As the public powers to interfere with rights and interests grow, many statutes have required greater procedural protections (sometimes using the phrase "principles of natural justice"). The courts have long shown themselves willing to "supply the omission of the legislature" if a statute which confers public power to affect rights and interests is silent about procedural protections. And the relevant international standards, including the right to a fair trial by an independent and impartial tribunal in the determination of rights and obligations in a suit at law, are being given a liberal reading by some, see, eg, Report of the Committee of the Justice - All Souls Review of Administrative Law in the United Kingdom, *Administrative Justice - Some Necessary Reforms* (1988) 256-258; see also 376-380. Sections 21-27 of the Bill of Rights Act give added emphasis and detail, as partly indicated in para 52 (see further Appendix C).

73 The right to personal liberty and especially to freedom from arbitrary imprisonment and detention of course fall within such principles. But the range of rights and interests to be protected by institutional and procedural safeguards may vary from one context and time to another as the assessment of the value of these rights and interests varies.

74 A large volume of relatively routine matters might provide a quite different reason for using a special tribunal especially at first instance rather than a general court. In some cases, this tribunal might be a public servant acting as an independent officer and usually subject to a full right of appeal to the courts. (This is true of many registration and intellectual and industrial property functions.) This relates also to the third of the general matters noted in para 66 above - the procedure to be followed. But the second matter, the decision-maker, is next to be considered.

The qualities and responsibilities of the decision-maker

75 This matter looks back to the characteristics of the issues and the function of the decision-maker and, indeed, forward to 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 in that field), 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. And the nature of the decisions to be made about the registration or approval of medicines, poisons and pesticides may dictate both much of the process to be followed in making those decisions and the qualifications of the decision-makers.

76 The nature of the issues and of the judgments to be made may affect not only the criteria for the appointment of tribunal members, but also the method and the terms of appointment. To stress the independent character of the tribunal, the Minister of Justice or Attorney-General should usually have the major role or at least be involved in the appointment (for instance by way of consultation) and there should be some security of tenure; but the relevant departmental Minister will often also - and rightly - have a role, given the greater policy component in the function. That matter also explains why party caucuses usually have a role in respect of tribunal appointments, but have none at all with judicial appointments. Tribunal appointments are also usually for a fixed term. That is often desirable. Among other things it acknowledges that the assessment of the relevant public interests can evolve, and change.

77 On the other hand the issues in some situations - for instance of law and fair procedure - might be such that judges in courts of general jurisdiction, with the traditional independence and other attributes of that office, are the appropriate people to determine them. There might be a case for specialisation within the general court as with the Family Courts. Another possibility, again seen in the Commerce Act, is to add expert members to the general court. A further variation in an appeal context is to limit the issues which a general court can consider, as mentioned at the end of para 70.

78 By contrast with the foregoing, the character of the issues and of the function might be such that Ministers should take responsibility. This could be so, for instance, if the policy and public interest components of the decision predominate. They might be such that elected Ministers accountable to the electorate should have the power of decision. Our law and administration has a democratic base.

The procedure to be followed

79 The three categories of decision-makers - court, tribunals, and the executive - have their characteristic procedures. Those different procedures, it can quickly be seen, are more apt for dealing with some issues than others. A court process is designed, for example, to resolve, through adversary presentation and testing of evidence and argument, disputes about facts and law. Sometimes that will require the formal, structured presentation of evidence and arguments. Tribunal procedure by contrast is usually less formal, with the rules of evidence being relaxed in almost all cases. Tribunals are sometimes expected to take an active

inquisitorial role in contrast to a more passive court which is dependent on the parties to bring the relevant material before it. Tribunals are still however bound by the principles of natural justice. The less structured processes of ministerial decision-making may extend out to the relevant sources of information and opinion (expert and political) in the community, without rules about notice, disclosure and opportunities for rebuttal. Those processes do not require the kind of organised and complete record that a court and many tribunals must assemble. Those who decide will often not have "heard" all the material relevant to decision. Such procedures are better able to determine, say, the nature and characteristics of a new taxation regime.

80 Procedures within courts and within tribunals can of course vary greatly, and that is even more true within the executive. The procedures can be more or less formal, more or less speedy and more or less costly. Those considerations may also themselves justify the use or establishment of a tribunal instead of a court. Thus the Small Claims Tribunal (now the Disputes Tribunal) was established to deal in an expeditious, informal, private and less costly way with small claims which otherwise come within the regular court jurisdiction. The issues might by contrast be so significant or difficult that a more elaborate and formal process is required.

81 Tribunals often are more accessible and less costly and allow a greater range of individual and public participation. In the courts a party who wishes to be represented is usually required to engage a lawyer. Tribunals frequently operate without the assistance of lawyers and indeed the use of lawyers is prohibited or limited in some tribunals concerned with private law matters in the interests of informality and lower costs. However, in some tribunal cases the interests involved will be very large, the issues complex and many, and parties will wish to be represented by counsel and to engage in a relatively formal process - which in consequence may well be, in part, as costly and time consuming as major litigation in the High Court. But in the usual case the procedural advantages will be available. Legal aid can be important in either event and is provided for in the Legal Services Act 1991 s 19.

Conclusions

82 As Appendix A indicates, the Government has specifically required that the criteria set out above are applied in relevant cases. To recapitulate, the criteria relate to

- the characteristics of the powers, the issues to be resolved and the interests affected (paras 67-74),
- the qualities and responsibilities of the decision-makers (paras 75-78), and
- the procedures they follow (paras 79-81).

83 In many situations the above criteria may be met by a combination of (1) officials (often acting in a summary administrative way) making the first decision and (2) an independent tribunal, following the principles of natural justice, determining appeals from the first administrative decision. This is particularly so where the volume of decision-making is large

and the great bulk of the decisions involve no or little difficulty. Such an approach should not of course involve an assumption that those first level decisions are not important. The characteristics of courts are considered further in the report of the Law Commission *The Structure of the Courts* (1989 NZLC R7) especially chs I and II.

84 Arbitration presents a further means of resolving of disputes. Usually arbitration is based on the consent of the parties. They agree to that method. But there are statutes which impose (or appear to impose) that method on the parties. The Committee has recently further considered this matter in consultation with the Law Commission. Both bodies see the force of the argument that arbitration will sometimes have real practical advantages for settling some disputes arising under statutes even if the matter is not submitted by agreement. Further, in some cases there will in fact be a consensual element. Accordingly, the Commission included in the draft statute proposed in its report, *Arbitration* (NZLC R 20) a provision to similar effect to that included in the 1908 and 1938 Acts (see s 7 and the commentary in Chapter VII, paras 219-223). What is required in each particular statutory area is an assessment of the general principles and the aptness of the different methods of dispute settlement. The assessment should be undertaken when methods are being considered for inclusion in new or revised statutes.

The Law Commission and the Committee also made some more specific proposals and comments on the legislative choice between court, tribunal and arbitration:

- The choice of the statutory language should be made carefully and consistently. While some statutes make it explicit that the arbitration they provide for is to be considered "a submission" and that the Arbitration Act accordingly applies, others leave the matter in doubt. So several enactments relating to licensing and education simply provide for decisions to be taken by an "arbitrator" without making it clear whether the 1908 Act is or is not to apply. The person might equally have been called a tribunal or authority, or indeed not have been given any title at all; that is especially the case if the appointment is made by a person not involved in the dispute. Given the provisions of s 25 of the 1908 Act and the proposed replacement, the word "arbitration" or "arbitrator" should be avoided in statutes unless the intention is to invoke the general law of arbitration, or unless the particular statute sets up a complete regime.

- Some statutory arbitrations are powers of reference: a person with a power of decision might be empowered to refer an issue, with or without the consent of the parties, to an "arbitrator" who is to report back. In that case "referee" is a better term and the relevant procedure should be established.

- Several of the provisions are based on agreements between the disputing parties, for instance legislation relating to building societies and credit unions, or legislation (especially local Acts) incorporating agreements between public bodies. Arbitration is more appropriate in these cases.

- A common subject matter of the statutory arbitration provisions, as of regular arbitration, is valuation - for instance of leases or licences. The relevant processes under those particular statutes may, as well, involve a consensual element. The

experience of the land valuation tribunals should also be kept in mind.

- A review of existing provisions (including those in the area of local government) should take account of their historical origin. They can sometimes be explained by the fact that statutory arbitration was introduced on a basis that the issues, particularly on valuation, were not appropriate for courts. Arbitration, despite the general distrust of it then current was the only obvious alternative. Tribunals had not then been "invented".

- Sometimes there will be a public interest element in the decision under the statute that will make a private arbitration with its consensual emphasis inappropriate.

Accordingly, the Committee and the Law Commission recommended that those considering including provisions for statutory arbitration in new or revised legislation examine the advantages and disadvantages of the range of methods of dispute resolution.

Executive government

85 The previous section treats the executive (within the choice between the executive, tribunals and courts) as a single entity. It is not, of course. There is the choice between central government and local government. Within the latter there are further choices. The following paragraphs relate to the bodies established within central government.

86 There is a continuum of bodies exercising public power at the level of central government. At one end is the standard Minister-department relationship and along it various forms of independent or partly independent power. The legal structures should reflect that continuum and the reasons for greater or lesser autonomy. Recent legislation has given a sharper definition to four distinct institutional forms:

- departments of state (often called Ministries)
- offices of Parliament
- state-owned enterprises
- other Crown bodies.

87 The members of the first three categories are clearly identified in the State Sector Act 1988, the Public Finance Act 1989 and the State-Owned Enterprises Act 1986. The Public Finance Act (in provisions which are still being refined) identifies a category of "Crown agencies" and several particular bodies (such as those involved in tertiary education) have been expressly made Crown agencies by particular enactments. It is convenient to consider offices of Parliament here. They are not, of course, part of the executive government as usually understood.

Departments of state

88 The First Schedule to the State Sector Act 1988 lists the departments of state. They have a variety of names (mainly Department or Ministry but also, Office, one Corporation (Housing), and one Commission (State Services)), and a great variety of functions with differing balances between advisory, operational or service provision functions. While there is a relevant Minister in each case, the Ministerial power and responsibility varies from being extensive, as with policy and many operational functions, to limited or almost non-existent, as with the independent statutory and other functions of the Inland Revenue Department or the Public Trust Office. The recent reforms have led to a greater emphasis on the policy and related roles - those subject to greater Ministerial scrutiny - and to other roles being transferred to state enterprises or Crown agencies. But the operational role of Departments is still major and critical, in respect for instance, of natural resources (such as the Department of Conservation) or transfers of money (such as the Department of Social Welfare).

89 Constitutional principles and legislation relating to the public service support four broad propositions (among others). Members of the public service are:

1 to act in accordance with the law;

2 to be imbued with the spirit of service to the community;

3 (as appropriate) to give free and frank advice to Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;

4 when the law so provides, to act independently in accordance with the terms of the law.

90 The Committee's report on *Departmental Statutes* (1989, Report 4) has largely been accepted by the Government and acted on in practice by Parliament. The report arose out of the common (but not invariable) practice of Parliament enacting statutes which establish departments of State. The Committee reached the general conclusion that such legislation is usually not necessary and, as already mentioned (para 18), much legislation can be and has been avoided as a consequence. The Committee stated the following conclusions and recommendations:

1 Departmental statutes and related legislative provisions should not in general be enacted.

2 Legislation should not in general confer functions on departments; rather it should confer functions on the Governor-General (in Council), Ministers or officials.

3 Legislation should not in general name specific Ministers or relate officials to particular departments; rather the reference should be general ("a Minister of the Crown", "the Registrar appointed under the State Sector

Act 1988". In some cases particular Ministers are however quite properly specified as having a statutory power.

4 Parliament should have to approve the addition of new departments to the list of departments scheduled to the State Sector Act 1988, as well as deletions and alterations.

91 The fourth recommendation has not been adopted as a general proposition (by an amendment to the State Sector Act). However, in particular cases it is often complied with since a statute is required if a department is to be abolished, as is generally the case when new bodies are being established. A fifth recommendation for the publication of a table of functions of Ministers, departments and statutes for general information purposes has yet to be taken up.

Offices of Parliament

92 The Public Finance Act 1989 identifies four offices as offices of Parliament - the Controller and Auditor-General together with the Audit Office and Department; the Office of the Ombudsmen; the office of the Parliamentary Commissioner for the Environment; and the office of the Wanganui Computer Centre Privacy Commissioner. Their distinctiveness from the other categories of public bodies is emphasised by the provisions in that Act and by the practice of the House for the handling of their estimates of revenue and expenditure. The relevant Chief Executive submits the estimates directly to the House and they are considered by an Officers of Parliament Committee, chaired by the Speaker.

93 While the Public Finance Bill was being considered, the Finance and Expenditure Committee reported on Officers of Parliament and the Government largely accepted the recommendations, 1989 AJHR I 4B and 1987-1990 AJHR I 20 p 113. The Finance and Expenditure Committee stated the essence of Officers of Parliament in this way; their primary function

> should be as a check on the Executive, as part of Parliament's constitutional role of ensuring accountability of the Executive (para 5.1.1)

The recommendations relating to the creation of an Officer of Parliament, accepted by the Government, indicate the essential characteristics of such officers:

1 An Officer of Parliament must only be created to provide a check on the arbitrary use of power by the Executive.

2 An Officer of Parliament must only be discharging functions which the House of Representatives itself, if it so wished, might carry out.

3 Parliament should consider creating an Officer of Parliament only rarely.

4 Parliament should review from time to time the appropriateness of each Officer of Parliament's status as an Officer of Parliament.

5 Each Officer of Parliament should be created in separate legislation principally devoted to that Office.

94 The special character of such offices is also to be reflected in the method of appointment:

8 That the Parliamentary Officers Committee recommend the appointment of an Officer of Parliament to the House, and appointment be made by the Governor-General on the recommendation of the House of Representatives.

The latter part of that recommendation is the law for the positions mentioned with the exception of the Controller and Auditor-General for which new legislation has yet to be enacted.

State enterprises

95 Government trading organisations have operated for much of New Zealand's history. The State-Owned Enterprises Act 1986 provides the general legal framework for most of those which operate at the moment. According to its title, it is

> An Act to promote improved performance in respect of Government trading activities and, to this end, to -
>
> (a) Specify principles governing the operation of State enterprises; and
> (b) Authorise the formation of companies to carry on certain Government activities and control the ownership thereof; and
> (c) Establish requirements about the accountability of State enterprises, and the responsibility of Ministers

The principal objective of every State enterprise is

> to operate as a successful business and, to this end, to be -
>
> (a) as profitable and efficient as comparable businesses that are not owned by the Crown; and
> (b) a good employer; and
> (c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so. (s 4(1))

The Act recognises that the enterprise may have non-commercial roles and that Ministers also have relevant responsibilities.

96 The Act establishes systems of accountability by the enterprises, for instance to Parliament (including the Audit Office) and by being subject to the Ombudsmen Act 1975 and the Official Information Act 1982. The continued application of those Acts to the enterprises was reviewed after two years and the Government accepted the relevant select committee's recommendation that the Acts should continue to apply, with some amendment (among other things by extension to subsidiaries of the enterprises), report of the State-Owned Enterprises (Ombudsmen and Official Information Acts) Committee 1990 AJHR I 22 A and the Finance Bill (No 4) cls 11-16.

Other Crown bodies

97 The Public Finance Act 1989 indicated the existence of a fourth category of bodies which it called *Crown agencies*. The relevant provisions of the Act have not yet in general come into effect and further work is proceeding, see, eg, 1989 AJHR I 4C pp 13-14, 26; and 1991 AJHR I 4A (proposing among other things that the expression "Crown-owned entity" be used).

98 At this stage it is possible to indicate the types of bodies which fall or may fall within this residual grouping, some of their characteristics, and some of the implications of coming within the grouping. The concern is with bodies set up *by statute*, not under common law or prerogative powers. The following types of bodies can be identified:

(1) *administrative tribunals* which in general have powers to decide disputes between the state and individuals or between individuals; some of them have separate funding but others are administered by departments; examples are the Commerce Commission and the Planning Tribunal; see further paras 65-84 above and 102-110 below;

(2) *funding bodies* supporting education, research, arts and culture, recreation and sport, community projects, relief and assistance, and other public and charitable purposes;

(3) *advisory bodies* with powers to give advice to the government and often more widely in areas of public policy and public interest; see the Legislation Advisory Committee's discussion paper on *Public Advisory Bodies;*

(4) *bodies providing services* in the public interest in a wide range of areas: roading and fire services, health and rehabilitation, superannuation and social welfare, education and training, museums and libraries, the protection of cultural and historical heritage and of the environment;

(5) *trading corporations* which are not state enterprises under the 1986 Act (paras 95-96 above); some might also come under the previous heading, eg, Earthquake and War Damages Commission, Export-Import Corporation and New Zealand Government Property Corporation;

(6) *control and supervisory bodies* other than those which are offices of Parliament or tribunals; the Commissioner for Children, the Police Complaints Authority, the Human Rights Commissioner and the Race Relations Conciliator (both of which might equally be under (3)).

There are also the producer boards, and some bodies with local responsibilities might be seen (for instance because of their funding or ownership) as Crown bodies such as airport companies, area health boards, and educational bodies.

99 The bodies can be characterised as public or Crown bodies by reference to their functions, their membership (including the methods of appointment and removal), their funding, the control by Ministers over their agenda, the power to give them directions, the extent of their power, and other Ministerial powers, for instance over the number and funding of staff.

100 The consequences of falling within the broad grouping relate to the reporting, including the financial reporting, of the body, the preparation and approval of its estimates, the application of a rather standard set of financial provisions, and the application of the Official Information Act and sometimes the Ombudsmen Act. The general point is that the bodies are separate from the regular departmental system but that they are still within the broad scope of the Crown. The particular elements of the relationship to Ministers depends on the specific characteristics of the body. But those elements should be accommodated with the general principles and the standard forms which are being developed.

101 The Government has accepted the following recommendations of the Finance and Expenditure Committee in the ways indicated:

Recommendation 3:

The tests which should be used to determine whether an entity is a Crown-owned entity are as follows. Crown-owned entities are those bodies corporate other than SOEs:

- in which the Crown owns a majority of the voting shares; or
- for which the Crown has the power to dismiss a majority of the members of the governing body or, where no such body exists, has the power to dismiss the chief executive, and replace the governing body or the chief executive with a governing body or a chief executive which is primarily responsible to the Crown; or
- for which the Crown has the right to more than fifty percent of their net assets on their disestablishment; or
- in respect of which the Crown would be expected to assume any residual liabilities other than pursuant to a guarantee; or
- which Parliament considers to be owned by the Crown and deems to be Crown-owned entities.

Response:

The Government agrees that these tests should be used to determine whether an entity is a Crown-owned entity.

Recommendation 4:

In legislation "Crown-owned entity" should be defined primarily by reference to a Schedule to the Public Finance Act 1989 listing entities owned by the Crown. If technically possible, the legislation should also include the tests identified by the committee for determining ownership by the Crown.

Response:

The Government agrees that in order to provide certainty, for the purposes of Part V of the Public Finance Act 1989 "Crown-owned entity" should be defined by reference to a new *Schedule* to the Act listing entities owned by the Crown. For the purposes of Part III of the Act, the tests in recommendation 3 should be used to define comprehensively the scope of the Crown reporting entity.

Recommendation 6:

The Schedule should be able to be amended by Order in Council only to add Crown-owned entities or to make technical amendments, such as a change in the name of a Crown-owned entity. Deletions from the Schedule should be able to be made only by Act of Parliament.

Response:

The Government agrees that such a provision should be included in the Public Finance Act 1989.

Recommendation 7:

The guidelines for the preparation of legislation formulated by the Legislation Advisory Committee and adopted by Cabinet should be amended so that all bodies being created by statute are as a matter of course considered for inclusion in the Schedule to the Public Finance Act 1989.

Response:

The Government agrees that the guidelines should be amended in this way and will have them amended at the time of the amendment to the Public Finance Act 1989.

Tribunals

How should the tribunal be constituted?

102 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.

103 Some statutes indicate criteria relevant to appointment (eg, para 75 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 by reference to two features at least of the operation of tribunals - their procedure, and the interpretation of the legislation governing the tribunal's work.

104 In general the members should be appointed by the government without the parties having any formal role. 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. Exceptionally the parties may have a role, for instance, when the legislation adopts arbitration as the means of resolving the dispute.

105 The appointment should in general be for a term of at least three years and terminable only for good reason such as disability. The reason for this requirement 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 particular government direction.

What procedure should the tribunal follow?

106 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 parties affected are likely to consider the decision a fairer and better one if they have had reasonable opportunity to present their cases and to answer anything prejudicial to their interest. The tribunal is also likely to come to a better decision if such a procedure has been followed. This matter has already been addressed in a general way in paras 50-57 and 79-81 above. Section 27(1) of the Bill of Rights (in para 52 and Appendix C) contains a relevant general statement of the principle.

107 As already noted, tribunal characteristics and powers vary greatly. The particular tribunal might decide or merely recommend. It might recognise and protect existing rights or it might confer and perhaps withdraw discretionary privileges. It 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 the establishment of tribunals, as we have seen, also vary.

108 Nevertheless, the basic principles are broadly agreed, and much tribunal legislation covers the same set of matters in identical or similar ways. The Public and Administrative Law Reform Committee addressed the question of appropriate procedures for tribunals in its sixth report (1973) paras 15-50. The Department of Justice subsequently reviewed the practice of conferring powers on tribunals by reference to the Commissions of Inquiry Act 1908 and concluded that it is inappropriate to confer powers on tribunals in this way. In consultation with that Committee it prepared a draft Tribunals Procedure Bill. The powers have been carefully tailored to the needs of tribunals. All departments have a copy of the draft Bill. Its draft provisions should be borne in mind when legislation which creates or continues tribunals is being prepared.

109 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

110 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.

Regulations and other subordinate lawmaking

111 It is Parliament which has full powers to make law. That power is not however an exclusive power. For one thing the Crown has limited prerogative (or common law) powers to legislate (principally in time of war). Much more important is the long established, justified practice of Parliament conferring powers on other bodies to make law - that is conferring delegated or subordinate legislative power. That practice can be considered by reference to five questions:

(1) In what circumstances may lawmaking power properly be delegated?

(2) To whom should the power be delegated?

(3) What procedure should be followed in the making of the regulations?

(4) How should the power be defined?

(5) What additional controls should there be over regulations once made?

112 The enactment in 1989 of the Acts and Regulations Publication Act and the Regulations (Disallowance) Act together with the establishment in 1985 of the Regulations Review Committee, the making of important changes to the Standing Orders of the House of Representatives also in 1985, and the repeal of broad regulation-making powers have both consolidated established principle and introduced some significant changes.

113 The 1962 Delegated Legislation Committee and the Regulations Review Committee have recognised that there are good reasons for the delegation of lawmaking power. They have also stated the principles which should govern and confine such delegation.

114 The line between the primary and the delegated lawmaker should in general be that between principle and detail, between policy and its implementation. Parliament with its representative composition and through its public processes should address and endorse (or not) the policies presented to it by the executive, while recognising that matters of less significance or of a technical character, or requiring rapid adaption or experimentation might be left to subordinate lawmaking. Another situation in which lawmaking powers might be and are delegated - and in broader terms -is to deal with emergencies. (*Report of the Delegated Legislation Committee* 1962 AJHR I 18, and Report of the Regulations Review Committee on *Regulation Making Powers in Legislation* 1986-87 AJHR I 16A paras 5.1-5.6, 8.1-8.5 and 14.2. See also Law Commission, *Final Report on Emergencies* (1991 NZLC R22)). The usual form of the empowering provision which reflects those principles and particularly the limit on the power is set out in para 121.

115 Two recurring aspects of delegated legislation power concern the amendment of Acts by regulations and the imposing of taxes by regulations. The Regulations Review Committee in 1986 confirmed that

> Parliament has constitutional responsibility for imposing or varying taxation; while the authority to amend Acts of Parliament should lie with Parliament itself. It follows that these are two ... categories of legislation which Parliament should delegate only in exceptional circumstances. The Committee recognises that one such circumstance is provision for emergency. (Report on *Regulation Making Powers in Legislation* 1986-1987 AJHR I 16A para 4.1)

116 Parliament has given added emphasis to the principle relating to taxation in its reaffirmation of article 4 of the Bill of Rights 1688 in the Imperial Laws Application Act 1988 and in the Constitution Act 1986, s 22 of which provides that it is not lawful for the Crown to levy a tax except by or under an Act of Parliament. The Regulations Review Committee has further considered the matter, and has emphasised the principle that the Crown must seek the prior authority of Parliament to extract from the public any money for the purposes of the Crown when the extraction is compulsory, is for public purposes, and is enforceable by law, (*Report into the Constitutional Principles to apply when Parliament empowers the Crown to change fees by regulation* 1989 AJHR I 16C para 11.1). The Government in its response has endorsed the Committee's reaffirmation of the basic constitutional principle. The Committee has also emphasised that if the amount of a "fee" fixed by regulation under statutory authority exceeds the value of that which is acquired, that fee is properly to be seen as a tax, requiring distinct authority. In practice the Committee is likely to be guided by the *Guidelines on Costing and Charging for Public Sector Goods and Services* (Audit Office, May 1989)

To whom should the lawmaking power be delegated?

117 Practice indicates a wide range of possible answers to that question. Within central government the Governor-General in Council, a Minister or an official are among those who may have the power delegated to them. Local government agencies have extensive by lawmaking powers under the Local Government Act 1974. And then there are bodies independent (or relatively so) of elected government, such as occupational and professional bodies. In some situations, such as the last, there may be a further legitimating factor of contract or election: for instance the members of a profession might agree to a certain rule-making procedure and they might elect the persons who exercise the rule-making power; or those pursuing tertiary education might be seen as consenting to the powers of the institution to adopt course or disciplinary regulations. In some situations, indeed, it may be more appropriate to see Parliament as recognising powers already existing in the group rather than as delegating new powers.

118 The choice within central government between the Governor-General in Council, a Minister and an official (usually a chief executive) should have regard to the importance of the power (for instance in its potential impact on individual rights and interests or by the creation of offences), and the safeguards available before the power is exercised (for instance

by way of the involvement of Parliamentary Counsel and Cabinet) and after (for instance by publication, tabling in the House and scrutiny and possible disallowance there). Accordingly, relatively technical matters, not subject to criminal sanction, might be regulated by a Minister or official rather than by the Governor-General in Council. Codes of practice, to be found for instance in safety areas, which do not directly create legal rights and obligations, might also be promulgated by a Minister alone. So too might a statement of government policy which indicates the way in which a broad Ministerial discretion to confer privileges or benefits is to be exercised. In some of those cases there may be obligations of consultation with those affected and special requirements for publication and notification. The choice of the level of decision-maker should have regard to their responsibility and relevant expertise and to the range of safeguards available before and after the making of the rules. The choice of decision-maker should not be made with the purpose of escaping appropriate safeguards.

What procedure should be followed in the making of regulations?

119 The law usually imposes no procedure on regulation-making other than the basic requirement that the Governor-General make the regulations by Order in Council, that is with the advice and consent of the Executive Council. There is for instance no general formal requirement of notice and 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, expressing a concern to encourage and extend the practice of consultation, has proposed in its report on *Regulation Making Powers in Legislation* that

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

(ii) Those responsible for the preparation of regulations are to give particular attention to the desirability of the fullest possible notice to and consultation 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. (1986 AJHR I 16A para 9.7)

The discussion earlier in the report (paras 21-29) of the means and values of consultation is also relevant.

How should the empowering provision be drafted?

120 In 1961 the government directed that a particular form of empowering clause be used in bills. That direction was endorsed by the 1962 Delegated Legislation Committee and in 1986 by the Regulations Review Committee in its report on *Regulation Making Provisions*. With only limited exceptions, the formula has also been adopted in legislative practice. To quote the 1986 Report the formula was designed to ensure that the precise limits of the lawmaking power conferred by Parliament were set down as clearly as possible in the enabling Act and

that the jurisdiction of the courts to review subordinate legislation and to determine its validity was not excluded or reduced (para 5.2). The power is to remain subordinate.

121 The basic formula is to the following effect:

> The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
>
> (a))
> (b)) (Paragraphs specifying purposes with as much particularity and precision as possible)
> (c))
> etc
> (f) Providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for the due administration thereof.

The two main changes from the formula generally used in earlier statutes were the transfer of a general power (expressly declared not to be limited by the specific matters) to the bottom of the list to deal with subsidiary or incidental matters, and the removal of the reference to the opinion of the Governor-General. The Regulations Review Committee has recently considered the final, standard paragraph set out above and was satisfied with the explanation given about the current use of the power. It appreciated that the general nature of the provision is to enable subsidiary and incidental matters to be provided for legally. It did however express concern that the provision not be used to broaden the scope of regulations and include other matters that would be more appropriately dealt with by parliamentary enactment (*Regulations Review Committee 1990* AJHR I 16 p 5).

122 Both the 1962 and 1986 reports recommended that appropriate opportunity should be taken to amend pre-1961 statutes which contain the old broad, subjective formula. While, as noted, some of the Acts containing the major examples of those powers have been repealed, some still remain.

123 One of the specific functions of the Regulations Review Committee is to examine empowering provisions in Bills introduced into Parliament. Its reports on this as on other matters show that its examination may lead to significant changes in measures.

What controls should there be over regulations once made?

124 The general controls include those found in the Acts and Regulations Publications Act 1989 and the Regulations (Disallowance) Act 1989 and in associated standing orders of the House, especially those relating to the Regulations Review Committee.

125 All regulations are to be published in the regulation series, in conformity with the constitutional principle that the law should be made known to those who are to comply with it. The role of the House of Representatives in respect of the exercise of the power it has delegated is marked first by the requirement that regulations be laid before the House. Standing Orders also provide that all regulations stand referred to the Regulations Review

Committee. Further, under the Regulations (Disallowance) Act 1989 the House can by resolution disallow, amend or substitute regulations for those made by the executive. The Standing Orders set out the grounds which the Regulations Review Committee is to apply in examining regulations. The Committee has emphasised that its responsibility, as a bipartisan committee, is to provide technical scrutiny of regulations. It is for the House itself to consider the policy issues raised by regulations, that is, the merits of those regulations (1986 report para 8.2). The Committee decides whether to draw the special attention of the House to the regulation on the ground or grounds that the regulation:

(a) is not in accordance with the general objects and intentions of the statute under which it is made;
(b) trespasses unduly on personal rights and liberties;
(c) appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
(d) unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal;
(e) excludes the jurisdiction of the courts without explicit authorisation in the enabling statute;
(f) contains matter more appropriate for parliamentary enactment;
(g) is retrospective where this is not expressly authorised by the empowering statute;
(h) was not made in compliance with particular notice and consultation procedures prescribed by statute;
(i) for any other reason concerning its form or purport, it calls for elucidation.

(SO 389(1))

126 In some circumstances, Parliament will reserve to itself greater control over regulations than the control ordinarily exercisable through the Committee procedure, by requiring that as well it confirm regulations. In the absence of that confirmation, the regulations will lapse. This additional control will be justified where the delegated power is a significant or broad one.

The Regulations Review Committee has recommended that the desirability of including a confirming provision in a proposed Act should be examined when statutory provisions delegating powers to make the following regulations are being drafted:

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

(1986 report, paras 8.1-8.5)

Such a proposed provision should as well prompt the preliminary inquiry whether delegated power is being properly employed. The matters might be ones more properly covered by Act.

127 A recurring technical issue with important consequences in terms of the questions asked in this section is the definition and scope of "regulations". The definition for the purposes of the Regulations (Disallowance) Act 1989 is as follows:

> "Regulations" means -
>
> (a) Regulations, rules, or bylaws made under the authority of any Act -
> (i) By the Governor-General in Council; or
> (ii) By any Minister of the Crown:
>
> (b) Instruments, other than Acts of Parliament, which revoke regulations:
>
> (c) Orders in Council, Proclamations, notices, Warrants, and instruments of authority made under any Act by the Governor-General in Council or by any Minister of the Crown which extend or vary the scope or provisions of any Act:
>
> (d) Orders in Council bringing into force, or repealing, or suspending any Act or any provisions of any Act:
>
> (e) Rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand:
>
> (f) Instruments deemed by any Act to be regulations for the purposes of the Regulations Act 1936 or this Act.

That is widened by the Acts and Regulations Publication Act 1989 and for the statute book as a whole by the Acts Interpretation Act 1924 s 4 to include any resolution of the House revoking, amending and substituting regulations.

128 For the most part there is no difficulty in determining whether a particular instrument is a regulation within those definitions. But that is not always so, especially with an Order in Council which applies an Act to a defined situation; does such an Order "extend or vary the scope or provisions of [that] Act" (or any other)? There is no general answer to that question since the word "Order" can be used for administrative or judicial acts as well as for legislative ones. The Regulations Review Committee recommended that when powers are being delegated, consideration should be given to the desirability of including a provision making it clear whether the exercise of those powers is within or outside the provisions of the regulations legislation (1986 I 16 A para 7.5 and I 16 B para 44.3). That recommendation is reflected in para (f) of the definition included in the Regulations (Disallowances) Act 1989 set out above.

129 The issue is not simply a technical one. The consequences for the processes of the making of, and control over, the instrument are also important. When powers to promulgate government policy are being conferred by statute, the question should be asked whether the forms and controls applicable to regulation-making should appropriately be applied. In some cases, the appropriate statutory power may be to give directions. That is considered next.

Powers to give policy directions to tribunals and independent administrative bodies

130 The Public and Administrative Law Reform Committee in its 19th Report (1986) made recommendations about statutory powers to give policy directions to independent bodies. The scope of the report was determined by two matters

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

131 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. The rights, duties and interests of those affected by those decisions and the exercise of those powers may accordingly be altered by the direction. Because of its legislative force, the question may arise whether the power should not be exercisable by way of regulation-making.

132 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, discussed in paras 85-91 above. 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.

133 The Committee recommended as follows:

- 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.
- Directions should be given in writing.
- 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.

- 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.

- Before a policy direction is given, the government should, wherever practicable, consult with individuals and organisations likely to be affected by the direction.

- 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.

134 Legislation enacted since the report was completed has in general conformed with those recommendations. The broad thrust of the principles may also be seen in the provisions of the State-Owned Enterprises Act 1986 regulating the relations between the shareholding Ministers and the directors of the enterprises.

Powers of entry and search

135 In the past decade substantial consideration has been given to the principles which should govern and the practice which should apply to powers of entry and search. The Bill of Rights Act 1990 affirms certain civil and political rights, and by s 21 gives everyone the right to be protected against unreasonable search or seizure of the person, of property or of correspondence. Two major reports have influenced the approach to these issues in statutes. Each review stressed that the competing interests of society and individuals must be balanced, with appropriate weight being given to time, place, circumstance and the importance of the activity involved. The studies indicate that adherence to appropriate principles does not necessarily result in increased cost or any impairment of function. Cooperation will be more likely to flow from clearly defined objective powers than what is perceived as overbearing officialdom exercising powers arbitrarily.

Principles

136 The Public Administrative Law Reform Committee in its 17th report (1983) identified the following principles against which powers of entry should be measured:

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, they should be entitled to challenge the need for the work, and the cost of it, in the courts.

14 Where an enactment provides for compensation for damage occasioned by 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.

Recommendations of the Search and Search Warrants Committee

137 The final report of the Search and Search Warrants Committee (1988) concluded that different approaches were required depending on whether or not there was a belief that an offence had been committed.

138 Where such a belief exists, the principles recommended were:

1 Every power of search should be contained in a statute.

2 Every search should be by consent or under a warrant unless there are compelling reasons to the contrary.

3 All searches of dwellinghouses should be by consent or under a warrant.

4 When a warrant is required:

(a) it should be issued only after independent judicial consideration of the application;

(b) all applications should be made in writing and on oath;

(c) persons applying for a warrant should disclose previous applications made in respect of the same matter;

(d) a warrant should be issued only if there is reasonable ground for believing that an imprisonable offence has been committed or is intended to be committed or where a power of search under a warrant is given by any Act in relation to a non-imprisonable offence;

(e) the person or persons who are to execute the warrant should be specified by the authority issuing the warrant;

(f) the issuer of a warrant should be empowered to impose reasonable conditions on the execution of the warrant;

(g) the warrant should authorise entry for search and seizure on only one occasion at a time reasonable in the circumstances within a determined period from its issue;

(h) persons executing the warrant should have it with them and produce it upon initial entry and response to any reasonable request thereafter;

(i) persons executing the warrant should be permitted to have such assistance as is reasonable in the circumstances;

(j) persons executing the warrant should be permitted to use such force as is reasonable in the circumstances;

(k) persons executing the warrant should be permitted, on reasonable grounds, to search persons present when the warrant is executed;

(l) persons executing the warrant should be empowered to search for and seize anything specified in the warrant;

(m) persons executing the warrant should be empowered to seize anything else seen that is evidence of an offence for which such a person could have obtained a warrant;

(n) information provided to support an application for a warrant should be made available only if a Judge orders.

5 Where the owner or occupier of the place or thing searched is not present at the time the search is made then that person should be informed promptly of the search unless a Judge, on application, orders otherwise.

6 Persons who have searched a place or thing should provide the owner or occupier with a schedule of any items seized, indicating the place from where they were taken and where they are held unless a Judge, on application, orders otherwise.

7 Evidence obtained in breach of the statutory rules of search and seizure should normally be inadmissible.

139 Where there is an intrusion, however described, and whether exercised by the Police or any other enforcement authority and whether or not based on a threshold requirement of reasonable belief that an offence has been committed, the following principles were recommended:

1 The power shall be exercised only at a time which is reasonable in all the circumstances.

2 Persons authorised to exercise such a power shall produce a means of identification and shall also give notice of the legal source of the power being relied upon before the power is exercised and also in response to any reasonable subsequent request.

3 The power shall be exercised in a manner that is reasonable in all the circumstances, having regard to the terms and purpose of the power.

4 In any case where the owner or occupier against whom the power is used is absent at the time the power is exercised, a notice must be left at the scene informing that person that the power has been exercised, unless a Judge subsequently confirms that the requirement can be waived because such a notice would unduly prejudice subsequent enforcement activity.

5 Within seven days of seizure an inventory of things seized should be supplied to the person from whom the things were seized, unless a Judge orders otherwise because of exceptional circumstances.

6 As a general rule, any thing or information obtained in breach of these principles should be inadmissible in evidence.

140 The Search and Search Warrant Committee in addition recommended generally:

- A constable should be able to search without a warrant a person who has been arrested and things that person has readily to hand where that is prudent.
- Consensual searches should be recognised.
- A person from whom property has been seized, or who claims to be entitled to it, should be able to apply to the court at any time for the immediate return of the property, subject to such conditions as the court may impose.
- All of the recommendations should be implemented by a Powers of Entry Act which would provide a code relating to all state powers of intrusion whether or not exercised pursuant to a warrant.

141 Although no comprehensive statute has been enacted, the principles recommended in these reports have been substantially incorporated into recent legislation.

Powers to require and use personal information

142 The Official Information Act 1982 s 39 gave the Information Authority functions in respect of personal information. One was 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, established a set of principles by which to test the fairness and reasonableness of legislation. Those principles concern the collection of information, the use which the government could make of it, and access by the individual to it. The principles were presented to Parliament, along with a draft statute, in support of a recommendation that personal privacy should be protected by legislation which would be a new and separate part of the Official

Information Act. (See Report of the Information Authority on the *Subject of Collection and Use of Personal Information* (1988), 1988 AJHR E 27 B.) At the time of the completion of this report a Government Bill, the Privacy of Information Bill, is before Parliament. It also contains a set of relevant principles based on the OECD principles.

C ENFORCEMENT

143 The general part of this report touches on this in para 34 above. The method of 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. Compliance with the law is not of course simply a matter of formal sanctions and state enforcement. It is much better if it is simply complied with, without any action having to be taken by public agencies to enforce it. The Report has already stressed that the process of consultation may significantly enhance the acceptability of legislation - and hence compliance with it (eg, paras 3 and 21). Also critical is the sense that the legislation conforms with important legal principles, is fair, and preserves individual liberty. Technical soundness and accessibility and comprehensibility are essential as well: ignorance of the law may not be a defence but it certainly lessens the prospect of intelligent compliance. Formal enforcement and sanctions must be exceptional means of getting compliance. The following is only a brief note of some of the principal issues.

Which of the range of remedies is to be invoked?

144 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 50-52 and 65-84 above. The statute book presents a great variety of processes and remedies in which the following elements figure:

- The compulsory availability of the process: usually the parties have no choice but to be subject to the process if one of them initiates it; but, sometimes, as for instance with some arbitration, the parties might agree to the process.

- Third party involvement: usually there is third party involvement, but the statute may provide for, or require, negotiation between the parties.

- 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 the usual case of arbitration where the parties chose the tribunal; or in respect of two of the members of certain three-member tribunals where the legislation enables the parties to appoint or nominate those members.

- 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.

- 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 processes of the Ombudsmen.

- 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).

145 Legislation relating to family matters, industrial disputes, the Ombudsmen, discrimination, small claims, the Treaty of Waitangi, arbitration, resource management, fisheries, mining and other environmental matters all provide material for consideration.

Is a criminal sanction needed?

146 Not every breach of a statutory duty should be an offence. A basic principle in our criminal law is that criminal offences should be distinctly created by Parliament or other lawmaker. A judgment should be made that remedy instead of, or as well as, other remedies is required. But often a civil or administrative remedy may be more appropriate in attempting to ensure future compliance or penalising or remedying the breach. Or there may be other relevant offences already on the statute book.

147 If an offence is being created, careful attention must be given to the factual and mental elements of the offence; for instance, what standard of care is required or is the offence one of strict or even absolute liability? If the last, what is the possible justification for making reasonable, careful, possibly faultless action criminal? Should reasonable care be a defence to such an offence? If a mental element is to be included how is it to be worded: knowingly, wilfully, recklessly ... ?

148 A related question concerns the burden of proof. The established principle of the presumption of innocence is stated in s 25(c) of the Bill of Rights: a person charged with an offence has the right to be presumed innocent until proved guilty according to law. The burden is sometimes reversed by legislation, but there must be good reason for that. One factor, in the case of regulatory offences, is the relative ease and lack of expense with which the defendant may disprove the matter.

149 The possible penalty on conviction which might be provided for in legislation raises many issues only some of which are noted here. One is whether daily penalties should be imposed for continuing offences, for instance for pollution. Those provisions introduce the possibility of large, indeterminate fines. The more appropriate remedy may be an order for discontinuance or some other coercive relief. A second question concerns the level of the fine and the need to relate it to others in the statute and related areas of the law. A connected

matter concerns the possibility of confiscation as part of a penalty (where issues about who should make the confiscation decision and following what procedure also arise). Finally, so far as imprisonment is concerned, the need for an arrest or search warrant power is not by itself sufficient justification. If such powers are justified they can be conferred distinctly for the offence. Imprisonment as a penalty must also be matched to the seriousness of the offence and in particular to its fault element.

150 Generally anyone may lay an information for an offence. But in some cases that is restricted, for instance in respect of offences involving a foreign element or freedom of speech issues. This is obviously a brief note on 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.

Should a specific civil remedy be established?

151 By contrast to the many provisions creating offences for breach of statutory obligations only a very few statutes expressly deal with civil remedies. Some provide that a breach of a duty stated in them gives rise to a damages action in tort. A few also empower officials and persons affected to seek injunctions and other coercive orders to prevent or penalise breach. Some provisions expressly provide that the only remedies available to enforce them are those included in the statute. For the most part though this matter is left to the uncertainty of the general law; cf, paras 34 and 35 above. Consideration should be given to removing that uncertainty by specific provisions. That consideration should be a broad one, looking to the full range of relevant means of getting compliance.

Should new particular remedies or processes be established?

152 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 conferred on an existing tribunal or a new tribunal with powers of decision might be established.

D APPEAL AND REVIEW

What provision, if any, should the legislation make about review?

153 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 58-64) and of regulations (paras 114-129). 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) to which the decision-maker is to have regard, the smaller the extent of review.

154 The legislature might also limit review, or attempt to, by so-called privative or ouster clauses. Section 27(2) of the Bill of Rights confirms that such provisions should not be included except in the most unusual cases. To the extent that such provisions 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 government agency with matters of discretion and policy. The agency should not be able to violate the law with impunity.

155 To be distinguished from regular privative clauses are sections which delay access to the courts until a particular remedy (usually an appeal to a tribunal) is first exhausted. Such a clause might be able to be justified since it appropriately gives preference to the expert tribunal and it does not completely prevent access to the courts.

What provision should be made about appeal?

156 The legislative decision about conferring a right of appeal should be based on the matters considered earlier relating to the allocation of original decision-making power and especially the nature of the rights and interests involved (paras 65-83). The greater the individual impact of a decision directly affecting important rights, interests or legitimate expectations of that individual, the stronger the case for a right of appeal. So s 25(h) of the Bill of Rights Act states as a minimum standard of criminal procedure the right of a person convicted of an offence to appeal according to law to a higher court against conviction, sentence or both. .

157 The Committee in its report on *Administrative Tribunals* concluded that in general there should be one right of appeal (as of right) against the final decisions of tribunals making decisions at first instance. Rights of appeal are 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 a right of 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, for instance on law alone, rather than for denying any appeal. There is moreover the consideration that the common law review powers are likely to extend in practice to errors of law made by tribunals. The review powers do however fall short of appeal powers - not reaching the merits including questions of fact and discretion.

158 The choice of the appellate body - a further tribunal or a Court (the District Courts, High Court, with or without expert members and assessors) - should be made according to the nature and importance of the issues involved. In the case of an appeal to the courts, whether the appeal is general or limited to points of law should depend on the matters discussed in paras 65-84 above: the relative expertise of the original and appellate bodies, the procedure that each follows and the nature of the issues which arise for determination. There should also in general be provision for an appeal to the Court of Appeal, but only with the leave of that Court and on the basis that the case presents questions of law of public importance. These matters are more fully discussed in the Committee's report on *Administrative Tribunals* 1989 paras 56-70 and the Law Commission report on *The Structure of the Courts* (1989) ch VI.

159 If there is to be an appeal or a question of law, the Public and Administrative Law Reform Committee in its 16th report (1982) proposed the detail of the procedure for settling the question of law for decision.

To what bodies should the powers of the Ombudsmen extend?

160 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. As indicated in the Cabinet Office forms set out in Appendix A, there should be consultation with the Office of the Ombudsmen about these matters and the question of any change in existing coverage of the Ombudsmen Act and those Acts considered in the following section.

To what bodies should the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 extend?

161 Whenever a new organisation is created, it is necessary to determine whether or not the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987 should apply to it. In some cases the 1982 Act will apply since the body is subject to the Ombudsmen Act. The basic criterion formulated by the Danks Committee that proposed

Official Information Act 1982 is that bodies carrying out a government or public function should be subject to the Act. The criterion is now to be understood more broadly given the Amendment Act of 1987 and the Local Government Official Information and 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.

As already noted (para 96), the State-Owned Enterprises (Ombudsmen Act 1975 and Official Information Act 1982) Select Committee recently recommended that the state owned enterprises should remain subject to those two statutes. The Government has accepted that recommendation and related legislation has been prepared.

162 The above set of four 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 Loans Act 1956, Local Authorities (Members' Interests) Act 1968, and Local Elections and Polls Act 1976.

E RELATION TO OTHER LAW

163 The general passage in paras 33 to 35 above touches on this critical and large matter. Three further particular issues are noted here:

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

164 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 Chapter V of its Report on *A New Interpretation Act* (NZLC R17 1990) for instance restates and develops the general principle that law should have prospective effect only. It sets out and discusses the following factors relevant to that principle and its limits:

effectiveness: *much law will work in practice only if the people subject to it know in advance what it requires and can organise their actions in accordance with it*

justice: *it may be unjust to apply new law to old situations; in particular no one should be subject to a criminal penalty for some act that was not a crime at the time of the alleged offence*

reasonable expectations: *individuals may enter into continuing legal obligations (as in contracts for oil exploration) on the basis that the law will have a particular impact*

responsibilities of government: *but Parliament may be of the view that the public interest requires the law (for instance of taxation of oil exploration) to be altered*

effective administration: *new courts, institutions and procedures might have to become relevant to existing obligations and rights; and indeed principle and practice do accept that procedural law can apply to earlier events.*

165 Those factors, as well as the general law to be found in the 1924 Act, in other legislation (including the Bill of Rights Act s 26, 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.

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

166 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.

Are there relevant supplementary powers?

167 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?

Appendix A

CABINET OFFICE MANUAL (1991)

Chapter 5, Appendices 1 and 2

REQUEST FOR A BILL TO BE INCLUDED IN THE LEGISLATIVE PROGRAMME

Note: This schedule indicates the format and headings to be used; it is not issued as a printed form.

Bids for Bills to be included in the Legislative Programme should be set out under the following headings. Details should be kept brief but should be sufficient to give persons, not acquainted with the issues, a clear idea of what is involved. There must be an entry for each of the headings listed; in cases where they do not apply, enter "Not Applicable".

DATE: PORTFOLIO OF SPONSORING MINISTER

DEPARTMENT RESPONSIBLE:

PROPOSED TITLE OF BILL:

1 Policy to be implemented by the Bill.

2 Reasons why a Bill is required.

3 Aspects of the Bill likely to be contentious.

4 *Compliance*
(If the Bill does not comply with any of the following, give details)

a The principles of the Treaty of Waitangi.

b Bill of Rights Act 1990.

c Relevant international standards and obligations.

d Guidelines in the Legislation Advisory Committee Report "Legislative Change: Process and Content".

5 *Consultation*

a Relevant Government departments which have been consulted or are yet to be consulted.

b Relevant bodies other than Government departments which have been consulted or are yet to be consulted.

c Method of consultation.

d Results of consultation to date.

e Consultations are expected to be completed by: [date]

6 Outstanding policy issues (if any) and date by when these are expected to be resolved.

7 *Amending Acts, Creation of New Agencies*

a In the case of a Bill amending an Act, do any of the following Acts currently apply: Ombudsmen Act 1975, Official Information Act 1982, Local Government Official Information and Meetings Act 1987?

Is any change to the coverage of these Acts contemplated?

b If a new agency is being created under the draft legislation, is there any reason why the Ombudsmen and Official Information Acts should not apply?

c If questions (a) and (b) apply, has the Office of the Ombudsman been consulted? If the Acts referred to are not intended to apply, what is the Ombudsman's view?

8 *Allocation of Decision-Making Powers*

a Does the draft legislation involve the allocation of decision-making powers between the executive, the courts and tribunals?

b Have the criteria relating to the qualifications and responsibilities of decision-makers and the procedures they follow (set out in paragraphs 30-55 of the Legislation Advisory Committee report entitled "Administrative Tribunals") paras 65-83 above, been applied?

c If not, state departures from the criteria and reasons for these.

Technical Matters

9 This Bill will comprise _____ clauses and is of low/medium/high complexity.

10 Drafting instructions will be delivered to the Parliamentary Counsel Office by: [date]

Recommendations

11 This Bill should be introduced no later than: [date]

12 The Bill should be passed no later than: [date]

(Signature of Minister)
Minister of:

COVER SHEET FOR DRAFT BILL

Note: This schedule indicates the format and headings to be used; it is not issued as a printed form.

Covering submissions for Bills submitted to the Cabinet Legislation Committee must be set out under the following headings. Details should be kept brief but should be sufficient to give persons not acquainted with the issues a clear idea of what is involved. There must be an entry for each of the headings listed; in cases where they do not apply, enter "Not Applicable".

Note: This should not be used as a form

[This document is almost the same as the *Request* document. There are two differences

- para 5(e): requests reasons why consultations have not yet been completed
- paras 9 and 10 are not included.]

Appendix B

THE DEPARTMENTAL SOLICITOR AND THE PARLIAMENTARY COUNSEL OFFICE

(Extracts from a paper by Mr W Iles QC CMG, 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 coordinator 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* (2nd 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 p 8 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 form 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 to be 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 ha 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.

Appendix C

ANALYSIS

Title
1. Short Title and commencement

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3. Application
4. Other enactments not affected
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CIVIL AND POLITICAL RIGHTS

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9. Right not to be subjected to torture or cruel treatment
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13. Freedom of thought, conscience, and religion
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19. Freedom from discrimination
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Search, Arrest, and Detention

21. Unreasonable search and seizure
22. Liberty of the person
23. Rights of persons arrested or detained
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MISCELLANEOUS PROVISIONS

28. Other rights and freedoms not affected
29. Application to legal persons

1990, No. 109

An Act—

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights [*28 August 1990*

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title and commencement—(1) This Act may be cited as the New Zealand Bill of Rights Act 1990.

(2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART I

GENERAL PROVISIONS

2. Rights affirmed—The rights and freedoms contained in this Bill of Rights are affirmed.

3. Application—This Bill of Rights applies only to acts done—

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. Other enactments not affected—No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations—Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred—Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights—Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—

(a) In the case of a Government Bill, on the introduction of that Bill; or

(b) In any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

PART II

CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

8. Right not to be deprived of life—No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. Right not to be subjected to torture or cruel treatment—Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10. Right not to be subjected to medical or scientific experimentation—Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. Right to refuse to undergo medical treatment—Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

12. Electoral rights—Every New Zealand citizen who is of or over the age of 18 years—

(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and

(b) Is qualified for membership of the House of Representatives.

13. Freedom of thought, conscience, and religion—Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. Freedom of expression—Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

15. Manifestation of religion and belief—Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. Freedom of peaceful assembly—Everyone has the right to freedom of peaceful assembly.

17. Freedom of association—Everyone has the right to freedom of association.

18. Freedom of movement—(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-Discrimination and Minority Rights

19. Freedom from discrimination—(1) Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

20. Rights of minorities—A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Search, Arrest, and Detention

21. Unreasonable search and seizure—Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. Liberty of the person—Everyone has the right not to be arbitrarily arrested or detained.

23. Rights of persons arrested or detained—(1) Everyone who is arrested or who is detained under any enactment—

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of *habeas corpus* and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) Arrested; or

(b) Detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24. Rights of persons charged—Everyone who is charged with an offence—

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. Minimum standards of criminal procedure—Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court:

(b) The right to be tried without undue delay:

(c) The right to be presumed innocent until proved guilty according to law:

(d) The right not to be compelled to be a witness or to confess guilt:

(e) The right to be present at the trial and to present a defence:

(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of

witnesses for the defence under the same conditions as the prosecution:

(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. Retroactive penalties and double jeopardy—(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. Right to justice—(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III

MISCELLANEOUS PROVISIONS

28. Other rights and freedoms not affected—An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. Application to legal persons—Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

This Act is administered in the Department of Justice.

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Appendix D

RECENT LEGISLATION RELATING TO THE TREATY OF WAITANGI AND MAORI INTERESTS

The following Acts, enacted since 1975, make particular reference to the Treaty of Waitangi, to the Maori perspective or to Maori interests, or include general provisions of special significance to Maori. The grouping attempts to indicate different forms of legislative reference.

Resolution of claims under Treaty of Waitangi

Treaty of Waitangi Act 1975
Treaty of Waitangi (State Enterprises) Act 1988
Crown Forest Assets Act 1989

Legislation to secure rights protected by the Treaty of Waitangi

Fisheries Act 1983
Maori Language Act 1987
Maori Fisheries Act 1989

Provisions requiring that regard be had to the principles of the Treaty of Waitangi

Environment Act 1986
State-Owned Enterprises Act 1986 *
Conservation Act 1987 *
Crown Minerals Act 1991
Foreshore and Seabed Endowment Revesting Act 1991
Harbour Boards Dry Land Endowment Revesting Act 1991
Resource Management Act 1991
(*denotes legislation which accords priority to the principles of the Treaty of Waitangi)

Provisions requiring that regard be had to Maori interests or the Maori perspective

Law Commission Act 1985
Education Act 1989
Broadcasting Act 1989

Equal opportunity provisions

Access Training Scheme Act 1988
State Sector Act 1988 (and many other provisions regulating the appointment of staff to statutory bodies, such as the Law Practitioners Act 1982 and the Broadcasting Act 1989)

General provisions allowing for cultural differences

Criminal Justice Act 1985
Coroners Act 1988
Children, Young Persons and their Families Act 1989
School Trustees Act 1989

Appendix E

STATUTES WITH POSSIBLE IMPLICATIONS FOR NEW ZEALAND TREATIES

This is a list of public Acts which appear to raise issues concerning New Zealand's international rights and obligations. The statutes may give effect to treaty provisions or they may empower the government to give effect to them. The list does not include the many regulations which have the same effect.

Abolition of the Death Penalty Act 1989
Accident Compensation Act 1982
Acts Interpretation Act 1924
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 Act 1908
Arbitration (Foreign Agreements and Awards) Act 1982
Arbitration (International Investment Disputes) Act 1979
Arbitration Clauses (Protocol) and Arbitration (Foreign Awards) Act 1933
Armed Forces Discipline Act 1971
Atomic Energy Act 1945
Aviation Crimes Act 1972
Bills of Exchange Act 1908
Boilers, Lifts, and Cranes Act 1950
Broadcasting Act 1989
Bush Workers Act 1945
Carriage by Air Act 1967
Carriage of Goods Act 1979
Cheques Act 1960
Children, Young Persons and Their Families Act 1989
Christmas Island - see 1981 No 110 section 2
Citizenship Act 1977
Citizenship (Western Samoa) Act 1982
Civil Aviation Act 1990

Coal Mines Act 1979
Commerce Act 1986
Commodity Levies Act 1990
Commonwealth Countries Act 1977
Conservation Act 1987
Construction Act 1959
Consular Privileges and 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 and Hostages) Act 1980
Crimes of Torture Act 1989
Criminal Justice Act 1985
Crown Proceedings Act 1950
Customs Act 1966
Dangerous Goods Act 1974
Defence Act 1990
Designs Act 1953
Diplomatic Privileges and Immunities Act 1968
Disabled Persons Community Welfare Act 1975
Disabled Persons Employment Promotion Act 1960
Domicile Act 1976
Driftnet Prohibition Act 1991
Dumping and Countervailing Duties Act 1991
Education Act 1964
Education Act 1989
Employment Contracts Act 1991
Enemy Property Act 1951
Environment Act 1986
Equal Pay Act 1972
Evidence Act 1908
External Relations Act 1988
Extradition Act 1965
Factories and Commercial Premises Act 1981
Fair Trading Act 1986
Family Proceedings Act 1980
Finance Act 1950 s 41 (duration of state of war)
Fisheries Act 1983
Flags, Emblems and Names Protection Act 1981
Fugitive Offenders Act 1881 (UK)
Food Act 1981
General Agreement on Tariffs and Trade Act 1948
Geneva Conventions Act 1958
Goods and Services Tax Act 1985
Government Service Equal Pay Act 1960
Guardianship Act 1968

Harbours Act 1950
Health Act 1956
Health Benefits (Reciprocity with Australia) Act 1986
Health Benefits (Reciprocity with UK) Act 1982
Holidays Act 1981
Human Rights Commission Act 1977
Immigration Act 1987
Imprisonment For Debt Limitation Act 1908
Income Tax Act 1976
Indecent Publications Act 1963
International Air Services Licensing Act 1947
Judicature Act 1908
Kermadec Islands Act 1887
International Energy Agreement Act 1976
International Finance Agreements Act 1961
Law Practitioners Act 1982
Legal Services Act 1991
Machinery Act 1950
Maori Affairs Act 1953
Maori Education Foundation Act 1961
Maori Fisheries Act 1989
Maori Language Act 1987
Marine Mammals Protection Act 1978
Marine Pollution Act 1974
Marketing Act 1936
Marriage Act 1955
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
Meteorological Services Act 1990
Military Decorations and Distinctive Badges Act 1918
Minimum Wage Act 1983
Mining Act 1971
Misuse of Drugs Act 1975
Nauru Island - Finance Act 1977
New Zealand Bill of Rights Act 1990
New Zealand Nuclear Free Zone, Disarmament and Arms Control Act 1987
Niue Act 1966
Niue Constitution Act 1974
Official Information Act 1975
Ozone Layer Protection Act 1990
Pacific Islands Polynesian Education Foundation Act 1972
Parental Leave and Employment Protection Act 1987
Passports Act 1980

Patents Act 1953
Penal Institutions Act 1953
Pesticides Act 1979
Petroleum Demand Restraint Act 1981
Phosphate Commission of New Zealand Dissolution Act 1989
Plant Variety Rights Act 1987
Plants Act 1970
Political Disabilities Removal Act 1960
Postal Services Act 1987
Protection of Personal and Property Rights Act 1988
Public Finance Act 1989
Quarries and Tunnels Act 1982
Race Relations Act 1971
Radiation Protection Act 1965
Radiocommunications Act 1989
Reciprocal Enforcement of Judgments Act 1934
Resource Management Act 1991
Sale of Liquor Act 1989
Sea Carriage of Goods Act 1940
Serious Fraud Office Act 1990
Shearers Act 1962
Shipping Act 1987
Shipping and Seamen Act 1952
Smoke-free Environments Act 1990
Social Security Act 1964
Standards Act 1988
State-Owned Enterprises Act 1986
State Sector Act 1988
Status of Children Act 1969
Submarine Cables and Pipelines Protection Act 1966
Tariff Act 1988
Telecommunications Act 1987
Temporary Safeguard Authorities Act 1987
Territorial Sea and Exclusive Economic Zone Act 1977
Time Act 1974
Tokelau Act 1948
Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977
Toxic Substances Act 1979
Trade in Endangered Species Act 1989
Trade Marks Act 1953
Trade Unions Act 1908
Transport Accident Investigation Commission Act 1990
Transport Act 1962
Transport (Vehicle and Driver Registration & Licensing) Act 1986
Treaty of Waitangi Act 1975
Treaty of Waitangi (State Enterprises) Act 1988
Union Representatives Education Leave Act 1986
United Nations Act 1946

United Nations (Police) Act 1964
Visiting Forces Act 1939
Vocational Training Act 1982
Wages Protection Act 1983
War Graves 1977 No 75 s 4(1)
Waterfront Industry Reform Act 1989
Waterfront Restructuring Act 1989
Weights and Measures Act 1987
Western Samoa Act 1961
Workers' Compensation Act 1956

TREATIES: WHAT ARE THEY, WHAT DO THEY DO, HOW ARE THEY MADE, AND HOW ARE THEY GIVEN EFFECT?

(LAW COMMISSION, AUGUST 1991)

A WHAT IS A TREATY?

A treaty is an international agreement between two or more states or other international persons, governed by international law. "Other international persons" include bodies such as the United Nations, the World Bank, or the South Pacific Commission.

Such international agreements have a great variety of names:

> *Treaty* is relatively rare, generally confined to major agreements of political importance (for instance treaties of alliance, treaties of friendship and the Antarctic Treaty) but found elsewhere (such as treaties of extradition); "treaty" is also used as a generic term;
>
> *Agreement* is by far the most common title, such as agreements regulating trade, air transport, fisheries, visa abolition ... especially for bilateral agreements (that is agreements between two states);
>
> *Exchanges of notes (or letters) constituting an agreement* make up a large proportion of the previous category; as the title indicates, in this case there are two documents rather than just one; the second document responds to the agreement proposed in the first and accepts it;
>
> *Convention* is the word commonly used for multilateral treaties (those which are open to acceptance by a large number or even all states); this usage is especially common in the United Nations and its specialised agencies;
>
> *Protocol* is commonly used for agreements supplementary to a principal treaty; it might be drawn up at the same time as the principal instrument or later (as in the very extensive practice of the General Agreement on Tariffs and Trade).

Other names are used from time to time, such as charter or constitution (for major international organisations such as the United Nations, the International Labour Organisation and the Organisation of African Unity), declaration, covenant (particularly for major documents such as the constitution of the League of Nations and the human rights instruments adopted by the General Assembly of the United Nations in 1966), instrument, and regulations (particularly for supplementary instruments such as those adopted by the World Health Assembly or the

International Telecommunications Conference for instance on radio and telegraphic communications).

Adjectives are sometimes also added, such as additional, special, supplementary and intergovernmental. The name of the place where a treaty is signed might also be a part of the title (such as the Vienna Convention on the law of treaties).

B WHAT DO TREATIES DO?

The functions and subject matter of treaties are various. They serve the *functions* of distinct legal instruments available in national legal systems such as:

Constitutions, as of the international organisations;

Legislation, as with the large numbers of conventions which regulate much international and related activity;

Conveyancing documents, as in the case of land and maritime boundaries and treaties regulating the status of a particular area (such as the Panama Canal or Antarctica);

Contracts, as in the exchange of promises concerning trade, investment, air transport, taxation or loans (many often made in the context of a multilateral system), or to resolve a particular controversy or to establish an ongoing political relationship (where the national analogies might rather be to an accord between government, business and labour, or an agreement between the federal and state authorities in a federal country.

Their *subject matter* is wide ranging including

War and peace: the United Nations Charter, treaties of alliance, the Geneva and Hague Conventions relating to warfare and the protection of the victims of armed conflict, armistices, treaties of peace, the Statute of the International Court of Justice, the Hague Convention establishing the Permanent Court of Arbitration, regional and bilateral treaties for the resolution of disputes;

Disarmament and arms control, such as the test ban treaty, the non-proliferation treaty, the Statute of the International Atomic Energy Agency, and regional arms control measures for instance in Latin America, the South Pacific and Antarctica;

International trade, including the General Agreement on Tariffs and Trade, regional economic agreements, and a great number of bilateral agreements;

International finance, including the multilateral agreements establishing the World Bank and the related agencies, regional banks (such as the Asian Development Bank), and a great number of bilateral arrangements including loan agreements, double taxation agreements;

International commercial transactions, both concerning the relationship between states (such as customs facilitation, common nomenclature for tariffs), and private commercial transactions (including treaties regulating carriage by sea and air, the international sale of goods and international commercial arbitration);

International communications, for example by sea and by air where many multilateral and bilateral treaties regulate traffic rights, safety and liability; international telecommunications; the recognition of qualifications for example in respect of the piloting of ships and aircraft and driving of motor vehicles;

The law of international spaces particularly the long established law of the sea, the relatively new law of the air and the much newer law of outer space; and the law relating to particular areas such as Antarctica, international canals, and areas of particular international concern;

The law relating to the environment, again a matter of relatively recent general concern but consider treaties relating to the protection of whales and other marine life and oil pollution; and more recent treaties relating to the ozone layer, wet lands, and methods of warfare threatening environmental destruction;

Human rights and related matters, including the general instruments drawn up by the United Nations (international covenants on the economic social and cultural rights and on civil and political rights), and on more particular matters (such as genocide, refugees, prostitution, the political rights of women, discrimination on grounds of race and sex, and the regional instruments especially drawn up in Europe and the Americas;

Labour conditions and relations, particularly the 150 or more conventions drawn up by the International Labour Organisation since 1919;

Other areas of international economic and social cooperation, such as the gathering and dissemination of information (health and other statistics and the work of the world meteorological organisation), and combating crimes with international ramifications (such as slavery, drug trafficking, international hostage taking, and hijacking of aircraft and ships).

That is a brief sketch of the subject matter of international treaty making. The picture can never be completed for there is no limit on the matters that states may wish to subject to international agreement, and over recent decades there has been an explosion of areas of international concern. New Zealand of course participates in this process. It is or has been party to more than 1500 treaties (including some it inherited from the United Kingdom).

C HOW ARE TREATIES NEGOTIATED AND AGREED TO?

International law and practice make it clear that various representatives of the state (such as the Head of State, Head of Government, Minister of Foreign Affairs, heads of diplomatic missions, and representatives accredited to international conferences or organisations) have authority to negotiate and adopt or authenticate the text of the treaty. Other officials may

also be given specific authority to undertake a negotiation or to agree to a treaty text.

These functions are executive functions. The Privy Council made that clear in 1937 in a Canadian case from which it is convenient to quote at some length. The quotation is also relevant to the next, final heading of this paper:

> It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone. Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default. In a unitary State whose Legislature possesses unlimited powers the problem is simple. Parliament will either fulfil or not treaty obligations imposed upon the State by its executive. The nature of the obligations does not affect the complete authority of the Legislature to make them law if it so chooses. (*Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347-348)

In practice the treaty might be negotiated simply between the representatives of the two states immediately involved, or at a conference of the interested states for the purposes of negotiating that particular text (such as in the aftermath of a war), or within an established international framework which may be regional (such as the South Pacific Forum) or universal (as within the United Nations and its agencies).

In some circumstances the representatives may be not only those of governments, but may include for example representatives of international organisations or countries which are not yet fully independent. The International Labour Organisation is unique in providing for tripartite representation at its conferences, involving representatives of employers and unions as well as governments. Treaty obligations sometimes arise directly through decisions of the authorities the treaty establishes, no further action by the States parties being needed.

A note on nomenclature might be useful. Treaties come into force and take effect at the international level according to their own terms. In some cases that may be simply on *signature* as is common with more simple bilateral agreements (although sometimes the

effective date is postponed to enable the appropriate administrative steps to be taken). More important or complex treaties, the final acceptance of which may require substantial changes in governmental policy or in national law (as discussed under the next heading), may lead to the text being established by signature but not becoming binding until a further act is taken by the state in question. That further action is most commonly referred to as *ratification*, and accordingly it is misleading for that word to be used for implementation in national law. It is sometimes given another name such as *acceptance* or *approval*. Those states which have not signed such a treaty but which wish to become party to it may have the right accorded under the treaty to *accede* or *adhere* to the text and thereby become bound by it. A State becoming a party to a multilateral convention may be able to file *reservations*, indicating that it will not be bound by one or other of the provisions.

All the actions just mentioned are actions at the international level. Whether they also make any change to national law is a matter for the national constitutional system. In some countries they do. In others, including New Zealand, they do not - as the Privy Council in the Canadian case makes clear.

D HOW ARE TREATIES GIVEN EFFECT TO?

This question arises at two levels, the international and the national. The international methods of implementation are various: diplomatic representation, negotiation, conciliation, mediation, good offices, fact-finding, inspection, arbitration, adjudication, recourse to a relevant regional organisation, or specialised agency or universal organisation. States may also be able to retaliate, claiming that the breach or an alleged breach by the other party to a treaty frees them of their obligations towards that party. In some cases, they may also be able to take action against individuals who allegedly breach a treaty. Treaties, especially labour and human rights conventions, may require the parties to them to report to an international body or to the other parties on the legislative and other steps they have taken to give effect to the terms of the conventions.

So far as national implementation is concerned, the passage already quoted from the Privy Council in the Canadian case provides the starting point. While the government can enter into treaties it cannot, by that action alone, change the rights and duties of individuals or of the state under the law of New Zealand. If such changes are called for then legislation will be necessary.

Many treaties do not have a direct impact on the rights and duties of individuals. They can operate without legislative support. The obligations arising under alliances or the Charter of the United Nations provide an example. For the most part those obligations are met through the powers which the government has under the prerogative and the common law to administer its foreign relations and to deploy its armed forces. But in some circumstances legislation will be called for, as in the recent instance of the trade sanctions against Iraq. The United Nations Act 1946 provides appropriate authority for the making of the regulations promulgated in that case.

In a second category of cases, New Zealand law will already conform, or largely so, with the treaty to which the government is proposing to become a party. That view was taken for

instance of the International Covenants on Civil and Political Rights and on Economic Social and Cultural Rights. Some specific amendments were made to the Immigration Act 1964 to bring that law into conformity with obligations in the civil and political rights covenant, and when it ratified the Covenants in 1978 the Government filed reservations in respect of certain other provisions which New Zealand law did not comply with.

In the third case, New Zealand law is not in compliance with the proposed treaty obligations. Legislative action will have to be taken. It might be taken by the executive under delegated authority if Parliament has conferred that authority (as with UN sanctions or in the case of extradition and double taxation agreements for instance), or the action might have to be taken by Parliament.

Parliament indeed very often takes such action. The foregoing list suggests that about one quarter of the 600 or so public Acts which make up the New Zealand statute book give effect to international obligations.

Legislative provisions giving effect to treaty obligations can take one of two broad forms. They might be more or less inconspicuously woven into the texture of existing legislation. That is so for instance of that part of international criminal law which can be found in the Crimes Act 1961. In some cases that weaving is more conspicuous than in others, as appears for example from the Aviation Crimes Act 1972 which expressly refers to the hijacking and related aviation conventions which it implements.

The second method is more direct. The particular treaty provisions are set out and are given the force of law in New Zealand. Legislation relating to extradition, double taxation, and diplomatic and consular privileges and immunities uses that method for instance. It has the advantage that New Zealand courts and other agencies which are charged with administering that area of law have direct access to the legal rules as agreed by the relevant states and to treaty interpretations given elsewhere. But in some circumstances that course will not be possible or will carry unnecessary costs. The course may not be possible since the treaty may not have been drafted with the intention that it should directly create rights and duties in national legal systems. It may not be convenient since the aim of providing a more accessible and comprehensible statement of the law might strongly suggest that the relevant legislation be more carefully integrated into the text of existing statutes or regulations.

Even if a treaty is not given direct force by legislation, it might nevertheless have significance in the operation of our legal system. For instance

(a) The treaty might be declaratory of customary international law on a particular topic. So provisions of the Vienna Convention on the Law of Treaties, while not being expressly adopted by legislation in New Zealand, Australia or the United Kingdom, have been referred to by courts in those countries on the basis that they authoritatively state the customary international law of treaties and customary international law *is* part of the law of New Zealand.

(b) Courts will if possible interpret statutes consistently with international obligations. But if the statute plainly contradicts the treaty, that interpretative course is not available.

The list of New Zealand statutes which appear to give effect to New Zealand's international obligations emphasises the very pervasive impact of international law on our domestic legal system. Cabinet has directed that Ministers proposing legislation are to report on the compliance of the measure with relevant international standards and obligations. (See Appendix A)