

5. New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (“NZBORA”)²⁹ affirms a range of civil and political rights, many of which are discussed in Chapter 3. NZBORA implements the International Covenant on Civil and Political Rights (“ICCPR”)³⁰ and affirms New Zealand’s commitment that policy and legislation will be consistent with those rights. New legislation should therefore be consistent with the rights and freedoms contained in NZBORA.

NZBORA applies to the executive, legislature, judiciary, and any other person performing a public function, power or duty. It identifies those areas where policy officials must tread carefully.

The rights affirmed by NZBORA can be grouped into six categories:

- life and security of the person;
- democratic and civil rights;
- non-discrimination and minority rights;
- search, arrest and detention rights;
- criminal procedure rights;
- rights to justice.

As discussed in Chapter 3, many of these rights have long histories and are deeply rooted in the common law. There is a developed body of case law concerning NZBORA and the interpretive approach the courts will take to legislation that affects NZBORA rights. It will therefore be necessary to obtain legal advice where NZBORA issues are involved.

Legal advice should be sought to ensure that any proposed legislation has had proper regard to the rights in NZBORA, and that any limitations thought to be necessary can be reasonably justified in a free and democratic society. The Ministry of Justice has produced detailed guidance for the public sector regarding NZBORA.³¹

It is necessary to have a good understanding of the rights and freedoms affirmed by NZBORA and to identify at an early stage whether any aspect of the proposed legislation may limit any NZBORA rights. If the legislation does limit an NZBORA right, every attempt should be made to eliminate the inconsistency. A full explanation as to why the limitation was necessary should be given to the relevant Cabinet committee and select committee. The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, NZBORA (see paragraph 7.60(b)).³²

²⁹ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

³⁰ <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/international-covenant-on-civil-and-political-rights>

³¹ <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector>

³² <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>

Guidelines

5.1. Have you selected the option that imposes no limitation or the least limitation on a particular right?

NZBORA rights should not be limited, or should be subject only to such reasonable limits as can be justified in a free and democratic society.

Alternative options for achieving the policy objective that will result in no limitation on NZBORA rights should be identified and considered. These alternatives might involve adopting a different legislative approach or relying on non-legislative alternatives (see Chapter 19).

The rights contained in NZBORA may be subject to reasonable limits which can be justified in a free and democratic society. Legislation that only imposes reasonable limitations on a right as provided for in NZBORA will not be inconsistent.

In those cases where a limitation is required, rigorous steps should be taken to identify the least limitation possible.

Determining whether a limitation is “justified in a free and democratic society” will involve assessing the policy objectives and relevant legal principles. Officials must therefore work closely with their legal advisers when conducting this assessment.

5.2. If the limitation cannot be justified, but remains the only possible way to achieve the policy objective, is the limitation only as wide as is necessary to achieve the policy objective?

Any unjustified limitation should be restricted to that which is necessary to achieve the policy objective.

There will be cases where the Government wishes to proceed with legislation that results in an unjustified limitation on an NZBORA right. Section 6 of NZBORA requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in NZBORA, that meaning shall be preferred to any other meaning.

This means that in cases where the Government wishes to proceed with legislation that is inconsistent with NZBORA, clear and unambiguous language must be used to confirm this intention.

The courts are prevented from striking down, or refusing to apply, legislation that is inconsistent with NZBORA. However, this is not a free pass to develop legislation that is inconsistent with NZBORA. Such legislation can have serious consequences.

- The Attorney-General is required to notify Parliament when a bill is introduced if a limitation on an NZBORA right is not reasonably justified and that the Bill is inconsistent with NZBORA.

- Standing Order 265(5) requires the Attorney-General's report to be referred to a select committee. The inconsistency may then be the subject of adverse comment during the select committee process, which might attract negative publicity.
- The courts may not strike down primary legislation, but may criticise the inconsistency in their judgments.
- Legislation that is inconsistent with NZBORA will place New Zealand at risk of breaching its international human rights obligations (under the ICCPR and otherwise) and expose it to any applicable sanctions.

All possible steps must be taken to ensure that the unjustified limitation is the least limitation required to achieve the policy objective. Additional procedures or safeguards that might further mitigate the limitation should also be considered.