

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 of 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).