Report of the Legislation Advisory Committee

1 January 1994 to 31 December 1995

Recurring Issues

Report No 9

June 1996

FOREWORD BY THE MINISTER OF JUSTICE

The Legislation Advisory Committee's terms of reference are 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; report to the Minister of Justice or the Legislation Committee of Cabinet on public law aspects of legislative proposals that are referred to it; and 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. It also has the task of monitoring the content of new legislation specifically from an "Official Information" standpoint.

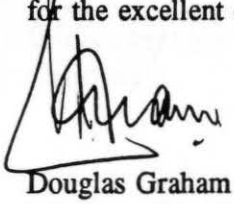
The Committee's publication *Legislative Change: Guidelines on Process and Content*, first published in 1987 and revised in 1991, sets out clear guidelines on the process of preparing legislation and elements of the content of legislation that should always be addressed. Cabinet has endorsed this report and Ministers putting forward a proposal for legislation are to report on the proposal's compliance with the principles stated in that report.

The Legislation Advisory Committee also plays a valuable role in improving the quality of legislation by examining legislative proposals before the House and making submissions to the appropriate select committee on aspects of the proposed legislation that raise public law issues. In making these submissions the Committee is not in general concerned with the policy of the legislative proposals it considers, but gives attention to whether the proposals give effect to the policy (so far as the Committee understands the policy) and does that consistently with accepted legal principle. In this respect, the Committee reinforces the work of the Parliamentary Counsel Office and the Law Commission.

This report covers the period from 1 January 1994 to the 31 December 1995. During this period the Committee has published *Issues of Principle* LAC Report No 8, produced a revised paper on ways of improving the quality of legislation, made submissions to select committees on 44 legislative proposals, given advice on proposed bills and regulations to departments and select committees, and advised the Clerk of the House on the wording of seven proposed indicative referenda questions.

In this, its latest report, the Committee has chosen to discuss a limited number of legislative issues that appear to recur in one form or another. As the report states the LAC's aim in drawing attention to these 'recurring issues' is "to encourage the use of good practices by highlighting basic principles ..... rather than to criticise the particular Ministers, government departments, or officials responsible for the cited legislative proposals".

Although the Legislation Advisory Committee is a ministerial committee set up by the Minister of Justice, it works independently and its views do not necessarily reflect those of the Government of the day. However, the calibre of its members is such that both the Government and Parliament respect and value its advice. As I did in the Foreword to LAC Report No 8, I commend the Committee for its thoughtful and professional analysis of a very wide range of legislative issues, and for the excellent contribution it has made, and is making, to improve the quality of legislation.



Douglas Graham
Minister of Justice

LETTER OF TRANSMITTAL

31 March 1996

The Hon Douglas Graham, MP
Minister of Justice
Parliament Buildings
WELLINGTON

Dear Minister

On behalf of the Legislation Advisory Committee, I am pleased to submit a report on the Committee's activities covering the period from 31 December 1993 to 31 December 1995. While the LAC normally endeavours to report at intervals of about eighteen months, the longer interval between this report and the last is due to pressures arising from a sharp increase in the number of submissions on legislative proposals that the Committee felt obliged to make during 1995.

You will note that, in this report, we have selected a number of recurring issues, and have used legislative proposals on which we made submissions during the reporting period to illustrate our concerns about those issues. I should emphasise that the LAC's aim in drawing attention to these 'recurring issues' is to encourage the use of good practices by highlighting basic principles rather than to criticise the particular Ministers, government departments or officials responsible for the cited legislative proposals.

Yours sincerely

Mervyn Probine
Chairman

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I INTRODUCTION

1 The Legislation Advisory Committee was established by the Minister of Justice in February 1986. The Committee does not report annually, but as matters arise that make it desirable to do so. *Issues of Principle* LAC Report No 8 covered the period from July 1992 to December 1993. This report covers the period from January 1994 to December 1995. The longer interval between this report and the last was due to pressures from a sharp increase in the number of submissions on bills that the Committee felt obliged to make during 1995.

Membership

2 The membership of the Committee is:

Dr Mervyn Probine CB, Chairman
Professor F M Brookfield, Emeritus Professor of Law, University of Auckland
Mr J G Fogarty QC, Christchurch
Ms Ellen France, Crown Law Office, Wellington
Mr A R Galbraith QC, Auckland
Mr Walter Iles CMG QC, Chief Parliamentary Counsel, Wellington
Sir Kenneth Keith KBE QC, President of the Law Commission, Wellington
The Hon Justice Robertson, Judge of the High Court, Auckland
Judge D F G Sheppard, Principal Planning Judge, Auckland
Ms Adrienne von Tunzelmann, Department of Justice, Wellington: to October 1995
Dr Matthew S R Palmer, Ministry of Justice, Wellington: from October 1995

Terms of Reference

3 The terms of reference of the LAC 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 or 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, and

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

4 The inclusion of reference (d) above results from the transition in June 1988 when the Information Authority, set up under the Official Information Act 1982, ceased to exist and its residual functions were allocated between the Legislation Advisory Committee and the Department of Justice.

5 The Legislation Advisory Committee has developed a very good working relationship with the Law Commission. The two bodies have overlapping responsibilities with respect to legislation, and the LAC acknowledges the excellent support it has received from the Law Commission and the Law Commission's research staff. The Chairman of the LAC has an office at the Law Commission.

6 The LAC was serviced by the Department of Justice, and the new Ministry of Justice, during the reporting period. Mr William Ogier was the Secretary of the Committee.

Meetings of the Committee

7 Generally, the Committee meets once a month to consider bills before select committees, and to review its ongoing programme of research on public law issues.

The role of the Committee

8 The Committee's role, in broad terms, is to assist in improving the quality of law making by:

(a) Attempting to ensure that legislative proposals, and enacted legislation, give clear effect to the intended policy of the legislation;

(b) Ensuring that legislative proposals introduced into the House of Representatives conform with the Cabinet approved principles of process and content contained in *Legislative Change: Guidelines on Policy and Content (Revised Edition)*, LAC Report No 6; and

(c) Discouraging the promotion of unnecessary legislative proposals.

Examination of legislative proposals

9 The majority of the LAC's time and resources is devoted to the examination of legislative proposals that are either:

(a) Already before a select committee and warrant the LAC making a formal submission on some aspect, or aspects, of the proposal; or

(b) Referred to the Committee by a Minister or Government department for comment before the legislative proposal is introduced into the House.

10 Both these activities give the LAC the opportunity to assist Ministers, Government departments and select committees in improving the quality of legislative proposals.

11 Of these two activities, research for, and making, formal submissions to select committees currently form the greater part of the Committee's workload. Appendix 2 to this report lists the submissions made to select committees during the reporting period. During this period the Law Commission, rather than the LAC (by arrangement), made submissions on three bills.

Legislative Change: Guidelines on Process and Content

12 In 1987, the Committee published a report on guidelines for improving the quality of legislation entitled *Legislative Change: Guidelines on Process and Content* LAC Report No 1.

13 These guidelines were adopted by the Cabinet in October 1987 and circulated within the Government. The guidelines now form part of the procedures that must be followed by:

(a) Government departments in preparing legislative proposals for, and Ministers in presenting legislative proposals to, the Cabinet Committee on Legislation and House Business for inclusion in the Government's legislative programme; and

(b) Government departments in preparing drafting instructions on a legislative proposal and Ministers in submitting the resulting draft legislation to that same Cabinet Committee for approval for introduction to the House.

14 In December 1991, a revised edition of the guidelines (LAC Report No 6) was published to take account of developments in the law and the legislative process since 1987. The revised edition of the Cabinet Office Manual issued in July 1994 drew attention to the importance of these guidelines in the following terms[1] :

> Everyone involved with the preparation and consideration of legislation should be familiar with the Legislation Advisory Committee report *Legislative Change: Guidelines on Process and Content* (revised edition, 1991), which has been endorsed by Cabinet.

15 The endorsement of *Legislative Change* by successive Governments, and the reference to the guidelines in the Cabinet Office Manual, are important steps towards ensuring improvements in the overall quality of legislation. The LAC intends to further revise *Legislative Change* shortly.

The 'Business' of Legislation: A Discussion Paper

16 The LAC believes that the primary responsibility for tendering advice to the Executive on whether legislative proposals comply with the guidelines set out in *Legislative Change* rests with the departmental officials responsible for preparing drafting instructions on those proposals. The LAC also considers that some defects in the content of legislative proposals owe much to poor process in their development - for example, poor policy and programme impact analyses; unrealistic deadlines

[1] Ch. 5, note under Heading A - Legislation.

set by Ministers; inadequate and hasty consultation within, and beyond, Government; and unfamiliarity with the guidelines themselves.

17 Poor policy development and policy impact analysis, no matter what the cause, generally leads to defects in legislative proposals. The resulting need for corrective action (at the select committee or Committee of the whole House stage, or by subsequent amending legislation) increases the cost of legislation. Flawed legislation can also expose individuals to unnecessary risk and perhaps to heavy costs (for example, of litigation to clarify the application of the law).

18 As the LAC stated in *Issues of Principle* [2], the Minister of Justice (the Hon Douglas Graham, MP) approved the limited distribution in September 1993 of a discussion paper entitled *The 'Business' of Legislation* to present and past politicians, senior civil servants, and members of the legal profession. In that discussion paper, the LAC took a critical look at the processes used in the preparation of legislative proposals, drawing on the experience of a private sector approach to improving products, processes and services. Material from that paper, and from subsequent discussions with people and groups consulted, will be used in the preparation of the next revision of *Legislative Change*.

Consultation

19 The LAC is currently preparing a report on consultation, particularly statutory duties to consult. The Committee is also of the view that it is good practice for Government agencies to consult widely during the development of new policies and legislative proposals. For example, consultation:

(a) Contributes to better decision-making by drawing on specialist knowledge and skills from both within and outside Government;

(b) Allows consultees to participate in decision-making, thus leading to more 'open' government;

(c) Helps identify whether there *is* a problem and *what* it is;

(d) Can identify and restrain the unreasonable exercise of power;

(e) Can ensure some degree of protection of particular interests;

(f) Can improve public compliance because the decisions are consensually based;

(g) Can improve relationships with special groups within society and improve the relationship between the Crown and Maori; and

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[2] *Issues of Principle* (Report of the Legislation Advisory Committee 1 July 1992 to 31 December 1993) Report No 8, December 1993, para. 20.

(h) Can make a contribution to the development of New Zealand's position in international negotiations and in treaty-making.

20 Consultation is, therefore, a vital part of the process of developing good policy and law.

21 There are other reasons why a study of consultation is important at this time. Recent state sector reform has seen:

(a) The division of some former Public Service departments into ministries and crown entities of various kinds that now exercise separate functions (eg, a policy/operations split), but provide support and advice in similar areas;[3]

(b) The State Services Commission's overarching role ended, with Government departments and ministries now having greater, and more specific, individual responsibilities; and

(c) The parallel process of devolving power away from the centre of government and giving, or delegating, that power to various other agencies (eg, State enterprises, Crown entities).

As a consequence, positive steps are needed to ensure that existing thinking is extended into the new environment [4], otherwise there is a risk that the underlying collective nature of government may be weakened by the new *vertical* processes of control and responsibility.

22 In this new environment, the best way for the Government to reach a single collective view on any issue that takes into account all the relevant information, and the perspectives of all affected Government agencies, is to consult. Internal Government consultation facilitates Government departments and ministries co-operating and communicating with one another, and co-ordinating their advice. This kind of consultation will be particularly important in the context of a *proportionally elected* Parliament in which political parties in a coalition government have to work together and ultimately reach a single view. Clearly, this will only be possible if the advice and information presented to Ministers at Cabinet for decision is comprehensive and, as far as possible, already agreed upon by the affected Government agencies. Generally, the achievement of that consensus will depend on a process of consultation that is comprehensive, timely, and well executed.

Recurring issues

23 In *Issues of Principle,* the Committee commented in some detail on a selection of legislative proposals on which it had made submissions to select committees. The seven examples cited (six bills and an apparent drafting error) illustrated a number of matters that departed from well-established and sound legal principle.

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[3] See, for example, *The Effective Operation of Cabinet Government*, Marie Shroff, Public Service Senior Management Conference, 18 to 19 August 1994.

[4] See, for example, *Working Under Proportional Representation: A Reference for the Public Service*, State Services Commission, New Zealand, September 1995.

24 In this report, the LAC has selected a number of recurring issues, and has used relevant legislative proposals on which it has made submissions during the reporting period to illustrate its concerns about those issues. The LAC's intention in doing so is to encourage the use of good practices by highlighting basic principles during the examination of these recurring issues, rather than to criticise the particular Ministers, Government departments, or officials responsible for the cited legislative proposals.

25 There is a brief summary of each issue below, with a fuller discussion in Sections II to VI.

Lost privileges to be restored

26 The Social Welfare Reform Bill (No. 3) 1993 was discussed in *Issues of Principle* LAC Report No 8. While not strictly a 'recurring' issue, the Bill illustrates a legislative proposal that needed to be revisited during the current reporting period because of serious flaws in the original bill.

27 It is accepted that, to carry out his or her functions, the Director-General of Social Welfare needs powers to require information from, or about, individuals who are receiving various types of financial assistance from the State. In these circumstances, a principled approach is highly desirable and there is a need for a balance between competing interests.

28 Before the proposed amendment by the Bill, section 11 of the Social Welfare Act 1964, which empowered the Director-General of Social Welfare in certain circumstances to require individuals to provide information to the Department preserved, all of the privileges that are available to a witness in a court of law. These are the privilege against self-incrimination, legal professional privilege, public interest immunity, the privilege for "without prejudice" communications, privilege between spouses, religious privilege, medical privilege, and the protection available to other confidential relationships in the court's discretion under section 35 of the Evidence Amendment Act (No. 2) 1980. New section 11(4) substituted a privilege against self-incrimination that protected only persons *suspected* of the offences in that subsection. However, the common law privilege does not require suspicion before the privilege can be asserted.

29 Also, the 1993 Bill preserved *only the privilege against self-incrimination and legal professional privilege*. The Bill was silent on the application of the other privileges, with no justification given for removing them.

30 The 1993 Bill as enacted, modified the privilege against self-incrimination in section 11(4) of the Social Security Act 1964, along the lines the LAC had recommended.[5] *However, the amendment did not include public interest immunity, the privilege for "without prejudice" communications, medical privilege, religious privilege, the privilege between spouses, and the protections available to other confidential relationships under the court's discretion in section 35 of the Evidence Amendment Act (No. 2) 1980. Rather, the application of these privileges was expressly excluded.*

31 Following wide public concern about the removal of these privileges and at the request of the Minister of Social Welfare (the Hon Peter Gresham MP), the Social Services Select Committee

[5] See paras. 59 and 63.

conducted an inquiry into the privilege provisions contained in section 11 of the Social Security Act 1964. As the result of that inquiry, the select committee recommended that all the privileges available to a witness in a court of law be restored, and that the Government extend the application of privilege to a wider range of comparable relationships and communications. As at the time of writing (March 1996), the bill was set down for committal.

International obligations

32 During this reporting period, the LAC has seen examples of proposed legislation that caused it some concern because they:

(a) *Would not have given full effect to New Zealand's international obligations* (Fisheries Bill 1995);

(b) *Glossed an international convention by enacting different provisions in New Zealand law,* thereby inviting difficulty because the courts might construe something from the fact that Parliament had enacted different words from those in the Convention.

The Guardianship Amendment Act 1991 did not follow the exactly wording of the Convention on the Civil Aspects of International Child Abduction. A further amendment in the Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994 recognised the law had to be put right, but the Explanatory Note to the Bill stated that the proposed section was only to be "*modelled more closely*" on the Convention. The LAC considered that this amendment, and the 1991 Act, should give *direct effect* to the Convention;

(c) *Used wording that was very close to the wording of treaty provisions but that was not identical with it* (Layout Designs Bill 1994).

While the LAC accepts that in many cases domestic legislation that implements international obligations will not always adhere exactly to the wording of those obligations, for example because the treaty was not written in terms that were intended to be directly applicable in domestic law, the Committee believes that in such cases *the wording of the domestic legislation needs to be carefully considered so that full effect is given to the international obligation*; and

(d) *Did not reflect international conventions to which New Zealand planned to become a party.*

For example, Supplementary Order Paper No. 10 relating to the Law Reform (Miscellaneous Provisions) Bill (No. 2) 1994 provided for the Director-General of Social Welfare to negotiate and conclude agreements relating to intercountry adoption. However, the SOP did not mention or reflect the requirements of the 1993 Hague Convention on the Protection of Children and Co-operation in respect of InterCountry Adoption that was adopted at a conference of 66 States to deal with major problems that were arising in the area. New Zealand was not a signatory to the Convention at the time the SOP was introduced, but the intention to incorporate the Convention into domestic law had been signalled by the Department of Social Welfare.

33 The way in which the provisions of conventions and treaties are incorporated into domestic law is a matter that is of increasing importance and one that requires much more systematic attention.

Omnibus bills

34 The LAC acknowledges that omnibus bills have a useful function in providing a vehicle to implement minor reforms, to make technical improvements and to correct mistakes in legislation; for instance, Law Reform (Miscellaneous Provisions) Bills and Statutes Amendment Bills.

35 The Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994 was an example of an omnibus bill that made significant amendments to a number of statutes. The Bill amended 29 different Acts. Three specific amendments were selected for special comment because they went well beyond what could be classified as minor or technical amendments. These amendments were to the Criminal Justice Act 1985, the Customs Act 1966, and the Land Transfer Act 1952. A further significant amendment contained in this omnibus bill was to the Guardianship Amendment Act 1991. The latter amendment is discussed in the context of Section III, International obligations.

36 The LAC considers that omnibus bills that make such significant amendments to a large number of unrelated statues should not contain significant policy changes that could attract considerable public and political debate. The LAC's rationale is:

(a) There is a general expectation that only minor amendments are included in Bills of this nature. There is, therefore, a risk that substantive policy reforms included in an omnibus measure with many other provisions of a truly minor or technical nature will not be subjected to the same degree of public and political scrutiny that they would have as 'stand alone' amendments to the relevant Acts;

(b) Interest groups that are not sufficiently well-informed, well-organised and well-resourced may not be aware of the inclusion of more substantive provisions in these bills and miss opportunities to prepare submissions on them; and

(c) The convenience of omnibus bills may offer a temptation to policy makers and Ministers to include provisions that may not always be strictly necessary or well thought through.

37 These views are generally in harmony with those expressed in a submission to the Standing Orders Committee by the Clerk of the House of Representatives (September 1994, paras. 14 to 17).

38 It is noteworthy that, since this report was drafted, a new set of Standing Orders came into force on 20 February 1996 - *Standing Orders of the House of Representatives 1995*. These new Standing Orders limit the types of omnibus bills that may be introduced and the changes should avoid many of the concerns the Committee has expressed about such bills.

Official information

39 In February 1990 the Committee made a submission to the State-Owned Enterprises (Ombudsmen and Official Information Acts) Select Committee that was established to review the

effect of the Ombudsmen Act 1975 and the Official Information Act 1982 on the operation of state enterprises. The LAC recommended that the two Acts should in general continue to apply to state enterprises, a view that was supported by the select committee. A 1990 bill sought to create a presumption of non-disclosure of information relating to an investment application to the Overseas Investment Commission; but that legislation was not carried over to the 44th Parliament. During the present reporting period the Overseas Investment Amendment Bill 1994 again attempted to create an exception to the Official Information Act 1982 for the same information supplied to the Overseas Investment Commission.

40 The LAC's starting point is that if the Overseas Investment Commission believes that the Official Information Act does not adequately protect the information supplied then the 1982 Act should be amended rather than attempting to create an exception to the Act's statutory scheme.

41 Proposed new section 16A of the Overseas Investment Amendment Bill 1995 would have permitted all "confidential information" to be withheld by the Minister of Finance (or others as the Bill provided) until a decision on the investment application had been made. Once the decision was made, the Minister (or others) must send to the applicant a summary of the "confidential information" that the Minister (or others) considers is available for release under the Official Information Act. That applicant could respond stating reasons for the continued withholding of the information. The Minister (or others) might omit any "confidential information" from the summary on the basis of that response. Having made any changes to the summary, the information now in the summary ceased to be subject to the special confidentiality regime and could be made available in the usual manner under the Official Information Act. (The above synopsis is based on our understanding of the intention of the proposal, not on its actual wording.)

42 In addition, the definition of "confidential information" covered not only information supplied in relation to investment applications made to the Commission, but also the application itself, and the fact that such an application had been made, was being considered, or had been granted or declined. This meant that, depending on what the Minister or Commission chose to continue to class as "confidential information" subsequent to a decision, the actual decision making process of the Commission on any investment application could remain secret. This was contrary to the principle that, in general, the exercise of statutory functions ought to be public.

43 The proposed amendment would also have enabled "confidential information" to be withheld indefinitely; that is, to the extent that this information was not included in the post-decision summary there was a continuing presumption of non-availability. The power of the Minister (or others) to define the scope of any exception from this presumption was not to be subject to review by the Ombudsmen or by Ministers collectively, nor were there any guidelines or principles proposed on how the Minister's power must be exercised. This type of proposal erodes the principle established in section 5 of the Official Information Act that information ought to be freely available unless there is good reason for withholding it. The LAC considered that the proper approach was for these issues to be raised in the context of possible amendments to the scheme of the Official Information Act 1982, rather than to seek piecemeal legislative exceptions to the current regulatory regime.

44 On 1 August 1995, following the introduction of Supplementary Order Paper No. 100, clause 9 of the Overseas Investment Bill (inserting new section 16A) was omitted at the Committee of the whole House stage.

Retrospective legislation [6]

45 Examples of retrospective legislation on which the LAC has commented during the reporting period are summarised below and discussed more fully in Section VI.

46 Clause 6(1) of the Finance Bill (No. 4) 1995 validated certain Crown forestry licences by providing that every Crown forestry licence granted under section 14 of the Crown Forest Assets Act 1989 before the commencement of this clause was deemed to comply, *and to have always complied*, with new sections 29 and 29A of the Act as substituted by clause 5 of the Bill.

47 Clause 6(2) provided that in every existing licence the terms "drainage works" and "erosion works" *was deemed to have, and always to have had, the meanings that those terms have in new section 2(1) of the 1989 Act, as amended by clause 4.* The Explanatory Note to the Bill suggested a justification for the retrospective operation of clauses 4 and 5: namely, that these provisions declared the law as it had always been understood and proceeded upon, and that the provisions were to operate retrospectively to give effect to a received common understanding of the law.

48 Clause 6(3) provided that clause 6 operate retrospectively by having effect:

> . . . notwithstanding any judgment or determination or order of any Court given before or after the commencement of this section in any proceedings commenced before the commencement of this section.

49 The Explanatory Note to the Bill stated that *an existing licensee had commenced proceedings in the High Court and was making submissions in reliance on the terms of existing section 29 of the Act.* The licensee's proceedings were ongoing. The LAC drew the select committee's attention to the fact that the Bill would, therefore, "cut off" the licensee's proceedings before they had run their course.

50 Because of the importance of such retrospective action, the LAC has extended the discussion to include the effects on judgments and legal proceedings of proposed amendments to the Human Rights Act 1993 in Supplementary Order No. 36 relating to the Finance Bill (No. 2) 1994. After discussing this legislation the LAC notes that, with respect to retrospectivity, there are two possible arguments of principle:

(a) Legislation should, in general, have prospective effect only. In particular it should neither interfere with accrued rights and duties, nor should it create offences retrospectively; and

(b) Legislation should not, in general, deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law, or to continue proceedings asserting rights and duties under that law.

51 The principle of non-retrospectivity is reflected for criminal offences and penalties in section 26(1) of the New Zealand Bill of Rights Act 1990, section 10A of the Crimes Act 1961, and section

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[6] Because of the importance of this matter, and because it is a recurring issue, a fuller discussion on this subject is included as Appendix 1. It is in form of a memorandum, prepared at the request of the Finance and Expenditure Select Committee, on legislation that responds to court judgments and proceedings.

4 of the Criminal Justice Act 1985; and, more generally, in section 20 of the Acts Interpretation Act 1924 and related common law rules.

Appendix 1

52 As has been pointed out above, when the Committee was before the Finance and Expenditure Select Committee which was hearing submissions on the Finance Bill (No. 4) 1995, the LAC commented that clause 6(3) of that Bill provided that clause 6 would operate retrospectively, and that an existing licensee's proceedings in the High Court would be "cut off" by the Bill before they had run their course.

53 The select committee requested that the LAC provide it with a memorandum on the general question of legislation that overrides judgments and pending proceedings. That memorandum is attached to this report as Appendix 1.

Appendix 2

54 Appendix 2 contains a list of the submissions that the LAC has made to select committees during the reporting period; a note indicating that, at the request of the Clerk of the House of Representatives, the LAC had commented on the wording of seven proposed indicative referenda questions; and a list of LAC publications since 1987.

II LOST PRIVILEGES TO BE RESTORED

Introduction

55 Whilst not strictly a 'recurring issue' in the sense of the rest of this report, the Social Welfare Reform Bill (No. 3) 1993 illustrated a legislative proposal that needed to be revisited during the current reporting period because of serious flaws in the original bill. The Bill introduced a number of significant amendments to the Social Security Act 1964, and was one of the bills discussed in *Issues of Principle* LAC Report No 8.

56 The LAC's submission on the Bill was particularly concerned with the increased breadth of the powers that the Bill would confer on the Director-General of Social Welfare to require any person to provide information to the Department of Social Welfare or a specified employee of the Department.[7] The Committee did not question the existence of an appropriately confined power to compel the provision of information with the purpose of ensuring that decisions about benefits were made properly. In that sense the freedom of the individual to remain silent could quite properly be limited. Rather, the LAC was concerned about the extent of the power and, in particular, its possible overriding of established privileges.

Restrictions on the privilege against self-incrimination

57 Clause 4 of the Bill substituted new sections 11 and 11A into the 1964 Act. New sections 11(4) to 11(7) were of particular relevance as they provided exceptions from the broad obligation to supply information (stated above) by enabling a person to refuse to disclose that information on the grounds of certain privileges. However, *the privilege against self-incrimination set out in new section 11(4)* was a significantly restricted version of the usual common law privilege against self incrimination. The Hon Justice McMullin, in the Court of Appeal decision of *New Zealand Apple and Pear Marketing Board* v *Master & Sons Ltd* [1986] 1 NZLR 191, at page 193, summed up this privilege:

> The law is well settled. It is a general rule that 'no one is bound to criminate himself,' in the sense that he is not to be compelled to say anything which 'may tend to bring him into the peril and possibility of being convicted as a criminal'.

58 New section 11(4) protected only persons *suspected* of the offences specified in new sections 11(4)(a) and 11(4)(b). But, as the above quotation indicates, the common law privilege has no requirement that the person asking questions or requesting information already suspects offending before the privilege can be asserted. Indeed, the basic philosophy behind the privilege is that it is a

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[7] This was the intention of proposed new section 11 of the Social Security Act 1964.

protection against an individual being forced either to establish in the mind of the questioner that the individual is an offender, or to confirm that allegation. The LAC considered that to limit the privilege in the way proposed in new section 11(4) was thus a novel and significant restriction.

59 Further, no justification for the restriction was given in the Bill nor in the arguments made in support of the Bill. The LAC suggested that the restriction was unsatisfactory in both principle and practice. *The Committee recommended to the select committee that the restrictions on the ability to assert the privilege against self-incrimination be reconsidered.*

Other privileges removed

60 The LAC pointed out that *existing section 11* preserved all the privileges that would be available to a witness in a court of law. These are the privilege against self-incrimination, legal professional privilege, public interest immunity, the privilege for "without prejudice" communications, privilege between spouses, religious privilege, medical privilege, and the protection available to other confidential relationships under the court's discretion in section 35 of the Evidence Amendment Act (No. 2) 1980.

61 This Bill was to repeal existing section 11 and provided specifically *only for the availability of the privilege against self-incrimination and legal professional privilege*. Even then, these privileges were truncated versions of those provided under existing section 11. The Bill was silent on the application of the other privileges, and no justification or reasons were given for removing them.

62 The LAC's view was that this silence created unnecessary uncertainty and it suggested to the select committee that the status of these other privileges be clarified in the Bill. The common law rule is that the privileges should be taken to operate unless there is a clear intention to exclude them. Given the unlikelihood of these other privileges providing a significant impediment to the investigation of welfare fraud, there seemed to be little reason to limit the protection generally accorded to those other relationships through the law of privilege. The Department was not able to provide any information to support the overriding of the privileges.

63 *The Legislation Advisory Committee, therefore, recommended that the Bill be amended to include a general provision clearly incorporating the protection of all privileges available to a witness in a court of law, subject to the specific limitation on legal professional privilege.*

Legislative outcome

64 Clause 4 was enacted as section 3 of the Social Security Amendment Act (No. 3) 1993, which modified, in new section 11(4) of the Social Security Act 1964, the privilege on the grounds of self-incrimination along the lines recommended by the LAC. However, *it did not, as recommended, increase the categories of privilege recognised by the 1964 Act to include public interest immunity, the privilege for "without prejudice" communications, medical privilege, religious privilege, privilege between spouses and the protections available to other confidential relationships under the court's discretion in section 35 of the Evidence Amendment Act (No. 2) 1980. Rather, the application of these privileges was expressly excluded.*

Select committee inquiry

65 Following the enactment of new section 11, policy changes were announced by successive Ministers of Social Welfare. A press release issued by the then Minister, the Hon Jenny Shipley MP, on 5 November 1993 stated that requests by the Department of Social Welfare for information under new section 11 would not be made to doctors until the section had been reconsidered.

66 A subsequent Ministerial Direction by the current Minister, the Hon Peter Gresham MP, to the Director-General on 22 December 1993 was to the effect that, notwithstanding anything in new section 11(7) of the Social Security Act 1964 [8], when the Director-General has requested information or required production of a document, and any person has refused to supply that information or to produce that document because of a claim of privilege, that he or she would be successfully able to assert if he or she was asked for that information or to produce that document in a Court of law, the Director-General was not prosecute that person for any offence under section 11(3)[9] of the Social Security Act 1964 in respect of that refusal.[10]

67 On 15 May 1994, the Social Services Select Committee, at the request of the Minister of Social Welfare, resolved to conduct an inquiry into the privilege provisions contained in section 11 of the Social Security Act 1964. The terms of reference of the inquiry were:

> To examine the Department of Social Welfare's administration of the Social Security Act 1964, with particular reference to:
>
> - the privilege provisions contained in section 11 of the Social Security Act 1964 prior to the 1993 amendment; and
>
> - the impact of the 1993 amendment
>
> and to report its findings and recommendations to the House of Representatives.

68 In evidence to the select committee, the Department of Social Welfare estimated that approximately 104 799 requests for information under section 11 would be made annually, and that the number of privilege claims made in terms of new section 11 would be no more than 12. The Department also advised that had been unable to locate copies of any specific advice that was given to the Minister prior to the Cabinet paper that sought the 1993 amendments to the Social Security Act 1964. The select committee indicated that this placed a constraint on its ability to judge whether the changes to the privilege provisions under section 11 were justified.[11]

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[8] This provides that "subject to sections 11(4) to 11(6) of the Act, no person shall be excused under this section from providing any information or producing any document that would be privileged in a Court of Law".

[9] These offences relate to a refusal or failure to comply with, or falsely furnishing information relating to, a notice to provide information under new section 11.

[10] For the text of that direction, see the *New Zealand Gazette*, No. 1, 13 January 1994, p. 58.

[11] See generally, *Report of the Social Services Select Committee on the Inquiry into the Privilege Provisions of Section 11 of the Social Security Act 1964* (I. 12A, 1994), p. 4.

69 In the select committee's view, policy shifts under the different Ministers, combined with the Department's failure to state clearly the departmental policy relating to the ability to assert privilege, had led to public confusion over the status of the Department's ability to compel information under the 1964 Act. The shifts in policy had also contributed to the Department's inability to compile adequate statistical data in this area.[12]

70 In its report, the select committee's recommendations with respect to privilege were that:[13]

- The legislation be amended so that the privileges available to witnesses in a court of law are restored, and that the limitation on legal professional privilege regarding solicitors' trust accounts provided in section 11(5) be retained; and
- The Government expand the application of privilege to a wider range of comparable relationships and communications.

71 The Social Services Select Committee also noted that the Law Commission will be reporting presently on the broader issues of privilege, and recommended that the Government give urgent consideration to the issues raised in the Law Commission's report.

Conclusion

72 As the result of the select committee's report, Supplementary Order Paper No. 84 was introduced and referred for consideration with the Bill. The LAC made further submissions on the SOP. At the time of writing (March 1996), the bill was set down for committal.

[12] Ibid, p. 5.

[13] Ibid, p. 9.

III INTERNATIONAL OBLIGATIONS

Introduction

73 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. It is worth noting that primary legislation which appears to raise treaty issues 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. 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. Appropriate and timely consultation, especially with the Ministry of Foreign Affairs and Trade, is therefore essential.

74 Despite the importance of ensuring that treaty issues are dealt with appropriately, the LAC considers that, during the current reporting period, there were a number of legislative proposals that fell short of standards that might be expected when New Zealand's international obligations are being incorporated into domestic law.

Fisheries Bill 1995

75 The Long Title to the Fisheries Bill 1995 stated that it was:

> An Act -
> (a) To reform and restate the law relating to fisheries resources; and
> (b) To recognise New Zealand's international obligations relating to fishing.

76 However, neither the Long Title nor the Explanatory Note to the Bill mentioned the United Nations Convention on the Law of the Sea, which New Zealand has signed but has not yet ratified. Since ratification must have been in prospect when the Bill was drafted, the LAC believes that the opportunity should have been taken to ensure that the Bill's provisions were consistent with those in the Convention.

77 Sections 3(1)(a) and 3(1)(b) of the Bill required that:

> ... all persons exercising or performing functions, duties, or powers conferred or imposed by or under ... the Act, shall act in a manner consistent with -
> (a) The provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; and
> (b) New Zealand's international obligations relating to fishing (*to the extent that such obligations do not conflict with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992*). [italics LAC's emphasis]

78 The LAC submitted that the proviso to section 3(1)(b) was wrong in principle. When the Crown enters into international obligations it is bound by those obligations as a matter of international law, irrespective of difficulties that those obligations may pose domestically. Therefore, possible domestic difficulties should be considered at the time the acceptance of international obligations is being considered. *The Committee, therefore, recommended that the bracketed words in section 3(1)(b) be omitted from the Bill.*

79 In the select committee's *Interim report on the Fisheries Bill* (I. 11A, 1995) which proposed an amended Bill, clause 3 was replaced with a new clause 5:

> **5. Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992** - This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with -
>
> (a) New Zealand's international obligations relating to fishing; and
>
> (b) The provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

80 This gives effect to the LAC's submission, on the understanding of course that the provisions of the 1992 Act would conform with New Zealand's international obligations.

81 Section 84(2)(d) of the Bill stated that the Minister *may have regard to* the terms of any relevant international agreement in setting limits on the allowable catch for foreign fishing vessels. To the LAC, this provision seemed unnecessary and undesirable as section 3(1)(b) already required the Minister to act consistently with international obligations. The Committee considered that the effect of section 84(2)(d) was to "water down" the requirement in section 3(1)(b). *The Committee recommended that section 84(2)(d) should either be omitted or be replaced by a mandatory provision which would ensure consistency with the intent of section 3(1)(b).*

82 In the select committee's interim report (see paragraph 79 above) it is proposed that the obligation in section 84(2)(d) be replaced by a provision that "the Minister shall have regard to ... the degree to which [countries other than New Zealand] ... have complied with any relevant international obligations" [proposed new section 77(2)(d)]. This proposed change satisfies the LAC submission.

Amendment to the Guardianship Amendment Act 1991

83 Clause 39 of the Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994 proposed to substitute a new section 4 into the Guardian Amendment Act 1991. The existing section 4 defined the term "rights of custody" in the context of Part I of the Act, which deals with international child abduction. The Explanatory Note to the Bill stated that the new section 4 "is modelled *more closely* than the existing section on Articles 3 and 5 of the Convention on the Civil Aspects of International Child Abduction". That Convention is contained in the Schedule to the 1991 Act.

84 When the Guardianship Amendment Bill 1990, which became the 1991 Act, was before Parliament, the LAC advised that *the best means of giving effect to the Child Abduction Convention was to set out its terms and give them the direct force of law.* The LAC considered that to gloss the Convention, by enacting differently worded provisions in New Zealand law, could invite difficulty because the Courts might construe something from the fact that Parliament had enacted different

words and had not directly enacted the words of the Convention. By contrast, the LAC noted that the Convention was given direct force in Canada, the United Kingdom and the United States.

85 That advice was not taken. Different words from those used in the Convention were included in the 1991 Act, in particular in the provisions about "rights of custody". And, as feared, the courts were persuaded that those differences, setting more stringent conditions for the parent seeking the application of the Convention, were significant:[14]

> It [Section 4(1)] is expressed in different words from art 5 of the Convention and effect should be given to that difference.

86 The consequences of that difference in wording might be that parents are deprived of the rights accorded by the Convention, the child is not returned as is required, and New Zealand is in breach of the obligations placed on it by the Convention.

87 As clause 39 of the Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994 recognised, the law had to be put right. However, to quote the Explanatory Note, the new section 4 was still only to be "modelled *more closely*" on the wording of the Convention - *it did not directly invoke the wording of the Convention.*

88 The LAC was concerned that there could still be room for judicial interpretation of the amended Act which is contrary to the intent of the Convention. Accordingly, the LAC supported the recommendations that it made when the Guardianship Amendment Bill 1990 was originally before Parliament; namely *that the resulting Act should give direct effect to the Convention.*

Layout Designs Bill 1994

89 The point has been made above that often the best means of giving effect to international conventions is to set out their terms and give them the effect of law. The example given above illustrates the dangers of glossing a convention by enacting different provisions in New Zealand law because the courts might construe something from the fact that Parliament has enacted different words and not relied on the words of the convention.

90 In the LAC's submission to the select committee hearing submissions on the Layout Designs Bill 1994, it therefore drew attention to differences in wording between the 1989 WIPO Treaty on Intellectual Property in Respect of Integrated Circuits (28 ILM 1477 (1989)), the 1993 GATT Agreement (33 ILM 81 (1994)), and the 1994 Bill.

91 The Committee stated, after consultation with the Ministry of Foreign Affairs and Trade, that:

> ... it does accept that in many cases national legislation designed to implement treaty provisions will not adhere closely to its wording. That may be the case for instance because the treaty was not written in terms that were intended to be directly applicable in national law or because the process of fitting the treaty provisions into the context of the national law and its wording call for a different approach.

[14] F v T [child abduction] (1994) 12 1994-95 FRNZ 157, 167 (HC).

92 However, the LAC believed that those considerations were not relevant to the Layout Designs Bill, which the Committee noted was drafted as a "stand alone" measure and on much the same lines as the Treaty and the Agreement. The Committee considered that:

> *This is not a case where in the relevant areas the national legislation has to be more precise. It is indeed because of the similarity of the approaches that the differences appear all the more striking.*

93 The LAC therefore recommended that *very careful consideration should be given to any deliberate departures in the precise wording of a provision which is otherwise very close to the wording of the Treaty*. To illustrate the similarity of wording the LAC compared, side by side, some of the definitions in the Bill and in the WIPO Treaty, namely "integrated circuit", "layout design", and "original". Whilst the differences in the definitions of "integrated circuit" and "layout design" were not great, there seemed little to be gained by not using the Treaty wording, particularly if there was a risk that the differences might unnecessarily provide a basis for an argument.

94 The approach taken to the wording of the definition of "original" was somewhat oblique in that, after stating *"that, for the purposes of this Act, but without limiting the ordinary meaning of the word 'original' in relation to layout design*", the remainder of the definition, in effect, indicated what an original layout design is not. This would, therefore, 'limit' the ordinary meaning of the word "original". In the LAC's view, the WIPO Treaty definition was more straight-forward and was to be preferred.

95 The Committee also compared the definition of "protection period" provided in the Bill with that provided in the GATT Agreement, but omitting those provisions relating to countries requiring registration because the Bill did not provide for registration of layout designs:

1993 GATT Agreement (33 ILM 81 (1994))

Term of Protection (Art. 38)

2. ... layout-designs shall be protected for a term of no less than ten years from the date of the first commercial exploitation wherever in the world it occurs.

3. Notwithstanding paragraphs 1 and 2 above, a Member may provide that protection shall lapse fifteen years after the creation of the layout-design.

Layout Designs Bill 1994

Protection Period (clause 6)

"Protection period" in relation to an eligible layout design, means the period beginning on the day on which the layout design was made and ending:

(a) If the layout design is first commercially exploited within 10 calendar years after the calendar year in which the design was made, at the end of the tenth calendar year after the calendar year in which the layout design was first commercially exploited; and

(b) In any other case, at the end of the period of 10 calendar years after the calendar year in which the layout design was made.

96 The differences in application between the provisions of the GATT Agreement and the provisions of the Bill are illustrated by the examples given below:

GATT Agreement

If a layout design is first exploited commercially eleven years from when the design was created (say, in 1995), under the GATT Agreement its protection would not lapse before 2016 (1995 + 11 + 10). This is not a likely scenario, but it is possible. However, under paragraph 3 of the Agreement provisions, this protection period could be limited to 15 years from the date of creation of the layout design; i.e., to the year 2010.

Layout Designs Bill

If the layout design is first commercially exploited eleven years after its creation, the protection would expire 10 calendar years after the calendar year in which the layout design was created. In other words the protection would lapse before the design was first commercially exploited.

97 In the LAC's view the provisions of the GATT Agreement were to be preferred because the Bill did not provide the full allowable "treaty" protection.

Legislative outcome

98 Although the definitions in the Layout Designs Act 1994 did not, as the Committee had recommended, follow the definitions in the GATT Agreement exactly, in general they were closer to those definitions than those in the Bill. The Act also corrected the "protection period" anomaly.

Supplementary Order Paper No. 10 relating to the Law Reform (Miscellaneous Provisions) Bill (No. 2) 1994 [Intercountry adoption agreements]

Introduction

99 Clauses 10 and 11 of the Law Reform (Miscellaneous Provisions) Bill (No. 2) 1994 provided for amendments relating to the definition of "social worker" in the Adoption Act 1955. Supplementary Order Paper No. 10 proposed to amend the Bill by adding a new clause 10A, which inserted a new heading and sections 19A to 19E (dealing with agreements on intercountry adoption) into the 1955 Act.

100 The Committee considered that the SOP had two serious faults:

(a) The first, which is relevant to the present discussion on international obligations, was that the SOP did not mention or reflect the requirements of the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption which had been adopted by 66 States in 1993 to deal with major problems that were arising in intercountry adoption; and

(b) The second was that the proposed amendment seemed to lack any operative legal effect as a matter of New Zealand law.

Consistency between delegation of functions and international law

101 The proposed amendment did not mention, or appear to reflect, the 1993 Hague Convention referred to above. This convention was developed because of concerns about the possible dangers of inter-country adoption. Although New Zealand was not a signatory to that convention at the time the SOP was introduced, the Department of Social Welfare Corporate Plan for the 1994/95 financial year indicated that incorporation of the Convention into New Zealand's adoption legislation and

practice was part of the strategic direction of the Children and Young Person's Service for the next three to five years.[15]

102 It seemed reasonable to the LAC that the policy underlying the proposed legislation should reflect the general thrust of the Convention.

103 The Convention requires that signatory States designate "central authorities" to discharge certain duties imposed by the Convention. These central authorities have certain functions that cannot be delegated. Delegation of any other functions can only be to accredited bodies that have particular characteristics, including the pursuit of non-profit objectives, direction and staffing by qualified persons, and supervision by a central authority. By contrast, the SOP contained no limits on the matters that could be delegated, nor any specifications about the characteristics of the bodies that may be accredited. The LAC, therefore, asked the select committee to consider how the SOP related to the Department of Social Welfare's declared intention to incorporate the 1993 Hague Convention into New Zealand's adoption legislation and practice.

104 Proposed new section 19B provided that the Director-General of Social Welfare may negotiate and conclude agreements relating to inter-country adoption with "appropriate authorities" in foreign countries. The conclusion of international agreements by the Executive is an exercise of prerogative powers, which exist quite independently of statute and need not be conferred by Act of Parliament. These prerogative powers are exercised in the ordinary way by the Head of Government, the Minister of Foreign Affairs, heads of diplomatic missions, and others authorised to do so by the Minister of Foreign Affairs, such as other Ministers, or officials.[16] Parliament cannot remove from the Government overall responsibility for implementing *its* international obligations. The LAC believed that whilst proposed new section 19B implied that the Director-General, rather than any other person, must conclude intercountry adoption with the "appropriate authorities" of other countries, it may be more appropriate for these agreements to be concluded by a New Zealand ambassador or a visiting Minister. As well, the other country involved may not wish to conclude such an agreement except through its "appropriate authority".

Lack of operative effect as a matter of New Zealand law

105 Proposed new section 19B also provided that the Director-General of Social Welfare was to be responsible for the implementation of any intercountry agreement, and proposed new section 19C contemplated the delegation of any function or power under the agreement to other organisations. However, as a matter of law, proposed new section 19B could have operative effect only if there are related powers available in New Zealand law. An agreement concluded under proposed new sections 19B and 19C cannot, of itself, confer such functions and powers on the Director-General.

106 Under the Adoption Act 1955, social workers have a function to report to the Court which then can make adoption orders. While the Director-General may consent to an adoption in those cases where the Director-General is the guardian (section 7(4) of the Adoption Act 1955) the Director-

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[15] See p. 26 of the Corporate Plan.

[16] *Legislative Change: Guidelines on Process and Content (Revised Edition)* LAC Report No 6, December 1991, pp. 78 to 79.

General does not seem to have general powers in relation to adoption other than those exercised by social workers employed by the Department; and the functions of social workers under the Adoption Act do not seem to be sufficient to implement any intercountry adoption agreements. Nor does the Director-General have powers under immigration legislation.

107 The basic problem was, therefore, that the Director-General did not seem to have general powers in relation to adoption orders, or the movement of children in and out of New Zealand for the purposes of adoption. As the SOP did not propose to create any new functions or powers under the law of New Zealand, proposed new sections 19B and 19C appeared to be without any operative effect.

Summary

108 The LAC's basic conclusion was that the Supplementary Order Paper should not proceed in its current form, because the delegation provisions did not:

(a) Sufficiently reflect the intent of an international convention that New Zealand is, or might wish to become, a party to; and

(b) Appear to be effective in New Zealand law.

Legislative outcome

109 The proposed amendments were omitted at the Second Reading stage.

Conclusion

110 The appropriate means of implementing treaty provisions in domestic legislation is a recurring issue and one of increasing importance. The examples that have been summarised in this section suggest that it is a matter that requires much more systematic attention. It is, therefore, timely that the Law Commission will shortly be publishing a basic guide on the role of international law in the making and operation of New Zealand law.

IV OMNIBUS BILLS

General comments on omnibus bills

111 The LAC acknowledges that omnibus bills have a useful function in providing a vehicle for the legislature to implement minor reforms, to make technical improvements and to correct mistakes in legislation; for instance, by means of Law Reform (Miscellaneous Provisions) Bills and Statutes Amendment Bills. Equally clearly, however, such bills have their drawbacks and may be used inappropriately.

112 For instance, the Committee considers that, in general, omnibus bills amending a large number of unrelated statues should not contain significant policy changes. The LAC believes there is a risk that substantive policy reforms included in an omnibus bill with many other provisions of a truly minor or technical nature will not be subjected to the same degree of public and political analysis that they would have as "stand alone" legislative proposal.

113 Firstly, there is a general expectation that only minor amendments are included in such bills, interest groups that are not sufficiently well-informed, well-organised, and well-resourced may not be aware of the inclusion of any relevant substantive measure and miss opportunities to prepare submissions on the bill.

114 Secondly, the question could be asked whether the convenience of omnibus bills offers a temptation to policy-makers to include provisions that may not always be strictly necessary or well thought through.

115 The Committee notes that a substantive submission to the Standing Orders Committee by the Clerk of the House of Representatives[17] also referred to difficulties posed by omnibus bills and made a number of recommendations which are generally in harmony with the LAC's views.

116 The LAC also notes that, since this report was drafted, a new set of Standing Orders came into force on 20 February 1996 - *Standing Orders of the House of Representatives 1995*. These new Standing Orders limit the types of omnibus bills that may be introduced and the changes should avoid many of the concerns the Committee has expressed below.

Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994

117 The Committee considered that this bill illustrated several of the difficulties posed by omnibus legislation. The Bill assembled amendments to 27 different statutes. These amendments varied both in their subject matter and their substantive significance.

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[17] September 1994, paras. 14 to 17.

118 Statutes amended by this bill were:

- Citizens Initiated Referenda Act 1993 (clauses 2 to 16);
- Criminal Justice Act 1985 (clauses 17 and 18);
- Customs Act 1966 (clauses 19 to 21);
- Disputes Tribunal Act 1988 (clauses 22 and 23);
- District Courts Act 1947 (clauses 24 and 25);
- Forestry Rights Registration Act 1983 (clauses 26 and 27);
- Forests Act 1949 (clauses 28 to 35);
- Gaming and Lotteries Act 1977 (clauses 36 and 37);
- Guardianship Amendment Act 1991 (clauses 38 and 39);
- Human Rights Act 1993 (clauses 40 to 42);
- Juries Act 1981 (clauses 43 to 46);
- Land Transfer Act 1952 (clauses 47 and 48);
- Law Practitioners Act 1982 (clauses 49 and 50);
- Marriage Act 1955 (clauses 51 to 53);
- Motor Vehicle Securities Act 1989 (clauses 54 to 58);
- Newspapers and Printers Act 1955 [*repeal of*] (clauses 59 to 62);
- New Zealand Maori Arts and Crafts Institute Act 1963 (clauses 63 and 64);
- Passports Act 1992 (clauses 65 to 67);
- Police Act 1958 (clauses 68 and 69);
- Private Investigators and Security Guards Act 1974 (clauses 70 to 89);
- Property Law Act 1952 (clauses 90 to 92);
- Securities Act 1978 (clauses 93 and 94);
- Statistics Act 1975 (clauses 95 and 96);
- Status of Children Act 1969 (clauses 97 and 98);
- Summary Proceedings Act 1957 (clauses 99 to 107);
- Superannuation Schemes Act 1989 (clauses 108 and 109); and
- Tariff Act 1988 (clauses 110 to 112).

119 The LAC commented on 14 of the Bill's provisions, three of which are discussed below to illustrate the Committee's concern about substantive reforms being included in omnibus bills. A fourth amendment in the Bill, to the Guardianship Amendment Act 1991, is discussed in Section III, International obligations.

Criminal Justice Act 1985

120 Clause 18 of the Bill amended the Criminal Justice Act 1985 by inserting a new section 84(2A). This new provision extended the application of section 84 by providing for a presumption of confiscation of the motor vehicle used in, or in relation to, the commission of a second stated qualifying serious traffic offence within a five year period. The Committee considered that this amendment was an *ad hoc* addition to existing sentencing powers.

121 It questioned whether departmental officials had directed their attention to the extent to which existing related powers were actually used, and to the whole sentencing regime and its aims. It was

not clear to the Committee from the Bill whether the aim of the new provision was primarily punitive, or whether it also had some road safety objectives.

122 Whatever the goal of these provisions, it is relevant to note the fact that, as stated by John Bailey[18],

> "The problem of injury road accidents in New Zealand is dominated by the young males in the 15-19 year old age group: ... this group accounts for 6.3 percent of all driving but for 28.0 percent of the injured drivers according to one hospital-based road accident survey".

This suggests that any new provisions in this area should be based on whatever empirical data were available: for example, the extent to which young male drivers have an ownership interest in the cars they drive, the number of people who commit two offences within a five year period, and the kinds of offences committed.

123 It was clear from information from the Policy and Research Division of the Department of Justice that present powers to confiscate vehicles were not used significantly. For instance, in 1992 there were 46 confiscation orders. This was a small percentage of the total convictions for offences for which confiscation may be ordered (such as driving with excess alcohol or driving while disqualified). In 1992 there were 21,124 convictions for excess alcohol and 9,558 convictions for driving while disqualified (*Vitolio* v *Police* [1994] 3 NZLR 210, 213). The Committee suggested that it would be helpful to have information on the reasons for such under-utilisation of existing powers and whether they might be as likely to apply to extended confiscation provisions even where the Courts are required to order confiscation as a more general rule.

124 The new provision also concerned the Committee because it was retrospective in effect, which is contrary to the legal principles applicable to criminal sanctions, and to section 26 of the New Zealand Bill of Rights Act 1990. *The LAC therefore recommended that if the provision was maintained it be along the following lines: "If a person is convicted of an offence which took place on or after the commencement of sections 17 and 18 ...".*

125 The LAC took the view that, because the proposed amendment was substantive, as it was an *ad hoc* addition to sentencing powers and it could be retrospective in effect, it should not have been included in an omnibus bill. The Committee also noted, in relation to the need to examine these issues in a relatively comprehensive and principled manner, that work had already begun on revising land transport rules and that this revision might well have some relevance to these provisions.

Customs Act 1966

126 The LAC believes that there is a need for a general approach to be taken to issues of the enforcement of Crown debts and the priority of debts, including Crown debts upon bankruptcy, insolvency and receivership. At present, different regimes are established for specific statutes and

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[18] John P M Bailey, *A Study of Road Accident Victims in New Zealand Aged 13 to 18*, ACC Research Report: No 104, August 1988.

industries, perhaps because they have been amended in an apparently uncoordinated way. The Committee considered that clause 20 of the Bill, which inserted:

(a) New section 154, which provides that a duty on specified goods constitutes a charge on the goods until it is paid in full; and

(b) New section 154A, which establishes a new priority for unpaid customs duty in relation to specified goods in certain cases,

was illustrative of this less coordinated style of legislative amendment.

127 The Committee believes that these, and similar, issues are more appropriately addressed in the context of a general review of insolvency law, which the LAC understood was being considered at that time. *The Committee recommended that attention should be given to a broader consideration of the enforcement of Crown debts.*

Land Transfer Act 1952

128 Clause 48 of the Bill proposed amendments to the law on obtaining title to land by adverse possession (clause 48(2), and to the closely related matter of obtaining a prescriptive title to land under the Land Transfer Act 1952 (clause 48(1)).[19] The Explanatory Note to the Bill states that the effect of the clause:

> ... is to give occupiers of land they own jointly with 1 or more other people the rights (in relation to obtaining title to the whole of the land by adverse possession) that they would have if they were not joint owners.

129 Thus the clause was intended to remove the technical difficulties that impeded one joint owner from obtaining, as against another joint owner, title based on adverse possession or prescription. It is convenient in this case to state at the outset the legislative outcome. The clause was modified in part to clarify its retrospective operation (see paragraphs 135 and 136 below), but the LAC's submission was not otherwise successful. As modified, the clause has been enacted as section 2 of the Land Transfer Amendment Act 1995.

130 The Committee understood that the Law Commission's proposals for reforming the Limitation Act 1950[20] were, at that time of the submission on the Bill, before the Minister of Justice. The Committee understands that this is still the case. The Law Commission's report proposed the abolition of the doctrine of adverse possession by repealing provisions in the Limitation Act 1950. In this context, the Committee considered that the Bill should have explained the justification for implementing just one aspect of that proposed reform. The LAC, therefore, suggested to the select committee that this amendment should be considered in the light of these wider reform proposals.

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[19] In the present report, as in the Explanatory Note to the Bill, "joint owners" is conveniently used to refer to the two classes of freehold (fee simple) owners affected by the reform (joint tenants and tenants in common, in the technical terms necessarily used in the legislation).

[20] *Limitation Defences in Civil Proceedings* (NZLC R 6, 1988).

131 The LAC had a second concern. The Explanatory Note to the Bill stated that:

> In July 1986 the Property Law and Equity Reform Committee [PLERC] recommended to the then Minister of Justice that this distinction [the one removed by clause 48] between joint owners and other occupiers [ie, *other owners*] should be abolished. (the words in italics are the LAC's - to avoid confusion)

132 The reference in the Explanatory Note to this recommendation which was contained in the PLERC report on *Prescriptive Title for Co-owners in Possession*, and the statement in paragraph 131 could perhaps be taken to mean that this amendment to the Land Transfer Act 1952 was generally to implement recommendations of that report.

133 But that was not in fact the case, as some important PLERC recommendations were either given doubtful effect or not included in the Bill at all. The LAC, generally supporting the PLERC report and its recommendations, therefore raised a number of points with the select committee and in later comments (made by way of response to criticisms of the submission).

134 The LAC's submission and comments bore fruit to some extent, insofar as, correcting obscurity in the Bill as introduced, section 2 of the Land Transfer Amendment Act 1995 makes clear its retrospective operation. (Thus, for the purposes of that section a period of adverse possession of one joint owner against another, beginning before the Act came into force on 30 March 1995 (the date of assent), is within the section whether the period was still running at that date or had previously expired).

135 It should be mentioned that the remedial nature of the provision justifies its being retrospective. So far as the general law on acquiring title by adverse possession is changed, the change is intended to do no more than remedy the clearly inadvertent omission from the Limitation Act 1950 of the substance of section 12 of the Real Property Limitation Act 1833 (UK), which had previously been in force in New Zealand.

136 Whether the change has otherwise (that is, apart from the matter of retrospective operation) been satisfactorily made is another question. The Committee does not think it has been and, in particular, is concerned that the enactment of section 2 of the Land Transfer Amendment Act 1995 has proceeded, without adequate reason given, in disregard of the following two important PLERC recommendations, to which the Committee drew attention and which it supported.

137 First, PLERC's recommendation that section 6 of the Limitation Act 1950 should be amended so that that Act is expressly made subject to the Matrimonial Property Act 1976 was disregarded. This was presumably in reliance on section 4(3) of the latter Act, which purports to make subject to that Act all other legislation (whenever passed) in the absence of expression provision to the contrary. It is doubtful whether section 4(3) can thus control legislation passed *after* the Matrimonial Property Act. Husband and wife are often joint owners of land and, like PLERC, the Committee thought it important that the relationship between statutory regimes should be clarified. The LAC remains strongly of that opinion.

138 Secondly (without going into detail unnecessary for present purposes), the wording

recommended by PLERC for the amendment of section 13 of the Limitation Act 1950 and of the Land Transfer Amendment Act 1963 was, for reasons that puzzle the Committee, not used in the Bill and the 1995 Act. The recommended wording for the new section in section 13 was:

> (4) Where land is held by joint tenants or tenants in common, *possession by a tenant of more than that tenant's share (otherwise than for the benefit of the other tenant)* shall be deemed for the purposes of this section -
>
> (a) Not to be possession by the other tenant; and
>
> (b) To be, as against the other tenant, adverse possession. (italics added for emphasis)

Similar wording was recommended for new section 3(3) of the Land Transfer Amendment Act 1963. In both cases the recommendations were disregarded in favour of formulae (in the Bill and the Land Transfer Amendment Act 1995) that made no use of the emphasised words and, in essence, simply enabled one or more joint owners to "take ... adverse possession of the land as against the other" joint owner(s). The formulae used have the advantage of brevity, but do not have the far more important advantages mentioned in the next paragraph.

139 As the LAC pointed out in its submission and further comments, the emphasised words in the PLERC draft have the double advantage of showing the nature of adverse possession as between joint owners and of embodying a concept (that of a joint owner taking possession of more than his or her share) which:

(a) Was used in section 12 of the Real Property Limitation Act 1833 (UK) (formerly in force in New Zealand); and

(b) Is used in the limitation legislation of several Australian states.

In particular, the rejected PLERC draft essentially followed section 12 of the 1833 Act and section 38(5) of the Limitation Act 1969 (NSW), the latter being a restatement of the substance of the former provision. Further (and contrary to the misapprehension under which the Bill appeared to have been drafted) the concept is one with which the Courts are familiar and which appears to have caused no theoretical difficulties. (Here the LAC referred the select committee to the judgment of the Privy Council in *Paradise Beach Co* v *Price-Robinson* [1968] AC 1072 and cases on section 12 of the 1833 Act there discussed.)

140 There was no statement in the Explanatory Note to the Bill of the reasons for departing from the PLERC recommendations in the ways mentioned above. In the Committee's opinion it would have been preferable if there had been such a statement - especially since the PLERC report was mentioned in the Explanatory Note. The reasons (so far as the Committee has become aware of them) were not adequate ones for departing from the PLERC recommendations and drafts, strongly supported in part as they are by overseas precedent.

Comment

141 It was the Committee's view that the proposed amendments to the three statutes discussed

above should not have been included in an omnibus bill.

Amendment to the Criminal Justice Act 1985

This proposed amendment was a substantive one in that

(a) It was an *ad hoc* addition to existing sentencing powers and there was at least a question as to why existing related powers were under-utilised; and

(b) The new provision was retrospective in effect, which is contrary to the legal principles applicable to criminal sanctions and to section 26 of the New Zealand Bill of Rights Act 1990.

Amendment to the Customs Act 1966

This amendment provided that a duty on specified goods would constitute a charge on the goods until it is fully paid (new section 154); and it established a new priority for unpaid duty in relation to specified good in certain cases (new section 154A). It was the LAC's view that these, and similar issues, would be more appropriately dealt with in the context of a general review of insolvency law, which the Committee understood was being considered at that time.

These amendments provided an example of how the use of omnibus bills can lead to an uncoordinated approach to legislative amendment.

Amendment to the Land Transfer Act 1952

At the time this amendment was proposed in the Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994 the Law Commission's proposals for reforming the Limitation Act 1950 were before the Minister of Justice. That is understood to be still the case, and the amendment is now law, enacted as section 2 of the Land Transfer Amendment Act 1995. The amendment has changed one aspect of the law relating to limitation and, in the Committee's view, it should before enactment have been considered in the light of the wider reform proposals. Furthermore, important recommendations made by the Property Law and Equity Reform Committee in its 1986 report were not adopted in the amendment, for reasons unstated in the Explanatory Note to the Bill and not made properly clear since. In the opinion of the LAC, if for reasons of prudence alone, it would have been better in these matters to have followed the expert views of the PLERC and to adopt its draft provisions as at least a basis for the necessary legislation.

142 The amendments to the three statutes discussed above, and to the Guardianship Amendment Act 1991 discussed in Section III, were not of a truly minor or technical nature. They dealt with substantive changes that might well have attracted more public and political debate (or at least much more professional concern) had they been the subject of 'stand alone' amendments to the relevant Acts. Further, amending legislation that seeks to make significant amendments a wide range of unrelated statutes increases the risk that, because attention may be narrowly focused on just one or two provisions in each statute, the resulting amendment(s) may adversely affect that legislation viewed as a whole. Such amendments should not be included in omnibus bills.

143 The new *Standing Orders of the House of Representatives* state (Standing Order 254) that every bill must relate to one subject only *unless otherwise permitted by Standing Orders* [italics the LAC's]. Standing Order 256 does allow some types of bill to relate to more than topic and, where appropriate, amend more than one Act, subject to the rules in respect of each type stated in various Standing Orders. So, for example, law reform or other omnibus bills may amend more than one Act where those Acts deal with an interrelated topic that can be regarded as implementing a single broad policy or where amendments being effected to the different Acts are of a similar nature in each case.[21]

144 The Law Reform (Miscellaneous Provisions) Bill (No. 3) 1994 could not be regarded as *implementing a single broad policy*, or as *effecting amendments to similar Acts of a similar nature*. The new Standing Orders should therefore prevent a variety of substantive and quite unrelated amendments to a range of Acts being included in a single omnibus bill, thereby reducing the concerns about such bills that the Committee has expressed above.

[21] Standing Order 257(a) and 257(b).

V OFFICIAL INFORMATION

Introduction

145 One of the LAC's terms of reference is *to monitor the content of new legislation from an "Official Information" standpoint.* From time to time, the Committee makes submissions to select committees when relevant information access issues arise. So, for instance, in February 1990 the Committee made a submission to the State-Owned Enterprises (Ombudsmen and Official Information Acts) Select Committee that was established to review the effect of the Ombudsmen Act 1975 and the Official Information Act 1982 on the operation of state enterprises. The LAC recommended that the two Acts should in general continue to apply to the state enterprises[22], as did the select committee.

146 The reasons for the Committee's view are briefly summarised below:

(a) State enterprises are not simply companies operating as profit-making businesses, as they:

(i) Are hybrids,
(ii) Are owned by the State,
(iii) Have public duties and accountability systems distinguishing them from privately owned companies,
(iv) May have functions which are central to the State, such as policy-making and its implementation, and

(b) Practice shows the value of the Ombudsmen Act 1975 and the Official Information Act 1982 in relation to the state enterprises, and to other bodies with trading functions and with some independence from Government. Principle is also consistent with their continued application, but the varying character of the functions of different enterprises may suggest some flexibility in that application.

147 Accordingly, the LAC concluded that the two Acts should in general continue to apply to the state enterprises.

Overseas Investment Amendment Bill 1994

Purpose of the Bill

148 The Overseas Investment Amendment Bill attempted to create an exception from the Official Information Act 1982 for information received by the Overseas Investment Commission.

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[22] See *Report of the Legislation Advisory Committee* (January 1990 to June 1992) Report No 7, September 1992, pp. 14 to 20.

Similar legislation proposed in 1990

149 Legislation to achieve a similar result was introduced in 1990 [23], but was not carried over to the 44th Parliament. The 1990 bill sought to create a presumption of non-disclosure of information relating to an investment application to the Overseas Investment Commission. The Commission or Minister of Finance could disclose the information only if it was not likely to prejudice the commercial position of any person, and there was no other good reason for withholding it under the Official Information Act. This special process for the release of information would apply only until a final determination was made on the investment application. After that time, by implication, the Official Information Act regime would apply to the information.

150 In its submission on the 1990 bill, the LAC argued that the proposed provision would:

(a) Bypass the provisions of the Official Information Act that establish a balance between the presumption in favour of disclosure and the need to protect information (including commercially sensitive information) when there is good reason to withhold it (see section 5 of the Official Information Act 1982);

(b) Remove any decision of the Minister of Finance on whether or not to disclose information from effective review, except by the High Court; and

(c) Remove the collective responsibility of Cabinet for withholding information that an Ombudsman might recommend ought to be made available, and replace this responsibility with ministerial control over the disclosure of that information.

151 The LAC further submitted that the Official Information Act 1982 already recognised that there will be circumstances where commercial interests require protection. The Act's approach requires a consideration of those circumstances in the assessment of whether to withhold the information in each case, rather than expressly excluding certain bodies or classes of information from the ambit of the Act. This approach was confirmed in subsequent considerations of the Act in 1987, and again in 1990 when the State-Owned Enterprises (Ombudsmen and Official Information Acts) Select Committee concluded that the Act should continue to apply to state enterprises.

The 1994 Proposal

152 Clause 9 of the Overseas Investment Amendment Bill proposed to insert a new section 16A into the principal Act. New section 16A purported to permit all "confidential information" to be withheld until a decision by the Minister of Finance (or others as the bill provided) on the investment application had been made. Once the decision had been made, the Minister of Finance (or others as the Bill provided) were to send to the applicant a summary of the "confidential information" the Minister (or others) considered should be available for release under the Official Information Act 1982. The applicant could respond, stating reasons why the information should continue to be withheld. The Minister (or others) might then omit any "confidential information" from the summary

[23] Clause 18 of the Law Reform (Miscellaneous Provisions) Bill 1990 sought to insert a new section 12A into the Overseas Investment Act 1973.

on the basis of that response. Following any resulting changes to the summary, it could be made available in the usual manner under the Official Information Act.

153 In addition, the nature of the information covered by the definition of "confidential information" in new section 16A was broader than that covered in the 1990 proposal. "Confidential information" included not only information supplied in relation to an investment application, but also the investment application itself, and the fact that such an application had been made, is being considered, or has been granted or declined. The inclusion of the latter meant that the Commission's decision making process on any investment application could remain secret. The LAC considered that this was contrary to principle that, in general, the exercise of statutory functions ought to be transparent.

154 The proposed amendment also enabled "confidential information" to be withheld indefinitely, as there was a continuing presumption of non-availability of any information excluded from the post-decision summary. The power of the Minister (or others) to define the scope of any exception from the presumption was not reviewable by the Ombudsmen or Ministers collectively, nor were there any guidelines or principles in the proposal about how the power should be exercised. The LAC considered that a provision of this nature erodes the principle established in section 5 of the Official Information Act that information ought to be freely available unless there is good reason for withholding it. The nature of such good reasons is stated expressly in that Act.

155 The LAC believed that the points raised in its 1990 submission were equally applicable to the 1994 proposal. It was the LAC's view that if the Overseas Investment Commission believed that the Official Information Act 1982 did not adequately protect the information supplied in relation to investment applications then the Commission should seek an amendment to that Act rather than attempt to create an exception to its statutory scheme. As the Official Information Act already recognises that there are general circumstances where commercial interests require protection, any justifications for greater protection for commercially sensitive information by the Commission were likely to apply no matter what body holds the information. The LAC found it difficult to see the rationale for special rules applying solely to the Commission.

Conclusion

156 The Official Information Act 1982 expressly provides that, information that "would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information" may be withheld unless this action is outweighed by considerations which render it desirable, in the public interest, to make the information available.[24]

157 The balance struck under section 9 of the Official Information Act 1982 was carefully examined at the time that Act was drafted, in the amendments made in 1987, and again by the Select Committee's consideration of the Act's application to state enterprises in 1990.

158 The LAC considered that proposals in the Overseas Investment Amendment Bill 1994 to create an exception from the scheme of the Official Information Act for information relating to investment applications to the Overseas Investment Commission had to be clearly justified, and that

[24] Sections 9(1) and 9(2)(b)(ii).

any such justifications would probably raise many more general issues about release of commercial information, no matter who held it.

159 It was the LAC's view that the proper approach would be to raise these issues in the context of amendments to the scheme of the Official Information Act 1982, rather than to seek piecemeal legislative exceptions to the current regulatory regime.

Legislative outcome

160 As reported back from the select committee on 30 March 1995, the definition of "confidential information" in the Bill was changed to one of "protected information". The LAC considered that this definition was still too broad.

161 On 1 August 1995, following the introduction of Supplementary Order Paper No. 100, clause 9 of the Overseas Investment Bill (inserting new section 16A) was omitted at the Committee of the whole House stage.

VI RETROSPECTIVE LEGISLATION

Introduction

162 In *Issues of Principle* LAC Report No 8 the Committee reported that it had expressed concern to the select committee considering the Patents Amendment Bill 1992 that a proposed amendment to the Patents Act 1953 would have retrospective effect and that it would terminate legal proceedings then in progress in which the applicants, for the purposes of transitional arrangements at least, had accrued rights. The amendment was enacted as the Patents Amendment Act 1992 and terminated those proceedings.

163 In the Committee's view this amendment was contrary to the general principle explicitly recognised by Parliament in section 20(e) of the Acts Interpretation Act 1924, which enacted general provisions relating to the repeal of Acts, namely:

> (e) The repeal of any Act ... shall not affect ...
> (ii) Any existing status or capacity; or
> (iii) Any right, interest, or title already acquired, accrued or established ...

164 Legislation that overrides judgments given, or proceedings already begun, presents two arguments of principle:

(a) Legislation should, in general, have prospective effect only; in particular it should not interfere with accrued rights and duties, nor should it create offences retrospectively; and

(b) Legislation should not, in general, deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under earlier law, or to continue proceedings asserting rights and duties under that law.

165 During the present reporting period there have been further instances of legislation overriding proceedings or judgments. Those specific instances are discussed below.

166 In addition, attached as Appendix 1, there is a memorandum on *Legislation Overriding Judgments and Legal Proceedings* that was prepared in May 1995 at the request of the Finance and Expenditure Select Committee which, at that time, was considering provisions that were later enacted as the Crown Assets Amendment Act 1995.

Part II of the Finance Bill (No. 4) 1995

Validation of certain Crown forestry licences

167 Clause 6(1) of the Finance Bill (No. 4) 1995 provided that "for the avoidance of doubt" every Crown forestry licence granted under section 14 of the Crown Forest Assets Act 1989 before

the commencement of clause 6 shall be deemed to comply, and to have always complied, with new sections 29 and 29A of the Act, as substituted by clause 5 of the Bill.[25] Clause 6(2) provided, again "for the avoidance of doubt", that in every existing Crown forestry licence granted before the commencement of clause 6 the terms "drainage works" and "erosion works" shall be deemed to have, and always to have had, the meanings that those terms have in new section 2(1) of the 1989 Act, as amended by clause 4 of the Bill.

168 The LAC's submission stated that it is a general principle of jurisprudence that the law should have prospective effect only. The Committee observed that the Explanatory Note to the Bill suggested a justification for the retrospective operation of clauses 4 and 5; namely, that these provisions declared the law as it was always understood and proceeded upon, and that the provisions were to operate retrospectively to give effect to a received understanding of the law. *The LAC recommended that the select committee needed to satisfy itself that the retrospective operation of these provisions was justified because of their declaratory nature (ie, to ensure that there really was satisfactory evidence of a received understanding of the law that the Bill merely gave effect to).* Such an understanding, if established, can justify retrospective legislation: ie, if it is truly declaratory of original understanding.

Interference with existing Court proceedings

169 Clause 6(3) of the Bill provided that clause 6 would operate retrospectively by having effect:

> . . . notwithstanding any judgment or determination or order of any Court given before or after the commencement of this section in any proceedings commenced before the commencement of this section.

170 The Explanatory Note to the Bill indicated that an existing licensee had commenced proceedings in the High Court and was making submissions in reliance on the terms of existing section 29 of the Act.[26] The licensee's proceedings were, therefore, ongoing and would be "cut off" by the Bill before they had run their course.

171 The Committee pointed out that, as a general legal principle, new legislation does not affect existing rights and existing proceedings, and that it does not matter that the judgment is not given until after the new law is enacted.[27] The principle that the particular effects of court judgments should rarely be overridden reinforces this general principle. Indeed, the retrospective denial of a remedy to a licensee who may have grounds to dispute a decision about a licence may conflict with the right in section 27(2) of the New Zealand Bill of Rights Act 1990 of persons aggrieved by administrative action to have the action reviewed. *The Committee, therefore, recommended that the select committee should enquire into why it was necessary that the Bill offend against the principle that existing proceedings are not affected by new legislation.*

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[25] New sections 29 and 29A provided, respectively, that the annual licence fee shall be a market rate agreed by the Crown and the licensee or determined in a manner agreed by them and specified in the licence, and for other rights and obligations concerning a Crown forestry licence.

[26] Refer p. ii of the Explanatory Note.

[27] Refer *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, December 1990), Ch. V.

Further issues and questions

172 At the time of its submission, the Committee did not have enough information to express an unqualified opinion on the application of the relevant principles (although some of the provisions had caused it some concern). However, in a subsequent letter to the select committee, the LAC suggested a number of further issues and questions that needed to be asked, and answered, in relation to each of the issues, including :

(a) In relation to clauses 6(1) and 6(2) of the Bill:

(i) Whether the retrospective character of the legislation could be justified, and what was the understanding of the legal position?

(ii) Was the law generally presumed to be as it was now being proposed?

(iii) Did the various parties rely on that understanding (as the form of the licences perhaps suggests); and

(iv) On the other side, what was to be made of the character of the interests in issue - were they essentially contractual and bilateral, not involving wider public interests?

In that context, *it was recommended that the select committee should consider as well the principle of equality in section 27(3) of the New Zealand Bill of Rights Act 1990* [28] *and, against that, the advantage that the Crown, as one of the parties, has in influencing the legislative process.*

(b) If the retrospective character of the legislation could be justified, a second issue, critical for clause 6(3), was whether the saving of judgments and pending proceedings under the old law would, in whole or substantial part, nullify the justified retrospectivity. Whether the saving would have that effect depended on the answer to three questions:

(i) What is the actual effect of the judgment ?

(ii) More particularly, how long will the judgment have effect (a matter which may be related to the term of the licences); and

(iii) How extensive is the membership of the class that may be successful in the litigation?

173 The select committee sought further advice from the LAC on the issue of legislation overriding judgments and pending proceedings. The memorandum prepared for that purpose is included in this report as Appendix 1.

[28] Section 27(3) provides that "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".

174 The legislation was enacted unchanged. The position was taken that the Act needed to be aligned with the licences; it was the 1989 Act that was at fault. Any saving of the judgment would have defeated that purpose.

Other examples of retrospectivity

175 Supplementary Order Paper No. 36 proposed to insert new clauses 29A to 29E into the Finance Bill (No. 2) 1994 amending the Human Rights Act 1993 in respect of the application of the principal Act to superannuation schemes providing benefits on account of martial status (new clause 29B), application of the principal Act to superannuation schemes providing benefits for children (new clause 29C), savings in respect of certain superannuation schemes (new clause 29D), and the application of the Human Rights Commission Act 1977 to superannuation schemes (new clause 29E).

176 These amendments to the Human Rights Act 1993 were made because the effect of a decision in the High Court in *Coburn* v *Human Rights Commission*[29] was that a superannuation scheme that provides benefits for spouses of members without also providing equivalent benefits to members without spouses contravenes the Act's prohibition against discrimination on the grounds of martial status. The application of the judgment was limited to benefits derived from contributions made on or after 1 February 1994, being the date on which the 1993 Act came into force.

177 The Committee commented on all of the above clauses, but the discussion here will be limited to just one of the SOP's provisions; namely, new clause 29B.

New clause 29B: Application of the principal Act to superannuation schemes providing benefits on account of marital status

178 The heading to the new clause referred to providing benefits on account of marital status, but the text of the clause was silent about the scope of the exception being made to the general prohibition against discrimination on the 13 grounds set out in section 21 of the 1993 Act.

179 The LAC did not suggest that new clause 29B(1) would lead to benefits being provided in a completely random way, although that was not precluded (the equitable duty of even handedness owed by trustees to beneficiaries of course constrains arbitrary decisions by trustees but it may not constrain choices made in designing a scheme or drafting a trust deed). It was suggested that the more likely scenario would be that benefits might be provided to subgroups of spouses such as those under or over a certain age or those not in paid employment. There was nothing in the text of the new clause itself that prevented distinctions being made on any of the grounds generally prohibited; any argument that new clause 29B be read as creating a more narrow exception rested on the clause heading alone.

180 The Committee suggested that the select committee consider specifying the scope of the intended exception in the text; that is, which of the 13 "prohibitions" (ie, on the grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, or sexual orientation) do not apply in this case.

[29] [1994] 3 NZLR 323.

181 Clauses 29B(1)(a) and 29B(1)(b) did not clearly address the question of whether a scheme which provides benefits to the people described (ie, to "the spouse of that member"; or "a person with whom that member was living in the nature of a marriage") must provide benefits to the de facto partner of a member where the member and the partner are of the same sex. The Committee asked for clarification of whether a same sex partner can be a "spouse" and whether he or she can be described as living in a relationship in the nature of marriage with a member? The case law in Canada demonstrates a divergence of answers to these questions. It is worth noting Justice Thorp's comment in *Coburn*: [30]

> The Court is bound to proceed on the basis that the legislation was intended to have effect in its terms. It is, however, not improper to comment that the material before the Court suggests that that assumption may in this case be no more than a legal fiction, and that the principal issue for my determination may be one which was not recognised as likely to arise from the legislation. If that is the case then clearly the situation deserves consideration by Parliament.

It is possible, of course, that Parliament may decide to leave some or all of these questions to the courts, but it should be a conscious choice.

182 The LAC also suggested that clauses 29B(1)(a) and 29B(1)(b) could also be improved to make clear whether, in order to take advantage of the exception made by the clause, the scheme or the trustees would have to provide a benefit *both* to spouses of members *and* to persons with whom members were living in a relationship in the nature of marriage, or whether the exception would apply if the scheme simply provided to benefits to spouses and no more. Were *proposed sections 29B(1)(a) and 29B(1)(b)* parts of a single rule about payments to legal and de facto spouses or was it possible for schemes to provide for paragraphs (a) or (b) or for both?

183 New clause 29B created an exception from the general provisions of the Human Rights Act 1993 prohibiting discrimination, notwithstanding section 70 of that Act. But section 70 is itself a list of exceptions to the general provisions; it permits rules within superannuation schemes that might otherwise be prohibited. It therefore seemed unnecessary to state that new clause 29B holds notwithstanding section 70.

184 Proposed clause 29B(3) (and also in new clauses 29C(3) and 29E(2)) reinforced the declaratory (and therefore retrospective) character of the substantive provisions in each of the proposed sections by adding:

> This section applies notwithstanding any judgment, decision, or order of any Court or tribunal given or made before or after the commencement of this Part of this Act.

185 The LAC questioned whether this provision was necessary. Had not Parliament had already made it clear in the Act's substantive provisions that the law is now to be considered always to have been as it is stated in the new provisions? Would they not override any judgment based on the old law?

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[30] Ibid, at page 358.

186 It was the Committee's view that if new clause 29B(3) was to be retained in any way it should be related to section 153 of the principal Act which refers to the impact of the Act on legal proceedings.

187 In summary, the LAC questioned whether new clause 29B(3) (and new clauses 29C(3) and 29E(2)), which was retrospective in character, were necessary. The Committee also noted that the issues that these amendments sought to address had been raised in "test" litigation by the superannuation industry, no doubt at considerable cost. There was therefore a question about whether a more extensive review of the principal legislation was not required to fairly serve those who would be affected by it but who were not part of a strong collective group able to take action such as that taken by the trustees of the superannuation fund of BHP NZ Steel Ltd (*Coburn* v *Human Rights Commission*).

A general comment on retrospective legislation

188 Broad categories of legislation that responds to court judgments and proceedings would be:

(a) Legislation that changes the law for the future but leaves rights, duties, judgments and proceedings under earlier law unaffected;

(b) Legislation that does apply to past situations by being retrospective, validating or declaratory, but which saves the effect of judgments and proceedings given or brought by reference to the earlier law; and

(c) Legislation that, as in category (b), applies to past situations but which, by contrast, overrides judgments and proceeding given or begun.

189 Generally, it is legislation in categories (b) and (c) above that is of concern. There are two possible arguments of principle:

(a) Legislation should, in general, have prospective effect only. In particular it should neither interfere with accrued rights and duties, nor should it create offences retrospectively; and

(b) Legislation should, in general, neither deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law, nor to continue proceedings asserting rights and duties under that law.

190 The principle of non-retrospectivity is reflected for criminal offences and penalties in section 26(1) of the New Zealand Bill of Rights Act 1990, section 10A of the Crimes Act 1961, and section 4 of Criminal Justice Act 1985; and, more generally, in section 20 of the Acts Interpretation Act 1924 and related common law rules.

191 The LAC notes that the Law Commission has discussed matters that should be weighed in a decision to give legislation retrospective effect in its report, *A New Interpretation Act.*[31] The Commission considered in turn the effectiveness of the law, justice, reasonable expectations, responsibility for government, and effective administration.

192 In addition, attached as Appendix 1, there is a memorandum on *Legislation Overriding Judgements and Legal Proceedings* that was prepared in May 1995 at the request of the Finance and Expenditure Committee Select Committee which, at that time, was considering provisions which were later enacted as the Crown Assets Amendment Act 1995.

[31] See *A New Interpretation Act*, NZLC 17, 1990, paras. 213 to 221. See also Burrows *Statute Law in New Zealand* (1992), Chapter 8; and, for a study of legislative practice, Palmer and Sampford "Retrospective Legislation in Australia" (1994) 22 Fed C R217.

APPENDIX 1

LEGISLATION OVERRIDING JUDGMENTS AND PENDING PROCEEDINGS

Memorandum prepared in May 1995 at the request of the
Finance and Expenditure Select Committee which, at that time, was considering
provisions which were later enacted as the Crown Assets Amendment Act 1995.

Introduction

1 Clause 6(3) of the Finance Bill (No. 4) 1994, if enacted, would deprive the successful plaintiffs and the class of interested persons they represented of the benefit of the judgment they obtained in *Carter Holt Harvey Ltd* v *Attorney-General* (CL 39/94, HC Auckland, Barker J, 31 January 1995). Clauses 4 and 5 would make substantive changes to the Crown Forest Assets Act 1989 with effect from 25 October 1989, the date of commencement of that Act. Clause 6(1) declares ("for the avoidance of doubt") that certain licences are deemed to comply and to always have complied with the new provisions, and clause 6(2) provides that two terms are to be deemed to have and always to have had the new meanings stated in the Bill.

2 This note concerns legislation which responds to court judgments and proceedings. It distinguishes between three broad categories of legislative response:

(a) Legislation that changes the law for the future and leaves unaffected rights, duties, and judgments and proceedings under the earlier law;

(b) Legislation that does apply to past situations by being retrospective, validating or declaratory but which saves the effect of judgments and proceedings given or brought by reference to the earlier law; and

(c) Legislation that, as in category (b), applies to past situations, but which, by contrast, overrides judgments and proceedings given or begun (for example, the case of the proposed Crown forest amendment).

In fact there are more than those three categories since, for instance, the savings or override provisions might relate to judgments but not to proceedings.

Relevant principles

3 As that description of the categories indicates, the legislation presents two possible arguments of principle:

(a) Legislation should, in general, have prospective effect only. In particular it should not interfere with accrued rights and duties, nor should it create offences retrospectively; and

(b) Legislation should, in general, neither deprive individuals of their right to benefit from the judgments they obtain in proceedings brought under the earlier law, nor to continue proceedings asserting rights and duties under that law.

4 The principle of non-retrospectivity is reflected for criminal liability and penalties in section 26(1) of the New Zealand Bill of Rights Act 1990, section 10A of the Crimes Act 1961 and section 4 of the Criminal Justice Act 1985, and more generally in section 20 of the Acts Interpretation Act 1924 and related common law rules. The Law Commission discussed the matters that should be weighed in a decision to give legislation retrospective effect in its report, *A New Interpretation Act* (NZLC R17 1990 Ch V); see also Burrows *Statute Law in New Zealand* (1992) Ch 8 and, for a detailed study of legislative practice, Palmer and Sampford "Retrospective Legislation in Australia" (1994) 22 Fed L R 217. In that report the Commission considers in turn the effectiveness of the law, justice, reasonable expectations, responsibility for government and effective administration. This note does not elaborate on those matters - and for instance on their differing significance for proposals for legislation which is declaratory rather than clearly introducing a change to the law or for retrospectivity which is benign rather than imposing obligations - although it does return to them later, paragraphs 15 to 22.

5 Rather, this note gives greater emphasis to the second matter - the saving or not of judgments and proceedings. The arguments for saving judgments and pending proceedings can be related in part to those supporting the principle of non-retrospectivity. For instance, the Law Commission in considering that principle discussed, under the heading of *justice*, the claim of the litigant to have the benefit of the judgment:[32]

> It can often be said that the rights of the litigant to a fair trial have in effect been abrogated after the event (compare chapter 29 of Magna Carta ... and article 14(1) of the International Covenant on Civil and Political Rights). Concrete accrued rights are likely to have been destroyed.

6 There are, as well, other specific arguments. Thus sections 27(2) and 27(3) of the New Zealand Bill of Rights respectively affirm the rights of persons to seek judicial review of public actions affecting their rights and obligations, and to bring civil proceedings against the Crown and to have them heard in the same way as proceedings between individuals. Regular parties to civil litigation do not have the power or ability to initiate legislation terminating litigation or nullifying its result, although they might, of course, try to promote that course.

7 An argument based on the principle of the separation of powers can also be made. The independent role of the courts can be put at nought if the legislature superintends the actions of the court and overrides particular decisions, eg for the United States, 46 Am Jur 2d para. 9 - statutes setting aside judgments have been held unconstitutional as attempted legislative exercises of judicial power and as violating the constitutional guarantee of due process of law. But legislation overriding judgments requiring acts to be done in the future have been upheld. Two United States Supreme

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[32] *A New Interpretation Act* NZLC R17 1990 Ch V, para. 216.

Court judgments support those propositions. In *McCulloch* v *Virginia* (1898) 172 US 102, 123 to 124 the Court ruled that:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

By contrast, in *State of Pennsylvania* v *Wheeling and Belmont Bridge Company* (1855) 17 How 421, 431, the Court upheld legislation declaring bridges across the Ohio River to be lawful, the Court the year before having declared the contrary under the common law. The Court ruled that that part of the earlier decree which looked to future execution could be overridden by later legislation. To be distinguished from such a decree were, it said, orders for damages for past breach of the free navigation of the river or for costs - Congress could not override such a judgment or order (compare the reservation as to costs in the otherwise nullifying Clutha legislation in paragraph 13(1) below). On the other hand, proceedings challenging legislation to reopen an order of the Cook Islands Land Titles Court, based on constitutional guarantees of equality before the law and the right not to be deprived of property except in accordance with the law, failed in the Cook Islands Court of Appeal, *Clarke* v *Karika* [1985] LR Com (Const) 732.

Prospective legislation responding to Court judgments

8 Legislation in the first of the three categories set out in paragraph 2 above generally presents no problems in terms of the two principles mentioned. After all, it is one of Parliament's major responsibilities to enact law for the future which is different from that stated earlier by it, by other legislatures, or by courts and tribunals. The word "generally" appears in the first sentence of this paragraph since it is sometimes contended that legislation which is apparently prospective has in fact a detrimental impact on rights and situations established in reliance on the old law. The principle of non-retrospectivity might be said to be breached in such cases, eg Lindsay McKay "Taxation and the Constitution" (1985) 15 VUWLR 53. As well the preparation in prospective legislation of the transitional provisions for pending processes can present difficulties, see paragraphs 206 to 207 of the *Interpretation* report, section 81(3) of the Civil Defence Act 1983, section 430 of the Resource Management Act 1991, section 128 of the Crown Minerals Act 1991, and section 183 of the Employment Contracts Act 1991. Transitional provisions often apply new institutions and procedures to earlier situations (which will, however, still be governed by the old substantive law). That can also happen with provisions which on their face are prospective, as with the wider powers of Inland Revenue Department officers to give evidence conferred hurriedly in 1989 as a case was about to come to trial, Inland Revenue Department Amendment Act 1989 discussed by Simon France, "Retrospectivity and Legislative Interference in Existing Criminal Trials - The West's Fastest Lawmaker Strikes Again" (1990) 16 UQLJ 103.

Retrospective legislation: Its impact on judgments and pending proceedings

9 The legislation might:

(a) Save judgments given before the date of its commencement and proceedings to be decided by reference to the earlier state of the law;

(b) Save judgments given before the date of commencement;

(c) Override (expressly or impliedly) judgments given and proceedings commenced before commencement.

A further variable is that the relevant date in paragraphs 9(a) and 9(b) is sometimes fixed earlier than the date of the commencement of the Bill, for instance at the date of its introduction (when interested parties, it might be said, are put on notice of the change).

Retrospective legislation saving judgments and pending proceedings

10 There are many instances of the situations in paragraphs 9(a) and 9(b); many, at least, relative to instances of paragraph 9(c). The statutes data base and other limited research identifies the following:

(1) *Chattels Transfer Amendment Act 1931, section 2*: This amendment was backdated to the date of the original Act "save that nothing in this section shall apply to any deed, agreement or chattel which before or at the date of the passing of this Act has been or is the subject of any action or proceeding in any Court of law" (section 2(a), and see similarly section 3 of the Chattels Transfer Amendment Act 1953). According to the *1931 Reprint of Statutes* Vol 1, pages 656 to 671, the 1931 Amendment nullified the decision in *General Motors Acceptance Corporation* v *Traders Finance Corporation* [1931] GLR 513. According to *Hansard* the 1953 Amendment was designed to reverse the effect of a judgment given in 1933.

(2) *Customs Acts Amendment Act 1939, section 11(2)*: Section 11(1) declared the Import Control Regulations 1938 to be and always to have been valid, reversing the effect of *F E Jackson and Co Ltd* v *Collector of Customs* [1939] NZLR 682. Section 11(2) saved that judgment and any others given before commencement - "Nothing in this section shall be construed to affect any judgment heretofore given by any Court." The principal Act was also amended to confer broader regulation making powers for the future.

(3) *Transport Amendment Act 1965, proviso to section 5(2)*: This section provided for the validation of certain by laws which were declared to have been lawfully made,

with the limit that nothing in the section affected the rights of the parties under any judgment given before the passing of the Act, or any judgment given on appeal, whether the appeal is commenced before or after the passing of the Act (compare section 22(4) of the Transport Amendment Act 1974, section 3(2) of the Transport Amendment Act 1976 and section 2(3) of the Transport Amendment Act (No. 3) 1978, which validate bylaws and regulations with no comparable saving provisions).

(4) *Town and Country Planning Amendment Act (No. 2) 1971, proviso to section 3(6)*: This section gave local authorities wide powers to grant waivers and dispensations from its district scheme, reversing the effect of *Attorney-General* v *Mt Roskill Borough* [1971] NZLR 1030. Section 3(6) provided that every dispensation and waiver granted before 10 November 1971 (the date the Bill was introduced) under a district scheme was validated and deemed to have been lawfully and properly granted, with the qualification that nothing in the section applied in respect of a court order or judgment given before 10 November or in respect of any proceedings begun before then. See similarly the first proviso to section 4(3) (a provision relating to the Johnsonville tip case, according to *Hansard*) and section 12(4) of the Town and Country Planning Amendment Act 1972.

(5) *Fugitive Offenders Amendment Act 1976, proviso to section 9* (see now Imperial Laws Application Act 1988, section 6, Schedule, Part II, Division II and *Imperial Legislation in Force in New Zealand* (NZLCR 1 1987) paragraph 18, p. 4): Section 4 of the Act "For the avoidance of doubt, ... declared that [the Fugitive Offenders Act 1881 (Imp)] is and always has been in force in New Zealand as part of the law of New Zealand", reversing the effect of *Re Ashman* [1985] 2 NZLR 224n (decided on 31 May 1976; the legislation was enacted on 15 July 1976 very soon after the beginning of the Parliamentary term, on the same day as the superannuation legislation discussed below, paragraph 21) which held that New Zealand was no longer subject to the Act given the fundamental constitutional changes that had occurred since 1881. Section 9 validated warrants, orders and proceedings made or begun before the commencement of the Act, with the qualification that

> nothing in this section shall affect the rights of the parties under any order made in any Court or by any Judge before the passing of this Act in proceedings on an application for habeas corpus.

(6) *Citizenship (Western Samoa) Act 1982, section 5*: This Act was designed to implement a protocol signed by the Governments of New Zealand and Western Samoa to deal with the consequences of the decision of the Judicial Committee in *Lesa* v *Attorney-General* [1982] 1 NZLR 165. It considerably altered the law stated in that decision, but section 5, in conformity with the decision, declared the litigant in the particular case to be a New Zealand citizen otherwise than by descent. Consistently with

principle the Act also made clear that no-one subject to the Act should be prosecuted for overstaying offences allegedly committed before the Act was passed.

(7) *Subordinate Legislation (Confirmation and Validation Act) 1989, section 7(2)*: Section 7(1), under a Part heading which reads "validation of invalid [fisheries] notices", deems 30 listed notices made over the previous six years to have been as valid and effectual as if they had been given by the Director-General of Agriculture and Fisheries. The High Court had held the notices to be invalid since they had been given by an Assistant Director-General to whom the relevant power had not been delegated - *Webster* v *Taiaroa* (1987) 7 NZAR 1. Section 7(2) provides that nothing in section 7(1) affects the rights of the parties under any judgment given in any court before 1 December 1989. The Bill was introduced on 12 December 1989.

(8) *Finance Act (No. 3) 1990, section 10(2)*: Section 10(1) deems valid certain forms and notices relating to transport infringements. Section 10(2) provides that the rights of the parties in any proceedings commenced under the Summary Proceedings Act 1957 before the day on which the section comes into force shall be determined and given effect to as if section 10(1) had not been enacted (see also section 8(1)(b) of the Subordinate Legislation (Confirmation and Validation) Act 1991 (repealed by section 9 of the Subordinate Legislation (Confirmation and Validation) Act 1992).

(9) *Housing Amendment Act 1992, section 2(2)*: Section 2(1) inserted a new section 19A providing that leases or tenancies granted by the Housing Corporation shall not be taken to have implied terms and conditions based on the previous government policy that rents be restricted to a quarter of a tenant's income. This amendment overturned the effect of a Tenancy Tribunal decision upholding such a condition (see 528 NZPD 10547). Section 2(2) provides that section 19A shall not affect the rights of any person under any judgment given in proceedings commenced before 21 July 1992, or any appeal from any such proceedings. 21 July 1992 is the date on which the Bill was reported back from the Planning and Development Select Committee, with the proposed section 2(2) included.

(10) *Finance Act 1993, section 3(3)*: Sections 3(1) and 3(2) validate certain increases in state house rentals. Section 3(3) provides that nothing in those provisions affects the rights of any person, where proceedings are brought before the close of 2 December 1992, under a judgment, decision or order of a court made originally or on appeal. The date 2 December 1992 appears to have been the date proceedings were filed in *Housing Corporation of NZ* v *Morrison* (28 May 1993, HC Auckland, HC 12/92), where Heron J held the increase in state house rentals to have been improperly notified in terms of section 24(3) of the Residential Tenancies Act 1986.

(11) *Social Security Amendment Act (No. 3) 1993, section 28*: Section 28 broadened the criteria applicable to special benefit applications under section 124(1)(d) of the Social Security

Act 1964. Section 28(3) preserves any decisions in any Social Security Appeal Authority or Court proceedings commenced before 1 April 1993. The Social Welfare Reform Bill (No. 3) was introduced on 31 March 1993.

(12) *Child Support Amendment Act 1993, section 4 (also note section 9)*: Section 3 of the principal Act was amended to allow the Department of Social Welfare to transfer parent-liability assessed at nil under the Security Act 1964 to liability under the Child Support Act 1991. This amendment Act was deemed to have come into force on the day that most of the 1991 Act came into force (see section 1(3) of the 1991 Act). The Courts had held that the Department could not transfer these liabilities, see *Ferrie* v *Ferrie* (1993) 10 FRNZ 430 and 534 NZPD 14477 to 14486. Section 4 of the Amendment Act protected the rights of parties under any judgment given in any Court before the Amendment Act was passed.

(13) *Fisheries Amendment Act (No. 2) 1994, sections 3(2) and 3(3)*: Section 3(1) declares valid certain assessments; sections 3(2) and 3(3) save both those judgments given on the matter and pending proceedings (which "are to be determined as if the section had not been enacted").

(14) *Forestry Rights Registration Amendment Act 1994, section 4(3)*: Section 4(2) deems valid certain contracts and agreements by reference to the new provision; section 4(3) protects orders and determinations of courts and tribunals made before 15 April 1994 and proceedings begun but not determined before then. The 15 April 1994 fell between the dates the Bill was referred to the select committee and was reported back to the House. The amendment, it seems, was designed to reverse the effect of an argument brought in a series of cases beginning with *Ngai Terangi Iwi Incorporated Society* v *Minister of Lands* (21 March 1994, HC Wellington, CP 69/93, Greig J).

(15) *Real Estate Agents Amendment Act 1992, section 5*: The Amendment Act reversed the general effect of the Court of Appeal decision in *Challenge Realty* v *CIR* [1990] 3 NZLR 42. The Court of Appeal held on 19 July 1990 that real estate salespersons are *employees* of real estate agents with whom they contracted under a contract of service. Section 2 of the Amendment Act declared that before 19 July 1990 real estate salespersons were *independent contractors* of real estate agents with whom they had contracted under a contract for services. Section 5 provided that proceedings commenced before 22 August 1991 (the day the Bill was introduced) would not be affected by the provisions of the Amendment Act.

(16) Several statutes which have introduced new rules applying to existing, as well as future, agreements or transactions covered by them save judgments already given: Section 11(3) of the Illegal Contracts Act 1970, section 36A of the Administration Act 1969, section 66A of the Property Law Act 1952, and section 2(2) of the Land Transfer

Amendment Act 1958; cf the Credit Contracts Act 1981 and *Sharplin* v *Broadlands Finance* [1982] 2 NZLR 1 CA.

(17) See also the second proviso to section 16 of the Marriage Act 1955, and the second proviso to section 39 of that Act, and the second proviso to section 6 of the Law Reform (Testamentary Promises) Amendment Act 1953.

11 A significant number of provisions validate invalid administrative actions without including express savings provisions. In many cases - for instance validating invalid contracts (eg, section 2(7) of the Ministry of Agriculture and Fisheries Amendment Act 1990 and Report of the Controller and Auditor-General (1990) AJHR B 1 [PT II] pages 19 to 21), invalid appointments (sections 3 to 5 of the Meat and Wool Board Elections (Validation) Act 1993), payments from one public fund to another (section 3 of the Finance Act 1994), technically irregular processes (section 5 of the Finance Act (No. 2) 1994), where the action appears to be benign (section 6 of the Finance Act 1986, payment of forestry encouragement grants (section 6 of the Finance Act 1988), or payment of pension to the widow of a former Prime Minister - the absence of a savings provision probably presents no issue (see also paragraph 23, and Palmer and Samford).

12 But in other cases the matter is not clear, for instance:

Social Welfare (Transitional Provisions) Act 1990, section 41: This provision contains a validation of actions of Department of Social Welfare staff that would have been valid had the Director-General (with the Minister's consent) delegated the power (cf section 3 of the Passports Amendment Act 1994 which appears to be completely benign; see the exception in the fisheries legislation paragraph 10(7) above); and

Customs Acts Amendment Act (No. 2) 1976, section 13: This section deems valid certain forms prescribed by the Controller.

Retrospective legislation overriding pending proceedings

13 By contrast to the retrospective provisions which save judgments and proceedings, those which override are limited in number. Some have been controversial because of their negation of the legal proceedings. They include:

(1) *Clutha Development (Clyde Dam) Empowering Act 1982* which granted certain water rights, in effect overriding the decision of the Planning Tribunal given in response to the earlier judgment of the High Court on appeal from the Planning Tribunal: *Annan* v *National Water and Soil Conservation Authority and Minister of Energy (No. 2)* (1982) 8 NZTPA 369; and *Gilmore* v *National Water and Soil Conservation*

Authority and Minister of Energy (1982) 8 NZTPA 298, discussed by Brookfield [33] [1983] NZ Recent Law 62. Section 4 of the Act provided that the parties to the litigation were entitled to their costs.

(2) *Economic Stabilisation Amendment Act 1982, section 9*: This provision validated and confirmed certain wage freeze regulations and declared them to be and to have always been validly made under the 1948 Act. The Amendment Act also widened the power to make regulations by making it clear that they could prevail over listed statutes, and that legislation assented to on 17 December 1982 reversed the effect of *Combined State Unions* v *State Services Coordinating Committee* [1982] 1 NZLR 742 in which the Court of Appeal gave judgment on 14 December 1982. It is significant, however, that the validation was not to affect any proceedings taken before or after the commencement of the amending Act in respect of an offence committed before that date. That saving recognises that criminal liability should not be created retrospectively and contrasts with the next override.

(3) *Homosexual Law Reform Act 198,6 section 7(2)*: The Act altered the substantive criminality of offences under sections 140 to 142 of the Crimes Act 1961. Section 7(1) benignly and retrospectively removed the criminality of pre-enactment behaviour not the subject of a charge at the time the Act was passed, and which, after the Act was passed, no longer constituted an offence. Section 7(2) provides that where persons were charged with offences under sections 140 to 142 before the commencement of the Act that continue to be offences after the Act, proceedings continue as if the Act had not been passed, except that defendants are retrospectively extended the benefit of new defences introduced by the Act.

(4) *Patents Amendment Act 1992: The Act* removed a power (or a near duty) of the Commissioner of Patents to grant compulsory patents in respect of food and medicine. As well, as enacted, it cancelled all pending proceedings and orders and licences made and granted. The Legislation Advisory Committee objected to this as a breach of principle and referred to the parallel United Kingdom legislation which did contain savings provisions (see *Issues of Principle*, LAC Report No 8 paras 92 to 117).

(5) *Fisheries Amendment Act (No. 3) 1992*: The Act, enacted on 18 December 1992, provides that the Quota Appeal Authority and a Court cannot rule on certain matters if the proceedings were brought or amended after 16 September 1992 in some cases and 5 October 1992 in others. During the very short time the legislation was before Parliament both the Attorney-General and the Legislation Advisory Committee expressed constitutional concerns about it (see *Issues of Principle* paras 118 to 132).

[33] "High courts, high dam, high policy: The Clutha River and the Constitution"

(6) *Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, section 11*: Under this section certain listed proceedings were terminated, and all interim orders made and all undertakings given in those proceedings were cancelled; certain declarations under section 28B of the Fisheries Act 1983 were declared to be and always to have been valid; section 9 declared that certain claims ... whether or not they had been the subject of adjudication by the Courts or any recommendation from the Waitangi Tribunal were finally settled and accordingly ... no court or tribunal had jurisdiction to inquire into the claims; the Preamble to the Act referred, among other things, to the proceedings (see especially Preamble paragraphs (c) to (d) and (g) to (i)) and to the deed of settlement which had been entered into, one element of which was that the implementation of the deed would constitute a full and final settlement of all Maori claims to commercial fishing rights (see especially Preamble paragraphs (e) and (l)(viii)); and the Bill was the subject of tribunal and court proceedings - *The Fisheries Settlement Report 1992* (Wai 307), *Te Runanga o Wharekauri Rekohu Inc* v *Attorney-General* [1993] 2 NZLR 301 CA.

(7) *Human Rights Amendment Act 1994, sections 2(3), 3(3) and 5(2): These* provide that the three sections apply notwithstanding any judgment, decision or order of any Court or Tribunal given or made before or after the commencement of the Act in proceedings commenced before or after that commencement. Section 2 is written with declaratory effect - nothing in certain sections should prevent or be taken ever to have prevented certain provisions in a superannuation scheme. Section 3 takes a clearer declaratory form - *for the avoidance of doubt, it is hereby declared that certain provisions shall not prevent or be taken never to have prevented certain superannuation scheme provisions*. Section 5 is only retrospective - nothing in certain provisions shall be taken ever to have prevented certain benefits; and section 4 also uses "for the avoidance of doubt - declared" wording, but has no provision relating to judgments or pending proceedings. This Amendment Act was a response to the judgment in *Coburn* v *Human Rights Commission* [1994] 3 NZLR 323 that the Human Rights Act made unlawful certain provisions of superannuation schemes, providing for benefits for surviving spouses and children.

(8) *Summary Proceedings Amendment Act 1992, section 3; District Courts Amendment Act 1981, section 2; and District Courts Amendment Act 1982, sections 3 and 4*: These statutes regularise irregularities - the first the unintended failure to confer jurisdiction on District Courts in respect of certain offences (see 528 NZPD 10619 to 10620), and the second and third the unintended failure to appoint certain areas as places where District Courts, Children and Young Persons Courts, and Small Claims Tribunals could exercise jurisdiction. The relevant amendment to the schedule of offences was deemed to have come into force on the appropriate earlier date, and the Governor-General was deemed to have made the relevant appointments from the relevant time. The legislation continues, nothing done is to be "held a nullity or to be otherwise invalid" because of the irregularity which has now been cured. The consequence is

that a litigant in those courts could not raise the defect of jurisdiction (see also section 11 of the Tokelau Amendment Act 1976).

14 One major United Kingdom controversy about the overriding of judgments concerns the War Damage Act 1965 which reversed the law as stated in *Burmah Oil Company* v *Lord Advocate* [1965] AC 75 and provided for the termination of proceedings relating to the issues. The latter provision followed the model of United Kingdom and colonial Indemnity Acts (such as those enacted in New Zealand in 1866 and 1882 and in Jamaica, considered in *Phillips* v *Eyre* (1870) LR 6 QB1). Professor Goodhart ((1966) "The Burmah Oil Case and the War Damage Act" 82 LQR 97) in commenting on the *Burmah Oil* case, and the statute, concluded that "the basic principles against retroactive legislation were reaffirmed in no uncertain terms, but, on the other hand, it was recognised that, in certain circumstances, justice might require such legislation".

Relevant factors

15 The question whether judgments already given should be saved or overridden arises only if the legislation is retroactive. The effect of new legislation on pending proceedings can arise even if it is only prospective (paragraph 8 above), but the concern here is with retrospective legislation which in practice might also override or save judgments and proceedings under the old law. Some of the factors which bear on that prior issue of retrospectivity may as well be relevant to the second issue of overriding judgments and proceedings. The LAC draws on some of the matters considered by the Law Commission in its consideration of retrospectivity.

Justice and effectiveness

16 The principle against non-retrospectivity is strongest in the case of criminal liability. The New Zealand Bill of Rights Act 1990 makes that clear. It is unjust, after the event, to make criminal and subject to penalty acts which were lawful when they were done. As well, since the criminal law is intended to be a guide to our actions, retrospective criminal law is also ineffective - people cannot adjust their actions to law which has not yet been written, eg Fuller, *The Morality of Law* (rev ed 1969) Ch 2. That second argument is not as strong in the case of invalid regulations; they were after all in fact in the books. They were there to guide and control. But the principle nevertheless still has force and the transport and economic stabilisation legislation mentioned in paragraphs 10(3) and 13(2) supports that limit. On the other hand, in many cases that exception has not been made expressly or has not been made in wide enough terms. It may be that the exception would be made as a matter of interpretation in some cases of silence, especially given the provisions of the Bill of Rights Act and associated legislation (paragraph 4 above). But if Parliament is to have a clear role, the proposed savings or override should be made explicit to it.

Reasonable expectations

17 By contrast, in some situations, the general understanding may have been that the law was to the effect that Parliament is now stating. That understanding can be reflected in the declaratory wording of the measure, as in the fugitive offenders legislation (paragraph 10(5)). In such situations the overriding of pending proceedings and judgments and the validation of proceedings decided on an erroneous basis might be justified; although as the fugitive offenders example shows even then savings might properly be made (if on a narrow basis) to maintain the position of those who successfully challenged the general understanding. The courts legislation also indicates the scope of the principles about retrospective criminal law - the actions in question were criminal at the relevant time (paragraph 13(7)). The retrospective element related only to the institutions. The common law has the related doctrine of the *de facto* officer, eg *In re Aldridge* (1893) 15 NZLR 361, and many statutory provisions similarly prohibit or limit challenges to appointments (see also paragraph 27 and also *Clarke* v *Karika* [1985] LRC (Const) 732, 749(i)).

18 The European Court of Justice has developed the related legal principle of certainty. For instance, it limited its annulment of a minimum selling prices decision to the particular applicant "for reasons of legal certainty and taking special account of the established rights of the participants in the invitation to tender whose tenders have been accepted" in *Simmenthal* [1979] ECR 777, discussed by Wyatt and Dashwood *The Substantive Law of the EEC* (2d ed 1987) 63. The LAC, in its advice on the real estate legislation (paragraph 10(15) above), considered that retrospective operation was legitimate in that case as the Bill was declaratory and stated the general understanding, and was not destructive of rights which had been understood to exist. But it also suggested that the provisions should save prior judgments and proceedings already commenced. As well, the tax position might need special consideration.

The nature of the individual right or interest

19 In the fugitive offenders case (paragraph 10(5)), personal liberty and the associated writ of *habeas corpus* are in issue. At first the case appears to be analogous to that of criminal liability. But is that really so? Extradition legislation can be and was in that case seen as procedural. New extradition law can apply to earlier offences as appears for instance in the retrospective wording of article 18 of the extradition treaties with the United States (1970) and Fiji (1992). Consistently with that, section 9 of the 1976 fugitive offenders legislation validated actions taken under the 1881 Act; as well, proceedings commenced under it "may be continued and dealt with under the [1881] Act as amended by [the 1976] Act". It was only those who, before the new Act came into force, had succeeded in *habeas corpus* proceedings that kept the advantage of the law as declared by the Supreme Court. The New Zealand Law Society in its submission on the Bill accepted that matters under the fugitive offenders legislation are procedural in nature and therefore did not object to the retrospective effect of the clause (see 403 NZPD 641). Other rights or interests might be similarly less significant; consider the limited interest that a member of a body might have in the technical regularity of appointments or elections to its governing board.

Responsibilities for Government

20 If the argument for retrospectivity has been accepted as a general proposition, that acceptance might be undermined or even negated by a savings provision. That appears to be the position in the human rights (superannuation) and economic stabilisation cases mentioned (although in the latter use criminal proceedings could be saved - in the sense that a defendant to a criminal charge could still plead the old law, that is that the regulations were invalid (paragraphs 13(2) and 13(7). Very rarely the *only* point of the legislation is to override the particular judgment as in the Clutha case (paragraph 13(1)). The legislation might also be based on a broadly applicable and accepted agreement which supersedes pending litigation while setting out a new regime for the future; the Sealords legislation (paragraph 13(6)) can be characterised in that way.

21 In such cases the public interest might be seen as uppermost and as allowing no room for the protection of judgments with continuing effect and proceedings under the old law. Indeed, the Government's course of action might require that such effects and proceedings be prevented. The legislation dissolving the New Zealand Superannuation Scheme enacted on 23 July 1976 provided that no action or other proceedings, civil or criminal, could be brought against various individuals for failing to meet certain obligations under the 1974 Act from 16 December 1975 - the day after the Prime Minister announced that the scheme would be abolished. The Supreme Court in *Fitzgerald* v *Muldoon* [1976] 2 NZLR 615 on 11 June 1976 had declared that that announcement was unlawful, but it adjourned the balance of the proceedings for six months and granted no coercive remedy - "it would be an altogether unwarranted step to require the machinery of the [1974 Act] now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months" when the proposed legislation was enacted (a matter on which there was "little doubt"). The Attorney-General had also in April 1976 stayed private prosecutions brought against employers for failing to meet their obligations under the 1974 Act; eg, "Superannuation: Retrospective Termination" [1976] NZLJ 268. That action too was based on the Government's declared intention to promote legislation repealing the 1974 Act. Like that stay the effect of the 1976 legislation was to prevent legal action being brought in respect of any breach of the 1974 Act from the date of the press announcement through to the date of repeal of that Act. Accordingly the Supreme Court proceedings came to an end, but with a costs order being made against the Government, see paragraph 7 above.

22 In a more recent case, the Court refused to grant a remedy where general validating legislation was in immediate prospect (the Bill had its Third Reading two days before judgment was given and assented to six days later) and where the legislation was generally accepted by the House as overwhelmingly necessary, *Turners and Growers Exports Ltd* v *Moyle* (CP 720/88, Wellington, December 1988, McGechan J), discussed by Liddell "Administrative Law" [1989] NZ Recent Law Review 105, 107 to 110, and by Brookfield "Constitutional Law" [1989] NZ Recent Law Review 217, 225 to 226. The regulations in that case, made under the Primary Products Marketing Act 1953, are among the limited group which require confirmation by Act if they are to remain in force.

Conclusions

23 The propriety of the overriding of judgments and proceedings cannot be kept separate from the broader issue of retrospectivity. As the recent Australian study by Palmer and Sampford indicates, discussions of retrospectivity are most convincing if related to the legislative practice. This note considers principally that retrospective legislation which, as well, expressly either protects or overrides judgments and legal proceedings. Only about 40 such provisions have been mentioned. They are principally those which have been discovered through a computer search. If the search is extended to retrospective legislation generally, the number becomes much larger. A search of the *Status* statutes database (which is limited to legislation which is in force or has been in force during the last two or three years) on 4 May 1995 for the wording "deemed to have come into force" revealed 196 entries. Some of the 40 provisions mentioned above are among those statutes.

24 Those additional instances help emphasise that a great number of retrospective provisions are seen as having only a benign effect; those which validate appointments, provide for backdated salary and benefits payments and new superannuation arrangements, and validate rating schemes and other local government actions (these latter two categories may create greater controversy). They are not seen as requiring savings provisions; indeed, to allow proceedings under the old law would be malign.

25 But of course not all retrospective legislation is benign in its effects. Not all of it states what everyone had assumed to be the case with the result that they relied on that assumption. Indeed, this paper considers situations where litigants took advantage of the earlier and (for them) more favourable state of the law; the litigants, as well, have not relied on others' erroneous assumptions. The balance of fairness may be wrongly altered by retrospective overriding, fairness being a central element in this law, as recently emphasised as well in the House of Lords in *Plewa* v *Chief Adjudicator's Office* [1994] 3 WLR 317.

26 In two cases it is clear that the old law and the judgments and proceedings under it should be protected. The first is where *criminal liability or penalty* might be imposed under the new (restoring or validating or declaring) law. If the legislation under which a person is being prosecuted did not validly create an offence at the time of the action, new legislation should not allow that. The principle that there is to be no crime or penalty without a law requires that. That principle is to be seen fully worked out in the economic stabilisation and Samoan citizenship legislation (paragraphs 13(2) and 10(6)). In other cases it is reflected, but not adequately.

27 There is an apparent exception to the proposition just stated in recent war crimes legislation enacted in Australia, Canada and the United Kingdom. That new legislation applies to offences committed 50 years ago. This exception is only apparent: the actions in question were "criminal according to the general principles of law recognized by the community of nations" (to quote the relevant terms of the International Covenant on Civil and Political Rights 1966, article 15(2)). What the legislation does is to provide another jurisdiction to deal with these serious offences. Parliament is being asked to agree to the principle in the war crimes legislation for former Yugoslavia and

Rwanda, International War Crimes Tribunals Bill 1994 which applies to offences committed before the Tribunals were established. See also Palmer and Samford pages 248 to 253 and the discussion of the fugitive offenders legislation, paragraphs 10(5) and 19 above.

28 A second situation in which the judgment and proceedings under the old law should be protected is where *the judgment* which has been obtained or is being sought *can be given effect to without undermining the purpose requiring retrospectivity.* Mr Jackson could have an order for the kerosene pumps he wished to import, and (if necessary) for money damages in respect of their wrongful detention (paragraph 10(2)); Mrs Lesa could retain her citizenship (paragraph 10(6)); Mr Ashman and Mr Best could continue to have the benefit of their *habeas corpus* orders (paragraph 10(5)) - in all cases without prejudicing the general validating effect of the legislation.

29 The situation contrasting to that just mentioned is where the maintenance of the judgment would undermine or perhaps completely nullify the retrospective legislation. That is to say, the arguments for retrospectivity and judgment override become the same. This situation will arise when the remedy given by the judgment is both prospective and broad; a general declaration that wage freeze regulations are invalid cannot stand with legislation validating them (paragraph 13(2)). By contrast, a narrow prospective judgment (for instance favouring Mrs Lesa and no-one else) might also be able to stand with legislation which generally overrides the law as stated in the judgment. That saving approach is supported by the principles mentioned at the outset (paragraphs 5 to 7) - about the rights of litigants and the relationship of the Court to the Legislature.

30 Accordingly, in the case of the forests assets legislation there are two related questions:

(a) Is the case for retrospectivity made out; and

(b) If it is, would the judgment, because of its scope (benefiting all members of the class) and its continuing effect, if it is continued in effect, nullify the substance of the legislation?

31 One matter relevant to the first question is the understanding of the legal position - was the law originally assumed to be to the same effect as is now proposed? Did the various parties rely on that? On the other side is the character of the interests in issue - is this not essentially a bilateral, contractual situation in which there is no wider public interest and in which, moreover, one party to the contract has a major advantage not available to the other in promoting legislation (in apparent breach of the principle reflected in section 27 of the Bill of Rights (paragraph 6 above))? On the second question, what is the general effect of the judgment? In particular, for how long will the judgment have effect and what is the membership of the successful class?

APPENDIX 2

SUMMARY OF REPORTING PERIOD

Submissions to select committees

1994

Fiscal Responsibility Bill	March
Layout Designs Bill*	April
New Zealand Sports Drug Agency Bill* .	May
Te Ture Whenua Maori Amendment Bill/Maori Land Amendment Bill	May
Supplementary Order Paper No.10 relating to the Law Reform (Miscellaneous Provisions) Bill (No. 2) [intercountry adoption agreements]	July
Watercare Services Limited (Auckland Emergency Water Supply) Bill	July
Social Services Select Committee Inquiry into the Privilege Provisions of Section 11 of the Social Security Act 1964	August
Fisheries Amendment Bill	August
Misuse of Drugs (Drugs Paraphernalia) Amendment Bill	August
Copyright Bill	August
Long Term Care of the Elderly Committee Bill	October
Supplementary Order Paper No. 36 relating to the Finance Bill (No. 2)	October
Law Reform (Miscellaneous Provisions) Bill (No. 3)*	November
Regulations Review Committee Inquiry into Resource Management (Transitional) Regulations 1994*	November

1995

Reserve Bank of New Zealand Amendment Bill (No. 2)	February
Crimes Amendment Bill (No. 2)	February
Overseas Investment Amendment Bill	February
Hazardous Substances and New Organisms Bill*	February
Fisheries Bill	February
Medical Practitioners Bill	February
Parliament Centre Bill	February
Domestic Violence Bill*	February
Finance Bill (No 4)*	February
Local Government Law Reform Bill	March
Social Welfare Reform Bill	March
Land Transport Law Reform Bill	April
Health and Disability Services Amendment Bill	May

Residential Tenancies Amendment Bill	May
Supplementary Order Paper No. 84 relating to the Social Welfare Reform Bill 1994 ["privilege provisions"]	May
Financial Transactions Reporting Bill	May
Crown Pastoral Land Bill	May
Environment Amendment Bill	May
Courts and Criminal Procedure (Miscellaneous Provisions) Bill	July
Parliamentary Privilege Bill	July
Waikato-Tainui Raupatu Claims Settlement Bill	September
Hospitals Amendment Bill	September
Co-operative Companies Bill	September
Institute of Chartered Accountants of New Zealand Bill	September
Customs and Excise Bill	October
Agricultural Compounds Bill	October
Submarine Cables and Pipelines Protection Bill	November
Subordinate Legislation (Confirmation and Validation) Bill	November
Disclosure of Political Donations and Gifts Bill	December
Protected Areas (Prohibition on Mining) Bill and the Coromandel Hauraki Gulf (Prohibition on Mining) Bill	December

* indicates that a follow-up submission was provided at the request of the relevant select committee.

By arrangement, the Law Commission rather than the LAC reported on the following:

International War Crimes Tribunal Bill
Meat Amendment Bill
Taxation Reform (Binding Rules and Other Matters) Bill
Criminal Investigations (Blood samples) Bill

Advice on draft bills and regulations to departments and select committees

Radio New Zealand Bill 1995 (comments to officials during preparation of bill)
Ozone Layer Protection Amendment Bill (comments to officials during preparation of bill)
Biosecurity Amendment Bill (comments to officials on proposed amendments)

Proposals under the Citizens Initiated Referenda Act 1993

During the reporting period, and at the request of the Clerk of the House of Representative, the Committee has commented on the wording of six proposed referenda questions.

Publications during the current reporting period

Issues of Principle (Report of the Legislation Advisory Committee (1 July 1992 to 31 December 1993), Report No 8, December 1993

The "Business" of Legislation: A Discussion Paper, April 1995

Publications since 1987

Publications of the Legislation Advisory Committee, excluding formal submissions to select committees of the House, are:

- *Legislative Change: Guidelines on Process and Content*, Report No 1, August 1987
- *Administrative Tribunals: A Discussion Paper*, January 1988
- *Report of the Legislation Advisory Committee* (on its work to date), Report No 2, June 1988
- *Departmental Statutes and other legislation relating to departments: A Discussion Paper*, September 1988
- *Administrative Tribunals*, Report No 3, February 1989
- *Report on Departmental Statutes*, Report No 4, January 1989
- *Report of the Legislation Advisory Committee* (April 1988 to December 1989), Report No 5, April 1990
- *Public Advisory Bodies: A Discussion Paper*, September 1990
- *Legislative Change: Guidelines on Process and Content (Revised Edition)*, Report No 6, December 1991
- *Report of the Legislation Advisory Committee* (January 1990 to June 1992), Report No 7, September 1992
- *The 'Business' of Legislation: A Discussion Paper*, September 1993 §
- *Issues of Principle* (Report of the Legislation Advisory Committee, 1 July 1992 to 31 December 1993) Report No. 8, December 1994

§ An April 1995 revision of the paper, taking into account the comments of those consulted in 1993, is also available from the committee, but it was not formally or separately published.