Te Tari Ture o te Karauna
Crown Law

# TE POUĀRAHI
# THE JUDGE OVER YOUR SHOULDER

## He aratohu mō te tuku whakatau pai me te ture i Aotearoa

A guide to good decision-making and the law in New Zealand

Te Tari Ture o te Karauna
Crown Law

**Disclaimer**

Note: This guidance is provided to public sector decision-makers to assist them to make better decisions. It is intended to describe the current position of the law but is not legal advice and cannot replace legal advice informed by specific circumstances. It is not binding on public sector decision-makers, and is not intended to be enforceable against decision-makers in any way.



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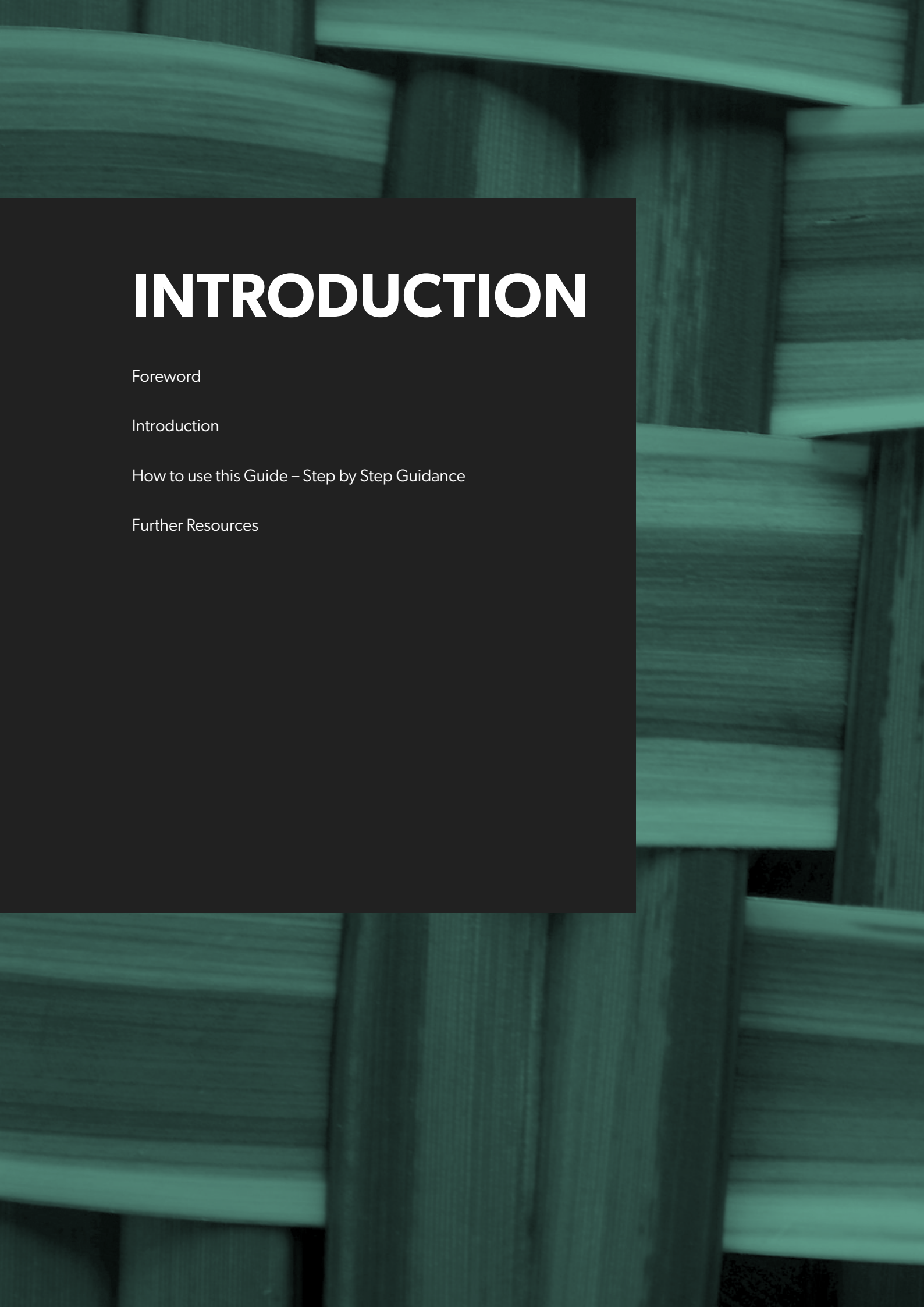


# INTRODUCTION

# **Kupu whakapuaki**
# Foreword

**Nau mai e ngā kaimahi kāwanatanga, ngā kaituku whakatau, me ngā rōia i roto i te kāwanatanga. He hōnore tēnei ki te whakatakoto atu i tēnei rauemi i a koutou katoa. Kia pai te whakamahi.**

Welcome to all public servants, decision-makers, and lawyers in government. It is my pleasure to introduce the latest edition of Crown Law's guide for decision-makers to you all. I wish you well in using it.

This Guide will inform and improve the quality of decision-making in government. At its simplest, a good decision is one that is made following a fair process, that complies with the law, and that is substantively sound.

Good decision-making is an important objective in its own right, regardless of whether the decision is challenged. Governments in Aotearoa have legitimacy to govern because they are committed to government according to law, a central pillar of our democratic society. The public rightly expects all government decision-makers to make decisions – both in terms of process and outcome – in accordance with the law. It is a strength of our democratic system that government decision-making is overseen and supervised by independent Courts, and by independent office holders such as the Ombudsman, the Auditor-General and others.

And, of course, if decisions are challenged, good decision-making in Government ensures that governments can achieve their policy or operational objectives. By being familiar with administrative law principles, decision-makers can make decisions that are less vulnerable to successful challenge in any forum, whether that is before the Courts or by one of the other public bodies that scrutinise public decision-making.

If you are responsible for decision-making in government, the questions in this Guide are here to help.

**Una Jagose QC**
Solicitor-General

# **Kōrero whakataki**
# Introduction

This Guide is a user-friendly guide for government officials making decisions or advising others to make decisions that affect members of the public.

As the complexity of the delivery of the government's programme increases, so too does the law relating to the decisions of government or other public decision-makers. This resource is designed to guide decision-makers and their advisors through that complexity in a practical way. While this Guide is informed by academic resources, it is not intended to be a comprehensive textbook on administrative law. Instead, the questions at the heart of this Guide are drawn directly from our experience of the best practical questions that decision-makers and their advisors can ask themselves to reduce the risk of decisions being overturned. Where possible, these questions are illustrated by real case examples.

This guidance is also informed by the fact that government is not only subject to the scrutiny of the Courts but also to a range of other public supervision. Those other bodies are detailed in Annex 3, and the questions that we have set out in this Guide will also help public decision-makers to satisfy those supervisory bodies that a decision has been well made.

This Guide is not intended to replace legal advice. If you have questions about any decision you are making or advising on, please seek advice from your in-house legal team.

In terms of its content, the last (second) edition of this Guide was published in March 2005. This revised edition provides a much-needed update on the law. With our move online, we intend to keep this resource as up to date as possible, but care must still be taken to ensure the law has not changed since the date of update.

Finally, we acknowledge the considerable debt we owe to the authors of the United Kingdom Government's *The Judge Over Your Shoulder* guide; and the Scottish Government's *Right First Time* guide, both of which inspired this Guide and its revision.

# **Me pēhea te whakamahi i tēnei Aratohu – Ngā Tohutohu o te Aratohu**
# How to use this Guide – Step by Step Guidance

To better ensure the guide is a simple and practical tool for improving decision-making, the questions in this Guide are broken into steps for decision-makers:

**Step 1:** Preparing for the decision

**Step 2:** Getting the process right

**Step 3:** Making a good decision

**Step 4:** After the Decision – Recording and Communicating

# **Ngā Rauemi Atu Anō**
# Further Resources

The Guide also includes additional standalone sections with background information for decision-makers:

**Annex 1:** A section with constitutional background to government in New Zealand

**Annex 2:** A practical explanation about how judicial review is used to scrutinise government decisions

**Annex 3:** A description of other forms of public supervision.

# STEP 1:
## PREPARING FOR THE DECISION

Question 1: What is the source of power for the decision?

Question 2: What are the limits on your decision-making?

Question 3: Who has legal authority to make the decision?

Question 4: Are there any government policies or guidelines that apply to this decision?

Question 5: Are there human rights implications of the decision?

Question 6: Are there Māori-Crown implications of the decision?

Question 7: Are there any relevant international obligations?

# Question 1: What is the source of power for the decision?

## The first step for making a good decision is to understand the source of the decision-making power.

## This source will usually be in statute or regulation…

To identify the source of the decision-making power, you first need to consider whether there is any governing legislation. You may work in an area which has a specific statute. For example, if you are making decisions about prisoners, look to the Corrections Act.

Or, if you are making decisions about social development, look first to the Social Security Act. If you are not sure whether there is relevant legislation for the decision you are making, ask your in-house lawyer.

Alongside properly understanding the source of power, it will be important to properly describe the power in the final decision-making documents [see Step 4] as well as in any initial papers setting out or approving processes to be used [see Step 2]. It can be tempting to paraphrase. Once a source of power is identified, particularly if found in statute or regulation, always quote the enactment correctly. To do otherwise risks a challenge that the decision-maker misdirected themselves as to the law [see Question 19].

## … but may be found elsewhere, in limited cases.

Usually, public officials' power to make decisions comes from statute or regulations. However, this is not always the case.

There are some decision-making powers sourced in the common law and the 'Royal prerogative' (the remaining few powers of the Monarchy).

If you have a statute dealing with a particular area or policy or service delivery, and it does not provide you with the powers you need, consult with your lawyers. It may be possible to find an alternative source of power for the decision, but there are limits.

Following the Canterbury earthquakes the Government declared certain damaged areas to be 'red zones' and offered to purchase land and buildings.

When the Quake Outcasts sued, the Government argued that the decision to create the zones did not need to be made under the Canterbury Earthquake Recovery Act 2011 but could instead be sourced from the common law or Royal prerogative, as applicable. The Supreme Court found otherwise, saying the Act's machinery needed to have been used. The Act 'covered the field'.

*Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2016] 1 NZLR 1

# Question 2: What are the limits on your decision-making?

Public powers of decision-making will almost always be limited in some way, whether by statute or common law.

It is important to understand the nature of the decision-making power, and the exact words used. If the source of the decision-making power is a statute, the nature of the power will mean that it is either something that:

- must be done (a 'rule' or a 'duty'); or
- may be done (a 'discretion').

> Section 45A of the Corrections Act contains both a rule and a discretion. The Chief Executive must make rules declaring items of property that a prisoner may be issued with or allowed to keep. The Chief Executive may also make rules imposing conditions that attach to an item of property.

A rule or duty is a very limited and specific power. It requires the particular function to be exercised in a certain way.

By contrast, the exercise of discretion enables a decision between several options, usually including a choice as to whether to act or not. The options before the decision-maker may be wide or can be narrowed by limits on how the discretion can be exercised.

A decision-making power is also always limited by its purpose. Even where the statute appears to give the widest possible discretion, the discretion must be exercised in a way that is consistent with the purpose of the statute. The purpose of a statute can be identified by the "purpose" or "objects" section, the statute read as a whole, its history, or surrounding legislation, or other wider factors (like Parliamentary debates). Particular parts of statutes may (explicitly or implicitly) have their own sub-purposes.

> The Court of Appeal held (by majority of 3 to 2) that section 11 of the Interpretation Act 1999, which allows public officials to take certain actions putting legislative infrastructure into place once an Act has been passed but before it comes into force, did not extend to the registration of unions before the Employment Relations Act 2000 came into operation.

The majority of the Court recognised that the interpretation provision was not to be narrowly read, but nonetheless were unable to find that administrative steps to register a union under a new Act could be said to be "*necessary and desirable*" steps to bring the new Act into operation, as enabled by section 11. The majority found that other transitional provisions ensured continuity and prevented a 'hiatus' – which was the purpose for section 11 that the Court found most important – meaning that section 11 did not need to be extended that far and could be limited to enabling internal and more mechanical establishment matters within the government. (The minority took a different view of the purpose of section 11 and the relevant employment law provisions, and would have confirmed that the early registrations were valid).

*New Zealand Employers Federation Inc v National Union of Public Employers* [2002] 2 NZLR 54.

Powers can also be limited by things not expressly set out in a statute. This can include principles established by the courts (common law); the need to exercise the power reasonably; or obligations to consider particular matters (such as may arise under Treaty of Waitangi obligations) or undertake particular processes to meet natural justice requirements. These matters are discussed in more detail in Steps 2 and 3.

The Court of Appeal declared invalid regulations which allowed the Chief Executive of the Ministry of Fisheries to allocate catch entitlements, when the regulations themselves did not specify the fish stocks to which they related or provide any rules or guidelines as to how allocation will occur. The statute envisaged that the regulations themselves would stipulate how the entitlements would be allocated, and therefore the level of discretion left to the Chief Executive invalidated them.

*Official Assignee v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722

A regulation requiring farmers to continue selling their milk to the same processor for a whole season (once they had started selling to that processor) was overturned.

While the objective behind the making of the regulation (of providing commercial certainty to processors and market stability) may have been sensible, it was not within the express or implied objectives of the empowering Act to use the regulatory power for that purpose.

*Carroll v A-G* [1933] NZLR 1461

# Question 3: Who has legal authority to make the decision?

Once the source and limits of the authority to make the decision have been identified, it is also important to check that you have identified the right person to make the decision. A delegation may be required.

For statutory powers, who is described as the decision-maker in the relevant statute or regulation? In what capacity are they acting? If it is proposed that someone other than that named person will make the decision, then is there a valid delegation from the person authorised to make the decision in the statute or regulation?

> The Court of Appeal determined that a delegation of (quasi-judicial) decision-making powers to a company was not valid, because the power in the statute to delegate to an "*officer*" should be read as being limited to natural persons in an employment or contractual relationship with the Council.
>
> *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA)

A delegation is a formal approval or permission from the decision-maker for someone else to make the decision on their behalf.

To ensure a delegation is valid, you need to think about the following things:

- Does the statute or regulation expressly prevent delegation? If so, only the named decision-maker will be able to make the decision. For example, under s 48 of the Public Finance Act 1989, a Minister cannot delegate the Minister's power to borrow.
- In what capacity is the named person acting? For example, the Solicitor-General may delegate some of the law officer functions to a Deputy Solicitor-General, and the chief executive functions to a wider group.
- If the statute or regulation permits delegation, are there any limits on the delegation? For example, s 28 of the State Sector Act 1988 limits a chief executive from further delegating powers delegated by a Minister. Other statutes may specify the group of people that can receive a delegation (such as a chief executive or officers of a department).
- If the statute or regulation does not say anything about delegation, sections 28 and 41 of the State Sector Act 1988 provide Ministers and public service chief executives a general power of delegation. Sections 73 and 74 of the Crown Entities Act provide the ability to, and limits on, a Crown entity board's power to delegate.
- Sub-delegations are generally not possible without express authorisation.

The Privy Council confirmed that it would not have been possible for a Minister to delegate final decision-making on port asset allocation to the Auckland Harbour Board. Such a delegation would have been inconsistent with the scheme of the Act.

*Manukau City Council v Ports of Auckland* [2000] 1 NZLR 1 (PC)

Decisions to implement a new driver licensing scheme were challenged for, amongst other reasons, the lack of a written delegation by the Minister of Transport to the relevant agency.

The Court of Appeal drew a distinction between the absence of a written delegation to bring a rule into force or exercise a power (which may be fatal) and the delegation of tasks of obtaining submissions and consulting, which could proceed on the basis of an oral delegation without endangering the final decision of the Minister.

*McInnes v Minister of Transport* [2001] 3 NZLR 11 (CA)

The delegation should follow all process requirements on delegations set out in the relevant statute (if the statute expressly permits delegation) or s 41 of the State Sector Act 1988 (if the statute doesn't prevent delegation). For example, if the delegation is to a person outside the public service, Ministerial approval is needed under s 41 of the State Sector Act 1988.

Most statutes that provide for delegations require them to be made in writing. If not, it is possible to establish that a delegation was in place notwithstanding a lack of written evidence, but it comes with a high risk that the delegation and any subsequent decisions might be held to be invalid. It is best practice to document all delegations.

Delegations may be able to be made specifically to named persons, or to any individual or groups that hold a specified position. The State Sector Act 1988 leaves both options open for delegations made under that Act. Other statutes may limit these choices.

The decision-maker remains responsible for the decision, even if it is made by a delegate. A decision-maker is able to amend or revoke a decision by a delegate in the same way the delegate would have been able to, but cannot otherwise "take back" the delegation and "remake" the decision if the delegate has already made the decision.

In limited circumstances, "unlawful" delegations may be able to be ratified (i.e. made lawful).

Under the Constitution Act 1986 any member of the Executive Council can exercise any other Minister's powers, although in practice they do not unless agreed, such as by delegation to each other or when the duty Minister roster is in place during recess. Ministerial delegations to other Ministers are available to Ministers in a process managed by the Department of Prime Minister and Cabinet.

In the very rare circumstances where the decision-making power is not based in a statute or regulation, you should seek specific legal advice about how the power can be used (and who can utilise it).

A notice specifying the minimum size for lobsters was overturned because the notice was issued in the name of Assistant Director-General, and should have been issued by the Minister or Director-General. Although the power could have been delegated to the Assistant Director-General, it had not been.

*Webster v Taiaroa* (1987) 7 NZAR 1

# Question 4: Are there any government policies or guidelines that apply to this decision?

There will often be policy or guidelines in place to guide the decision-maker, especially in situations where decision-makers may have to deal with a large number of cases.

Policies and guidelines can be useful to decision-makers by encouraging consistency and avoiding successful challenges on the basis of inconsistency. However, policy documents or guidelines do not have the same force as legislation. Decision-makers should ask whether there are any policies or guidelines that apply to the process and decision before them and apply them in the context of the relevant statutory framework. Officials supporting decision-makers should be aware of and understand all relevant policies.

A failure to consider, or misinterpreting, policy or guidelines may be seen as a failure to take into account a relevant factor; an error of law; unreasonableness; causing a decision-maker to go beyond their power; or a breach of a legitimate expectation that you will apply policy or guidelines. These points are discussed in more detail in Steps 2 and 3 of this Guide.

Decision-makers must ensure that the policy or guidelines are read as a whole, rather than by reference to selected passages. The extent to which policy or guidelines have been relied on, or not relied on, should be made clear in the decision.

While policies are helpful, decision-makers must also ensure they consider whether the merits of the individual case justify a departure from the policy.

Are there any facts in this case that justify a different approach being taken than is required by the departmental policy, manual or guideline?

- Policy documents and guidelines should be applied sensibly according to the purpose of the policy and the natural meaning of the language. Policy must not be inconsistent with the statute under which the policy is being applied (for example, policy may not override obligations under legislation to consider specific matters).
- While it is lawful to follow a policy or guidelines, the decision-maker must consider the merits of each case, and whether the facts justify a departure from the policy.
- This doesn't mean an exception to policy or guidelines must be made, but that the decision-maker should remain open to persuasion that an exception should be made.
- If a decision-maker does depart from policy, reasons should be documented and provided.

## Policies may also create additional process obligations.

If a policy says that the government will act in a certain way, or follow a particular policy, it may also be that consultation with affected parties is required before departing from that process.

# Question 5: Are there human rights implications of the decision?

Human rights are part of the general law of New Zealand. This means that, if the protected rights are breached, the affected person may be able to sue and may be awarded compensation.

The primary source of human rights is the New Zealand Bill of Rights Act 1990, which protects a range of rights. The Human Rights Act 1993 (which focuses on prohibiting discrimination) and the Privacy Act 1993 (which focuses on protecting the privacy of individuals' personal information) also protect individual rights. [See Question 13 for more information on privacy and requirements for treatment of personal information].

Increasingly, the Bill of Rights Act is being used to invalidate administrative decisions or challenge policy decisions.

A decision-making power will need to be interpreted consistently with the rights in the Bill of Rights Act, where this is possible. For example, the power to make rules relating to prisoners' property must be interpreted consistently with the rights affirmed in the Bill of Rights Act where possible.

Where the decision-making power is a discretion, the discretion must be exercised consistently with the rights in the Bill of Rights Act. For example, the Minister of Immigration may only exercise the discretion to order surrender of a person consistently with the rights affirmed in the Bill of Rights Act. The rights most frequently relevant to public decision-making include:

- Freedom of thought, conscience and religion;
- Freedom of expression;
- Manifestation of religion and belief;
- Freedom of peaceful assembly;
- Freedom of association;
- Freedom of movement;
- Freedom from discrimination (on grounds from section 21 of the Human Rights Act);
- The right for a person belonging to a minority to enjoy the culture, profess and practice the religion, or use the language of that minority;
- The right to be secure against unreasonable search and seizure;
- The right not to be arbitrarily arrested or detained;
- The right to the observance of the principles of natural justice.

The Police received information that a man was selling cannabis but the search warrant was for the wrong house. On entry, the Police were advised they had the wrong house but continued searching, finding nothing incriminating. The search was held to be in breach of the Bill of Rights Act and, in that case, damages were held to be the only appropriate remedy.

*Simpson v Attorney-General (Baigent's case)* [1994] 3 NZLR

The High Court overturned a decision by the Department of Corrections not to allow a journalist access to interview a prisoner alleging miscarriage of justice (in a conviction for murder).

The right to freedom of expression as affirmed in section 14 of the Bill of Rights Act is of vital constitutional importance and, in the context of investigating possible miscarriage of justice, the consideration of the Department not to allow access to avoid further harm to victims was insufficient to justify the decision made.

*Watson v Chief Executive of the Department of Corrections* [2015] NZHC 1227

However, a decision that infringes a right or freedom will not breach the Bill of Rights Act if the infringement is prescribed by law *and* can be demonstrably justified in a free and democratic society. This is a legal test to be applied by a court so, if you think your decision might infringe a right in a permissible way, you need to check with your in-house lawyer.

The Bill of Rights Act is not 'supreme law'. Other statutes (though not regulations or subsidiary legislation) can override the Bill of Rights Act in some circumstances. If you think that might be a possibility, it is best to check with your in-house lawyer.

In limited circumstances, it may be mandatory to consider one or more of the rights in the Bill of Rights Act – if the decision being made could impact the right(s). For example, the Broadcasting Standards Authority, in deciding whether or not to uphold a complaint, must take into account the right to freedom of expression.

## The Human Rights Act focuses on discrimination.

The Human Rights Act permits a person who considers they have been discriminated against to take a claim to the Human Rights Commission and/or to the Human Rights Review Tribunal. It also permits a person to challenge any government action, including legislation, on the grounds that it is discriminatory. However, note that discrimination (different treatment) is only prohibited where the difference is based on a prohibited ground of discrimination. These are set out in section 21 of the Human Rights Act, and include:

- Sex (which includes pregnancy and childbirth);
- Marital status;
- Religious belief;
- Ethical belief;
- Colour;
- Race;
- Ethnic or national origins (including nationality and citizenship);
- Disability;
- Age;
- Political opinion;
- Employment status;
- Family status; and
- Sexual orientation.

Cases such as *Child Poverty Action Group (CPAG) v Attorney General* [2013] NZCA 402 and *Atkinson v Ministry of Health* [2012] NZCA 184 dealt with challenges to government policies regarding, respectively, eligibility for tax credits associated with social welfare policy (on the basis of employment status) and payments for the provision of disability support services by family members (on the basis of family status). In both cases, the relevant policy was declared to be discriminatory. In the *CPAG* case, the Court of Appeal also held that the relevant rule was a justified limit (under section 5 of the Bill of Rights Act) on the right of freedom from discrimination on the ground of employment status. In *Atkinson*, by contrast, the discriminatory policy was held not to be a justified limitation.

# Question 6: Are there Māori-Crown implications of the decision?

The Treaty of Waitangi and Treaty principles can be significant to the exercise of a decision-maker's authority, a mandatory relevant consideration, or can impose consultation requirements on the decision-maker. This will depend on statutory wording and context.

Some statutes provide that the decision-maker must "*have regard to*" or "*take into account*" Treaty principles, which makes the Treaty a mandatory relevant consideration in decisions taken under that Act.

In such cases, decision-makers must:

- carefully identify the Treaty interest(s);
- determine whether "active protection" of the interests is required; and
- produce a decision which balances the interest(s) at play in accordance with the statutory direction.

Section 9 of the State-Owned Enterprises Act 1986 prohibits the Crown from acting inconsistently with Treaty principles when exercising powers under that Act.

This means the Treaty principles are critical to the lawful exercise of the decision-maker's authority.

The decision-maker will need to ensure they act reasonably and in good faith, are well informed (through consultation as necessary), and ensure the substantive decision reached is not inconsistent with any Crown obligations to protect Māori interests.

## Consultation with Māori and consideration of relevant reports of the Waitangi Tribunal may be required to ensure the decision-maker is informed of Māori interests.

The relevant statute may not mention the Treaty or Treaty principles but they may still be relevant where the factual context involves Māori interests or where the relevant provisions in other (related) Acts require Treaty principles to be accounted for in some way.

It will also be important to be aware of any obligations that might arise from existing Treaty settlement arrangements – each department should have a record of obligations that must be taken into account in its decision-making (or Te Arawhiti can assist with understanding what might apply).

In 1987, the Court of Appeal expressed the Treaty principles in a way which remains their fundamental legal articulation in *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 . The Court found that the exercise of a power to transfer land to State-owned enterprises would be unlawful without setting up a system to consider claims/potential claims to the Waitangi Tribunal. The Court expressed the Treaty principles as follows:

- The Crown and Māori must act reasonably and in good faith towards each other;
- The Crown has a duty to make informed decisions, which may require consultation with Māori. Consultation does not require negotiation, nor is it open-ended. Consultation may be required to ensure the decision made is informed;
- The Crown may have an obligation to protect Māori interests which prevents the Crown from acting to unreasonably compromise the resolution of grievances that have arisen under the Treaty;
- However, the Crown is sovereign and should provide laws and make decisions for the community as a whole, having regard to the economic and other needs of the day.

*New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641

In 2018 the Supreme Court considered the use of the phrase "*to give effect to the principles of the Treaty of Waitangi*" in section 4 of the Conservation Act 1987.

The Supreme Court held that section 4 was a "powerful" treaty provision requiring more than procedural steps. The Court noted that "*enabling iwi or hapū to reconnect to their ancestral lands by taking up opportunities on the conservation estate (whether through concessions or otherwise) is one way that the Crown can give practical effect to Treaty principles*".

Noting that a number of other factors needed to be taken into account, the Court concluded that what is required is "*a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles.*"

The Supreme Court quashed tourism concessions granted to two commercial providers and directed the decisions to grant them to be reconsidered because, in light of section 4, the papers setting out the Minister's decisions showed two errors of law. The decision was mistaken in incorrectly concluding that:

- there was no basis for preferential entitlement to concessions in favour of any party under the relevant legislation or current planning documents; and
- economic benefit (and the interest of another party, in this case the Trust, in that benefit) was not a relevant consideration.

*Ngai Tai Ki Tamaki Tribal Trust v Minister of Conservation* [2018] NZSC 122

# Question 7: Are there any relevant international obligations?

Consideration should be given to New Zealand's international obligations if they are relevant to a decision being made.

International obligations do not immediately become part of the law of New Zealand. However, there are at least three ways that international obligations may be relevant to a decision.

First, they may be mandatory relevant considerations (express or implied) that the decision-maker must take into account. [See Question 15 for more information on spotting mandatory considerations].

Second, they may give rise to a presumption that, where possible, legislation and the powers conferred under it will be interpreted consistently with relevant international obligations.

Third, a treaty may have been incorporated into existing domestic law – such as in the International Crimes and International Criminal Court Act 2000.

New Zealand legislation, where possible, should be read consistently with New Zealand's international obligations, whether or not the legislation was enacted with the purpose of implementing the relevant obligation.

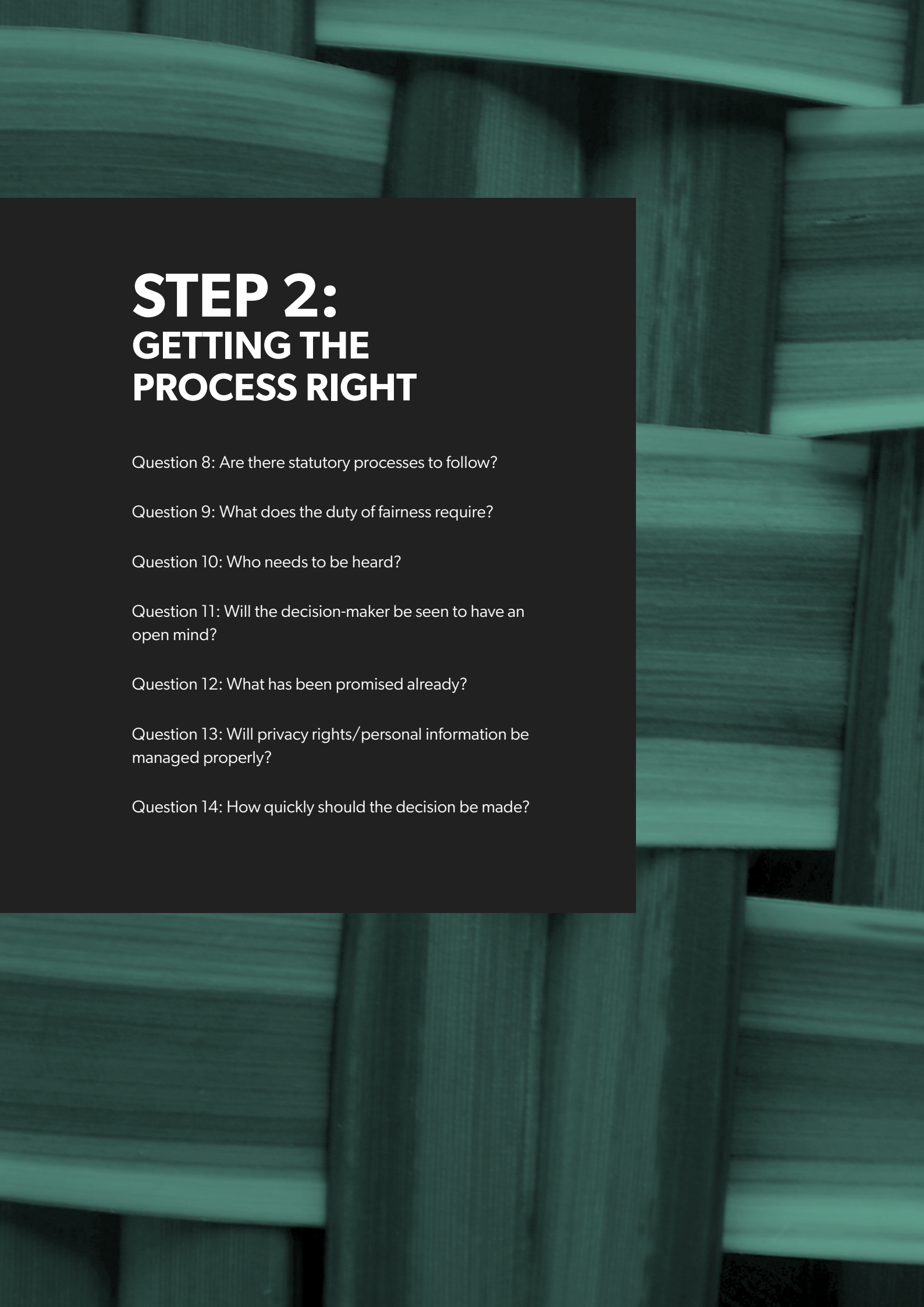
This presumption will depend on the actual text of the international instrument and relevant statute.

The text of the Chicago Convention was assessed in this way in *New Zealand Airline Pilots' Association v Attorney General* [1997] 3 NZLR 269.

Section 127 of the Immigration Act 2009 requires a refugee and protection officer to act in accordance with the Act and "*in a way that is consistent with New Zealand's obligations under the Refugee Convention*".

The Extradition Act 1999 does not expressly provide for consideration of whether or not an individual will receive a fair trial in the country to which s/he is to be extradited. But this issue must be addressed in making surrender decisions because the provisions of the Act must be interpreted, to the extent its wording permits, consistently with NZ's obligations under the International Convention on Civil and Political Rights and the Convention Against Torture.

*Kim v Minister of Justice* [2019] NZCA 209



# STEP 2:
## GETTING THE PROCESS RIGHT

Question 8: Are there statutory processes to follow?

Question 9: What does the duty of fairness require?

Question 10: Who needs to be heard?

Question 11: Will the decision-maker be seen to have an open mind?

Question 12: What has been promised already?

Question 13: Will privacy rights/personal information be managed properly?

Question 14: How quickly should the decision be made?

# Question 8: Are there statutory processes to follow?

The particular statute may require certain processes to be followed in making a decision. Often, this will require a lawyer to read and interpret the statute as the process may not be neatly set out in one statutory provision.

Sometimes, a statute will set out the process that is to be followed in making a decision. Where this is the case, a failure to follow the process may invalidate the decision. A process may be set out in a particular section of the statute, or in a number of sections. It will usually be sensible to check with your in-house lawyer whether the statute you are applying contains a process for making the decision. And, if so, what steps the decision-maker is required to take.

The Social Security Act 2018 contains a process for the imposition of sanctions. That process is set out over several sections of the Act:

- Section 252 provides that a notice must be given before a benefit may be reduced, suspended or cancelled and sets out the required contents of that notice;
- Section 254 sets out how a notice may be given;
- Section 255 sets out additional steps that must be taken in certain circumstances.

The Immigration Act 2009 sets out how claims or refugee or protected person status are to be accepted and determined (see sections 134–138).

## A statutory process differs from a process set out through policy or guidelines.

A statutory process *must* be followed, or the decision may be rendered unlawful. By contrast, where a decision is being made pursuant to a policy or guideline, the decision-maker:

- must give consideration to whether a departure from the policy is warranted;
- may be required to consult with affected parties if intending to depart from the policy; and
- if there is a departure, must explain why.

# Question 9: What does the duty of fairness require?

A decision-maker should think carefully about the persons who may be affected by the decision and how they may be affected. The greater the potential impact on a person or group, the greater the requirements of fairness. This is particularly so if adverse findings may be made.

The principles of natural justice, including the right to be heard and the rule against bias and predetermination, form the greater part of the duty of fairness.

> Natural justice is "*not to be confined within certain hard and fast and rigid rules*"
> …
>
> Natural justice is "*fairness writ large and juridically. It has been described as 'fair play in action'.*"
>
> *Furnell v Whangarei High Schools Board* [1973] 1 All ER 400 at 412

However, 'fairness' is not a term of art. What is required will depend on the nature of any rights or interests affected and what procedures are necessary to give those affected a proper opportunity to put their case to the decisionmaker and for the decision-maker to weigh that material with an open mind.

The right to be heard and the rule against bias are also not independent principles. Open-minded decision-making will often favour hearing from affected persons. Both aspects of natural justice are also protected under s 27 of the New Zealand Bills of Rights Act 1990.

Fairness may require the decision-maker to give the affected person one or more of the following:

- full information about the decision;
- a chance to be heard on the matter before the decision is made;
- reasonable time to prepare a case;
- opportunity for legal representation;
- an oral hearing with legal representation and an opportunity to test evidence against them (such as, where appropriate, cross-examining witnesses);
- prior notice of proposed findings or the risk or likelihood of adverse findings;
- reasons for, or an explanation of, the decision.

The following questions in this part of the guidance delve into some of these matters in more detail.

The Court held that statutory Benefit Review Committees required express legislative authority to lawfully use fictitious names and signatures when issuing decisions under the Social Security Act 1964. Concealing the names behind pseudonyms meant that the individual concerned was unable to challenge appointment of decision-makers on the basis of bias or other ineligibility. This in turn breached the right to natural justice affirmed in section 27(1) of the Bill of Rights Act. Health and safety requirements to the decision-makers concerned did not justify the use of pseudonyms.

*Chief Executive of the Ministry of Social Development v L* [2018] NZLR 2528

## The overall question is, 'what is a fair process for any people affected in these particular circumstances?'

# Question 10: Who needs to be heard?

A decision-maker should consider whether fairness requires a person or group who will be affected by a decision to be heard.

Sometimes a statute or regulation (or the requirements of natural justice) may require the decision-maker to hear from specific people, or consult more broadly.

Even if the statute or natural justice does not require consultation, it can be a good way to ensure that all relevant matters are taken into account and no expectation of consultation is breached.

If there are any principles of the Treaty of Waitangi at issue, there will be a 'strong expectation' that the decision-maker will consult with Māori.

A right to be heard is about more than providing an opportunity to contradict adverse testimony. It also ensures the decision-maker is sufficiently informed of the facts and consequences of a decision.

When consultation is carried out, the decision-maker must be open to changing their mind. However, consultation is not negotiation or consensus-seeking and agreement need not be reached. The decision-maker is entitled to have a preferred option (and should say so) and is free to make the ultimate decision as they see fit.

> *"… the reason that the observance of natural justice is so important is that hearing from all sides of the dispute can change even fixed views of the merits."*
>
> *Electricity Corporation of New Zealand Ltd v New Zealand Electricity Exchange Ltd* [2005] 3 NZLR 634 (CA)

An inquiry into a surgeon's treatment of patients made recommendations about supervision of the surgeon's work.

The surgeon did not have an adequate opportunity to respond to some of the allegations. The College's report was quashed in part.

*Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC)

In some cases a decision-maker may appear to be already adequately informed of relevant views but if there is no fresh consultation there is a risk that information that may have made a difference to the decision may be missed or come to light after the decision is made. In judicial review terms, the decision-maker will have failed to have had regard to a relevant consideration.

If the statute requires consultation, any statutory requirements must be carefully followed (and will override any of the other suggestions below).

If consultation is required, it is good practice to get legal advice on the form of the consultation. However, consider the following general recommendations:

- When consultation is required, it is important to give early notice of a proposed decision so that those consulted have adequate time to provide their views.
- If a provisional view or recommendation has been formed, that should be communicated for comment by those consulted. They should be advised that it is provisional and is open to change after consultation and before a final decision is made.
- It is important to provide persons with enough information for them to offer an informed view. This could include: the reasons for the proposed decision, the factors considered, and any material relied on. In some cases an affected person may ask for, and must be provided with, additional information.
- If there is any person who might be affected by the proposed decision, they need to be given a fair opportunity to comment. If individual persons might be affected, but can't be identified, call for public input/submissions.
- If a person is adversely affected (particularly where the issue involves discipline/sanction), an oral hearing may be required. In other circumstances, an opportunity for written submissions will be enough
- If you intend to make a decision that differs from one publicised, you may need to advise any adversely affected person. This includes where the proposed decision changes as a result of consultation – consider whether it adversely affects other people and whether they need to be consulted.
- Before making the decision, you need to give proper consideration to any representation made in the consultation. This means you need to have an open mind and be open to changing your view.

A Minister's consultation process followed before closing Aorangi School was challenged by judicial review. One aspect of the challenge was whether or not all relevant information had been provided. The Court noted that more could have been done to provide information but that ultimately the Board (through use of the Official Information Act) had obtained all relevant papers. Upholding the Minister's decision, the Court quoted earlier overseas authority saying:

*"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this." (R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213).

*Aorangi School Board of Trustees v Ministry of Education* [2010] NZAR 132

The Court of Appeal held that the statutory consultation obligation on a District Health Board was to consult resident populations rather than primary health organisations, and that consultation was not required where the Board's plan was to maintain existing service standards for the public.

*Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385

Wellington International Airport Limited was formed in 1990 to run the airport and needed to set landing fees. It wrote to affected airlines and proposed a consultative process. Information was supplied and two consultation meetings held. Further information was requested and supplied promptly. The airlines did not complain about the process but, based on previous experiences setting landing fees for at Christchurch and Auckland airports, assumed there would be protracted discussions. The airlines were mistaken and fees were set relatively quickly. When told of the decision to set fees the airlines did not complain about the consultation process. The Court found they chose to stay silent for tactical reasons. That failure to respond was not a failure in consultation. Consultation is not a negotiation.

*Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671

# Question 11: Will the decision-maker be seen to have an open mind?

Fairness requires decision-makers to approach issues with an open mind. Decisions must be taken fairly, and seen to be taken fairly.

The rules against bias and predetermination prevent pre-judgement or conflicts of interest. Affected persons may require decision-makers who are perceived not to be neutral to stand aside.

Generally, a decision-maker must not have:

- a financial interest in the outcome of the decision;
- some relationship to a party or witness (unless disclosed and agreed to by the parties at the time);
- any personal prejudice or attitude toward a party or a party's case;
- pre-determined the issue, by making up their mind before all the relevant information is available.

Direct or indirect financial (pecuniary) interest (e.g. where the financial interest of a family member is affected) will rule out a decision-maker. It is very likely that any decision would not survive a challenge in these cases.

For non-pecuniary interests, the test for disqualification is whether a fairminded and informed lay observer would reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question. This does not mean, however, that a decision-maker cannot form or hold preliminary views. Ministers, for example, will hold views based on their experience or elected platform and do not need to empty their minds of these views – as long as they remain open to persuasion.

The type of decision also matters – for purely commercial or procurement decisions, for example, the Courts have accepted that decision-makers may bring strongly held or adverse views to the process. What is required is honesty and a willingness to consider information which might change the view.

A party to a decision may also waive (or be deemed to have waived) its objection to a decision-maker who would otherwise be disqualified for bias.

The decision-maker must also not allow another person to have a decisive say in the matter, or on how to make the decision, or 'rubber stamp' the decision of someone else. If any of these things occur, the decision-maker may be said to have acted under dictation and the decision-making power would not have been properly exercised.

The decision-maker can consult with or receive advice from others – but must make the ultimate decision independently from other people.

The Problem Gambling Foundation of New Zealand, a disappointed participant to a procurement process to provide services to the Ministry of Health, challenged decisions made by the procurement process. The Court of Appeal held that:

- the fact that it was a commercial procurement process provided the appropriate *prima facie* context for the Court (resulting in a less extensive level of scrutiny by the Court);
- in the circumstances a high standard of conflict of interest analogous to bad faith or corruption would be required (and this was not alleged); and
- the Government's Rules of Sourcing did not create rights that could be enforceable by the Foundation.

*Attorney-General v Problem Gambling Foundation of New Zealand* [2016] 2 NZCA 609

Auckland Casino Limited, as an applicant for casino licence, should have raised its concerns about bias earlier in a process (when presented with an opportunity to do so). The Casino argued that a decision to decline a licence was biased because some members of the licensing authority held shares in a competitor that had successfully gained a licence; and because the chair and deputy chair of the authority had personal connections with the competitor and were lawyers whose firm acted for the local authority in transactions associated with the grant of the completing licence. The claims of bias failed. As Auckland Casino had known about these facts before the hearing but chose not to object, it had waived its ability to claim bias. (Note the strong commentary from the Court that it may have viewed the facts as successfully making out a case for bias, if not for the waiver.)

*Auckland Casino Limited v Casino Control Authority* [1995] 1 NZLR 142

Robust questioning by a member of the Casino Control Authority did not constitute bias. Members of specialist tribunals were expected to have expertise and experience in the relevant area.

*Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78

The reason that the test (that "*a fair-minded lay observer might reasonably apprehend might not bring an impartial mind to the resolution of the question*") is objective is to avoid disqualification based on the mere assertion that they might be biased—the apprehension of bias must be both rational and reasonable.

*Saxmere Company Ltd v Wool Board Disestablishment Co* [2009] NZSC 122

# Question 12: What has been promised already?

Decision-making may be impacted by expectations that have arisen about the process that will be followed.

These expectations can often be reset through a process of engagement with the individuals concerned.

A legitimate expectation can arise where:

- a promise has been made to the particular person (expressly or impliedly);
- an process is outlined by a policy document or guideline; or
- a department has consistently acted in a particular way in the past.

Usually, a legitimate expectation is relevant only to the process by which the decision was reached, not the outcome. The courts have been somewhat reluctant to enforce legitimate expectations as to outcome but it is not unprecedented.

In other jurisdictions, there have been rare cases where decisions have been successfully challenged for breach of an assurance about an outcome. (See for example *R. v. North and East Devon Health Authority, ex parte Coughlan* [2001] 1 QB 213). In that case, that Court was persuaded that a public authority should not be allowed to renege on previous specific assurances to the individual (that she could live in a particular facility).

New Zealand has been very slow to follow this overseas trend. Here it is more likely that, in the case of statutory decision-making, a decision-maker will be able to depart from expectations created as long as the departure is in the public interest and is proportionate, and a fair process is followed. Making decisions contrary to specific assurances that have been provided is high risk, however, and specific advice should be obtained.

Air New Zealand challenged Wellington International Airport Ltd's increases to landing fees. The airline claimed a legitimate expectation that the airport company would not seek more than a 'normal' return, and would act consistently with precedent. The Court accepted that the argument was about the outcome – where the parties simply disagreed about what was 'normal' for airport fee setting.

The High Court stated that New Zealand courts will give effect to a legitimate expectation of a fair, or a particular, process or procedure, but will not enforce any particular substantive outcome or result.

*Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138

Think about whether there have been any:

- previously expressed assurances, promises or statements of intent made by the decision-maker;
- a regular practice that the claimant could reasonably expect to continue;
- the wording of legislation (for example, if it refers to the principles of equity).

A Ministry official dealing with an application for a transfer of a petroleum exploration permit emailed a third party with a commercial interest in the transfer to advise that the Minister was aware that the third party's consent was required for the transfer. The application was subsequently processed without any further contact with the third party.

The Court of Appeal held that the email (a) could not create a legitimate expectation in a substantive outcome (i.e. that the transfer would not be approved); but (b) did create a legitimate expectation that the third party would be notified of the proposed departure from the emailed assurances. However, the Court refused to quash the transfer decision as it was obvious the Minister would make the same decision again.

*GXL Royalties Ltd v Minister of Energy* [2010] NZCA 185

If there has been any such promise or practice, and the decision-maker has a good reason for not wanting to follow through, it may be possible to adopt a different course despite the legitimate expectation. **This will require the decision-maker to expressly tell the person that the particular practice or promise will not be followed and the reasons why**. The decision-maker may need to give the affected person an opportunity to comment on that decision, and to take account of the person's views, before deciding not to follow through with the particular course of action.

It is also possible for an expectation to be overridden by policy change, but the effect of such as a change will depend on a range of factors such the specificity of a promise, the significance of the consequences if the promise is not kept or the prior practice not followed, and whether there has been proper consideration of the position of the affected parties. Policy change should be carried out with proper notice to those affected and, if appropriate, implemented through a transitional period. Affected individuals may also need to be given the opportunity to take steps to comply with the new policy – e.g. by having the chance to submit a new application, or to amend an application that has already been made.

Where a claim of legitimate expectation is raised, the inquiry will generally examine:

- the nature of the commitment made by the public authority, whether by a promise or settled practice or policy;
- whether it was reasonable to rely on the promise or practice; and
- what remedy should be provided, if any, if a legitimate expectation is established.

Terminals (NZ) Limited failed in a case seeking to avoid paying excise duty, where it had relied on advice from a telephone conversation with a departmental official to calculate excise duty. The Court of Appeal said that where a legitimate expectation is established, the court may require the decision maker to follow a process that the decision-maker has expressly or impliedly undertaken to follow. (Examples given were an obligation to give notice to an affected party or to consult before making a decision.)

In other cases, the court may direct the decision-maker to reconsider the decision in the light of the expectation. The judgment reinforced that relief in the form of a substantive outcome is rarely, if ever, granted in New Zealand. To do so would be to usurp the function of the person or body carrying out the relevant public function.

*Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598

In *New Zealand Association for Migration and Investments Limited v Attorney-General* (2006) NZAR 45, the Court was dealing with a challenge to immigration policy. The applicants sought to have their immigration applications processed under a previous (more favourable) policy, on the basis that their applications for different (but arguably related) visas had been being processed at the time of the policy change and that created an expectation that a subsequent application would be processed under the same policy. In the judgment, the Court described the evolution of legitimate expectation, concluding that:

*"It is clear that the approach adopted by the Court in legitimate expectation cases involving policy changes will be very much fact dependent. The response will depend on a range of factors including the degree of specificity of the promise; the significance of the consequences to the individual or class concerned if the promise is not kept or the prior practice not followed; whether the decision-maker has given proper consideration to the position of the affected parties; what provision, if any, has been made to accommodate those affected by way of transitional provisions whether by creation of exceptions to the policy or by compensation or otherwise; and the nature and strength of any countervailing public interest factors justifying the course proposed."*

The Court rejected the claim in this case, finding an insufficient connection between the prior applications and the current ones in question. The Court also found that, even if the expectation had been made out, intervention by the Court would not have been appropriate, because the Minister had turned her mind to the impact on these applicants, and the transitional provisions she had been put in place were not irrational. The Minister was entitled to act in the way she had and her decisions were, "*quite clearly, in the political category*".

# Question 13: Will privacy rights/ personal information be managed properly?

Decisions involving individuals will almost always involve dealing with personal information. The collection, storage, use or disclosure of that information is all relevant to the process that you use and decision that you make.

Privacy was deliberately excluded from the Bill of Rights Act and New Zealand lacks a constitutional right to privacy, unlike other jurisdictions. However, you should still consider whether your decision will include personal, private or confidential information about individuals, whether it is necessary to disclose that information for the purpose of the decision you are making, and whether you can reduce the amount of personal information referred to in your decision. You should also consider whether your decision will involve personal information about other, identifiable, individuals.

The Privacy Act 1993 is the primary mechanism providing for the protection of the personal information of individuals (any information about an identifiable living person). It governs how agencies collect, store, use and disclose personal information. Section 6 of the Privacy Act sets out 12 "*information privacy principles*" for dealing with personal information. Those principles include:

- Personal information must be collected for a lawful purpose and that purpose must be connected with the function or activity of the agency;
- Personal information must only be collected by lawful methods, and not in a way that is unfairly intrusive;
- Personal information should be collected from the individual concerned, where possible;
- Personal information must be stored securely, and not for longer than is necessary;
- Individuals have a right to access to information held by an agency about them, and to request to correct any such information;
- An agency should check the accuracy of any information held before it is used;
- Personal information must not be disclosed except for a lawful reason, or with the permission of the individual concerned.

Individuals who think an agency has breached their privacy may make a complaint to the Privacy Commissioner. For more information on privacy obligations, see www.privacy.org.nz or speak to your in-house legal team or privacy officer. Annex 1 of this guidance contains more details about the Privacy Commissioner and the privacy-related role of the Human Rights Review Tribunal.

There is also a growing body of law enabling private law actions to sue and seek damages for breach of privacy. Your in-house team or Crown Law can provide more details.

# Question 14: How quickly should the decision be made?

The timeliness of decision-making can also have an impact on the ability to withstand challenge. A failure to make a timely decision may render it invalid or unlawful.

A decision may be required to be made within a statutory timeframe (e.g. "*not later than 20 working days*"), by a certain date (e.g. "*before the close of 31 December 2020*"), or within regular intervals (e.g. "*once every six months*").

A decision-maker should start the process of making the decision sufficiently in advance that the decision will be complete on or before the deadline. A decision-making process that has been commenced, but not concluded, before the deadline may be invalid.

Where no statutory deadline is fixed, a decision should still be made within a reasonable period. A decision that is made unreasonably late may also be invalid.

Where consultation is required, a sufficient period of time should be provided for submissions to be drafted and received. If a consultation period is too short, the decision may be unfair for that reason.

Where a statute stipulates that a decision must be made within a number of 'working days', you should check with your in-house lawyer the appropriate definition of 'working day' in the context of the relevant legislation—different statutes apply different definitions of this term.

A school closure decision made before the start of the school year (to enable transfer of students before neighbouring schools started for the year) was argued to be unreasonable due to its haste. The High Court held otherwise, finding that the speed and timing of the decision was ultimately a policy matter, and that the speed of the decision was not so unreasonable that a Minister faced with making that decision could not have made it that quickly.

*Aorangi School Board of Trustees v Ministry of Education* [2010] NZAR 132 at [98]

# STEP 3:
## MAKING A GOOD DECISION

Question 15: What is relevant or irrelevant to the decision?

Question 16: What weight applies to different factors?

Question 17: What factors in your decision might attract judicial criticism?

Question 18: Are you acting for a proper purpose?

Question 19: Do you understand the legal position?

Question 20: Is your proposed action proportionate?

Question 21: Is your decision consistent with the evidence?

# Question 15: What is relevant or irrelevant to the decision?

Your consideration may include factors that **must** be considered, factors that **may** be considered, and factors that **must not** be considered.

The various factors to consider in your decision can be thought about in three ways – mandatory; permissible; or irrelevant considerations.

The factors that **must** be considered may be expressly stated in the statute or may be implied because their importance is so obvious.

There are three subject-areas which typically raise implied mandatory relevant considerations:

- the principles of the Treaty of Waitangi;
- New Zealand's international obligations; and
- human rights.

For example, these may come about due to Māori-Crown agreements or in international treaties.

There will be factors which **may** be considered and where it is up to the decision-maker to decide whether they are relevant, and how much weight to give them (unless no-one acting reasonably could have taken that approach).

A statute may also expressly state or impliedly require that matters **must not** be considered and must be disregarded. These are irrelevant considerations.

A prisoner successfully argued that a decision not to allow media to interview him was unreasonable. His right to freedom of expression was an implicit mandatory consideration in the decision whether or not to allow the interview.

*Taylor v Corrections* [2015] NZCA 477

Section 9 of the Fisheries Act 1996 provides that all persons exercising functions under the Act "*shall take into account*" certain environmental principles. This is a mandatory consideration.

A Minister's decision to decline consent for a marina application was overturned. By participating in a site visit, the Minister received irrelevant information, even though the subsequent decision expressly said it was disregarded.

*Whangamata Marina Society Inc v Attorney-General* [2007] NZLR 252

A Minister's decision to grant a petroleum exploration licence to the Crown, and decline an application by Petrocorp for a licence, was upheld by the Privy Council, notwithstanding the Crown being a party to a joint venture agreement with Petrocorp.

The Privy Council held that the Minister was right to take the view that the Crown's contractual obligations were irrelevant and should be ignored. It was for the Minister alone to identify and determine the national interest, and this decision was not reviewable by the Courts.

*Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 641

# Question 16: What weight applies to different factors?

Once irrelevant matters are put aside, it is up the decision-maker to decide what weight attaches to any relevant factors, unless: the statute says otherwise; the weighting is palpably unfair or unreasonable; or you have promised otherwise.

The Courts are traditionally hesitant about substituting or second-guessing the weighting of different considerations by a decision-maker. However, there are a variety of reasons why some factors may have to be given greater or lesser weight.

First, a statute might require that a matter is given more or less weight, either explicitly or by implication

> Section 7 of the Resource Management Act 1991 requires decision-makers to "*have particular regard to*" a set of specified considerations.

In addition, while respect for the role of the original decision-maker remains high, the Courts may intervene if the weightings are considered to be substantially unfair, or beyond the limits of reason – although this remains a high bar and the excess or insufficiency must be palpable. [See Annex 2 for more detail].

It is also possible to create a legitimate expectation on the part of a third party (through a statement made or by past practice) that a matter will be given weight or given specific weight.

> The best interests of an affected child in an immigration case were held to be so important as to be a "*primary*" consideration for a decision-maker.
>
> *Huang v Immigration* [2008] NZCA 377

> A decision by the Commerce Commission not to meet the interest commitments of a milling company was overturned because assurances had been provided to the company and a contrary interim practice put in place. The company was not told the arrangements were temporary and had relied on them. The Commission then failed to give enough weight to these factors.
>
> *Northern Roller Milling Co v Commerce Commission* [1994] 2 NZLR 747 (HC)

# Question 17: What factors in your decision might attract judicial criticism?

Alongside process challenges, there are a variety of circumstances in which a Court may overturn a decision on the basis that it is considered to be unlawful, irrational, unreasonable, or unfair.

What is unlawful, irrational, unreasonable or unfair depends on the context.

Traditionally, unless persuaded that the decision was outside the available legal powers of the decision-maker or that the process was unfair, courts have been hesitant to interfere with public decision-making and a high bar for challenges applied – only decisions so "*perverse, absurd or outrageous in its defiance of logic*" that Parliament could not have contemplated them being made would be invalidated. This is often referred to as '*Wednesbury* unreasonableness' (named after the English House of Lords case when this formulation was first put forward). It might also be called irrationality.

However, the courts are increasingly (and explicitly) varying the intensity of their review, and therefore intervening more readily to determine what is reasonable in some cases than may have been historically the case, based on the nature of the decision-maker or the decision and those affected. This 'sliding threshold' is now considered an 'orthodox' judicial approach.

Decisions can be overturned because decision-makers:

- act for an improper purpose;
- misunderstand or misapply the legal position;
- do not act consistently with the available evidence; or
- act disproportionately.

The four questions that follow (Questions 18 – 21) are expressly designed to help you reduce the risk of a challenge on one of these grounds.

However, it is also worth 'stepping back' from the decision. Could the decision be said to be objectively unfair? At its most extreme, decisions are now subject to close scrutiny where a court is simply concerned that 'something has gone wrong' of sufficient magnitude to 'require' the court's intervention. This is particular prevalent in cases which involve fundamental rights or in cases where the outcome, in combination with procedural unfairness or failure, appears to demand intervention. In these cases we can expect heightened scrutiny.

# Question 18: Are you acting for a proper purpose?

Is your purpose clearly articulated and appropriate, or could it be alleged that you are motivated by an improper purpose?

If there are multiple purposes for your decision, which is dominant?

A decision can be invalidated where an improper purpose materially influences the outcome, even if a proper purpose also exists. However, a decision made for a proper purpose is not invalid because it has an ancillary purpose, as long as that ancillary purpose is also within the ambit of the Act.

A State Services Commission decision in 1985 to relocate a staff member pursuant to an administrative transfer provision was overturned. The decision was held to be influenced by conduct that could have been subject to disciplinary action (the staff member had been expressing views seen as political and inconsistent with their role). The relevant statute provided a disciplinary process that should have been used instead. The existence of the disciplinary issue and conduct were held to be material to the decision to use the administrative transfer provision, and therefore it was overturned.

*Poananga v State Services Commission* [1985] 2 NZLR 385

The Court of Appeal confirmed that the Department of Conservation could use buildings on a reserve, not just for the purposes of that reserve, but to administer other reserves as well.

*Attorney-General v Ireland* [2002] 2 NZLR 220

One way of asking this question is, 'but for that [improper] purpose, would I still take this course of action?' Why is the decision being made? Is each purpose material to the decision being made?

The Court of Appeal rejected an argument that Ministers could not use the procedure in the State-Owned Enterprises Act 1986 to direct changes to the content of Timberland's Statement of Corporate Intent, with the effect of preventing West Coast beech forest harvesting. The power could be used in that manner and the Court held that it is not for the courts to prevent the Crown exercising legitimate power.

*Lumber Specialists Ltd v Hodgson* [2000] 2 NZLR 347

Decisions by the Minister for Canterbury Earthquake Recovery to direct changes to regional planning documents were set aside by the High Court. The Court found that, alongside legitimate statutory purposes, the Minister had acted to resolve broader urban boundary development issues and resolve 'reverse sensitivity' issues relating to noise at the airport. These were not relevant purposes for the Minister to act under the statute.

*Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1810

The Supreme Court held that revocation of the protected status of conservation land under section 18(7) of the Conservation Act 1987 could only occur where protection was no longer warranted by the intrinsic conservation values of the specific land protected. A calculation based on "net gain" due to land transfers was not permitted.

*Hawkes Bay Regional Investment Co Ltd v Royal Forest and Bird Protection Society* [2017] NZSC 106

# Question 19: Do you understand the legal position?

## Do you understand the legal framework you are operating under? Are there any legal questions that you should seek advice on?

Decisions can be invalidated if decision-makers misunderstand or misdirect themselves about the legal position under which they are operating.

This issue may arise because the decision-maker or advisors apply the wrong legal test, or ask the wrong question. One obvious example is when 'glossing' or imprecise language is used to describe statutory requirements or considerations, with the effect that the Court can be persuaded that the decision-maker failed to properly consider the whole statutory provision.

A decision-maker might also misconstrue the common law (judge-made law), for example by misunderstanding rules around admissibility of evidence in an inquiry context.

New Zealand Steel Ltd (the applicant) had asked MBIE to investigate whether or not the Chinese government was subsidising the manufacture of galvanised steel coil and, if so, whether the subsidisation was causing material injury to the applicant (as the sole domestic manufacturer). At international law, subsidisation occurs where a government or public body provides a financial contribution that is specific to a particular industry.

On the basis of MBIE's advice, the Minister of Commerce and Consumer Affairs determined that galvanised steel coil from China was subsidised only to *de minimis* levels, and therefore was not causing material injury to the domestic steel industry. As a consequence, countervailing duties were not imposed on Chinese imports of galvanised steel coil. The applicant challenged the Minister's decision.

On review, the High Court held that there were two material errors in MBIE's advice to the Minister which meant that the Minister's decision was unlawful. The first error was MBIE's advice on whether an entity was a "public body" (relevant to whether subject goods receive subsidies in China). The High Court held that MBIE did not apply the right test. The second error was MBIE's treatment of various investigations by regulators in other countries. The High Court found that MBIE's advice differed from the findings of the other overseas regulators and that MBIE did not properly inform the Minister about the reliability of conclusions reached by overseas investigations.

*New Zealand Steel Ltd v Minister of Commerce and Consumer Affairs* [2018] NZHC 2454

The Court of Appeal held that the Chief Ombudsman made an error of law in equating "*likely*" in section 27(1)(a) of the Official Information Act 1982 with 'more likely than not' – seen as a higher bar and one that was unacceptable to impose on departments considering information release.

*Pearce v Thompson* [1988] 1 NZLR 385

The Court of Appeal held that a participant in a Royal Commission (the 'Winebox Inquiry') could apply for judicial review of a finding, even though its recommendations had no direct legal force, where there was an alleged error of law which affected his reputation.

*Peters v Davison* [1999] 2 NZLR 164

# Question 20: Is your proposed action proportionate?

Are the options proportionate responses to the problem? Have all options been properly considered, especially when options impact on fundamental rights?

Decisions involving impacts on fundamental rights are increasingly vulnerable to challenge as disproportionate. The cases fall into three general categories:

1. Cases considering the proportionality of penalties;
2. Cases considering the proportionality of delegated legislation, bylaws and rules;
3. Cases considering proportionality as a general, stand-alone ground of judicial review.

The statutory context may also impliedly rule out a challenge on the basis of proportionality, especially when a statute anticipates a decision- maker making a decision of a binary nature.

A decision by the Institute of Chartered Accountants to impose penalties was held to be excessive in the context of the breach by a member. The penalties were imposed primarily due to the member's delay in responding to a complaint investigation being undertaken by the Institute (with the complaint that was the subject of the investigation eventually being withdrawn). The Institute imposed a suspension, fine, review of practice, mandatory training, censure, and costs due to the delay. These penalties were held to be disproportionate and overturned.

*Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154

The Court of Appeal refused to overturn a District Court decision on extradition on proportionality grounds. The specific statutory role provided to the District Court under the relevant immigration legislation left "*little or no room for the proportionality approach*".

*Mailley v District Court at North Shore* [2016] NZCA 83

# Question 21: Is your decision consistent with the evidence?

Is your decision supported by the evidence before you? Is that evidence robust? Do you have good reason to have rejected evidence that would support an alternative option? Do you have all of the facts?

While the courts will resist weighing the evidence for the decision-maker, the treatment of evidence (or lack of it) can lead to decisions being overturned. The courts also expect that a decision-maker can demonstrate in a transparent and accountable way how the balancing exercise was undertaken.

Decisions may therefore fail for:

- relying on evidence that is discredited or mistaken;
- rejecting or failing to consider relevant evidence;
- applying the wrong onus of proof.

Lack of information may mean that the process should be delayed to make fresh inquiries.

The Court of Appeal overturned a decision by the Minister of Immigration not to exercise discretion to order that a woman not be deported. The request from the woman was primarily based on the impact the deportation would have on her (New Zealand-born) child with a rare disease. The Court found that a key medical report relied on by the Minister was flawed (leading to a mistake of fact), and also found a breach of natural justice in that the adverse report was not provided to her in order to allow her to submit on it.

*Daganasi v Minister of Immigration* [1980] 2 NZLR 130

In the context of a decision under the Resource Management Act 1991 not to publicly notify an application for a resource consent, the Supreme Court stated:
*"The consent authority must be clear that notification would not elicit information or perspective which would cause it to view the effects of the activity on the environment as more than minor.… It was not sufficient for the consent authority to have before it 'some material of probative value'"*

*Westfield (New Zealand) Limited v North Shore City Council* [2005] SC 17 at [25-26]

In 2005, the High Court held that TV3's decision to exclude two political leaders from its televised leaders' debate was susceptible to review. Review is not limited to public bodies exercising statutory functions. It is concerned with bodies performing what are essentially public functions or the exercise of public powers. The Court was satisfied that TV3 in its election coverage was performing a public function and this was a "*comparatively rare*" example of a private body exercising a public power with such significance that it should be susceptible to review. The decision to exclude the two leaders was held to be arbitrary and flawed as it was based on a single poll with high levels of margin of error, with the poll results (including the margin of error) of the two leaders excluded being indistinguishable from two leaders included.

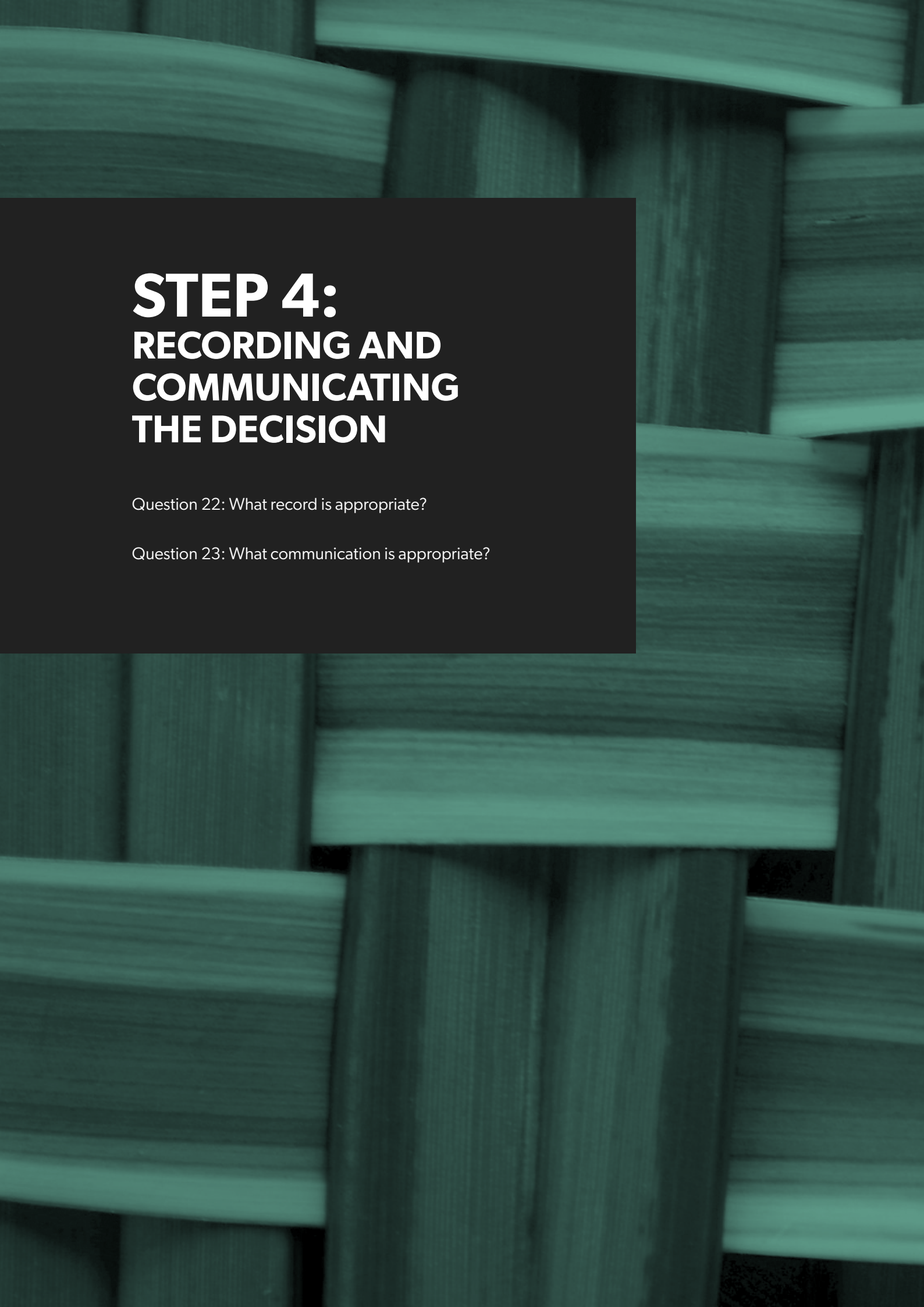
*Dunne v CanWest TV Works Ltd* [2005] NZAR 577 (HC)

## Will the record of your decision establish that you have considered all of the relevant material?

If you are summarising facts for a decision-maker, the summary needs to be carefully constructed to ensure the relevant facts are correctly portrayed.

A decision of the Minister of Fisheries to set a maximum number of sea lions that could be caught by the squid industry around the Auckland Islands was challenged in 2003. The Minister had set a limit that was recognised as conservative, and did not take into account the principle that decisions should be based on the best available evidence. Better analysis and advice relating to recent scientific approaches and evidence would have indicated to the Minister that there was considerable more 'head room' deaths within the agreed conservation outcomes than (the Court inferred) the Minister had in mind when the decision was made. The Minister's contemporaneous notes indicated an acceptance that the newly developed scientific approach was preferable, but the actual decision was still based on old science. While the Court did not say that another number should have resulted, this failure in process was sufficient to overturn the decision.

*Squid Fishery Management Company Ltd v Minister of Fisheries* CA39/04, 13/7/2004, at [93] and [103]



# STEP 4:
## RECORDING AND COMMUNICATING THE DECISION

Question 22: What record is appropriate?

Question 23: What communication is appropriate?

# Question 22: What record is appropriate?

## The decision of the decision-maker should be recorded in writing so that the decision is clear and can be communicated to those it affects, and will be clear in the event of challenge.

Any statutory decision, and all significant decisions (especially involving a third party), should be recorded. Recording decisions is also part of normal, prudent business practice (as required by s 17 of the Public Records Act 2005).

For some decisions, the relevant Act may expressly require the decision-maker to record reasons for the decision, see for example s 27 of the Immigration Act 1999. For other decisions, the relevant Act may state that reasons are not required, for example 'absolute discretion' decisions under s 11 of the Immigration Act 1999 where reasons are not required.

An accurate record of reasons helps the decision-maker to ensure the decision is reasonable. Reasons provide accountability.

Officials preparing recommendations should carefully formulate the reasons for the recommendation.

## Stop and consider: are the reasons logical and coherent, is this a well-reasoned decision, do the reasons support the decision?

When recording a decision, the following matters are important:

- Decisions expressly refer to mandatory relevant considerations.
- If consultation was required, the record notes that this was carried out and that the decision-maker (or delegate) considered any representations made. It is also helpful to summarise the consulted parties' positions and attach their submissions.
- If a recommendation for a decision was made and the decision-maker did not accept it, the reasons for the decision should be recorded, together with any new or different matters that were considered.
- Where policy guidelines are being applied these should be referred to. If policy guidelines exist but are not being followed, this should be explained and reasons given for the departure.
- The report and accompanying reasons are factually correct, otherwise the decision could be unlawful.

# Question 23: What communication is appropriate?

## Good practice and natural justice support providing the reasons for and outcome of a decision to those affected, unless the statute provides otherwise.

Where the relevant Act is silent, there is no general legal duty to proactively provide reasons; but natural justice and good practice may still require you to record and/or give reasons for a decision or the recommendation for a decision, especially if requested. There are good reasons to record and provide reasons:

- Any person about whom a decision is made has a right to a written statement of the findings of fact and reasons for the decision (s 23 of the Official Information Act) and has rights of access under the Privacy Act, both subject to withholding grounds.
- Notice of reasons help an affected person decide whether to challenge the decision. The existence of an appeal right – or availability of judicial review – mean that notice of a decision must be provided so that the appeal or review can occur.
- Reasons provided at the time of the decision reduce the needs for a decision-maker to later explain the decision to a court if challenged. If no reasons are recorded, a court could infer there were no good reasons.

## In deciding what other communications are appropriate, you should consider confidentiality, privacy, risk of defamation, and what is in the public domain already.

Decision-makers should weigh up the following factors in deciding what, if any, broader or public communications are appropriate:

- Were assurances regarding confidentiality provided to any person in the process? Generally, public decision-makers should be cautious in providing assurances, as Privacy Act or Official Information Act disclosure obligations may override them.
- Will a communication breach the privacy of any individual involved with the decision? Careful consideration of the relevant Privacy Act provisions is required. Once the decision is published, the Privacy Act may also entitle a person to seek correction of information published or to include a correction statement alongside the information.
- Will the information be defamatory – will it lower the reputation of the person in the eyes of the public and not be defensible as truth or honest opinion?
- Has the information been requested already? If material has been or will be released to a third party, and is in the public domain, public communication may be more appropriate to provide context.

# ANNEXES

Annex 1: Constitutional Background to Decision-Making

Annex 2: Judicial Review Described

Annex 3: Other forms of public supervision

# Tāpiritanga 1: Ngā Whakamārama Ture Kāwanatanga mō te Tuku Whakatau

# Annex 1: Constitutional Background to Decision-Making

### Three branches of government

New Zealand's government has three parts: the executive, the legislature, and the judiciary.

- The executive is central government. It is headed by Cabinet. It includes Ministers and government departments. The executive makes policy, proposes laws, and implements the law. It is the 'administration' arm of government.
- The legislature is Parliament. It is comprised of elected members, including those who are Ministers (and so part of the executive). Parliament makes statute law and supervises the executive through Parliamentary question-time and select committees.
- The judiciary is the courts (made up of all judges). The courts interpret and apply statute law, and make and apply common law. The courts ensure that both statute law and common law is correctly applied by the executive.

### Separation of powers

The three branches of government operate separately from one another. It is important they respect each other's different roles.

For example, the courts cannot interfere with Parliament's decision to pass a law – they cannot overrule a statute.[1] Nor do the courts interfere with parliamentary process, or with the executive's political role in terms of its control of the legislative agenda or the policies it wishes to implement.

Equally, the executive respects the law-making functions of Parliament and the courts. This means the executive must carefully follow the law as set in statute and in decisions of the courts.

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1 Except in the exceptional circumstance of a 'manner and form' challenge, where the courts may be asked to declare invalid a statute based on an alleged failure to follow a legislative requirement associated with its passage (such as passing an statute without a necessary super-majority as required by another statute).

### The hierarchy of law and the importance of precedent in the common law

Statute law, made by Acts of Parliament, is the most authoritative source of law in New Zealand. It supersedes all other law. The Courts cannot overrule legislation and the executive must abide by it. Secondary (and tertiary) legislation is the body of regulations, rules, orders and policies made pursuant to statutory authority by the executive. It has the force of law and is legislation made under delegation from Parliament. It is subject to scrutiny and oversight by the courts, especially to ensure that it has been made through proper processes and within the scope of the delegated power.

Common law is judge-made law. It is made up of the decisions of courts on individual cases that come before it. Parliament can overturn common law by passing legislation.

The courts operate in a hierarchy – the decisions of more superior courts take precedence. Courts are also extremely respectful of previous decisions. This means that previous decisions will generally be followed by courts at the same level and that decisions of a higher court must, other than in exceptional circumstances, be followed in lower courts. There can also sometimes be useful guidance from the courts of similar common law jurisdictions such as Australia, the United Kingdom and Canada. Those decisions are not binding on New Zealand courts, and may not reflect the New Zealand circumstances, but can still in appropriate cases be persuasive.

The powerful role of precedent in the common law is intended to provide certainty and stability and support the rule of law – so that citizens can structure their affairs and operate with confidence that a court will rule in a particular way if presented with a decision for which there is strong precedent.

# **Tāpiritanga 2: Arotake ā-Ture**
# Annex 2: Judicial Review Described

Administrative law is the law that governs public bodies exercising public functions. This Guide primarily focuses on an aspect of administrative law, namely judicial review, which is the legal process through which the courts oversee executive decision-making. However, administrative law also includes other forms of public oversight including public sector watchdogs like the Ombudsman and Auditor-General, statutory appeals, and public inquiries. A person who is aggrieved by a public sector agency's decision may use one, or several, of these avenues for redress. Annex 3 contains more detail on the most applicable 'watchdog' agencies.

Administrative law is important for three reasons. It guides good decision-making by providing a set of principles that public bodies have to comply with when making decisions. It protects individual citizens against excesses or abuses of public power. And it ensures Parliament's will is properly implemented by the government.

### What is judicial review?

Judicial review is a legal process where individuals can challenge the lawfulness of a decision in the High Court. To decide whether the decision was lawful, the High Court has regard to a set of standards that have been developed by the courts over time.[2]

A frequently cited description of judicial review is "*the enforcement of the rule of law over executive action*".[3] A court examines the decision, to ensure the decision-maker remained within the bounds of the laws bestowing and regulating their decision-making powers and processes, based on precedent.

### How is a judicial review process undertaken?

An application for judicial review is submitted to the High Court in much the same way as civil proceedings, with an applicant filing a notice of proceeding and a statement of claim identifying the alleged grounds for review.[4]

The applicant bears the onus of proving on the balance of probabilities that the decision was unlawful.[5]

The decision of the High Court may be appealed to the Court of Appeal, and ultimately to the Supreme Court.

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2 The Rt Hon Lord Woolf and Ors, *De Smith's Judicial Review* (7th ed, Sweet and Maxwell, 2013) at [1-001].

3 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 70.

4 Graham Taylor, *Judicial Review A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018), at 154.

5 Taylor, ibid, at 486-487.

For a challenge to succeed, the court will need to be persuaded on the evidence that the decision-maker did not lawfully follow the process. If evidence is contested, the civil evidential standard applies (and a matter must be proved on the balance of probabilities). In most situations the decision-maker or their representatives will not need to attend the hearing to give evidence.

One important difference to regular civil litigation is that the applicant is likely to have access to decision-making information under the Official Information Act 1982, the Local Government Official Information and Meetings Act 1987 and/or the Privacy Act 1993. Subject to its consideration of withholding grounds under these statutes, the decision-maker must provide the applicant with access to the information, with only withheld material (such as legally privileged material) being subject to the usual court processes for discovery.[6]

Evidence is usually provided by way of written affidavit. The affidavit involves the decision-maker stating the information that was before them and their reasons for coming to the decision, but cannot include an after-the-fact rationalisation of the decision. Cross-examination on affidavits can be ordered by the court if there are disputes,[7] or credibility issues, but this is rare.

Reliance on existing statements of reasons can be useful for persuading the court that the decision-maker considered all the relevant matters, did not take irrational factors into account, and gave proper weight to all legal and factual considerations. While statements of reasons for a decision and other assessments or records of the decision-making process are not always mandatory for decision-makers (see Question 22 for more detail), the existence of these documents is important in the event of a challenge as they can enable affected parties and the Court to understand why that outcome was reached. Some statutes impose mandatory statements of reasons on decision-makers, in which case failure to give reasons or giving inadequate reasons is a failure to comply with the law governing the decision-making process.[8]

### What decisions are subject to review?

Most public decisions made by the public sector are potentially subject to judicial review. For example, judicial review of even the Crown's contracting decisions is available but, in a commercial context, review will usually only succeed where there is evidence of fraud, corruption, bad faith, or any analogous situation, unless there is some other extenuating circumstance that give the decision a more 'public' nature and require closer court scrutiny.

6 Taylor, ibid, at 305.

7 Taylor, ibid, at 477.

8 Taylor, ibid, at 309-310.

The decisions of private organisations performing public functions or exercising public power may also be reviewed.[9] The term 'decision' in this context usually means a final commitment to a definitive choice that is communicated to the affected party.[10]

National security matters also require special treatment when considering judicial review, given the processes in place for protection of classified information and the role of IGIS (see Annex 3). These matters require specialist advice.

### What will a court look at in judicial review?

The nature and level of intensity that a review will take is a complex legal topic.

The willingness of the courts to intervene for the (overlapping) reasons of illegality (i.e. a decision-maker operating outside powers) or breaches of natural justice (such as failure to allow someone to be properly heard or concerns about bias or predetermination) has been settled for some time.

However, much judicial and academic time and effort is spent on the questions of whether or not and when a court should intervene on the basis of 'unreasonableness', or more recently to test the proportionality of decisions or intervene in the weightings applied by a decision-maker.[11] This creates some inevitable uncertainty about the level of scrutiny that might apply to any specific administrative decision.

It is now relatively orthodox and uncontentious to say that the courts will apply a sliding intensity of review for the 'unreasonableness' of decisions, based on a range of factors.[12]

The questions set out in Step 3 of this guidance are an attempt to navigate this issue in a practical way, without drawing the reader into the complexity of the case law or academic debate.

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9 See for example *White v New Zealand Stock Exchange* (No 2) [2002] NZAR 342, where decisions of the Stock Exchange and its appeal board were reviewed for natural justice breaches; *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513, where an inquiry into a surgeon's treatment of patients made recommendations about supervision without providing adequate opportunity to the surgeon to respond.

10 Taylor, ibid, at 162-163. See however cases such as *Peters v Davison* [1999] 2 NZLR 164 where review of a finding of a Royal Commission for alleged error of law was allowed, even though the finding had no direct legal force.

11 See Joseph, *Constitutional and Administrative Law*, 4th Ed, at 23.2.3(4)

12 See *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 66, and Joseph, ibid, at 24.3 (for the rejection of *Wednesbury* as a doctrine of universal application), and at 24.4.2 (for the factors that will determine where on the spectrum the intensity of review may fall in any case).

### What will a court not look at in judicial review?

Courts will limit or refuse review of decisions involving high policy content, as the judiciary are not equipped, and are not the constitutionally appropriate body, to weigh policy considerations. However policies must be consistent with legislative requirements[13] and significant changes to existing policies may necessitate consultation, breaches of which could result in a judicial review challenge.[14]

A court undertaking judicial review will not generally review the substance of a decision or substitute its own decision, although there are some exceptions.[15]

For decision-makers, this restraint may be cold comfort. The level of scrutiny involved in a broad review of their process, and the constraints that may follow as a result of a successful judicial review, may have a significant impact on the subsequent choices available. Directions from the Court as to how a decision is to be made may substantially influence the final result.

However, the general principle still holds – matters of substance are for the decision-maker not the court.[16] In this manner the law balances the need for government to have independence in making decisions on public matters with the need to hold the executive accountable to the rule of law.

### What if the legal action will make no practical difference to the matter?

Arguments about utility or lack of utility in terms of the relief that is sought often arise in judicial review, especially as court proceedings take time and matters may have moved on before the case is heard.

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13 See for example *Board of Trustees of Salisbury Residential School v Attorney-General* [2012] NZHC 3348, where BTSRS successfully judicially reviewed a decision by Minister of Education to close a residential school for girls with special learning needs and intellectual impairments. The fact that the disestablishment decision was part of wider policy change on how to meet special needs did not obviate the statutory requirements on the Minister to consider alternative arrangements, in a situation where errors were found in the process and consideration of the alternatives.

14 McGechan on Procedure, at JRIntro.05(3) and (5).

15 See, for example, *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 where Woodhouse and Cook JJ granted a declaration that, subject to the upgrading of premises in accordance with plans that had been submitted, the appellant was entitled to a game packing house licence. Also *Edwards v Attorney-General* [2017] NZHC 3180, where an application first made in 1966 for a pension due to partial loss of eyesight during military service had been consistently and incorrectly declined, and substitution of the decision was appropriate where the relevant body to which a decision would be remitted no longer existed.

16 See *Curtis v Minister of Defence* [2002] 2 NZLR 744, where the Court of Appeal was not prepared to interfere with the decision to disband the Air Combat Squadron of the Royal New Zealand Air Force, regarding it as a political and not a legal issue.

Generally, a person prejudiced by a decision who has established that there was an error is entitled to relief.[17] On the other hand, "*the Court's time is precious*"[18] and the courts may hesitate to proceed with matters where judgment can lead to no practical outcome or benefit. One benefit may be the value in stating the law where similar decisions will impact on others.[19]

### Avoiding judicial review

The best way to prevent judicial review, or any other scrutiny of your decision, is to ensure the proper procedure is followed and recorded throughout the decision-making process. This Guide intends to assist you with this. Where you have any doubt about the correct process, seek advice from your in-house lawyer. This will save a great deal of expense, time and potential embarrassment to the government in the long-run.

A good record and evidence of proper process can be extremely helpful in the progress and outcome of judicial review cases. Gaps in the paperwork can lead the court to draw an adverse inference – and may mean that an applicant succeeds in getting orders to prevent a decision proceeding in circumstances where the decision is valid but that validity cannot be easily established. Gaps in the record may also prevent an early successful argument that there is no merit in a challenge and mean that the Crown has to go to a full hearing and cannot strike out meritless cases easily.

If there is uncertainty in regard to legislative or regulatory requirements, such as whether considerations are mandatory or discretionary, consider whether the legislation or regulations can be amended to frame criteria more clearly without losing the policy intent.

### What orders will be made?

At the start of the matter, the applicant may seek interim relief, usually orders to prevent any further action being taken in reliance the decision challenged. It may be possible to resist these orders – with the court looking at the balance of the matter and usually trying to preserve the position to enable a full hearing to proceed.

In the event that the court finds the decision-making process was not correctly followed, the court may validate the decision (generally if the only successful ground of review is a technicality),[20] make a declaration, issue an injunction and/or quash the decision.[21] The decision-maker may be ordered to remake the decision, with directions from the court. The court will not generally replace the original decision with its own decision.[22]

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17 *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC) at [27]; *New Zealand Employers Federation Inc v National Union of Public Employers* [2002] 2 NZLR 54 at [125-126]

18 *Te Whakakitenga O Waikato Inc v Martin* [2016] NZCA 548 at [39]

19 *Hudson v Attorney-General* [2017] NZHC 1441

20 Taylor, ibid, at 151-152.

21 Section 16, Judicial Review Procedure Act 2016.

22 Although see footnote 15 above for rare exceptions.

When remaking the decision, the decision-maker may arrive at exactly the same decision as the original, provided they comply with the procedure as prescribed by law and including any directions from the Court.  In this situation, keeping a thorough record of the process followed when re-making the decision may be equally as worthwhile as in the original instance, as if the same decision is reached it may face a repeat challenge.

# Tāpiritanga 3: Ētahi atu momo whakahaere tūmatanui

# Annex 3: Other forms of public supervision

1. New Zealand has a range of 'public watchdog' bodies with legal powers to supervise the executive government. These bodies work within narrower subject areas than the Courts but tend to have lower thresholds for finding wrongdoing and broader powers (for example, the power to initiate investigations into particular issues). Generally, the courts will refuse judicial review where an appeal right is available, but an ability to complain or seek an investigation from one of these other bodies is not an appeal – and does not prevent the courts also exercising their review functions.

**Parliament**

2. Parliament oversees and regulates government action in a number of ways. The legislative process enables Parliament to scrutinise government policy and practice through debate during readings of a Bill. Parliamentarians also oversee the executive government with questions to Ministers and the use of select committees, which are made up of groups of MPs.
3. Select committees receive Bills and other proposals within their jurisdiction for review and can question representatives of government on the content and process of the proposed legislation. The committees can apply to the Speaker of the House to summons any person, to direct a person to give evidence under oath and to require the provision of any documents.[23]
4. Select committees also seek public submissions on proposed legislation, which frequently results in changes to the proposals. At the end of the review process the committee makes recommendations to the House of Representatives, which often includes amendments to Bills.
5. Parliament controls public finances and therefore also holds the executive government accountable by requiring parliamentary authorisation for any public spending. The Public Finance Act 1989 imposes financial reporting obligations on government and Crown entities, and there is a public audit system operated under the Public Audit Act 2001.

23 Standing Orders of the House of Representatives 2011, SO 194.

### The Ombudsman

6. The Office of the Ombudsman has several areas of responsibility. Perhaps the most well-known is with respect to official information. However, the Ombudsman also has a very important role monitoring good administration. As part of this function, the Ombudsman has powers to investigate individual complaints and to investigate broader system issues within government.
7. The Ombudsman can receive complaints about the conduct or decisions of state agencies (including recommendations made to Ministers). When investigating the complaint,the Ombudsman looks at whether the agency acted fairly and reasonably. An agency that has squarely adhered to the legal standards of judicial review should be safe from an adverse finding. However, the Ombudsman is likely to more carefully scrutinise the reasonableness of a decision than the High Court on judicial review.
8. The Ombudsman is also a "*National Preventive Mechanism*" under the Crimes of Torture Act 1989, and monitors the treatment of persons held in places of detention (including prisons, youth justice residences and care and protection residences) in accordance with that role.
9. The Ombudsman also provides advice and guidance to state agencies before decisions are made or policies developed.

### The Auditor General

10. The Auditor-General oversees the use of public resources from a financial and organisational perspective. The Auditor-General is responsible for auditing public entities to ensure they fairly reflect the results of their activities in their annual reports. The Auditor-General also evaluates the performance and effectiveness of public entities. This assesses whether a public entity is carrying out its activities effectively and efficiently, complying with statutory obligations, using public resources appropriately, is operating with probity (integrity) and being financially prudent.
11. The role of the Auditor-General is considerably broader than that of the High Court on judicial review. However, adhering to the legal standards of judicial review should protect agencies from adverse reports of the Auditor-General with respect to statutory compliance and acting with probity.
12. The Auditor-General does not have a complaints function like the Ombudsman. However, people can report concerns about public agencies' use of resources to the Office of the Auditor-General. If the matter is considered serious enough, the Auditor-General can conduct an inquiry.

## Royal Commissions, Public Inquiries and Government Inquiries

13. An inquiry often involves establishing the cause of something and recommending action to prevent similar occurrences in future.
14. A Public Inquiry is an investigation to look into any matter of public importance. The Inquiries Act 2013 enables the Governor-General by Order in Council to establish Public Inquiries and also preserves the option of setting up a Royal Commission of Inquiry, established under letters patent and reserved for the most serious matters of public importance.
15. Public Inquiries and Royal Commissions of Inquiry report to the Governor-General and the report must be presented to the House of Representatives.
16. Under the Inquiries Act, the Government may instead establish a Government Inquiry which reports to a Minister and does not have to be presented to the House.
17. For all inquiries, the evidence that is sought tends to depend on the terms of reference, which are published early in the process. The parties involved participate in the process by providing submissions and answering questions. Overall the process is potentially more flexible and less formal than court proceedings.

## Waitangi Tribunal

18. Questions of interpretation of Te Tiriti o Waitangi and allegations of conflict between Te Tiriti and government policy or law are the primary concerns of the Waitangi Tribunal. The Tribunal sits in a similar manner to a court, with a bench of members appointed by the Governor-General and chaired by a current or retired Judge.[24] However, the Tribunal has more flexibility than the courts as it is a commission of inquiry and can determine its own procedure and timetable.[25] The conduct of the Tribunal tends to be significantly influenced by tikanga Māori.
19. The Waitangi Tribunal has jurisdiction to inquire into claims that the government's acts or omissions have breached the principles of the Treaty of Waitangi, causing prejudice. This could include any statutory instrument, policies and procedures adopted or proposed to be adopted by or on behalf of the Crown since 6 February 1840. The Tribunal's current work programme includes contemporary inquiries and thematic 'Kaupapa inquiries' which consider current Crown legislation and policies that are alleged to be in breach of Treaty principles.
20. Reports of the Tribunal can take years to produce given the breadth of information involved and the complexity of hearing multiple claims from individuals within an iwi and/or competing claims from different iwi.

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24 Treaty of Waitangi Act 1975, s 4.

25 Joseph Williams, *Laws of New Zealand,* Treaty of Waitangi: Jurisdiction (online ed) at [48].

21. The Tribunal has the authority to find that legislation and government action are inconsistent with the principles of the Treaty, although any Tribunal recommendations are not binding in law on Parliament or the executive.[26] However courts will have regard to the findings of the Tribunal, and a failure of to consider Tribunal findings and recommendations when making a decision has been held to be an error of law in judicial review.[27]

### Privacy Commissioner

22. The Office of the Privacy Commissioner is tasked with overseeing the enforcement and development of the law of privacy, which focuses on helping people access and control their personal information. The Privacy Commissioner receives and investigates privacy complaints, and also proactively helps public and private organisations to establish good information-handling practices and policies.
23. It is useful to view the Office of the Privacy Commissioner as a resource to contact early in a matter involving privacy questions, instead of viewing the Commissioner as a body that gets involved once a complaint is made.
24. Advice from the Commissioner early in a process can avoid the risk of breaching privacy rights that may lead to legal proceedings against the government.
25. If a complaint about an alleged breach of privacy is made to the Commissioner, the Commissioner will consider the complaint and may decide to investigate the complaint if it is within their jurisdiction. The Commissioner can also assist parties in reaching a settlement.
26. If an investigation is undertaken, the organisation responsible for the alleged privacy breach will be contacted for submissions.[28]

### Health and Disability Commissioner

27. The Health and Disability Commissioner is an independent Crown entity that can receive complaints relating to health and disability services in New Zealand. Complainants can submit concerns to the Commissioner directly, but the Ombudsman or other public body may refer a complaint to the Commissioner if it is considered within their jurisdiction.
28. The Commissioner endeavours to resolve complaints and can initiate formal investigations.

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26 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 651-652.

27 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 223 and 227; *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) at 134-135 [the *Radio Frequencies* case].

28 Privacy Act 1993, s 73.

29. The Commissioner is responsible for enforcing the Code of Health and Disability Services Consumers' Rights, which imposes duties on health providers and sets out consumer rights. Tertiary health providers are predominantly public sector bodies, such as district health boards. Organisations such as the Department of Corrections may also provide health and disability services. The Commissioner also reports to the Minister of Health on any legislative or policy recommendations for promoting and protecting consumer rights.

### Human Rights Commission

30. The Human Rights Act 1993 (HRA) includes a mechanism through which a person can complain that a potentially discriminatory legislative instrument, practice or policy has been made, carried out or adopted by a person or body within the legislative, executive and judicial branches, or by any person or body performing public functions or powers.[29]
31. The functions of the Human Rights Commission are to receive these complaints and to attempt to settle discrimination complaints through dispute resolution, in which they act as an independent body.[30] The Commission can involve any person it considers appropriate for the purposes of gathering information and resolving disputes.[31]
32. The Commission also acts to promote human rights programmes in organisations, which can include reporting on action taken to eradicate laws and practices that are discriminatory. Additionally, the Commission can review alleged discrimination in employment matters if the complainant chooses to go to the Commission rather than through an employment dispute resolution route.[32]
33. The Commission will endeavour to resolve complaints through dispute resolution, but if the parties are unable to agree on an outcome, proceedings for breach of the HRA can be taken to the Human Rights Review Tribunal (HRRT).

### Human Rights Review Tribunal

34. The HRA also allows a person to lay a complaint with the HRRT that a public person or body, under any of the legislative, executive and judicial branches of government, has acted inconsistently with the right to freedom from discrimination.[33]

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29 Philip A Joseph *Constitutional Law – A to Z of New Zealand Law* (online looseleaf ed, Thomson Reuters) at 10.3(3)(a).

30 Human Rights Act 1993 [HRA], s 76(1).

31 HRA, s 79(6).

32 HRA, s 79A.

33 HRA, Part 1A. The right to freedom from discrimination is set out at section 19(1) of the New Zealand Bill of Rights Act 1990.

35. Any person may bring a related proceeding to the HRRT to challenge alleged discrimination as defined in the HRA.[34] This means that the person bringing the proceeding is not required to have any connection to the substance of the complaint, and it may be the case that the Human Rights Commission brings the proceeding.[35]

36. The HRRT can receive any evidence and can make decisions that are binding on the parties.[36] The HRRT has a broad discretion as to remedies, and the types of remedies the Tribunal can issue include: declaring a breach of the HRA has occurred; issuing an order restraining continued or repeated breaches; issuing an order that the defendant take action to redress harm caused by the breach; issuing damages; and/or ordering the defendant to undertake training or implement programmes to promote HRA compliance.[37]

37. If legislation is found to be inconsistent with the right to freedom from discrimination, which is affirmed by section 19 of the New Zealand Bill of Rights Act 1990, the HRRT can issue a declaration to that effect.[38] The Minister responsible for administering that enactment must present a report to the House to alert the House to the declaration and to advise on the government's response. The legislation is not invalidated by the declaration.

38. The Privacy Act 1993 and Health and Disability Commissioner Act 1994 set out other aspects of the HRRT's jurisdiction, as well as remedies it may award. Under these statutes, the HRRT has jurisdiction to hear proceedings:

    - in which a breach of privacy is alleged, if the Privacy Commissioner's processes have not been able to resolve or settle the issue; and
    - following a complaint to the Health and Disability Commissioner.

### Inspector-General of Intelligence and Security

39. The Inspector-General of Intelligence and Security is an independent body to the intelligence and security agencies,[39] such as the Government Communications Security Bureau and the New Zealand Security Intelligence Service. The Inspector-General has oversight of the intelligence community and ensures statutory processes are followed when these agencies make decisions or otherwise act.[40]

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34 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers Ltd, 2014) at 295.

35 Joseph, ibid, at 295; and HRA, s 92B(1).

36 HRA, ss 94 and 106.

37 HRA, s 92I.

38 HRA, s 92J.

39 Jim Rolfe "New Zealand: Small Community, Central Control" in D Baldino (ed) *Democratic Oversight of Intelligence Services* (The Federation Press, New South Wales, 2010) 108 at 127.

40 Rolfe, ibid, at 124.

40. Their role also involves taking action to ensure the statutory processes are followed, by either:[41]

    a. Responding to a complaint;

    b. Initiating an investigation into the process followed by an agency at the request or consent of a Minister; or

    c. Reviewing individual processes randomly or methodically.

    The types of investigation undertaken by the Inspector-General have included reviewing the adequacy of safeguards employed by security agencies, inquiring into whether an agency has acted properly when advising another government department, and examining the validity of an agency's internal rules.[42]

### State Services Commissioner

41. The State Services Commissioner acts as the employer of Public Service chief executives. The Commissioner is part of the executive and appointed by Ministers, but under statute has a wide ranging mandate and can act independently in investigating and reporting on performance failure by State service agencies and breaches of the State Services code of conduct.

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41 Rolfe, ibid, at 124.

42 Rolfe, ibid, at 125.

Te Tari Ture o te Karauna

Crown Law