

### 3. Basic constitutional principles and values of New Zealand law

A number of fundamental principles and values are found in New Zealand law. Regardless of whether or not these principles are reflected in legislation, they run so deep in New Zealand law that the courts will often draw on them when interpreting legislation. Where new legislation is inconsistent with or challenges one of these fundamental principles, it will become the subject of concern and increased scrutiny by Parliament, the public, and often the courts.

Many of these principles exist in the common law or are reflected in legislation such as the Constitution Act 1986<sup>12</sup>, the New Zealand Bill of Rights Act 1990 (“NZBORA”)<sup>13</sup>, and the Public Finance Act 1989<sup>14</sup>. Other principles are found in constitutional conventions, the Standing Orders of the House of Representatives<sup>15</sup>, and in the Cabinet Manual<sup>16</sup> (supplemented by the CabGuide<sup>17</sup>). While New Zealand does not have a written constitution, these principles, together with important documents such as the Treaty of Waitangi (“the Treaty”) and ancient English statutes such as the Magna Carta 1297<sup>18</sup> and the Bill of Rights 1688<sup>19</sup>, form the constitution of New Zealand.

Officials are encouraged to read the short essay “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” by the Rt Hon Sir Kenneth Keith, which is found in the introduction to the Cabinet Manual.<sup>20</sup>

The principles discussed in this chapter will be relevant throughout the policy and legislative development process. Where the proposed legislation has the potential to impact on any of the principles below, legal advice should be sought as early as possible.

#### Guidelines

##### 3.1. Does the new legislation affect the basic constitutional principles and values of New Zealand law?

*New legislation should respect the basic constitutional principles of New Zealand law.*

**The rule of law:** The rule of law is the most fundamental constitutional principle in New Zealand law and incorporates a number of subsidiary principles. The full scope of the rule of law is the subject of debate, but at its core are the following principles:

- the law must be clear, accessible and apply to everybody (private citizens and the Government);
- human rights must be adequately protected, and proceedings before courts and tribunals must be fair;

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<sup>12</sup> <http://www.legislation.govt.nz/act/public/1986/0114/latest/DLM94204.html>

<sup>13</sup> <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

<sup>14</sup> <http://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>

<sup>15</sup> <http://www.parliament.nz/en-nz/pb/rules/standing-orders>

<sup>16</sup> <http://cabinetmanual.cabinetoffice.govt.nz/>

<sup>17</sup> <http://cabguide.cabinetoffice.govt.nz/>

<sup>18</sup> <http://www.legislation.govt.nz/act/imperial/1297/0029/latest/DLM10929.html>

<sup>19</sup> <http://www.legislation.govt.nz/act/imperial/1688/0002/latest/DLM10993.html>

<sup>20</sup> <http://cabinetmanual.cabinetoffice.govt.nz/introduction>

- public powers must be exercised fairly and in accordance with the law, and must never be exercised arbitrarily;

The principles and values that follow all stem from, or uphold aspects of, the rule of law.

**Equality before the law:** Everybody is equal before the law and is subject to it. The application of legislation to the Government is complex and dealt with in more detail in Chapter 10.

**Parliamentary sovereignty:** Parliament is the supreme law-making body of New Zealand and comprises the House of Representatives and the Governor-General. The House of Representatives has the exclusive power to regulate its own procedures. One Parliament cannot prevent a subsequent Parliament from repealing or amending existing legislation, or from passing new legislation. The courts can neither invalidate legislation passed by Parliament nor interfere with the legislative process. It is often said that Parliament can legislate to do anything. Yet this does not mean that it should, particularly where human rights or fundamental principles are affected.

**Separation of powers:** Each branch of government (executive, legislature, and judiciary) must perform only those functions associated with that branch and not intrude into, or assume the functions of, another branch. This principle helps to prevent the concentration of power in one branch of government and helps to reduce the potential for abuse. While the executive/legislature divide is not always strictly adhered to in New Zealand (Ministers must be members of Parliament), stringent protections must be kept in place to keep the judiciary separate from the other branches.

**Judicial independence and impartiality:** Certain decisions must be made by judges independent of the Government. Judges interpret legislation and are the source of the common law. They decide disputes between individuals and between individuals and the Government. Courts are the only institutions that can impose criminal convictions or sentence people to imprisonment.

To properly perform these functions and to maintain public confidence in the judicial system, judges must be impartial in respect of the matter before them, and be independent of the executive and legislature. Legislation that affects a judge's appointment, tenure in office, or financial security will potentially affect judicial independence. Measures that create evidentiary presumptions, minimum or mandatory penalties, or restrict remedies also affect judicial independence and must be considered with care.

**Free and fair elections:** Members of the House of Representatives are chosen by a process of regular free and fair elections in which all citizens and permanent residents may vote and put themselves forward for election (subject to some restrictions in the Electoral Act 1993<sup>21</sup>). Any attempt to affect either the process by which elections are conducted or the eligibility criteria to vote or stand as a candidate will be the subject of considerable scrutiny.

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<sup>21</sup> <http://www.legislation.govt.nz/act/public/1993/0087/latest/DLM307519.html>

*New legislation must respect the principles of the Treaty of Waitangi.*

**Respect for the spirit and principles of the Treaty of Waitangi:** The Treaty is discussed in more detail in Chapter 4.

*New legislation must respect the dignity of the individual and the presumption in favour of liberty.*

**Respect for the dignity of the individual:** Respect for the dignity of the individual is of paramount concern to the law and gives rise to fundamental human rights. These rights include the right to:

- life;
- physical integrity;
- freedom from medical or scientific experimentation without consent;
- freedom to refuse to undergo medical treatment;
- freedom from discrimination on specified grounds;
- freedom from torture, cruel, degrading or disproportionately severe treatment or punishment

(see Chapter 5).

**The presumption in favour of liberty:** Nobody should be deprived of their liberty without proper cause and due process. Liberty can be denied in various ways. Examples include:

- arrest and imprisonment;
- detention for mental health treatment;
- detention for customs or immigration purposes;
- restrictions on a person's movement or activities (such as curfews or prohibition from entering certain parts of a town).

Those who are or may be deprived of their liberty should have access to the courts to review the legality of the restriction.

*New legislation should respect property rights.*

**Respect for property:** People are entitled to the peaceful enjoyment of their property (which includes intellectual property and other intangible property). The law actively protects property rights through the criminalisation of theft and fraud and through laws dealing with trespass, and other property rights. The Government should not take a person's property without good justification. A rigorously fair procedure is required and compensation should generally be paid. If compensation is not paid, there must be cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated).

The law may allow restrictions on the use of property for which compensation is not always required (such as the restrictions on the use of land under the Resource Management Act 1991<sup>22</sup>).

*The exercise of powers under legislation must be subject to the principles of natural justice where appropriate.*

**Natural justice:** This is a flexible concept, the purpose of which is to ensure people are dealt with fairly. First, decision makers must be unbiased in respect of the matter before them. Second, decision makers must provide those affected by the decision with the opportunity to be heard. The exact requirements of natural justice will vary depending on the particular context of the case, having regard to the importance of the rights and interests involved. Natural justice operates at its highest level in the case of criminal trials, with strict procedural requirements; the requirements of natural justice in a licencing decision may be less stringent.

*New legislation should not generally restrict the right of access to the courts.*

**Access to the courts:** The ability of the courts to review the legality of government action or to settle disputes is a key constitutional protection. Legislation that seeks to limit this right must be justified, and will generally be given a restrictive interpretation by the courts. This principle does not prohibit a mandatory requirement to attempt a resolution by alternative dispute resolution (“ADR”) or review processes before bringing court proceedings in appropriate cases (see Chapter 26).

*Legislation should not affect existing rights and should not criminalise or punish conduct that was not punishable at the time it was committed.*

**The presumption against retrospectivity:** The general rule is that legislation should have prospective, not retrospective, effect (see Chapter 11).

*Money must not be raised, spent or borrowed without Parliamentary authority.*

**Parliamentary authority is required to spend or borrow money, or levy a tax:** Government departments can only spend those funds that Parliament specifically grants them each year. Departments that run over budget must seek approval from Parliament for more funds. Only Parliament can authorise the borrowing of money by the Government, and only Parliament has the power to authorise the raising of money by way of new or increased taxes. The granting of powers to charge fees and levies is discussed in Chapter 15.

*Clear and unambiguous wording must be used if Parliament wishes to override fundamental rights and values.*

**The principle of legality:** Parliament must use unambiguous language when seeking to override basic human rights. The courts will presume that general words in legislation are not intended to override basic human rights. If there is any doubt, it is likely that the right

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<sup>22</sup> <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM231916.html>

will prevail. This principle is reflected in s 6 NZBORA<sup>23</sup>: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

*New legislation must comply with New Zealand’s international obligations.*

**International obligations:** There is a presumption that New Zealand will act in accordance with its international obligations, and that legislation will comply with those obligations (see Chapter 8).

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<sup>23</sup> <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>