CONSTITUTIONAL ISSUES AND RECOGNISING RIGHTS

Chapter 4 Fundamental constitutional principles and values of New Zealand law

Constitutions are concerned with public power. They confer (and also limit and regulate) the power of a State over its people. Fundamental constitutional principles and values in New Zealand law and practice run so deep that the courts will often draw on them when interpreting legislation or otherwise deciding cases. If 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 New Zealand's constitutional principles exist in the common law and are reflected in legislation such as the Constitution Act 1986, the New Zealand Bill of Rights Act 1990 (NZBORA), and the Public Finance Act 1989. Other principles are found in constitutional conventions, the Standing Orders of the House of Representatives, and in the Cabinet Manual (supplemented by the CabGuide). While New Zealand does not have a written constitution, these principles, together with important statutes and documents such as the Treaty of Waitangi (the Treaty) and ancient English statutes such as the Magna Carta 1297 and the Bill or Rights 1688, 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 may be found in the introduction to the Cabinet Manual.

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

4.1 Fundamental constitutional principles and the rule of law

Legislation should be consistent with fundamental constitutional principles, including the rule of law.

Legislation should be consistent with fundamental constitutional principles. Officials should carefully consider the impact of fundamental constitutional principles on proposed legislation, particularly when the legislation will:

- change or reshape State power (for example, by creating or removing new powers for the State, significantly shifting power between branches of the State, or removing powers from the State);
- change the relationship between citizens and the State in a fundamental way (for example, by encroaching on the operation of democratic processes, individual dignity or liberty, equality before the law or access to the courts);

- modify the fundamental structures or functions of the State (for example, by altering the scope or operation of representative democracy, altering the scope of parliamentary sovereignty, not observing the separation of powers, conferring law enforcement functions or powers on private sector bodies, or affecting judicial independence and impartiality); or

- modify or remove safeguards and limitations imposed on the exercise of State functions (for example, the rule of law, human rights, the spirit and principles of the Treaty of Waitangi, or natural justice).

The following are some of the most important constitutional principles in New Zealand law.

The rule of law: The full scope of the rule of law is the subject of debate, but at its core are the following principles:

- **Everyone is subject to the law, including the Government**—People and institutions that wield power must do so within legal limits, and be accountable for their actions; everybody is equal before the law and is subject to it. The application of legislation to the Government itself is considered in more detail in Chapter 11.

- **The law should be clear, and clearly enforceable**—The law should be publicly accessible and able to be easily understood by all to whom it applies. Rights and obligations need to be matched with enforcement mechanisms (civil or criminal) and remedies so that people and/or the State can enforce it.

- **There should be an independent, impartial judiciary**—Certain decisions must be made by judges who are independent of the government. Judges interpret legislation and develop the common law. They decide disputes between individuals and between individuals and the Government. Courts are the only institutions that should 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.

There should also be effective access to justice and redress for individuals (access to courts is the subject of a specific guideline below).

Representative democracy and free and fair elections—Members of the House of Representatives are chosen through regular free and fair elections in which almost all citizens and permanent residents may vote and put themselves forward for election (subject to some restrictions in the Electoral Act 1993). Parliament's role as a forum of democratic participation and debate gives it the strongest contemporary justification for asserting sovereign law-making status (*see* parliamentary sovereignty below). 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.

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 constitutional 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 by ensuring those responsible for making the law cannot direct how that law will be enforced against themselves, and by ensuring those responsible for enforcing the law cannot change the law to remove procedural safeguards. While the executive and legislative branches share a common membership in New Zealand (Ministers must be members of Parliament), there is still a functional separation between the two branches that means the legislature can hold the Executive to account. Separation between the legislature and the judiciary requires that legislation should not direct the punishment and guilt of named or identifiable people without due process of law. Legislation that does so appropriates judicial power and undermines judicial independence, as well as offending against the rule of law. Stringent protections must be maintained to keep the judiciary separate and independent from the other branches to enable proper judicial scrutiny.

4.2 The spirit and principles of the Treaty of Waitangi

Legislation should be consistent with the principles of the Treaty of Waitangi.

The Treaty is of vital constitutional importance. The development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty. Chapter 5 sets out guidelines to help ensure legislation is consistent with the principles of the Treaty of Waitangi.

4.3 The principle of legality—the dignity of the individual and the presumption in favour of liberty

Legislation should be consistent with the dignity of the individual and the presumption in favour of liberty.

All law is made (and, when enacted, will be construed by courts) against a matrix of values and principles that are regarded as fundamentally important to our legal system. These values and principles can be expressed at differing levels of abstraction. Fundamentally, they concern human dignity and liberty but these terms embrace a broader set of rights and freedoms that include:

- the right not to be deprived of life;

- physical integrity of one's body, including freedom from medical treatment or scientific experimentation without consent;
- freedom from torture, or cruel, degrading, or disproportionately severe treatment or punishment;
- freedom from discrimination based on immutable characteristics;
- physical liberty, in the sense of freedom from arbitrary arrest or restraint;
- freedom of conscience, religion, expression, association, assembly, and movement;
- liberty, in the sense of freedom to make fundamental personal choices as to how one lives one's life; and
- procedural fairness, often referred to as natural justice.

The expectation is that legislation will be construed and applied in light of these abiding values. This has been called the "principle of legality".

Most of these fundamental rights and freedoms have, since 1990, been affirmed in NZBORA. Section 7 of that Act requires, as part of the process of law making, that the Attorney-General advise the House of Representatives if any provision in a bill appears to be inconsistent with rights and freedoms in NZBORA. For its part, section 5 of NZBORA recognises that limits on rights and freedoms may be appropriate if they are no more than "reasonable limits" that can be "demonstrably justified in a free and democratic society". Chapter 6 provides guidance on developing legislation that impacts on rights.

4.4 Respect for property

New legislation should respect property rights.

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).

4.5 Natural justice

Legislation should be consistent with the right to natural justice.

Section 27(1) of NZBORA provides a right to the observance of natural justice in a broad range

of circumstances—for example, whenever a tribunal or other public authority makes a determination in respect of a person's rights, obligations, or interests that are protected or recognised by law. The requirements of natural justice vary depending on the particular context of the case, having regard to the importance of the rights and interests involved, but its purpose 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. Natural justice operates at its highest level in the case of criminal trials, with strict procedural requirements; the requirements of natural justice in civil matters (for example, a licensing decision) may be less stringent. *See* Chapter 6 for more guidance on legislation that impacts on rights.

4.6 Access to the courts

Legislation should not restrict the right of 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 (*see* Chapter 28 for guidance on creating a system of appeal, review, and complaint). 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 29 for guidance on designing legislation involving ADR).

4.7 The presumption against retrospectivity

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

This presumption is part of the rule of law. The general rule is that legislation should have prospective, not retrospective, effect (Chapter 12 provides guidance on legislation that has a retrospective effect).

4.8 Parliamentary authority is required to spend or borrow money, or levy a tax

Legislation needs to clearly authorise the raising, spending, and borrowing of money.

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 17.

4.9 International obligations

Legislation should comply with New Zealand's 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 (Chapter 9 provides guidance on designing legislation to implement treaties and international obligations).

4.10 The clear statement principle

Legislation that overrides fundamental rights and values must use clear and unambiguous wording.

If any of these principles are intended to be departed from in a particular case, Parliament must use clear and unambiguous language to do so. Without clear words to the contrary, courts will presume that general words in legislation are intended to operate consistently with the principles. As to rights, this clear statement principle is reflected in section 6 of NZBORA: "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." It follows that if a meaning *inconsistent* with the Bill of Rights is intended this will need to have been expressed very clearly. (Recall, however, that the Bill of Rights contemplates that rights may be limited so long as the limitations are "reasonable" and "demonstrably justified in a free and democratic society"—meaning that a law imposing only reasonable limits on rights is not inconsistent with NZBORA).

Chapter 5 The Treaty of Waitangi, Treaty settlements, and Māori interests

The Treaty of Waitangi (the Treaty) has been described as "part of the fabric of New Zealand society" and is of vital constitutional importance.[5] The development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty.

The Treaty requires that the Government and Māori act towards each other reasonably and in good faith—akin to a partnership. Two important ways to achieve this are through informed decision making (which includes effective consultation by the Government) and through the active protection of Māori rights and interests under the Treaty by the Government.

The nature of the Treaty partnership between the Crown and Māori is evolving as increasing numbers of grievances are settled and the Treaty partners move into new post-settlement relationships. This means that the maintenance of the ongoing relationship between the parties to the settlement is a key part of any obligation to consult in this context and may require a different approach to consultation than in other contexts. Te Puni Kōkiri (TPK) has information on its website explaining how and why to engage with Māori as part of the policy process.[6]

Due to its constitutional significance, in the absence of clear words to the contrary, the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and interpret legislation accordingly. 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, the Treaty.[7]

Guidelines

5.1 Does the proposed legislation affect, or have the potential to affect, the rights or interests of Māori under the Treaty?

Māori interests that will be affected by the proposed legislation should be identified.

Legislation may affect the rights and interests of Māori if it impacts on the relationship between the Government and Māori, the durability of treaty settlements, or the possession, use, or ownership of land, waterways, forests, fisheries, taonga, and other resources. Taonga may include tribal heirlooms or weapons, and intangible treasures such as language, cultural practices, and traditions.

The Treaty is a living document. This refers to the common understanding that the intent and application of the Treaty will change as society and circumstances evolve, and that the interests of Māori to be protected under the Treaty are not only those that existed when the Treaty was signed. A Māori interest may arise in respect of the right to develop a resource that was either undiscovered or unexploited at the time the Treaty was signed. Interests might also be affected by the use of new technology, such as the ability of Māori to have access

[5] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.
[6] Te Puni Kōkiri *Building Relationships for Effective Engagement with Māori* (2006).
[7] Cabinet Office *Cabinet Manual 2017* at 7.65(a).

to television and radio broadcasts to promote culture and language. A Māori interest may also arise in issues where Māori are disproportionately affected.

The Crown Law Office should be consulted early to assist the identification of interests that will be affected.

5.2 Does the proposed legislation impact Crown commitments made under any Treaty settlement?

New legislation must not be inconsistent with an existing Treaty settlement.

The Government negotiates and, on behalf of the Crown, is party to a number of Treaty of Waitangi settlements with iwi, hapū, collectives of iwi or hapū, and other groupings to provide redress for historical breaches of the Treaty or its principles by the Crown and to make provision for ongoing relationships between the parties.

Individual Treaty settlements are final, meaning the historical claims they settle and the settlement itself (with the exception of disputes over interpretation) may not be the subject of a further historical claim to the Waitangi Tribunal or the courts. The detail of each settlement is reflected in a Deed of Settlement that is given effect by legislation.

Thorough consultation must take place with the relevant post-settlement governance entity if new legislation has the potential to adversely impact an existing Treaty settlement, or damage the relationships between that entity and local or central government established through the Treaty settlement. The Office of Treaty Settlements (OTS) and the Post Settlement Commitments Unit (PSCU) should also be consulted in these circumstances. OTS is a unit within the Ministry of Justice responsible for negotiating Treaty settlements on behalf of the Government. PSCU was established to support the durability of Treaty settlements.

5.3 Does the legislation potentially affect rights and interests recognised at common law or practices governed by tikanga?

Any land, bodies of water, or other resources potentially subject to customary title (or rights), and that might be affected by proposed legislation, should be identified, as should any other potentially affected practices that are governed by tikanga.

The common law recognises Māori customary title (akin to a property right) and customary rights (which may include rights of use and access) in land and other natural features. Customary title and customary rights pre-date the Government's acquisition of sovereignty.

Recognition of Māori customary title and customary rights at common law is not dependent on the Treaty. Express language (or at least clear and plain implication) is required to extinguish any subsisting Māori customary title or customary rights. A statement that Parliament intends to legislate inconsistently with the principles of the Treaty will therefore not be sufficient to extinguish customary title.

The courts will generally hold that, unless voluntarily surrendered, abandoned, or expressly extinguished in clear terms by legislation, customary title and customary rights will continue to have legal effect. Legislation that is intended to extinguish or apply to customary title and

customary rights will require clear and precise wording to that effect.

Extra care must be exercised when dealing with customary title or rights relating to riverbeds, lakes, and the foreshore and seabed as these often pose difficult legal issues.

Care should be taken where legislation may affect practices governed by tikanga. As a matter of practicality, such practices will likely be identified by the steps taken under 5.1.

5.4 Should Māori be consulted?

The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori.

Consultation is not required in all cases; however, it is one of the principal mechanisms through which the Government (via Ministers and government agencies) discharges its responsibility to make informed decisions to act in good faith towards Māori. A failure to effectively consult may be seen as a breach of the principles of the Treaty and harm the relationship between Māori and the Government.

A failure to consult may also result in Parliament passing legislation without appreciating fully the variety of views and interests that may be relevant. This may result in difficulties in applying and interpreting the legislation at a later date.

5.5 Who should be consulted?

Consultation must target Māori whose interests are particularly affected.

Government policies and legislation may affect different groups of Māori in different ways. It is therefore important to identify who might be specifically affected and ensure their views are sought and fully considered. As no one body speaks for all Māori on all matters, iwi, hapū, or other entities representing Māori groups that are specifically affected must be identified and consulted. For matters concerning particular regions, it may be appropriate to focus consultation on the groups which have customary interests in that area.

TPK, through its directory Te Kāhui Māngai, provides a comprehensive list of post-settlement groupings and areas of interest.[8] If an iwi has not yet settled its historical claims, OTS will be able to advise on which groups have a mandated body recognised by the Crown for Treaty settlement purposes.

The CabGuide notes that departments should consider consulting TPK on proposals that may have implications for Māori as individuals, communities, or tribal groupings; and the Crown Law Office for constitutional issues, including Treaty issues.[9]

Also, the Ministry of Justice (through PSCU) is developing a central register of all settlement commitments. The Ministry should be consulted to determine whether proposals for legislation will affect treaty settlements.

[8] Te Puni Kōkiri *Te Kāhui Māngai (Directory of Iwi and Māori Organisations).*
[9] Cabinet Office *CabGuide* "Cabinet paper consultation with departments" (2017).

5.6 In the event of a conflict between the proposed legislation and the principles of the Treaty of Waitangi, does the legislation include additional measures to safeguard Māori interests?

If legislation has the potential to come into conflict with the rights or interests of Māori under the Treaty, additional measures should be considered to ensure recognition of the principles of the Treaty or the particular rights concerned.

Two general classes of measures may be included in legislation to acknowledge or safeguard Māori rights and interests under the Treaty:

- **General measures—**These provisions relate to the manner in which the legislation is administered or the way a power is exercised. For example:
    - section 4 of the Conservation Act 1987 provides: "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi";
    - section 9 of the State-Owned Enterprises Act 1986 provides: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi"; and
    - section 4 of the Crown Minerals Act 1991 provides: "All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)".

  Even subtle differences in the wording of legislation (for example, the contrast between "give effect to" and "have regard to") may have significant effects and must be carefully considered with the benefit of legal advice.

- **Specific measures—**In these provisions, the Treaty and its principles are tied to specific mechanisms by which they are recognised in the legislation. For example, section 4 of the Environmental Protection Authority Act 2011 provides:

  "In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi,—

  (a) section 18 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and

  (b) the EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under the Act."

Other examples include section 4 of the New Zealand Public Health and Disability Act 2000 and section 7 of the Public Records Act 2005.

Specific measures have been the usual approach since 2000. They have the advantage of demonstrating that the Government has actively worked through what is required in order to

recognise and safeguard what the principles of the Treaty mean in the particular context. In doing this, the provisions provide greater certainty than general measures.

5.7 Does Parliament intend to legislate inconsistently with the principles of the Treaty of Waitangi?

Clear language is required where legislation is intended to be inconsistent with the principles of the Treaty.

In rare cases, the Government may wish to achieve an outcome that risks being held by a court to be inconsistent with the principles of the Treaty. In such circumstances, great care must be taken to express the policy intention as clearly as possible, both in the legislation itself, and in the policy documentation underlying the Act. If the intention is not clear, the courts will presume that Parliament intended to legislate consistently with the principles of the Treaty. This may yield results inconsistent with the intended policy outcome.

Chapter 6 New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (NZBORA) is expressed to "affirm, protect and promote human rights and fundamental freedoms in New Zealand", and to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". NZBORA applies to the executive, legislature, and judiciary, as well as to acts done by any other person or body in the "performance of a public function, power, or duty conferred or imposed … by or pursuant to law". Its purpose is to set basic standards that all these people and bodies ought to observe. Actions of Government and public actors ought to comply with the Bill of Rights. So too, new legislation should be consistent with the rights and freedoms contained in NZBORA. The Ministry of Justice has produced detailed guidance for the public sector regarding NZBORA.[10]

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; and
- rights to justice.

Many of these rights and freedoms are discussed in Chapter 4. As discussed there, most have long histories. They are deeply rooted in the common law and reflected in the detail of our legislation. There is also a developed body of case law concerning NZBORA and the interpretive approach taken by courts when applying legislation that implicates rights in NZBORA (in the sense described in 6.1).

Section 7 of NZBORA is of special relevance to the development of legislation. It requires the Attorney-General, upon the introduction of a Government bill, to bring to the attention of the House of Representatives any provision in that bill that he or she considers to be inconsistent with a right or freedom in NZBORA. In discharging that duty, the Attorney-General is assisted by advice given by officials in the Ministry of Justice. If the relevant bill was developed by the Ministry of Justice, that advice is supplied instead by Crown Law.

If the Attorney-General considers a bill to be consistent with NZBORA (so that no report under section 7 is required), the relevant legal advice is subsequently published on the Ministry of Justice website. If the Attorney-General considers a provision to be inconsistent (so that a section 7 report is made), that report is tabled in the House and a link made available from the Ministry website.

Because of the importance of ensuring consistency of legislation with NZBORA, legal advice should be sought at an early stage to ensure that legislative proposals give proper regard to rights and freedoms in NZBORA. Any restrictions on rights and freedoms—or "limits", as they are called in NZBORA—must

[10] Ministry of Justice *Introduction to the Guidelines* http://www.justice.govt.nz/assets/Documents/Publications/Guidelines-to-Bill-of-Rights-Act.pdf

be able to be "demonstrably justified" as "reasonable limits" in a "free and democratic society" (*see* section 5 of NZBORA).

If proposed legislation is to limit NZBORA right, every attempt should be made to eliminate the inconsistency or ameliorate its impact so that the limit meets the standard of reasonableness set out in section 5. A full explanation as to why the limitation was necessary will need to 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.[11] It also provides that possible inconsistencies with NZBORA should be identified by the agency developing the bill at the "earliest possible stage".[12]

Guidelines

6.1 Has the option that imposes no limit or no more than a reasonable limit on a particular right been selected?

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.

The first question that must be answered is whether a right or freedom in the Bill of Rights is implicated by a legislative proposal. Making this determination requires an awareness of all the rights and freedoms set out in NZBORA. (The particular case of rights against discrimination in section 19 of NZBORA is dealt with in the next chapter.) The initial inquiry is into whether a right is "implicated"—in the sense of being likely to be affected in some way by proposed legislation. This requires an understanding of what falls within the scope of a right. Sometimes rights will be implicated in ways that are not obvious at first.

The scope of a right in NZBORA, and hence whether it is implicated by a particular legislative proposal, is ultimately a legal question. It is important to identify the rights potentially in issue at an early stage in the policy process and, when in doubt, seek and proceed on the basis of legal advice.

If a right is implicated, then the manner in which that right would be affected by the proposed legislation needs to be considered. If it is possible to attain the legislative goal without limiting a protected right or freedom, then that should be the preferred option. That possible option might arise through adopting a different legislative approach or relying on non-legislative alternatives (*see* Chapter 22).

But NZBORA also recognises that rights are not always absolute. Section 5 of NZBORA says that rights may be subject to limits so long as those limits are "reasonable" and are able to be "demonstrably justified in a free and democratic society". Legislation that imposes no more than reasonable limits on protected rights and freedoms is therefore consistent with NZBORA. Determining whether a limitation is "justified in a free and democratic society" involves an

[11] Cabinet Office *Cabinet Manual 2017* at 7.65(b).
[12] Ibid 7.67.

inquiry that can be summarised as follows:[13]

(a) Does the proposed limit on a right serve a purpose sufficiently important to justify limiting a right?

(b) (i) Is the limiting provision rationally connected to its purpose?

(ii) Does the proposed limit impair the right no more than is reasonably necessary for sufficient achievement of its purpose?

(iii) Is the limit proportionate to the importance of the objective?

In many cases there will be a range of reasonable options that may be taken, and there will be consistency with NZBORA if the chosen option is within this range.

Officials must therefore work closely with their legal advisers when conducting this assessment. For their part, legal advisers will need information on the policy objectives and the impact of the selected means of implementing those objectives (and whether there are any more rights-consistent alternative modes of implementing them). The aim should be to attain the least possible limit on a right that is consistent with attaining the legislative purpose (and certainly no more than a "reasonable" limit on that right, with reasonableness being determined in the manner set out above).

6.2 If the limit on a right cannot be justified, but remains the only possible way to achieve the policy objective, is the limit drawn as narrowly as possible to achieve that objective?

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

There may be cases where the Government wishes to proceed with legislation that results in an unjustified limitation on an NZBORA right—one that cannot be regarded as a reasonable limit on that right. This ought to be very rare. In these situations, great care must be taken to ensure the legislative intent of the bill is very clearly stated. Section 6 of NZBORA requires that wherever an enactment can be given a meaning that is consistent with rights and freedoms contained in NZBORA, that meaning shall be preferred to any other meaning. It follows that clear and unambiguous language must be used to confirm a rights-infringing (and thus inconsistent) intention.

Section 4 of NZBORA makes it clear that courts are prevented from striking down, or refusing to apply, legislation that is inconsistent with NZBORA. However, that provision must not be seen as an invitation to develop legislation inconsistent with NZBORA. Such legislation can have serious consequences:

- First, the Attorney-General is required by section 7 of NZBORA to notify Parliament if he or she considers a bill imposes a limitation on an NZBORA right that is not a

[13] This summary paraphrases the approach set out by Tipping J of the Supreme Court in *R v Hansen* [2007] 3 NZLR 1 at [104].

reasonable limit demonstrably justified in a free and democratic society.

- Secondly, 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.

- Thirdly, while the courts are not empowered to strike down an Act, they may declare the existence of the inconsistency in their judgments.

- Finally, legislation that is inconsistent with NZBORA will place New Zealand at risk of breaching its international human rights obligations (under the International Covenant on Civil and Political Rights and possibly other instruments) and expose it to adverse comment from the international treaty monitoring body, which may have negative political consequences.

In any event, all possible steps must be taken to ensure that any unjustified limitation of rights is the least limitation required to achieve the policy objective. Additional procedures or safeguards that might further mitigate the limitation should also be considered.

Chapter 7 Discrimination and distinguishing between different groups

Unjustified discrimination causes harm to people and may stigmatise already vulnerable groups. This chapter will assist in identifying whether proposed legislation might unjustifiably discriminate on its face or in its application, and how that might be avoided.

Section 19(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) affirms that everyone has the right to freedom from discrimination on the 13 grounds of discrimination set out in section 21 of the Human Rights Act 1993. Those grounds are:

- Sex (including pregnancy, childbirth, and gender identity)
- Marital status
- Religious belief
- Ethical belief
- Colour
- Race
- Ethnic or national origins
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation

Some of these terms are further elaborated on and defined in the Human Rights Act 1993, which also contains various exceptions and modifications.

The starting point is that it ought to be rare for legislation to differentiate between people on the basis of these characteristics. That said, some of the grounds—especially age—may well be used to make important distinctions necessary to the very policy of the statute. Examples include making special provisions in criminal justice and family law for children and young people, and creating minimum age thresholds in various other areas of life (as with driving, voting, ability to marry, and purchasing tobacco and alcohol).

The courts have established that a law (or a policy or practice) unjustifiably discriminates when:

- it draws a distinction on one of the prohibited grounds of discrimination;
- the distinction involves a material disadvantage to the affected person or group; and
- making that distinction cannot be justified, in terms of section 5 of NZBORA, as a reasonable limit on the right to be free of discrimination that is "demonstrably justified in a free and democratic society" (refer to Chapter 6).

Be alert for both *direct* and *indirect* discrimination. The former occurs when a legislative provision discriminates on its face, by expressly treating a group differently on the basis of a prohibited ground of discrimination. Indirect discrimination occurs when a provision is not on its face discriminatory

because it does not expressly contravene a prohibited ground, but its *effect* is that a group is disadvantaged. For example, a generally expressed provision may not include any reference to a person's religion yet impose some requirement or restriction that impacts differently on people of a particular religious belief. In both cases, there is a need to consider whether the difference in treatment involves a material disadvantage and, if so, whether it is capable of justification.

The Ministry of Justice holds policy responsibility for matters related to NZBORA and the Human Rights Act 1993 and provides detailed guidance for the public sector on its website.[14]

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, the Human Rights Act 1993.[15]

If there is any doubt whether new legislation will discriminate or authorise discrimination on one of the prohibited grounds, officials should consult their legal advisers.

Guidelines

7.1 Does the legislation affect the right to freedom from discrimination in section 19 of NZBORA?

Legislation should not discriminate on any of the prohibited grounds.

The starting point is that legislation should not discriminate on any of the prohibited grounds. However, it is not unlawful to discriminate by taking steps in good faith to assist or advance those disadvantaged by discrimination (section 19(2) of NZBORA). It will generally be important to take legal advice on the application of section 19(2), having regard to its requirement that the measures must be premised on assisting or advancing those disadvantaged due to discrimination.

Where discrimination by a State sector organisation on a prohibited ground is the only means of achieving an important policy objective, clear language must be used in the legislation and the limitation must be justified in a free and democratic society (refer to the general discussion on limiting NZBORA rights in Chapter 6). The courts will presume that Parliament has intended to legislate consistently with NZBORA and will interpret the legislation as such in the absence of clear indicators in the legislation.

Particular care should be exercised in social policy areas such as welfare, health, or education, where it is often necessary to treat groups differently to achieve a positive outcome for those groups. For example, it may be necessary to consider and treat people differently by reason of age, sex, marital status, and certain other characteristics. Early consultation with legal advisers is recommended for officials working in such areas.

The Human Rights Act 1993 also contains a number of exceptions to the right to freedom

[14] Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector: Guidelines on how to apply the standards and who is covered* (March 2002).
[15] Cabinet Office *Cabinet Manual 2017* at 7.65(b).

from discrimination that may be relevant to legislation. For example:

- it is not unlawful to exclude people of one sex from participating in competitive sporting activity in which the strength, stamina, or physique of competitors is relevant (section 49(1)); and
- it is not unlawful to provide goods, services, or facilities at a reduced fee, charge, or rate on the ground of age, disability, or employment status (section 51).

Seeking legal advice is important when the exceptions will be relied upon.

7.2 Has the option that results in the least amount of discrimination been selected?

Any discrimination should be no greater than is necessary to achieve the policy objective.

When faced with multiple options for achieving the policy objective, an option that achieves the policy objective without discriminating on a prohibited ground should be selected. If differential treatment is required by the policy, the option that results in the least discrimination should be preferred and additional measures to reduce the infringement of rights and freedoms or promote accountability and transparency should be considered. Chapter 6 provides a list of the types of measures that may be appropriate.

7.3 Has the Human Rights Commission been consulted?

Consult the Human Rights Commission early in the policy development process.

The Human Rights Commission is an independent body that advocates and promotes respect for human rights. It has a key role in educating the public on human rights issues and in providing a service to resolve disputes and complaints.

7.4 Have all the consequences of non-compliance with NZBORA and the Human Rights Act 1993 been considered?

Consider the full range of consequences of passing legislation or taking action that does not comply with section 19 of NZBORA and the Human Rights Act 1993.

The consequences that may result where legislation is inconsistent with NZBORA are described in Chapter 6.

If the Human Rights Review Tribunal finds that a piece of enacted legislation is inconsistent with the right to freedom from discrimination, it may also make a declaration that the legislation is in breach of the right to freedom from discrimination. The declaration does not affect the operation of the legislation, but the Minister must report the declaration to Parliament and table a response.

Chapter 8 Privacy and dealing with information about people

The Government should respect privacy interests of people and ensure that the collection, use, and disclosure of information about identifiable people is done consistently with those interests. The unnecessary collection, misuse or perceived misuse, or unauthorised disclosure of personal information erodes the community's trust in the Government and other institutions, and can make it harder to collect information in the future. Further, other countries may be reluctant to share information with New Zealand if our law does not give proper respect to privacy rights.

If new policy is being developed that proposes the handling of personal information (that is, information about a person that either identifies or is capable of identifying that person), officials must first consider whether the proposed action is governed by the Privacy Act 1993. That Act applies to both public sector and private sector agencies and establishes a set of information privacy principles for the handling of personal information. The two key concepts in the Act are purpose and transparency. If the personal information is already held by a public body for another purpose, officials must consider whether the proposed use falls within the purposes for which the personal information was originally collected, and whether those purposes have been communicated to the individuals concerned, before developing legislation that permits a new use or disclosure of that information.

Any policy development that affects personal information should include a Privacy Impact Assessment[16] at an early stage to assess the extent of the impact on privacy and how that impact can be managed in the policy development process.

If the proposed handling of personal information is not authorised by the Privacy Act 1993 or other legislation (and authorisation under an approved information sharing agreement under that Act would be insufficient or inappropriate),[17] new legislation may be required. In designing legislation, officials must know what they want to do and what personal information is required to do it. Legislation relating to personal information needs to clearly set out the particulars of the information to be collected, the purpose or purposes for which the information may be used, and to whom the information may be disclosed and why.

While this chapter focuses on how public sector agencies handle personal information, the Privacy Act 1993 and codes of practice also apply to private sector agencies. This chapter will therefore be relevant to legislation that affects or authorises the handling of personal information by private sector agencies.

Guidelines

8.1 Is the legislation consistent with the requirements of the Privacy Act 1993 and that Act's 12 information privacy principles?

Legislation should be consistent with the requirements of the Privacy Act 1993, in particular the information privacy principles.

The 12 information privacy principles are the cornerstone of the Privacy Act (and can be found

[16] Privacy Commissioner *Privacy Impact Assessment Toolkit* (2015).
[17] A more detailed discussion of approved information sharing agreements later in this chapter at 8.3.

in section 6). They address how agencies may collect, store, use, and disclose personal information. They also allow a person to request access to and correction of their personal information. Many of the information privacy principles have in-built exceptions, and Part 6 of the Privacy Act has further exemptions.

The policy objective will sometimes justify an inconsistency with the privacy principles. Section 7 of the Privacy Act provides that legislation that is inconsistent with the privacy principles will take precedence. There is then no need for legislation overriding the Act to contain an express override provision. However, any override of the Act requires a policy decision and the reasons should be clearly identified in the Cabinet papers.[18]

If that occurs, the policy should be developed so as to minimise the inconsistency. If there is any ambiguity regarding an inconsistency with the Privacy Act, the courts may prefer an interpretation of the legislation that involves the least impact on the privacy interests of individuals.

The design of any legislative provision that overrides the privacy principles, in particular principles 10 and 11 (relating to the use and disclosure of personal information), should reflect as necessary the principles of specificity, proportionality, and transparency. Consultation with the Office of the Privacy Commissioner and the Ministry of Justice will help to identify the necessary design features.

The Cabinet Manual requires Ministers to draw attention to any aspects of a bill that have implications for, or may be affected by, the principles in the Privacy Act 1993, when submitting bids for bills for the legislative programme. Similarly, it requires Ministers to confirm compliance with those principles when subsequently submitting the bill to the Cabinet Legislation Committee for approval for introduction.[19]

8.2 Does the new legislation comply with any relevant code of practice issued by the Privacy Commissioner?

The design of new legislation must take account of any applicable code of practice.

The Privacy Commissioner issues codes of practice, which may modify or apply the information privacy principles to any specified information, agency, activity, industry, profession, or calling (or class of such thing). Codes of practice are disallowable instruments but not legislative instruments and are enforceable through the Privacy Commissioner's investigation and complaints process and proceedings in the Human Rights Review Tribunal.

A list of the currently applicable codes of practice can be found on the Privacy Commissioner's website.

[18] Previously, the Guidelines indicated that if proposed legislation would be inconsistent with the information privacy principles that should be explicitly stated in the legislation. That advice has been amended because it could be misleading.

[19] Cabinet Office *Cabinet Manual 2017* at 7.65 – 7.66.

8.3 Does the legislation authorise information sharing?

New legislation should only provide authority for information sharing where the sharing cannot be undertaken using one of the existing mechanisms in the Privacy Act 1993 (for example, an approved information sharing agreement), or where using those mechanisms is not sufficient for the policy purpose.

Disclosing information about identifiable individuals between agencies for the purposes of delivering public services can be appropriate provided the privacy risks are managed well. However, information sharing to deliver public services must have clear legal authority. That authority may already be provided under the Privacy Act by the exceptions to the information privacy principles or by a code of practice.[20] For example, information may be disclosed for a purpose directly related to the purpose for which it was obtained or when disclosure is necessary to prevent or lessen a serious threat to public health or public safety. There may also be existing authority under Part 10 (information matching), Part 10A (identity information), or Part 11 (law enforcement information) of the Privacy Act.

If there is no such authority, or the available authority is partial or uncertain, an approved information sharing agreement (AISA) under Part 9A of the Privacy Act 1993 may provide the necessary authority without the need to resort to a new Act. AISAs are information sharing agreements approved by the Governor-General, by Order in Council on the recommendation of the relevant Minister. An AISA may grant an exemption to, or modify, one or more of the privacy principles or a code of practice (except in respect of principles 6 and 7 relating to access and correction rights). The Office of the Privacy Commissioner has published guidance for creating AISAs.[21] Departmental legal advisers, the Office of the Privacy Commissioner, and the Ministry of Justice should be consulted to ascertain whether there is already authority for information sharing or whether an AISA could provide that authority.

If there is no existing authority for proposed information sharing between agencies and an AISA would be insufficient or inappropriate, new legislation may be required. Generally, a new Act to authorise information sharing will only be required to overcome a statutory prohibition or restriction preventing it. However, in some cases, a new Act may be justified in other circumstances, for example where an Act would provide greater transparency than for the disclosure to be regulated under 1 or more AISAs. However, this should be weighed against the risk that a specific legislative disclosure regime will forgo the flexibility inherent in the Privacy Act, the safeguards provided by that Act, and the benefit of case law developed around it.

8.4 Does the legislation require a complaints process?

New legislation should use the existing complaints process under the Privacy Act 1993 unless there is a good reason not to do so.

[20] Privacy Act 1993, Parts 2 and 6.
[21] Privacy Commissioner *Approved Information Sharing Agreements (AISAs)* (2015).

The Privacy Act 1993 provides a comprehensive system for dealing with complaints arising from alleged breaches of the information privacy principles. This includes a complaints investigation process by the Commissioner and proceedings before the Human Rights Review Tribunal.

New legislation should adopt the Privacy Act complaints procedure. Such new legislation should include clear words that incorporate the complaints procedure (*see* section 66 of the Human Assisted Reproductive Technology Act 2004). Good reasons must exist to create any new complaints and review procedures.

8.5 Have the Privacy Commissioner, the Ministry of Justice and the Government Chief Privacy Officer (GCPO) been consulted?

The Privacy Commissioner, the Ministry of Justice and, when appropriate, the GCPO should be consulted when developing new policies and legislation that may affect the privacy of individuals.

The Privacy Commissioner and Ministry of Justice should always be consulted where policy and legislative proposals potentially affect the privacy of individuals.[22] In addition, the following uses of information raise specific issues on which further advice should also be sought from legal advisers, the Privacy Commissioner, and the Ministry of Justice:

- **Public register—**A database or register that contains personal information and that members of the public can search through.[23]
- **Personal information sharing—**Including either approved information sharing agreements (under Part 9A of the Privacy Act) or information matching regimes (under Part 10 of the Privacy Act).[24]
- **Transfer out of New Zealand—**Sending information by any method to a body outside New Zealand (such as the sending of passport data to the border agencies of other countries or authorising banking records to be held overseas). Information sent outside New Zealand may no longer have the protection of the Privacy Act 1993 or other New Zealand laws or values. Also, the receiving jurisdiction may not have comparable safeguards to those found in New Zealand law. An appropriate level of additional safeguards should therefore be provided.

If the proposed legislation involves the management and governance of privacy in the

[22] The Privacy Commissioner has a number of functions in respect of privacy, including examining proposed legislation that makes provision for the collection of personal information by any public sector agency or the disclosure of personal information by one public sector agency to another: Privacy Act 1993, section 13(1). The Ministry of Justice administers the Privacy Act 1993.
[23] Privacy Commissioner Drafting suggestions for departments preparing public register provisions (2007).
[24] Privacy Commissioner Approved Information Sharing Agreements (2015); Privacy Commissioner, Privacy Commissioner's Views On The Information Matching Guidelines (2006).

provision of State services, the GCPO[25] should be consulted.[26]

Statistics New Zealand, which leads the government's work on data and analytics, should be consulted on proposed approved information sharing agreements.

Finally, if legislation is to propose sharing court information, the Ministry of Justice should be consulted and consideration given to consulting the judicial branch (through the Ministry of Justice).[27]

[25] The GCPO leads an all of Government approach to privacy, including setting standards, developing guidance, building capability within agencies, and providing assurance to Government.
[26] Note the Cabinet Manual departmental consultation expectation: Cabinet Office *Cabinet Manual 2017* at 5.19-5.20; Cabinet Office *CabGuide 'Cabinet paper consultation with departments'*.
[27] "Court information" means information held by the Ministry of Justice on behalf of the Court, as described in Schedule 2 of the Senior Courts Act 2016 and in Schedule 1 of the District Court Act 2016.