

## 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.<sup>10</sup>

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

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<sup>10</sup> 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.<sup>11</sup> It also provides that possible inconsistencies with NZBORA should be identified by the agency developing the bill at the “earliest possible stage”.<sup>12</sup>

## 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

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<sup>11</sup> Cabinet Office *Cabinet Manual 2017* at 7.65(b).

<sup>12</sup> *Ibid* 7.67.

inquiry that can be summarised as follows:<sup>13</sup>

- (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

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<sup>13</sup> 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.