

## 8 Human Rights

This chapter describes how we propose to build upon New Zealand's rich tradition of rights protection in a systematic way by:

Articles  
75–106

- broadening the range of rights to be protected by the Bill of Rights to more closely reflect the range of rights actually recognised across our legal system and in international human rights treaties;
- retaining the ability for the institutions of the State to place reasonable limits on those rights where they can be demonstrably justified, as the current Bill of Rights Act allows;
- ensuring that anyone who claims that their rights have been unjustifiably infringed can approach the courts for a determination;
- ensuring that human rights protection is enhanced by allowing judges to strike down legislation that is inconsistent with the Bill of Rights;
- permitting Parliament to specifically override any court decision, so long as a resolution to that effect has the support of 75 per cent of the Members of Parliament. This is in addition to the ability for the people to override a court decision through a referendum process.

These proposals would ensure that New Zealand's constitutional system more comprehensively protects human rights in accordance with our international obligations, but preserves the last word for Parliament on matters where there is a large measure of parliamentary consensus.

### **New Zealand has a strong human rights culture**

New Zealand has a strong heritage of protecting human rights. It is a significant part of this country's DNA. New Zealand was:

- the first country in the world to extend the vote to women in 1893;
- one of the earliest supporters in 1919 of the International

Labour Organisation, a key institution protecting workers' rights:

- one of the first countries to ban discrimination against state employees based on political allegiance (1936);
- one of the first countries to formally abolish capital punishment (abolished for murder in 1961, and abolished altogether, including for treason, in 1989);
- one of the first to ban discrimination on the grounds of sexual orientation (1993).

New Zealand also participated to a significant extent in the drafting of the Universal Declaration of Human Rights (1948)<sup>1</sup> which led to the drafting of the International Covenant on Civil and Political Rights (ICCPR) (1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (also 1966), both of which New Zealand has ratified; and we took a leadership role in developing and promoting the (International) Convention on the Rights of People with Disabilities (2006). Of course, our human rights record is not perfect; we acknowledge that there are plenty of laws and incidents that people can point to as not being consistent with human rights. Our point, however, is that there is a strong human rights tradition in New Zealand—it is part of our “fair go” culture.

However, the laws that protect our human rights are a hodgepodge.

### **What is the law?**

The way we protect human rights in New Zealand mirrors the general state of our constitutional law; a hodgepodge of common law and statute.

The main laws that protect human rights are:

- **the New Zealand Bill of Rights Act 1990.** The Bill of Rights Act protects a range of civil and political rights (the right to life, freedom from torture and medical experimentation, voting rights, freedom of expression, thought, conscience,

1 C Aikman, “New Zealand and the Origins of the Universal Declaration” (1999) 29(1) VUWLR 1.

religion and movement, freedom from discrimination, freedom from unreasonable search and seizure, and a range of criminal process rights). Importantly, the rights guaranteed by the Bill of Rights Act are not absolute; the Bill of Rights explicitly allows the rights in it to be limited if there is good justification for it and the limit is reasonable.

- **the Human Rights Act 1993.** The Human Rights Act focuses more particularly on the right to be free from discrimination. It prohibits discrimination on many grounds including race, sex, sexual orientation, political opinion, family status, age and disability. Like the Bill of Rights Act, the Human Rights Act also permits Government to place reasonable limits on the right to be free from discrimination.

In addition to the Bill of Rights Act and the Human Rights Act, some human rights are specifically protected by other statutes. For example, the Education Act 1989 guarantees certain minimum rights to education, including the rights of students with special educational needs. The Privacy Act 1993 protects personal data. The Electoral Act 1993 guarantees certain aspects of the electoral system. The Public Works Act 1981 provides a right to compensation where land is taken for public works. The Crimes Act 1961 outlaws slavery.

### **The vulnerability of the law**

Neither the Bill of Rights Act nor the Human Rights Act empowers the Judiciary to strike down legislation that is inconsistent with them. Where legislation is inconsistent with those statutes, the only remedy available to the courts is to make a declaration of that inconsistency; until Parliament decides to amend or repeal the law, the courts must give the law full effect. And, of course, there is no obligation on Parliament to amend the law.

These laws are therefore vulnerable to being overridden by a bare parliamentary majority. This vulnerability is not theoretical or fanciful. Nor is the ability of Parliament to override human rights a fanciful argument. Unfortunately, there are plenty of examples, such as the New Zealand Public Health and Disability

Amendment Act 2013, which we cited in chapter one. That Act passed in a single sitting day despite an almost immediate public outcry.

More generally, the Human Rights Review Tribunal has found in three cases that Acts of Parliament are in breach of the right not to be discriminated against: in two cases sections of the ACC legislation were found to unjustifiably treat older people less favourably than younger people,<sup>2</sup> and just this year several provisions of the Adoption Act 1955 were condemned by the Tribunal.<sup>3</sup> But whether anything is done about these laws is entirely in the hands of Parliament, which can decide to do nothing if it chooses.

Since 1990 Attorneys-General, acting under section 7 of the Bill of Rights Act, have concluded on more than 30 occasions that provisions in Bills proposed by their own governments are inconsistent with the Bill of Rights Act; and nonetheless those governments have proceeded to enact them regardless. That is more than one Bill a year that the Government itself enacts knowing it to be an unjustifiable breach of human rights.

### **Other views**

Earlier this year, the Human Rights Committee of the United Nations called on the New Zealand Government to consider amending the Bill of Rights Act to ensure that all of the rights protected by the ICCPR are included in it, and to consider entrenching the Bill of Rights and strengthening the role of the Judiciary.<sup>4</sup> This committee, which consists of 18 experts from around the world, considers the state of human rights in most countries. Their views are a powerful statement of what can be considered best practice. And it is worth noting that our Court of Appeal has gone so far as to state that in some sense the Committee can be regarded as part of the judicial structure of New Zealand.<sup>5</sup> In short, its views are authoritative and should be given due weight.

2 *Howard v A-G* (2008) 8 HRNZ 378; *Heads v A-G* [2015] NZHRRT 12.

3 *Adoption Action Inc v A-G* [2016] NZHRRT 9.

4 *Concluding Observations of the (UN) Human Rights Committee* CCPR/C/NZL/CO/6 (31 March 2016) at [10(a)] and [10(c)].

5 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266.

In 2013 the Constitutional Advisory Panel, which consulted widely with New Zealanders about our current constitutional arrangements, reported that its work demonstrated “broad support for exploring change to the Bill of Rights Act and enhancing mechanisms for ensuring compliance with the standards set in the Act”.<sup>6</sup>

### **Why protect human rights?**

The purpose of the State is to serve the people. State power, therefore, should never be used to the detriment of core values of the people. History clearly shows us that the protection of human rights is a core New Zealand value, and no State institution should be allowed to override that, unless it can demonstrably justify that limit as being reasonable.

New Zealand is also bound by a wide range of international treaties and conventions which commit this country to respect human rights. New Zealand has been regularly criticised by various UN human rights bodies precisely because under our current system of parliamentary sovereignty human rights can be, and are, unreasonably overridden by Parliament.

Strong protection of human rights of all citizens enhances respect for the fundamental law of the State. By recognising that everyone holds a suite of fundamental human rights, which they can rely upon when threatened, all citizens buy in to the fundamental role of the rule of law and the constitution as the bedrock of the system.

Respect for human rights has been shown to advance the long-term, sustainable development of those communities where there are strong human rights protections in place.

Most modern constitutions identify a range of human rights which state institutions must respect, and provide mechanisms to safeguard those rights. It would be odd for Constitution Aotearoa not to do the same.

Sometimes it is said that a Bill of Rights is not a good idea because it is all about protecting criminals and not about protecting ordinary people. That is not correct. While it is true

<sup>6</sup> Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013) at 56.

to say that in the early days of the Bill of Rights Act many of the decisions concerned criminal justice procedure, those cases are now relatively few as the police and the courts have come to a better understanding of how human rights affect their work. There can be little doubt that the Bill of Rights has improved the quality of policing in New Zealand. Nowadays, much of the litigation around the Bill of Rights Act concerns other areas like discrimination that affect all New Zealanders. Besides, criminal justice rights are important to ensure everyone who goes through the system gets a fair go. We have witnessed numerous cases of miscarriages of justice in New Zealand; in many that has come about because the basic rules of fairness have not been observed.

### **What do we propose?**

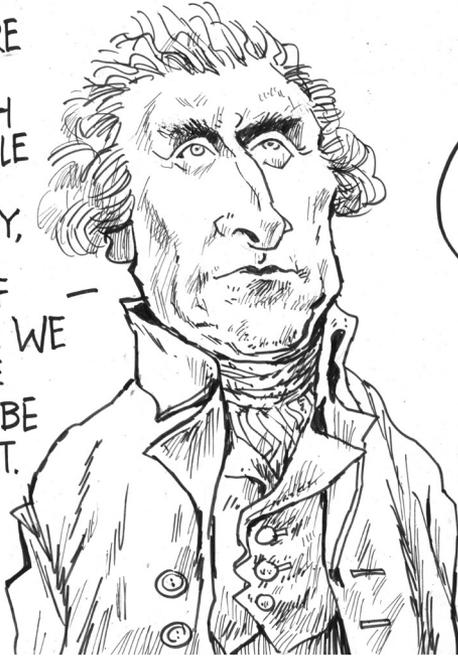
Part 12 of Constitution Aotearoa sets out a Bill of Rights. This retains all of the rights currently protected by the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

It adds to the Bill of Rights Act:

- the right not to be deprived of security of the person, except in accordance with the principles of fundamental justice:
- the right not to be held in slavery or in servitude or required to perform forced or compulsory labour:
- the right not to be subject to arbitrary or unlawful interference with privacy, family, home or correspondence:
- the right to be treated as equal before the law and be given equal protection of the law:
- the right to be free from discrimination on the grounds of gender:
- the right to property; the right to free enrolment and free education at any state primary or secondary school; and
- the right to an environment that is not harmful to health or wellbeing.

Many of these rights need to be added so that New Zealand can be said to have fully adopted the ICCPR as part of the Bill of Rights, as recommended by the Human Rights Committee of the United Nations.

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MAYBE TO YOU  
MISTER JEFFERSON.  
OTHER PEOPLE WILL  
NEED MORE PROOF.



TomRolt.

It also provides other principles relating to social and economic rights which shall guide Parliament and the Government, drawing on the ICESCR which New Zealand has ratified. It reaffirms the important principle in the Bill of Rights Act that rights can be subject to reasonable limits, if they can be demonstrably justified.

It provides that the Bill of Rights binds the State, public bodies and other persons performing public functions just like the current Bill of Rights Act.

It also provides that the benefit of the Bill of Rights is engaged by natural and legal persons, as the current Bill of Rights Act does.

### **Why add more rights to the Bill of Rights Act?**

Most of the additional rights that we propose adding to the Bill of Rights are guaranteed by various international human rights conventions that New Zealand is obliged to comply with. Those rights were not included in the New Zealand Bill of Rights Act 1990 for a number of reasons: some because at the time there was not thought to be a need to include them (for example, the prohibition on slavery), or because at the time the right was considered to be too vague and uncertain for inclusion (for example, the right to privacy). However, experience over the last 25 years tells us that those rights should now be included.

#### *Slavery and servitude*

In our globalised world modern forms of slavery and servitude have emerged. It is important that, even if it is not a problem in New Zealand, Constitution Aotearoa clearly states that this country is firmly opposed to any laws or conduct that would violate such an important basic principle of human rights.

**Article 85**

#### *Security and privacy*

In 1985, when a Bill of Rights was first proposed by the then Fourth Labour Government, the right to security of the person and the right to privacy more generally were deliberately left out. The reason was that, although some overseas Bills of Rights protected those rights, there was real uncertainty about how

they would be applied by the courts.

Since then, however, a substantial body of case law has developed overseas and these concepts have become much more concrete and less frightening. To the contrary, the last 30 years have only served to emphasise how important a right such as the right to privacy is in preserving human dignity and freedom. Indeed, we believe there is little exaggeration in saying that one of the biggest threats to human freedom and dignity lies in the digital transformation of society and the consequent ease with which information can be acquired, retained and analysed in respect of individuals. A bill of rights that does not protect these rights from unjustifiable encroachment would be seriously deficient.

### *Property*

The right not to be arbitrarily deprived of property is included in the Universal Declaration of Human Rights (1948). Most Bills of Rights overseas protect that right in some form or other. Property is an important means by which individuals look after themselves and their families and communities and shield themselves from the power of the State. On a number of occasions there have been proposals to amend the Bill of Rights Act to add property rights to it; on each occasion the proposal was rejected, but it would appear that concern about wording was the primary driver.

Interestingly, the Constitutional Advisory Panel noted that adding property rights to the Bill of Rights Act had been discussed; and it recommended exploring options to add property rights to the Bill of Rights Act,<sup>7</sup> although noted that there was concern about getting the wording right.<sup>8</sup>

#### Article 104

Our proposed wording builds in a modest, targeted protection for property rights. It draws on the long established principle of no compulsory acquisition without compensation and prohibits arbitrary deprivation of property, while at the same time affirming the ability for Parliament to enact laws that affect property rights in pursuit of the common good.

<sup>7</sup> Constitutional Advisory Panel, above n 6, at 48.

<sup>8</sup> At 51.

*Equality*

Equality is one of the most basic expectations and entitlements of an individual in modern society. In particular, equal treatment before and by the law is core to the notion that all individuals are worthy of respect by the State. It is a right reflected in the terms of the ICCPR and the ICESCR. **Article 95**

*Education*

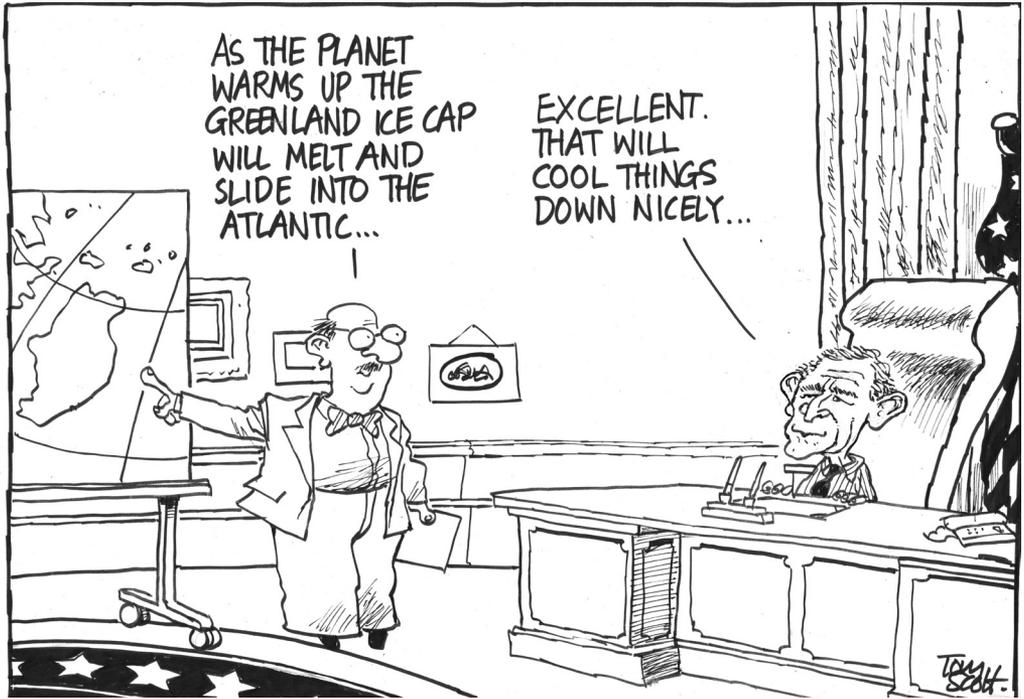
Section 3 of the Education Act 1989 provides for the right to free primary and secondary education. Under it, every person who is not an international student is entitled to free enrolment and free education at any state school between the ages of five and 19. Section 8 of the Education Act further provides that people who have special education needs have the same rights to enrol and receive education at State schools as others. The right to primary and secondary education is recognised in many other constitutional human rights instruments.<sup>9</sup> **Article 94**

*Environment*

There has been over the last 20 years a rapidly growing international movement to connect the strong developments in human rights law with the magnitude of the global environmental crisis.<sup>10</sup> More than 80 nations have enacted constitutional reforms to provide recognition to environmental rights. We believe the time has come to follow that trend in New Zealand. The model we have chosen is based on the widely admired South African constitution. There are some judicial decisions available from there upon which to build, but it is clear that, important as this right is, it has not given rise to **Article 105**

9 J Heymann, A Raub and A Cassola, "Constitutional Rights to Education and the Relationship to National Policy in School Enrolment" (2014) 39 *International Journal of Development* 121 notes that 81 per cent of institutions protect primary education and 53 per cent specify that it is free. Thirty-seven per cent secure the right to a secondary education. Moreover, the authors note that the constitutional protection of that right has increased in recent decades.

10 David R Boyd *The Environmental Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, Vancouver, 2012).



much litigation. The aim is to ensure that people can enjoy an environment that is not harmful to their health or wellbeing and to protect the environment for the benefit of present and future generations by ensuring that economic development is sustainable. This is an important principle reflected in the New Zealand Resource Management Act 1991. The provision in the Constitution gives constitutional status to that principle.

### *Socio-economic rights*

One of the most challenging aspects of human rights systems overseas concerns the recognition and protection of so-called socio-economic rights. These include the rights to housing, to work, to health, to an adequate standard of living and so on. As many people have pointed out, when one does not have adequate food, shelter or health, protecting rights such as freedom of expression can appear to be a luxury or, worse still, an irrelevance. For that reason most member countries of the United Nations, including New Zealand, recognised that a rights system that focused only on civil and political rights, but that ignored socio-economic rights, would be deficient. As a result the UN drafted, and most nations have ratified, the ICESCR.

**Article 106**

The real challenge with such rights, though, is enforcement. In particular, are these rights of the type that judges can or should be entrusted with enforcing? The view taken by most overseas systems is that there are real risks involved with that, because court processes are not always adequate to the task. We have considered a number of overseas models and have decided that the best approach for New Zealand is to explicitly recognise a number of socio-economic rights in Constitution Aotearoa, but make them explicitly non-justiciable (capable of being settled by law or by the action of a court). So the courts will not be able to enforce them; but citizens will be able to draw on them to make State institutions accountable. We are particularly interested in feedback on this approach to these rights. We have earnestly considered the pleas that have been made already to extend the Bill of Rights to these rights.<sup>11</sup>

**Article 106**

11 Joss Opie "A Case for Including Economic Social and Cultural Rights in the New Zealand Bill of Rights Act 1990 (2012) 43 VUWLR 471.

### **Justified limitations**

#### **Article 77**

One of the key features of the current Bill of Rights Act is the provision (section 5) that permits limits on rights that are reasonable and capable of being justified in a free and democratic society like New Zealand. This provision serves several important purposes:

- It explicitly states the obvious, but important, principle that rights are not absolute. Limits can be placed on rights where the public interest supports that. In this way the Bill of Rights Act can be fairly described as a Bill of reasonable rights. The justified limits provision means that New Zealand law does not fall into the extremes found in some overseas jurisdictions, such as the United States, where certain rights, including, for example, freedom of expression, are only rarely able to be regulated.
- Secondly, the justified limits provision creates a “culture of justification”, which forces Parliament, the Government and Judiciary to think hard about why a limit on rights is required in any particular situation. Casual utilitarianism is discouraged; careful and nuanced consideration of all reasonable policy options is encouraged.
- There is now a very well developed and transparent series of steps established in the case law to determine whether a limit is or is not justified. Those steps are well understood within parliamentary, governmental and judicial circles; they encourage transparency and they work well in practice. We see no need to change them and replace them with something new.

We propose no change to this important provision, which strikes a good balance between individual human rights and the ability of State institutions to govern in the public interest.

**Will we just be creating a United States-style system, where Supreme Court judges decide everything that is important?**

No. This is probably one of the biggest misunderstandings about an enhanced judicial role in enforcing the Bill of Rights.

It is true that in the United States, the United States Supreme Court effectively has the last word on many important issues of public policy through its ability to rule on the compatibility of legislation with the United States Bill of Rights. Issues like capital punishment, abortion, electoral finance, healthcare insurance (to name but a few recent issues), all come before the United States Supreme Court, which in effect has the final decision on whether such laws stand or fall.

It is important to understand the reason why the United States Supreme Court has such a prominent role. This is a result of the great difficulty in the American system of overruling a court decision through constitutional amendment. In the 225 years of the United States Constitution, it has only been successfully amended on 17 occasions.<sup>12</sup> Under Constitution Aotearoa, judicial views would be able to be overridden either by a special majority of Parliament (which would itself demonstrate a high level of broad political consensus in opposition to the view of the judges) or by a simple majority at a referendum.

In our view, this approach strikes the right balance. Citizens who are part of a minority group can, appropriately, seek the protection of the courts if they are of the view that their human rights are being unreasonably limited. In general, the view of

12 There have been 27 amendments made to the United States Constitution since 1789. Of these, the first 10 amendments were adopted and ratified simultaneously and are known collectively as the Bill of Rights (1791). The other are Sovereign Immunity (1795); State, Presidential Election Procedures (1804); Abolition of Slavery (1865); Equal Protection Clause (1868); Prohibition on Race, Colour or Slavery Discrimination in Respect of Voting Rights (1870); Income Tax (1913); Senatorial Elections (1913); Alcohol Prohibition (1919), repealed (1933); Prohibition on Right to Vote based on Sex (1920); Commencement of Presidential Office (1933); Cap on Presidential Terms of Office (1951); Representation of the District of Columbia (1961); Prohibition on Revoking Voting Rights Due to Non-payment of Tax (1964); Presidential Succession (1967); Voting Age of 18 (1971); and Congressional Salary Restrictions (1992).

the courts will prevail. Where, however, the overwhelming majority of MPs are persuaded that the court judgment is wrong, or where the majority of the people at a referendum can be so persuaded, then popular sovereignty will prevail.

We anticipate that the need to use these override mechanisms will be infrequent. Nonetheless, they will act as a reasonable check on an unelected Judiciary running rampant and becoming itself a politicised body. We believe the enhanced judicial role, particularly in the area of human rights, will increase the number of checks and balances within our system for the overall common good.

Furthermore, we are proposing a Constitution that is much easier to amend than that of the United States. And the Constitution will be regularly reviewed with extensive public input.