Introduction to the Guidelines


What is the purpose of these guidelines?

These guidelines are intended to make the Bill of Rights Act more accessible to the public sector.

Since its enactment, New Zealand courts have had to consider how the Bill of Rights Act impacts on their role and on the functions of those agencies subject to it. The courts have now provided a considerable amount of caselaw on the Bill of Rights Act that we can use in the development of policies, conduct of operational practices, and in service delivery. Our purpose in publishing these guidelines is to bring this information to you in one easy-to-use resource.

The guidelines are not intended to be a legal text on the Bill of Rights Act. Rather, they are a practical resource to assist you in the process of integrating human rights considerations into the development of your policy or practice. They will help you:

- identify whether your organisation's existing and proposed legislation, policies and practices may comply with the Bill of Rights Act;
- explore ways in which you can reach or improve your policy goals while still complying with the Bill of Rights Act and human rights principles;
- improve your level of awareness of the Bill of Rights Act and what compliance with the Bill of Rights Act involves;
- identify areas of potential legal risk for your organisation.

The appendices to the guidelines contain a number of tools that can help you with this.

As the guidelines give general guidance only, they cannot provide a definitive view on whether your organisation's legislation, policies, or practices are consistent with the Bill of Rights Act. If you have concerns
about whether the specific policy you are working on is consistent, you should obtain advice from your legal section before contacting the Ministry of Justice.

**Who are these guidelines for?**

These guidelines are written primarily for:

- policy and legal advisers;
- public sector managers and staff;
- advisers who service Cabinet, Cabinet Committees, Officials' Committees, and Select Committees.

As the Bill of Rights Act applies to acts performed by a wide range of agencies, individuals, and organisations, we hope these guidelines will help shape the policies and practices of the wider public sector including:

- Crown entities;
- local government;
- private bodies performing public functions under contract (for example, health screening, or security tasks).

**Structure of the guidelines**

As you move through these guidelines you will see cross-references to other sections of the Bill of Rights Act. These will help you move through the guidelines more easily, and find all the information you require.

The guidelines are organised into the following sections:

**Part I** will take you through a number of preliminary aspects of the Bill of Rights Act focusing on the coverage of the Bill of Rights Act and its relevance to public sector policy advisers and legal advisers.

**Part II** briefly discusses how to apply the Bill of Rights Act. This part includes a discussion on how to determine whether a limitation on a right is reasonable.

**Part III** contains the substantive discussion on each of the individual rights and freedoms found in section 8 through section 27(3) of the Bill of Rights Act. Part III also contains a discussion on applying limits to individual rights
and freedoms. Each section of the discussion on the individual rights and freedoms is broken down as follows:

*Policy triggers: do I need to consider section -- *?

This section is intended to alert you to the possibility that your policy or practice may infringe on a particular right or freedom. The triggers are not necessarily indicative of whether the policy infringes the right.

*What every policy adviser needs to know about section --*

This section gives a brief run-down on the scope of the right or freedom.

*Measures to improve compliance*

This section sets out options to guide you in the development of policies and practices which will be consistent with the right or freedom.

*Related rights and freedoms and freedoms*

This section alerts you to other potential areas of inconsistency with other provisions of the Bill of Rights Act that you might need to consider.

*Further discussion on the meaning of section --*

Each right and freedom is then discussed in some depth with the commentary focusing mainly on New Zealand caselaw. The commentary may include some discussion of developments overseas and internationally so that we can paint a "fuller picture" of the scope of the right.

*Key cases*

The key cases that have discussed the right or freedom, in New Zealand and other jurisdictions, are listed for further reference.

*History of the section*

The final part of the section provides an overview of the origins of the right, including the proposal in the *White Paper*, and how the right compares with the ICCPR and other constitutional models.

**Part IV** of the guidelines discusses the implications of, and the remedies available for, a breach of the Bill of Rights.
The **Appendices** include practical information, such as model legislative frameworks, which are designed to assist policy advisers in the process of developing policies, legislation, and practices. Some of this information is in the form of checklists that you may wish to fill out as you develop your policy.

**How do I find the information I need?**

For many policy advisers and operational staff, the Bill of Rights Act will be unchartered territory. In an attempt to assist you to find your way around these guidelines and the Bill of Rights Act, we have provided you with a Subject Matter Index. The Index contains signposts that will make your task in identifying relevant Bill of Rights considerations easier. The Index is not intended to be an exhaustive list of every subject that may trigger every right but is designed to give you a sense of the type of subjects covered by the right. The Index is at the back of the Handbook.

Note that in March 2002, the Ministry of Justice published *The Non-discrimination Standards for Government and the Public Sector: Guidelines on how to apply the standards and who is covered*. Although this publication includes discussion on section 19 you should also refer to the *Non-discrimination Guidelines* if your policy raises discrimination issues.

**Human rights in policy development**

**What are human rights?**

The United Nation's Universal Declaration of Human Rights states that human rights are those inalienable rights that belong to all members of the human family. They are fundamental to maintaining the inherent dignity and worth of all individuals. Human rights are indivisible and interrelated: it is insufficient to respect some human rights and not others. Human rights provide a benchmark for a democratic society, and are a foundation for freedom, justice, and peace in the world.

New Zealand's human rights law is delivered through a number of Acts, particularly the Bill of Rights Act and the Human Rights Act 1993.

**Why do I need to integrate human rights into the development of policy?**

New Zealand as a society expects that human rights will be complied with. At the same time, successive governments have moved to ensure that human
rights are given greater emphasis in policy development. Integrating human rights into your policy will help ensure that the policies are responsive to the needs of both the community at large and government. Building human rights considerations into policy at an early stage of development will make this process easier.


If taken into account early in the policy making process, human rights tend to generate policies that ensure reasonable social objectives are realised by fair means. They contribute to social cohesion and, as the Treasury's Briefing to the Incoming Government (1999) observes: 'Achieving and maintaining a sense of social cohesion and inclusion is an important aspect of welfare in the broadest sense ... Fairness to all parties involved extends both to the processes by which things are done and to the outcomes themselves. Social cohesion is low when individuals or groups feel marginalised.'

Policies which respect and reflect human rights are more likely to be inclusive, equitable, robust, durable and of good quality. Critically, such policies will also be less vulnerable to domestic and international legal challenge.

In short, human rights make good policy.

**So why give special consideration to the rights in the Bill of Rights Act?**

The Bill of Rights Act has an impact on the work of policy and legal advisers in the following areas.

*Policy development*

Section 3(a) of the Bill of Rights Act states that the Bill of Rights Act applies in respect of all acts done by the legislative, executive, and judicial branches of government. As Ministers and their departments form the core of the Executive, the Bill of Rights Act will apply to most, if not all their activities, whether that is in the form of legislative and policy development or in the delivery of services.
Therefore, the Bill of Rights Act is a relevant factor that you should consider when advising your Minister, developing policy proposals, or making decisions that affect the interests of a private individual or organisation.

Policy advisers particularly need to be aware that the Cabinet Office requires all Cabinet papers on policy proposals (including those papers which accompany draft legislation) to include a Human Rights Implication statement. [3] The statement describes the consistency of the proposals with both the Bill of Rights Act and the Human Rights Act 1993, and advises Ministers how any issues are to be resolved.

**Delegation and contracting of public functions**

Section 3(b) of the Bill of Rights Act states that the Act also applies to acts done by any person or body in the performance of any public function, power, or duty conferred or imposed by or pursuant to law.

The Bill of Rights Act is, therefore, relevant for non-public sector agencies or individuals performing public functions. You will need to be conscious of Bill of Rights Act implications when considering whether to delegate certain functions to the private or non-government sector.

A more comprehensive discussion on the scope of section 3 of the Bill of Rights Act is set out in Part II of these guidelines.

**Legislation**

The Bill of Rights Act further requires the Attorney-General to draw to the attention of the House of Representatives the introduction of any Bill that is inconsistent with the Bill of Rights Act. A more comprehensive discussion on this function can also be found in Part II.

The courts have recently signalled that they are prepared to declare legislation to be inconsistent with the Bill of Rights Act. [4] Section 92J of the Human Rights Act 1993 provides that the Human Rights Review Tribunal may issue a declaration of inconsistency if it finds an enactment to be inconsistent with section 19(1) of the Bill of Rights Act (freedom from discrimination). The courts have also made it clear that secondary legislation (e.g. regulations or rules) that is inconsistent with the Bill of Rights Act will be struck down as ultra vires (exceeds the powers of the empowering legislation), unless the regulation- or rule-making power expressly or necessarily authorises the inconsistency. [5]
Remedies for breach of the Bill of Rights Act

In Simpson v Attorney-General (Baigent's case) [6] the Court of Appeal held that effective and appropriate remedies are available for breach of the Bill of Rights Act. This is in spite of the Bill of Rights Act having no remedy provision. Since Baigent's case, the courts have provided various remedies for infringement of the rights and freedoms identified in the Act.

The Human Rights Act 1993 also provides for a publicly funded complaints process in respect of breaches of section 19(1) of the Bill of Rights Act.

Individuals, who consider that their human rights have been breached (including their rights under the International Covenant on Civil and Political Rights), can lodge a complaint with the United Nations Human Rights Committee.

The issue of remedies is discussed in Part IV of these guidelines.

Footnotes:

1. For ease of reference the New Zealand Bill of Rights Act 1990 will be referred to as the Bill of Rights Act in these guidelines. You can also find a copy of the New Zealand Bill of Rights Act in the appendices.
3. The Cabinet Office requirements are set out in the Cabinet Manual, and the Step By Step Guide.
PART I: An Introduction to the Bill of Rights Act

The Bill of Rights Act sets out to:

a. affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
b. affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR).

The Bill of Rights Act did not create any new rights but merely confirmed existing common law rights. Section 28 of the Bill of Rights Act provides that, just because a right or freedom is not expressly provided for in the Bill of Rights Act, it does not mean that the right or freedom does not exist or is otherwise restricted.

Contrary to popular perception, although the Bill of Rights Act "affirms" the ICCPR, it is not a copy of the ICCPR. There are differences between the two. For example, while the ICCPR contains a right to privacy, the Bill of Rights Act does not. The New Zealand Government has also entered reservations against four articles of the ICCPR, meaning that New Zealand is not obliged to comply with those articles in full. However, as at late 2003 these reservations were being reviewed.

What is the purpose behind the Bill of Rights Act?

The Bill of Rights Act restrains a government's ability to limit an individual's rights. [7] The White Paper [8] promoted the idea of a Bill of Rights for New Zealand on the basis that it would act as a "constitutional check" on the power of the Executive branch of Government and Parliament itself. It was hoped that such a law would improve New Zealand's system of government and provide a safeguard for those fundamental rights and freedoms "vital to the survival of New Zealand's democratic and multicultural society". [9] The White Paper went on to express the view that the Bill of Rights would: [10] provide a set of minimum standards to which public decision making must conform. In that sense a Bill of Rights is a mechanism by which governments are made more accountable by being held to a set of standards.

Who is subject to the Bill of Rights Act?
The Bill of Rights Act is designed to protect individuals and legal bodies (such as corporations) from the actions of the state. [11] When considering whether the actions done by you or your agency are subject to the Bill of Rights Act, you first need to consider whether those activities fall within the scope of section 3 of the Bill of Rights Act. Section 3 states that the Bill of Rights Act applies to any acts done by:

a. the legislative, executive and judicial branches of government; or
b. a person or body performing a public function, power or duty conferred or imposed by or pursuant to law.

'Branches of government' (section 3(a))

The key matter in considering whether an agency is bound by the Bill of Rights Act is the nature of the activity performed by that agency, not the form of the agency. In its broadest sense, all of the policy and operational work carried out by central government agencies is likely to fall within the scope of section 3(a) of the Bill of Rights Act. As mentioned previously, this is because Ministers and their departments form the core of the Executive.

However, the devolution of some activities from central government to agencies has not altered the fact that some functions remain the responsibilities of the state, regardless of who performs them. The Gambling Commission is an example of a statutory body that might be considered to be an agency subject to section 3(a). Members of the Commission are all appointed by the Governor-General on the recommendation of the Minister to carry out certain functions, including the accreditation of Casinos, under the Gambling Act 2003. The Commission is also subject to the Ombudsman Act 1975.

There is an array of other activities that are potentially subject to the Bill of Rights Act because of section 3(b) of the Bill of Rights Act. You should be aware of the potential scope of section 3(b) so you can identify areas of potential legal risk when it comes to implementing your policy or practice.

'Public function test' (section 3(b))

Section 3(b) provides that the Bill of Rights Act applies to non-government bodies, but only in respect of their public functions.

At present the scope of section 3(b) is not completely certain, because the courts have not settled the precise margins of the "public function" test.
However, the fact that a particular organisation is essentially private in nature does not, by itself, mean that it is never performing a "public function, power or duty". [12] For example, a privately-funded non-statutory industry self-regulating body has been held to fall within the scope of public sector activity because of the public nature of its functions. [13] An organisation may be subject to the Bill of Rights Act on some occasions but not others. For example, a school board of trustees may at times be performing functions more traditionally associated with the commercial operations of a private company, and at other times may make decisions relating to the delivery of state-sponsored education programmes.

Relevant factors

Although the decisions of the courts vary, relevant factors in the "public function" test include whether the organisation is:

- acting in the public interest;
- conferring a public benefit;
- acting to implement or in furtherance of government policy or strategy;
- under special obligations or responsibilities that other (private) bodies do not have;
- receiving or involved with public funding (although this is not determinative on its own);
- exercising powers under statute or regulation.

In applying these factors, it can be seen that organisations operating in different spheres of activity may be subject to the Bill of Rights Act as a result of applying the public function test. [14] Examples of these activities may include (but are not limited to):

1. The administration of a public welfare regulatory framework:

Organisations that regulate the media (Press Council, Advertising Standards Authority, Films and Videos Labelling Body) Organisations that administer liquor licensing laws (Alcohol Liquor Advisory Council)

2. The delivery of social services/government programmes to the community:

3. The regulation of professional bodies:

Professional bodies that have responsibility for regulating the professional activities of members and for taking disciplinary action (Medical Council, District Law Societies)

*So what does "conferred or imposed by or pursuant to law" mean?*

Although an organisation may be performing a "public function", the Bill of Rights Act may not apply if the function is not "conferred or imposed pursuant to law". While this term has not received extensive consideration by the courts, it is clear that section 3(b) applies in respect of a broader range of activities than just those imposed by legislation. Section 3(b) applies where a body voluntarily assumes obligations under a set of legal rules as well as an organisation that operates under legal rules conferred or imposed on it.

Decisions of the European Court of Human Rights (and followed by the New Zealand and Canadian courts) have indicated that expressions such as "conferred or imposed by law", "pursuant to law", and "prescribed by law", can to a large extent be treated the same.

**The Bill of Rights Act sets minimum standards for public decision making**

The Bill of Rights Act plays an important role in setting the "minimum standards to which public decision making must conform" referred to in the *White Paper*. It does so in five ways:

1. Section 7 requires the Attorney-General to notify the House of any provision in any Bill introduced into the House that appears to be inconsistent with the Bill of Rights Act. (Section 4, which provides that no provision in any enactment can be held impliedly repealed or in any way invalid or ineffective merely because the provision is inconsistent with the Bill of Rights Act, plays no part in the Attorney-General's consideration of a Bill under section 7).
2. Section 6 provides that legislation should be interpreted consistently with the Bill of Rights Act wherever such an interpretation is possible.
3. Decision-makers must therefore act consistently with the Bill of Rights Act unless the enactment clearly provides otherwise. For example, a person exercising statutory discretion needs to exercise that authority
in a way that is consistent with the Bill of Rights Act. The Bill of Rights Act fetters their decision-making powers by preventing a decision-maker from exercising his or her discretion in a way that infringes a right.

4. The courts have recently signalled that they will declare legislation to be inconsistent with the Bill of Rights Act.

5. The courts have also made it clear that secondary legislation (e.g. regulations or rules) that is inconsistent with the Bill of Rights Act will be struck down as *ultra vires* unless the regulation- or rule-making power expressly or necessarily authorises the inconsistency. [21]

**The Ministry of Justice's role in advising on consistency with the Bill of Rights Act**

The Ministry of Justice has two principal roles in relation to the Bill of Rights Act:

1. advising departments on the consistency of policy proposals and government bills with New Zealand's human rights laws; and
2. advising the Attorney-General on the consistency of a bill with the Bill of Rights Act.

**Advising departments**

All submissions to Cabinet Committees on policy proposals and government bills must include a statement on the consistency of the proposal or legislation with both the Bill of Rights Act and the Human Rights Act 1993.

In addition, all papers seeking a priority on the Government's legislation programme should include a statement about any inconsistencies with the rights and freedoms contained in the Bill of Rights Act and the Human Rights Act 1993. At the legislative bid stage, it is not always possible to finally determine consistency. However, where possible, any potential areas of inconsistency should be identified in the legislative bid.

Each government department has to make its own assessment and sign off on human rights implications in the department's area of responsibility. However, in carrying out this assessment, departments should, where appropriate, consult agencies with an interest or experience in human rights
issues such as the Ministry of Justice (human rights policy and legal assistance), and the Crown Law Office (legal advice).

**Vetting and section 7 of the Bill of Rights Act**

As indicated above, under section 7 of the Bill of Rights Act the Attorney-General is required to notify the House of any provision in any Bill introduced into the House that appears to be inconsistent with the Bill of Rights Act.

Cabinet Office requires all final versions of government bills to be with the Ministry of Justice (or with the Crown Law Office in the case of bills in the name of the Minister of Justice or an Associate Minister of Justice) at least two weeks before the Cabinet Legislation Committee's meeting on that bill. This is to allow the Ministry of Justice or Crown Law Office to advise the Attorney-General on the consistency of a bill with the Bill of Rights Act at least a week before the Cabinet Legislation Committee's meeting where that bill is considered.

In most cases, vetting a Bill involves members of the Ministry of Justice's Bill of Rights team working closely with the sponsoring agency to ensure that successive versions of the Bill comply with the Bill of Rights Act. If a provision appears to raise issues of consistency with the Bill of Rights Act you will be contacted to clarify the effect or purpose of that provision or justifications for it. This involves a process of ongoing consultation and negotiation between the agency and the Ministry. The Ministry may present different options for achieving a specific objective, particularly if it considers that the objective can be achieved in a way that does not give rise to Bill of Rights Act issues. This process of negotiation may lead to changes being made to the Bill to address particular concerns.

If you satisfy the Ministry that a proposal which appears to be inconsistent with the Bill of Rights Act is justifiable, it is said that the Bill does not appear to be inconsistent with the Bill of Rights Act. If the apparent inconsistency cannot be justified, the Ministry is likely to help you explore ways of amending the provision or to consider other means of achieving the same objective that do not give rise to Bill of Rights issues. Failing that, the Ministry will ask you to consider whether the provision can be omitted from the Bill on the basis that the provision appears to be inconsistent with the Bill of Rights Act.
Although the Ministry's primary aim is to assist government departments in the process of developing legislation that is consistent with the Bill of Rights Act, the Ministry does have to provide the Attorney-General with legal advice if it considers a provision in the bill is inconsistent with the Bill of Rights Act. The Attorney-General is then likely to table a "section 7" report in the House on the Bill's introduction stating that the provision is inconsistent with the Bill of Rights Act.

Even though a Select Committee is not required to consider the report, it may take the report into account and hear public submissions on the issue. A report by the Attorney-General may make the passage of the legislation more problematic. [22]

You can avoid an adverse report by integrating human rights considerations into your policy proposals at an early stage of the process. You can also contact the Ministry to clarify whether your project raises potential human rights issues and discuss ways of pursuing the policy consistently with the Bill of Rights Act.

**Appendix : Incorporating Bill of Rights Considerations into Your Policy Development Process**

You should consider the Bill of Rights Act implications of your policy early in the policy making process, well before you write the Cabinet paper. The following indicates how you might do this at each stage of the process:

<table>
<thead>
<tr>
<th>1. Defining the policy problem within the strategic context</th>
<th>Does your problem definition raise any Bill of Rights issues?</th>
<th>Consider discussing with in-house counsel and/or the Ministry of Justice, including how to rework the problem definition so it does not raise Bill of Rights issues.</th>
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<tr>
<td>2. Identifying and assessing options</td>
<td>Do any of the options that you</td>
<td>Seek the advice of your in-house counsel.</td>
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<td>to achieve the policy objective</td>
<td>have identified have any Bill of Rights implications? If so, how do you propose to address those implications?</td>
<td>counsel. Consider seeking input from the Ministry of Justice, including</td>
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<td>• help with identifying Bill of Rights implications;</td>
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<td>• advice on how to avoid or minimise those implications.</td>
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3. Forming recommendations

| Do any of your recommendations raise any Bill of Rights issues? | Ensure the Ministry of Justice is consulted and their views considered. |

4. Presenting your advice to the Minister

| Does your advice have Bill of Rights implications? | Advise the Minister of these implications and how they are to be resolved / managed. Be sure to include the Ministry of Justice's views. |

5. Presenting your advice to Cabinet

| Does your advice have Bill of Rights implications? | Cabinet Office requires all Cabinet policy papers to include a Human Rights Implication statement describing the consistency of your proposals with both the Bill of Rights Act and the Human |


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<td><strong>6. Implementation of the policy - legislation</strong></td>
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<td><strong>Rights Act 1993, and advising how any issues are to be resolved.</strong></td>
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<td></td>
<td><strong>Does your legislation have Bill of Rights implications?</strong></td>
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<tr>
<td><strong>7. Implementation of the policy - operational issues</strong></td>
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<td><strong>Even if your policy or legislation does not raise Bill of Rights issues, the</strong></td>
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<td><strong>Ensure your evaluation strategy for your policy includes</strong></td>
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way it is implemented may do so. consideration of Bill of Rights issues.

Footnotes:

8. 1985 White Paper "A Bill of Rights for New Zealand", tabled in the House of Representatives by the then Minister of Justice, Hon Geoffrey Palmer (the "White Paper").
14. Further guidance may be obtained from the decision by the UK Court of Appeal in Poplar Housing & Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2001] 3 WLR 183 (CA) from paragraphs 58. These guidelines are referred to in Carss-Frisk "Public Authorities: The Developing Definition", p 323-324.
15. Andrew and Petra Butler have observed that "the education sector is a field in which the application of public law values through the New Zealand Bill of Rights Act 1990 is likely to be complex because of the mixed education delivery systems in place, and the diverse range of facilities offered by various educational institutions." See Laws of New Zealand "Human Rights" Part I para 23.
17. In McGuin v Board of Trustees of Palmerston North Boys' High School [1997] 2 NZLR 60 it was held that as student boarding was a private commercial arrangement the Board of Trustees could not be
regarded as exercising a public function or power conferred by or pursuant to law.

18. **Le Compte, Van Leuven and De Meyere v Belgium** (1981) 4 EHRR 1 para. 64.

19. **Lawn v Waikato Bay of Plenty District Law Society** Master Gambrill 30/03/2001, HC Auckland CP No 229-IM00 para 67; **Sheehan v Valuers Registration** [1998] DCR 159.

20. The phrase "conferred or imposed pursuant to law" is discussed in more detail in the part of the guidelines on section 5 of the Bill of Rights Act headed "Prescribed by law".


22. You also need to be aware that as a result of changes made to the Human Rights Act, the Human Rights Review Tribunal may issue a declaration of inconsistency if it considers that the legislation it has been asked to rule on is discriminatory and therefore inconsistent with the Bill of Rights Act. For more information see Part IV of these guidelines on Remedies.
PART II: Initial Considerations
When Applying the Bill of Rights Act

So I'm applying the Bill of Rights Act - What sort of approach should I adopt?

Human rights legislation is generally given a broad, purposive interpretation. This means that you should give effect to the purpose behind the right in question, rather than taking a technical or minimalist approach to the wording of a right. This approach is necessary because human rights are fundamental to our democratic social system. It ensures that human rights are dynamic and responsive to changes within our communities.

A good example of how the scope and application of a right may change over time is the right to be secure against unreasonable search and seizure affirmed in section 21 of the Bill of Rights Act.

The classic statement on any intrusion by the state onto private property remains Entick v Carrington (1765) 19 State Tr 1029 in which Lord Camden CJ held: "...our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."

Although time and technology have moved on since Lord Camden reiterated these common law principles, the principles remain as valid as ever, even though he was at the time concerned with physical intrusions by the state or state actors.

In Kyllo v US (2001) 150 L Ed 2d 94 the US Supreme Court said that it would be "...foolish to contend that the degree of privacy secured to citizens by the [protection against unreasonable search and seizure] has been unaffected by the advance of technology."

The Supreme Court in this case was considering the use of a thermal imaging device to detect the presence of cannabis growing in a house. The majority for the Court held that, even though the police did not enter the property of the accused, using the device was a search. Using the device enabled officers
to "explore details of the home that would previously have been unknowable without physical intrusion".

**The Bill of Rights Act appears to have several groups of rights - is this important?**

In approaching the rights set out in the Bill of Rights Act, you need to be aware that they complement each other - they coexist. Individual rights may be read to strengthen and reinforce each other. For instance, it would be difficult to give effect to the right to freedom to manifest one's religion or belief in public without the corresponding right to freedom of movement, expression, assembly, or association. How could street protests take place without the right to the freedoms of expression, assembly, association, and movement? The right to freedom of movement can therefore not only be seen in its own context but also as a foundation through which an individual can exercise a wide variety of civil and political rights.

You may need to consider the potential application of a number of rights, even though they appear in different parts of the Bill of Rights Act.

**What the courts have said**

McEachern C.J.S.C in the British Columbia Supreme Court set out his approach to applying the Canadian Charter of Rights and Freedoms [23] as follows: [24]

...in my view each section and subsection [of the Bill of Rights Act] should be regarded as complementary, assisting, and explaining each other, and not in isolation...it is seldom a case raising Charter questions will be one-dimensional... More often, the issues in Charter cases will be multi-faceted... In such circumstances the Charter must be read and construed not narrowly, with each section and subsection disembodied from the rest, but rather in the larger sense I have mentioned.

**What happens when the rights in the Bill of Rights Act are in conflict with each other?**

The courts have taken two different approaches to resolving the difficulty when two rights appear to conflict with one another: definitional balancing and ad hoc balancing.

The definitional balancing approach was used in *Re J (An infant): Director-General of Social Welfare v B and B.* [25] The potential conflict in this case
was whether the parents of a child could refuse life-saving medical treatment. The parents, who were Jehovah's Witnesses, claimed that a blood transfusion was inconsistent with their right to manifest their religious belief in accordance with section 15 of the Bill of Rights Act. The countervailing right at issue was section 8 of the Bill of Rights Act, which affirmed the child's right to life. If the court upheld the parents' right to practice their religion, the state could have been seen to act in a way that was inconsistent with the child's right to life. The Court of Appeal reconciled the issue by interpreting section 15 so that the right of the parents did not extend to situations where the manifestation of their religious belief placed other people's lives in danger. In other words, it defined section 15 so that it could not override the right in section 8. This definitional approach to balancing conflicting rights meant the courts did not have to use section 5 of the Bill of Rights Act to balance the respective merits of sections 8 and 15.

The second approach, ad hoc balancing, is used by the Canadian Supreme Court. [26] Ad hoc balancing requires section 5 to be used to determine whether a decision to restrict someone's right under the Bill of Rights Act is reasonable. The value of other rights is considered in the process of determining whether the limit on the infringed right is reasonable. So, in the case of *Re J (An infant)*, the court would have considered whether a court order authorising the blood transfusion for the purpose of saving a child's life was a reasonable limit on the parents' right to manifest their religion. This approach would probably have achieved the same outcome, but would use a decision-making process that was more consistent with human rights principles. Ad hoc balancing ensures that rights continue to be defined broadly and that limits on rights are not arbitrarily imposed. As Andrew Butler suggests, the ad hoc balancing approach creates a more robust justificatory process to ensure that where the state limits a particular right, it adequately explains its justifications for doing so. [27]

**Case study based on decision of Canadian Supreme Court in Keegstra**

**Scenario:** The accused was charged under Canadian criminal law with wilfully promoting hatred against an identifiable group by communicating anti-semitic statements to his students. Mr Keegstra successfully appealed his conviction on the basis that the criminal offence was an unjustifiable breach of his right to freedom of expression.

**Issue:** How to resolve the right of Mr Keegstra to express his views while protecting the interests of members of the community not to be exposed to racial hatred.
**Canadian Charter problem:** The Canadian Charter protects both the right to freedom of expression and the right to be free from discrimination on the grounds of race. However, the Charter does not make it clear which right takes precedence where there are competing rights.

**Question posed to Canadian Supreme Court:** Does the right to freedom of expression extend to the public and wilful promotion of hatred against an identifiable group, or should the right be read down to exclude statements with content that promotes inequality?

The Court of Appeal in Alberta had held that the Canadian Charter's non-discrimination and equality provisions did not prevent Canadians from criticizing the values of equality and multiculturalism. In other words, the non-discrimination and equality provisions could not be used to limit the scope of the right to freedom of expression to the extent that the Canadian criminal law did.

**Answer:** Although the Supreme Court was split as to whether the criminal offence was a reasonable limit on the right to freedom of expression, the Court was unanimous in holding that the scope of the right to freedom of expression was not limited by the non-discrimination provisions of the Charter. The Court emphasised the neutral content of the right to freedom of expression. To read down the right to freedom of expression by reference to the non-discrimination provisions of the Charter would run contrary to the established principle that the right to freedom of expression applied no matter how offensive or disagreeable the content of the expression was. Dickson CJ stated that it was inappropriate to limit the scope of the right on the grounds that a particular right so required. The large and liberal interpretation given to freedom of expression suggests that the optimal approach is to balance the contextual values and factors in section 5 of the Bill of Rights Act. Dickson CJ considered that the use of this exercise was appropriate because section 5 guarantees and limits the rights by reference to principles fundamental in a free and democratic society. [28]

**SUMMARY**

When interpreting or applying human rights legislation remember:

1. Human rights legislation is generally given a broad, purposive interpretation.
2. Individual human rights should be read in a way that the rights are seen to strengthen and reinforce each other.
3. When seeking to limit the scope of a right, consider whether the limitation on the application of the right is reasonable through the global limitation provision, section 5.

**Interpreting Enactments and Justified Limitations - Sections 4, 5, and 6 of the Bill of Rights Act**

Sections 4, 5 and 6 of the Bill of Rights Act are your guide on interpreting and applying the Bill of Rights Act.

**Section 4: Status and Effect of the Bill of Rights Act**

The *White Paper* was written on the assumption that a Bill of Rights Act for New Zealand would have the status of supreme law. That is, the courts could strike down as invalid any New Zealand law that was inconsistent with the Bill of Rights.

*Can the Courts strike down legislation that is inconsistent with the Bill of Rights Act?*

The Bill of Rights Act does not have the status of supreme law, so it cannot be used to override other legislation. In fact section 4 of the Bill of Rights Act states that:

4. Other enactments not affected-

   No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-

   a. Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

   b. Decline to apply any provision of the enactment-by reason only that the provision is inconsistent with any provision of this Bill of Rights.

Section 4 instructs judges on how to resolve situations where they consider an enactment is inconsistent with the Bill of Rights Act. Section 4 requires the enactment to be applied despite the inconsistency.
However, the Court of Appeal in Moonen [29] has said that section 4 comes into play only if:

- the legislation cannot be given a meaning that is consistent with the Bill of Rights Act by virtue of section 6 of the Bill of Rights Act; and
- any limitation on the right cannot be demonstrably justified in terms of section 5.

**Section 6: Consistent Interpretation**

Section 6 of the Bill of Rights Act requires you to interpret any legislative provision consistently with the Bill of Rights Act wherever possible. In other words section 6 is designed to avoid a situation envisaged by section 4.

The Court of Appeal considered the application of section 6 in *R v Pora.* [30] In her judgment, Elias CJ discussed the importance and significance of section 6 and said: "[P]arliament must speak if it wishes to trench upon fundamental rights. By s6 the New Zealand Parliament has adopted a general principle of legality." [31] In other words, Parliament should be generally regarded as wishing to comply with the law.

In *Re Winnipeg School Division* [32] the Supreme Court of Canada considered whether the human rights legislation was impliedly repealed by subsequent legislation that permitted discrimination. In the course of delivering the judgment of the Court, McIntyre J emphasised that while human rights legislation may be amended or repealed by the Legislature, it cannot do so other than by way of a clear legislative pronouncement. McIntyre J held that:

...To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.

Therefore, it seems to be well settled that if Parliament wishes to override basic rights, it needs to do so by using clear and unambiguous language. [33]

**Secondary legislation**

The above judgments have implications for secondary legislation (e.g. regulations or rules). Statutes often include powers to make secondary legislation. The authority to make secondary legislation must be exercised consistently with the empowering statute, taking into account the Bill of
Rights Act. If the empowering provision does not expressly allow for the making of secondary legislation that is inconsistent with the Bill of Rights Act, then the secondary legislation will where possible, be read consistently with the Bill of Rights Act.

The courts have made it clear that secondary legislation that is inconsistent with the Bill of Rights Act can be struck down as *ultra vires* unless the regulation- or rule-making power expressly or necessarily authorises the inconsistency. [34] The ability of the courts to use section 6 to limit the application of section 4 is illustrated by the following case study.

*Case study* [35]

**Scenario:** An inmate at a corrections facility attended a disciplinary hearing before the Superintendent charged with an offence under the Penal Institutions Act. He appealed the Superintendent's decision to a Visiting Justice.

**Issue:** Section 45(1)(19) of the Penal Institutions Act provides that the Governor-General may make Regulations for "Ensuring the discipline of inmates, including (without limitation) regulating the laying of complaints relating to offences against discipline and prescribing the procedures for the hearing of such complaints."

The Penal Institution Regulations prescribe the procedures for the hearing of complaints against inmates in accordance with section 45(1)(19). Regulation 144 states: "An inmate whose case is referred by way of appeal to a Visiting Justice under section 35 of the Act may, at his or her own expense, contact his or her legal adviser for the purposes of assisting with the preparation of the appeal, but the legal adviser may not represent the inmate at the appeal."

**Bill of Rights problem:** The Court of Appeal held that the prohibition on legal representation at the appeal was inconsistent with the inmate's right to the observance of the principles of natural justice, so the regulations breached section 27(1) of the Bill of Rights Act. Section 45(1)(19) of the Penal Institutions Act did not explicitly authorise the making of regulations that were inconsistent with the Bill of Rights Act.

Regulation 144 could not be read consistently with the Bill of Rights Act. The Court did not go on to apply a section 5 (justified limitations) analysis because they held that section 27(1) was a flexible standard. That is, an
assessment of whether the principles of natural justice had been observed would depend on the context of the case before them.

**Question:** Does section 4 of the Bill of Rights Act mean that the Regulations remain valid?

The Court of Appeal heard arguments that the regulations remain valid unless they are invalid for reasons other than the Bill of Rights. It was submitted that striking down regulation 144 because of the section 27 guarantee of a right to the observance of the principles of natural justice would invalidate regulation 144 because of an inconsistency with the Bill of Rights Act. Section 4 prevented the Courts taking such action.

**Answer:** The Court held that section 4 was not a relevant factor in holding the regulation invalid. The Court considered the regulation to be invalid because the empowering provision in the Penal Institutions Act needed to be read in accordance with section 6 of the Bill of Rights. Section 45 of the Penal Institutions Act did not authorise the making of a regulation that was inconsistent with the Bill of Rights Act. The Court gave section 45 a meaning that was consistent with the rights and freedoms contained in the Bill of Rights Act.

**The exercise of discretion**

The implications of the judgments discussed above are significant for policymakers. Frequently, statutes confer discretions on decision-makers. When faced with a discretion as to a course of action, the person exercising the discretion needs to exercise that authority in a way that is consistent with the Bill of Rights Act.

The Canadian Supreme Court expresses it this way: [36]

Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred.

...As the Constitution is the supreme law of all Canada...it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless of course that power is expressly conferred or necessarily implied.

In *Police v Beggs* [37] the Full Bench of the High Court considered whether the Speaker of the House of Representatives had invoked his powers under
the Trespass Act consistently with the Bill of Rights Act. Section 3(1) of the Trespass Act 1980 states: "Every person commits an offence against this Act who trespasses on any place and, after being warned to leave that place by the occupier of that place, neglects or refuses to do so." The Court stated that section 3(1) of the Trespass Act could be read consistently with section 16 of the Bill of Rights Act (so section 4 was not relevant). Section 6 of the Bill of Rights Act means that a decision-maker exercising a discretion as to whether to issue a warning under the Trespass Act can exercise the discretion only when it is reasonably necessary for him or her to do so. This is because the act of warning limits rights and freedoms contained in the Bill of Rights Act.

Section 6 of the Bill of Rights Act does not prevent a decision-maker from exercising his or her discretion. Section 6 simply requires the decision-maker to take the Bill of Rights Act into account in the process of determining whether or not to exercise a discretion.

**SUMMARY**

If you are developing or amending legislation that intends to override the Bill of Rights Act, the legislation must do so clearly and expressly because:

1. Decision-makers are required to interpret legislation consistently with the Bill of Rights Act wherever possible.
2. When exercising a discretionary decision-making power, the person making the decision needs to exercise that authority - where possible - in a way that is consistent with the Bill of Rights Act.
3. Any regulation or rule made under the authority of a statute that does not purport to oust the Bill of Rights Act can be struck down by the courts as invalid if the regulation or rule is itself inconsistent with the Bill of Rights Act.
4. Section 4 of the Bill of Rights Act comes into play where -
   - the legislation cannot be given a meaning that is consistent with the Bill of Rights Act by virtue of section 6 of the Bill of Rights Act; and
   - any limitation on the right cannot be demonstrably justified in terms of section 5.

**Section 5: Justified Limitations**
If the policy you are working on limits one of the rights and freedoms in the Bill of Rights Act, it may still be consistent with the Bill of Rights Act if you can justify it in accordance with section 5.

Section 5 of the Bill of Rights Act states:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**What you need to know about section 5 of the Bill of Rights Act**

Put simply, the section 5 test means that once you have decided there is prima facie (on the face of it) infringement of a right, you must decide whether that limitation on that right can be "demonstrably justified in a free and democratic society". If it fails this test, then the legislative provision, policy, practice, or service is inconsistent with the relevant section of the Bill of Rights Act.

There are a number of matters you will need to take into consideration before continuing with a policy that limits a right, including the following:

- The onus on proving that the limitation on any particular right is reasonable lies with the agency or organisation imposing the limit.
- Whether a limit on a right is reasonable is going to depend on a number of factors including:
  - the significance of the objective of the proposal;
  - the interests addressed by the particular right;
  - the extent to which the proposal limits the rights;
  - the proposal's effectiveness in achieving its objectives.
- The objective in limiting the right must be more than a general goal of protection from harm common to legislation; it requires a specific purpose so pressing and substantial that it warrants the imposition of a limit.
- Economic considerations are unlikely, of themselves, to be considered sufficient justification for limiting a right.
- Any limitation on the right:
  - can be written or unwritten;
  - must have some basis in domestic, that is, New Zealand law;
  - must be adequately accessible;
must be expressed with **sufficient precision**.

There is some discussion as to whether all rights should be subject to a section 5 analysis or whether it is possible to limit rights on their face. This is because the language used in some of the rights appears to contain in-built limitations. For example, section 21 of the Bill of Rights Act refers to the right to be secure against unreasonable search and seizure. In such cases, although section 5 may still be a relevant factor to be considered, it may not play as prominent a role. Despite this we consider that the most prudent approach for a policy adviser is to continue to define the right broadly and then subject any limitation on the right to scrutiny in terms of section 5 of the Bill of Rights Act. Such an approach will ensure that any limitation placed on the right is subject to a robust justificatory process.

**Further discussion on the meaning of section 5**

**What does "demonstrably justified" mean?**

Where a legislative provision, policy, practice, or service appears to be inconsistent with a right, it is up to you or your agency to establish how that inconsistency is justified under section 5 of the Bill of Rights Act. [38] That means justifying your policy or proposed law with evidence such as research, empirical data, findings from consultation, reports, or the results of inquiries or reviews. As with any good policy development, it is important not to act on assumptions, but to provide a well-argued case - based on high-quality analysis and research - that clearly establishes why a particular course of action is necessary. You should avoid relying solely on comparable overseas developments to justify your proposals. The social/political and cultural context in those countries, which would go to demonstrating the justification in their jurisdictions, may be significantly different to our own.

**And "free and democratic society"?**

The courts have also provided us with some guidance on what the phrase "free and democratic society" means. For example, the Canadian Supreme Court in *R v Oakes*, [39] interpreting a similar provision in the Canadian Charter, said that some of the core principles and values of a free and democratic society include:

- respect for the inherent dignity of the human person;
- commitment to social justice and equality;
- accommodation of a wide range of beliefs;
• respect for cultural and group identity;
• faith in social and political institutions which enhance the participation of individuals and groups in society.

*When is something "prescribed by law"?*

Section 5 provides that limitations must be "prescribed by law". In short, they must be accessible and ascertainable for all. "Laws" in New Zealand can be found in, for example, legislation, regulations, codes of practice, and common law. However, "prescribed by law" does not mean just these specific sources. For something to be "prescribed by law" it needs to have the following four factors: [40]

1. The "law" can be written or unwritten.
2. It must have some basis in domestic, that is, New Zealand law.
3. It must be *adequately accessible*. In general, a person can only be expected to comply with a law if they can find out what the law actually is - what legal rules apply in a given situation. So you will need to think about where the policy, regulation, or law is to be published or publicised and just how available it will be to the public.
4. Be expressed with *sufficient precision*. A clear and well-defined law, policy, or practice will make it easier for a person to comply with and to foresee or to find out the consequences of their actions. It will also help officials to know exactly what they are supposed to do. So you will need to think about how detailed the law, policy, or practice should be.

In other words, identifying limits "prescribed by law" under section 5 of the Bill of Rights Act involves looking to the substance rather than the form of the legislation, policy, practice, or service in question. Where the government limits a right or freedom, it must do so on a clear and transparent basis.

*Economic considerations*

As a general rule, although it is reasonable to take into account economic issues when conducting a section 5 analysis, you should not generally rely on these factors as the sole justification for limiting a right. The New Zealand Court of Appeal has not yet specifically considered whether an economic argument is, of itself, sufficient at any stage in the section 5 justification process under the Bill of Rights Act. It has, however, stated that economic
concerns are one of the several factors to take into account. In Moonen (No 1) [41] the Court held that social, legal, moral, economic, administrative, ethical, and other considerations may all be relevant. The Canadian Supreme Court has said that economic concerns are not, by themselves, sufficient to justify a limitation on the rights and freedoms in the Canadian Charter of Rights. [42]

**Possible approaches to applying section 5 of the Bill of Rights Act**

In Moonen v Film & Literature Review Board (No 2) [43] the Court of Appeal stated that the steps in Moonen (No 1) were intended to be used as guides and not prescriptive requirements. Therefore, although there are a number of possible approaches to applying section 5 of the Bill of Rights Act, we consider that either of the following approaches will provide you with the analytical framework you need to apply section 5.

*A. The Moonen test*

In Moonen v Film & Literature Review Board (No 1) [44] the Court of Appeal developed a set of guidelines for assisting in determining whether any limitation imposed on a right or freedom affirmed by the Bill of Rights Act is "demonstrably justified" in terms of section 5 of the Act:

- first identify the objective which the legislature was endeavouring to achieve by the provision in question;
- assess the importance and significance of that objective;
- the way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective;
- the means used must also have a rational relationship with the objective;
- in achieving the objective there must be as little interference as possible with the right or freedom affected;
- the limitation involved must be justifiable in light of the objective.

The Ministry of Justice has distilled the inquiry under Moonen (No 1) into what is essentially a two-step process:

1. First, whether the infringing provision, policy, practice, or service in question serves an important and significant objective; and
2. Second, whether there is a rational and proportionate connection between that objective and the infringing provision, policy, practice, or service, or whether the objective may be achieved in another way which interferes less with the right or freedom affected. [45]

*How do I know if my policy or service delivery serves an important and significant objective?*

To meet the first part of the steps in *Moonen* you should be able to show that your infringing provision, policy, practice or service:

- achieves a clearly defined objective;
- from a common-sense standpoint - meets a pressing and substantial concern [46] rather than one that is more than trivial;
- addresses a specific (rather than generalised) area of public and social concern. [47]

To complete the first part of the section 5 analysis, you will need to be able to clearly and precisely articulate your policy objective. If your objective does not seem to be important or significant, you will need to think about whether there are other ways to achieve the objective without limiting the right.

If the goal/objective does appear to be important and significant, you can proceed to the next question of the inquiry to be made under section 5 of the Bill of Rights Act.

*When is something rationally and proportionately connected to the objective?*

There are two questions that are at the heart of this element of section 5:

1. Does the measure achieve its objective effectively?
2. Is there another means of reasonably achieving the objective without limiting the right or limiting it to a lesser extent? To put it in another way, is the measure so broad that it unreasonably interferes with the rights and interests of those it is not intended to affect?

*The Noort test*
In *Ministry of Transport v Noort* [48] the Court of Appeal stated that any inquiry as to whether an apparent limitation on a right can be justified requires consideration of all economic, administrative, and social implications. In the end it is a matter of weighing:

1. the significance in the particular case of the values underlying the Bill of Rights Act;
2. the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
3. the limits sought to be placed on the application of the Act provision in the particular case; and
4. the effectiveness of the intrusion in protecting the interests put forward to justify those limits.

Many of the points of analysis identified in the *Moonen* test will be brought to bear.

*A flexible standard*

These tests are not simply a mechanical or mathematical exercise. The balancing required by section 5 means that advisers and others working in the public sector must exercise their judgement in weighing the various elements of this test.

Although it was previously considered that any limit on a right should form the least possible interference with the particular right, this no longer appears to be the case. The Canadian courts now tend to favour the approach that the policy or practice interferes with the right "as little as reasonably possible". [49]

Section 5 is sufficiently flexible to accommodate different policy contexts. However, sufficient justificatory material must be put forward to satisfy each question in turn - in other words, it is very much a case of "[s]he who asserts must prove". The Canadian Supreme Court has stated: [50]

[While] the impugned law must be considered in its social and economic context, nothing in this jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified.
Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge.

In all cases where you are unsure, you should check with your legal advisers, the Ministry of Justice, or Crown Law Office.

**Section 6 as a check on limits**

Section 6 of the Bill of Rights Act may also have a bearing on the application of section 5 of the Bill of Rights Act, and the extent to which a limit on a right may be construed as reasonable.

Section 6 of the Bill of Rights Act provides that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning it to be preferred over any other meaning.

The courts have held that where a statutory provision places a limit on a right, the limitation itself should be read consistently with the Bill of Rights Act. The limitation should not be read so broadly that the right has no application at all.

This point may be best illustrated by the decision of the Court of Appeal in *Sullivan v Ministry of Fisheries*. [51] The question for the Court in this case was the extent to which a person detained and questioned under Fisheries legislation could rely on advice from his lawyer when answering questions he was required to answer. The legislation provided that a person was required to answer questions put to him or her even though the answers might incriminate him or her. On the face of it, this provision raised issues of consistency with section 23(4) of the Bill of Rights Act - the right to silence - but would have been considered a reasonable limit. The Court stated: [52]

There are few statutory pre-emptions of the right to silence affirmed by the Bill of Rights, and of the constraints on cross-examination of detainees. The Fisheries Act is one such exception. But its limitations on fundamental rights should not be construed expansively having regard to s 6 of the Bill of Rights.

...Just because the Fisheries Act gives power to question, with a concomitant implied power to detain for that purpose, and a duty to answer, it does not mean that a person questioned is to be denied the right to legal consultation
and advice; nor that the person interrogated is obliged to answer effusively rather than strictly correctly. Persons interviewed cannot be required to promote the questioner's obvious or concealed motives, nor to facilitate their own conviction, beyond compliance with a duty to give honest answers which meet the question.

**SUMMARY**

If the policy or practice being developed appears to infringe the Bill of Rights Act, you will need to be able to justify the limitation. In the process of justifying the limitation you will need to consider:

- the significance of the objective of the proposal;
- the interests that the particular right is addressing;
- the need to promote a policy that limits the right (are there other ways of achieving the objective?);
- the extent to which the proposal limits the rights;
- the effectiveness of the measure in achieving its objectives.

**Other considerations**

- The policy that you are developing should have a specific purpose that is sufficiently pressing and substantial to warrant the imposition of a limit.
- Economic considerations are unlikely to be considered sufficient justification for limiting a right in the absence of other factors.

We have developed a number of resources to help you apply section 5 and to understand the interaction between sections 4, 5, and 6 of the Bill of Rights Act. A flow diagram showing the process that you should undertake in applying section 5 appears overleaf. There is a checklist in the back of these guidelines setting out the sorts of questions you should ask in assessing whether you can demonstrably justify a particular policy or practice that appears to be inconsistent with the rights and freedoms of the Bill of Rights Act. A Fact Sheet on section 5 also appears at the back of these guidelines.

**Section 5 flow diagram - applying section 5**
SECTION 5 of the BILL OF RIGHTS ACT

Can the policy objective be clearly and precisely articulated?

Yes

What is the objective behind this policy or provision, and why is it important?
How does the objective contribute to the overall goals and objectives of the policy or Bill?

No

Is the objective sufficiently important to justify infringing or limiting a right?

Yes

Evidence may include research findings, reviews of current legislation, consultation findings, statistics, and caselaw.

No

Is the policy or provision able to be justified for reasons other than simply economic considerations?

Yes

Consider whether the measure is likely to achieve the objective, and whether the measure limits the right only to the extent necessary to achieve the objective.

No

Do you have evidence to demonstrate the significance and importance of this objective?

Yes

No

Is the limitation on the right rationally and proportionately connected to the objective?

Yes

The policy or provision does not appear to be a reasonable limit in terms of section 5 of the Bill of Rights Act.

No

Are there other options available that would achieve the objective without limiting the right (or limit the right to a lesser extent)?
SECTIONS 4, 5, and 6 BILL OF RIGHTS ACT
Policy Proposals

Policy proposal raises potential Bill of Rights Act issue

Yes

Does the policy proposal involve the exercise of a discretionary power?

No

Can the discretionary power be exercised in a manner that is consistent with the Bill of Rights Act (Section 6 BORA)

Yes

Can the policy proposal be read consistently with the Bill of Rights Act? (Section 6 BORA)

The policy proposal is consistent with the Bill of Rights Act.
NOTE: the implementation of the proposal would need to be carried out consistently with the Bill of Rights Act.

No

Can the policy proposal be justified as a reasonable limit on a right? (Section 5 BORA)

Yes

No

If the policy proposal cannot be justified from you will need to consider whether:
- you can modify the policy to be consistent with the right
- the policy is necessary or can be abandoned
- proceed with the policy proposal in its existing form, noting that:
  - there is likely to be an adverse comment in the Cabinet paper
  - any legislation resulting from the proposal is likely to result in a section 7 report
  - the enactment of that legislation might result in the Courts issuing a declaration of inconsistency or declaring the legislation (if in the form of Regulations or Rules) beyond the power of the parent legislation.
Footnotes:

23. From this point the Canadian Charter of Rights and Freedoms will be referred to as "the Charter".
27. McLachlin J in her dissenting judgment suggests a number of persuasive reasons why it was inappropriate to use arguments based on the non-discrimination provisions of the Charter. One of these reasons was that using the non-discrimination provisions of the Charter to read down the right to freedom of expression would involve choosing between competing rights in an abstract sense. See pages 833-835 of the judgment.
30. R v Pora [2001] 2 NZLR 37; (2000) 18 CRNZ 270 (CA), at paragraphs 52-53 of the judgment of Elias J. See also para 121 of the judgment of Thomas J in the same case.
32. See also Te Waipoumanu Trust: Ngati Apa Ki Waipoumanu Trust v R [2000] 2 NZLR 659.
34. This case study is based on the decision of the Court of Appeal in Drew v Attorney-General [2002] 1 NZLR 58.
35. Slaight Communications v Davidson 9 DLR (4th) 416 (SCC).
39. As set out in the European Court of Human Rights decisions Malone v United Kingdom 2 August 1984, Series A, No 82, 7 EHRR 17 at paragraph 66; The Sunday Times v United Kingdom 26 April 1979, Series A, No 30, 2 EHRR 245 at paragraphs 46, 47, and 49. See also the following cases which uphold the ECHR approach: Canadian Supreme Court decisions of R v Nova Scotia Pharmaceutical Society.
[1992] 2 SCR 606; R v Thomsen [1988] 1 SCR 640; R v Therens [1985] 1 SCR 613; Slaight Communications Inc v Davidson [1989] 1 SCR 1038 (on "prescribed by law" in relation to statutory conferrals of discretion); New Zealand Court of Appeal Ministry of Transport v Noort [1992] 3 NZLR 260 (which held that the operational requirements of the law are covered by the term "prescribed by law").

41. Moonen v Film & Literature Review Board (No 1) [2000] 2 NZLR 9, at 17. In Ministry of Transport v Noort [1992] 3 NZLR 260, at 283, Richardson J (as he then was) of the Court of Appeal noted that "section 5 will properly involve consideration of all economic, administrative and social implications".


43. [2002] 2 NZLR 754, 760.


45. Note that the question as to whether an objective may be achieved in a way that interferes less with the right does not mean that the limit has to form the "least" interference.


50. RJR-MacDonald Ltd v Attorney General of Canada (1995) 127 DLR (4th) 1 per McLachlin J.

51. [2002] 3 NZLR 721 (CA),

52. Sullivan v Ministry of Fisheries [2002] 3 NZLR 721 (CA) at paras 58 and 61.
Part III: Rights and freedoms affirmed by the Bill of Rights Act -
Introduction to Sections 8-11: Life and Security of the Person

Sections 8 to 11 of the Bill of Rights Act concern the fundamental rights and freedoms essential to an individual's personal well-being.

- Section 8 concerns a person's right not to be deprived of life, except on such grounds established by law and consistent with the principles of fundamental justice.
- Section 9 related to a person's right not to be subjected to torture, or cruel, degrading or disproportionately severe treatment or punishment.
- Section 10 is about a person's right to be free from medical or scientific experimentation without that person's consent.
- Section 11 concerns a person's right to refuse to undergo medical treatment.

These rights are complementary and interdependent. The interaction of these fundamental rights with other rights in the Bill of Rights Act is also important. For example, considerations under section 8 and 9 may be relevant to procedures under section 21-25 regarding custody arrangements for those involved in the criminal justice process. The interplay between rights guaranteed under sections 10 and 11 and section 15 and 20 might need consideration in some cases.

Section 8 Right not to be deprived of life

Section 8 of the Bill of Rights Act is as follows:

Right not to be deprived of life
No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

Policy triggers: do I need to consider section 8?
Are you developing policies or practices that:

- amend the law on suicide, euthanasia, or abortion in any respect?
- create or amend policy or practices permitting law enforcement officers to use reasonable force including the use of weapons in the course of their duties?
- are likely to amend the laws in relation to the defences of self defence, provocation, or insanity?
- target the delivery of medical resources for acute patients?
- impact on the way in which essential medical or welfare services are provided to vulnerable groups within the community?
- establish procedures for the management of individuals held in state care?
- may lead to the extradition, removal or expulsion of individuals to overseas countries?

If you answered 'yes' to any of these questions then you will need to consider if your policy is consistent with section 8 of the Bill of Rights Act.

**What every policy analyst needs to know about section 8**

- A decision to deprive someone of life cannot be made arbitrarily.
- The right may apply in circumstances where the failure to provide economic or social assistance is likely to lead to loss of life.
- The state has an obligation to protect life of a person in their care because the person is in a vulnerable position where the state knows or ought to know that there is a risk to that person's life.
- "No one" is likely to be interpreted as meaning natural persons
  - The right not to be deprived of life in New Zealand is unlikely to extend to corporations;
  - New Zealand courts have not yet considered the issue of whether the right not to be deprived of life extends to a foetus.
- Any procedure allowing for the deprivation of life must be established by law.
- Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual.
• The "principles of fundamental justice" are likely to be something more than the "principles of natural justice" under section 27(1), because of
  
  i. the deliberate decision by Parliament to use the phrase fundamental justice ahead of other options;
  ii. the nature and purpose of section 8;
  iii. the context within which section 8 appears, that is, sections 8 -11 are concerned with promoting the dignity and worth of the person.

• The principles underpinning fundamental justice must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result.
• The criteria governing circumstances under which a person is able to be deprived of life should therefore be transparent and robust and capable of being articulated with certainty.
• The principles of fundamental justice together with the obligation on the state to protect a person's life may require the state to take steps to protect an individual whose life is at risk from another's criminal acts, where authorities knew or ought to have known at the time of a real and immediate risk to the person's life.
• The state may also be under an obligation to actively investigate the circumstances leading to a loss of life in circumstances where it was informed of the possibility of a risk but was unaware of the immediacy of the risk to a person's life.
• Decisions not to proceed with medical treatment should be built into policy to ensure that:
  o decisions have been made following a deliberative process, and
  o that process is in line with well-settled medical procedures, and
  o decisions have been made in a manner that is consistent with objectively acceptable standards in the best interests of the patient, and
  o such decisions are not made arbitrarily.
• Section 8, in the context of New Zealand's international obligations, means New Zealand has an obligation to ensure that it is not carrying
out policies involving the extradition, removal or expulsion of an individual in circumstances where that action may lead to the person being sentenced to death or executed in another country without a fair and public hearing or where the penalty is not proportionate to the offence.

**Measures to achieve compliance**

When making policy decisions regarding medical resources and treatment, ensure that:

- The criteria that is to be used for determining whether individual patients are able to access certain treatment is based on sound clinical reasons.
- Clinicians have access to clear procedures that establish the means by which a decision to terminate a life may be implemented.
- There are clear procedural safeguards to ensure that decisions are made at an appropriate level and that there is sufficient oversight of those decisions.
- There are safeguards to ensure that individuals and families affected by the decision are adequately informed and consulted over the decision.

If you are developing policy about law enforcement, provide:

- The appropriate level of training required to ensure only adequately trained and qualified law enforcement officers are authorised to use force.
- The type of training that is necessary to ensure that law enforcement officers are aware of a number of techniques that minimise the risk to another individual.
- Clear procedural safeguards that make it clear to law enforcement officers what steps they are required to take prior to using weapons.

If you are developing policies or practices relating to the management of persons in the care of the state, establish:

- Best practice guidelines that promote the safety of individuals in the care of state agencies.
• Procedures that enable those charged with the care of individuals to be able to respond to concerns about the safety of individuals promptly
• Clear procedural safeguards to ensure that decisions are made about the safety of individuals at an appropriate level and that there is sufficient oversight of those decisions
• Regular reviews of these procedures.

If you are developing policies or practices relating to the extradition, removal or expulsion of individuals, establish:

• Procedures and resources that enable those charged with the extradition or removal of individuals to be able to independently verify whether the safety of the individual's is or is not in jeopardy by reason of their expulsion
• Guidelines that will provide the individual with sufficient opportunity to alert authorities to the nature of the risks that he or she may face on their return to the country of origin
• Guidelines that will alert individuals at risk of expulsion to their right to seek legal assistance.

Related rights and freedoms
When considering whether your policy proposal or practice might give rise to an issue under section 8, you should also consider whether the policy or practice places restrictions on sections 9-11 of the Bill of Rights Act and:

• The right not to be arbitrarily arrested or detained (section 22)
• The right, when deprived of liberty, to be treated with humanity (section 23(4))

Further discussion of the meaning of section 8

General considerations
The first of the civil and political rights in Part II of the Bill of Rights Act is the right not to be deprived of life in section 8. The right not to be deprived of life could be described as the fundamental right of human existence. [53] The Court of Appeal in referring to the need to give full effect to the fundamental rights affirmed in the Bill of Rights, noted:
when questions about the right to life are in issue the consideration of the lawfulness of official action must call for the most anxious scrutiny". [54]

In Lawson, Williams J observed that it would be for the person claiming that their rights under section 8 had been breached to show that the acts or omissions of the state actor deprived the person of his or her life. [55] In other words, the person would need to be able to demonstrate a clear and unbroken link between the act or omission of the state and the "loss of life". Williams J went on to add that:

...Whilst this Court should have regard to international human rights norms in interpreting and applying the New Zealand Bill of Rights Act 1990, and whilst a liberal interpretative approach is warranted, the Court is ultimately constrained by the wording of s 8 itself. It requires an unduly strained interpretation of s 8 itself to conclude that the right not to be deprived of life encompasses a right not to be charged market rent for accommodation without regard to affordability and impact on the tenant's living standards. [56]

The decision in Lawson indicates that for section 8 to apply there would need to be a demonstrated level of causality between the omission to provide services and the death of a person. Although the courts in New Zealand have still to fully consider this issue, section 8 may still apply in the context of general economic and social considerations, where that linkage can be established. For example, if a person dies because the state fails to provide a person with the standard of health care they require then it may be possible to establish that a person has been deprived of life for the purposes of section 8.

**Does section 8 confer a right to life?**

Although the objective of section 8 is directed at preventing the state from taking life rather than requiring the state to protect or preserve life, there may be occasions where the state is under an obligation to protect life. Although the courts here have not considered this issue, the courts in some overseas jurisdictions provide an indication of circumstances in which an obligation to prevent deprivation of life may arise.

The United Nations Human Rights Committee has taken the view that the right to life (as provided for by article 6 of the ICCPR) should not be interpreted in an unduly restrictive manner and that member states should take the requisite steps to reduce infant mortality and increase life expectancy. [57] It may therefore be prudent to consider whether the
rationalisation of health and social services will negatively impact on the life expectancy of vulnerable groups within society.

The European Court of Human Rights has held that where a person is under the care of the state, the state has an obligation to protect that person's life because the person is in a vulnerable position. Therefore, according to the European Court, if the authorities know of, or ought to know of the existence of a real and immediate risk to that person's life, they must take steps to alleviate that risk.

Article 6 of the ICCPR and Article 2 of the European Convention appear broader than section 8 of the Bill of Rights Act in that it recognises the right to life whereas section 8 refers to the right not to be deprived of life. Although the ICCPR and European Convention impose a requirement on the state to take certain steps to protect life, it is not clear whether the difference in language will lead to different conclusions. The courts in New Zealand have not been asked to decide whether section 8 requires the state to take positive steps under similar circumstances.

Despite the uncertainty about the scope of the obligation under section 8, the right would not appear to confer the diametrically opposite right; namely a right to die. In an assisted suicide/euthanasia situation, section 8 would come into play if the law/policy provided for termination in circumstances that amounted to 'deprivation'. The fact that section 8 does not confer a 'right to die' is relevant in that state-authorised termination procedures would arguably need to be approached with greater caution than if a 'right to die' was guaranteed.

**Just who is "no one"?**

New Zealand courts have not turned their minds as to who is or who is not covered by the term "no one" in section 8. However, overseas case law suggests that the scope of section 8 is likely to be restricted to natural persons.

The Canadian Supreme Court in *Irwin Toy Ltd v Quebec (Attorney-General)* held that to extend the right to life in section 8 of the Charter to cover corporations would "stretch the meaning of the right to life beyond recognition." The Court in this case went on to say that

...read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the
phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life ...and include only human beings. [63]

New Zealand courts have not considered the issue of whether the right to life in New Zealand will extend to a foetus. The courts in the United Kingdom [64], United States [65] and Canada have held that the constitutional right to life only extends to human beings. The position in Europe is less clear. The European Commission of Human Rights has avoided deciding the issue of whether the right to life extends to a foetus or whether there are implied limitations on the right of life of the foetus. [66]

**What are the principles of fundamental justice?**

The meaning of the phrase "principles of fundamental justice" has not been considered directly by the courts in New Zealand. The phrase involves a conception of substantive, as opposed to procedural justice. Accordingly, it would seem likely that the courts will take into consideration a number of factors such as:

- the deliberate decision by Parliament to use the phrase fundamental justice ahead of other options, such as "natural justice" (which has a more procedural focus, see section 27)
- the nature and purpose of section 8 to prevent the arbitrary taking of life
- the context within which section 8 appears; that is sections 8 -11 are concerned with promoting the dignity and worth of the person.

Dickinson CJ in the Canadian Supreme Court [67] considered that the scope of fundamental justice must necessarily be broader than natural justice on the basis that:

For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals will be deprived of these most basic rights. This latter result is to be avoided given that ...the deprivation of [life] "has the most severe consequences upon an individual" (*R v Cadeddu* (1982) 40 OR (2d) 128 (HC) at p 139).
[To interpret fundamental justice as being synonymous with natural justice] would strip the protected interests of much, if not most, of their content and leave the "right to life...of the person" in a sorely emaciated state. [68]

According to Dickinson CJ the principles of fundamental justice are to be found:

in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. [69]

This would appear to mean that the principles of fundamental justice must be interpreted within the specific context within which the section is invoked. [70] It is therefore a flexible concept.

The Canadian Supreme Court subsequently went on to add that the principles of fundamental justice are inextricably bound to society's expectation of justice. [71] The principles underpinning fundamental justice must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also be legal principles. To determine the principles of fundamental justice that are central to a particular situation, it is helpful to review the common law and the legislative history of the activity in question and, in particular, the motivation behind the practice itself and the principles which underlie it. It is also appropriate to consider the state interest. Fundamental justice requires that a fair balance be struck between the interests of the state and those of the individual. [72]

The standards allowing for the deprivation of life should therefore be transparent and robust and capable of being articulated with certainty.

Preventive measures

The principles of fundamental justice together with the obligation on the state to protect a person's life may require the state to take steps to protect an individual who is being detained or being cared for by the state, particularly where that person's life is at risk from criminal acts of another individual. Such an obligation is likely to exist where authorities know or ought to know of the existence of a real and immediate risk to the life of that individual and fail to take steps to prevent that loss of life. [73]

The requirements of fundamental justice would also appear to require that the state take active steps to investigate the circumstances leading to the loss of
life where it did not know, or could not have been expected to know of the existence of the risk to life. [74] The requirement to investigate the cause of death is directed at preventing similar acts occurring again.

**Terminally ill patients**

The New Zealand case law reflects a contextual approach when considering the scope of section 8 in situations where medical intervention is needed to prolong the life of terminally ill patients. Although the term "fundamental justice" is not expressly discussed, it is clear from the judgment in *Auckland Healthcare Services Ltd v L* as to what type of factors the courts may take into account. In this case the Court held:

In all but the most exceptional case, the Court is required to take all necessary steps to preserve human life. An exceptional case does not mean a decision on whether to end life, but whether to prolong it by giving or maintaining treatment, *without which death would ensue from natural causes*. The decision whether to withdraw treatment must be taken in the *best interests of the patient* having regard to *established medical practice*. The *continued and futile suffering* of the patient will be a relevant factor. If the case is an exceptional one and withdrawal of treatment is appropriate, there is no breach of the Bill of Rights. [75]

Salmon J was more succinct in his reasoning in *Shortland v Northland Health Ltd*:

The decision in this case made as it was in good faith and in accordance with the doctor's best clinical judgment, was not a decision to deprive of life, but rather, one to let life take its natural course. [76]

From these cases, some key elements regarding decisions not to proceed with medical treatment that should be built into policy are to ensure that:

- decisions have been made following a deliberative process;
- that process is in line with well-settled medical procedures;
- decisions have been made in a manner that is consistent with objectively acceptable standards in the best interests of the patient; and
- such decisions are not made arbitrarily.

**Refugees/Extradition and Expulsion**
The right in section 8 not to be deprived of life also needs to be considered in the context of extradition hearings and attempts to remove persons seeking to claim refugee status under the UN Convention on Refugees. In certain circumstances the effect of extradition or removal may be to return the person to a country that may carry out a death sentence. Although the New Zealand government is not actually depriving the person of life, the effect of the removal or extradition is the same. Consequently, New Zealand has an obligation to ensure that it is not carrying out policies that may lead to the violation of an individual's rights in another country. [77] Section 8 does not prevent the extradition or removal of persons to countries that carry out the death penalty in circumstances where the death penalty is imposed following a fair and public hearing and where the penalty is proportionate to the offence. [78]

**Further considerations**

The significance of the right not to be deprived of life in section 8 is given further weight by the additional requirement that any procedure allowing for the deprivation of life is required to be established by law. [79]

The courts have also noted that, where there is scope for a potential conflict of rights such as where the interests of the parents may differ from the clinicians regarding a child's health, those rights are to be defined in such a way that the conflicts are reconciled and the rights made compatible. Accordingly, the parental right to freedom of religion in section 15 cannot extend to imperil the life or health of a child. [80] This is an example of where the scope of one right may be read down because of the importance attached to another right. See earlier discussion about 'competing rights' and the role of section 5.

**Key cases**

History of the Section

The White Paper

The provision in the White Paper [81] was worded slightly differently from the section that finally appeared in the Bill of Rights Act. The article as it was originally worded read:

No one shall be deprived of life except on such grounds, and, where applicable, in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice.

Notably the words "and, where applicable, in accordance with such procedures" were gone by the time of the introductory reading of the Bill in October 1989 (a search of Hansard and the Select Committee Reports from the time do not reveal why).

Section 8 origins in international treaties and overseas legislation

Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) provides:

Every human being has the inherent right to life. This shall be protected by law. No-one shall be arbitrarily deprived of his life.

Article 3 of the Universal Declaration of Human Rights (UDHR) states that:

Everyone has the right to life, liberty and security of person.

Article 2(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) provides:

Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Section 7 of the Canadian Charter of Rights and Freedoms provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.
Section 9 Torture, or cruel, degrading, or disproportionately severe treatment

Section 9 of the Bill of Rights Act is as follows:

**Right not to be subjected to torture or cruel treatment**
Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

**Policy triggers: do I need to consider section 9?**

- Are you developing policy that proposes new offences and penalties or increasing the size and/or range of penalties for offences?
- Are you developing policy or practices that affect the conditions under which individuals may be detained?
- Does your policy authorise searches of persons?

If you answered 'yes' to any of these questions then you should read the information below about section 9 of the Bill of Rights Act.

**What every policy analyst needs to know about section 9**

The following key factors can be highlighted about section 9:

- Section 9 is directed at two types of actions of the state: those that are inherently barbaric and those where the state is responding to particular conduct or activities in a grossly disproportionate manner.
- Section 9 is directed at treatment or punishment that is incompatible with the dignity and worth of the human person.
- Torture involves the deliberate infliction of physical and/or mental suffering and is an aggravated form of cruel or disproportionately severe or degrading treatment or punishment.
- "Torture" can include not only acts that cause physical pain but also acts that cause mental suffering.
- Where the state acts in a disciplinary or penal context, almost any act designed to have a detrimental effect on the life, liberty, and security interests of a person may be considered "treatment or punishment" for the purposes of section 9. For example, in New Zealand "treatment" has been held to include:
• the forfeiture of property under the Proceeds of Crime Act 1991;
• a strip search;
• the wide-spread distribution of a photograph for publication of a person suspected of having committed a crime.

- In order for the treatment or punishment to be "cruel" or "disproportionately severe", the courts have consistently held that the punishment or treatment must be excessive or grossly disproportionate to what is considered appropriate in the circumstances.
- For the purposes of section 9, a form of punishment is cruel, disproportionately severe if the treatment or punishment exceeds society's expectation of what is appropriate in a particular circumstances, having regard to
  o the nature of the act;
  o the context in which it is delivered; and
  o the manner of its execution.

- A treatment or punishment may be considered "degrading" where it humiliates or debases an individual and shows a lack of respect for, or diminishing, his or her human dignity.
- An assessment of whether a form of punishment or treatment is degrading or not will involve consideration of:
  o the impact it has on the affected individual;
  o the nature of the act;
  o the context in which it is delivered; and
  o the manner of its execution.

Measures to achieve compliance

When considering the appropriate offence and level of penalty:

- Consult the Legislation Advisory Committee Guidelines and research the statute book to consider whether new offences are necessary and whether the level of penalty is appropriate.
- Consider whether the offences and the penalty levels associated with those offences are consistent with each other.
- Tailor the penalty level to the type of conduct you are seeking to prohibit.
When considering other activities:

- Limit the range of persons who can exercise coercive powers to those classes of individuals who are shown to possess the required skills, training and experience.
- Develop practice guidelines to ensure that law enforcement officers are familiar with basic procedural requirements.
- Consider providing guidelines that provide for the needs and individual circumstances of persons who come under the control of the legislation, so where practicable and to the extent possible, individuals are not more seriously affected or disadvantaged by a policy.

The United States Supreme Court has developed guidelines that may assist you in determining whether a proposed punishment or treatment is likely to be grossly disproportionate or manifestly excessive. You should consider if the punishment or treatment:

1. makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering;
2. is grossly out of proportion to the nature of the conduct;
3. is inconsistent with generally recognised and applied principles for addressing the conduct;
4. is of such a character or duration as to outrage the public conscience;
5. goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of the treatment and the adequacy of possible alternatives; or
6. is arbitrarily imposed in the sense that it is not applied in a rational basis in accordance with ascertained or ascertainable standards.

**Related rights and freedoms**

When considering whether your policy proposal or practice might give rise to an issue under section 9, you should also consider whether the policy or practice places restrictions on the following rights and freedoms:

- the right not to be subject to medical or scientific experimentation without consent (section 10);
- the right to refuse to undergo medical treatment (section 11);
• the right to be secure against unreasonable search and seizure (section 21);
• the right not to be arbitrarily arrested or detained (section 22);
• the right, when deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the person (section 23(4));
• minimum standards of criminal procedure (section 25).

Further discussion on the meaning of section 9

The White Paper explains that the objective of section 9 is directed at treatment or punishment that is incompatible with the dignity and worth of the human person. [83] This principle is reflected in earlier caselaw from the United States where the Supreme Court in *Trop v. Dulles* [84] held that that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." [85]

The Court went on to say that a punishment must be examined "in light of the basic prohibition against inhuman treatment," and the Amendment was intended to preserve the "basic concept... [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilised standards." [86]

A question of degree

The modifying words in section 9 ("cruel, degrading, or disproportionately severe") makes it clear that all these terms will involve questions of degree, but so too torture. The European Court of Human Rights in *Ireland v UK* [87] said:

...ill-treatment must attain a minimum level of severity if it is to fall within the scope of [the right]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. [88]

Section 9 is directed at two actions of the state - those that are inherently barbaric, and those where the state is responding to particular conduct or activity in a grossly disproportionate manner.

What is torture?
The courts in New Zealand have not addressed the meaning of torture. However, there are a number of judicial and legal statements on the term. Torture has been described to be the deliberate infliction of physical or mental suffering and differs from the merely cruel and severe in its intensity.

Torture has been defined to mean: ...

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

On a similar note, in the Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment it was noted that the prohibition of torture relates not only to acts that cause physical pain but also to acts that cause mental suffering of the victim or a third person, such as intimidation and other forms of threats.

Torture may be regarded as an extension of treatment or punishment that would otherwise be cruel, degrading or disproportionately severe in a particular context. At the same time not all "cruel, degrading, or disproportionately severe" treatment will be "torture".

**What is 'punishment'?**

Again, the courts in New Zealand have not addressed the meaning of this term in the context of section 9. However, we can assume from other decisions that the term "punishment" is likely to be limited to situations where there is a judicially imposed sentence in order to distinguish it from "treatment". The Canadians have construed punishment to mean "the imposition of a penalty", and a penalty is, in a broad sense, a "disadvantage of some kind imposed as a consequence of a misbehaviour which ... may include a loss of reward." [94]

**What is 'treatment', then?**
The caselaw in New Zealand to date focuses on the threshold of proportionality (etc). This emphasis indicates that the courts will accept that most conduct will be treatment for the purposes of section 9. There is nothing to suggest that it is limited to judicially imposed punishments. The court in *Bracey v Hawkins* (No 2) [95] accepted the dictionary definition of treatment and held that treatment was "conduct, behaviour; action or behaviour towards a person". However, it is unlikely that section 9 would apply to any form of "conduct, behaviour...". As section 9 is primarily concerned with matters associated with the life, liberty and security of the individual it is likely that the reach of the meaning of the word treatment will be limited to these areas. It is therefore likely that almost anything can be treatment for the purposes of section 9 where the state has actively interacted with an individual in a disciplinary context or exercised a form of control over the individual. [96]

"Treatment" has been held in New Zealand to include:

- the forfeiture of property under the Proceeds of Crime Act [97];
- a strip search [98];
- the wide-spread distribution of a photograph for publication of a person suspected of having committed a crime [99].

*What is 'cruel' or 'disproportionately severe' treatment or punishment?*

In order for the treatment or punishment to be cruel or disproportionately severe, the courts in New Zealand and overseas have consistently held that the punishment or treatment must be excessive; [100] or so excessive as to outrage standards of decency. [101]

The courts have indicated that a particular form of treatment or punishment may be excessive for reasons other than the severity of the treatment or punishment. For example, the imprisonment (as opposed to detention in a medical facility) of an offender with a mental disability for sexual offences may be excessive if imprisonment posed serious risks to his or her safety or health. [102] Consideration will need to be given to the nature of the treatment or punishment and the context within which it is applied. A "combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality" might be considered excessive in certain cases. [103] The Supreme Court in the United States has recently said that in looking to see what is excessive, the courts "must draw
its meaning from the evolving standards of decency that mark the progress of a maturing society." [104]

**What is 'degrading' treatment or punishment?**

The notion that treatment or punishment should not be degrading is concerned with the effect that the treatment or punishment is likely to have on an individual. On "degrading" the European Court of Human Rights has held: [105]

Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking the individual's moral and physical resistance, it may be characterised as degrading.

Even though all forms of treatment or punishment are likely to have an element of degradation [106] it is clear that the level of degradation must exceed society's expectations of what is appropriate in a particular context. For example, the Commissioner for Children has found that the action of high school teachers in strip searching students was a degrading form of treatment for the purposes of section 9. [107] The New Zealand courts have not specifically addressed this issue.

The European Court has provided more assistance when it held that, when considering whether a form of treatment or punishment is degrading, consideration will be given to a number of factors including the nature of the act, the context within which it is delivered, the manner of its execution, and the impact it has on the victim. [108]

**Key cases**


**History of the section**

*The White Paper*
The wording of the article in the White Paper is unchanged from that which appears in section 9.

Section 9 origins in international treaties and overseas legislation

ICCPR article 7 provides that:

No one shall be subjected to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 5 of the Universal Declaration of Human Rights (UDHR) provides that:

No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Canadian Charter section 12 provides:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Article 3 of the European Convention on Human Rights provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The Eighth Amendment to the Constitution of the United States provides:

Excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

Section 10 No medical or scientific experimentation

Section 10 of the Bill of Rights Act is as follows:

Right not to be subjected to medical or scientific experimentation
Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

Policy triggers: do I need to consider section 10?
You may need to consider whether there are issues in terms of section 10, if you are developing policies or regulations in the following areas:

- The regulation of medical practices that involve the use of alternative therapeutic practices.
- Policies that seek to regulate the conduct of medical research.
- Policies or practices that seek to allow for the approval of forms of medical experimentation that will involve the trialing of new techniques on people.

**What every policy analyst needs to know about section 10**

The following key facts can be drawn out of the following discussion on section 10:

- Medical and scientific experimentation is to be distinguished from standard forms of medical treatment dealt with under section 11.
- A trial or experimentation concerns a medical intervention that aims to lead to a new standard of treatment, whereas treatment is any medical measure that is commonly used by physicians and specialists in treating the particular illness.
- The Protection of Personal and Property Rights Act 1988, section 18, provides that no Court can empower a welfare guardian to, and no welfare guardian can, consent to a person's taking part in any medical experiment other than for the purpose of saving that person's life or of preventing serious damage to that person's health.
- A person's participation in medical or scientific experimentation should be governed by the doctrine of informed consent and the Code of Health and Disability Services Consumers' Rights, which requires that consent be:
  1. Voluntary
  2. Specific
  3. In some cases in writing
  4. Competent
  5. Informed.
- In order to give informed consent, the patient should receive full information about the nature of the procedure including:
  - an explanation of his or her condition;
• an explanation of the options available, including risks, side effects, benefits, and costs;
• advice of the estimated time within which services will be provided;
• notification of any proposed participation in teaching or research;
• any other information required by legal, professional, ethical, and other relevant standards;
• results of tests; and
• results of procedures.

• Informed consent should be viewed as a process, rather than a one-off event, with the essential elements of that process being:
  • effective communication: In a form, language and manner that enables the consumer to understand the information provided to them; In an environment that enables both consumer and provider to communicate openly, honestly and effectively; And, where necessary and reasonably practicable, including the right to an interpreter.
  • full information: To give all relevant information to the consumer including, for example, honest and accurate answers to questions about services and the receipt of, on request, a written summary of the information provided.
  • freely given, competent consent.

• Any intrusion into this right would require explicit statutory authorisation, which would be interpreted very strictly and wherever possible consistently with the Bill of Rights Act.

Measures to achieve compliance

The issue of consent will be crucial when exploring ways in which you can ensure that your policy or practice is consistent with section 10. In order to achieve compliance, you should refer to international and domestic guidelines on scientific and medical experimentation and develop the policy or practice consistently with these standards. You should also ensure that if any policy or practice requires individuals to participate in a medical procedure, that this requirement be expressed in legislation.
There are also international standards governing the conditions under which medical research is conducted. The Revised Helsinki Declaration on Biomedical Experimentation has become universally accepted as providing a standard for the conduct of such experiments. [109]

**Related rights and freedoms**

Section 10 recognises that the protection of bodily integrity and privacy are amongst the most fundamental human rights and values. [110] When considering whether your policy or practice gives rise to issues under section 10, you should also consider whether the following rights apply:

- the right not to be deprived of life (section 8);
- the right not to be subject to cruel, degrading or disproportionately severe treatment (section 9);
- the right to refuse to undergo medical treatment (section 11);
- the right, when deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the person (section 23);
- the right to the observance of the principles of natural justice (section 27(1)).

**Further discussion on the meaning of section 10**

**Treatment versus experimentation**

Erwin Deutsch, a specialist in medico-legal matters, argues that:

Experimentation has to be distinguished from treatment. Treatment is never to be regarded as experimental solely because doctor and patient are not sure about the success ... medical trial ...has to be contrasted with standard treatment. Standard treatment is any medical measure that is commonly used by physicians and specialists in treating the particular illness. By contrast the trial or experimentation concerns a medical intervention that aims to lead to a new standard of treatment ... There can be treatment and trial working together in the same medical measure. Sometimes both are of equal importance; sometimes it is necessary to know whether the emphasis is on treatment or experimentation. [111]

The distinctions between treatment and experimentation are reflected in the Protection of Personal and Property Rights Act 1988, in particular section 18 of that Act. That section provides, amongst other things, that no Court can
empower a welfare guardian to, and no welfare guardian can, consent to a person's taking part in any medical experiment other than for the purpose of saving that person's life or of preventing serious damage to that person's health.

In differentiating between treatment and experimentation, the German Supreme Court [112] has considered whether the medical measure looks towards the restoration of the health of the patient or looks more to research purposes. [113]

**Informed consent**

Section 10 provides that "every person has the right not to be subjected to medical or scientific experimentation without that person's consent." The notion of bodily integrity is central to section 10. That is, section 10 protects the idea that every individual to make choices has the right to determine for themselves what they do or not do to their own body, free from restraint or coercion.

The idea of informed consent is central to this autonomous decision-making process. The doctrine of informed consent has particular significance for medical practitioners and health care professionals as a person may elect to undergo or not undergo a form of medical treatment in a situation where that decision may be life-threatening.

The doctrine of informed consent for medical experiments first arose out of the Nuremberg Trials following World War II. [114] Informed consent is a medical ethics and legal doctrine developed by the courts over a number of years. The doctrine requires that medical practitioners and other health care practitioners provide a patient with all relevant information about a proposed procedure or treatment prior to obtaining the consent of the patient. The issue of medical experimentation and consent has arisen in New Zealand in the context of the Committee of Inquiry into allegations concerning the treatment of cervical cancer at National Women's Hospital. In the Committee's report (the Cartwright Report) it was stated:

There are two fundamental rules ...which must be observed if patients are to be included in clinical trials.

i. The patient must be given information which allows her to understand what is involved in the trial, including its potential risks and benefits.
She must know that refusing to enter a trial or leaving it at any time is her choice and will not compromise future care.

ii. She must give her consent freely. She must not be in a dependent relationship to the person seeking the consent, must not feel vulnerable or under any obligation and must have a good grasp of English or have adequate interpreting services. She must be given time to decide and to consult whanau, family or friends. [115]

Further discussion of what is meant by informed consent is set out in the discussion in these guidelines on the right to refuse medical treatment as affirmed by section 11 of the Bill of Rights Act.

Key cases

Jeffcoat v Waetford (1999) 17 CRNZ 75; 5 HRNZ 466; Down v Van de Wetering [1999] 2 NZLR 631; Suresh v. Canada (Minister of Citizenship and Immigration) (C.A.), [2000] 2 F.C. 592

History of the section

The White Paper

The wording of the proposed provision in the White Paper was identical to that now found in section 10, but it was considered to form part of the broader right not to be subject to cruel, degrading or disproportionate treatment as now set out in section 9 of the Bill of Rights Act.

Section 10 origins in international treaties and overseas legislation

Article 7 of the ICCPR provides:

No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no-one shall be subjected without his free consent to medical or scientific experimentation

There is no equivalent provision in the Canadian Charter of Rights and Freedoms or European Convention on Human Rights. However, the principles found in section 10 of the Bill of Rights Act would appear to correspond with section 7 of the Charter, which provides:
Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

**Section 11 Right to refuse to undergo medical treatment**

Section 11 of the Bill of Rights Act is as follows:

**Right to refuse to undergo medical treatment**
Everyone has the right to refuse to undergo any medical treatment.

**Policy triggers: do I need to consider section 11?**

If the policy you are developing does any of the following, it may raise issues in terms of section 11:

- any compulsory medical examination or treatment;
- provides organisations with a statutory authority to compel medical examination, test, or some other form of medical practice; for example, when a medical examination is a pre-requisite to the holding of a particular type of transport license, professional registration, or a pre-requisite to access to a service, or medical treatment that is required before a professional registration is continued or reinstated;
- provides for the administration of compulsory assessment, examination and treatment where it is considered that a person may be mentally disordered;
- medical examination and/or medical treatment of children;
- medical examination and/or medical treatment practices in emergency situations, including civil emergencies.

**What every policy analyst needs to know about section 11**

Section 11 of the Bill of Rights Act:

- extends to all forms of health care and medical intervention, including compulsory medical examinations;
- the right to refuse to undergo medical treatment serves to maintain a person's bodily integrity and autonomy, and human dignity;
• a person has a right to refuse treatment even though the decision may be considered by objective standards to be medically unsound or contrary to the patient's best interests;

• in order to give informed consent, the patient should receive full information about the nature of the procedure including:
  o an explanation of his or her condition;
  o an explanation of the options available, including risks, side effects, benefits, and costs;
  o advice of the estimated time within which services will be provided;
  o notification of any proposed participation in teaching or research;
  o any other information required by legal, professional, ethical, and other relevant standards;
  o results of tests; and
  o results of procedures.

• informed consent should be viewed as a process, rather than a one-off event, with the essential elements of that process being:
  o effective communication: In a form, language and manner that enables the consumer to understand the information provided to them; In an environment that enables both consumer and provider to communicate openly, honestly and effectively; And, where necessary and reasonably practicable, including the right to an interpreter.
  o full information: To give all relevant information to the consumer including, for example, honest and accurate answers to questions about services and the receipt of, on request, a written summary of the information provided.
  o freely given, competent consent.

• a person must be "competent" to grant informed consent to, or to refuse, medical treatment - there are three general categories in which a patient is considered not to be competent to give consent:
  i. emergency situations
  ii. by reason of age
  iii. mental capacity
• every person of diminished competence has the right to grant informed consent to or to refuse treatment to the extent appropriate to the person's level of competence;
• limitations to the application of section 11 should be set out explicitly in statute and will be read strictly.

Measures to achieve compliance

If creating a requirement for medical examination or medical treatment:

• consider whether the medical examination/treatment can be made optional
• provide safeguards for how the medical examination/treatment will be done (eg, have a clear purpose for the treatment, set out in statute, and include details of when, where, and by whom)
• where possible, avoid a punitive consequence or professional disadvantage for a person who refuses the medical examination/treatment
• develop your policy consistently with the Code of Health and Disability Services Consumers' Rights (as developed by the Office of the Health & Disability Commissioner).

Related rights and freedoms

Section 11 is similar to section 10 in that it recognises that the protection of bodily integrity and privacy are amongst the most fundamental human rights and values. [116] When considering whether your policy or practice gives rise to issues under section 11, you should also consider whether the following rights apply:

• the right not to be deprived of life (section 8);
• the right not to be subject to cruel, degrading or disproportionately severe treatment (section 9);
• the right not to be subjected to medical or scientific experimentation (section 10);
• the right to freedom of thought, conscience and religion (section 13);
• the right to manifest religion or belief (section 15);
• the right, when deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the person (section 23);
Further discussion on the meaning of section 11

**The need for informed consent**

Section 11 provides that "everyone has the right to refuse to undergo any medical treatment." Like section 10, the notion of bodily integrity is central to section 11. That is, section 11 protects the idea that every individual to make choices has the right to determine for themselves what they do or not do to their own body, free from restraint or coercion.

The idea of informed consent is central to this autonomous decision-making process. The doctrine of informed consent has particular significance for medical practitioners and health care professionals as a person may elect to undergo or not undergo a form of medical treatment in a situation where that decision may be life-threatening.

The doctrine of informed consent for medical treatment and experimentation first arose out of the Nuremberg Trials following World War II. [117] Informed consent is a medical ethics and legal doctrine developed by the courts over a number of years. The doctrine requires that medical practitioners and other health care practitioners provide a patient with all relevant information about a proposed procedure or treatment prior to obtaining the consent of the patient.

The Code of Consumers' Rights [118] requires that consent be:

- voluntary
- specific
- in some cases in writing
- competent
- informed

**What is meant by "informed consent"?**

Informed consent requires that a person who is considering whether to participate in a medical or scientific experiment or undergo medical treatment be fully informed about the experiment/treatment.
The Health and Disability Commissioner describes informed consent as a process, rather than a one-off event, with the essential elements of that process being:

- Effective communication: In a form, language and manner that enables the consumer to understand the information provided to them; In an environment that enables both consumer and provider to communicate openly, honestly and effectively; And, where necessary and reasonably practicable, including the right to an interpreter.
- Full information: To give all relevant information to the consumer including, for example, honest and accurate answers to questions about services and the receipt of, on request, a written summary of the information provided.
- Freely given, competent consent.

The Code of Health and Disability Services Consumers' Rights ("the Code of Consumers' Rights") provides clear guidance as to the requirement for consent to be obtained and the quality of that consent.

The Code of Consumers' Rights outlines what it means for a person to be fully informed about a course of medical treatment [and by analogy medical experimentation]. The consumer should receive full information about the nature of the procedure including:

- an explanation of his or her condition;
- an explanation of the options available, including risks, side effects, benefits, and costs;
- advice of the estimated time within which services will be provided;
- notification of any proposed participation in teaching or research;
- any other information required by legal, professional, ethical, and other relevant standards;
- results of tests; and
- results of procedures. [120]

**Consent should be voluntary**

As the Code of Consumers' Rights notes, consent should be voluntary and free from coercion. Coercion can appear in many forms and includes indirect compulsion such as where a person's decision to refuse to undergo a medical
procedure may have serious adverse consequences for the person, either in terms of criminal or disciplinary proceedings, their career or entitlement to some benefit.

There are several examples of statutory provisions other than mental health legislation that override the right of a person to refuse medical treatment. These include provisions of the Health Act 1956 [121], the Children, Young Persons and Their Families Act 1989 [122], the Land Transport Act 1998 [123], and the Criminal Investigations (Blood Samples) Act 1995. [124]

In a general sense, many of these provisions override the right to refuse medical treatment in the interests of the safety of the public and/or the person themselves. However, these procedures are also subject to appropriate checks and balances to ensure that the powers are not exercised unreasonably. [125]

The courts have recognised the importance of adhering to these procedures, as a person is unable to effectively exercise their right to informed consent. In Down v Van de Wetering [126] the court said:

There can be little doubt that to compel a person, against his or her will, to give a blood sample, if necessary by the use of force, is an infringement of fundamental rights. This is implicit in provisions of the New Zealand Bill of Rights Act such as s 10 ... and s11... Reference may also be made to R v T [127] for the proposition (at p20) that it is inappropriate to adopt an expansive construction of a statute which encroaches in a substantial way on fundamental personal rights... Equally clearly, the Criminal Investigations (Blood Samples) Act establishes a procedure, subject to various safeguards, enabling orders to be made for the taking of blood samples by or under compulsion. Parliament having made the policy decision to enact such legislation, it is not for police officers to re-reason the desirability of such legislation, nor to undermine its effect and intent...

*What is meant by competent to consent*

The courts have taken the view that where a person is competent, treatment cannot be imposed on them without their consent. [128] Section 5 of the Protection of Personal and Property Rights Act 1988 ("the PPPR Act") creates the presumption that all persons are capable of giving informed consent. The courts to date have held that "everyone" in section 11 means "every person who is competent to consent." [129] This definition appears to be an attempt to limit the scope of section 11 and has been subject to
criticism. [130] It is unclear whether such an approach would be taken in respect of section 10.

The Code of Consumers' Rights [131] establishes a presumption of competence in consumers, but does not define the meaning of competence and nor is there any guidance as to how competence is to be determined. The common law also recognises a presumption of competence. [132]

Although the courts here have not defined the meaning of competence, the courts in the United Kingdom have provided some basic principles for determining whether a person has capacity to consent. [133] The Court in Re MB held that a person lacks capacity to consent:

[if] some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to, or to refuse, treatment. That inability to make a decision will occur when: (a) the patient is unable to comprehend and retain the information which is material to the decision...(b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision. [134]

The Court recognised that a combination of factors - such as fatigue, shock, fear or confusion - may temporarily inhibit a person's capacity to consent. However, because of the transitory nature of these characteristics, decision-makers need to be satisfied "that such factors are operating to such a degree that the ability to decide is absent." [135] This needs to be distinguished from the situation where a person makes what is regarded to be an irrational decision. A person can make an irrational decision yet be competent for the purposes of this discussion.

**Degrees of competence**

The Code of Consumers' Rights recognises that there are degrees of competence. The Code of Consumers' Rights provides that where a consumer has diminished competence, that person retains the right to make an informed choice and give informed consent to the extent appropriate to the person's level of competence. Such an approach is consistent with statements from the United Nations Human Rights Committee. The Committee has observed that, in the context of considering the validity of any consent, particular consideration needs to be afforded to the quality of consent provided by certain classes of individuals, such as prisoners or other detainees, minors, and those suffering from mental illness or an intellectual disability. [136]
It is suggested that policy advisers adopt the same approach.

In New Zealand other legislation, such as the Children, Young Persons, and Their Families Act 1989 and the Mental Health (Compulsory Assessment and Treatment) Act 1992 provide guidelines for the treatment of minors and adults with mental illness. [137] Section 6(1) of the PPPR Act also provides for the appointment of welfare guardians in relation to incapacitated persons. These welfare guardians have the power to consent to a person participating in any medical experiment for the purpose of saving that person's life or of preventing serious damage to that person's health. [138]

There are three general categories in which a patient is considered not to be competent to give consent. However, even in such circumstances the extent to which somebody may be subjected to medical treatment without their consent is limited. In some cases, a person's inability to provide consent is balanced by the ability of others to consent on their behalf. In other situations the statutory framework authorising the treatment may establish tightly prescribed procedures governing the administration of the treatment. In other words, the interference is seen as being reasonable because it can satisfy a section 5 analysis. The three grounds are set out briefly below

*Emergency situations (life sustaining medical treatment)*

The Code of Consumers' Rights gives recognition to the common law doctrine of necessity. [139] This doctrine may apply where a medical practitioner or health care provider considers that it is necessary to act, in the best interests of the patient's life or physical or mental health, and:

1. it is not practicable to communicate with the patient; and
2. the action or treatment taken is treatment that a reasonable person would in all the circumstances take, acting in the best interests of the patient.

However, policy advisers need to take note of the limits to the doctrine. For example, a health professional cannot justify treatment or intervention without consent on the basis of necessity where:

1. there is an appropriate person, other than the patient, who is available and willing to give consent to the proposed treatment and that consent was not sought; or
2. the proposed treatment was contrary to the known wishes of the patient.

By reason of age

Although it may be considered that children do not have the understanding or reasoning ability to enable them to make fully informed choices about medical treatment, it is clear that children need to be involved in the decision-making process. Although a child may not have the reasoning ability of an adult, the child may still be able to make an informed choice. And, as the Code of Consumers' Rights points out, the child is able to give informed consent about a medical procedure to the extent appropriate to his or her level of competence. The United Nations Convention on the Rights of the Child also requires that children be actively involved in the process of making decisions about their medical treatment. [140] However, this does not mean that the views of the child will prevail where those views are not considered to be in that child's best interest. In such cases, the parents' views or the views of a court appointed guardian may be ascertained. [141]

By reason of mental capacity

The provisions of the Mental Health (Compulsory Assessment and Treatment) Act have been held to prevail over section 11 of the Bill of Rights Act by virtue of section 4 of the Bill of Rights Act. [142] Such a view appears to be consistent with the approach of the United States Supreme Court. [143] The Court has held the state can authorise the administration of compulsory treatment of a person with a mental disorder if they are extremely disabled or posed a serious threat to himself or others. [144] However, an alternative approach would be to regard the provisions of this Act as a reasonable limit on section 11. It is clear that the procedures for making such an assessment have been sufficiently prescribed to take into account the person's inability to consent.

Explicit statutory authorisation required

Because the purpose of section 10 and section 11 is to protect a fundamental personal right of the person to preserve their bodily integrity from coercive medical procedures, any intrusion into the right would require "explicit statutory authorisation and even then the words actually used will be read very strictly and wherever possible consistently with the Bill of Rights Act." [145]
The United States Supreme Court, in *Cruzan v Director Missouri Department of Health* [146], has stated that:

No right is held more sacred, or is more carefully guarded ... than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

**Is it medical treatment or medical examination?**

Not all forms of medical intervention may be considered to be a form of treatment that will result in the patient deriving benefit. For example, can a test for blood pressure be considered to form a "treatment". On the face of it the answer would appear to be in the negative. However, section 11 embodies the common law principle that, as a general rule, people can decide for themselves what should be done with their bodies. [147] In terms of the elements that this right is trying to protect, a medical examination may potentially be as invasive of bodily integrity and human dignity as a medical treatment. In some circumstances, one can lead almost seamlessly into the other (consider, for example, a visit to a GP in this context). [148]

The principle of preserving bodily integrity also applies to a person's decision whether or not to have a particular treatment even though the decision may be considered by objective standards to be medically unsound or contrary to the patient's best interests. The classic statement of this principle, and its importance, is that of Cardozo J in *Schloendorff v Society of New York*: [149]

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.

On this basis, section 11 is as concerned with compelled medical examinations as it is compelled medical treatment. [150] The caselaw to date supports this approach. [151]

In *R v B*, [152] for instance, the Court of Appeal suggested that an order to compel the complainant to undertake a second medical examination in a rape trial may constitute a medical treatment within the scope of section 11 of the Bill of Rights Act. The Court stated:
The complainant has a right to have her privacy, dignity and bodily integrity protected from non-consensual medical procedure - a right which may be wider than those assured by ss10 and 11 of the Bill of Rights... [153]

**Key cases**


**History of the section**

*The White Paper*

Section 11 is identical to the proposed provision set out in the *White Paper*.

**Section 11 origins in international treaties and overseas legislation**

Although the White Paper [154] states that there is no equivalent provision in the ICCPR nor in any other international human rights instrument, the right to refuse to undergo medical treatment has been recognised as a fundamental right elsewhere. It is worth noting for instance that aspects of the right have been considered under section 7 of the Canadian Charter, which protects "life, liberty and security of the person". [155] The European Court of Human Rights regards the right to decide whether to undergo medical or dental treatment as forming part of the right to respect for private life (Article 8 of the European Convention on Human Rights). [156]

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Footnotes:

55. *Lawson v Housing New Zealand* [1997] 2 NZLR 474, 494.
56. *Lawson v Housing New Zealand* [1997] 2 NZLR 474, 494 - the Court observed that the issue of whether section 8 applied in the context of social and economic policy considerations was "far from clear".
57. General Comment No 6 Adopted on 27 July 1982 A/37/40 (1982) Annex V (pp. 93-94); CCPR/C/21/Rev.1, (pp. 4-6)
59. Osman v. United Kingdom 87/1997/871/1083. See discussion under fundamental justice at page of these guidelines
60. Dianne Pretty v United Kingdom Application No 2346/02.
61. Irwin Toy Ltd v Quebec (Attorney-General) [1989] 1 SCR 927, 1002-1004
62. Irwin Toy Ltd v Quebec (Attorney-General) [1989] 1 SCR 927, 1003
63. Irwin Toy Ltd v Quebec (Attorney-General) [1989] 1 SCR 927, 1004
64. Paton v. British Pregnancy Advisory Service Trustees [1978] 2 All ER 987. However, this case was decided prior to the United Kingdom's Human Rights Act 1988.
66. See Brüggemen and Scheuten v Germany (1977) 3 EHRR 244.
69. Reference re Section 94(2) of the Motor Vehicle Act [1985] 2 SCR 486, 503. It should also be noted that Cooke J in the New Zealand Court of Appeal has previously commented to the effect that "some common law rights run so deep that even Parliament could not overridethem", Taylor v New Zealand Poultry Board [1984] 1 NZLR 394,398.
72. Rodriguez v British Columbia (Attorney-General) 3 SCR 519, pp 591-594 per Sopinka J.
75. Auckland Healthcare Services Ltd v L (1998) 5 HRNZ 748
[emphasis added].


79. For an explanation of the meaning of "established by law" see the discussion on prescribed by law under section 5 of these guidelines.


81. The White Paper para 10.84.


89. Adams on Criminal Law Ch 10.5.11.

90. Article 1 of Resolution 3452 of the General Assembly of the United Nations (9/12/75).

91. (A/56/156).

92. See the Crimes of Torture Act 1989 which defines what an act of torture is. The definition has been held to be in accordance with Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.


94. Knockaert v Canada (Commission of Corrections) [1987] 2 FCR 202 at 205, FCA.

95. Bracey v Hawkins (No 2) [1993] DCR 395.

109. World Medical Association *Declaration of Helsinki: Ethical principles for medical research involving human subjects* Adopted by the 18th WMA General Assembly Helsinki, Finland, June 1964 and amended on the last occasion at the 52 General Assembly in October 2000.
112. BGHZ 20, 61.
114. The War Crimes Tribunal at Nuremberg laid down the Nuremberg Code, 10 standards to which physicians must conform when carrying out experiments on human subjects, including the requirement of *voluntary informed consent* of the human subject.
115. The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's
Hospital and into Other Related Matters (1988), Government Print, Auckland, p167.


117. The War Crimes Tribunal at Nuremberg laid down the Nuremberg Code, 10 standards to which physicians must conform when carrying out experiments on human subjects, including the requirement of *voluntary informed consent* of the human subject.


120. Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 (SR 1996/78), Schedule, cl 2, right 6(1)(a) - (g).

121. Section 70(1)(e) - (h).

122. Sections 49 -52.

123. Section 73.

124. Section 13.

125. See page of the Guidelines on this point.


132. For a statement of this position, see *Re MB (Medical Treatment)* (Court of Appeal) [1997] 2 FLR 426, 436. The presumption is rebuttable.

133. See *Re MB* 38 BMLR 175, [1997] Fam Law 542, [1997] 2 FCR 541. The Court of Appeal in *Re MB* emphasised that the principles are not meant to be determinative in every case because the facts in each case were to be given due regard.


137. See sections 52 - 56 of the CYPF Act and Part VI of the Mental Health (Compulsory Assessment and Treatment) Act.

138. Section 18(1)(f) of the PPPR Act.

139. Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 (SR 1996/78), Schedule, cl 2, right 7(1).


141. See section 25(3)(a) and section 8(1) of the Guardianship Act respectively. Note also related provisions of the Care of Children Bill.


146. *Cruzan v Director Missouri Department of Health* 497 US 261.

147. For a discussion of these principles see *Ms B v An NHS Hospital Trust* [2002] EWHC 429, paras 14 -21.

148. Medical treatment has been defined in the Injury Prevention, Rehabilitation, and Compensation Act 2001 as being: "an examination for the purpose of providing a certificate including the provision of the certificate".
149. *Schloendorff v Society of New York Hospital* (1914) 105 NE 92, at 93.


151. *Down v Van der Wetering* [1999] 2 NZLR 172, *Pio v Police* (High Court, Rotorua, 13-2-95 TGA AP 43/94); *Police v Onekawa* (High Court Auckland T293/97, 7 July 1998; *NZ Police v McIsaac* (High Court Auckland M399/01, 3 May 2001).


153. *R v B* [1995] 2 NZLR 172, 177, per Cooke P.


156. See for example *Herczegfalvy v Austria* (1992) 15 EHRR 437. See, too, the discussion at para 8.017 UK Human Rights Practice, *Sweet & Maxwell*. 
Introduction to sections 12-18: Democratic and Civil Rights

Sections 12 - 18 of the Bill of Rights Act concern the fundamental rights and freedoms that are essential to an individual's effective representation and meaningful participation in the public life of a democratic society:

- Section 12 is about a person's right to vote for, and to be elected, a member of Parliament.
- Section 13 concerns an individual's freedom of thought, conscience and religion, while sections 14 and 15 concern a person's freedom to express those thoughts or opinions and to practise their religion or otherwise manifest their beliefs.
- Sections 16 - 17 relate to an individual's freedom to participate (and not to participate) in private and public gatherings and demonstrations about particular viewpoints.
- Sections 18 is about the right of an individual to enter, stay and move freely within, and leave, New Zealand.

These rights are complementary and interdependent. For example, the United Nations Human Rights Committee stated that the "freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected." [157]

Section 12 Electoral Rights

Section 12 of the Bill of Rights Act is as follows:

**Electoral rights**
Every New Zealand citizen who is of or over the age of 18 years

a. Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
b. Is qualified for membership of the House of Representatives.
Policy triggers: should I be considering section 12?

Are you working on a policy or developing a practice that:

- Limits the ability of classes of individuals to take part in general elections?
- Requires individuals to meet certain conditions in order to be eligible to participate in elections for Parliament?
- Regulates how individuals are able to vote in a general election?

If you answer "yes" to any of these questions, then you need to consider whether your policy or practice is consistent with section 12 of the Bill of Rights Act.

What every policy analyst need to know about section 12

- Section 12 should be read as providing the basic principles for the conduct of periodic elections.
- Legislation governing the mechanics of the operation of an election should be directed at facilitating the purpose of section 12.
- Section 12 should be read as imposing a duty on the state to put in place measures that enable individuals to exercise their right to vote.
- The right to vote in section 12 does not extend to local body elections or other elected statutory positions or to cover citizens initiated referenda.

Measures to achieve compliance

You can increase the possibility that your policy or practice is consistent with section 12 of the Bill of Rights Act by:

- Taking positive steps to increase participation in the electoral process.
  - Consider removing physical or communication difficulties that act as a barrier for persons with disabilities or persons from different ethnicities.
  - Consider ways in which you can target those sectors in the community who are underrepresented on voting statistics.
Explore alternative means of voting other than through attendance at polling stations (for example postal voting, electronic voting).

- If you are establishing criteria for the establishment of electoral boundaries, ensure that the criteria is reflective of the need to ensure broad Parliamentary representation.

Related rights and freedoms

Because section 12 involves such a fundamental democratic right, it is clear that when considering whether your policy proposal or practice might give rise to an issue under section 12, you should also give consideration as to whether the policy or practice places restrictions on the remaining democratic and civil rights (sections 13 to 17) as well as the right to be free from discrimination (section 19).

The United Nations Human Rights Committee has gone so far as to say that the "freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected." [158]

Further discussion on the meaning of section 12

The commentary in the White Paper suggests that section 12 is only "concerned with basic principles and is not designed to entrench the present law in its details." [159]

Section 12(a) - the right to vote

Section 12 requires that all New Zealand citizens aged 18 years and over are provided with the opportunity to vote in "genuine and periodic" elections and that the election shall be by "equal suffrage and secret ballot." The manner in which this right is given effect to is left to the legislation governing the conduct of the election. Section 12 simply acts as a benchmark against which that legislation is measured. The entitlements provided for by electoral legislation may and can exceed the requirements set out in section 12(a). [160]

It would appear that, like in Canada and Europe, the right in section 12(a) would not extend to local government elections or other elected statutory positions. This is because such positions are creatures of statute and are subordinate to Parliament. [161] It would also not appear to cover citizens
initiated referenda as such referenda are not binding on the Government. [162] In Haig the majority held that

the purpose of s. 3 [the right to vote] is to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives. Since a referendum is in no way such a selection -- a referendum is basically a consultative process..."

Disqualification of certain voters

Despite the fact that section 12 appears to provide all New Zealand citizens aged 18 years and over with the right to vote, section 80 of the Electoral Act 1993 does provide for some limitations on this right. [163]

In the only case to date in New Zealand directly concerning a restriction on the right to vote, the High Court held that the provisions disqualifying certain inmates from voting prevailed over section 12 by virtue of section 4 of the Bill of Rights Act. [164] Although the court in this case did not consider whether the restriction was a reasonable limit on the right to vote, the Canadian courts have considered this issue on several occasions and held that certain limits may be justifiable where there is no blanket restriction. [165] Although blanket restrictions on the right of prisoners' right to vote might not satisfy a section 5 analysis, restrictions based on the length of the sentence or nature of the offence might be considered a reasonable limit. [166]

Genuine and periodic elections

If the value of the right to vote is to be maintained, elections need to be held periodically and on a regular basis with a limited time span between elections.

Although section 12 does not require a particular electoral system, form of electoral system or result, it would appear to require that whatever system is adopted, is meaningful. The electoral system should therefore ensure that the outcome of the election, the form of the government and the make up of Parliament is an accurate reflection of the will of the voters. As one example, the ability of members of Parliament to resign from their parties while remaining in Parliament between elections may have the effect of distorting the effect of the election, particularly within a proportional voting system. However, measures to address the distortion caused by resignations from political parties need to take into consideration that member's right to freedom of expression and freedom of association.
The requirement that an election is "genuine" goes to the substantive nature of the right. Such a requirement appears to require the creation of measures that enable people to vote in elections. Electoral officials should consider what steps need to be undertaken to ensure that individuals are aware of their right to vote and have opportunities to cast their vote.

Such considerations include whether a person has adequate opportunity to cast their vote (including the casting of special votes), whether they have reasonable access to a polling facility (including the provision of alternative forms of voting) or assistance with casting a vote (translation of ballot form).

**Equal suffrage**

Section 12(a) does not appear intended to introduce the idea of absolute voter parity. That is, the right to vote does not mean that every person's vote has the same value. Other factors such as the size of the electorate or the shared community within an electorate may be given weight. The Canadian Supreme Court has held that the purpose of the right to vote is to guarantee the right to effective representation. [167] The drawing of electoral boundaries therefore needs to take into consideration a range of objective criteria to ensure that Parliament is representative of a broad range of interests.

**Secret ballot**

Any form of voting must meet the substance of the requirement in section 12(a) for a secret ballot.

**Representation of Maori**

As Rishworth has pointed out, the issue of Maori electoral seats or a person's eligibility to enrol in Maori electorates is unlikely to turn on the interpretation of section 12. [168] As this discussion pointed out earlier, section 12 does not require any particular form of electoral system so long as the requirements of the section are met. [169]

**Section 12(b) -The right to candidacy**

Section 12(b) provides that every New Zealand citizen is entitled to stand for election to the House of Representatives. Again, restrictions on the entitlement to stand for election must be considered in light of section 5 of the Bill of Rights Act. [170]
The High Court has also considered whether section 12 prohibits parties entering into an agreement restricting a person's ability to stand as a candidate in an election if they were unsuccessful in obtaining a political party's nomination as a candidate. [171] In this case the court held that the Bill of Rights Act did not apply as a political party is not subject to the Bill of Rights Act. [172] However, the Court did hold that such a requirement was contrary to public policy.

The courts here have yet to rule on whether a member of Parliament can be expelled from the House if he or she resigns from or is dismissed from the political party whom they represent. The Canadian courts have considered that the right to qualification for membership of the House does not apply in circumstances where the House of Representatives seeks to expel a member. It also does not require authorities to provide candidates with assistance such as broadcast funding, even where this may be felt to be reasonably indispensable. [174]

Key cases


History of the section

*The White Paper*

Section 12 is identical in terms to the proposed Article 5 of the *White Paper*.

*Section 12 origins in international treaties and overseas legislation*

The right to vote and participate in political life is recognised in international law as a broad democratic right in article 25 of the ICCPR and article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. [175] Section 12 differs from both the ICCPR and CERD in that section 12 is merely concerned with the right to vote and the right to stand for membership of the House of Representatives. Articles 25 and 5 respectively provide for a broader right of participation in the public sphere, including the judiciary and public sector.
The ICCPR and CERD also emphasise the non-discriminatory application of that right as a means of obtaining substantive equality of democratic participation.

Article 25 of the ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [the prohibited grounds of discrimination] and without reasonable restrictions:

a. To take part in the conduct of public affairs, directly or through freely chosen representatives;

b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

c. To have access, on general terms of equality, to public service in his country. [176]

Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination [177] provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

... Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service

Section 3 of the Canadian Charter provides that

Every citizen of Canada has the right to vote in an election of members of the House of Commons of a legislative assembly and to be qualified for membership therein.

The First Protocol Article 3 of the European Covention on Human Rights provides that
The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

**Section 13 - Freedom of Thought**

Section 13 of the Bill of Rights Act is as follows:

**Freedom of thought, conscience, and religion** -
Everyone has the right to freedom of thought, conscience, religion and belief, including the right to adopt and to hold opinions without interference.

**Policy Triggers: do I need to consider section 13?**

- Does your policy further a particular religion or set of beliefs?
- Does your policy restrict or interfere with a particular religion or set of beliefs?
- Does your policy compel certain acts that may be inconsistent with a religion or set of beliefs (for example, military service or reciting an oath)?
- Does your policy impinge on or disadvantage a person because of the person's opinions or thoughts on a matter?

**What every policy analyst needs to know about section 13**

- Section 13 is concerned with the internal element of thought, conscience, religion, belief and opinion.
- It includes the freedom not to believe in or adhere to any ideology or religion and to refuse to participate in activities or practice relating to that ideology or religion.
- May be interpreted to include freedom from religion, that is, the Government cannot be seen to take sides in matters of religion or belief or opinion.
- While section 13 does not generally impose positive duties on the state, in some circumstances the state may be obliged or consider it necessary to intervene to protect religious or personal freedom against private oppression or coercion (e.g., religious harassment).
• It is likely to only extend to individuals, because the section is directed at personally held beliefs, but may include groups that have been formed as a consequence of the members holding similar thoughts, beliefs or faith.
• Section 13 includes the right to change opinions, as well as not to be compelled to change an opinion.

**Measures to achieve compliance**

• Consider whether an exemption to accommodate differing religious or ethical beliefs is appropriate.
• Ensure your policy is neutral and objective on matters of religion or ideology and is not promoting one set of beliefs.

**Related rights and freedoms**

Section 13 is regarded as the first of three sections dealing with the basic liberal freedoms of thought, conscience, opinion, religion and expression. [178] Whereas section 13 is concerned solely with the internal element of the freedoms, sections 14 (freedom of expression) and 15 (freedom to manifest religion or belief) cover the external manifestations of this internal element. [179] As both sections 13 and 15 relate to the right to freedom of religious belief, if the policy you are working on affects an individual's ability to express their religious belief, you will need to consider whether the policy is consistent with both provisions.

Sections 13 -15 are complemented by:

• the right to peaceful assembly (section 16);
• the right to freedom of association (section 17);
• the right to freedom from discrimination, including discrimination on the grounds of religious belief and political opinion (section 19); and
• the rights of minorities to, amongst other things, profess and practice their religion (section 20).
Further discussion on the meaning of section 13

General considerations

The right to freedom of thought, conscience and religion is said to form part of the bedrock of our fundamental political and democratic rights. [180]

The protection in section 13 is far-reaching. The section is likely to include "freedom of thought on all matters, personal conviction and the commitment to religion or belief". [181] The freedom extends to thoughts and beliefs of any kind including theistic, non-theistic and atheistic beliefs. [182]

Section 13 is likely to include freedom from religion - meaning the Government cannot be seen to be taking sides in matters of religion or belief. [183] This approach is consistent with the idea that the state cannot coerce or subject an individual to a form of preferred religious observance. In Canada certain legislation prohibiting Sunday trading [184] or providing religious instruction in public schools [185] has been held to violate freedom of religion.

Section 13 does not generally impose positive duties on the state. [186] However, the Court of Appeal has recognised that in some circumstances the state may be obliged, or consider it necessary, to intervene to protect religious freedom against private oppression or coercion. [187] This approach is consistent with the European Court of Human Rights which has held that a state may need to intervene to protect against seriously offensive attacks on religious sensitivities. [188] Such circumstances may include the publication of offensive portrayals of religious worship, [189] or where private individuals instigate a campaign of harassment against a church or religious group. [190] In Otto-Preminger Institute v Austria, [191] the Court found the state was justified in restricting freedom of expression of the complainant in order to protect the religious freedom of others. The Court stated:

... the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the state to ensure the peaceful enjoyment of the right guaranteed under Article 9.

The freedoms in section 13 are likely to only extend to individuals and not organisations or associations, on the basis that it is directed at personally held beliefs. [192] The section may however extend to congregations who hold...
similar thoughts and opinions as a consequence of their membership of a faith. [193]

**The Freedoms Defined**

The terms "thought, conscience, religion and belief" are capable of independent, although related meanings.

As Wilson J stated in *R v Morgentaler*: [194]

... in a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality. Indeed, as a matter of statutory interpretation, "conscience" and "religion" should not be treated as tautologous if capable of independent, although related, meaning.

**Freedom of Thought**

Section 13 protects the freedom to think freely. At this stage the scope of this freedom is unclear. The freedom is likely to include political, philosophical and social thought [195] and likely to protect against brainwashing or indoctrination. [196]

The case of *Moonen v Film and Literature Board of Review (No 1)* [197] illustrates the relationship between freedom of thought and censorship laws. The High Court and the Court of Appeal dismissed the argument that banning objectionable material breached the right to freedom of thought in section 13. By banning the material, prospective recipients would not have the opportunity to form thoughts on the material. However, the Court of Appeal held:

The fact that the recipients are by the censorship deprived of the opportunity of forming such thoughts is inherent in the concept of censorship, but it is not the thoughts that are being censored.

**Freedom of Conscience**

*Defining 'conscience'*

"Conscience" is often bound up with religious belief, but the term goes beyond religious belief to include personal morality that is not founded in religion. In Canada "conscience" has been described as "self-judgment on the
moral quality of one's conduct or the lack of it". The caselaw from Europe also suggests "conscience" requires some philosophical basis. [199]

**What does "freedom of conscience" involve?**

The United States Supreme Court has said that freedom of conscience "implies respect for an innate conviction of paramount duty". [200] Freedom of conscience therefore signifies that a person may have views or beliefs that go beyond those commonly shared by the community or espoused by the state. An example of the application of this freedom is the Canadian decision of *Maurice v Canada (Attorney-General)* [201], where it was found that the Correction Service of Canada was obligated to provide a vegetarian diet to accommodate an inmate's non-religious conscientious beliefs. [202]

The United Nations Human Rights Committee has observed that the right to freedom of conscience contained in article 18 of the ICCPR does not imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal. [203] Nevertheless, the Committee has expressed the view that the right to conscientious objection to military service can be derived from article 18. [204]

**Freedom of Religion and Belief**

*Defining 'religion' and 'belief'*

The terms "religion" and "belief" are often used as analogous terms. For this reason we have combined our analysis of the two terms.

The United Nations Human Rights Committee states that "religion" and "belief" should be interpreted broadly to include theistic, non-theistic and atheistic beliefs. [205] The US Supreme Court suggests the terms should include moral, ethical or religious beliefs about what is right and wrong that are held with the strength of traditional religious convictions. [206] The terms should be considered in a non-technical sense and not be confined to traditional or parochial concepts of religion or deities. [207]

There is some suggestion that the right in Europe would not only cover traditional religious and non-religious beliefs but also minority views that attain a certain level of cogency, seriousness and importance to the person. [208]
For the purposes of determining whether a particular collection of ideas or practices can be characterised as a religion, the following indicia may be useful. [209] The indicia are objective guidelines only and should not be thought of as a test for religion. They are:

i. A belief in the supernatural (ie. a belief that reality extends beyond what is capable of perception by the senses);
ii. The ideas relate to the nature and place of humans in the universe and their relation to things supernatural;
iii. The ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance;
iv. The adherents constitute an identifiable group or groups; and
v. The adherents themselves see the collection of ideas, beliefs and practices as constituting a religion.

Sincerity of the belief held

If a religion or belief is found to be sincere, it is unlikely a court will inquire into the validity of the belief itself. [210] However, the court may question whether the belief is truly held. [211]

What does 'freedom of religion and belief' involve?

The essence of freedom of religion and belief is the right to entertain such religious beliefs as a person chooses. [212] It also includes the freedom not to believe in or adhere to any religion or to engage in any religious practices. [213] This protection has been interpreted widely to include freedom from being obliged to belong to a religious body or to submit to religious rites that are contrary to a person's beliefs. For example, in Buscarini v San Marino [214] an obligation on new Members of Parliament to take an oath on the Holy Gospels was in breach of their religious freedom.

The Canadian guarantee of religious freedom has been defined to include "freedom from religion". In R v Big M Drug Mart Ltd [215], the Supreme Court found that an Act prohibiting Sunday trading was invalid because its purpose was to compel observance of the Christian Sabbath. The Court found the Act (by proclaiming the standards of the Christian faith) created a subtle coercion that infringed the freedom of religion of persons of other faiths or no faith. [216]
The Canadian courts will act to prevent the majority from imposing their religion or beliefs on a minority. In *Zylberg v Sudbury Board of Education* [217] a regulation requiring schools to open each day with religious exercises was held to be unconstitutional. The regulation was found to impose a compulsion to conform to the religious practices of the majority:

...the peer pressure and the class-room norms to which children are acutely sensitive... are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices. [218]

As a result of *Zylberberg* and subsequent decisions [219], it is unclear whether legislative exemptions designed to accommodate diverse beliefs will save Canadian legislation from being declared unconstitutional. The Ontario Court of Appeal has taken the view that the embarrassment of non-conformity can be a significant barrier to a person exercising an exemption clause. [220]

Following the reasoning of the Ontario Court of Appeal - religious exercises or instruction in public schools are likely to be found to violate freedom of religion. [221] However, education about religion (without promoting any one religion or assuming the superiority of any one religion) is not prohibited. [222]

**Freedom to adopt and to hold opinions without interference**

The freedom is closely connected to the freedom to express and disseminate opinions without compulsion contained in section 14 (freedom of expression). The freedom to adopt and hold opinions without interference would also logically include the right to change opinions or not to be compelled to change an opinion. [223]

**Key cases**

History of the Section

The White Paper

Section 13 remains unchanged from the White Paper proposal.

Section 13 origins in international instruments and overseas legislation

Section 13 is derived from Articles 18 and 19 of the International Covenant on Civil and Political Rights (ICCPR).

Article 18 of the ICCPR states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.

Article 18 of the Universal Declaration of Human Rights (UDHR) provides:

Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change their religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest their religion or belief in teaching, practice, worship and observance.

Article 9(1) of the European Convention of Human Rights provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

Sections 2(a) and 2(b) of the Canadian Charter provide:

- a. Everyone has the freedom of conscience and religion;
b. Everyone has the freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The First Amendment to the Constitution of the United States provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 14 Freedom of expression

Section 14 of the Bill of Rights Act is as follows:

Freedom of expression
Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Policy triggers: do I need to consider section 14?

Are you working on a policy or developing a practice that:

- Seeks to prohibit, regulate, or restrict the dissemination or expression of any form of idea or opinion or information?
- Regulates or otherwise restricts or prohibits the ability of individuals to gain access to information?
- Requires individuals, organisations, or companies to provide enforcement agencies or any other statutory body with information and documents?
- Requires individuals, organisations or companies to publicly disseminate any ideas, opinions or information that may not be consistent with their own views?

When developing policy, you will need to consider whether your policy or practice limits the right to freedom of expression in any one or more of the following ways:
**Restraint on content**

Legislation or practices may limit the right to freedom of expression if they:

- prevent the dissemination of certain forms of expression;
- require a person to obtain prior approval before taking part in some form of expressive activity;
- regulate the contents of any publication, broadcast, or display or promotion;
- restrict or control the ability of the media to cover news events or issues that the public may have an interest in;
- require particular material to be reviewed or approved before it is published.

Forms of prior restraint include: legislation governing the classification of publications, regulation of media or the advertising of products; defamation laws; requirements to obtain approval before staging public demonstrations, protests, or events; court injunctions or restrictions on the media coverage of particular events.

**Time, manner and place**

A wide array of laws including by-laws may limit expression by dictating the time, manner or places in which that form of expression can occur.

Examples of this form of restriction include:

- the placement of restrictions on areas where or times when a demonstration, picket or public event can take place;
- prohibitions on the placement of posters anywhere on public property;
- restricting the conditions or circumstances under which commercial entities are able to advertise, promote or display their products, such as restrictions on the display of tobacco products, or limitations on the amount or duration of advertising during children's television programmes.
**Criminal or civil proceeding after the event**

Legal proceedings brought as a consequence of the publication of ideas, opinions or information may also 'chill' free expression. Examples include those laws governing:

- court processes, for example contempt of court; [224]
- prohibitions on the expression of opinions invoking racial disharmony;
- defamation;
- censorship;
- breaches of the peace.

As legal proceedings have the effect of penalising people for the expression of those ideas or opinions, the threat may prevent them or others from expressing or conveying similar information on subsequent occasions.

If you answer yes to any of these questions, then you need to consider whether your policy or practice is consistent with section 14 of the Bill of Rights Act.

**What every policy analyst needs to know about section 14**

- There are very few activities that will not be protected by the freedom of expression because most human activity has an expressive element (including political, artistic and commercial expression).
- Speech or an expression that is considered important to the ability of individuals to participate in core democratic processes, for example in elections, and political and social speech, is likely to enjoy a very high degree of protection.
- A fundamental aspect of the right to freedom of expression is that it extends to protecting all information and opinion, however unpopular, offensive or distasteful.
- The right generally protects all expression that conveys or attempts to convey meaning except expressive activity that takes the form of violence.
- Even though the right extends to all types of opinions, certain categories of expression (e.g., advertising, pornography or speech that
incites racial violence) are more likely to be subject to reasonable limitations than others (e.g., political and social speech).

- The scope of section 14 means that as all forms of expression except those that take the form of violence are protected by the right, any restriction on expressive activity will be considered in the context of section 5 of the Bill of Rights Act.
- Freedom of expression includes the right to say nothing or the right not to say certain things.
- The opinions or views do not have to be held by that individual - the protection broadens out to include anyone else who subsequently communicates or disseminates those ideas or opinions.
- The right to seek and receive information may involve consideration of other statutory frameworks such as the Official Information Act 1982 or the Privacy Act 1993.

**Measures to achieve compliance**

If the policy or practice that you are working on seeks to justify restrictions on the freedom of expression consider the nature of the harm that is being addressed. There are some general questions that policy advisers might ask themselves, for example:

- How significant is the harm that is sought to be addressed by the measure?
- Is the measure concerned with protection of individuals from harm, with the protection of community interests, or both?
- Are there options other than regulating expression for dealing with the harm?
- Is compelled speech rather than prohibited speech an option (e.g., a requirement for product info and warnings rather than a ban on product advertising)?

If the harm involves:

- *The interests of national security* - contemplate whether the restrictions provide for a capacity to report unlawfulness or irregularity to those in authority, challenge decision-makers, authorise the publication of any information or permit proper disclosure. [225]
• The interests of public safety - consider whether restrictions on these grounds should be tied to certain objective assessable criteria and whether a total prohibition is warranted.

• The prevention of disorder or crime - reflect on whether the restrictions provide for sufficient opportunity for the media to accurately and objectively record the events in question for wider public discussion. Also, does your objective require a complete prohibition on the dissemination or expression of certain opinions or are those views able to be expressed in other ways? Are restrictions on the reporting of events time-bound?

• The protection of health or principles [226] - reflect on the nature of the restriction. Ask yourself whether the restriction is narrow enough to address the specific harm or whether it is sufficiently broad to capture certain ideas or opinions that others might find abhorrent or offensive. [227]

• The protection of the reputation or the rights of others - consider whether there are opportunities for those persons whose rights or reputations may be affected or interested parties to publicly respond (for example, do they have regular access to the media, is there a publicly recognisable person with the jurisdiction to speak on these issues, for example the Race Relations Commissioner or Children's Commissioner).

• The preservation of the administration of justice - consider what the competing interests are. Is the public interest in a free press outweighed by the public interest in maintaining an effective court system? Are you able to develop criteria that the courts should take into account before making a decision as to whether certain information should be revealed/suppressed? Are there alternative means of disclosing discreet information to a party to proceedings that provides adequate protection for the other party, for example through a third disinterested party? Is it possible to limit the restriction to a period of time? [228]

Related rights and freedoms

You may need to consider whether the right to freedom of expression complements the other rights that you have identified in the course of
developing the policy or practice that you are working on, or potentially limits it. This is because the scope and potential application of the right to freedom of expression is so broad it intersects with a wide variety of rights.

For example, the right to a fair trial under section 25(a) and the right to be presumed innocent under section 25(c) of the Bill of Rights Act may require that information related to the proceedings (such as the name of the accused) be suppressed to ensure that there is continuing public confidence in the integrity of the trial process Solicitor General v Radio New Zealand. [229] However, the right to a fair trial would also require that the court be provided with all the necessary and relevant information needed to arrive at the correct decision.

The right to freedom of expression also complements the following rights under the Bill of Rights Act:

- the right to vote (section 12) and the rights to freedom of thought (section 13), the right to peaceful assembly (section 16), movement (section 18) and association (section 17);
- the right to manifest a person's religion or belief (section 15) and the rights of minorities to profess and practice their religion (section 20);
- the right to silence (section 23(4)) and the right not to confess guilt (section 25(d));
- the right to be secure against unreasonable search and seizure (section 21).

**Further discussion on the meaning of section 14**

The right to freedom of expression is well established in the common law and has been recognised in all relevant international human rights treaties. There are several rationales for the protection of freedom of expression, which date back to periods before political philosophers such as John Stuart Mill and John Milton.

The justifications for the importance of the right of freedom of expression have been summarised by Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms* [230] as follows:

[Freedom of expression] serves a number of broad objectives. First it promotes the self fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill) 'the best test of truth is
the power of the thought to get itself accepted in the competition of the market.' [231] Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country. [232]

Expression of any kind and in any form?

The wording of section 14 gives an indication of the broad range of activities that are protected by the right to freedom of expression. Section 14 protects the right to seek, receive and impart information of 'any kind' and in 'any form'. This right has been described as "...as wide as human thought and imagination." [233] Accordingly "expression" encompasses political, artistic and commercial expression. It includes written and oral communications, television programmes, broadcasting, film, video, pictures, dress and images. There are very few activities that will not be protected by the freedom of expression because most human activity has an expressive element.

The New Zealand courts have generally adopted the Canadian approach to the scope of the right stressing that the Bill of Rights generally protects all expression that conveys or attempts to convey meaning except violence. [234] Expressive activity that takes the form of violence is unlikely to be protected by s.14. The courts in Canada have said that "...a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen." [235]

Is hate speech protected by the right?

The courts in New Zealand have accepted the proposition that a fundamental aspect of the right to freedom of expression is that it extends to protecting all information and opinion, however unpopular, offensive or distasteful. [236] Content neutrality has been highlighted as an important aspect of the right on numerous occasions [237] because:

Freedom of expression constitutes one of the essential foundations of a democratic society ...it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb; such are the demands of that pluralism, tolerance, and broad-mindedness without which there is no 'democratic society. [238]
In practice the courts weigh the value of the particular speech. The courts consider that, political and social speech fall within the core of the right and are therefore more deserving of the protection of the courts. Other forms of expression on the other hand, such as advertising, pornography, speech that incites racial violence form part of the periphery of the right and in such cases the court may find it easier to find a limit justifiable.

There still appears to be some uncertainty as to whether threats of violence fall within the meaning of "expression". The Canadian Supreme Court, in a case concerning the promotion of hate speech, indicated that so long as the form of the expression is violent, the right to freedom of expression will not apply. However, where the content or meaning attributed to the expression is violent, the right shall continue to apply (subject to section 5). Dickson C.J observed that "while the line between form and content is not always easily drawn...threats of violence can only be so classified by reference to the content of their meaning." Essentially, this draws a distinction between expression that takes the form of violence (not covered by section 14) and expression that incites, promotes or encourages violence (covered by section 14 but limits may be justifiable under section 5). In the latter case, the role that section 5 plays in assessing whether the limit is reasonable is important.

By way of contrast, the European Court has taken a divergent approach in considering the relationship between the right to freedom of expression and hate speech. The difference between the two regions is significant in that it highlights the importance of taking into consideration the political-social context of the environment within which you are developing policy. The recent European experience of racial hatred is arguably more traumatic than that of Canada.

It would therefore appear that the key factor is the nature of the message and the extent to which it promotes violent acts. It is also worth remembering that section 5 may play a role in determining the extent to which someone may rely on section 14 to disseminate particular ideas.

**Compelled expression**

The Courts in Canada and the United States have held that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Part of the reasoning behind this position is that individuals should not be portrayed as being aligned with particular opinions that they do not believe in or forced to express deeply held personal beliefs.
The right not to say certain things appears to extend to written as well as oral forms of communication. It is therefore likely to apply to product warnings and other controls over commercial forms of expression. The United States Supreme Court has also held that a mandatory levy, collected for the purposes of advertising and promoting of a product or service may constitute a form of compelled expression. This is particularly the case where a person required to make a contribution is unable to disassociate themselves from the message of the campaign.

It remains unclear as to whether section 14 applies to a statutory requirement to produce information or documents or provide reports on particular issues. However, the plain language of section 14 ("information of any kind and in any form") suggests that section 14 may extend that far, particularly where the information is not purely factual. Where this requirement forms part of an investigation into compliance with a regulatory framework, you should also consider the right to be secure against unreasonable search and seizure and the right to silence.

Because of the potential breadth of the right to freedom of expression, you should gather information in support of your policy even if you are uncertain as to whether your policy limits the right.

What about the distribution of another person's ideas?

The right includes the right to seek, receive and impart information and opinions. To impart simply refers to a person's right to communicate information and opinions.

But note that the scope of the protection provided by section 14 is not restricted to an individual being able to express his or her own views. That is, the opinions or views do not have to be held by that individual - the protection broadens out to include anyone else who subsequently communicates or disseminates those ideas or opinions.

What about the right to seek and receive information?

1. Although the extent of the right to receive information does not appear to have been considered by the New Zealand courts, there is the suggestion that the right ensures that a government cannot prevent a person from receiving information that others wish to impart. The right is said to be "primarily a freedom of access to general sources of information which may not be restricted by positive action
of the authorities. Some commentators have said that the caselaw on Article 10 of the European Convention indicates that this Article does not provide a general right of access to information.

The European Court appears to take a deliberately narrow view of the scope of this right. It remains to be seen whether the courts in New Zealand will take a similarly narrow view. It is conceivable that the courts will take a broader approach because any limitations on the approach to article 10 of the European Convention are compensated for by article 8(1), which provides for an expanded right of access to information.

The right to seek and obtain information of different kinds is recognised to various degrees by the Official Information Act 1982 and Privacy Act 1993. You may need to give special consideration to the guiding principles of these Acts when you are seeking to restrict access to information. However, you should also be aware that if the statute or policy that you are working on seeks to override or restrict either of these Acts, then you may need to consider whether that decision is consistent with the Bill of Rights Act.

The media also play an important role in enabling individuals to seek out or receive information - the dissemination of information, ideas and opinions to the public is the core part of their role after all. Their role enables them to gain access to information more readily than an individual and as such is often able to publicly disclose information that others may wish to be kept secret. Because the media plays an important role in making information that is in the public interest public, the courts are more likely to uphold the right to publish the information than suppress it.

Key cases

History of the section

The White Paper

Section 14 appears in the same form as that proposed in the White Paper.

Section 14 origins in international treaties and overseas jurisdictions

The New Zealand freedom of expression provision is similar to that in article 19(2) of the ICCPR. Article 19(2) reads:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The right to freedom of expression is also found in:

Article 19 of the Universal Declaration of Human Rights (UDHR) provides that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Section 2(b) of the Canadian Charter is identical to section 14 as it provides:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

The First Amendment to the Constitution of the United States provides:

Congress shall make no law...abridging the freedom of speech, or of the press...
Article 10(1) of the European Convention on Human Rights and Freedoms states:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article does not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.

**Section 15 Manifestation of religion and belief**

Section 15 of the Bill of Rights Act is as follows:

**Manifestation of religion and belief**
Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

**Policy triggers: do I need to consider section 15?**

- Will this policy affect an individual's ability to adhere to his/her religion or belief?
- Is this policy attempting to regulate conduct that will affect some aspect of a person's worship, observance, practice, or teaching of his or her religion or belief?
- Does this policy compel certain types of conduct that may conflict with an individual's religion or belief (eg. compulsory military service)?
- Does this policy set dress codes (possibly for safety or hygiene reasons) that do not accommodate religious dress?
- Will conduct that is required or encouraged by an individual's religion or belief be subject to criminal penalties or fines under this policy?
- Will this policy place an individual in a position where he/she must choose between their belief or participating properly in society?

**What every policy analyst needs to know about section 15**

- The freedom to manifest one's religion or belief should be interpreted broadly to include
  - theistic, non-theistic and atheistic beliefs,
The protection extends to all religions and beliefs, even those without the established doctrines and customs of traditional religions.

Unlike section 13 (freedom of thought, conscience and religion), the freedom to manifest one's religion or belief does not include thought or conscience.

The freedom does not generally impose duties on the state to protect or promote religious activities.

In some circumstances the state may consider it desirable or be obliged to intervene to protect religious freedom against private oppression or coercion.

The freedom to manifest religion or belief covers a broad range of acts and has both individual and collective aspects.

'Worship' includes building places of worship, using ritual formulae and objects, displaying symbols, and observing holidays and days of rest.

'Observance' includes dietary regulations, wearing of distinctive clothing, participation in rituals associated with certain stages of life, and use of particular language customarily spoken by a group.

'Practice' and 'Teaching' include choosing religious leaders, priests and teachers, establishing seminaries or religious schools, and preparing and distributing religious texts or publications.

There is a distinction between acts required to express one's religion or belief and acts merely motivated by that belief. The former will be protected under the right to freedom of religion, whereas the latter may not.

The right includes the ability of people to establish and attend places of worship, disseminate their beliefs and teachings, and organise their lifestyles in accordance with their beliefs.

The right also includes the ability of parents to raise and educate their children according to their beliefs but does not extend to decisions that imperil the life or health of the child (such as decisions about the health care or medical treatment).
Measures to achieve compliance

Ensure your policy is neutral and objective on matters of religion and is not promoting one religion or set of beliefs.

Consider whether an exemption to accommodate religious practices is appropriate.

Related rights and freedoms

As the introduction to this part of the guidelines noted, the rights in sections 12 to 18 are complementary and interdependent. If your policy gives rise to issues of consistency with section 15 of the Bill of Rights Act, you should also consider whether the policy gives rise to issues under these other sections (with the exception perhaps of section 12). You will need to give particular regard to section as sections 13 and 15 both concern religious freedom.

You should also whether your policy gives rise to issues of consistency with

- the freedom from discrimination, including discrimination on the grounds of religious belief (section 19); and
- the freedom of minorities to profess and practice their religion (section 20).

Further discussion on the meaning of section 15

The freedom to manifest religion or belief covers a broad range of acts and has both individual and collective aspects. The terms "either individually or in community with others and either in public or in private" recognises that religion or belief may be practised in many forms. [257]

Section 15 does not generally impose duties on the State to protect or promote religious activities. [258] The Court of Appeal has, however, suggested that in some circumstances the State may consider it desirable or be obliged to intervene to protect religious freedom against private oppression or coercion. [259] This reasoning is consistent with the approach of the European Court of Human Rights. [260]

How should I interpret the term 'religion or belief'?

The New Zealand courts have not discussed the scope of the meaning of the terms religion or belief in the context of either sections 13 or 15 of the Bill of
Rights Act. However, the courts have considered the matter in a more general legal context, and developed the following indicia, which may be useful. [261] They are:

i. A belief in the supernatural (i.e., a belief that reality extends beyond what is capable of perception by the senses);

ii. The ideas relate to the nature and place of humans in the universe and their relation to things supernatural;

iii. The ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance;

iv. The adherents constitute an identifiable group or groups; and

v. The adherents themselves see the collection of ideas, beliefs and practices as constituting a religion.

The United Nations Human Rights Committee states the terms "religion" and "belief" should be interpreted broadly to include theistic, non-theistic and atheistic beliefs. [262] The protection in section 15 extends beyond obligatory doctrine and applies to all religions and beliefs, even those without the established doctrines and customs of traditional religions. [263] No individuals or religious communities should enjoy any less protection than the major recognisable religions. [264]

The US Supreme Court suggests the terms should include moral, ethical or religious beliefs about what is right and wrong that are held with the strength of traditional religious convictions. [265] The term "religion or belief" should be considered in a non-technical sense and not be confined to traditional or parochial concepts of religion or deities. [266]

It is likely that a court will not inquire into the validity of a belief if a religion or belief is found to be sincere. [267]

**What types of activities are protected by section 15?**

**Worship**

Worship is a central feature of most religions. The concept extends to ritual and ceremonial acts giving direct expression to belief and includes practices that are integral to such acts. [268] These practices may include: [269]

- building places of worship;
• using ritual formulae and objects;
• displaying symbols; and
• observing holidays and days of rest.

An example of the application of this right is in *Feau v Department of Social Welfare* [270] where a Seventh Day Adventist appealed his sentence of periodic detention which required him to attend a programme on a Saturday morning (his Sabbath). Although his religious beliefs would be affronted by attending the programme, the Court held the limitation on his right was reasonable within the meaning of section 5 of the Bill of Rights Act.

*Observance*

The observance of a religion or a belief may include not only ceremonial acts but also such customs as: [271]

• the observance of dietary regulations;
• the wearing of distinctive clothing or headcoverings;
• participation in rituals associated with certain stages of life; and
• the use of particular language customarily spoken by a group.

*Practice*

The practice of a religion or belief strongly overlaps with the concepts of "observance" and "teaching" also contained in section 15.

As a result, "practice" is likely to include acts covered by the concept of observance, but may also include acts integral to the conduct by religious groups of their basic affairs, such as the freedom to: [272]

• choose their religious leaders, priests and teachers;
• establish seminaries or religious schools; and
• prepare and distribute religious texts or publications.

It is clear that the term 'practice' does not cover every act that is motivated or inspired by a religion or a belief. The New Zealand courts for instance were unwilling to 'read in' exemptions to the criminal law in order to accommodate religious acts. [273] The courts overseas have created a distinction between acts required in order to express one's religion or belief and acts merely motivated or influenced by that belief. The former will be protected under the right to freedom of religion, whereas the latter may not.
The right to freedom of religion is likely to protect expressions and manifestations of religious non-belief \[274\] and refusals to participate in religious practice. \[275\]

**Teaching**

In a similar vein to the concept of "practice", the teaching of a religion or belief may include acts such as: \[276\]

- choosing their religious leaders, priests and teachers;
- establishing seminaries or religious schools; and
- preparing and distributing religious texts or publications.

Section 15 includes the right of parents to bring up and educate their children in their religion or belief until such time as their children are able to exercise their own freedom of religion. \[277\] This parental right extends to decisions on appropriate medical treatment or health care. \[278\] But the right to make decisions on appropriate medical treatment or health care or the welfare of the child does not extend to decisions that imperil the life or health of the child. \[279\]

The European Court of Human Rights has held that the right to evangelise is covered by the right to manifest one's religion or belief:

the freedom to manifest one's religion includes in principle the right to try to convince one's neighbour, for example through 'teaching'. \[280\]

The Court has made a distinction between true evangelism and improper proselytism. 'Improper proselytism' may occur where there is:

- the offering of activities offering material or social advantages with a view to gaining new members for a Church;
- the exertion of inappropriate pressure on people in distress or in need;
- the use of violence or brainwashing; \[281\] or
- the abuse of a relationship of authority or trust. \[282\]

It would therefore appear that "improper proselytism" is not covered by the right.
History of the section

The White Paper

Section 15 remains unchanged from the *White Paper* proposal.

Section 15 origins in international treaties and overseas legislation

Section 15 is derived from Article 18(3) of the International Covenant on Civil and Political Rights (ICCPR) which states:

3. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Article 18 distinguishes matters of belief from action. The freedom to manifest religion or belief is subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. [283]

Article 18 of the Universal Declaration of Human Rights provides:

Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change their religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest their religion or belief in teaching, practice, worship and observance.

Article 9(1) of the European Convention of Human Rights provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

Section 2(a) of the Canadian Charter provides:

Everyone has the freedom of conscience and religion

The First Amendment to the Constitution of the United States provides that:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 16 of the Bill of Rights Act is as follows:

Freedom of peaceful assembly
Everyone has the right to freedom of peaceful assembly.

Policy Triggers: do I need to consider section 16?

Are you developing policies or practices that may:

- Limit the ability of a person or group of persons from being able to exercise their right to peacefully protest (e.g., regulation of picketing in an employment setting)?
- Limit the ability of an individual or group of individuals to hold or participate in a public or private gathering?
- Limit the ability of a group of individuals to come together for a common purpose?

What every policy analyst needs to know about section 16

- The focus of any discussion about the right will be on the "peacefulness" of any assembly, in terms of both the actions of those gathering and the impact of the gathering (however peaceful) on others.
- Similar to the right to freedom of expression, peaceful assembly applies to gatherings for any purpose - however unpopular, offensive or distasteful - except violence.
- The right to assemble applies to private and public meetings.

Measures to achieve compliance

Restrictions on the right to assemble may be permissible if they:

- serve a legitimate interest,
- are no more than what is necessary to protect that interest, and
clearly contemplate the person's right to continue to assemble peacefully where possible; that is, the restrictions must not effectively negate the right if other options are available.

You should also state the reasons for any restrictions in your policy or legislation.

Related rights and freedoms

As the introduction to this part of the guidelines noted the rights in sections 12 to 18 are complementary and interdependent. If your policy gives rise to issues of consistency with section 15 of the Bill of Rights Act, you should also consider whether the policy gives rise to issues under these other sections.

You should also consider whether your policy gives rise to issues of consistency with the right to freedom from arbitrary arrest or detention (section 22).

Further discussion of the meaning of section 16

It has been suggested that:

The decisive element for the determination of an 'assembly' - as opposed to a more or less incidental gathering - obviously is the intention and the purpose of the individuals coming together. [284]

The right to freedom of peaceful assembly is closely associated with the series of fundamental democratic rights that it appears next to in the Bill of Rights Act, such as the rights to freedom of expression, freedom of religion, freedom of association, and freedom of movement. It is, in this way, most clearly associated with an individual's participation in the public and private demonstration of particular viewpoints.

Peaceful assembly

The White Paper emphasised the operative phrase "peaceful". It goes on to state that:

...obviously in many cases a balance has to be struck between the freedom - an important one - and other interests, such as those of the public to pass through the streets unimpeded, or of the wider community in the prevention of disorder. [286]
The comparable right in the International Covenant on Civil and Political Rights, Article 21, explicitly provides that restrictions on peaceful assembly can be placed where the interest of national security or public safety, public order (ordre public), the protection of public health or morals, or the protection of the rights and freedoms of others are at risk.

Because of the requirement that the assembly be peaceful, the Courts at times have acted in anticipation of what the likely impact of the assembly would have on others. [287]

There may be instances, however, where the actions of the demonstrators or protestors are peaceful, but their actions create disorder. In such cases there is a clear conflict between the peaceful intentions of the protestors and the public interest in keeping the peace. Under the common law [288] it was clear that:

[...]he law has recognised, as a matter of principle, that the attentions of an irate spectator can have the effect [of restricting the person's right to freedom of assembly and freedom of expression]... While agreeing that any such curtailment of liberty must be restricted, I cannot agree that the police should never have the power to require law-abiding citizens to comply with reasonable requests in order to avert a threatened breach of the peace. It must always be a question of what is reasonable in the circumstances, having regard to the test of a real possibility of a breach of the peace. [289]

In *Bradford v Police* [290] Robertson J made the point that:

...in any free society, the factor of protest is part of daily activity. It is a right for everyone, whether their cause is attractive or unattractive and whether the form of protest is attractive or unattractive. [291]

In this way the right to freedom of expression can be seen to complement the right to freedom of peaceful assembly in that it applies to all forms of expression - no matter how distasteful - except actual violence. [292]

The Bill of Rights Act makes it clear that if there is to be any interference with [the right to peaceful assembly] it can only be to the least extent necessary to preserve some other proper interest. [293] The law should also specify the reasons for those restrictions. [294]
**Reasonableness of the restriction**

The exercise of a statutory power that limits the right can be resorted to only when reasonably necessary and the measure taken must clearly contemplate the individual's right to continue to assemble peacefully where such options exist.

The Justice and Electoral Select Committee endorsed Professor Joseph's submission that protestors' rights to peaceful assembly and freedom of expression were infringed in circumstances:

When the police concealed the protest from view, they did not, in effect, subject the protestors' rights to any limits that could be justified under section 5 of the New Zealand Bill of Rights Act 1990. Rather, the police denied the protestors their right to protest. A protest that is made ineffectual - one that cannot be seen - is no protest at all. The right is negated, not limited.

Such a possibility suggests that public authorities adopt measures that enable lawful protests to take place where possible, without the participants being subjected to physical violence or other threats.

The Court in *Police v Beggs* set out a framework to assist law enforcement officers and public officials that we consider may be of value when developing your policies regarding public assemblies. The Court stated:

...what is reasonable is not to be determined only by an analysis of that "which is disorderly, unlawful, or interferes with others in the exercise of their rights and freedoms"... we think other relevant considerations might include whether the assembly is unreasonably prolonged, the rights of the occupier and the size of the assembly and its duration, and the observance of ordinances in place to ensure the smooth functioning of gatherings and demonstrations.

**Key cases**

History of the section

*The White Paper*

This section appears unchanged from that which was proposed in the *White Paper*.

*Section 16 origins in international treaties and overseas legislation*

Article 21 of the International Covenant on Civil and Political Rights provides that:

The right of peaceful assembly shall be recognised. No restrictions may be placed on exercise of this right other than those imposed in conformity with the law and which are necessary in democratic society in the interest of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 20(1) of the Universal Declaration of Human Rights states:

(1) Everyone has the right to freedom of peaceful assembly and association.

Article 11(1) of the European Convention on Human Rights confirms that:

(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

Section 2(c) of the Canadian Charter provides that:

(c) Everyone has the freedom of peaceful assembly.

The First Amendment to the US Constitution provides that:

Congress shall make no law...abridging the...right of the people to peaceably assemble.
Section 17 Freedom of association

Section 17 of the Bill of Rights Act is as follows:

Freedom of association
Everyone has the right to freedom of association.

Policy triggers: do I need to consider section 17?

- Does your policy treat people differently on the basis of their membership of a group or association?
- Does your policy prohibit or create disincentives for membership in a group or association (including in a penal or criminal justice context)?
- Does your policy require a person to disclose their membership in a group or association?
- Does your policy compel an individual to belong to a professional body or workplace association?
- Does your policy offer any form of inducement to individuals who become members of a specific body or association?
- If your policies do offer inducements for membership, are the inducements such that they amount to a practical compulsion to join an association so as to obtain the relevant benefits?
- Does your policy confer some form of preferential treatment upon individuals who are willing to associate with a particular body?
- Does your policy confer a preference in terms of obtaining or retaining employment?
- Does your policy confer a preference in relation to employment terms and conditions?

What every policy analyst needs to know about section 17

- The right to freedom of association protects the right of all persons to join with others without interference by the state to attain a particular end.
- A person's decision to join or refrain from joining an organisation should be free from compulsion, intimidation, coercion, incentives or disincentives of a magnitude that effectively removes the exercise of choice.
• The right does not protect the acts of the association itself.
• The right also encompasses the freedom not to associate with others.
• The right includes both initial membership and ongoing involvement.
• While freedom of association is regarded as an inherent right, the right can be limited by statute in some circumstances, such as non-association orders as part of the sentence of an offender convicted of an offence punishable by imprisonment, if reasonably necessary to ensure he or she does not commit further offences punishable by imprisonment.

Measures to achieve compliance

If you are creating a new professional body or association, consider whether it is possible to create exemptions for people who do not wish to be members of that particular organisation or association.

Ask yourself:

• is membership required in order to achieve the objectives of the policy?
• is the criteria for allowing an exemption practicable?
• will those persons obtaining exemption be significantly disadvantaged by not being a member of the organisation?

If your policies offer inducements to persons who associate with certain bodies, ensure that the inducements are not so great as to effectively compel persons to join that body. For example, provided the benefits offered by your body may be obtainable elsewhere you would not be deemed to be compelling association. [302]

Related rights and freedoms

As the introduction to this part of the guidelines noted the rights in sections 12 to 18 are complementary and interdependent. If your policy gives rise to issues of consistency with section 15 of the Bill of Rights Act, you should also consider whether the policy gives rise to issues under these other sections.

Further discussion on the meaning of section 17
Section 17 recognises that persons should be free to enter into consensual arrangements with others and to promote the common interest objects of the associating group. [303] The right to freedom of association recognises the basic human desire to unite in order to pursue or achieve a common purpose, whether for political, religious, ideological, economic, commercial, labour, social, sports, cultural, or professional objectives. [304] The right to freedom of association therefore extends not only to the initial membership of an association but also to the ongoing involvement with that association.

While freedom of association is regarded as an inherent right, the right can be limited by statute in some circumstances. For example:

- section 28A of the Criminal Justice Act 1985 allows a court to make a non-association order as part of the sentence of an offender convicted of an offence punishable by imprisonment, if satisfied that the order is reasonably necessary to ensure he or she does not commit further offences punishable by imprisonment. Such an order prohibits the offender from associating with a specified person, people, or class of persons, for a specified period of up to 12 months;
- section 6A of the Summary Offences Act 1981 makes it an offence for a person to habitually associate with a violent offender in circumstances from which it can reasonably be inferred that the association will lead to the commission of a crime involving violence by that person or the violent offender. The section requires that the person must have been warned previously by a constable on at least three separate occasions that his or her continued association with that violent offender could lead to such a charge, and the warning must have been given within seven years after the date of the violent offender's last conviction for crimes involving violence;
- sections 27 to 30 of the Commerce Act 1986 prohibit individuals or organisations from entering into an arrangement or agreement with others for the purposes of lessening competition in the marketplace.

Objectives of the group

Although the intention of the right is to enable individuals to join with others for a common purpose without interference, the right concerns the ability to associate - it does not extend to protecting achievement of the group's purpose. The rationale for this differentiation appears to be that to extend the
right to include the right to fulfil the objectives would confer greater entitlements on the individuals as a group than they have as individuals.

The Canadian Supreme Court in a series of industrial relations cases [305] has taken the view that because the constitutional right to freedom of association is a right exercised by an individual, the scope of that right extends only to what an individual as an individual can perform. That is, if the individual has no fundamental right to undertake an activity, then neither does the organisation. The organisation can exercise only those rights that individual members have on behalf of those members. The right to freedom of association is not intended to protect activities that an association undertakes, but the ability of individuals to gather for the purpose of pursuing the collective exercise of constitutional rights. [306] For example, the right to freedom of association does not confer on a trade union the right to strike, but it does enable members of a trade union to collectively express their opinion about workplace practices.

The ability of groups to act as a group to achieve specific objectives is therefore dependent on the nature of specific legislative frameworks. The objectives of the group are not of a kind anticipated by the fundamental nature of the right to freedom of association.

There is some indication from overseas courts that suggests that this position may be shifting to a point where the right to the freedom of association is considered as being more purposive. [307]

**The freedom not to associate**

Like many civil and political rights, the right to freedom of association carries with it the implication that a person should not be compelled to associate. [308] There are two aspects to the freedom not to associate:

1. the right of a group, associated on behalf of its members, not to be compelled to associate with any particular individual; and
2. the right of an individual not to be compelled to associate with a group of persons.

The first aspect arises in circumstances where the freedom to associate (and not to associate) may intersect with anti-discrimination values as expressed in the prohibition on discrimination under section 19 of the Bill of Rights Act and under the Human Rights Act 1993. For example, section 44 of the Human Rights Act prohibits discrimination in the provision of goods and
services; however, this prohibition does not apply to access to membership of a club or to the provision of services or facilities to members of a club. Similarly, section 38 of the Human Rights Act prohibits discrimination by industrial and professional associations, qualifying bodies, and vocational training bodies, but provides an exception to allow for freedom of religion. [309]

The second aspect highlights the need for an individual's membership of an organisation to be based on informed consent. A person's decision to join or refrain from joining an organisation should be free from intimidation or coercion, or the existence of incentives or disincentives. In other words, the exercise of that choice must be free from outside pressures of a magnitude whereby they in effect remove the exercise of choice. [310]

Despite this, section 5 of the Bill of Rights Act may have some bearing on whether the compulsory membership of a professional organisation infringes the right to freedom of association. The courts in New Zealand have not considered this matter, but in Europe the courts have held that where:

- a person practises a profession;
- the exercise of which affects the general interest;
- there is a requirement to belong to a regulated professional organisation; and
- there is a public interest in maintaining professional standards,

then that requirement falls outside the scope of the freedom of association. [311]

From a Bill of Rights Act standpoint, it is more likely that the requirement to belong to such an organisation would be assessed from the perspective of whether the compulsory membership was justifiable. However, the same considerations are applicable.

The right to freedom of association could also extend to discriminatory treatment based on an individual's association with another individual or group. For example, a proposal that gang members who commit crimes should receive harsher sentences than non-gang members may come within this right. Further, if there is a possibility that a person may suffer discrimination as a result of a particular association, then the right may also extend to protection from compulsory disclosure of membership. [312]
Key cases


History of the section

*The White Paper*

The *White Paper* originally contained a subclause that clarified the scope of this section. It stated:

This right includes the right of every person to form and join trade unions for the protection of that person's interests consistently with legislative measures enacted to ensure effective trade union representation and to encourage orderly industrial relations.

This was done to ensure consistency with New Zealand's reservation of article 22 of the ICCPR (set out below). Despite this reservation, the Justice and Electoral Select Committee determined that the subclause was an unnecessary feature of this section and it was deleted. [313]

*Section 17 origins in international treaties and overseas legislation*

Article 22 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

New Zealand's reservation to Article 22 provides:

The Government of New Zealand reserves the right not to apply article 22 as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.

Article 20 of the Universal Declaration of Human Rights provides that:

1. Everyone has the right to freedom of peaceful assembly and association.

2. No-one may be compelled to belong to an association.

Article 11 of the European Convention states:

1. Everyone has the right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of armed forces, or of the police or of the administration of the State.

Section 2(d) of the Canadian Charter provides that:

Everyone has the following fundamental freedoms:

. . .

d) freedom of association.
Section 18 Freedom of Movement

Section 18 of the Bill of Rights Act is as follows:

**Freedom of movement**
(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
(2) Every New Zealand citizen has the right to enter New Zealand.
(3) Everyone has the right to leave New Zealand.
(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

**Policy triggers: do I need to consider section 18?**

Are you working on a policy or developing a practice that:

- limits the ability of individuals to move freely through, remain in, or enter or depart from, any form of public space;
- places conditions on the ability of a person to live within the community;
- enables the state to monitor or trace the movements of a person within the community;
- limits the ability of any individual to choose where he or she wishes to reside;
- requires persons to fulfil certain requirements before they are able to leave and enter New Zealand at will; or,
- seeks to require an individual to leave New Zealand?

If you answer yes to any of these questions, then you need to consider whether your policy or practice is consistent with section 18 of the Bill of Rights Act.

**What every policy analyst needs to know about section 18**

- Section 18 recognises:
  - the right to move freely within the country;
  - the right to choose a place of residence within the country;
  - the right to be free to leave and enter New Zealand (including the right to obtain the necessary travel documents); and,
• the right not to be expelled from the country except in accordance with the law.

• The rights to freedom of movement and residence are subject to the person being lawfully in New Zealand; that is, as long as they comply with the conditions of their admission (as imposed by and under the Immigration Act 1987).

• The rights set out in section 18 have more general application than just immigration matters.

• Freedom of movement includes the right not to be forced to move to, or from, a particular location.

• The right includes freedom from physical barriers and procedural impediments (e.g., requirements for prior notification or authorisation from a public authority before entering a public park or participating in a public demonstration on a public thoroughfare; inability to enter or depart New Zealand until a certain condition is met, or a prohibition on particular forms of activity in public areas such as reserves).

• Restrictions on movements imposed by a Court as part of sentence or release conditions may raise issues of freedom of movement, and may also raise issues of arbitrary detention (section 22). This remains an unsettled area in the European Courts.

Measures to achieve compliance

Restrictions on the exercise of these rights may be justifiable in certain contexts where they can be shown to be necessary to, and are imposed only to the extent necessary to achieve, the objectives of preserving:

• national security
• public safety
• public order, or
• public health.

The powers used to preserve such objectives must also be rational and proportionate. If, for example, you are considering restricting open access to a park or reserve for reasons of public order, consider: the period of time during which the restriction is to remain in place, the criteria under which persons are to be granted/denied access; and the extent of the area covered by the restriction.
Related rights and freedoms

As the introduction to this part of the guidelines noted the rights in sections 12 to 18 are complementary and interdependent. If your policy gives rise to issues of consistency with section 18 of the Bill of Rights Act, you should also consider whether the policy gives rise to issues under these other sections.

You should also whether your policy gives rise to issues of consistency with

- the right to freedom from arbitrary arrest or detention (section 22);
- the right of persons charged with an offence to release on reasonable terms and conditions (section 24(b)).

Further discussion on the meaning of section 18

The commentary in the White Paper concentrates on common law principles and the effect given to the right. The common law recognised the right to freedom of movement to the extent that it applied to all movement unless such movement is expressly prohibited or limited by law. [314] Although there is the presumption that an individual can roam at will, the right to freedom of movement is infringed on a regular basis by a range of laws that govern where we reside or where we are able to move. These laws include, for example:

- the law of trespass, which limits an individual's right to enter onto private property;
- road transport laws which govern an individual's use of their motor vehicle on the roads;
- planning and zoning laws that determine where we can reside or conduct trade; and
- lawfully imposed sentences of imprisonment and bail.

The right to enter and move within New Zealand is not qualified in any way other than by the fact that the person has to be lawfully in the country. This requirement refers to domestic law, which may lay down the conditions to be fulfilled. Overseas visitors who are provisionally allowed to remain in this country can only be regarded as lawfully in the country as long as they comply with the conditions of their admission. [315] The provision is also not available to those whose residence permit has been revoked. [316]
The right to leave New Zealand carries with it the right to obtain the necessary travel documents. Any restrictions placed on the availability of a passport would need to be considered in light of the restrictions that are placed on the ability of a person to travel abroad. The right to leave New Zealand also exists independently of the individual's motivations for leaving the country or his or her destination.

**Is section 18 limited to immigration policy?**

It appears the "freedom of movement" referred to in section 18(1) is not coloured by issues of immigration that influence the remainder of section 18. The District Court in *Kerr v Attorney-General* was not inclined to find that the reference to immigration matters limited the scope of the right to freedom of movement. The Court found instead that the right to freedom of movement also extended to the right to move freely down highways. The right to the freedom of movement would also appear to include the right not to be forced to move to, or from, a particular location. In other words, the right includes the right of an individual to move at any time he or she chooses.

This approach to section 18(1) is consistent with statements from the United Nations Human Rights Committee which have said, in relation to article 12 of the ICCPR, that "[L]iberty of movement is an indispensable condition for the free development of a person." It is also consistent with the approach of the European Court of Human Rights (see below). Although the District Court did not address the issue, the decision in *Kerr* appears to take into account the relationship section 18(1) has with other rights in the Bill of Rights Act.

New Zealand caselaw appears to be broadly consistent with the approach taken by the European Court.

The right to freedom of movement is also not restricted to physical barriers preventing travel, but includes procedural impediments, such as prior notification or prior authorisation. In addition, restrictions on movement, for example limiting the ability of a person to enter particular areas, which are imposed by a court as part of a sentence or conditions of release, may raise issues of freedom of movement. Where the extent of restriction of movement is severe, this is likely to also raise issues under section 22 (right not to be arbitrarily arrested or detained). The following European Court cases illustrate this point:
• **Guzzardi v Italy** [323]
The Court in Guzzardi's case took the view that the confinement of an individual in a small area, between set hours, over a prolonged period during which he had to report to authorities at set times and could only leave under strict supervision arrangements, was a deprivation of liberty.

• **Raimondo v Italy** [324]
Restrictions requiring a person to report to authorities, remain at home between set hours, and otherwise inform the authorities that they were leaving their home, were held by the Court in this case to be a breach of the freedom of movement.

• **Van den Dungen v The Netherlands** [325]
An injunction prohibiting an anti-abortionist campaigner from entering an area within 250 metres of an abortion clinic has also been regarded as an interference with the right to freedom of movement.

**Key cases**


**History of the section**

*The White Paper*

Section 18 is identical to the right found in the *White Paper*.

**Section 18 origins in international treaties and overseas legislation**

The right to freedom of movement is recognised in international law.

Article 12 of the International Covenant on Civil and Political Rights (ICCPR) provides that:
1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.
4. No-one shall be arbitrarily deprived of the right to enter his own country.

Article 13 of the ICCPR provides that:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or personally designated by the competent authority.

Article 13 of the Universal Declaration of Human Rights provides that:

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including their own, and to return to their own country.

Article 2 of the Fourth Protocol of the European Convention on Human Rights provides:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or
public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Footnotes:

158. Human Rights Committee CCPR General Comment 25 para 12 12/07/96.
160. For example, the Electoral Act extends the right to vote to all permanent residents of New Zealand who have resided continuously here for 12 months, whereas section 12 only refers to New Zealand citizens.
163. A person may be denied the right to vote for example if they have lived outside of NZ for the preceding 3 years, or if they are detained under certain provisions of the Mental Health (Compulsory Treatment and Assessment) Act 1993 - see section 80(1)(d) of the Electoral Act.
166. See, for example, section 80 of the Electoral Act 1993.
169. This may fall for consideration under section 19 of the Bill of Rights Act.
170. See section 47 of the Electoral Act.
172. This case was decided prior to the introduction of the MMP electoral system. Because political parties are required to play a more significant role in determining the make up of the House (through the creation of party lists) it remains to be seen whether political parties no longer remain subject to the Bill of Rights Act.
176. Article 21 of the UDHR is expressed in broadly similar terms.
177. Note that article 7 of CEDAW is expressed in similar terms to article 5 of CERD, but for the sake of conciseness, we have only reproduced article 5 from CERD here.
181. UN General Comment 22-1.
182. UN General Comment 22-2.
188. See *Otto-Preminger Institut v Austria* (1995) 19 EHRR 34.
190. Church of Scientology v Sweden (8282/78).
    The Otto-Preminger decision was followed in Wingrove v United Kingdom (1997) 24 EHRR 1.
192. Application 11308/84 Vereniging v Rechtswinkels Utrecht v Netherlands 46 DR 200 (1986), ECom HR.
193. Application 7805/77 X and Church of Scientology v Sweden 16 DR 68 (1979) EComHR.
195. Arrowsmith v United Kingdom (Decision of 22/10/78, No 7050/75).
    The Manitobian Court of Appeal found a provision allowing financial support to minority political candidates and parties did not restrict the applicant's freedom of conscience.
199. Application 7050/75 Arrowsmith v United Kingdom 19 DR 5 (1980), EComHR.
202. See too the quote from Wilson J above from the decision in Morgentaler.
204. UN General Comment 22-11.
205. UN General Comment 22-2. For example, pacifism is considered a belief for the purposes of Article 9 of the European Convention on Human Rights. See Arrowsmith v United Kingdom (Decision of 22/10/78, No 7050/75).


209. These 5 indicia were used in Centrepoint Community Growth Trust v CIR [1985] 1 NZLR 673 and Re I C [1999] NZFLR 471. Following the leading Australian decision Church of New Faith v Commissioner for Pay-roll Tax (1984) 57 ALJR 785. The Court of Appeal has not expressed a view as to its correctness.

210. The Canadian approach is the a court is not to inquire into the validity of a sincerely held belief. See R. v. Lewis; Elizabeth Bagshaw Society et al., Interveners 139 D.L.R. (4th) 480 1996.


215. R v Big M Drug Mart Ltd 5 DLR (4th) 121.


219. See also Canadian Civil Liberties Association v Ontario (Minister of Education) (1990), 71 OR (2d) 341 (CA).


222. Canadian Civil Liberties Association v Ontario (Minister of Education) (1990), 71 OR (2d) 341 (CA).


228. *Newspapers Publishers Association of New Zealand (Inc) v Family Court* [1999] 2 NZLR 344.


231. *Abrams v United States*.


237. For example, see *R v Keegstra* [1990] 3 S.C.R 697, 828.


245. *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705.


250. See sections 21 and 23(4) of the Bill of Rights Act respectively.


255. Guerra and others v Italy February 19, 1998.
256. Article 7 of the proposed Bill of Rights Act. A discussion of the right appears at paras 10.54 to 10.58 of the White Paper.
260. See Otto-Preminger Institut v Austria (1995) 19 EHRR 34.
261. These 5 indicia were used in Centrepoint Community Growth Trust v CIR [1985] 1 NZLR 673 and Re I C [1999] NZFLR 471. Following the leading Australian decision Church of New Faith v Commissioner for Pay-roll Tax (1984) 57 ALJR 785. The Court of Appeal has not expressed a view as to its correctness. The indicia are objective guidelines only and should not be thought of as a test for religion.
262. UN General Comment 22-2. For example, pacifism is considered a belief for the purposes of Article 9 of the European Convention on Human Rights. See Arrowsmith v United Kingdom (Decision of 22/10/78, No 7050/75).
263. UN General Comment 22, para 2.
268. UN General Comment 22-4.
269. UN General Comment 22-4.
271. UN General Comment 22-4.
272. UN General Comment 22-4.
276. UN General Comment 22-4.
283. UN General Comment 22-8.
284. *Kivenmaa v Finland* (412/990) Mr Hendl (dissenting).
285. For the idea that the right extends to private as well as public meetings, see Application 8191/78 *Rassamblment Jurassien Unité v Switzerland* 17 DR 93 (1979), EComHR.
286. This is an area in which the power of local authorities to make and administer by-laws may be critical. Unfettered powers to prevent meetings or processions might be questioned because of the lack of "limits prescribed by law" in terms of [section 5]. It may also seem that in some cases the interest to be protected cannot be seen as justifying the interference with an important freedom. See *The White Paper* para 10.62.
287. *Kapiti Coast DC v Raika* [1997] NZRMA 218. In this case the Environment Court granted an interim enforcement order that prohibited the respondents using certain residential premises as gang headquarters without a resource consent. The Court found that this was a reasonable limit on the respondents' right of assembly in light of the potential danger to residents, the fear of many residents, and the general disruptive effect upon the neighbourhood. On a similar note see sections 86 and 87 of the Crimes Act 1961.
288. See, for example, *Williams v Police* (1986) 2 CRNZ 131.


292. As long as the assembly is lawful, see *Bradford v Police* [1995] 2 HRNZ 405.


295. See, for example, section 23 of the Summary Offences Act 1981 which enables certain law enforcement officers to arrest a person obstructing an officer in the course of their duties.


297. See *Minto v Police* (1991) 7 CRNZ 38, 41 where the Court noted that the decision by the police to move the protestors away from the venue by some 50m did not prevent the protestors from being able to maintain a presence or effectively voice their position.

298. Pages 37-39 of "Inquiry into matters relating to the visit of the President of China to New Zealand in 1999". *Report of the Justice and Electoral Committee* New Zealand House of Representatives, December 2000 [italics in original, bold added].

299. *Plattform 'Artze für das Leben' v Austria* A 139 (1988) 13 EHRR 204, E Ct HR.


305. *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 per McIntyre J at p 407. This case should be read
together with *PSAC v Canada* [1987] 1 SCR 424 and *RWDSU v Saskatchewan* [1987] 1 SCR 460 (the Labour Trilogy). In each of these cases the majority of the Court held that legislation that prevented a workers' association from taking effective industrial action was not inconsistent with the right to freedom of association.

306. For a European perspective see *Schmidt and Dahlström v Sweden* February 6, 1976, Series A, No 20; 1 EHRR 632.

307. *Dunmore v Ontario Attorney-General* [2001] 3 SCR 1016; *Delisle v Canada (Deputy Attorney-General)* [1999] 2 SCR 989. The minority in the Labour Trilogy cases considered that the purpose of the right to freedom of association is to protect the right of individuals to act collectively in the pursuit of common interests. Workers have an inherent interest in safe conditions in the workplace and are likely to act in concert to secure these goals. Because an individual cannot strike, workers necessarily must associate for the purpose of their collective interests in the workplace; the right to take industrial action (including a strike) is an inevitable corollary of this association.

308. *Air New Zealand Ltd v Trustees of the New Zealand Airline Pilots Mutual Benefit Fund* [2000] 1 NZLR 418. See also, the Canadian Supreme Court decision *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211.

309. Section 39(1) states "Nothing in section 38 of this Act shall apply where the authorisation or qualification is needed for, or facilitates engagement in, a profession or calling for the purposes of an organised religion and is limited to one sex or to persons of that religious belief so as to comply with the doctrines or rules or established customs of that religion."

310. *Air New Zealand Ltd v Trustees of the New Zealand Airline Pilots Mutual Benefit Fund* [2000] 1 NZLR 418, 429; *Chassagnou & Ors v France* Applications 25088/94 28331/95, and 28443/95, 29/04/1999.


313. See Justice and Law Reform Select Committee, "Inquiry into the White Paper- A Bill of Rights for New Zealand"
320. There is Canadian case law that states that the right of an individual to use the public highways is a right which comes within the concept of the right to liberty. See Re Rowland and the Queen 10 DLR (4th) 724, 13 CCC (3d) 367, 33 Alta LR (2d) 252; Re Gresham Produce Co. Ltd and Motor Transport Board 14 DLR (4th) 722 varied, 22 DLR (4th) 520.
322. It would be difficult, for example, to give effect to the right to peaceful assembly, without giving effect to the right to freedom of movement.
323. Guzzardi v Italy November 6 1980, Series A, No. 314; 20 EHRR 301. The European Court in Guzzardi held that there was a technical distinction to be made between the deprivation of liberty and freedom of movement and that the difference in application of the rights was one of degree and intensity rather than substance or nature. Despite this, the considerations remain similar.
324. Raimondo v Italy February 22, 1994, Series A No. 281-A; 18 EHRR 237.
Van den Dungen v The Netherlands 22838/93 Netherlands, (Dec) February 22, 1995, 80-A DR 147. The infringement was held to be justified for the protection of the rights of others having regard to the limited area affected and duration of the measure.
Introduction to sections 19-20: Non-Discrimination and Minority Rights

Sections 19 and 20 of the Bill of Rights Act concern the right to be free from discrimination on a variety of grounds, and particularly provide protection of rights for minorities.

- Section 19 concerns the right to be free from discrimination, on the grounds contained in the Human Rights Act 1993. The section also contains "affirmative action" provisions.
- Section 20 is about the rights of persons who belong to an ethnic, religious, or linguistic minority in New Zealand. These include the right to enjoy the culture, to profess and practice the religion, and to use the language of that minority.

These rights are complementary. It is also important to be aware of how the rights and freedoms contained in these two sections interact with other sections of the Bill of Rights Act; for example, sections 10 and 11, and sections 13-17.

The rights in section 19 must be read in conjunction with the Human Rights Act 1993, which sets out the prohibited grounds of discrimination, namely: sex, marital status, religious belief, ethical belief, colour, race, ethnic/national origin, disability, age, political opinion, employment status, family status, sexual orientation.

Section 19 Freedom from discrimination [326]

Section 19 of the Bill of Rights Act is as follows:

**Freedom from discrimination**

1. Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
2. Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.
**Policy triggers: do I need to consider section 19?**

To determine whether your policy appears to be consistent with section 19 you need to ask the following questions:

- Does your policy draw distinctions between persons or groups based on one or more of the following prohibited grounds of discrimination in the Human Rights Act 1993, namely: sex, marital status, religious belief, ethical belief, colour, race, ethnic/national origin, disability, age, political opinion, employment status, family status, sexual orientation?
- Does the distinction involve disadvantage to the persons or group?
- Does the policy you are developing contain measures that are attempting to assist persons who have been socially, culturally and/or economically disadvantaged?
- Is the policy taking steps to diminish or eliminate conditions that have caused on-going disadvantage for specific groups within society?

Some of the more specific questions to identify these distinctions that you may wish to consider include, but are not limited to:

- Does your policy provide for the delivery of financial entitlements or social services to some sectors of society and not to others? Does that policy make distinctions based on an individual's age, marital status, family status, race, ethnic or national origins, religious or ethical belief, disability, sex, or sexual orientation?
- Does your policy set age bands that are expressed as protective measures (e.g. consumption of alcohol), graduated entitlements (e.g. driver licensing) or statements of legal capacity (e.g. voting)?
- Has your policy been developed to assist or recognise interests of Maori and/or the interests of other ethnic groups?
- Do the requirements of your policy have a disproportionate impact on some sectors of the community by reason of their age, sex, ethnic or national origins, political opinion, race, disability, sexual orientation?

**What every policy analyst needs to know about section 19**

- Not every form of differential treatment is discriminatory.
Legislation, policies, or practices give rise to a *prima facie* (on the face of it) issue of "discrimination" under section 19(1) of the Bill of Rights Act if the legislation, policy, or practice leads to groups or individuals being treated differently on the basis of one of the prohibited grounds of discrimination in the Human Rights Act, and that difference in treatment disadvantages some groups or individuals.

The groups or individuals being compared must be in a comparable or similar position.

It is immaterial whether this disadvantage has already occurred or whether it is being assumed that it will occur in the future.

Discrimination can arise on more than one ground. For example, policies which consider persons under 20 years of age to be "minors" and treat persons aged 16 to 19 years differently from adults unless the minor is married, raise discrimination issues on the grounds of age and marital status.

Discrimination can also arise intra-ground; for example, the provision of different services to people with disabilities based on the nature of their disability.

Discrimination may arise:

- directly; for example, a policy may discriminate on the basis of age where it requires a person to be over a certain age to be a judge; or
- indirectly - a requirement that is neutral on its face may impact disproportionately on a particular group of people; for example, a policy may discriminate on the basis of age where it requires a person to have been admitted to the bar for a minimum number of years to be a judge. The effect of the policy is potentially discriminatory because it requires a person to be of a certain age before they can reasonably be expected to qualify.

Section 19(2) aims to clarify the fact that certain "affirmative action", policies or programmes may not be discriminatory for the purposes of the Bill of Rights Act.

Affirmative action programmes are only non-discriminatory for the period of time it takes to address the disadvantage experienced by the targeted group.
The courts in New Zealand have not had an opportunity to apply section 19(2) of the Bill of Rights Act - the application of section 19(2) and relationship of section 19(2) with section 19(1) is therefore far from clear.

However, if you are able to demonstrate that a specific group within the community are in need of specific short-term assistance which is unavailable to others for the purposes of addressing or alleviating ongoing disadvantage related to their membership of that group, then it is unlikely that such a measure will amount to discrimination.

If the legislation, policy, practice, or service gives rise to a *prima facie* issue of "discrimination" under section 19(1) of the Bill of Rights Act (because there is different treatment resulting in disadvantage), discrimination will only be found if it cannot be demonstrated that the measure is a "justified limitation reasonably necessary in a free and democratic society" in accordance with section 5 of the Bill of Rights Act.

**Measures to achieve compliance**

There are a number of ways to increase compliance of your policy with section 19 of the Bill of Rights Act. Some of the issues an agency should consider are set out below.

If your policy makes a distinction on one of the prohibited grounds of discrimination, make sure it is inclusive and not exclusive in its effect. For example:

- if your policy establishes an advisory committee comprised of Maori, ensure that other sectors of the community have access to decision-makers;
- if it is necessary to appoint persons to boards in order to provide a wider cultural perspective, consider requiring selection based on cultural knowledge rather than on ethnic or racial background;
- if your policy is aimed at people living in relationships, be sure to develop the policy so that it applies equally to married couples, de facto couples, and same-sex couples.
If the policy or practice appears to be discriminatory, consider the underlying purpose or reason for the distinction. Ask whether:

- the reason for the distinction is consistent with the objectives of the policy;
- the objective of the policy is legitimate;
- the distinction is sufficiently prescribed to meet its purpose;
- the basis for the distinction is able to be supported by reliable information.

In looking at whether a provision in legislation, a policy, practice, or service is an affirmative action measure under the Bill of Rights Act, you will need to consider the following questions:

- Is your legislation, policy, practice, or service shaped this way because it is aimed at assisting or advancing persons or people who are traditionally disadvantaged?
- What is the nature of the disadvantage suffered by the person or group?
- Is there any evidence to support the existence of that disadvantage?
- How will your legislation, policy, practice, or service assist in addressing that disadvantage?
- Can you measure the results of your action? For example, can you determine to date or will you be able to determine in the future whether your action has been successful in assisting or advancing persons who have been disadvantaged by discrimination?

If you can demonstrate that your legislation, policy, practice, or service is an affirmative action measure, then it will not be discrimination under the Bill of Rights Act.

However, due to the complexities in applying section 19(2), we suggest that you always consult your legal adviser when considering whether section 19(2) might be applicable to your legislation, policy, practice, or service.

**Related rights and freedoms**

Section 19(1) complements many of the rights in the Bill of Rights Act as it requires government departments and agencies to consider what the impacts of their actions may have on all sectors of society. Section 19(1) will have a more direct relationship with:
• the right to freedom of thought and conscience (section 13);
• the right to freedom of expression (section 14);
• the right to freedom to manifest religion (section 15);
• the rights of minorities (section 20).

Further discussion on the meaning of section 19(1)

What is discrimination: a fuller analysis?

In *Quilter v Attorney-General* [327] Thomas J stated:

[t]he existence of discrimination or otherwise can only be determined by 'assessing the prejudicial effect of the distinction against...the fundamental purpose of preventing the infringement of essential human dignity.' [328]

It is clear that not every form of treatment that differentiates between individuals or groups of individuals on the basis of one or more of the prohibited grounds of discrimination will constitute discrimination. [329]

It has been said that:

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on individual's merits and capacities will rarely be so classed. [330]

The essence of discrimination lies in the different treatment of individuals or groups of individuals in comparable situations, where one individual or group of individuals is disadvantaged in circumstances where that disadvantage is not able to be objectively justified. Tipping J in *Quilter* [331] described the process of identifying discrimination as requiring two separate questions: "What does the difference in treatment relate to and upon what factor or factors is the difference based?" [332]

In answering these questions, one must seek to:
Give substance to the principle of equality under the law and the law's unwillingness to allow discrimination on any of the prohibited grounds unless the reason for the discrimination serves a higher goal than the goal which anti-discrimination laws are designed to achieve. [333]

The approach in Quilter

The leading New Zealand case on section 19 of the Bill of Rights Act remains Quilter v Attorney General. [334] In this case, the five Judges were unanimous in finding that the Marriage Act did not enable same-sex couples to marry. However, the divergence in approaches of the Judges to applying section 19 has meant that the law on section 19(1) remains unsettled. [335]

A number of key points can be taken from Quilter: [336]

1. Discrimination cannot be defined in precise terms.
2. Not all distinctions drawn between individuals and groups of individuals are tantamount to discrimination.
3. By its very nature, what is (or is not) discrimination is dependent on the environmental context - that context will be indicative of whether difference in treatment is discriminatory.
4. Distinctions based on irrelevant personal characteristics are likely to be discriminatory whereas distinctions based on an individual's merits and capabilities are unlikely to be regarded as discriminatory. [337]

The Canadian Supreme Court has added a gloss to discrimination law by suggesting that:

...the purpose of [the right to be free from discrimination] is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian
society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society. [338]

There is no New Zealand caselaw to indicate that the courts here would take a similar approach to discrimination law. It is therefore not essential for an affected party to establish that their dignity has been lowered or that such stereotypes or prejudices exist in order to show disadvantage. The dignity approach is also problematic as it does not address all avenues of discrimination. Some individuals or groups within the community, such as widowed people or married couples, are unlikely to have experienced the effects of prejudicial stereotyping, but may still suffer a disadvantage under some policies or legislation. [339] An example of such a policy might be one that confers an entitlement such as access to free child-care facilities for single parents who are employed but not two parent households where both parents are employed. Such a policy might be considered to disadvantage two parent families, particularly where the families are in equivalent income ranges, even though no-one's dignity would appear to have been infringed.

Section 19(1) - a suggested approach to non-discrimination law

The Ministry of Justice has considered the caselaw on discrimination issues and, in an attempt to provide a practical way forward for agencies, has developed the following guidelines.

The two key questions to ask when assessing whether discrimination under section 19 exists are:

i. Does the policy or legislation draw a distinction based on one of the prohibited grounds of discrimination?

ii. Does this distinction involve disadvantage to the person or group?

If the answer to both of these questions is "yes", then consideration needs to be given as to whether the limit on the right to be free from discrimination is reasonable in terms of section 5 of the Bill of Rights Act. If it is, then it appears that the policy or practice does not amount to discrimination. The policy or practice infringes section 19(1) only where it cannot be demonstrably justified.
Can the distinction be drawn within one of the prohibited grounds of discrimination?

It is likely that a New Zealand court would consider the merits of a claim of intra-ground discrimination, even though intra-ground discrimination is not expressly referred to in the Human Rights Act. Intra-ground discrimination occurs when distinctions are made within the prohibited grounds of discrimination. For example, intra-ground discrimination may occur if individuals who have a particular disability are eligible for certain entitlements of a quality not available to others with disabilities.

The Canadian Supreme Court has directly considered the issue of whether there can be intra-ground discrimination and found it to be possible in Granovsky v Minister of Employment and Immigration. [340]

Intra-ground discrimination may arise in a number of contexts and may be based on a number of the prohibited grounds of discrimination. For example, to date it seems more likely to arise more frequently in relation to the ground of disability than to other grounds in the Act by virtue of the broad nature of that particular ground of discrimination, but it may also arise in other contexts. The Supreme Court in Lovelace v Ontario [341] for example, was considering the issue in the context of different bands within the First Nation people of Canada. In that case, the Canadian Government provided one band was given assistance in developing a casino. This assistance was not provided to others.

When is a person disadvantaged?

As not all forms of distinction or differences in treatment amount to discrimination, consideration needs to be given to the nature of the disadvantage. A person is disadvantaged if they are treated less favourably, either because they are deprived of something from which they can derive a benefit - such as access to services, or an opportunity to do something - or because they have less choice available to them or have a burden imposed on them. [342] The extent to which a person experiences different treatment is likely to have a bearing on whether that difference amounts to "disadvantage".

In order to identify disadvantage there needs to be some basis for assessing the disadvantage. The European Court of Human Rights notes the analysis of whether discrimination exists is only made meaningful if the basis for comparison is reasonable; that is, the groups or individuals being compared
need to be in a comparable or similar position. [343] The courts in New Zealand are likely to adopt an equivalent approach.

Not all policies or practices that treat groups or individuals in comparable positions differently result in disadvantage. Consideration should be given to the nature and the extent of the impact of the policy on both parties before an assessment as to the existence of disadvantage can be made. The following examples illustrate situations where it could be said that there is no disadvantage.

**Example 1: Different needs**

At first glance car-parks that are reserved for persons with a disability may "disadvantage" those who do not experience a disability because they do not have access to these car parks and may have to walk further to access services. However, a person who does not have a disability is not disadvantaged in a meaningful way as they do not have the same need for the car park.

**Example 2: Different interests**

A governance body has been established under legislation to make decisions relating to the allocation of assets that have been provided to Maori as part of a Treaty Settlement agreement. Only Maori are able to be appointed to the Board. While on the one hand such an appointment criterion might appear to be discriminatory, the use of this criterion in this situation is unlikely to cause disadvantage as only Maori are likely to have an interest in the way in which the assets are managed.

**Example 3: Alternative services**

A new government initiative results in a service provider receiving funding to provide a particular range of social services that are necessary to meet the needs of a specific ethnic community ("Group A"). Such an initiative might be seen as not causing disadvantage if it could be shown that other ethnic groups receive publicly-funded social services of a similar quality, and which meet the needs of their community ("Group B"). Although the services provided to Group A may differ from those provided to Group B, there may be no disadvantage to either group if the quality of the services, the level of the funding, and the quality of access is similar, and the benefits that accrue to both groups is similar.
Because the law on discrimination continues to evolve, we would strongly urge policy advisers against developing policies or practices that treat groups in a comparable position differently without considering possible justifications for the proposals. In other words, assume that such treatment might constitute a *prima facie* infringement of section 19(1) and that you will need to justify it in terms of section 5 of the Bill of Rights Act.

It is also conceivable for a form of treatment to disadvantage someone indirectly. Unlike the Human Rights Act, section 19 of the Bill of Rights Act does not differentiate between indirect and direct discrimination. Indirect discrimination may occur where legislation, a practice, rule, policy, or requirement that is neutral on its face may impact disproportionately on one sector of the community in an unjustifiable way. An example of a policy that may indirectly discriminate would be a requirement that all persons must wear hard hats for certain jobs. This requirement may indirectly discriminate against Sikhs and other ethnic groups whose religion or culture requires them to wear certain headwear. [344]

**Does this mean that people need to be treated the same?**

Section 19 of the Bill of Rights Act does not require everyone to be treated identically. It should be noted that there was a deliberate decision by Parliament to omit the phrases "equality" and "equality before the law" from section 19 despite its inclusion in section 15(1) of the Charter. The Justice and Law Reform Select Committee endorsed the following views expressed in the *White Paper*:

[t]he meaning of the phrase "equality before the law" is "elusive and its significance difficult to discern." (paragraph 10.81)...the phrase "equal protection of the law" should be excluded because of its openness and the uncertainty of its application...it would enable the courts to enter into many areas which would be seen in New Zealand as ones of substantive policy (paragraph 10.82).

In reviewing European caselaw, Lord Lester of Herne Hill QC had this to say:

The principle of equal treatment, viewed as a general principle of European Community law, requires that similar situations must not be treated differently and that different situations must not be treated in the same manner unless such differentiation is objectively justified. [345]
It is clear that despite the divergence of approaches from the Court of Appeal in *Quilter* and overseas caselaw, differential treatment will not necessarily itself amount to discrimination. The main questions will be whether the treatment disadvantages the person or group and, if so, whether the differentiation is justifiable in terms of section 5 of the Bill of Rights Act.

**Affirmative action programmes**

The New Zealand courts have not addressed the meaning or application of section 19(2) of the Bill of Rights Act, or its relationship with section 19(1). However, it would seem that if we apply the approach taken by the Canadian courts to applying the affirmative action provision in the Canadian Charter, the role of section 19(2) is to inform the scope of section 19(1). [346] That is, a policy or practice that is in the form of an affirmative action programme may not be discriminatory if it can be shown that sectors of society who do not benefit from the programme are not disadvantaged or that the programme is a reasonable limit on section 19(1) in terms of section 5 of the Bill of Rights Act.

The reason for section 19(2) is that sometimes the effects of discrimination require specific policies or programmes in order for those effects to be addressed - for example, where discrimination has resulted in one group being underrepresented in education out of proportion to their relative population in New Zealand as a whole or in the particular local community.

The European Court of Human Rights has recognised that "certain legal inequalities tend to correct factual inequalities" and are therefore compatible with the right to be free from discrimination. [347] The European Court went on to say:

The principle of equality of individuals under international law does not require mere formal or mathematical equality but a substantial and genuine equality in fact. [348]

Although the European Convention does not contain an affirmative action provision the courts have considered whether such programmes are consistent with the right to be free from discrimination found in Article 14. The approach of the European Court has been that affirmative action programmes are not discriminatory if the differentiation is reasonable and objective - in other words, would it meet a test like that set down by section 5 of the Bill of Rights Act? [349] The European Court is said to interpret the European Convention as a "living instrument, and requires the State to keep
the justification for the affirmative action measure under review in the light of present day conditions." [350]

Affirmative action programmes are therefore, by definition, short-lived as they only have legitimacy for the time that is required to address the effect of previous disadvantage. [351]

**Alternative approach to section 19(2)**

The alternative approach to applying section 19(2) is to apply section 19(2) as an exception to section 19(1). Under this approach, an agency seeking to implement an affirmative action programme would first need to consider if the subject of the policy or programme has experienced unlawful discrimination on the grounds in the Human Rights Act and they have experienced disadvantage because of that discrimination. In other words, there is a requirement that the assisted group first be disadvantaged because of unlawful discrimination.

A problem arises with applying section 19(2) in this way because it may not always be possible to establish actual discrimination against this assisted group, in other words, to match up the group who has suffered discrimination with the group being targeted by the affirmative action measure. This might be the case where, for example, a particular age bracket or ethnic group may be under-represented in a certain activity by reason of general social disadvantage, but that disadvantage may not be directly connected to specific and identifiable discriminatory acts.

If you can demonstrate that your legislation, policy, practice, or service is an affirmative action measure, then it will not be discrimination under the Bill of Rights Act. However, due to the complexities in applying section 19(2), we suggest that you always consult your legal adviser when considering whether section 19(2) might be applicable to your legislation, policy, practice, or service.

**Key cases**

*Quilter v Attorney-General* [1998] 1 NZLR 523; *LSA Daniels & Ors v Attorney General* unreported M 1615- SW99, High Court Auckland, 3 April 2002; *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; *Lovelace v Ontario* [2000] SCC 37; *Granovsky v Minister of Employment and Immigration* [2000] 1 SCR 703;
History of the section

The White Paper

Section 19(1) was originally drafted in identical terms to that which was proposed in the *White Paper*, as follows:

Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, or religious or ethical belief.

Section 19(1) was amended so that from 1 February 1994 it would include all the prohibited grounds of discrimination set out in section 21 of the Human Rights Act 1993.

The *White Paper* did not include an affirmative action provision in its draft proposals. However, the Select Committee considering the Bill of Rights Bill inserted the following provision:

Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

The Human Rights Act 1993 amended section 19(2) into its current form. The provision inserted by the Select Committee could be applied to affirmative action programmes that were targeted at general systemic disadvantage as opposed to unlawful discrimination.

Section 19 origins in international treaties and overseas legislation

Articles 2(1), 3 and 26 of the ICCPR provide:

Article 2(1)
Each State party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Article 3
The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 26
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 1 of the Convention on the Elimination of Discrimination Against Women defines 'discrimination against women' as:

Article 1
Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD") defines the term 'racial discrimination' to mean:

Article 1
Any distinction, exclusion, restriction or preference... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 1(4) of CERD provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.
Article 14 of the European Convention on Human Rights states:

Article 14 Prohibition of discrimination
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Section 15 of the Canadian Charter states that:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental and physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 20 - Rights of Minorities

Section 20 of the Bill of Rights Act is as follows:

Rights of minorities
A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

Policy triggers: do I need to consider section 20?

Is the policy or practice that you are working on likely to:

- Limit the observance of religious practices other than those associated with the main religions?
- Limit the ability of individuals to communicate in languages other than English?
- Limit the ability of Maori, iwi, or hapu, or other ethnic groups to continue to take part in distinct cultural practices?
• Result in an agreement with one iwi that interferes with the distinct cultural practices of another?
• Prohibit the use of any particular language?
• Impose or coerce individuals to do something that interferes with their distinct cultural practices (e.g., wear clothes that differ from their traditional cultural attire)?
• Prevent persons using their language in a community with others?

What every policy analyst needs to know about section 20

• The specific elements of this right are still uncertain and need to be determined by the courts.
• The protection of the rights of minorities is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned.
• The rights of minorities under section 20 are distinct from, and in addition to, all other rights held as individuals in common with everyone else.
• A minority is a group whose members:
  o are numerically inferior to the rest of the population of a state;
  o are in a non-dominant position;
  o possess ethnic, religious, or linguistic characteristics differing from those of the population;
  o show a sense of solidarity directed towards preserving their culture, traditions, religion, or language.
• To be considered a minority, the members of the group need not be citizens of the State in which they live - the rights of migrants and even visitors are also protected.
• Whether the minority a person belongs to is an "ethnic" minority is likely to be determined by a mixture of subjective (the members of the group have a subjective belief that they are alike and share a historically determined social identity, belief, and customs) and objective (recognised by others as distinguished in the community) criteria.
• Most religions in New Zealand might qualify as a religious minority.
• It is likely that groups that use a language other than English will be considered a linguistic minority.
- For the purposes of section 20, cultural practices:
  - are distinctive to the minority claiming their right to practice them;
  - are an essential element of the culture of an ethnic community;
  - can be undertaken for economic gain, but not necessarily a traditional means of livelihood.
- A "denial" of the right means a limit or restriction of the enjoyment of the right - it does not require a total denial.

**Measures to achieve compliance**

Where your policies affect any specific minority groups, or impose any burdens upon a minority that compromise their traditional activities, you should engage in consultation and good faith discussions with those groups. Ensure your agency is aware of, and has considered, their interests in the process of developing that policy.

Create policy that promotes cultural diversity. In other words, try to ensure your policy is culturally inclusive and not exclusive in its effect. Promote practices that are fundamental to the existence of a culture (such as language).

**Related rights and freedoms**

When considering section 20, it would be prudent to consider also sections 13, 15, and 19 of the Bill of Rights Act. The courts have often looked at section 20 in the same context as other rights, such as the right to freedom of religion (section 13) or the right to freedom from discrimination on the ground of language (section 19). In the case of religious minorities, it can be argued that section 20 does not necessarily add anything new; however, linguistic and ethnic minorities do not have rights to language or culture elsewhere in the Bill of Rights, so section 20 will be especially significant in relation to them. [352]

**Further discussion on the meaning of section 20**

Section 20 is directed at the obligations of the state in respect of:

...the survival and continued development of the cultural, religious and social identity of the minorities concerned thus enriching the fabric of society. [353]
The United Nations Human Rights Committee further observed that the rights of minorities establish and recognise rights that are conferred on individuals belonging to minority groups. These are distinct from, and additional to, all other rights, which are held as individuals in common with everyone else. [354] In essence, unlike most other protections accorded to individuals by the Bill of Rights Act, this section protects specific classes of individuals. [355]

There is very little caselaw in New Zealand that has specifically turned on this section.

**Positive or negative obligation**

Section 20 does not require the state (or its agents) to take steps to promote a minority's enjoyment of their culture, language, or religion. [356] However, the United Nations Human Rights Committee has stated that Article 27 of the ICCPR (which is equivalent to section 20) may require the state to act in circumstances where an ethnic, religious, or linguistic minority is unable to exercise their rights because of the actions of a third party. [357]

*What is an ethnic minority, religious minority or linguistic minority?*

The New Zealand courts have not defined who or what a minority is for the purposes of section 20. We have therefore looked to how Article 27 of the ICCPR has been interpreted to provide us with some guidance. A minority for the purposes of section 20 may therefore be regarded as:

...a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members...possess ethnic, religious, or linguistic characteristics differing from those of the population, and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language. [358]

The significance in this definition lies in the fact that the group needs to be numerically inferior at a national level. A group may therefore be a minority even though they are numerically superior in specific parts of the country. It should also be recognised that as the Bill of Rights Act is not limited in its application to just New Zealand citizens or permanent residents, the right in section 20 equally applies to those who are here on a temporary basis. [359]

It is also apparent that a decision as to whether a group is an ethnic, religious, or linguistic minority will be able to be established by objective criteria. [360]
The following are some indicators that may assist agencies to identify minorities.

*Ethnic minority*

The New Zealand courts have helpfully discussed the meaning of the term "ethnic origins". In *King-Ansell v Police* [361] the New Zealand Court of Appeal discussed the plain language meaning of "ethnic origins". Woodhouse and Richardson JJ considered that the test for ethnic origins should be a mixed subjective/objective test. Members of the group would have to have a subjective belief that they were alike and shared a historically determined social identity, beliefs, and customs. The objective part of the test would be satisfied if the group was recognised by others as sufficiently distinguished in the community.

This subjective/objective test was subsequently approved by the House of Lords. [362] Lord Fraser set out a detailed test for characteristics of ethnic origin, including in brief: a long shared history; a cultural tradition; a common geographical origin or ancestors; a common language; literature; a common religion; being a minority, oppressed, or dominant group within a larger community. [363]

*Religious minority*

For the purposes of determining whether a particular collection of ideas or practices can be characterised as a religion, the following indicia may be useful. [364] The indicia are objective guidelines only and should not be thought of as a test for religion. They are:

i. a belief in the supernatural (i.e. a belief that reality extends beyond what is capable of perception by the senses);

ii. the ideas relate to the nature and place of humans in the universe and their relation to things supernatural;

iii. the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance;

iv. the adherents constitute an identifiable group or groups; and

v. the adherents themselves see the collection of ideas, beliefs and practices as constituting a religion.
It would appear that because of the scope of a religious belief, most religions in New Zealand might qualify as a religious minority - particularly if denominations were counted separately.

**Linguistic minority**

A broad and liberal interpretation of section 20 also suggests it is likely that groups that use a language other than English will be considered a linguistic minority. On the same understanding we consider it likely that sign would be regarded as a language. Thus it seems logical to consider that members of the community who use sign language as their primary method of communication are a linguistic minority.

**Enjoyment of culture, religion, and language**

Although an ability to enjoy one's culture may of necessity include the ability to practice a religion or communicate in one's own language, these elements of the right can also be exercised independently of each other. We have therefore dealt with each element separately in order to assess their scope and to provide some guidance in each case.

**Culture**

Because of the lack of New Zealand caselaw on the subject, we have again looked overseas for additional guidance on what the identifiable aspects of a culture are.

The United Nations Human Rights Committee has observed [365] that culture:

...manifests itself in many forms, including a particular way of life associated with land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting....

These observations have implications in respect of observing Maori customary practices, such as fishing. In terms of Maori for example, the courts have recognised that fishing is a distinctive part of their culture. [366]

The United Nations Human Rights Committee considers that certain activities may be cultural even though they are undertaken for economic gain. However, in order for such activities to be cultural, they must be "an essential element of the culture of an ethnic community". [367] Maori customary fishing practices have been held to form part of Maori culture.
Significantly, though, the UN Committee has added that, in order for a minority community to establish that the activity is an essential element of the culture of their community, it is not necessary for them to show that this is a traditional means of livelihood. Minorities are therefore able to use modern technology to assist them in undertaking that activity. [369]

However, the practice must be distinctive to that minority for the purposes of Article 27. In the case of Diergaardt et al. v Namibia [370] the Committee held that the use of the pastoral lands in question for the purpose of cattle grazing was not deemed distinctive to that particular culture. There was no breach of Article 27.

An infringement of cultural rights may come about in other ways, such as preventing individuals from wearing traditional dress.

Religion

The right of minority communities to practise their religion is likely to be subject to the same considerations as those set out in the discussion in these Guidelines of section 15 of the Bill of Rights Act; however, the focus of section 15 is on the right of individuals as individuals to practice their religion. The emphasis in section 20 is on the right of the individual to practice their religion in community with others. As Rishworth suggests, [371] this is unlikely to add anything to the application of the section.

Language

Although the right of an individual to use, in community with others, the language of that minority has not yet been addressed by the New Zealand courts, the right would apply to members of minorities who wish to use their language among themselves, in private, or in public. The right is seen as being distinct from other language rights such as the right to freedom of expression. [372]

Denial of the right to enjoy culture, religion, and language

Once you have identified that a minority exists, the next question to be determined is whether these groups have been denied the opportunity to enjoy their culture, religion and language. It would appear from a close reading of the limited New Zealand caselaw and caselaw from the UN Human Rights Committee, that the "denial" of the right need not be an absolute restriction. It requires an interference with the enjoyment of the right. However, the UN Human Rights Committee has also held that
measures that "have a certain limited impact on the way of life...will not necessarily amount to a denial of the rights under article 27. [373]

In *Te Runanga O Whare Kauri Rekoku Inc v Attorney General* [374] the High Court adopted a robust definition of what is meant by a "denial". In this case the applicants were a number of tribes that were excluded from a Deed of Settlement negotiated by the Crown and other iwi and Maori organisations. The applicants argued that the Crown had breached their cultural fishing rights by virtue of the fact the Settlement Deed purported to compromise or settle their fisheries rights. The Court determined that although the applicants' cultural fishing rights were limited, the plaintiffs were by no means being deprived of their cultural entitlement. Those cultural rights could be exercised in a variety of ways but were retained in a manner consistent with promoting of the rights of Maori as a whole. The applicants were being treated as Maori and will be treated in that respect in the future under the statutory regime proposed. [375]

This approach is broadly consistent with that of the United Nations Human Rights Committee, which heard the tribes' claim that the Settlement Deed was a denial of the equivalent right in the ICCPR, Article 27. [376] The Committee took the view that whether there is a denial of the right in Article 27 is a question of degree, requiring an assessment of the magnitude of the interference. The Committee found that the iwi who brought this case were not denied the right to enjoy their culture, because the State engaged in broad consultation and paid specific attention to the sustainability of Maori fishing activities. [377]

It remains unclear as to how broad or narrow an approach the New Zealand courts will take to interpreting whether a limit is a "denial" and what role section 5 of the Bill of Rights Act plays in defining the scope of the term. We would suggest that you regard any interference with a minority's ability to practice their religion, use their language, or engage in cultural practices as a "denial" of their rights under section 20. You should then consider whether such interference is reasonable for the purposes of section 5 of the Bill of Rights Act.

**Importance of meaningful consultation**

The United Nations Human Rights Committee has observed [378] that:
The enjoyment of [minority] rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

In some situations this may require the state to undertake meaningful consultation with minorities to ensure that their interests are given sufficient consideration in any decision-making process.

The obligation to consult with minority communities over cultural rights was discussed by the UN Human Rights Committee in *Mahuika v New Zealand*. [379] In this case 7 iwi alleged that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 confiscated their fishing resources, denied them their right to freely determine their political status, and interfered with their right to freely pursue their economic, social, and cultural development. The Committee found that:

The State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation...are compatible with article 27.

In other words, even though there may be an obligation to consult with the minority, consultation does not preclude the state from acting in a way that may be seen to interfere with the interests of the minority.

Although meaningful consultation will be a significant consideration, it will not, of itself, lead to a conclusion that there has been no denial of the right. In *Mahuika*, other factors, such as the countervailing rights and interests of other Maori may also be influential in reaching the conclusion that there had been no denial. [380]

**Other considerations**

It has become apparent that there is some overlap between the Treaty of Waitangi and section 20. Although the Treaty may deal with constitutional issues relating to the relationship between the Crown and Maori, both section 20 and the Treaty protect Maori culture, religion, and language in some way. [381] As previously stated, international jurisprudence on the rights of minorities suggests that states have an obligation under section 20 to ensure effective participation of members of minority groups in decisions that affect
them. As Maori are an ethnic minority, the benefit of this obligation extends to them. The Treaty also obliges the Crown to consult with Maori.

The nature of the obligations in section 20 of the Bill of Rights Act and the Treaty can perhaps be best illustrated by the decisions of the New Zealand High Court and Court of Appeal in the *Te Runanga O Whare Kauri Rekoku Inc* cases and the decision of the United Nations Human Rights Committee in the *Mahuika* case. These decisions arose out of the Sealords Deal. [382] The actions of the state in engaging in a broad process of consultation with Maori, in fulfilment of their obligations under the Treaty and section 20, were regarded as a significant factor. Both the High Court and the UN Human Rights Committee have taken the view that meaningful consultation with minorities will be strongly suggestive of the fact that the state has complied with its obligations to minorities as required by the Treaty, the Bill of Rights Act, and the ICCPR.

The significance of this for policy advisers is that the obligation to consult with Maori should be seen to transcend obligations under the Treaty. Currently, the Treaty has no legal status unless it is incorporated into statute, and then only to the extent specified in that statute. For this reason, the rights in section 20 may have a special significance as they form part of general human rights law and are universally applicable. Rishworth puts it this way:

In the end, exploring the human rights dimensions of the Treaty of Waitangi may assist in understanding the Treaty itself. The exercise focuses attention on the sorts of commitments that the Crown owes Maori as human beings [and indigenous peoples], and not simply as a contract partner.... Ultimately, this may remind us that we would probably be having much of the same sorts of debates in New Zealand even if there were no Treaty of Waitangi. They would arise under the rubric of human rights. That does not make it any easier to work out what should be done, but it does take some of the emphasis off the words of the Treaty itself.... If the human rights dimensions of the Treaty are identified, they must then be accommodated within the overall framework of human rights. [383]

**Key cases**

History of the section

The White Paper

The White Paper states that: [384]

What [section 20] is aimed at is oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which go to the heart of their very identity - their language, culture, and their religion. It should be noted too that [section 20] together with [section 15] not only guarantees the right of members of a minority group to practice etc. their religion, or belief individually and in private, but also in community with other members of the group and in public.

Section 20 origins in international treaties and overseas legislation

Article 27 of the ICCPR states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Footnotes:

326. Section 19 of the Bill of Rights Act has also been incorporated in the Human Rights Act 1993, as section 20L. Section 20L(1) of that Act states:

An act or omission to which Part 1A of the Act applies [i.e., an act or omission by a person or body covered by section 3 of the Bill of Rights Act], breaches that part of the Act if it is inconsistent with section 19 of the Bill of Rights Act.


334. Quilter v Attorney-General [1998] 1 NZLR 523. Some debate has centred on the decision of LSA Daniels & Ors v Attorney General unreported M 1615- SW99, High Court Auckland, 3 April 2002. Baragwanath J of the High Court took an approach that differs from the approach taken by our Court of Appeal in Quilter. Essentially, Baragwanath J observed that discrimination in the Bill of Rights Act and Human Rights Act 1993 meant "failure to treat the same". The Court of Appeal did not address the issue of discrimination when it heard the appeal, and it appears that the comments by Baragwanath J form part of New Zealand law.

335. This case was brought before the United Nations Human Rights Committee - see Joslin et al. v New Zealand, United Nations Human Rights Committee Communication no 902/1999.


337. On this last point see Law Society of British Columbia et al v Andrews [1989] 1 SCR 143, 174-175 per McIntyre J.


339. The addition of the element "human dignity" has been subject to criticism by at least one leading commentator. Hogg considers that the element of dignity is vague, burdensome, and confusing and is unpredictable in its application. See PW Hogg Constitutional Law of Canada (3rd ed ), p52-26.

341. *Lovelace v Ontario* [2000] SCC 37. The decision in Lovelace may have special significance for a policy analyst in the context of giving effect to the Treaty of Waitangi. Intra-ground discrimination may arise in the context of iwi/iwi and iwi/urban Maori authority differentiation.


348. *Belgian Linguistics Case (No 2) (1979-80)*, 1 EHRR 252, E Ct HR.

349. In spite of section 15(2) of the Canadian Charter, this appears to be the preferred approach of the Canadian courts as well, see *Lovelace v Ontario* [2000] SCC 37.


353. UN General Comment 23, paragraph 9.
354. UN General Comment 23, para 1.
359. UN General Comment 23, para 5.1-5.2.
360. UN General Comment 23, para 5.1-5.2.
364. These 5 indicia were used in *Centrepoint Community Growth Trust v CIR* [1985] 1 NZLR 673 and *Re I C* [1999] NZFLR 471. Following the leading Australian decision *Church of New Faith v Commissioner for Pay-roll Tax* (1984) 57 ALJR 785. The Court of Appeal has not expressed a view as to its correctness.
365. UN General Comment 23, *The Rights of Minorities* para 3.2.
372. UN General Comment 23, *The Rights of Minorities*, para. 5.3.

375.  *Te Runanga O Whare Kauri Rekoku Inc v Attorney General* HC Wellington, 12/10/92 CP 682/92 per Heron J, p 40.


378.  UN General Comment 23, *The Rights of Minorities* para 3.2.


380.  The countervailing interests of other members of a minority has also been influential in the Committee finding that there was no denial of the right in *Kitok v Sweden* Comm 197/85.


382.  The background to these decisions is covered in more depth by Paul Rishworth (2003) "Minority Rights", in *New Zealand Bill of Rights*, OUP, p 410 -417.


Introduction to sections 21-22: 
Search, Arrest and Detention

Sections 21 to 26 of the Bill of Rights Act are primarily concerned with ensuring compliance with the law at different stages of a sequential process relating to the investigation and prosecution of offences. The sequence of provisions shows a proportionate increase in the likelihood that a person's liberty, privacy and security interests may be in jeopardy at each stage of the process.

At all stages of this process, individuals come into contact with the coercive powers of the state. The rights in sections 21 to 26 address the inherent imbalance in power between the individual and the state. More specifically, these rights are designed to ensure that the liberty, privacy and security interests of individuals are maintained except in situations authorised and identified by law. This means interference with these interests must accord with appropriate procedures set out in law subject to substantive checks on the state's actions. The checks and procedures must be proportionate to the threat to the person's interests at each stage of the process.

- Section 21 addresses the initial stage of the process, where law enforcement officers are ascertaining compliance with the law, or attempting to uncover evidence of breaches of the law.
- Section 22 applies to situations in which individuals have come into contact with law enforcement officers, who may wish to prevent the individual from leaving the vicinity until a preliminary assessment of the person has been completed.
- Section 23 comes into play where an individual has been arrested or detained by the authorities in relation to specific allegations about activities that might breach the law. As there is an escalation in the extent to which a person's liberty is at risk, there is a corresponding increase in the individual's rights.
- Section 24 represents that stage of the process in which the state has signalled that it believes the law has been breached and it wishes to take steps to punish the individual. Section 24 ensures that those charged with an offence have access to the resources needed to prepare their defence.
• Section 25 sets out minimum standards of criminal procedure, to ensure individuals have the opportunity and means to challenge the case against them. In so doing, it ensures that individuals' liberty interests are not unfairly jeopardised by the state.
• Section 26 represents the final stages of the process, in which a person has either been deprived of liberty or the state has not made its case. Section 26 ensures that these persons continue to be dealt with in a fair manner and are not subject to ongoing disadvantage.

**Section 21 Security against unreasonable search and seizure**

Section 21 of the Bill of Rights Act is as follows:

**Unreasonable search and seizure**
Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

**Policy triggers: do I need to consider section 21?**

You will need to consider section 21 if you are developing policies or practices that:

• authorise the entry of officials from government agencies or law enforcement officers onto commercial and/or residential property;
• authorise law enforcement officers to conduct searches of a person or personal belongings, whether or not that person is in custody;
• require individuals or companies to create and/or disclose documents, records and other forms of information;
• authorise enforcement officers or inspectors to take samples, analyse data, take copies of documents, make recordings or take photographs;
• authorise the taking of property that has been discovered as a result of a search;
• authorise law enforcement officers to stop vehicles and question occupants;
• authorise the taking of fingerprints, blood samples and samples of bodily tissue;
authorise law enforcement officers to intercept electronic communications.

What every policy analyst needs to know about section 21

- Consideration of section 21 involves an assessment of the reasonableness of the powers of the state to intrude into the lives of its citizens. Such an assessment requires a consideration as to whether:
  - the power authorising the exercise of the search and seizure is unreasonable; or
  - the search or seizure is carried out in an unreasonable manner.
- Section 21 is commonly associated with law enforcement - both in terms of investigating offences and carrying out powers of inspection.
- Section 21 does not of itself guarantee property rights (rights to own, use or enjoy property).
- The privacy values underlying the section 21 guarantee are those held by the community at large. They are not merely the subjective expectations of privacy a particular owner or occupier may have and may demonstrate by signs or barricades.
- Reasonable expectations of privacy are lower in public places than on private property. The expectation of privacy is greatest in relation to a person's body.
- The nature of the activities carried on, particularly if involving public wellbeing or governmental control, may affect reasonable expectations of privacy.

What does the concept of a search involve?

- A "search" is not confined to physical intrusion. Section 21 is relevant to developing technologies and new forms of law enforcement devices, such as electronic surveillance, that do not require law enforcement officers to physically enter a property. The courts have previously considered that a search for the purposes of section 21 includes:
  - looking through windows or cracks in the walls of a building; [385]
  - checking the contents of a vehicle; [386]
• climbing over a locked gate to see if the occupant or owner is in the backyard; [387]
• electronically recording (by audio or visual methods) a conversation or activity; [388]
• requiring a person to remove items of clothing or to empty out his or her pockets; [389]
• demanding under statutory authority that a person provide documents and records. [390]

Exercising search powers:

• The starting point when establishing search powers for obtaining evidence for criminal proceedings is that:
  o the search power is expressly authorised by statute; and
  o the search is authorised by a warrant signed by a judicial officer on being persuaded that there are reasonable grounds for believing that an offence has been or is being committed.
• The purpose of the search needs to be apparent from the empowering legislation. A statute should also be clear on its face as to what enforcement officers can or cannot do (e.g. using force to effect entry).
• The presumption that a search should be undertaken only under the authority of a warrant may be overridden in certain circumstances, but only on limited grounds.
• A search may be unlawful if it is not authorised by law or if it is carried out contrary to law.
• Even though a search may be unlawful, the courts have held that it may still be reasonable for the purposes of section 21 of the Bill of Rights Act. Similarly, a lawful search may be unreasonable in certain circumstances.

What does the concept of seizure involve?

• A search is an examination of a person or property for something that is not immediately apparent or visible. A seizure, on the other hand, is the "taking of that which is discovered".
• A seizure is likely to involve the compulsory or non-consensual removal of property from an individual or organisation.
• A seizure may extend to the circumstances of retention or continued deprivation of property following its initial taking.
• For the purposes of section 21 an item is seized for as long as that person or organisation retains a reasonable expectation of privacy.

Measures to achieve compliance

If you are developing policies or practices that raise issues of consistency with section 21, you will need to consider:

• the primary purpose of the power (for instance, is it to monitor for compliance with a regulatory regime or is it to gather evidence for the purpose of taking criminal proceedings?); and
• the powers necessary to achieve that policy objective.

If search powers are necessary to achieve your policy objective, you will need to address a number of issues in developing the search powers:

• who will be authorised to exercise the power?
• what is the purpose behind the exercise of this power?
• will enforcement officers require a warrant before exercising the power?
• what actions must an enforcement officer take prior to executing the power?
• what powers can an enforcement officer employ in the course of exercising a power of entry?
• what other powers can an enforcement officer have to execute the power of entry?

See the diagram 'Developing a statutory power of entry' in the appendices for further guidance on these issues.

There are a number of issues to factor in to the development of operational policy. For instance, does the policy establish processes for ensuring:

i. there are no deficiencies in the warrant?
ii. there are reasonable grounds to undertake a statutory search?
iii. that the statutory code is complied with?
When developing operational policies on search powers, include best practice guidelines requiring those exercising the power to:

- show the authority to search or inspect;
- carry identification;
- consider whether it is necessary to remove items of property from the premises which have been searched;
- record the items removed from the premises and provide the owner with a list of things removed;
- retain those things taken from the property only for as long as necessary to achieve the purpose for which they were removed;
- maintain, care for, and secure the property for the period which it is seized. [391]

The guidelines might also include information on the circumstances in which:

- it might be appropriate to exercise or utilise certain powers associated with powers of entry (e.g strip searches) [392]
- the use of force or use of dogs may be considered necessary, rather than expedient, [393]
- it may be considered necessary for enforcement officers to obtain a warrant before embarking on a search, [394]
- it may be considered appropriate to conduct particular forms of search so as to maximise the privacy interests of the individual. [395]

**Related rights and freedoms**

Because section 21 is often considered in the context of law enforcement and the investigation and detection of offences, you should consider whether your policy or practice affects the rights provided for in the Bill or Rights Act in those contexts, for example:

- the right not to be compelled to say anything (section 14): do you intend to create a power requiring a person to answer questions put to them by a law enforcement officer?
- the right to be free from discrimination (section 19(1)): does the policy or practice target, directly or otherwise, particular sectors of the community?
in the case of personal searches, the right not to be subject to degrading treatment or punishment (section 9) and the right to be treated with humanity and dignity (section 23(5)).

- the right to the observance of the principles of natural justice (section 27(1): does your policy allow for the forfeiture or confiscation of property? If so, does it provide for a procedure allowing the affected party to challenge that decision?

**Further discussion on the meaning of section 21**

In the leading case on section 21, the New Zealand Court of Appeal held that the intention of section 21 is: [396]

...to ensure that governmental power is not exercised unreasonably... The guarantee under section 21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity.

**Security interests of the individual**

The exercise of the powers of search and seizure are connected with a coercive power of state. As section 21 is in practice often linked to law enforcement, both in terms of investigating offences and carrying out powers of inspection, the right in section 21 focuses on the ability of the state to enter private property and intrude on the privacy of its citizens.

The starting point for any intrusion by the state onto private property remains *Entick v Carrington* in which Lord Camden CJ held: [397]

...our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

**A right to privacy**

The following considerations influence the right to privacy for the purposes of search and seizure laws:

i. Every person has the right to determine when, how, and to what extent they will release personal information about themselves. [398]
ii. Privacy values underlying the section 21 guarantee are those held by the community at large. They are not merely the subjective expectations of privacy which a particular owner or occupier may have and may demonstrate by signs or barricades. [399]

iii. Reasonable expectations of privacy are lower in public places than in private property. They are higher in the home than in the surrounding land, farmland or land not used for residential purposes. [400]

Many activities and industries are subject to a high degree of regulatory control and oversight by government agencies. Because there is an element of consent involved in such activities, persons participating in them have a lesser expectation of privacy than they might expect if they are in a private dwelling.

**Does section 21 confer a property right?**

Despite the reference in section 21 to "seizure...of property", the provision does not confer a right to property, or protection from the state seizing property. The meaning of the word seizure is influenced by its close proximity to the word search. The context within which section 21 appears is also important. McGechan J in *Westco Lagan v Attorney-General* put it this way: [401]

The portion of the Act in which s 21 occurs goes on to deal with liberty of the person, rights of persons arrested or detained, rights of persons charged, minimum standards of criminal procedure, retroactive penalties and double jeopardy, and right to justice. These ... all focus plainly on prosecution and judicial process. It would be distinctly odd if the legislature had plonked a provision intended to deal in a general way with seizure of property without compensation into such a matrix.

However, as we shall see, the courts will consider how enforcement agencies treat property that has been seized in the context of exercising their law enforcement functions. [402]

**What is a search?**

The New Zealand courts have analysed what is meant by a search. In *R v Fraser*, the Court said: [403]

in broad terms a search is an examination of a person or property. Though sometimes broader, in usage to search means to endeavour to find something
not readily at hand or available. The general connotation is of investigation or scrutiny in order to expose or uncover; going beyond or penetrating some degree of concealment.

As one of the objectives in upholding section 21 is to protect the individual's reasonable expectation of privacy, a search involves looking for something that is not immediately apparent or visible. [404] That is, there is no expectation of privacy in respect of a thing that is in plain view.

The courts have previously considered that a search for the purposes of section 21 includes:

- looking through windows or cracks in the walls of a building; [405]
- checking the contents of a vehicle; [406]
- climbing over a locked gate to see if the occupant or owner is in the backyard; [407]
- electronically recording (by audio or visual methods) a conversation or activity; [408]
- requiring a person to remove items of clothing or empty out his or her pockets [409]
- demanding under statutory authority that a person provide documents and records. [410]

Because of the common links between section 21 and law enforcement, a search is often principally undertaken for one of the following purposes:

i. Monitoring for compliance: an examination of a commercial property and the inspection of documentation or goods for the purposes of determining whether the owner or occupier is complying with the statutory regulatory framework (for example, registration requirements in the Animal Products Act 1999, workplace safety in the Health and Safety in Employment Act 1992, or the controls on gambling establishments under the Responsible Gaming Act 2003);

ii. Examining information for the purpose of gathering evidence: a search undertaken where there are reasonable grounds to believe that an individual or organisation is committing a criminal offence and it is necessary to collate information to substantiate that belief and to use as evidence in proceedings; and
iii. A combination of (i) and (ii) where the objective is to gain compliance with the law, and the information can be used for purposes other than criminal proceedings but sanctions exist (for example the maintenance of discipline at schools or maintaining the integrity of sport).

**Is electronic surveillance a search?**

The *White Paper* envisaged that section 21 would take into account developing technologies and new forms of law enforcement devices that would not require law enforcement officers to physically enter a property. The concept of a search would therefore extend to the interception of mail, the electronic interception of private conversations, and other forms of surveillance. [411] To date New Zealand courts have taken an approach which suggests that forms of electronic surveillance may constitute a search for the purposes of section 21 but no firm guidance has been provided. [412]

Elsewhere, the courts have adopted an approach consistent with the meaning given to the word search in *Fraser* [413], on the understanding that there has been an interference with the right to privacy. The US Supreme Court, for example, has previously concluded that police use of a thermal imaging device to detect the presence of cannabis growing in a house is a search. [414] The majority for the Court said that it would be "foolish to contend that the degree of privacy secured to citizens by the [protection against unreasonable search and seizure] has been unaffected by the advance of technology." [415] The Court went on to add:

Where . . . the Government uses a [sense-enhancing] device, not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant. [416]

The US Supreme Court emphasised the community's long-held and existing interest in the privacy of the home, and, significantly, pointed out that as everything in the home has the quality of intimacy, the whole house can be regarded as private.

The New Zealand Court of Appeal, in the case of *R v Gardiner*, [417] took a different view on the issue of expectations of privacy in the home. The Court acknowledged that the circumstances of the case were somewhat unusual [418] and the issue of whether the power was reasonable to be borderline. However, on the facts before it, the Court took of the view that: [419]
Although the camera was intended to pick up images from within the building, it was not trained on a bedroom or bathroom or other area of particular privacy. The area under observation was, as the police suspected, a part of the house which was being used for purposes of drug dealing; and judging by their own conduct the occupants had a less than complete expectation of privacy in that place.

The Court of Appeal in *Gardiner* concentrated their discussion on the reasonableness of the actions of law enforcement officers in training a video camera on a part of the house. The Court did not expressly consider whether the use of camera amounted to a search. Given the privacy principles underlying section 21, you should assume that:

i. the use of electronic surveillance is considered to be a search; and
ii. all parts of a private dwelling should be considered private with the occupiers assumed to have a high expectation of privacy.

**Production of documents**

A requirement to produce, create, or copy documents is likely to be considered a search for the purposes of section 21, especially where failure to provide the documents results in possible sanction. While the New Zealand courts have not directly addressed this point, the Privy Council, in considering an appeal from New Zealand, [420] accepted such an approach based on Canadian caselaw. [421]

A requirement to produce documents is less intrusive than other search powers, and can be exercised as part of an agency's inspection or audit functions. Requesting documents can be used by itself or in combination with other search powers - for example, a requirement to produce documents can be issued, and if the required information isn't forthcoming a warrant can be obtained. [422]

The power to require the production of documents raises issues of consistency with other rights, particularly the right to silence and the privilege against self-incrimination. [423] The Canadian courts have taken the view that a proper balance between the interests of the individual and the state can be struck if the requirement to produce documents is subject to appropriate terms and conditions, including those designed to protect the interests of the person compelled to provide the documents. [424]
**Seizure of property**

While a search is an examination of a person or property, a seizure is the "taking of that which is discovered." A seizure for the purposes of section 21 is likely to involve the compulsory or non-consensual removal of property from an individual or organisation for as long as that person or organisation retains a reasonable expectation of privacy. A seizure may include the taking of body and fluid samples, or the taking of photographs and fingerprints.

The High Court has stated that seizure includes both the initial taking possession of property, and any continuing detention of that property. Williams J in *Wilson v New Zealand Customs Service* indicated that:

...even if there was reasonable cause for seizure at the time possession was first taken, circumstances and further investigations may later demonstrate that there is no reasonable cause for the continued detention of the goods and the seizure should accordingly be disallowed and the goods returned.

Because a seizure extends beyond the initial taking possession of property, the state must assume a responsibility for the safe and proper storage of the thing seized. A seizure may be unreasonable if, for example, the property is damaged by enforcement officers.

'Unreasonable' searches and seizures

Section 21 does not affirm the right to be secure against all searches and seizures, just those that are unreasonable. A power of search and seizure may be considered unreasonable if:

- the power authorising the exercise of the search and seizure is unreasonable; or
- the search or seizure is carried out in an unreasonable manner.

Section 21 requires that certain procedural safeguards be established around the powers before they can be considered reasonable.

**Creating the right balance**

The Court of Appeal in *R v Grayson & Taylor* indicated that a balancing exercise has to be performed when determining whether a search or seizure is unreasonable in terms of section 21. The balance is between the legitimate interests of the state in law enforcement and the privacy interests
of the individual. The court held that what is reasonable is subject to changing community values, but that contemporary society attaches a high value to privacy and to the security of personal privacy against arbitrary intrusions by those in authority. What is likely to be considered reasonable is largely dependent on where the search takes place, for what reason, and the method of the search (for example, electronic surveillance as opposed to a search of the person).

**Ask the right questions**

When developing legislation with potential search powers, there are three essential issues to address: [432]

Is the power necessary?

The most important issue is whether the power is necessary. Examples of purposes that are likely to be considered necessary include:

- to obtain or secure evidence of offending;
- to ensure that regulatory responsibilities are complied with;
- to recover property or to render it available for eventual forfeiture;
- to prevent or deter offending.

What powers are required?

The second question concerns the type of powers that are reasonably necessary to achieve the policy objective. Does the policy require a power of entry or can the information be obtained from other sources or in another way - such as a requirement to produce information? As the objective of section 21 is to preserve an individual's reasonable expectation of privacy, a requirement to produce documentation is generally considered to be less intrusive on a person's privacy than entry onto premises. At the same time, a demand to produce documents or information can raise other issues, as discussed above.

How is the search to be exercised?

The third questions concerns the authorisation to carry out the search, specifically: how is the search going to be carried out, by whom, under whose authority, and for what purpose?

In considering these issues, ask yourself:
What should an officer be able to do by way of search?
Who should be able to exercise the powers?
Should the powers be exercisable at any time or only at certain times?
If an officer needs to enter onto private property, is the use of force appropriate?

The purpose of the search will influence the answers to these questions. As regulatory inspections generally take place in areas which have lower expectations of privacy than searches carried out for the purpose of detecting criminal offending, the levels of protection are likely to be less. However, regulatory powers of inspection are not as extensive as search powers associated with criminal investigations (see examples of model legislation in the appendices to Guidelines). In addition, enforcement officers cannot use a regulatory power of inspection to gather evidence when that officer is acting on a suspicion that an offence has been committed. [433]

The purpose of the search must be apparent from the empowering legislation. A statute should be clear on its face as to what enforcement officers can and cannot do, and should not authorise officers to undertake acts that amount to fishing expeditions. [434]

**Is a search warrant required?**

The starting point when developing proposals to allow enforcement officers, or agents of the state carrying out a law enforcement function, to execute a power of entry and search is that:

- the power be expressly authorised by statute; [435] and
- the search be authorised by a warrant signed by a judicial officer on being persuaded that there are reasonable grounds for believing an offence has been or is being committed.

Obtaining prior authorisation for a search by obtaining a warrant enables enforcement officers to intrude on the privacy interests of individuals only in circumstances where a demonstrable justification is seen to exist. [436]

Search warrants are not, however, required in all situations. Regulatory inspections are a case in point. These inspections are not premised on the suspicion that an offence has been committed. There is little value to be gained by requiring an inspector to obtain a warrant. Warrantless searches may also be reasonable in situations where:
obtaining a warrant would be impossible (in emergency situations, for instance);
the delay in obtaining a warrant may cause a dangerous situation (civil aviation and health and safety legislation, for instance);
there are reasonable grounds to believe that evidence may be destroyed or removed (border control situations, for instance).

In the absence of a warrant an enforcement officer may enter private premises or conduct a personal search with the consent of the occupier/person so long as the consent is informed and freely obtained. [437] Where an occupier has given consent to search premises, the entry onto those premises is not invalidated by another occupier subsequently seeking to exclude the officers from the premises. [438] The issue of freely obtained, informed consent is also relevant in situations where bodily samples are taken from individuals.

Similarly, there may be an implied license for enforcement officers to enter private property, but generally speaking that license comes to an end on reaching a dwelling house. [439] The purpose of the implied license is to enable persons, including law enforcement officers, to come onto a property to conveniently communicate with the occupier. New Zealand's Court of Appeal in Bradley has held that the scope of an implied license for police officers must necessarily be broader than that of ordinary members of the public and others because of the nature and scale of their duties and the public interest in law enforcement. [440] An enforcement officer's implied license extends only to those parts of the premises normally associated with access. An implied license is therefore revoked in circumstances where gates or barriers are in place that are designed to prevent persons other than the occupier from gaining entry to certain parts of the property. [441]

**Does an enforcement officer carrying out an inspection power require a warrant?**

The High Court has recently made the distinction between a "search" and an "inspection" for the purposes of section 21. The court held that a search involves looking for specific information, whereas an inspection is a more general examination. [442] The court relied on case law from overseas to make the point that the purpose behind the entry is significant.

Commercial organisations that operate within a regulated industry are subject to certain scrutiny to ensure compliance with the law. This is particularly the
case where the law requires the organisation to be licensed in order to carry out certain activities. The state has an interest in enforcing the terms of licences, and inspections may be required as part of that enforcement role. However, the scope of the inspection powers must be limited to those necessary to monitor compliance. The powers would therefore be less than those authorised by search warrants. For example, the power may not extend to all parts of premises, such as an employee's locker.

In most cases agencies need to obtain a warrant in order to gather evidence for the purposes of taking proceedings. [443] However, it is less clear whether an enforcement officer, when carrying out an inspection, is able to gather documents and other information to be used as evidence where reasonable grounds for believing that an offence has been committed exist. The intention of the inspectors in entering premises and gathering evidence is crucial. [444] The Canadian Supreme Court, in the context of tax law, has drawn a distinction between monitoring for compliance and an investigation. [445] The court set down the following guidelines:

1. Inspectors are not required to obtain a warrant if the primary purpose of the inspection is to monitor for compliance.
2. However, the primary purpose of the inquiry shifts if, in the course of conducting an inspection, an inspector develops a suspicion that an offence has been, or is being, committed.
3. Once the primary purpose of the inquiry becomes an investigation into the commission of an offence, any further production of documents requires a warrant.
4. Documents obtained during the inspection phase may be used in evidence, but once the investigation phase commences no new material can be gathered except under the authorisation of a warrant.

The Canadian Supreme Court acknowledged that it may be difficult for regulatory officers to establish when the nature of the inquiry shifts from an inspection to an investigation. Courts are likely to look at a range of factors, including the regulatory context, the extent of the inquiry, and the conduct of the inspector.

*What about the case of searching persons?*

There is greater expectation of privacy for searches of a person as opposed to searches of property. Generally speaking, the more intrusive the search, the
more tightly constrained the circumstances in which the search can take place will be. In addition, for more intrusive searches there will be a greater requirement for procedural protections, both in terms of the authorising power and procedure as well as the manner of its execution.

The manner and extent in which a search of a person is carried out may have a bearing on the extent to which the search intrudes on their reasonable expectations of privacy. [446] For example, as a search by a scanner is less intrusive than a strip search it is more likely to be seen as a reasonable exercise of a personal search power in certain contexts.

A search of a person may be undertaken without consent or a warrant in situations where the person has a diminished expectation of privacy. This could be because of where the person is at the time the search is conducted, [447] or because the person has been lawfully arrested or there is a concern that the evidence may be destroyed or removed. Prior to conducting the search, an enforcement officer would have to believe on reasonable grounds that the person possessed illicit property - an officer could not conduct a search in a random manner in an effort to find unlawful items. [448]

**Operational issues**

*Exercise of the search power - operational guidelines*

From a best policy perspective and as a risk limitation exercise, we strongly recommend that agencies with law enforcement functions develop sound practice guidelines for operational groups or enforcement agencies to ensure that all searches are undertaken lawfully and reasonably. When developing operational guidelines there are a number of areas to focus on, including:

i. Establishing a process for carrying out inspections. Ensure that officers carrying out inspections are clear about:

- the specific purpose for the inspection;
- the extent of the powers that can be exercised; and
- the procedures to be followed when, in the course of an inspection, the officer forms the view that an offence has been, or is being, committed. [449]
ii. Establishing a process for ensuring that there are no deficiencies in the warrant. A warrant can be deficient for a number of reasons, either because:

- the information in the affidavit supporting a warrant application is insufficient to justify the authorisation of the warrant (and there is no additional information to draw on); [450]
- the information on the warrant is inaccurate; or
- the information on the warrant is too general.

iii. Establishing a process to ensure that there are reasonable grounds for undertaking a statutory search power. Reasonable grounds may not exist where:

- there is no means of testing the objectivity of the information relied on; [451]
- the nature of the information gives rise to nothing more than a mere suspicion; [452] or
- the search is speculative. [453]

iv. Establishing a process for ensuring that the statutory code is complied with. This includes ensuring that:

- the statutory provisions detailing the procedures that need to be followed are strictly complied with; and
- the purpose of the search is consistent with the statutory scheme. Officers should not conduct a search for reasons other than those under which the search was authorised. [454]

*Reasonable searches - operational policy development*

The wording of section 21 indicates that the emphasis of any power of search should be on the reasonableness of that power or the exercise of that power rather than its legality. Although a search may be unlawful, it can still be reasonable for the purposes of section 21 of the Bill of Rights Act. [455] Similarly, a lawful search may be unreasonable in certain circumstances. [456] In such cases the manner in which a search authorised under statute or warrant is carried out will be relevant. Whether an otherwise lawful search or seizure is unreasonable "depends on both the subject-matter and the
particular time, place and circumstance." [457] The circumstance of the search enables the courts to consider the conduct of officers in carrying out their powers.

To help ensure that searches are carried out reasonably, officers should consider the merits of exercising particular powers in situations before them, rather than exercising all powers as a matter of routine. [458] Relevant considerations include:

- whether the use of force or use of dogs in particular circumstances was necessary, rather than expedient; [459]
- whether there was sufficient time and opportunity for enforcement officers to obtain a warrant before embarking on a warrantless search; [460]
- whether the search could have been carried in an alternative way so as to maximise the privacy interests of the individual. [461]

**Key cases**

History of the section

The White Paper

The current wording of section 21 is identical to the proposed wording in the White Paper.

Section 21 origins in international treaties and overseas legislation

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention of Human Rights provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

Section 8 of the Canadian Charter states:

Everyone has the right to be secure against unreasonable search or seizure.

Fourth Amendment of the US Constitution provides

The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.
Section 22 Liberty of the person

Section 22 of the Bill of Rights Act is as follows:

Liberty of the person
Everyone has the right not to be arbitrarily arrested or detained.

Policy triggers: do I need to consider section 22?

You will need to consider section 22 if the policy or practice you are developing:

- permits the police or other officials to detain individuals, whether or not they are suspected of committing an offence;
- authorises the committal of psychiatric patients to a mental health facility in order to protect public safety;
- allows the detention of persons in order to control the spread of a contagious disease;
- gives the police, customs or prison authorities the right to detain a person for the purposes of asking the person further questions or conducting a search of that person;
- makes it an offence for a person to fail to remain at a place for further questioning or conducting a search of that person by health, conservation, customs or immigration officers, or law enforcement officers.

What every policy analyst needs to know about section 22

- Section 22 applies to all forms of detention, including detention carried out for purposes of customs, criminal justice, immigration and military discipline, as well as enforced detention for medical and psychiatric treatment.
- The application of section 22 involves two considerations. Firstly, has a person been arrested or detained? Secondly, was the arrest or detention arbitrary?
**Detention**

- A person is said to be detained where he or she has a reasonably held belief, induced by the conduct of officials, that he or she is not free to leave.
- A person may be considered to be in detention for the purposes of section 22 when:
  - deprived of liberty by physical means;
  - required by law to attend or remain at a particular place (usually accompanied by penalty for failure to comply); or
  - words or conduct by a state official make it clear that the person is not free to go.
- A detention must be substantial - that is, something more than a "temporary check, hindrance, or intrusion on the citizen's liberty".

[462]

**Arrest**

- The New Zealand courts have stated that an arrest for the purposes of the Bill of Rights Act will be deemed to have occurred where there has been:
  1. a clear and unequivocal statement or action by a law enforcement officer that makes it clear that he or she wishes to detain the individual; and
  2. the law enforcement officer is seen to be acting or purporting to act under legal authority. [463]

**When an arrest or detention is arbitrary**

- The courts have said that an arrest or detention is arbitrary when it is not "in accordance with the law or which is not in accordance with the principles which the law regards as appropriate for a discretion to be operated within". [464]
- The exercise of a discretionary power to detain or arrest someone may be arbitrary where "it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures". [465]
• For this reason "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability.
• An arrest or detention that was lawful may become arbitrary if it continues beyond the period for which the state can provide appropriate justification.

Measures to achieve compliance

When working on a policy or developing a practice that involves the arrest or detention of individuals, consider developing the policy in such a way that its implementation is:

i. principled;
ii. predictable;
iii. consistent with the principles that the law regards as just.

In essence, you need to clearly set out the circumstances in which the power may be used and who may effect the arrest or detention. Ensure that the discretion to arrest or detain is prescribed in terms that are consistent with the objective of the policy. Ask whether there are clearly defined, express, criteria for determining when such individuals can be detained.

It is also vital that officers receive adequate training as to the circumstances where the power can be used. Practice guidelines governing the exercise of the powers should also be prepared and given to those exercising the powers.

You should assess your policy against the following criteria:

• Are the grounds for the arrest or detention prescribed by law?
• Will the arrest or detention be made in accordance with proper procedures?
• Is the arrest or detention necessary and reasonable in the circumstances (that is, to prevent flight, prevent the rapid spread of disease, avoid interference with evidence, or prevent the recurrence of crime)?
• Is the length of time that the person may be arrested or detained for justifiable?
Related rights and freedoms

Section 22 aims to ensure that persons are not deprived of their liberty in an arbitrary manner. The right not to be deprived of liberty is also important with respect to section 18, which guarantees an individual's freedom of movement.

Section 22 of the Bill of Rights Act also complements section 23. Section 23 guarantees various rights to persons who are arrested and detained, ranging from the right to be informed of the reason for the arrest or detention to the right to be treated with respect and dignity whilst in custody. These rights will be discussed in more detail in the following chapter.

Further discussion on the meaning of section 22

The right to be free from arbitrary arrest or detention applies in situations where the state places a person in custody, requires them to remain in a place for a period of time, prevents them from leaving a location, or requires them to attend a particular location (for example, a facility for the treatment of a contagious disease). Section 22 applies to all forms of detention, not just detention for the purposes of criminal justice. It therefore extends to acts of a number of officers who carry out regulatory powers in the areas of conservation, fisheries, bio-security, commerce and health. It also applies to forms of detention for the purposes of customs, immigration, and military discipline, as well as enforced detention for medical and psychiatric treatment.

The application of section 22 involves two considerations - firstly, has a person been arrested or detained? Secondly, was the arrest or detention arbitrary?

When is someone considered to be "under arrest"?

The New Zealand courts have stated that for the purposes of the Bill of Rights Act an arrest will be deemed to have occurred where there has been:

1. a clear and unequivocal statement or action by a law enforcement officer that makes it clear that he or she wishes to detain the individual; and
2. the law enforcement officer is seen to be acting or purporting to act under legal authority.
The courts have taken a cautious approach to finding whether an arrest has taken place. However, you need to be mindful of the overall purpose of section 22 - it seeks to promote the freedom of individuals to move freely without interference from the state. Even though a policy does not provide a power of arrest, any significant interference with the liberty of an individual may still constitute a form of detention for the purposes of section 22.

**What is the meaning of detention for the purposes of section 22 of the Bill of Rights Act?**

A person may be considered to be in detention for the purposes of section 22 where:

- they are deprived of liberty by physical means;
- the law requires them to attend or remain at a particular place (usually accompanied by penalty for failure to comply); or
- words or conduct by a state official make it clear that a person is not free to go.

The New Zealand courts have demonstrated a willingness to examine whether anything was said or done by the alleged detainer which would cause a person to reasonably believe that he or she was not free to depart. This test, which is a mixed objective/subjective test, is as follows: [467]

[...] does the suspect have a reasonably held belief, induced by police conduct, that he or she is not free to leave?

If the answer to this question is "yes", then it is likely that the person is detained for the purposes of section 22 (and section 23). [468]

The courts have attempted to provide a common-sense approach to the meaning of detention for the purposes of section 22. In *Police v Smith and Herewini*, Richardson J stated that a restriction on a person's liberty had to be substantial in order for it to be a form of detention. [469] Restrictions on a person's movement that are fleeting or transitory, such as breath screening tests, do not amount to detention and therefore fall outside the scope of section 22. [470]

Determining the actual moment when an individual is detained will therefore be a question of degree. For instance, compliance with routine customs formalities upon entering the country does not necessarily amount to detention. However, a passenger may be detained in circumstances where a
customs official requires them to answer further questions. The passenger would have no choice but to comply with the request: failure to do so would result in criminal liability. A certain threshold of compulsion needs to be crossed if the concept of detention is to come into play.

**Questioning by law enforcement officers**

A statutory requirement to answer questions may cause a person to be detained if the questioning amounts to a sufficient restraint on a person's liberty. If you are developing policy that authorises law enforcement officers to question a person, you should carefully consider the purpose for requiring the person to answer questions, the context within which the person is expected to answer questions and the extent of the questioning.

**What is meant by "arbitrary"?**

In *R v Hufsky* the Supreme Court held that "a discretion is arbitrary if there are no criteria, express or implied, which govern its existence." [471] The New Zealand courts have interpreted this statement to mean that an arrest or detention is arbitrary: [472]

if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.

**When is an arrest or detention considered to be arbitrary?**

Section 22 requires that a person may be lawfully deprived of their liberty only if the arrest or detention is consistent with procedures established by law.

In *Re M*, Gallen J held that the exercise of the discretion to arrest or detain may be arbitrary when: [473]

it is not in accordance with the law or is not in accordance with the principles which the law regards as appropriate for a discretion to be operated within.

A policy may therefore provide for arbitrary detention or arrest powers where it confers too broad a discretion on enforcement officers or where the scope of the power is broader than the objective of the policy.

An arrest or detention that is unlawful is likely to be arbitrary. [474] For example:
• Where an arrest is made in order to achieve an unlawful purpose, the resulting detention will be arbitrary. [475]
• An arrest or form of detention may be unlawful (and thereby arbitrary) even though it is carried out in consequence of a statutory power.
• The exercise of a statutory power may be considered unlawful (and thereby arbitrary) where it is carried out pursuant to a mandatory requirement without regard to the merits of the case. [476]
• Where law enforcement officers carry out an arrest that is unwarranted in the individual circumstances, the arrest or detention may be arbitrary because the decision to arrest was irrational and therefore unlawful. [477]

There are therefore a number of ways in which an otherwise valid power of arrest or detention may be considered arbitrary:

1. Continuation of detention - although the initial power to detain a person may be valid, the detention may become arbitrary if there are insufficient procedures to ensure that the reasons for continuing to detain the person are legitimate. [478] An individual should not be kept in detention as a matter of convenience.
2. Improper exercise of power - although law enforcement officials have the statutory power to detain a person, the detention may be arbitrary if it is not carried out for a valid reason or where there is insufficient cause to detain an individual.
3. Illegitimate purpose - a person who has been apprehended and subsequently confined in a police cell for the sole purpose of questioning will be considered to have been arbitrarily arrested and detained. [479]

The New Zealand caselaw on what makes an arrest or detention "arbitrary" is consistent with the approach taken elsewhere. International human rights judicial institutions have held that the prohibition of "arbitrary" deprivations of liberty goes further than the prohibition of "unlawful" deprivations, as arbitrariness is a principle above rather than within the law. For instance, in Van Alphen v The Netherlands, [480] the UN Human Rights Committee - interpreting Article 9(1) of the ICCPR - held that: "'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to
include elements of inappropriateness, injustice and lack of predictability."
This meant, in the Committee's opinion, that:

[...] remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.

The Committee also considers an arrest or detention that is previously lawful may become arbitrary if it continues beyond the period for which the state can provide appropriate justification. [481]

Under the European system for the protection of human rights, a deprivation of liberty will only be considered to be lawful if it is in accordance with the applicable municipal law and the ECHR, including the general principles of the latter, and is not "arbitrary". The European Court of Human Rights has considered a detention to be arbitrary if it is not in conformity with the purpose of one of the permissible grounds of detention, as set out in Article 5(1) the ECHR. For example, detention ostensibly for the purpose of deportation that is really aimed at illegal extradition would be "arbitrary".

Key cases


History of the section

*The White Paper*

Section 22 is identical to the provision that was proposed in the *White Paper.*

*The Select Committee Reports on the Bill of Rights Bill*

In its consideration of the right not to be arbitrarily arrested or detained, the Select Committee spent considerable time discussing the manner in which the Canadian Courts had interpreted the equivalent provision of the Canadian
Charter. The Committee noted that the principal matter that needed to be determined was whether the alleged infringement amounted to an "arbitrary" arrest or detention. Given the uncertainty of the qualifier, "arbitrary", the Committee suggested, as an alternative, that this right could be redrafted along the following lines:

No one shall be arrested or detained except on such grounds, and in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice.

**Section 22 origins in international treaties and overseas legislation**

Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 3 of the Universal Declaration of Human Rights states that:

Everyone has the right to life, liberty and security of person.

Article 5(1) of the European Convention of Human Rights provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful detention of a person after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
Footnotes:


391. See Appendices for further examples.

392. See for example, the discussion by Thomas J on the exercise of strip-search powers in *Everitt v A-G* [2002] 1 NZLR 82.


397. (1765) 19 State Tr 1029.


400. The courts in Canada, for example have said that personal searches at borders are not of themselves unreasonable because a person’s expectations of privacy in such a location is low. See *R v Simmons* [1988] 2 SCR 872.


402. See *Wilson v New Zealand Customs Service* [1999] 5 HRNZ 134,139.


412.  For an overview of the various approaches, see *R v Davis* (reported as *R v A* [1994] 1 NZLR 429); *R v Barlow* (1995) 14 CRNZ 9 (CA); and *R v Fraser* [1997] 1 NZLR 442. There is some academic discussion on this point too. See Scott Optican 'What is a "Search" under section 21 of the New Zealand Bill of Rights Act 1990? An Analysis, Critique and Tripartite Approach', [2001], *Part III New Zealand Law Review*, pp 239-275. In his concluding remarks, Optican makes a plea for the courts to provide some guidance on the matter so as to assist policy makers and enforcement officers. The advantage of defining what is and isn't a search is that it avoids difficulties in determining what is and isn't reasonable.


418.  The case concerned a police operation which took place over more than 6 months. The police placed a video camera with a zoom lens on an adjacent property and trained it onto the kitchen of the accused's house. The accused was suspected of committing "serious drug offences". The Court was cognisant of the privacy issues but also the extent to which the accused and other persons using the house took steps to avoid detection. The decision to use video surveillance only took place after other evidence had been obtained and other surveillance techniques considered.


422. The Court of Appeal in *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 580 discusses the procedures that should be followed before a warrant can be obtained (the discussion is, however, specific to the procedural requirements of the Commerce Act 1987).


432. See also chapter 14 of the LAC Guidelines, available at www.justice.govt.nz/lac/


435. For a recent statement of this principle, see *Choudry v Attorney-General* [1999] 2 NZLR 582.

436. See *Hunter v Southam* [1984] 2 SCR 145 where Dickson J held that justifications after the event do not preserve the privacy interests of the individual citizen from intrusions by the state.

437. *R v Allen* 19/12/96 CA 88/94.

438. *Bell v Police* 27/6/01, Panckhurst J, HC Dunedin AP10/01.


442. *Waikato Regional Council v Wellington City Council & Ors* 25/06/03, Venning J HC Auckland AP18-SW03.


444. See *Baron v Canada* [1993] 1 SCR 627.
For example, a border control area *R v Simmons* [1988] 2 SCR 495


Note that the courts in North America take the view that an unlawful search is unreasonable. Hart Schwartz sets out a number of policy reasons for why unlawful searches are of their very nature unreasonable in "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" [1998] New Zealand Law Review, pp 259 - 311, pp 271 - 275.

See, for example, the discussion by Thomas J of the exercise of strip-search powers in *Everitt v A-G* [2002] 1 NZLR 82.

On the use of dogs in association with searches, see *Wilson v Maihi* (1991) 7 CRNZ 178 (CA).

The courts in North America take the view that an unlawful search is unreasonable. Hart Schwartz sets out a number of policy reasons for why unlawful searches are of their very nature unreasonable in "The Short Happy Life and Tragic Death of the New Zealand Bill of Rights Act" [1998] New Zealand Law Review, pp 259 - 311, pp 271 - 275.

See, for example, the discussion by Thomas J of the exercise of strip-search powers in *Everitt v A-G* [2002] 1 NZLR 82.

On the use of dogs in association with searches, see *Wilson v Maihi* (1991) 7 CRNZ 178 (CA).
468. See the decision of the Ontario Court of Appeal in *R v Moran* (1987) 36 CCC (3d) 225 (Ont CA).


470. *Police v Smith and Herewini* [1994] 2 NZLR 306, 315 (see *Adams 10.9.07(3))*.


474. See *R v Goodwin (No2)* [1993] 2 NZLR 390 where the Court of Appeal left this possibility open.

475. The New Zealand courts have held that the burden of showing, on the balance of probabilities, that the arrest or detention of a suspect has not breached section 22 of the Bill of Rights Act rests with the Crown *R v Te Kira* [1993] 3 NZLR 257.


480. *Van Alphen v The Netherlands* 305/88.

Introduction to sections 21-22: Search, Arrest and Detention

Sections 21 to 26 of the Bill of Rights Act are primarily concerned with ensuring compliance with the law at different stages of a sequential process relating to the investigation and prosecution of offences. The sequence of provisions shows a proportionate increase in the likelihood that a person's liberty, privacy and security interests may be in jeopardy at each stage of the process.

At all stages of this process, individuals come into contact with the coercive powers of the state. The rights in sections 21 to 26 address the inherent imbalance in power between the individual and the state. More specifically, these rights are designed to ensure that the liberty, privacy and security interests of individuals are maintained except in situations authorised and identified by law. This means interference with these interests must accord with appropriate procedures set out in law subject to substantive checks on the state's actions. The checks and procedures must be proportionate to the threat to the person's interests at each stage of the process.

- Section 21 addresses the initial stage of the process, where law enforcement officers are ascertaining compliance with the law, or attempting to uncover evidence of breaches of the law.
- Section 22 applies to situations in which individuals have come into contact with law enforcement officers, who may wish to prevent the individual from leaving the vicinity until a preliminary assessment of the person has been completed.
- Section 23 comes into play where an individual has been arrested or detained by the authorities in relation to specific allegations about activities that might breach the law. As there is an escalation in the extent to which a person's liberty is at risk, there is a corresponding increase in the individual's rights.
- Section 24 represents that stage of the process in which the state has signalled that it believes the law has been breached and it wishes to take steps to punish the individual. Section 24 ensures that those charged with an offence have access to the resources needed to prepare their defence.
• Section 25 sets out minimum standards of criminal procedure, to ensure individuals have the opportunity and means to challenge the case against them. In so doing, it ensures that individuals' liberty interests are not unfairly jeopardised by the state.
• Section 26 represents the final stages of the process, in which a person has either been deprived of liberty or the state has not made its case. Section 26 ensures that these persons continue to be dealt with in a fair manner and are not subject to ongoing disadvantage.

Section 21 Security against unreasonable search and seizure

Section 21 of the Bill of Rights Act is as follows:

Unreasonable search and seizure
Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

Policy triggers: do I need to consider section 21?

You will need to consider section 21 if you are developing policies or practices that:

• authorise the entry of officials from government agencies or law enforcement officers onto commercial and/or residential property;
• authorise law enforcement officers to conduct searches of a person or personal belongings, whether or not that person is in custody;
• require individuals or companies to create and/or disclose documents, records and other forms of information;
• authorise enforcement officers or inspectors to take samples, analyse data, take copies of documents, make recordings or take photographs;
• authorise the taking of property that has been discovered as a result of a search;
• authorise law enforcement officers to stop vehicles and question occupants;
• authorise the taking of fingerprints, blood samples and samples of bodily tissue;
authorise law enforcement officers to intercept electronic communications.

What every policy analyst needs to know about section 21

Consideration of section 21 involves an assessment of the reasonableness of the powers of the state to intrude into the lives of its citizens. Such an assessment requires a consideration as to whether:
  - the power authorising the exercise of the search and seizure is unreasonable; or
  - the search or seizure is carried out in an unreasonable manner.

Section 21 is commonly associated with law enforcement - both in terms of investigating offences and carrying out powers of inspection.

Section 21 does not of itself guarantee property rights (rights to own, use or enjoy property).

The privacy values underlying the section 21 guarantee are those held by the community at large. They are not merely the subjective expectations of privacy a particular owner or occupier may have and may demonstrate by signs or barricades.

Reasonable expectations of privacy are lower in public places than on private property. The expectation of privacy is greatest in relation to a person's body.

The nature of the activities carried on, particularly if involving public wellbeing or governmental control, may affect reasonable expectations of privacy.

What does the concept of a search involve?

A "search" is not confined to physical intrusion. Section 21 is relevant to developing technologies and new forms of law enforcement devices, such as electronic surveillance, that do not require law enforcement officers to physically enter a property. The courts have previously considered that a search for the purposes of section 21 includes:

- looking through windows or cracks in the walls of a building; [385]
- checking the contents of a vehicle; [386]
• climbing over a locked gate to see if the occupant or owner is in the backyard; [387]
• electronically recording (by audio or visual methods) a conversation or activity; [388]
• requiring a person to remove items of clothing or to empty out his or her pockets; [389]
• demanding under statutory authority that a person provide documents and records. [390]

**Exercising search powers:**

- The starting point when establishing search powers for obtaining evidence for criminal proceedings is that:
  - the search power is expressly authorised by statute; and
  - the search is authorised by a warrant signed by a judicial officer on being persuaded that there are reasonable grounds for believing that an offence has been or is being committed.
- The purpose of the search needs to be apparent from the empowering legislation. A statute should also be clear on its face as to what enforcement officers can or cannot do (e.g. using force to effect entry).
- The presumption that a search should be undertaken only under the authority of a warrant may be overridden in certain circumstances, but only on limited grounds.
- A search may be unlawful if it is not authorised by law or if it is carried out contrary to law.
- Even though a search may be unlawful, the courts have held that it may still be reasonable for the purposes of section 21 of the Bill of Rights Act. Similarly, a lawful search may be unreasonable in certain circumstances.

**What does the concept of seizure involve?**

- A search is an examination of a person or property for something that is not immediately apparent or visible. A seizure, on the other hand, is the "taking of that which is discovered".
- A seizure is likely to involve the compulsory or non-consensual removal of property from an individual or organisation.
• A seizure may extend to the circumstances of retention or continued deprivation of property following its initial taking.
• For the purposes of section 21 an item is seized for as long as that person or organisation retains a reasonable expectation of privacy.

Measures to achieve compliance

If you are developing policies or practices that raise issues of consistency with section 21, you will need to consider:

• the primary purpose of the power (for instance, is it to monitor for compliance with a regulatory regime or is it to gather evidence for the purpose of taking criminal proceedings?); and
• the powers necessary to achieve that policy objective.

If search powers are necessary to achieve your policy objective, you will need to address a number of issues in developing the search powers:

• who will be authorised to exercise the power?
• what is the purpose behind the exercise of this power?
• will enforcement officers require a warrant before exercising the power?
• what actions must an enforcement officer take prior to executing the power?
• what powers can an enforcement officer employ in the course of exercising a power of entry?
• what other powers can an enforcement officer have to execute the power of entry?

See the diagram 'Developing a statutory power of entry' in the appendices for further guidance on these issues.

There are a number of issues to factor in to the development of operational policy. For instance, does the policy establish processes for ensuring:

i. there are no deficiencies in the warrant?
ii. there are reasonable grounds to undertake a statutory search?
iii. that the statutory code is complied with?
When developing operational policies on search powers, include best practice guidelines requiring those exercising the power to:

- show the authority to search or inspect;
- carry identification;
- consider whether it is necessary to remove items of property from the premises which have been searched;
- record the items removed from the premises and provide the owner with a list of things removed;
- retain those things taken from the property only for as long as necessary to achieve the purpose for which they were removed;
- maintain, care for, and secure the property for the period which it is seized. [391]

The guidelines might also include information on the circumstances in which:

- it might be appropriate to exercise or utilise certain powers associated with powers of entry (e.g strip searches) [392]
- the use of force or use of dogs may be considered necessary, rather than expedient, [393]
- it may be considered necessary for enforcement officers to obtain a warrant before embarking on a search, [394]
- it may be considered appropriate to conduct particular forms of search so as to maximise the privacy interests of the individual. [395]

**Related rights and freedoms**

Because section 21 is often considered in the context of law enforcement and the investigation and detection of offences, you should consider whether your policy or practice affects the rights provided for in the Bill or Rights Act in those contexts, for example:

- the right not to be compelled to say anything (section 14): do you intend to create a power requiring a person to answer questions put to them by a law enforcement officer?
- the right to be free from discrimination (section 19(1)): does the policy or practice target, directly or otherwise, particular sectors of the community?
• in the case of personal searches, the right not to be subject to degrading treatment or punishment (section 9) and the right to be treated with humanity and dignity (section 23(5)).
• the right to the observance of the principles of natural justice (section 27(1): does your policy allow for the forfeiture or confiscation of property? If so, does it provide for a procedure allowing the affected party to challenge that decision?

Further discussion on the meaning of section 21

In the leading case on section 21, the New Zealand Court of Appeal held that the intention of section 21 is: [396]

...to ensure that governmental power is not exercised unreasonably... The guarantee under section 21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity.

Security interests of the individual

The exercise of the powers of search and seizure are connected with a coercive power of state. As section 21 is in practice often linked to law enforcement, both in terms of investigating offences and carrying out powers of inspection, the right in section 21 focuses on the ability of the state to enter private property and intrude on the privacy of its citizens.

The starting point for any intrusion by the state onto private property remains *Entick v Carrington* in which Lord Camden CJ held: [397]

...our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

A right to privacy

The following considerations influence the right to privacy for the purposes of search and seizure laws:

i. Every person has the right to determine when, how, and to what extent they will release personal information about themselves. [398]
ii. Privacy values underlying the section 21 guarantee are those held by the community at large. They are not merely the subjective expectations of privacy which a particular owner or occupier may have and may demonstrate by signs or barricades. [399]

iii. Reasonable expectations of privacy are lower in public places than in private property. They are higher in the home than in the surrounding land, farmland or land not used for residential purposes. [400]

Many activities and industries are subject to a high degree of regulatory control and oversight by government agencies. Because there is an element of consent involved in such activities, persons participating in them have a lesser expectation of privacy than they might expect if they are in a private dwelling.

**Does section 21 confer a property right?**

Despite the reference in section 21 to "seizure...of property", the provision does not confer a right to property, or protection from the state seizing property. The meaning of the word seizure is influenced by its close proximity to the word search. The context within which section 21 appears is also important. McGechan J in *Westco Lagan v Attorney-General* put it this way: [401]

The portion of the Act in which s 21 occurs goes on to deal with liberty of the person, rights of persons arrested or detained, rights of persons charged, minimum standards of criminal procedure, retroactive penalties and double jeopardy, and right to justice. These ... all focus plainly on prosecution and judicial process. It would be distinctly odd if the legislature had plonked a provision intended to deal in a general way with seizure of property without compensation into such a matrix.

However, as we shall see, the courts will consider how enforcement agencies treat property that has been seized in the context of exercising their law enforcement functions. [402]

**What is a search?**

The New Zealand courts have analysed what is meant by a search. In *R v Fraser*, the Court said: [403]

in broad terms a search is an examination of a person or property. Though sometimes broader, in usage to search means to endeavour to find something
not readily at hand or available. The general connotation is of investigation or scrutiny in order to expose or uncover; going beyond or penetrating some degree of concealment.

As one of the objectives in upholding section 21 is to protect the individual's reasonable expectation of privacy, a search involves looking for something that is not immediately apparent or visible. [404] That is, there is no expectation of privacy in respect of a thing that is in plain view.

The courts have previously considered that a search for the purposes of section 21 includes:

- looking through windows or cracks in the walls of a building; [405]
- checking the contents of a vehicle; [406]
- climbing over a locked gate to see if the occupant or owner is in the backyard; [407]
- electronically recording (by audio or visual methods) a conversation or activity; [408]
- requiring a person to remove items of clothing or empty out his or her pockets [409]
- demanding under statutory authority that a person provide documents and records. [410]

Because of the common links between section 21 and law enforcement, a search is often principally undertaken for one of the following purposes:

i. Monitoring for compliance: an examination of a commercial property and the inspection of documentation or goods for the purposes of determining whether the owner or occupier is complying with the statutory regulatory framework (for example, registration requirements in the Animal Products Act 1999, workplace safety in the Health and Safety in Employment Act 1992, or the controls on gambling establishments under the Responsible Gaming Act 2003);

ii. Examining information for the purpose of gathering evidence: a search undertaken where there are reasonable grounds to believe that an individual or organisation is committing a criminal offence and it is necessary to collate information to substantiate that belief and to use as evidence in proceedings; and
iii. A combination of (i) and (ii) where the objective is to gain compliance with the law, and the information can be used for purposes other than criminal proceedings but sanctions exist (for example the maintenance of discipline at schools or maintaining the integrity of sport).

Is electronic surveillance a search?

The White Paper envisaged that section 21 would take into account developing technologies and new forms of law enforcement devices that would not require law enforcement officers to physically enter a property. The concept of a search would therefore extend to the interception of mail, the electronic interception of private conversations, and other forms of surveillance. [411] To date New Zealand courts have taken an approach which suggests that forms of electronic surveillance may constitute a search for the purposes of section 21 but no firm guidance has been provided. [412]

Elsewhere, the courts have adopted an approach consistent with the meaning given to the word search in Fraser [413], on the understanding that there has been an interference with the right to privacy. The US Supreme Court, for example, has previously concluded that police use of a thermal imaging device to detect the presence of cannabis growing in a house is a search. [414] The majority for the Court said that it would be "foolish to contend that the degree of privacy secured to citizens by the [protection against unreasonable search and seizure] has been unaffected by the advance of technology." [415] The Court went on to add:

Where . . . the Government uses a [sense-enhancing] device, not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant. [416]

The US Supreme Court emphasised the community's long-held and existing interest in the privacy of the home, and, significantly, pointed out that as everything in the home has the quality of intimacy, the whole house can be regarded as private.

The New Zealand Court of Appeal, in the case of R v Gardiner, [417] took a different view on the issue of expectations of privacy in the home. The Court acknowledged that the circumstances of the case were somewhat unusual [418] and the issue of whether the power was reasonable to be borderline. However, on the facts before it, the Court took of the view that: [419]
Although the camera was intended to pick up images from within the building, it was not trained on a bedroom or bathroom or other area of particular privacy. The area under observation was, as the police suspected, a part of the house which was being used for purposes of drug dealing; and judging by their own conduct the occupants had a less than complete expectation of privacy in that place.

The Court of Appeal in *Gardiner* concentrated their discussion on the reasonableness of the actions of law enforcement officers in training a video camera on a part of the house. The Court did not expressly consider whether the use of camera amounted to a search. Given the privacy principles underlying section 21, you should assume that:

i. the use of electronic surveillance is considered to be a search; and

ii. all parts of a private dwelling should be considered private with the occupiers assumed to have a high expectation of privacy.

*Production of documents*

A requirement to produce, create, or copy documents is likely to be considered a search for the purposes of section 21, especially where failure to provide the documents results in possible sanction. While the New Zealand courts have not directly addressed this point, the Privy Council, in considering an appeal from New Zealand, [420] accepted such an approach based on Canadian caselaw. [421]

A requirement to produce documents is less intrusive than other search powers, and can be exercised as part of an agency's inspection or audit functions. Requesting documents can be used by itself or in combination with other search powers - for example, a requirement to produce documents can be issued, and if the required information isn't forthcoming a warrant can be obtained. [422]

The power to require the production of documents raises issues of consistency with other rights, particularly the right to silence and the privilege against self-incrimination. [423] The Canadian courts have taken the view that a proper balance between the interests of the individual and the state can be struck if the requirement to produce documents is subject to appropriate terms and conditions, including those designed to protect the interests of the person compelled to provide the documents. [424]
**Seizure of property**

While a search is an examination of a person or property, a seizure is the "taking of that which is discovered." [425] A seizure for the purposes of section 21 is likely to involve the compulsory or non-consensual removal of property from an individual or organisation for as long as that person or organisation retains a reasonable expectation of privacy. [426] A seizure may include the taking of body and fluid samples, [427] or the taking of photographs and fingerprints. [428]

The High Court has stated that seizure includes both the initial taking possession of property, and any continuing detention of that property. [429] Williams J in *Wilson v New Zealand Customs Service* indicated that:

...even if there was reasonable cause for seizure at the time possession was first taken, circumstances and further investigations may later demonstrate that there is no reasonable cause for the continued detention of the goods and the seizure should accordingly be disallowed and the goods returned.

Because a seizure extends beyond the initial taking possession of property, the state must assume a responsibility for the safe and proper storage of the thing seized. A seizure may be unreasonable if, for example, the property is damaged by enforcement officers. [430]

**'Unreasonable' searches and seizures**

Section 21 does not affirm the right to be secure against all searches and seizures, just those that are unreasonable. A power of search and seizure may be considered unreasonable if:

- the power authorising the exercise of the search and seizure is unreasonable; or
- the search or seizure is carried out in an unreasonable manner.

Section 21 requires that certain procedural safeguards be established around the powers before they can be considered reasonable.

**Creating the right balance**

The Court of Appeal in *R v Grayson & Taylor* [431] indicated that a balancing exercise has to be performed when determining whether a search or seizure is unreasonable in terms of section 21. The balance is between the legitimate interests of the state in law enforcement and the privacy interests
of the individual. The court held that what is reasonable is subject to changing community values, but that contemporary society attaches a high value to privacy and to the security of personal privacy against arbitrary intrusions by those in authority. What is likely to be considered reasonable is largely dependent on where the search takes place, for what reason, and the method of the search (for example, electronic surveillance as opposed to a search of the person).

Ask the right questions

When developing legislation with potential search powers, there are three essential issues to address: [432]

Is the power necessary?

The most important issue is whether the power is necessary. Examples of purposes that are likely to be considered necessary include:

- to obtain or secure evidence of offending;
- to ensure that regulatory responsibilities are complied with;
- to recover property or to render it available for eventual forfeiture;
- to prevent or deter offending.

What powers are required?

The second question concerns the type of powers that are reasonably necessary to achieve the policy objective. Does the policy require a power of entry or can the information be obtained from other sources or in another way - such as a requirement to produce information? As the objective of section 21 is to preserve an individual's reasonable expectation of privacy, a requirement to produce documentation is generally considered to be less intrusive on a person's privacy than entry onto premises. At the same time, a demand to produce documents or information can raise other issues, as discussed above.

How is the search to be exercised?

The third questions concerns the authorisation to carry out the search, specifically: how is the search going to be carried out, by whom, under whose authority, and for what purpose?

In considering these issues, ask yourself:
What should an officer be able to do by way of search?
Who should be able to exercise the powers?
Should the powers be exercisable at any time or only at certain times?
If an officer needs to enter onto private property, is the use of force appropriate?

The purpose of the search will influence the answers to these questions. As regulatory inspections generally take place in areas which have lower expectations of privacy than searches carried out for the purpose of detecting criminal offending, the levels of protection are likely to be less. However, regulatory powers of inspection are not as extensive as search powers associated with criminal investigations (see examples of model legislation in the appendices to Guidelines). In addition, enforcement officers cannot use a regulatory power of inspection to gather evidence when that officer is acting on a suspicion that an offence has been committed. [433]

The purpose of the search must be apparent from the empowering legislation. A statute should be clear on its face as to what enforcement officers can and cannot do, and should not authorise officers to undertake acts that amount to fishing expeditions. [434]

**Is a search warrant required?**

The starting point when developing proposals to allow enforcement officers, or agents of the state carrying out a law enforcement function, to execute a power of entry and search is that:

- the power be expressly authorised by statute; [435] and
- the search be authorised by a warrant signed by a judicial officer on being persuaded that there are reasonable grounds for believing an offence has been or is being committed.

Obtaining prior authorisation for a search by obtaining a warrant enables enforcement officers to intrude on the privacy interests of individuals only in circumstances where a demonstrable justification is seen to exist. [436]

Search warrants are not, however, required in all situations. Regulatory inspections are a case in point. These inspections are not premised on the suspicion that an offence has been committed. There is little value to be gained by requiring an inspector to obtain a warrant. Warrantless searches may also be reasonable in situations where:
• obtaining a warrant would be impossible (in emergency situations, for instance);
• the delay in obtaining a warrant may cause a dangerous situation (civil aviation and health and safety legislation, for instance);
• there are reasonable grounds to believe that evidence may be destroyed or removed (border control situations, for instance).

In the absence of a warrant an enforcement officer may enter private premises or conduct a personal search with the consent of the occupier/person so long as the consent is informed and freely obtained. [437] Where an occupier has given consent to search premises, the entry onto those premises is not invalidated by another occupier subsequently seeking to exclude the officers from the premises. [438] The issue of freely obtained, informed consent is also relevant in situations where bodily samples are taken from individuals.

Similarly, there may be an implied license for enforcement officers to enter private property, but generally speaking that license comes to an end on reaching a dwelling house. [439] The purpose of the implied license is to enable persons, including law enforcement officers, to come onto a property to conveniently communicate with the occupier. New Zealand's Court of Appeal in Bradley has held that the scope of an implied license for police officers must necessarily be broader than that of ordinary members of the public and others because of the nature and scale of their duties and the public interest in law enforcement. [440] An enforcement officer's implied license extends only to those parts of the premises normally associated with access. An implied license is therefore revoked in circumstances where gates or barriers are in place that are designed to prevent persons other than the occupier from gaining entry to certain parts of the property. [441]

**Does an enforcement officer carrying out an inspection power require a warrant?**

The High Court has recently made the distinction between a "search" and an "inspection" for the purposes of section 21. The court held that a search involves looking for specific information, whereas an inspection is a more general examination. [442] The court relied on case law from overseas to make the point that the purpose behind the entry is significant.

Commercial organisations that operate within a regulated industry are subject to certain scrutiny to ensure compliance with the law. This is particularly the
case where the law requires the organisation to be licensed in order to carry out certain activities. The state has an interest in enforcing the terms of licences, and inspections may be required as part of that enforcement role. However, the scope of the inspection powers must be limited to those necessary to monitor compliance. The powers would therefore be less than those authorised by search warrants. For example, the power may not extend to all parts of premises, such as an employee's locker.

In most cases agencies need to obtain a warrant in order to gather evidence for the purposes of taking proceedings. [443] However, it is less clear whether an enforcement officer, when carrying out an inspection, is able to gather documents and other information to be used as evidence where reasonable grounds for believing that an offence has been committed exist. The intention of the inspectors in entering premises and gathering evidence is crucial. [444] The Canadian Supreme Court, in the context of tax law, has drawn a distinction between monitoring for compliance and an investigation. [445] The court set down the following guidelines:

1. Inspectors are not required to obtain a warrant if the primary purpose of the inspection is to monitor for compliance.
2. However, the primary purpose of the inquiry shifts if, in the course of conducting an inspection, an inspector develops a suspicion that an offence has been, or is being, committed.
3. Once the primary purpose of the inquiry becomes an investigation into the commission of an offence, any further production of documents requires a warrant.
4. Documents obtained during the inspection phase may be used in evidence, but once the investigation phase commences no new material can be gathered except under the authorisation of a warrant.

The Canadian Supreme Court acknowledged that it may be difficult for regulatory officers to establish when the nature of the inquiry shifts from an inspection to an investigation. Courts are likely to look at a range of factors, including the regulatory context, the extent of the inquiry, and the conduct of the inspector.

What about the case of searching persons?

There is greater expectation of privacy for searches of a person as opposed to searches of property. Generally speaking, the more intrusive the search, the
more tightly constrained the circumstances in which the search can take place will be. In addition, for more intrusive searches there will be a greater requirement for procedural protections, both in terms of the authorising power and procedure as well as the manner of its execution.

The manner and extent in which a search of a person is carried out may have a bearing on the extent to which the search intrudes on their reasonable expectations of privacy. [446] For example, as a search by a scanner is less intrusive than a strip search it is more likely to be seen as a reasonable exercise of a personal search power in certain contexts.

A search of a person may be undertaken without consent or a warrant in situations where the person has a diminished expectation of privacy. This could be because of where the person is at the time the search is conducted, [447] or because the person has been lawfully arrested or there is a concern that the evidence may be destroyed or removed. Prior to conducting the search, an enforcement officer would have to believe on reasonable grounds that the person possessed illicit property - an officer could not conduct a search in a random manner in an effort to find unlawful items. [448]

**Operational issues**

*Exercise of the search power - operational guidelines*

From a best policy perspective and as a risk limitation exercise, we strongly recommend that agencies with law enforcement functions develop sound practice guidelines for operational groups or enforcement agencies to ensure that all searches are undertaken lawfully and reasonably. When developing operational guidelines there are a number of areas to focus on, including:

i. Establishing a process for carrying out inspections. Ensure that officers carrying out inspections are clear about:

- the specific purpose for the inspection;
- the extent of the powers that can be exercised; and
- the procedures to be followed when, in the course of an inspection, the officer forms the view that an offence has been, or is being, committed. [449]
ii. Establishing a process for ensuring that there are no deficiencies in the warrant. A warrant can be deficient for a number of reasons, either because:

- the information in the affidavit supporting a warrant application is insufficient to justify the authorisation of the warrant (and there is no additional information to draw on); [450]
- the information on the warrant is inaccurate; or
- the information on the warrant is too general.

iii. Establishing a process to ensure that there are reasonable grounds for undertaking a statutory search power. Reasonable grounds may not exist where:

- there is no means of testing the objectivity of the information relied on; [451]
- the nature of the information gives rise to nothing more than a mere suspicion; [452] or
- the search is speculative. [453]

iv. Establishing a process for ensuring that the statutory code is complied with. This includes ensuring that:

- the statutory provisions detailing the procedures that need to be followed are strictly complied with; and
- the purpose of the search is consistent with the statutory scheme. Officers should not conduct a search for reasons other than those under which the search was authorised. [454]

Reasonable searches - operational policy development

The wording of section 21 indicates that the emphasis of any power of search should be on the reasonableness of that power or the exercise of that power rather than its legality. Although a search may be unlawful, it can still be reasonable for the purposes of section 21 of the Bill of Rights Act. [455] Similarly, a lawful search may be unreasonable in certain circumstances. [456] In such cases the manner in which a search authorised under statute or warrant is carried out will be relevant. Whether an otherwise lawful search or seizure is unreasonable "depends on both the subject-matter and the
particular time, place and circumstance." [457] The circumstance of the search enables the courts to consider the conduct of officers in carrying out their powers.

To help ensure that searches are carried out reasonably, officers should consider the merits of exercising particular powers in situations before them, rather than exercising all powers as a matter of routine. [458] Relevant considerations include:

- whether the use of force or use of dogs in particular circumstances was necessary, rather than expedient; [459]
- whether there was sufficient time and opportunity for enforcement officers to obtain a warrant before embarking on a warrantless search; [460]
- whether the search could have been carried in an alternative way so as to maximise the privacy interests of the individual. [461]

**Key cases**

History of the section

The White Paper

The current wording of section 21 is identical to the proposed wording in the White Paper.

Section 21 origins in international treaties and overseas legislation

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the European Convention of Human Rights provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

Section 8 of the Canadian Charter states:

Everyone has the right to be secure against unreasonable search or seizure.

Fourth Amendment of the US Constitution provides

The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.
Section 22 Liberty of the person

Section 22 of the Bill of Rights Act is as follows:

Liberty of the person
Everyone has the right not to be arbitrarily arrested or detained.

Policy triggers: do I need to consider section 22?
You will need to consider section 22 if the policy or practice you are developing:

- permits the police or other officials to detain individuals, whether or not they are suspected of committing an offence;
- authorises the committal of psychiatric patients to a mental health facility in order to protect public safety;
- allows the detention of persons in order to control the spread of a contagious disease;
- gives the police, customs or prison authorities the right to detain a person for the purposes of asking the person further questions or conducting a search of that person;
- makes it an offence for a person to fail to remain at a place for further questioning or conducting a search of that person by health, conservation, customs or immigration officers, or law enforcement officers.

What every policy analyst needs to know about section 22

- Section 22 applies to all forms of detention, including detention carried out for purposes of customs, criminal justice, immigration and military discipline, as well as enforced detention for medical and psychiatric treatment.
- The application of section 22 involves two considerations. Firstly, has a person been arrested or detained? Secondly, was the arrest or detention arbitrary?
**Detention**

- A person is said to be detained where he or she has a reasonably held belief, induced by the conduct of officials, that he or she is not free to leave.
- A person may be considered to be in detention for the purposes of section 22 when:
  - deprived of liberty by physical means;
  - required by law to attend or remain at a particular place (usually accompanied by penalty for failure to comply); or
  - words or conduct by a state official make it clear that the person is not free to go.
- A detention must be substantial - that is, something more than a "temporary check, hindrance, or intrusion on the citizen's liberty". [462]

**Arrest**

- The New Zealand courts have stated that an arrest for the purposes of the Bill of Rights Act will be deemed to have occurred where there has been:
  1. a clear and unequivocal statement or action by a law enforcement officer that makes it clear that he or she wishes to detain the individual; and
  2. the law enforcement officer is seen to be acting or purporting to act under legal authority. [463]

**When an arrest or detention is arbitrary**

- The courts have said that an arrest or detention is arbitrary when it is not "in accordance with the law or which is not in accordance with the principles which the law regards as appropriate for a discretion to be operated within". [464]
- The exercise of a discretionary power to detain or arrest someone may be arbitrary where "it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures". [465]
For this reason "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, and lack of predictability.

An arrest or detention that was lawful may become arbitrary if it continues beyond the period for which the state can provide appropriate justification.

**Measures to achieve compliance**

When working on a policy or developing a practice that involves the arrest or detention of individuals, consider developing the policy in such a way that its implementation is:

i. principled;
ii. predictable;
iii. consistent with the principles that the law regards as just.

In essence, you need to clearly set out the circumstances in which the power may be used and who may effect the arrest or detention. Ensure that the discretion to arrest or detain is prescribed in terms that are consistent with the objective of the policy. Ask whether there are clearly defined, express, criteria for determining when such individuals can be detained.

It is also vital that officers receive adequate training as to the circumstances where the power can be used. Practice guidelines governing the exercise of the powers should also be prepared and given to those exercising the powers.

You should assess your policy against the following criteria:

- Are the grounds for the arrest or detention prescribed by law?
- Will the arrest or detention be made in accordance with proper procedures?
- Is the arrest or detention necessary and reasonable in the circumstances (that is, to prevent flight, prevent the rapid spread of disease, avoid interference with evidence, or prevent the recurrence of crime)?
- Is the length of time that the person may be arrested or detained for justifiable?
Related rights and freedoms

Section 22 aims to ensure that persons are not deprived of their liberty in an arbitrary manner. The right not to be deprived of liberty is also important with respect to section 18, which guarantees an individual's freedom of movement.

Section 22 of the Bill of Rights Act also complements section 23. Section 23 guarantees various rights to persons who are arrested and detained, ranging from the right to be informed of the reason for the arrest or detention to the right to be treated with respect and dignity whilst in custody. These rights will be discussed in more detail in the following chapter.

Further discussion on the meaning of section 22

The right to be free from arbitrary arrest or detention applies in situations where the state places a person in custody, requires them to remain in a place for a period of time, prevents them from leaving a location, or requires them to attend a particular location (for example, a facility for the treatment of a contagious disease). Section 22 applies to all forms of detention, not just detention for the purposes of criminal justice. It therefore extends to acts of a number of officers who carry out regulatory powers in the areas of conservation, fisheries, bio-security, commerce and health. It also applies to forms of detention for the purposes of customs, immigration, and military discipline, as well as enforced detention for medical and psychiatric treatment.

The application of section 22 involves two considerations - firstly, has a person been arrested or detained? Secondly, was the arrest or detention arbitrary?

When is someone considered to be "under arrest"?

The New Zealand courts have stated that for the purposes of the Bill of Rights Act an arrest will be deemed to have occurred where there has been: [466]

1. a clear and unequivocal statement or action by a law enforcement officer that makes it clear that he or she wishes to detain the individual; and
2. the law enforcement officer is seen to be acting or purporting to act under legal authority.
The courts have taken a cautious approach to finding whether an arrest has taken place. However, you need to be mindful of the overall purpose of section 22 - it seeks to promote the freedom of individuals to move freely without interference from the state. Even though a policy does not provide a power of arrest, any significant interference with the liberty of an individual may still constitute a form of detention for the purposes of section 22.

**What is the meaning of detention for the purposes of section 22 of the Bill of Rights Act?**

A person may be considered to be in detention for the purposes of section 22 where:

- they are deprived of liberty by physical means;
- the law requires them to attend or remain at a particular place (usually accompanied by penalty for failure to comply); or
- words or conduct by a state official make it clear that a person is not free to go.

The New Zealand courts have demonstrated a willingness to examine whether anything was said or done by the alleged detainer which would cause a person to reasonably believe that he or she was not free to depart. This test, which is a mixed objective/subjective test, is as follows: [467]

[...] does the suspect have a reasonably held belief, induced by police conduct, that he or she is not free to leave?

If the answer to this question is "yes", then it is likely that the person is detained for the purposes of section 22 (and section 23). [468]

The courts have attempted to provide a common-sense approach to the meaning of detention for the purposes of section 22. In *Police v Smith and Herewini*, Richardson J stated that a restriction on a person's liberty had to be substantial in order for it to be a form of detention. [469] Restrictions on a person's movement that are fleeting or transitory, such as breath screening tests, do not amount to detention and therefore fall outside the scope of section 22. [470]

Determining the actual moment when an individual is detained will therefore be a question of degree. For instance, compliance with routine customs formalities upon entering the country does not necessarily amount to detention. However, a passenger may be detained in circumstances where a
customs official requires them to answer further questions. The passenger would have no choice but to comply with the request: failure to do so would result in criminal liability. A certain threshold of compulsion needs to be crossed if the concept of detention is to come into play.

**Questioning by law enforcement officers**

A statutory requirement to answer questions may cause a person to be detained if the questioning amounts to a sufficient restraint on a person's liberty. If you are developing policy that authorises law enforcement officers to question a person, you should carefully consider the purpose for requiring the person to answer questions, the context within which the person is expected to answer questions and the extent of the questioning.

**What is meant by "arbitrary"?**

In *R v Hufsky* the Supreme Court held that "a discretion is arbitrary if there are no criteria, express or implied, which govern its existence." [471] The New Zealand courts have interpreted this statement to mean that an arrest or detention is arbitrary: [472]

- if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.

**When is an arrest or detention considered to be arbitrary?**

Section 22 requires that a person may be lawfully deprived of their liberty only if the arrest or detention is consistent with procedures established by law.

In *Re M*, Gallen J held that the exercise of the discretion to arrest or detain may be arbitrary when: [473]

- it is not in accordance with the law or is not in accordance with the principles which the law regards as appropriate for a discretion to be operated within.

A policy may therefore provide for arbitrary detention or arrest powers where it confers too broad a discretion on enforcement officers or where the scope of the power is broader than the objective of the policy.

An arrest or detention that is unlawful is likely to be arbitrary. [474] For example:
- Where an arrest is made in order to achieve an unlawful purpose, the resulting detention will be arbitrary. [475]
- An arrest or form of detention may be unlawful (and thereby arbitrary) even though it is carried out in consequence of a statutory power.
- The exercise of a statutory power may be considered unlawful (and thereby arbitrary) where it is carried out pursuant to a mandatory requirement without regard to the merits of the case. [476]
- Where law enforcement officers carry out an arrest that is unwarranted in the individual circumstances, the arrest or detention may be arbitrary because the decision to arrest was irrational and therefore unlawful. [477]

There are therefore a number of ways in which an otherwise valid power of arrest or detention may be considered arbitrary:

1. Continuation of detention - although the initial power to detain a person may be valid, the detention may become arbitrary if there are insufficient procedures to ensure that the reasons for continuing to detain the person are legitimate. [478] An individual should not be kept in detention as a matter of convenience.

2. Improper exercise of power - although law enforcement officials have the statutory power to detain a person, the detention may be arbitrary if it is not carried out for a valid reason or where there is insufficient cause to detain an individual.

3. Illegitimate purpose - a person who has been apprehended and subsequently confined in a police cell for the sole purpose of questioning will be considered to have been arbitrarily arrested and detained. [479]

The New Zealand caselaw on what makes an arrest or detention "arbitrary" is consistent with the approach taken elsewhere. International human rights judicial institutions have held that the prohibition of "arbitrary" deprivations of liberty goes further than the prohibition of "unlawful" deprivations, as arbitrariness is a principle above rather than within the law. For instance, in Van Alphen v The Netherlands, [480] the UN Human Rights Committee - interpreting Article 9(1) of the ICCPR - held that: "'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to
include elements of inappropriateness, injustice and lack of predictability."
This meant, in the Committee's opinion, that:

[...] remand in custody pursuant to lawful arrest must not only be lawful but
reasonable in all the circumstances. Further, remand in custody must be
necessary in all the circumstances, for example, to prevent flight, interference
with evidence or the recurrence of crime.

The Committee also considers an arrest or detention that is previously lawful
may become arbitrary if it continues beyond the period for which the state
can provide appropriate justification. [481]

Under the European system for the protection of human rights, a deprivation
of liberty will only be considered to be lawful if it is in accordance with the
applicable municipal law and the ECHR, including the general principles of
the latter, and is not "arbitrary". The European Court of Human Rights has
considered a detention to be arbitrary if it is not in conformity with the
purpose of one of the permissible grounds of detention, as set out in Article
5(1) the ECHR. For example, detention ostensibly for the purpose of
depортation that is really aimed at illegal extradition would be "arbitrary".

Key cases

*R v Goodwin* [1993] 2 NZLR 153; *R v Goodwin (No 2)* [1993] 2 NZLR 390;
*R v Te Kira* [1993] 3 NZLR 257; *Police v. Smith and Herewini* [1994] 2
Auckland T12/96; *R v M* [1995] 1 NZLR 242; *R v Ihaka* CA 71/02, 17 June
2002; *Re M* [1992] 1 NZLR 29; *Attorney-General v Hewitt* [2000] 2 NZLR
(Ont CA); *R v Hufsky* [1988] 1 S.C.R. 621; *Van Alphen v The Netherlands*
305/88; *Spakmo v Norway* 631/95.

History of the section

The White Paper

Section 22 is identical to the provision that was proposed in the *White Paper*.

The Select Committee Reports on the Bill of Rights Bill

In its consideration of the right not to be arbitrarily arrested or detained, the
Select Committee spent considerable time discussing the manner in which
the Canadian Courts had interpreted the equivalent provision of the Canadian
Charter. The Committee noted that the principal matter that needed to be determined was whether the alleged infringement amounted to an "arbitrary" arrest or detention. Given the uncertainty of the qualifier, "arbitrary", the Committee suggested, as an alternative, that this right could be redrafted along the following lines:

No one shall be arrested or detained except on such grounds, and in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice.

Section 22 origins in international treaties and overseas legislation

Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 3 of the Universal Declaration of Human Rights states that:

Everyone has the right to life, liberty and security of person.

Article 5(1) of the European Convention of Human Rights provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful detention of a person after conviction by a competent court; the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
Footnotes:

391.  See Appendices for further examples.
392.  See for example, the discussion by Thomas J on the exercise of strip-search powers in *Everitt v A-G* [2002] 1 NZLR 82.
397.  (1765) 19 State Tr 1029.
400.  The courts in Canada, for example have said that personal searches at borders are not of themselves unreasonable because a person's expectations of privacy in such a location is low. See *R v Simmons* [1988] 2 SCR 872.
402.  See *Wilson v New Zealand Customs Service* [1999] 5 HRNZ 134,139.
406.  


407.  


408.  


409.  

*Everitt v Attorney-General* [2002] 1 NZLR 82.

410.  


411.  


412.  

For an overview of the various approaches, see *R v Davis* (reported as *R v A* [1994] 1 NZLR 429); *R v Barlow* (1995) 14 CRNZ 9 (CA); and *R v Fraser* [1997] 1 NZLR 442. There is some academic discussion on this point too. See Scott Optican 'What is a "Search" under section 21 of the New Zealand Bill of Rights Act 1990? An Analysis, Critique and Tripartite Approach', [2001], *Part III New Zealand Law Review*, pp 239-275. In his concluding remarks, Optican makes a plea for the courts to provide some guidance on the matter so as to assist policy makers and enforcement officers. The advantage of defining what is and isn't a search is that it avoids difficulties in determining what is and isn't reasonable.

413.  

*R v Fraser* (1997) 15 CRNZ 44; 3 HRNZ 731 (CA).

414.  


415.  


416.  


417.  


418.  

The case concerned a police operation which took place over more than 6 months. The police placed a video camera with a zoom lens on an adjacent property and trained it onto the kitchen of the accused's house. The accused was suspected of committing "serious drug offences". The Court was cognisant of the privacy issues but also the extent to which the accused and other persons using the house took steps to avoid detection. The decision to use video surveillance only took place after other evidence had been obtained and other surveillance techniques considered.

419.  


420.  

422. The Court of Appeal in *Tranz Rail Ltd v Wellington District Court* [2002] 3 NZLR 580 discusses the procedures that should be followed before a warrant can be obtained (the discussion is, however, specific to the procedural requirements of the Commerce Act 1987).
432. See also chapter 14 of the LAC Guidelines, available at www.justice.govt.nz/lac/
435. For a recent statement of this principle, see *Choudry v Attorney-General* [1999] 2 NZLR 582.
436. See *Hunter v Southam* [1984] 2 SCR 145 where Dickson J held that justifications after the event do not preserve the privacy interests of the individual citizen from intrusions by the state.
437. *R v Allen* 19/12/96 CA 88/94.
438. *Bell v Police* 27/6/01, Panckhurst J, HC Dunedin AP10/01.
442. *Waikato Regional Council v Wellington City Council & Ors* 25/06/03, Venning J HC Auckland AP18-SW03.
444. See *Baron v Canada* [1993] 1 SCR 627.

468. See the decision of the Ontario Court of Appeal in *R v Moran* (1987) 36 CCC (3d) 225 (Ont CA).


470. *Police v Smith and Herewini* [1994] 2 NZLR 306, 315 (see Adams 10.9.07(3)).


474. See *R v Goodwin (No2)* [1993] 2 NZLR 390 where the Court of Appeal left this possibility open.

475. The New Zealand courts have held that the burden of showing, on the balance of probabilities, that the arrest or detention of a suspect has not breached section 22 of the Bill of Rights Act rests with the Crown *R v Te Kira* [1993] 3 NZLR 257.


480. *Van Alphen v The Netherlands* 305/88.

Part III: Section 23 – Rights of persons arrested or detained

Section 23 Rights of persons arrested or detained

Section 23 of the Bill of Rights Act states that:

1. Everyone who is arrested or who is detained under any enactment:
   a. Shall be informed at the time of the arrest or detention of the reason for it; and
   b. Shall have the right to counsel and instruct a lawyer without delay and to be informed of that right; and
   c. Shall have the right to have the validity of the arrest and detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

2. Everyone who is arrested for an offence has the right to be charged promptly or to be released.

3. Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

4. Everyone who is
   a. Arrested; or
   b. Detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

5. Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

Policy Triggers: do I need to consider section 23?

Is your agency or department working on a policy or developing a practice that will enable a law enforcement officer to exercise a statutory power to detain or arrest? If so, you will need to establish procedures and guidelines to:
• ensure the enforcement officer gives the arrested or detained person (the "detainee") sufficient information about the reasons for the arrest or detention;
• ensure the enforcement officer informs the detainee that he or she may consult and instruct a lawyer;
• ensure that detainees who wish to consult and instruct a lawyer are not questioned in the absence of the lawyer;
• enhance the ability of detainees to consult with and instruct their lawyers;
• enable the detainee to consult with a lawyer in private;
• enable the detainee to lodge a writ of habeas corpus with a court to test the validity of the arrest or detention;
• establish minimum standards and conditions to which the detainee may be subjected.

**What every policy analyst needs to know about section 23**

• The rights in section 23 apply only where a person has been arrested or, in relation to sections 23(1), 23(4) and 23(5), detained under an enactment.
• As a person may have been arrested or detained as a consequence of an alleged offence, there may be some overlap and link between the rights in sections 23, 24, and 25 - even though they apply to distinct stages of the prosecutorial process.
• Where a person has been arrested or detained under an enactment because of an alleged offence, the rights in section 23 apply from the time a person is arrested or detained until such time as the prosecuting authority formally advises an arrested person that he or she is to be prosecuted and gives that person particulars of the charges he or she will face.

**Further discussion on the meaning of section 23(1) - initial considerations**

**Who is "Everyone who is arrested or detained under any enactment"?**

The words "under any enactment" distinguish the character or quality of arrest or detention in section 23 from those in section 22. [482] The effect of
this qualification is to limit the scope of the meaning of "detention" for the purposes of section 23. [483] The rights in section 23 apply in the case of a detention only if that detention is authorised by legislation. [484] However, if a person is "detained" but the detention falls outside of the scope of the enactment, the rights in section 23 will still apply if the officer acted in reliance on the statutory power. [485]

Statutory provisions, such as section 68 of the Land Transport Act 1998, may expressly provide for a power of detention. In other cases the power may be implicit given the nature of the statutory objective, for example, personal searches under section 18(2) of the Misuse of Drugs Act 1975.

Key case


History of the section

The White Paper

The White Paper separated the proposed rights of persons arrested and detained into those concerned with the liberty of the person (clause 15) and those pertaining to arrest (clause 16). Apart from the right not to be arbitrarily arrested or detained, section 23 is a consolidation of these clauses.

The Select Committee Reports on the Bill of Rights Bill

The Select Committee considered the two clauses on the rights of arrested and detained persons alongside those pertaining to the criminal process (namely clauses 18 and 19 of the Bill of Rights Bill). The Committee received several comments about the general nature of these proposals. For instance, it was suggested that they would shift the focus in criminal cases from questions about the guilt of the defendant to questions about the actions of the police. It was also submitted that the effect of the proposals would be to create uncertainty and complexity in the law with a resultant lack of guidance for police officers and an increase in the volume of litigation. Finally, it was proposed that the order of these clauses should be changed to better reflect the sequence of the criminal process, i.e. arrest, charging, and trial.

The Select Committee noted that it was inevitable that the adoption of the rights contained in these proposals as part of the supreme law would enable arguments to be made on the basis of the infringement of these rights:
particularly as they had been the subject of considerable litigation in Canada. However, the fundamental nature of these rights was such as to outweigh any perceived disadvantages in their entrenchment. In the Committee's opinion, awareness of the rights contained in the Bill would increase over time and this would assist in overcoming some of the practical difficulties associated with its adoption. Finally, the Committee supported the suggestion that the Bill should be altered to reflect the sequence of events in the criminal process.

With respect to the specific proposals, the Select Committee confined its comments to the right not to be arbitrarily arrested and detained (which is set out in section 22 of the Bill of Rights Act) and the right of arrested persons to remain silent. The Committee considered that the latter right was one of the most fundamental rights requiring protection. Although the Committee was not convinced that the protection of silence was relevant in all situations where persons were detained, it supported the view that it should also apply where a person was detained "in relation to a suspected offence".

*Origins in international treaties and overseas legislation*

Articles 9(2) through (4) and 10(1) of the ICCPR provide:

9(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
9(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
9(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
10(1) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Articles 5(2) to 5(4) of the European Convention of Human Rights provide:
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be promptly brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Section 10 of the Canadian Charter sets out that:

Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

**Section 23(1)(a) The right to be informed of the reasons for the arrest**

Section 23(1)(a) of the Bill of Rights Act is as follows:

**Reasons for the arrest**
Everyone who is arrested or who is detained under any enactment shall be informed at the time of the arrest or detention of the reason for it.

**Policy triggers: do I need to consider section 23(1)(a)?**

If you are working on a policy or developing a practice that enables enforcement officers to carry out powers of arrest or detention, you need to ensure that the policy or practices are consistent with section 23(1)(a).

**What every policy analyst needs to know about section 23(1)(a)**

To comply with section 23(1)(a) of the Bill of Rights Act, the enforcement officer should promptly inform an arrested or detained person (the "detainee") of the reasons for his or her arrest or detention in words sufficient
to give the detainee notice of the true reasons for the arrest. With regard to the type of information that needs to be provided, the enforcement officer should be mindful that he or she does not:

- deliberately minimise the legal consequences of the jeopardy facing the detainee;
- mislead the detainee over the reasons for the arrest or detention for the purpose of eliciting information from him or her; or
- fail to advise the detainee that the reasons for the detention have changed.

Measures to achieve compliance

When working on a policy or developing a practice that involves arrest or detention, you should establish instructions or rules governing the exercise of these powers. You may also need to consider what additional training and support is required so that enforcement officers can carry out their tasks consistently with the standards set down by the courts.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the following discussion on section 23(1)(a).

Related rights and freedoms

When developing policies or practices relating to the detention of persons, you should consider the remaining rights in section 23, particularly section 23(1)(b) and 23(4). You may also need to consider:

- the right not to be arbitrarily arrested or detained (section 22);
- the right of everyone who is charged with an offence to be informed promptly and in detail of the nature and cause of the charge (section 24(a));
- the right to adequate time and facilities to prepare a defence (section 24(d));
- the right to a fair trial (section 25(a));
- the right to be tried without undue delay (section 25(b));
- the right to be present at the trial and to present a defence (section 25(e)).
Further discussion on the meaning of section 23(1)(a)

*Why should a person be informed at the time of his/her arrest or detention of the reason for the arrest or detention?*

The first right that is guaranteed to suspects under section 23(1) of the Bill of Rights Act is the right to be informed of the reason for arrest or detention. The purpose of informing a person who has been arrested or detained of the grounds for the arrest or detention enables the person arrested or detained to:

- remedy any mistake, misapprehension, or misunderstanding in the mind of the arresting or detaining authority;
- make use of the other rights that are set out in this section - particularly, the right to consult a lawyer under section 23(1)(b) - as the enjoyment of these rights is contingent on the detained or accused person having "adequate knowledge of the reasons for detention or arrest"; [486]
- Furthermore, once a suspect is able to identify the act or omission for which he or she is arrested, the suspect might "make informed decisions about whether to make a statement to the police, [...] co-operate in the giving of body samples, participate in an identity parade, show where exhibits are to be found, and co-operate in other aspects of the police inquiry." [487]

*When should a person be informed of the reasons for the arrest or detention and what information should be provided?*

Although section 23(1)(a) states that this information must be given at the time the arrest is made or a person is detained, the courts have said that such a requirement should not be taken literally where the enforcement officer cannot comply.

The courts have held that section 23(1)(a) requires that the person is given sufficient information to appreciate the nature and extent of the jeopardy they are in. [488] In most cases this would involve identifying the date, place, and act in question. [489] The person need not be told of the exact charge contemplated or the reason in technical or precise language but the person should have an appreciation of the "total situation" as it impacts on him or her. [490] In certain cases, the reasons for the arrest or detention may be so
obvious from the conduct that preceded it that there is no need to expressly inform the person of the reasons for the arrest. [491]

One Canadian commentator has observed: "The information conveyed to the arrested or detained person [needs only be] such as to reasonably enable him to decide whether or not to resist arrest as well as make an informed choice concerning the right to retain and instruct counsel." [492]

The courts have also said that the person must be given sufficient information to enable them to make an informed decision about whether or not to waive their right to counsel. If a person is given an inadequate explanation as to the reasons for his or her arrest, their subsequent decisions not to ask for legal representation may be considered invalid. [493] Similarly, if the enforcement officer misleads the arrested or detained person as to the reasons for his or her arrest, then the arrest or detention is considered to be in breach of this section. [494] It may also be considered a breach of this section if the indication given to a person is that they have been arrested on significantly less serious charges than the ones the police are contemplating.

**When reasons for an arrest change**

If a law enforcement officer becomes aware of other information that:

1. gives effect to a fundamental and discrete change in the purpose of the investigation; and
2. may give rise to new and further charges

then the officer must advise the person arrested or detained of the new reasons for his or her arrest or detention. [495]

**Key cases**

Section 23(1)(b): The right to counsel and instruct a lawyer without delay

Section 23(1)(b) of the Bill of Rights Act is as follows:

Right to counsel
Everyone who is arrested or who is detained under any enactment shall have the right to counsel and instruct a lawyer without delay and to be informed of that right

Policy triggers: do I need to consider section 23(1)(b)?

Are you developing a policy or practice that establishes or affects procedures for dealing with persons arrested or detained (the "detainees") under any statutory power? You should consider whether your policy or practice is consistent with section 23(1)(b) if:

- it regulates the procedures for providing access to a lawyer;
- it provides procedures for informing detainees that they may be able to gain access to free legal assistance;
- establishes guidelines on procedures relating to the questioning of detainees.

What every policy analyst needs to know about section 23(1)(b)

- There are essentially four elements that make up the right to legal representation. These are:
  
  i. the right to consult counsel;
  ii. the right to instruct a lawyer;
  iii. the exercise of those rights without delay; and
  iv. the right to be informed about those rights.

- The right under section 23(1)(b) not only ensures that detainees have access to the information and advice they need before being interviewed by law enforcement officers, it also enhances their representation.
- In addition to protecting the various rights of detainees, counsel may assist the law enforcement agency by: providing information and
advice on technical matters, negotiating an agreement between the agency and a detainee, and/or improving communications between the arresting officer and a detainee.

- The phrase "without delay" does not mean instantly or immediately, but the information must be given before the detainee's legitimate interests are jeopardised.
- The expression "without delay" applies equally to the detainer and the detainee. Although a detainee has the right to consult and instruct a lawyer without delay, this right must be exercised without delay - failure to do so may constitute a forfeiture of the right.
- Enforcement officers do not have to wait indefinitely for a lawyer sought by a detainee to arrive - they are only required to allow a reasonable opportunity for consultation.
- The right to consult and instruct a lawyer must be communicated to the detainee effectively.
- Enforcement officers must facilitate contact with counsel. This means:
  - a detainee who lacks sufficient means to pay for legal representation should be advised of the existence of free legal advice schemes;
  - access to counsel should normally be in person. However, in certain circumstances (particularly in the case of drunk drivers) it may be made by telephone;
    - generally, legal consultation should be in private.
- Enforcement officers must ensure that any waiver of the right to legal representation is informed and voluntary.
- The right in section 23(1)(b) does not extend to the right to telephone a friend or family member unless such a call is necessary to enable the detainee to contact his or her lawyer.
- When a detainee seeks to exercise his or her right to legal representation, an enforcement officer has a duty to refrain from taking any positive or deliberate step to elicit evidence from the detainee until he or she has had a reasonable opportunity to consult with counsel.
- In such circumstances, enforcement officers cannot merely refrain from taking any positive or deliberate step to elicit incriminating evidence - they should avoid acting in a manner that will have the
effect of drawing out information in the absence of a detainee's legal representative.

- A detainee may elect to waive the right to counsel. A waiver is not effective unless it can be shown that the detainee had a proper understanding of the protection under the right and the decision was an informed and voluntary one.
- Enforcement authorities should, therefore, be aware of any barriers that may affect a detainee's ability to make an informed choice to exercise or waive the right to counsel.

**Measures to achieve compliance**

Consider what extra training or resources law enforcement officers need to help them comply with their obligations under this section. Consider developing checklists to help officers ensure the detainee understands about the right to legal representation.

Your department should also develop guidelines on how an enforcement officer may facilitate contact with a lawyer. These guidelines should:

i. remind the enforcement officer that a detainee who lacks sufficient means to pay for legal representation should be advised of the existence of free legal advice schemes;
ii. indicate the circumstances where access to counsel may be made by telephone as opposed to being in person; and
iii. advise the enforcement officer that legal consultation, in general, should be in private.

Consequently, when a detainee seeks to exercise his or her right to consult a lawyer, it would be advisable for the enforcement officer to provide the detainee with:

- a list of available lawyers drawn up by various law societies;
- a telephone book (both the yellow and white pages, if available);
- a telephone, including a cell-phone where a land-line is not available.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the following discussion on section 23(1)(b).
Related rights and freedoms

If you are considering whether the policy or practice that you are working on raises section 23(1)(b) issues, you will also need to consider whether the policy or practice is consistent with the remaining provisions of section 23, particularly sections 23(1)(a) and 23(4) of the Bill of Rights Act.

You may need to consider:

- the right to adequate time and facilities to prepare a defence (section 24(d));
- the right to a fair hearing (section 25(a));
- the right to be present at the trial and to present a defence (section 25(e));

If the policy infringes section 23(1)(b), it may also infringe one or more of the other rights.

Further discussion on the meaning of section 23(1)(b)

Section 23(1)(b) serves the same purpose as the rule laid down in the United States by *Miranda v Arizona*. [496] In *Miranda* the US Supreme Court interpreted the privilege against self-incrimination as requiring that a suspect be informed of his right to consult and instruct a lawyer prior to police questioning. The right to legal representation is also found in section 10(b) of the Canadian Charter.

There are essentially four elements that make up the right to legal representation. [497] These are:

- the right to consult counsel;
- the right to instruct a lawyer;
- the exercise of those rights without delay, and
- the right to be informed of these rights.

**Why is it necessary to inform a suspect that he or she has the right to counsel and to instruct a lawyer?**

The right to consult with and instruct a lawyer is intended to correct the imbalance between arrested or detained persons and the informed and coercive powers available to the state. [498] The right under section 23(1)(b) not only ensures that arrested or detained persons have access to the
information and advice they need before taking part in the interview with law enforcement officers but it also enhances the representation of such persons.

In addition to protecting the various rights of arrested or detained persons, counsel may: provide information and advice on technical matters, negotiate an agreement between the agency and the arrested party and/or improve communications between the arresting officer and the arrested or detained persons. The presence of counsel also prevents the use of unacceptable tactics on the part of the arresting officer and ensures that the position of the arrested or detained persons is fully and accurately advanced.

**What does it mean to exercise the right to legal representation without delay?**

The New Zealand courts have held that the right to legal representation without delay is not synonymous with instantly or immediately. [499] However, any delay in advising the arrested or detained person must be reasonable. [500] The reasonableness of the delay will be dependent on the facts of the case, but may be dependent on either the period of time that is lapsed, [501] or the prejudice to the accused that results from the delay. [502]

The preamble to section 23(1)(b) confers the right to consult counsel to everyone who is arrested or detained. It does not contemplate that persons be advised they have the right before an arrest or detention takes place. Nonetheless, Canadian courts have considered valid advice given before an arrest or detention, provided there is "a close factual connection relating to the [advice] to the detention and the reasons therefor." [503] However, as the courts in New Zealand have not addressed this point, it is recommended that agencies instruct their law enforcement officers to advise persons of their rights once they have been arrested or detained even if that advice has been given previously.

**Can an arrested or detained person take his time when deciding whether to consult and instruct a lawyer?**

The New Zealand courts have held that the interests of justice and the obligations inherent in human rights alike call for the expression "without delay" to apply equally to the detainer and the detainee. Although a suspect has the right to consult and instruct a lawyer without delay, the suspect must exercise this right without delay. [504] Failure to do so may constitute a forfeiture of the right.
The consequence of this approach is that where the circumstances require or permit personal attendance of counsel, the enforcement officer is not obliged to wait indefinitely for a lawyer sought by a suspect to arrive. They are required to allow for a reasonable opportunity for consultation. Again, what is reasonable is a question of fact, dependent on the particular circumstances and the statutory context. [505] However, agencies need to be cautious about acting to circumvent the right.

In *R v Etheridge*, [506] the Court of Appeal identified a number of factors that were to be indicative of whether a delay was reasonable or not. These factors included whether:

i. the law enforcement officers knew the person wanted legal counsel;
ii. the law enforcement officers knew arrangements had been made for a solicitor to represent him;
iii. there was a pressing need or great urgency confronting the enforcement officers requiring them to conduct the interview without the lawyer being present.

*What does it mean "to be informed" that you have the right to a lawyer?*

Having determined when it should be given, the next matter that needs to be considered is the precise content of the advice. The leading case on the meaning of "informed" is *R v Mallinson*, [507] in which the Court of Appeal confirmed the view that the obligation on the arresting officer is to communicate the nature of the right in a clear, meaningful way that gives effect to the right. [508]

The determination of whether there has been effective communication will always be a question of fact, but there are a number of factors that will be considered to go show whether the right has been given effect to. These include whether the person arrested or detained:

- fully understood what the right entitled him or her to do or refrain from doing;
- had the mental, education, or language skills to fully understand what the role of counsel was and what the implications were if he or she waived the right.
There may also be occasions where it is necessary for the enforcement officer to re-advise the arrested or detained person that he or she has the right to legal representation. Such occasions may include situations where:

- the circumstances surrounding the arrest have changed;
- there has been a substantial lapse in time between the initial arrest and the commencement of questioning; or
- the person detained or arrested elects to participate in a further evidential process. [509]

**Having advised the arrested or detained persons that they have the right to consult a lawyer, is the arresting officer under an obligation to actually facilitate contact with the lawyer?**

The New Zealand courts have been very clear that once an arrested or detained person indicates a desire to consult a lawyer the arresting officer is under a duty to assist the person to make that contact. As Richardson J stated in *MOT v Noort* and *Police v Curran*: [510]

That right can only have meaning to an arrested or detained person if it is taken as raising a correlative obligation on the enforcement officer to facilitate contact with a lawyer.

The New Zealand courts have routinely held that an individual who is unable to contact one lawyer "should normally be allowed to try one or two others". [511] However, once the individual has made several unsuccessful attempts to contact various lawyers, then the police would be within their right to request the detainee to carry on with the testing procedure (in the case of drunk drivers) or commence their interrogation of the accused (in other situations).

The right in section 23(1)(b) does not extend to the right to telephone a friend or family member unless such a call was necessary to enable the person to contact his or her lawyer. [512]

In order to ensure that contact with a lawyer has been adequately facilitated, the following additional points should be noted:

**Legal aid:** Where an arrested or detained person, who has been informed of his or her right to consult and instruct a lawyer, advises the enforcement officer that he or she cannot afford one, the enforcement officer should advise the arrested or detained person of the existence of free legal advice
schemes (such as the Police Legal Assistance Scheme). [513] Failure to do so may lead to the exclusion of any evidence obtained thereafter.

Choice of counsel: In New Zealand an accused has a *prima facie* right to appoint a lawyer of his or her own choice, unless the accused lacks sufficient means to retain counsel and is relying on the state to fund his or her legal representation. Where an accused person is legally assisted, he or she has no right to counsel of choice. This contrasts with the position in Canada. [514]

Consultation with a lawyer in person or over the phone: Unless a person elects to consult with his or her lawyer by phone, or because the idiosyncrasies of the breath and blood alcohol legislation regime demand that consultation in most cases take place by phone, the police are under a duty to refrain from attempting to elicit evidence from any person who seeks to exercise his right to legal representation until they have consulted with the lawyer in person.

Consultation in private: In general, the police should allow a detainee to consult with a lawyer in private. [515] However, the right to privacy may be waived or departed from where there is good reason. [516] Good reason may exist where there is "a realistic prospect of criminal conduct if the suspect is left unsupervised." [517]

*May the enforcing authorities interrogate a suspect who makes incriminating statements while waiting for counsel to arrive?*

When a suspect seeks to exercise his or her right to legal representation, an enforcement officer is under a duty to refrain from taking any positive or deliberate step to elicit evidence from the suspect until he or she has had a reasonable opportunity to consult with counsel. [518] Any evidence obtained by law enforcement officers as a result of failing to observe the right of the accused not to answer questions may be ruled inadmissible by the courts on the grounds that the evidence was obtained unfairly. [519]

However, it would appear that the courts will make enquiries as to whether the law enforcement officers "elicited" the information before ruling whether the evidence is inadmissible.

The Court of Appeal has addressed the issue of whether enforcement officers could use evidence gained where the accused voluntarily provides information even though he or she is waiting for his or her lawyer to arrive (see for example *R v Taylor* [520]).
However, the courts have not taken a consistent approach to determining whether a state official elicited the information through unfair practices. [521] It would seem that enforcement officers need to avoid steps that could objectively be regarded as putting pressure on the accused to make statements that may incriminate them.

**Can an arrested or detained person waive his or her right to consult counsel?**

An arrested or detained person is at liberty to waive his or her right to consult with and instruct a lawyer. The New Zealand courts have adopted a similar approach to the Canadian Supreme Court in holding that the failure to request the right to consult counsel and instruct a lawyer is not of itself a waiver. To amount to a waiver, the person must exercise a conscious choice that is both informed and voluntary. A proper understanding of the right is a pre-requisite for a valid waiver. [522]

The Canadian Supreme Court has taken the view that valid waivers of the equivalent provisions of the Canadian Charter will be rare. In their view, the validity of a waiver is linked to the person’s awareness of the rights which the provision was enacted to protect. A person cannot be said to have validly waived his or her right to receive information unless the person was fully appraised of the information he or she was entitled to receive.

According to Lamer J in *R v Bartle*: [523]

The fact a detainee merely indicates that he knows his rights will not, by itself, provide a reasonable basis for believing that the detainee in fact understands their full extent or the means by which they can be implemented. [524]

**Key cases**

Section 23(1)(c) Determining the validity of the arrest or detention

Section 23(1)(c) of the Bill of Rights Act is as follows:

**Habeas corpus**
Everyone who is arrested or who is detained under any enactment shall have the right to have the validity of the arrest and detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

**Policy triggers: do I need to consider section 23(1)(c)?**

- Is your agency or department working on a policy or developing a practice that enables enforcement officers to carry out powers of arrest or detention?
- Does the power of arrest or detention take place in remote locations?

If the answer to either of the above is "yes", you may need to consider whether your policy or practice is consistent with the right set out in section 23(1)(c) of the Bill of Rights Act.

**What every policy analyst needs to know about section 23(1)(c)**

- The purpose of section 23(1)(c) is to enable a detainee to test the validity of the arrest or detention, so the detainee may be released if the arrest or detention is found to be unlawful.
- Section 9(3) of that Act requires that the date for hearing the application for the writ be no later than three days after the date on which the application is filed.

**Measures to achieve compliance**

If you are working on a policy or is developing a practice that permits enforcement officials to arrest or detain an individual pursuant to an enactment (or has such a policy or practice currently in place) you need to be aware that:
i. a detainee has a right to file an application for a writ of habeas corpus before the High Court to test the validity of the arrest and detention; and

ii. the application must be treated as a matter of priority and urgency.

Enforcement officials should be made aware of the elements that make up section 23(1)(c) of the Bill of Rights Act. More importantly, your department should establish the procedures necessary to allow it to respond, in a timely manner, to any application for a writ of habeas corpus filed by an individual who is arrested or detained by an employee of your department.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion on section 23(1)(c) below.

**Further discussion on the meaning of section 23(1)(c)**

**What is the purpose of section 23(1)(c)?**

One of the most fundamental principles of human rights is "the protection of individual liberty, especially from the undue exercise of state power." [525] As a means of securing the rights of citizens not to be arbitrarily-including unlawfully - detained, the "great writ" of habeas corpus ad subjiciendum has been long accepted as a constitutional protection of basic importance. [526] This principle, which is recognised internationally by way of Article 9(4) of the ICCPR, is reflected in section 23(1)(c) of the Bill of Rights Act, and confers upon an arrested or detained person the right to test the validity of the arrest or detention by way of habeas corpus. If the arrest or detention is found to be unlawful, the arrested or detained person must be released.

The Court of Appeal observed in *Bennett v Superintendent of Rimutaka Prison:* [527]

In the hands of creative lawyers and Judges it has proved to be a flexible remedy against oppression and unlawful conduct. In recent years its use in this country may largely have been confined to immigration and refugee matters because alternative convenient and specific remedies have been developed to meet particular problems in the general law. Bail laws and legislation relating to child custody disputes are examples. But habeas corpus is not to be shackled by precedent. It will adapt and enlarge as new circumstances require.
What is the procedure for filing a writ of habeas corpus and how soon does an application for a writ of habeas corpus have to be heard by the court?

The right of a detainee to have his or her application for a writ of habeas corpus reviewed by a court without delay is regarded as critical to giving effect to the right. The procedure for hearing writs of habeas corpus in New Zealand is set out in section 9 of the Habeas Corpus Act 2001. Section 9(3) of that Act requires that the date for hearing the application for the writ be no later than three days after the date on which the application is filed.

The Human Rights Committee has found a breach of article 9(4) of the ICCPR in a case where an individual was detained incommunicado for three days during which it was impossible for him to gain access to a court to challenge his detention. [528] This case can be contrasted with that of another where the Committee found no breach of article 9 (4) when the applicant was held for fifty hours without having the opportunity to challenge his detention. [529]

The Human Rights Committee has also been critical where a court, having upheld the application for a writ of habeas corpus, has failed to render its decision "without delay". In Torres v Finland, [530] the Committee held "that, as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible." However, the question of whether a decision was reached without delay depends on the type of deprivation of liberty and on the circumstances of a given case. A period of almost three months between the hearing and the date when the decision was reached is "in principle too extended."

It should be noted that the expression "without delay" has been interpreted to mean that the lawfulness of administrative detention must be directly reviewed by a court and not only after a review by a higher administrative authority. [531] The European Court of Human Rights has said that this does not have to be a "court of law of the classic kind integrated within the standard judicial machinery of the country". [532] But it must be a body that has judicial character and that provides the "guarantees of procedure appropriate to the kind of deprivation of liberty in question". [533]

Key cases

Section 23(2) The right to be charged promptly or released

Section 23(2) of the Bill of Rights Act is as follows:

To be charged promptly
Everyone who is arrested for an offence has the right to be charged promptly or released.

Policy triggers: do I need to consider section 23(2)?

You may need to consider if the policy or practice that you are developing is consistent with section 23(2) if it:

- provides enforcement officers with the power of arrest;
- establishes procedures for dealing with persons who are arrested.

What every policy analyst needs to know about section 23(2)

- The right does not require that the person be charged immediately - but requires that an enforcement officer act with a sense of urgency.
- Section 23(2) does not require a person to be charged immediately on arrest or detention. However, any delay in charging a person merely because it is not administratively convenient to do so, or to allow the Police an opportunity to strengthen their case against the person detailed (for example, by prolonged questioning or by allowing the police time to gather additional evidence to support a charge), could run afoul of the right in section 23(2).

Measures to achieve compliance

The most effective way of complying with section 23(2) is to establish internal procedures to allow an arrested person to be brought promptly before a suitably authorised official for charging. Enforcement officers should be encouraged to decide, as soon as possible, the particular charges that should be laid against the arrested person. If there is insufficient evidence to support the proposed charges, enforcement officers must release the arrested person, but may re-arrest the person if such evidence subsequently becomes available.
The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion on section 23(2) below.

Related rights and freedoms

Section 23(2) relates to the initial stage of the criminal justice process where decisions are being made whether to continue to detain a person. Section 23(3) applies flows on logically from section 23(2) as it enables the person who is arrested to test the validity of the decision to continue to detain him or her and any subsequent decision on whether to charge the person.

Further discussion on the meaning of section 23(2)

The right to be charged promptly or released

Under this subsection, an arrested person has the right to be charged promptly or released. The word "promptly" does not mean that no time is allowed to pass. Time will be required to make decisions (particularly whether there is sufficient evidence to charge the person and, if so, with what) and, as a result, some delay will be unavoidable. This was confirmed by Richardson J in R v Te Kira: [534]

Section 23(2) recognises that some time may have to elapse before a decision to charge can be made and, if so, as to what particular charge should be brought. In its natural and ordinary meaning 'prompt' carries a sense of urgency, of 'acting with alacrity' as the Oxford English Dictionary puts it.

The courts have also noted that there are other reasons where the delay between arrest and charge may be justifiable, such as where the enforcement authorities are urgently called elsewhere, where they wish to briefly question the person, or where they have afforded him or her the right to consult with their lawyer. [535] At the same, time section 23(2) is likely to be infringed where the delay has been brought about in order to achieve an unfair advantage, for example where the delay is to allow the police the opportunity to strengthen their case through prolonged questioning or evidence gathering. [536] It should be noted that a delay in charging a person may lead to an infringement of section 23(3) of the Bill of Rights Act and the right to be brought before a court as soon as possible.
Key cases

R v Te Kira [1993] 3 NZLR 257; (1993) 9 CRNZ 649 (CA); R v Rogers (1993) 1 HRNZ 282

Section 23(3): The right to be brought before a court

Section 23(3) of the Bill of Rights Act is as follows:

To be brought promptly before a court
Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal

Policy Triggers: do I need to consider section 23(3)?

You may need to consider whether the policy or practice that you are developing is consistent with section 23(3) if it:

- permits enforcement authorities to arrest and detain a person for the purposes of questioning in connection with the commission of offences;
- is silent on the time-frame for bringing an arrested person before a court or competent tribunal;
- allows enforcement authorities to detain an arrested person in custody on a charge while continuing to investigate the case against that person;
- affects the ability of courts to sit or the numbers of judges that may be available to attend hearings (over holiday periods, for example).

What every policy analyst needs to know about section 23(3)

- The right to be brought before a court is guaranteed to "everyone who is arrested for an offence" not just those who are "charged with an offence".
- The arrested person must be brought before a judge or a competent tribunal within a reasonable and realistic time period.
- The time period under consideration runs from arrest until presentation before the court.
Delays in bringing a person before a judge caused by delay on a holding charge or for reasons arising out of Police tactics are likely to breach the section.

The arrested person needs to be brought before a judicial body that is independent, objective and impartial in determining the issues.

Methods to increase the compliance of your policy with section 23(3)

In order to comply with section 23(3), your department should develop internal procedures that ensure that an arrested person is brought before a judge or a competent tribunal as soon as possible. These procedures may need to include consideration of the availability and accessibility of court venues in other centres or the availability of special sittings.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion on section 23(3) below.

Related rights and freedoms

Section 23(3) of the Bill of Rights Act flows on logically from section 23(2).

Further discussion on the meaning of section 23(3)

What is the purpose of the right that is guaranteed under section 23(3)?

Section 23(3) of the Bill of Rights Act requires that everyone who is arrested for an offence and is not released must be brought before a court or some other tribunal authorised by law to exercise judicial power as soon as possible. As noted in one case, the time period under consideration runs from arrest until presentation before the Court. [537] The intention behind section 23(3) is to prevent persons arrested on suspicion of having committed a criminal offence from being arbitrarily or unjustifiably deprived of their liberty.

There are three key aspects to section 23(3) of the Bill of Rights Act:

i. the judicial control must be "as soon as possible";
ii. judicial scrutiny must be automatic - it cannot depend on a previous application by the arrested person;
iii. the arrested person must be heard by the judicial officer in person.
**How soon is "as soon as possible"?**

The New Zealand courts have acknowledged that the phrase "as soon as possible" does not mean immediately. As stated by Cooke J in *R v Te Kira*:

The requirements "promptly" [as set out in section 23(2) of the Bill of Rights Act] and "as soon as possible" must be interpreted realistically. For example, a reasonable time may be needed for a decision whether or not to charge a person arrested (as by reference of the case to a senior officer) and, if the person is to be charged, for the process of laying the charge and incidental matters. Further, if having been given the information required by s 23(1)(a) and (b) and s 23(4) the person wishes to make a statement or to wait for the arrival of a lawyer, a reasonable time may be allowed for either of those stages.

The inclusion of the phrase "as soon as possible" is one of the main differences between section 23(3) of the Bill of Rights Act and Article 9(3) of the ICCPR - upon which it is based - as the latter provision uses the term "promptly" to describe the time-frame in which the police must bring arrested persons before a judicial authority. However, the Human Rights Committee has been vague on the exact meaning of this phrase, commenting only that in no event may this period last more than a "few days". [538]

Although the enforcement authorities are expected to take whatever steps are necessary to ensure that an arrested person is accorded the rights contemplated by this section, the courts have recognised that they can only do so "within the limits of proper administrative and financial constraints." [539] Enforcement officials are therefore required to take steps in fulfilment of these obligations where such steps are available. For instance, in *R v Shriek* [540] the accused was arrested in Greymouth on cheque charges on a day when the Court was not sitting. The Court of Appeal held that the circumstances of the case did not necessitate the convening of a special sitting of the court in compliance with section 23(3) given the nature of the offending. However, there may be circumstances where compliance with section 23(3) will point towards a duty on police to transport the person to another centre or to take advantage of the opportunity for a special sitting. [541]

The enforcement authorities may not deliberately keep an arrested person in custody under the pretext of a lesser charge while a more serious charge against that person is being further investigated, nor as a tactical delay while they are gathering further evidence to support a conviction. [542]
Does an arrested person have to be brought before an actual court?

The New Zealand courts have not addressed this point, but section 23(3) appears, like Article 9(3) of the ICCPR, to anticipate that there may be situations where an arrested person is brought before a judicial body other than a court. The Human Rights Committee has stated that such a body must be independent, objective, and impartial in relation to the issues dealt with. [543] A panel of Justices of the Peace appointed to decide whether there was sufficient evidence to hold an individual in custody would likely satisfy such criteria.

Key cases


Section 23(4) The right to refrain from making any statement

Section 23(4) of the Bill of Rights Act is as follows:

**Right to silence**
Everyone who is
(a) Arrested; or
(b) Detained under any enactment
for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

Policy triggers: do I need to consider section 23(4)?

You may need to consider whether the policy or practice that you are developing is consistent with section 23(4) if it:

- enables law enforcement officers to question detainees, either in connection with a statutory power of entry or more generally;
- establishes guidelines on what steps to take when a detainee has exercised the right to silence;
- makes it an offence for a detainee to refuse to respond to questions put to him or her by the enforcement authorities;
enables enforcement officers to use techniques or devices to elicit information from persons who have been arrested or detained on a charge but released on bail, for the purposes of gaining further evidence.

**What every policy analyst needs to know about section 23(4)**

- The right protected by section 23(4) comprises two distinct elements:
  - the right to refrain from making a statement; and
  - the right to be informed of that right.
- Section 23(4) protects the right of persons who are arrested or detained not to make incriminating or prejudicial statements.
- Although the rights affirmed by this provision begin with the taking into custody, the right extends the period leading to trial and the determination of the charge.
- The right provides a general immunity from being compelled on pain of punishment to answer questions posed by others.
- The right presents a general immunity from being compelled to answer questions in situations where those answers may incriminate.
- Once a detainee has made it clear that he or she does not wish to answer questions, no further attempts may be made to elicit information from the detainee.
- The exclusion of evidence obtained in breach of section 23(4) is not limited to statements made by the detainee, but extends to include any information disclosed by the detainee following what the court would regard as unfair tactics by enforcement officers.

**Measures to achieve compliance**

Adherence to the right to silence is likely to be monitored closely by the courts. If you are considering developing a power to question detainees you will need to ask:

- whether the power is essential to the operations of the agency;
- the purpose of the power;
- what steps could be taken to achieve that purpose without requiring the detainee to answer questions;
- whether there are adequate procedural protections surrounding the questioning;
- whether you will need to use the information in subsequent legal proceedings against the detainee, or whether the use will be restricted;
- what steps that you wish to take to ensure compliance with the power.

You may also need to establish guidelines to ensure that the detainee has the opportunity to obtain advice and legal representation during questioning. The detainee being questioned should also be allowed to act on that advice.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion on section 23(4) in the Bill of Rights Act Guidelines.

**Related rights and freedoms**

When developing your proposals that might give rise to issues under section 23(4) you should also whether the proposals are consistent with the remaining provisions in section 23, particularly section 23(1)(b). You should also consider:

- the right not to be compelled to provide information (section 14);
- the right to be secure against unreasonable search and seizure (section 21);
- the right to a fair trial (section 25(a));
- the right to be presumed innocent (section 25(c));
- the right not to be compelled to be a witness or confess guilt (section 25(d));
- the right to the observance of principles of natural justice (section 27(1)).

In addition to the Bill of Rights Act, each of these aspects of the right to silence is protected, to varying degrees, by other statutory provisions or by common law rules. For instance, the right to refrain from speaking is protected indirectly through the law's insistence on the voluntariness of confessions and through the exercise of the discretion to reject confessions on the grounds of unfairness. Other expressions of the right to silence include the caution that is given under the Judges Rules, and in the judicial warnings that adverse inferences are not to be drawn from exercising the right to silence.
Further discussion on the meaning of section 23(4)

What is the right to silence?

Section 23(4) of the Bill of Rights Act protects the right of persons who are arrested or detained under any enactment not to make a statement. Section 23(4) protects the right of silence before trial whereas section 25(d) protects the right at the trial itself. However, as alluded to by the majority in *R v Barlow*, [544] there is a reasonable degree of overlap between the two rights. Both these sections put into legislative form the right to silence that existed before the Bill of Rights Act was passed. The "right to silence" has been described as an "accumulation of a number of Related rights and freedoms or liberties of [suspects] or accused persons." [545] In *Smith v Director of Serious Fraud Office*, [546] Lord Mustill listed the various aspects that are protected by the right as follows:

- a general immunity from being compelled on pain of punishment to answer questions posed by others;
- a general immunity from being compelled to answer questions whose answers may incriminate;
- a specific immunity for those under police questioning on suspicion of criminal activity from being compelled to answer questions;
- a specific immunity for those on trial from being compelled to give evidence;
- a specific immunity for those charged with an offence from having questions put to them by police or others in authority; and
- a specific immunity for those on trial from having adverse comment made on their failure to answer questions put to them prior to trial or at trial.

What are the components of the right to silence?

The right protected by section 23(4) comprises two distinct elements:

- the right to refrain from making a statement; and
- the right to be informed of that right.

The right to refrain from making a statement extends to the production of documents and verbal statements.
The right to silence is often considered by the New Zealand courts in conjunction with the rights accorded to arrested or detained persons under section 23(1)(b) of the Bill of Rights Act. In cases where suspects and accused persons are advised of their right to consult a lawyer and they indicate a desire to do so, the enforcement authorities are obliged to cease any attempt to gain information from them under their lawyers arrive. In cases where suspects and accused persons were not advised of their right to consult a lawyer, the courts have, in general, excluded any confessions subsequently obtained.

**When does the right to silence apply?**

The right to refrain from making a statement commences when a person has been arrested or detained under any enactment. [547]

The right affirmed by section 23(4) protects accused persons throughout the period they are placed on remand and also the time they are released from police custody.

The majority in the Court of Appeal in *Barlow* held that although the rights affirmed by this provision begin with the taking into custody, they did not cease to operate when the person was released on bail. It could continue its effect down to trial and the determination of the charge so long as the police attempt to obtain information from the accused by whatever means.

**Whose conduct will infringe the right?**

The approach in *Barlow* is consistent with that taken in Canada. In *Broyles v R* [548] the Supreme Court of Canada held that the police may not elicit confessions from an accused through the use of a undercover officer or an informer. However, Iacobucci J did note that:

In every case where the right to silence is raised, the threshold question will be: was the person who allegedly subverted the right to silence an agent of the state? In answering this question one should remember that the purpose of the right to silence is to limit the use of the coercive power of the state to force an individual to incriminate himself or herself; it is not to prevent individuals from incriminating themselves per se. Accordingly, if the person to whom the impugned remarks is made is not an agent of the state, there will be no violation of the right to silence. [549]

Iacobucci J added that in order to determine whether or not the informer is a state agent:
...it is appropriate to focus on the effect of the relationship between the informer and the authorities on the particular exchange or contact with the accused...only if the relationship between the informer and the state is such that the exchange between the informer and the accused is materially different from what it would have been had there been no such relationship should the informer be considered a state agent for the purposes of the exchange.

It would therefore appear that the right to silence may not be infringed in situations where a person suspected of committing an offence divulges incriminating information to a person with whom he or she has a pre-existing relationship that included the imparting of personal confidences and where the recipient of this information makes it known to the police.

**What does the right to silence actually mean?**

Once a suspect or accused person has expressed a desire to exercise his or her right to silence as guaranteed in section 23(4), the police are obliged to cease questioning him or her either directly or by deception or trick. [550] To give a real meaning to the right, the courts have been quick to exclude statements obtained by persistent questioning after the suspect or accused has made it clear that he or she does not want to answer questions. [551]

The exclusion of evidence obtained in breach of section 23(4) is not limited to statements made by the suspect or accused, but extends to include any information disclosed by the accused following what the court would regard as unfair tactics by enforcement officers. [552] For example, the police cannot continue to question the accused once the lawyer for the accused has left after informing the police that the accused does not wish to answer questions. [553] Similarly, enforcement officers cannot use a third party to actively elicit information from the accused in circumstances where the use of the third party undermines the right to silence. [554]

**Key cases**

*R v Barlow* (1995) 14 CRNZ 9 (CA); *R v Taliau* 30/6/99, CA99/99; *R v Taumata (Ruling No 4)* (1997) 15 CRNZ 451; 4 HRNZ 297; *Broyles v R* (1991) 68 CCC (3d) 308 (SCC); *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456;
Section 23(5): The right to be treated with humanity and respect

Section 23(5) of the Bill of Rights Act is as follows:

**Humanity and dignity**
Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

**Policy Triggers: do I need to consider section 23(5)?**

Section 23(5) is essentially concerned with ensuring that detainees are kept in facilities that meet minimum standards. Are you currently working on a policy or developing a practice that:

- enables the state to detain individuals?
- permits the enforcement authorities to hold persons for any length of time?
- authorises the enforcement authorities to restrain detainees?
- allows the enforcement authorities to hold individuals in amenities that have limited facilities or services for the care and safety of detainees?
- enables law enforcement officers to undertake personal searches of persons detained in custody?

If so, you may need to consider whether your policy or practice is consistent with the right set out in section 23(5) of the Bill of Rights Act.

**What every policy analyst needs to know about section 23(5)**

- Section 23(5) is essentially concerned with ensuring that, where persons are detained by the state, the conditions under which they are detained conform with commonly accepted standards.
- The term "deprivation of liberty" refers to broader forms of detention than just those used in law enforcement.
- The application of the right extends to all forms of detention and includes all forms of detention after conviction.
- Any person deprived of liberty under the laws and authority of the New Zealand government has the benefit of this right.
In considering whether a detainee has been treated with humanity, consideration will be given to the degree of suffering, both physical and mental, to which the detainee has been subjected.

**Methods to increase the compliance of your policy with section 23(5)**

When developing policies or procedures for detaining persons, consider whether there are any appropriate international standards that may be of assistance when developing guidelines. For example, the Standard Minimum Rules for the Treatment of Prisoners establishes the minimum conditions for the treatment of prisoners.

You will also need to consider what training is required to enable staff to comply with the guidelines.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion on section 23(5) below.

**Related rights and freedoms**

When considering whether your policy or practice complies with section 23(5), you should also stop to consider whether it is consistent with the right not to be subject to cruel, degrading, or disproportionately severe treatment or punishment (section 9 of the Bill of Rights Act).

**Further discussion on the meaning of section 23(5)**

*Whenever a person is deprived of liberty*

The term "deprivation of liberty" is not confined to the initial stages of the criminal process. As noted by Richardson J in *R v Barlow* [555]

Section 23(5) [...] applies to any deprivation of liberty. The White Paper, para 10.102, notes that the provision clearly has relevance to standards of police detention, prison administration and so forth and that there is an overlap between it and the prohibition of torture and cruel, degrading or disproportionately severe treatment or punishment in (now) s 9. In the draft Bill accompanying the White Paper the present s 23(5) was included along with the present s 22, the right not to be arbitrarily arrested or detained, and parts of the present s 23 under the section heading (now given to s 22) of "Liberty of the person". It could equally be included as subs (2) of s 8. Its presence in s 23 does not assist in determining the reach of s 23(4).
Any person deprived of liberty under the laws and authority of the New Zealand government, whether in a police cell, prison, correctional institution, hospital - particularly a psychiatric hospital - an asylum processing facility, or elsewhere have the benefit of this right.

**Treated with humanity and with respect for the inherent dignity of the person**

As stated previously, this provision complements the prohibition on torture and cruel, degrading, or disproportionately severe treatment or punishment, as set out in section 9 of the Bill of Rights Act. Persons deprived of their liberty may not be subject to such treatment or punishment, or to any constraint other than that resulting from the deprivation of liberty. Respect for the dignity of such persons must be guaranteed under the same conditions as that of free persons. As noted by the Human Rights Committee, persons deprived of their liberty enjoy all the recognised rights, subject to restrictions that are unavoidable in a closed environment. [556]

A person who is detained is treated with humanity in circumstances where the form of detention does not give rise to feelings of anguish and inferiority capable of humiliating and debasing a detainee. [557] The conditions and circumstances under which a person is detained, and purpose of the detention, are significant in determining whether a person has been treated with humanity. It is important in this regard to note that the totality of circumstances under which a person is detained may help determine whether a person is treated with humanity. [558]

It is important to note that the Standard Minimum Rules for the Treatment of Prisoners, which were first adopted by the United Nations in 1955, set out in detail the minimum conditions which are suitable in the treatment of prisoners, including those under arrest or awaiting trial. Among the requirements in these Rules are minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. The Human Rights Committee has observed that these are minimum requirements which should always be observed, even if budgetary considerations may make compliance with these obligations difficult. [559]
What type of conduct would fall within section 23(5)?

Although a person's rights and liberties are subject to a number of limitations simply by virtue of being deprived of their liberty, section 23(5) makes it clear that there is a residue of basic rights which they may not be denied; and if they are denied them, then they are entitled to legal redress.

Unfortunately, the New Zealand courts have had little opportunity to examine the type of conduct that would be considered contrary to this section. But in those cases where they have, the courts have looked at the degree of suffering, both physical and mental, that the detained person has been subjected to. In Ministry of Transport v Entwisle, [560] the accused was acquitted of a charge of refusing to provide a blood sample for the purpose of a drink-driving investigation on the ground that the rough treatment meted out to him by the police - which had left him "shocked and distressed" - breached section 23(5). In Harris v A-G [561] the accused was awarded exemplary damages and damages for a breach of section 23(5) arising out of a beating which had been inflicted upon him by the police.

These cases reflect the decisions of the Human Rights Committee, which has held that ICCPR Article 10(1) is violated when a prisoner is held incommunicado for any length of time; [562] is beaten by enforcement officers; [563] is shackled and blind-folded; [564] is refused medical attention; [565] is subjected to ridicule; [566] is denied reading facilities and is not allowed to listen to the radio; [567] or is confined to his cell for an inordinately long period of time. [568] To prepare prison food in unsanitary conditions [569] and to place restrictions on a prisoner's correspondence with his family [570] also infringe ICCPR Article 10(1).

Key cases

Footnotes:

482. For the sake of simplicity, future references to "detention" should be read to mean "arrest or detention".

483. The phrase "under any enactment" was not included within the White Paper and the first version of the Bill of Rights Bill, which was introduced into the House of Representatives in 1989. The phrase was inserted by the Select Committee following submissions it received expressing concern about the risks that a failure to qualify the word "detention" may lead to excessive litigation.

484. You may still need to consider whether the detention is arbitrary for the purposes of section 22 of the Bill of Rights Act.


488. R v Jones 16/7/1993 CA 312/92.


490. R v Jones 16/7/1993 CA 312/92.

491. R v Gibbons (1997) 14 CRNZ 552, 559. See also Nicholson v Police (1993) 11 CRNZ 126. Section 316(1) of the Crimes Act 1961 provides that an arresting officer may not need to advise the person of the reasons for the arrest if the reasons are obvious in the circumstances.


493. Rv Robinson CA 16/97, 12 May 1997. See also R v Tawhiti [1993] 3 NZLR 594 and R v Small (1998) 52 CRR (2d) 315 (Alta CA) in which the accused was not given sufficient detail as to why he was detained. His response that he did not want a lawyer was, therefore, an invalid waiver of his right to counsel.


496. Miranda v Arizona (1966) 384 U.S 436. For the latest statement by the Supreme Court on Miranda warnings, see Chavez v Martinez
538 U.S. __(2003). In this case the Court held that police questioning in the absence of Miranda warnings, even questioning that is overbearing to the point of coercion, does not violate the constitutional protection against compelled self-incrimination, as long as no incriminating statements are introduced at the suspect's trial.

500. See, for instance, Toki v Police, 21/7/94, Doogue J, HC Nelson AP17/94.
504. As Richardson J observed in MOT v Noort; Police v Curran "if the detainee wishes to avail himself or herself of the right to a lawyer that must be done without delay on his or her part."
505. Section 72(1)(b) of the Transport Act 1998 provides that a suspected drunk driver has ten minutes in which to decide whether he or she wishes to undergo a blood test. For a discussion on when the 10 minutes commences see Rae v Police [2000] 3 NZLR 452.
508. See too R v Kai Ji CA 333/03 8/09/03 where the Court of Appeal discusses the issue in the context of a person with English as a second language.
516. See Police v Toki HC Auckland 21/7/94 AP 17/94.
519. R v Read CA 438/00, 14/2/01.

Despite the statements by the Court upholding the principles underpinning the right, the Court held in this case that statements made by the accused were not elicited by the police.

521. For an overview of the approaches taken by the Courts see Mahoney "The Right to Counsel" in The New Zealand Bill of Rights Act p539 footnote 82.
522. Ngata v MOT 1 HRNZ, Sullivan v Police 1 HRNZ 434.
528. Hammel v Madagascar (155/83).
529. Portorreal v Dominican Republic (188/84).
530. Torres v Finland (291/88).
531. Torres v Finland (291/88) para 7.2.
533. De Wilde, Ooms and Versyp v Belgium A 12 para 76 (1971).
538. See General Comment 8 of the Human Rights Committee.
539. R v Greenaway [1995] 1 NZLR 204 (CA) [emphasis added].
545.  *Adams on Criminal Law*, Ch 10.11.02.
546.  *Smith v Director of Serious Fraud Office* [1992] 3 All ER 456.
547.  For the meanings of these terms, see the discussion on Section 22 of the Bill of Rights Act.
550.  See *R v Accused M A T* (T000515) 7/6/00, Chambers J, HC Auckland T000515.
552.  See *R v Taumata (Ruling No 4)* (1997) 15 CRNZ 451; 4 HRNZ 297 and *R v Moresi* (No 2) 14 CRNZ 322.
554.  See *R v Barlow* (1995) 14 CRNZ 9 (CA). The majority of the Court in Barlow held that the third party did not elicit information from the accused as Barlow willingly divulged the incriminating information.
562.  See, for example, *Caldas v Uruguay*, Communication No 43/1979, HRC 1983 Report, Annex XVIII.
Introduction to section 24: Rights of persons charged and minimum standards of criminal procedure

Section 24 of the Bill of Rights Act provides:

Rights of persons charged
Everyone who is charged with an offence -

a. Shall be informed promptly and in detail of the nature and cause of the charge; and
b. Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and
c. Shall have the right to consult and instruct a lawyer; and
d. Shall have the right to adequate time and facilities to prepare a defence; and
e. Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and
f. Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and
g. Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

Section 25 of the Bill of Rights Act is as follows:

Minimum standards of criminal procedure
Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

a. The right to a fair and public hearing by an independent and impartial court:
b. The right to be tried without undue delay:
c. The right to be presumed innocent until proved guilty according to law:
d. The right not to be compelled to be a witness or to confess guilt:
e. The right to be present at the trial and to present a defence:
f. The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:
g. The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:
h. The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
i. The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

Policy Triggers: do I need to consider sections 24 and 25?

Are you developing policy that creates or amends:

- criminal offences?
- criminal penalties?
- criminal procedures?

Are you developing policy of a regulatory nature that creates or amends offence or penalty provisions? If so:

- is the offence by its very nature of a criminal character?
- does the offence carry a penalty of imprisonment or a fine that is intended to indicate that the conduct was socially harmful?

If your response to any of these questions is "yes", the proposal is likely to raise issues of consistency with the rights in sections 24 and 25.

If, on the other hand, you answer "no" to the above questions, you should still consider whether your policy is consistent with the right to the observance of the principles of natural justice (section 27(1) of the Bill of Rights Act). Even though your policy may not include "offences" for the purposes of sections
24 and 25, the principles of natural justice require that a person receive a fair hearing where he or she may be subject to an adverse decision.

**What every policy analyst needs to know about sections 24 and 25:**

- If you are developing policy that creates or amends criminal offences or procedures, you need to consider whether the policy complies with the rights in sections 24 and 25.
- You should also consider whether sections 24 and 25 are applicable when developing policies of a regulatory nature that contain offence provisions. You should therefore ask whether:
  - the offence by its very nature it is of a criminal character; or
  - the offence carries a penalty of imprisonment or a fine that is intended to indicate that the conduct was socially harmful.
- For the purposes of the Bill of Rights Act, a person is charged with an offence "when the prosecuting authority formally advises an arrested person that he is to be prosecuted and gives him particulars of the charges he will face".
- The rights in section 24 are, therefore, applicable at some point between the time of arrest and the commencement of court proceedings.
- Generally, the courts in New Zealand would interpret the word "offence" as an act punishable by criminal law, because these provisions of the Bill of Rights Act set out rights that are primarily concerned with criminal procedure.
- Any offence provision, no matter how minor, may fall within the scope of sections 24 and 25 if its purpose is to punish and deter, or is of a public nature intended to promote public order and welfare.
- Although criminal offending would appear to be the principal context within which the rights in sections 24 and 25 would be applied, other offences (such as military offences) might come within the meaning of "offence" for the purposes of the Bill of Rights Act. This is more likely to be the case if the resulting penalty (whether a fine or imprisonment) is punitive and/or intended to act as a deterrent to prevent future offending.
Methods to increase the compliance of your policy with sections 24 and 25

In developing any policy that may raise issues of consistency with sections 24 and 25, consider:

- the nature of the conduct you are seeking to regulate or the harm you are seeking to address via offences or penalties;
- whether the interests of persons charged with the offence are adequately recognised and taken into account;
- the impact that the policy or practice may have on the public's perception of the way in which justice is administered;
- if you are considering developing a new offence, you should refer to the Legislation Advisory Committee Guidelines (Guidelines on Process and Content of Legislation). This publication contains a useful chapter on criminal offences, which sets out other relevant considerations when developing offences. [571]

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion on section 24 and section 25 below.

Further discussion on the meaning of section 24

When is somebody "charged with an offence"?

Section 24 of the Bill of Rights Act is to apply to any person who is "charged with an offence". The question as to whether any person has been charged with an offence has come in for considerable discussion by the courts as prior to the Bill of Rights Act it had no fixed meaning. [572] The Court of Appeal has held that, for the purposes of the Bill of Rights Act, a person is charged with an offence when the first official accusation is made. [573]

It should be noted at this point that sections 23, 24, and 25 deal with different stages of the prosecutorial process and the rights set out in those sections apply at those distinct stages of the process. The rights in section 24 are applicable at some juncture between the time of arrest and the
commencement of court proceedings. [574] It has been held that the presence of this intermediate set of rights means that the phrase "charged with an offence" must be given a broader interpretation than the Canadian approach [575] which provides that a person is charged when a formal court process is initiated. [576] The United Nations Human Rights Committee has said that the rights of a person charged with an offence commence once a competent authority makes a decision to proceed against a person or publicly announces their intention to do so. [577]

For the purposes of the Bill of Rights Act then, a person is charged with an offence "when the prosecuting authority formally advises an arrested person that he is to be prosecuted and gives him particulars of the charges he will face." [578] The person charged with the offence should be given sufficient information to enable them to invoke his or her rights under section 24.

**Offences**

The word "offence" in sections 24 and 25 is not qualified by reference to criminal activities. An offence is generally conceived of as being an act punishable under criminal law. Section 2 of the Crimes Act 1961 defines an offence to be "any act or omission for which any one can be punished under this Act or under any other enactment, whether on conviction on indictment or on summary conviction." It would appear that the courts in New Zealand, for the purposes of applying sections 24 and 25, would generally interpret the word consistently with this definition as these rights are primarily concerned with criminal procedure.

The Court of Appeal in *Daniels v Thompson* [579] adopted the approach that the Canadian Supreme Court has taken in respect of the prohibitions against double jeopardy; that is the protection against double jeopardy only applies in respect of a further criminal prosecution for a criminal offence for which the accused has already been convicted or acquitted. [580]

However, there are indications that the courts in New Zealand may not restrict the application of sections 24 and 25 of the Bill of Rights Act to criminal offences. There have been signals by the Court of Appeal which suggest that offences other than criminal offences might fall within the definition. It is likely that military offences will fall within the scope of the definition. [581] If a broad approach to interpreting the scope of sections 24 and 25 was taken, the approach would be consistent with trends in Canada and Europe.
The approach in Canada and Europe

The Canadian Supreme Court has stated that while section 11 of the Canadian Charter of Rights and Freedoms is principally concerned with criminal law process, the ambit of section 11 is slightly broader than just criminal offences. The Court considered that a matter could fall within the scope of section 11 either: [582]

...because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence.

The Court in *R v Wigglesworth* went on to distinguish between those matters which are "of a public nature, intended to promote public order and welfare within a public sphere of activity" and those that are "primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity." [583] It is these latter matters that do not fall within the scope of section 11 of the Canadian Charter unless such matters include penalties that are punitive. [584] A penalty may be punitive if it is of a kind intended to address a social harm resulting from the conduct. [585] Such a penalty could be in the form of a fine or a term of imprisonment. The Court in *Wigglesworth* [586] doubted whether a proceeding could not be criminal by its very nature and yet attract a punitive penalty, but because it was willing to accept that such a situation could occur, said:

If an individual is to be subject to penal consequences such as imprisonment - the most severe deprivation of liberty known to our law - then he or she, in my opinion, should be entitled to the highest procedural protection known to our law. [587]

The European Court of Human Rights has developed three criteria for the determination of whether an offence is criminal for the purposes of the Convention. [588] These criteria may prove useful if you are developing a policy that creates a new specific offence that may be considered to be an "offence" for the purposes of sections 24 and 25. Only the last two criteria are said to have any significance [589] and to have any relevance from a Bill of Rights standpoint. The relevant criteria and associated questions with each are:

i. The nature of the offence -

   - What procedures are put in place for dealing with the offence?
• Is the conduct prohibited because of the context in which it occurred or because of the public interest in prohibiting such conduct generally? (For example, an assault of a prison officer by a prisoner may cease to remain a disciplinary offence).

• Is the offence only applicable to persons under a specific regime or does it have a potentially broader application?

ii. The severity of the penalty -

• What is the nature and purpose of the penalty - is it purely punitive?
• Does the penalty have the effect of depriving a person of their liberty?
• Is a financial penalty intended to act as a deterrent to prevent future offending or is it in the form of a remedy to compensate injured parties?

An offence may be criminal for the purposes of the Convention even if it meets only one of these criteria, but the European Court may also consider the effect of both in any particular instance. [590]

Policy and legal advisers involved in developing policy that creates or amends offence provisions or procedures should test their proposals against these criteria to see what procedures need to be put in place to protect the rights of persons who might be subject to these proposals.

All offences or just some?

There is some suggestion that persons charged with minor traffic violations might not be able to avail themselves of the protections of the rights in sections 24 and 25 of the Bill of Rights Act on the basis that such offences do not "threaten their liberty". [591] It is unclear whether the New Zealand courts will follow this line given overseas caselaw where even a minor traffic infringement was sufficient to be considered a criminal charge for the purposes of the Convention because the purpose of the offence provision was to punish and deter. [592]

Key cases

Daniels v Thompson [1998] 3 NZLR 22 (CA); Drew v Attorney-General (No.2) (2001) 18 CRNZ 465 (CA); R v Gibbons (1997) 14 CRNZ 552; R v Kalanj [1989] 1 SCR 1594; R v Wigglesworth (1989) 2 SCR 541; Engel v
History of the section

*The White Paper*

Section 24 is a reformulation of different aspects of the right of a person charged with offences that were set out in articles 16 and 18 of the *White Paper*. Parts of articles 16 and 18 now appear in sections 23 and 25 of the Bill of Rights Act respectively.

*Section 24 origins in international treaties and overseas legislation*

Section 24 affirms in part New Zealand's obligations under Article 14(3) of the ICCPR.

The equivalent to section 24 of the Bill of Rights Act can be found in section 11 and section 14 of the Canadian Charter.

Aspects of section 24 can also be found in Article 6(3) of the European Convention on Human Rights. [593]

**Section 24(a): Right to be informed promptly and in detail of the nature and cause of the charge**

Section 24(a) of the Bill of Rights Act is as follows:

**Inform promptly**

Everyone who is charged with an offence shall be informed promptly and in detail of the nature and cause of the charge.

**Policy triggers: do I need to consider section 24(a)?**

Are you developing policy or practices that:

- amend the procedures set out in the Summary Proceedings Act or practice guidelines for altering a charge?
- establish practice guidelines or procedures for the laying of charges?
If you answer "yes" to either of these questions, you should consider whether your policy or practice infringes section 24(a).

**What every policy analyst needs to know about section 24(a)**

- The primary purpose of section 24(a) is to enable an accused person to make full answer and defence to any charge.
- A person who has been charged with an offence needs to be informed about the specific offences he or she is alleged to have committed and the alleged facts/events on which the charge is based.
- Section 24(a) does not mean the charges cannot be altered, as long as the accused is informed promptly of any changes and, if changes are made during proceedings, the accused is personally present.
- The relevant period of delay for the purposes of section 24(a) is the time between the formal notification of the decision to lay charges and revealing the specific nature of those charges.
- The failure to inform the accused person promptly needs to be considered in the context of the causes of the delay and the prejudice that has caused to the accused.

**Measures to achieve compliance**

- Establish quality assurance procedures to enable in-house legal advisers to confirm whether the appropriate charges have been laid.
- Review and/or monitor the procedures that are followed in the stages leading to the bringing of charges.
- Ensure that the legislation or operational policy specifies a clear duty to promptly inform the person charged of the particulars of the charge.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion below.

**Related rights and freedoms**

When developing policies or practices relating to laying or amending charges, in addition to those remaining rights in section 24, consider the following rights:
the right to be informed of the reason for the arrest or detention (section 23(a));
the right to a fair trial (section 25(a));
the right to be tried without undue delay (section 25(b));
the right to be present at the trial and present a defence (section 25(e)).

Further discussion on the meaning of section 24(a)

The aim of section 24(a) [594] is to provide a person accused of committing an offence with an opportunity to prepare their defence. In order to do this they need to know what information they require to be able to respond to specific allegations. [595] The person charged with an offence therefore requires more detailed information on the nature of the charge and the allegations against them than what they received at the time they were arrested or detained. [596]

Extent of information to be provided

The level of detailed information required to be provided to the accused person at this stage of the process will depend on what information he or she has already received and the degree of complexity of the charges involved. [597] However, as a basic minimum, the person must be informed of the specific offence he or she has committed and the alleged facts or events upon which the charge is based.

Specific information about the details of the charge enables the accused person to make decisions about:

- whether he or she requires legal representation;
- whether he or she will make a statement to the police;
- whether he or she would provide body samples to assist with the investigation;
- matters concerning his or her professional and personal life. [598]

It is permissible to amend charges if you promptly notify the accused person of the particulars of those changes. [599] Amendments to the charges can be made at any time during the trial as long as the statutory procedures for making these amendments are strictly followed. [600] It is not considered sufficient to only notify the accused's legal representative [601] or any other party [602] of these changes. The defendant should be notified as well. A defendant may need an opportunity to consider the implications of these
changes and an adjournment to proceedings may be necessary in order for them to plan their defence. However, you should exercise caution about the extent to which, and the number of occasions on which changes are made to the charges as this prolongs court proceedings. These delays may infringe section 25(b) of the Bill of Rights Act. [603]

**The relevant period**

As section 24(a) applies after a person is formally advised of the decision to bring charges, the relevant period is the time between the notification of that decision and the provision of the specific details of the charges. The United Nations Human Rights Committee has said that the requirement to provide the information "promptly" requires that the information is given "as soon as the charge is first made by the competent authority." [604]

The Supreme Court in Canada has pointed to the existence of four factors that need to be considered when determining whether any delay in informing the accused is undue: [605]

i. the extent to which the accused contributed to the delay;
ii. the extent to which the delay could be attributed to the conduct of enforcement officers;
iii. the resources that were available for finding the accused; and
iv. the prejudice experienced by the accused as a result of the delay.

Lamer CJ in *Delaronde* indicated that the prejudice caused by the delay refers to matters other than just those relating to the defence of the charges. The delays may, for example, lead to financial or personal detriment.

**Key cases**


**History of the section**

**The White Paper**

Section 24(a) appears in the exact form that was proposed in the *White Paper*. 
Section 24(a) origins in international treaties and overseas legislation

Article 14(3)(a) of the ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled to, in full equality, be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

Article 6(3)(a) of the European Convention provides:

Everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

Section 11(a) of the Canadian Charter states:

Any person charged with an offence has the right to be informed without unreasonable delay of the specific offence.

Section 24(b) Right to release on reasonable terms and conditions

Section 24(b) of the Bill of Rights Act is as follows:

Bail
Everyone who is charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention

Policy Triggers: do I need to consider section 24(b)?

You may need to consider section 24(b) if you are:

- developing policy that seeks to amend the Bail Act;
- developing procedures or guidelines on bail applications.

What every policy analyst needs to know about section 24(b)

- The Bail Act 2000 sets out the parameters under which a person charged with an offence may or may not be bailed.
- Bail applications should be denied only:
i. in a limited set of circumstances; and
ii. where the denial of bail is necessary to promote the proper functioning of the bail system and is limited to that purpose.

- Section 24(b) forms the standard or benchmark against which the Bail Act is applied.
- Applications for bail can be made on more than one occasion.
- The merits of a renewed application must be considered in light of the latest application, not on the original information.

**Measures to achieve compliance**

When developing policies or practices that may affect an individual's release from custody before the hearing and determination of a charge, consider:

- whether the range of circumstances within which it is proposed to deny bail are consistent with the generally accepted grounds for which bail can be denied;
- whether the concerns addressed by continuing detention could instead be met through imposing conditions on release;
- developing review mechanisms to ensure that the reasons for a person's continuing detention remain valid, rather than detaining because it is convenient.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion below.

**Related rights and freedoms and considerations**

When developing policies or practices relating to laying or amending charges, consider the following rights as well as those in section 24:

- the right to freedom of movement (section 18);
- the right not to be arbitrarily arrested or detained (section 22);
- the right to have the validity of the arrest and detention determined without delay by way of habeas corpus (section 23(1)(c));
- the right to be presumed innocent until proven guilty according to law (section 25(c));
• the right to the observance of the principles of natural justice (section 27(1)).

**Further discussion on the meaning of section 24(b)**

Section 24(b) creates the presumption that every person charged with an offence will be released on bail unless there is just cause for them to be detained in custody. The Canadian Supreme Court has defined "just cause" in the context of bail applications to mean that bail can only be denied:

i. in a limited set of circumstances; and
ii. where the denial of bail is necessary to promote the proper functioning of the bail system and is limited to that purpose.

Proposals to restrict the availability would therefore need to establish a clear link between the reason for the detention and the need for detention. [606] Such a linkage is consistent with the idea that every person is presumed innocent until proven guilty according to law (see the discussion in these guidelines dealing with section 25(c) of the Bill of Rights Act).

**Clear criteria**

The criteria for granting or refusing bail should be clearly set out to ensure that the reasons for declining bail are limited to those that are considered necessary to achieve an effective bail system.

The criteria could reflect the nature and quality of the offending and the alleged offender as well as the risk that may be associated with the release of the accused into the community. Relevant factors would include whether there is a risk that the person charged with an offence may fail to appear in court, or interfere with witnesses or offend while released on bail.

**Appropriate procedures**

A person accused of committing an offence should be released on bail unless there is good cause for them to be detained in custody. For example, concerns about the release of an accused person could be addressed by releasing the person on bail subject to certain conditions. However, where there are public interest reasons for not releasing the person into the community, prosecuting agencies should be able to raise these before the courts. The public interest reasons for continuing to detain would need to be balanced against the liberty interests of the accused. Relevant factors here
may include the likely length of time before the matter comes to hearing or trial and the impact ongoing detention may have on the ability of the accused to prepare his or her defence.

The procedures for the granting of bail are set out in the Bail Act 2000 and should be read consistently with section 24(b) of the Bill of Rights Act. Section 7 of that Act establishes clear parameters for considering whether a person charged with an offence is eligible for release on bail as of right. All persons are considered to have a right to bail unless the person is charged with particular specified offences. If a person is charged with any of these offences, his or her eligibility will have to be assessed according to other criteria. Even where a person does not meet the eligibility criteria for automatic bail, the Bail Act makes it clear that the courts should release the accused person, with or without conditions, unless there is good reason not to. [607]

**Need for review**

An accused person should be able to test the reasons for their ongoing detention to ensure that their detention continues to be justified. [608] This is because circumstances dictate that a person's eligibility for bail may change. [609] As one commentator has pointed out, the continuing detention of a person where there were originally reasonable grounds to suspect he or she had committed the offence [610] may have less validity over a period of time as new evidence becomes available. [611] On-going and prolonged detention of a person in such circumstances may give rise to issues under sections 22 and 25(c) of the Bill of Rights Act unless there are other reasons for the person's ongoing detention. [612] The European Court of Human Rights has taken a view that the original reason for ordering detention must be constantly reviewed, and that the justifications for continuing to detain a person must be made with regard to the current circumstances. As the United Nations Human Rights Committee has said, on-going detention should reflect the realities of the situation and the necessity of detention should be able to be demonstrated with specific details. [613]

**Conditions of release**

Section 24(b) not only applies to whether a person charged with an offence should be released on bail or not, but also the terms under which they are released. Section 24(b) requires that such terms and conditions be "favourable" to the accused. In other words, the conditions should not be so onerous that they unnecessarily restrict that person's freedom of movement
or act as a de facto deprivation of their liberty. Nor should those conditions expose him or her to treatment that might otherwise be seen as an unreasonable interference with their rights as members of the community. In other words, the terms and conditions should form a rational and proportionate response to any concerns that arose in the context of the bail application.

**Key cases**


**History of the Section**

*The White Paper*

The *White Paper* proposed that the right to be released on favourable terms and conditions would be triggered upon arrest rather than when being formally charged. However, the *White Paper* did note that the right would apply at different stages of the process. [617]

**Section 24(b) origins in international treaties and overseas legislation**

Article 9(3) of the ICCPR provides:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgement.

Article 5(3) of the European Convention provides:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (e) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or release pending trial. Release may be conditioned by guarantees to appear for trial. [618]
Section 11(e) of the Canadian Charter provides:

Any person charged with an offence has the right not to be denied reasonable bail without just cause.

Article VIII of the US Constitution states:

Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Section 24(c) The right to consult and instruct a lawyer**

Section 24(c) of the Bill of Rights Act is as follows:

**Instructing a lawyer**

Everyone who is charged with an offence shall have the right to consult and instruct a lawyer.

**Policy triggers: do I need to consider section 24(c)?**

You may need to consider section 24(c) if you are developing policies that:

- affect a person's eligibility for legal aid;
- amend or alter procedures relating to legal representation for the accused.

**What every policy analyst needs to know about section 24(c)**

The right to consult and instruct a lawyer in section 24(c):

- applies to all matters relating to the charge, including procedural issues such as the application for name suppression;
- refers to two aspects of the process - the lawful gathering of evidence and the right to a fair trial;
- does not prevent the state from acting on information where an accused person chooses to act contrary to the advice of his or her lawyer;
- may be given greater significance where a case raises particularly complex legal issues and the presence of counsel would have been of
advantage to the accused in determining the outcome of the proceedings.

Measures to achieve compliance

If the policy or practice you are working on raises issues of consistency with section 24(c):

- establish procedures to enable a person who is detained to have reasonable access to legal representation;
- establish procedures to ensure that each person accused of an offence (where there is more than one party to the offence) is individually aware of the right to be represented and of the possible consequences of joint representation.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion below.

Related rights and freedoms

If you are considering whether the policy or practice you are working on raises section 24(c) issues, also consider the following rights and freedoms:

- the right not to be compelled to provide information or opinions of any kind (section 14);
- the right of everyone arrested or detained to be informed of the right to consult and instruct a lawyer (section 23(1)(b));
- the right to refrain from making a statement (section 23(4));
- the right to adequate time and facilities to prepare a defence (section 24(d));
- the right to receive legal assistance without cost (section 24(f));
- the right to a fair hearing (section 25(a));
- the right to be present at the trial and present a defence (section 25(e)).

If the policy infringes section 24(c), it may also infringe one or more of these rights.
Further discussion on the meaning of section 24(c)

Purpose and scope of section 24(c)

As with section 23(1)(b) of the Bill of Rights Act, section 24(c) appears directed at addressing the imbalance between the state and the accused by enabling the accused to obtain legal advice. A person who has access to legal representation can make informed decisions relating to the preparation of his or her defence and can have their interests represented in any matter related to the charge.

There has been some judicial discussion as to whether section 24(c) may be regarded as assisting an accused to exercise the right to silence found in section 23(4) of the Bill of Rights Act and the right to consult and instruct a lawyer upon arrest or detention in section 23(1)(b). This discussion is unresolved and at this time it appears that the narrow interpretation of section 24(c) is preferred (see footnote 488). Whereas the right to consult and instruct a lawyer in section 23(1)(b) appears directed at the period leading up to an application for bail, section 24(c) comes into effect after the issue of bail has been decided.

The Court of Appeal in Barlow considered the meaning and scope of the right to consult a lawyer. In drawing a link between the right to silence in section 23(4) and the right to consult and instruct a lawyer, Hardie-Boys J cited with approval the following discussion from the Canadian Supreme Court decision in R v Hebert:

The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed, it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.

Hardie-Boys J explained the necessity for the right to silence to extend to the period after an accused person has been released on bail in this way:

Necessarily, the right to silence must continue to be available after an accused person has been released on bail. For until the charge has been finally disposed of, the adversarial relationship between the State and the individual continues, and the superior power and resources of the State
remain available to the police...[and it is within this context] that the right of silence and the right to a lawyer's advice has been established.

It seems clear from *Barlow* that the right to consult a lawyer includes the right for the accused to act on his or her lawyer's advice without interference from the state. As was said in *Hebert* and *Barlow*, this does not mean that the state cannot act on the basis of information freely provided by an accused person who acts contrary to the legal advice they have received.

**Complexities of the case**

The Court of Appeal considers that the ability to consult with and retain counsel may be of particular benefit to the accused where the facts of the case raise complex issues or may be of assistance in understanding the defences available in law and in cross-examining witnesses. [623]

The right to consult and instruct a lawyer may also require consideration as to whether the accused and his representative had sufficient time to prepare a defence and whether the accused was disadvantaged in any material sense by the restrictions on the time to prepare for trial. [624] The overriding consideration for the courts is whether a person convicted of an offence "has been found guilty at the end of a process which has integrity and the hallmarks of fairness." [625] It is for this reason that while section 24(c) may allow a person charged with an offence to consult and instruct a lawyer of his or her choice, the courts have held that the combined effect of section 5 and 24(c) means that a person who is charged with an offence and eligible for legal aid does not have a right to consult and instruct a lawyer of his or her choice. [626]

**Consultation over procedural matters**

The right for a person charged with an offence to consult with a lawyer would seem to extend to the right of that person to consult with his or her lawyer over all matters relating to the charge, including procedural issues such as applications for name suppression.

**Key cases**

*R v Barlow* (1995) 14 CRNZ 9; *Neilson v R* 15/06/93 CA53/93; *R v Ru* 4/10/01, CA 238/01; *R v Broyles* (1991) 68 CCC (3d) 308 (SCC); *R v Hebert* (1990) 57 CCC (3d) 1; 77 CR (3d) 145 (SCC)
History of the section

The White Paper

Section 24(c) appears in the same form as was proposed in the White Paper.

Section 24(c) origins in international treaties and overseas legislation

As noted in the introduction to section 24, the rights applying to the part of the process after arrest and prior to trial are unique to our context and there are no equivalent provisions elsewhere. However, similar provisions do appear either prior to a person being charged, or at a subsequent time during the pre-trial process.

Article 14(3)(b) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

Article 6(3)(b) of the European Convention states:

Everyone charged with a criminal offence has the following minimum rights:

... (b) to have adequate time and facilities for the preparation of his defence

Section 10(b) of the Canadian Charter provides that:

Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.

Article VI of the American Bill of Rights states:

In all criminal prosecutions, the accused shall have the right...to have the assistance of counsel for his defense.
Section 24(d) Right to time and facilities to prepare a defence

Section 24(d) of the Bill of Rights Act is as follows:

Time and facilities
Everyone who is charged with an offence shall have the right to adequate time and facilities to prepare a defence

Policy Triggers: do I need to consider section 24(d)?

You may need to consider section 24(d) if you are developing policies or practices that:

- alter procedures for responding to requests for information or material to be used as evidence in criminal proceedings;
- affect the ability of self-represented persons to gain access to legal or other relevant research material;
- establish procedures for the destruction or disposal of material that was to be used, or has been used, as evidence in criminal proceedings;
- relate to the storage of evidence before and after the conclusion of criminal proceedings;
- create, amend, or alter procedures relating to the ability to appeal decisions from tribunals or disciplinary bodies to the courts;
- require the accused to follow certain procedures before submitting evidence in their defence;
- establish rules or procedures governing the ability of the courts to adjourn hearings;
- establish protocols for agencies to share information gathered in the context of analysing evidence;
- would codify the laws of criminal discovery.

What every policy analyst needs to know about section 24(d)

- The right to adequate time and facilities to prepare a defence is concerned with what is "sufficient or necessary" rather than what is "full and complete".
• The adequacy of time to prepare a defence will depend on a number of factors, including the legal complexity of the case and the relative experience of legal counsel.
• Where a statute or practice places a time limit on making certain appeals or applications, those limits must be reasonable and certain.
• The right to adequate facilities to prepare a defence is intended to put the defence on an equal footing with the prosecuting authority.
• The right to adequate facilities to prepare a defence does not infer that the defence should have access to the same or identical facilities as the prosecution.
• "Facilities" should be interpreted broadly to include access to evidence, witnesses, caselaw and other information that the defendant needs to make a full defence.
• The adequacy of facilities is likely to depend on the complexity of the charge and the type of evidence that is required to make a full defence.
• A self-represented accused is more likely to require access to a greater range of information than an accused represented by counsel.
• Access to evidence on an equal footing appears to mean unrestricted access to evidence, including exhibits and witnesses, to enable the defence to put forward a plausible explanation as to the legitimacy of the defendant's actions, where the point in dispute is an essential element of the offence and the interpretation of the evidence goes to the central issue at trial.
• The prosecution has an obligation to preserve evidence or information that may be of significance to the defence.
• The right to adequate facilities is generally limited to a duty not to obstruct the defence from carrying out its investigations, and to provide pre-trial disclosure.
• The state may have a positive obligation to assist the defence where the nature of the evidence and the limited circumstances under which it can be obtained demands assistance to preserve the interests of justice.
• Not only is the prosecution required to provide the defence with the material considered essential for the prosecution to prove its case, but any other specified information requested by the defence, subject to competing considerations.
Measures to achieve compliance

If you are developing any policy or practice that gives rise to an issue of consistency with section 24(d), consider:

- developing checklists to enable your agency to identify what information should be disclosed in response to an application for discovery;
- whether procedures are needed to ensure the preservation of evidence relating to the offence;
- developing practice guidelines to ensure appropriate responses for requests for assistance from persons charged with an offence;
- developing procedures to enable the accused to access expert evidence;
- developing practices or procedures to ensure a person convicted of an offence is automatically advised of his or her appeal rights and the relevant procedures;
- establishing flexible guidelines and procedures to permit adjournments of hearings to allow a defence to be prepared.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion below.

Related rights and freedoms

When considering whether your policy or practice is consistent with section 24(d), also consider:

- the right to seek information (section 14);
- the right to consult and instruct a lawyer (section 24(c));
- the right to a fair trial (section 25(a));
- the right to be presumed innocent (section 25(c));
- the right to be present and present a defence (section 25(e));
- the right to appeal (section 25(h)).
Further discussion on the meaning of section 24(d)

What is adequate time?

An inquiry into whether a person has had adequate time to prepare his or her defence is going to depend on the facts of the case and whether the requirement that the defence prepare a defence within the allotted time is likely to result in a miscarriage of justice.

The adequacy of the time is going to depend on a number of factors including the legal complexity of the case, and the relative experience of legal counsel. It would therefore appear that short time frames are themselves not a relevant consideration because of the presumption that counsel has the required level of training to compensate and the existence of adjournments as a procedural safety-net. However, the Court may also have regard to the reasons why the defence has not had adequate opportunity to prepare a defence. Relevant considerations here might include:

- the length of time between the time the person was charged and the commencement of proceedings;
- whether the charges have been amended or fresh charges have been laid;
- the availability or presence of the counsel for the accused;
- delays in obtaining evidence from the prosecution under the discovery process.

Procedural constraints

Statutory provisions or court practices that require the defence to follow certain procedures before presenting evidence in their defence - such as providing the court with notice that they wish to raise a particular defence - should be reasonable and certain. The same principles would seem to apply in respect of procedural constraints on the ability to appeal.

In one case before the European Court, the minority expressed the view that:

in criminal matters, the State must ensure that the accused is officially informed of the essential and decisive steps and elements [that need to be followed in order to allow him or her to appeal a decision]...it cannot put the burden in this respect entirely on the accused or convicted person.
The European Court of Human Rights has gone on to accept the minority point of view as more correctly stating the law on Article 6 of the Convention and has emphasised this point in subsequent cases. [631]

**Adequacy of facilities**

"Facilities" should be interpreted broadly for the purposes of section 24(d) to include access to evidence, witnesses, and information that the prosecution will present at the hearing as are reasonably necessary to enable the accused to prepare a defence. The adequacy of those facilities is likely to be dependent on the complexity of the charge and the type of evidence that is required to make a full defence. A self-represented accused is also more likely to require access to a greater range of information than an accused represented by counsel. [632]

In *R v Accused* [633] Richardson J expressed the view that the right to adequate facilities to prepare a defence must be interpreted in a manner that gave effect to the right. Significantly, the right should be given effect to in order that there is a fair trial. Richardson J observed that section 24(d) was designed to put the defence on an equal footing with the prosecution and included adequate access to evidence which the accused person requires to present his or her case. [634]

The majority of the Court of Appeal in *Griffin* endorsed the approach of Richardson J in *R v Accused*. [635] The Court said: [636]

The question of the adequacy of the facilities made available [to the accused] will depend, at least in part, on determining what more could have been done and whether to do more was necessary in all the circumstances. As in many contexts an abstract answer cannot be given. The question is one which must be answered according to the circumstances of the individual case.

In *Griffin* the majority held that having access to evidence on an equal footing meant that access would enable the defence to put forward a plausible explanation as to the legitimacy of the defendant's actions where:

i. the point in dispute was an essential element of the offence; and
ii. the interpretation of the evidence was going to the central issue at trial. [637]
It is also significant that the failure to allow the accused to have access to the evidence on an equal footing in *Griffin* would seriously affect the credibility of the expert testimony of the accused.

**Disclosure of information**

Closely associated with the adequacy of facilities is the application of the laws on disclosure. The disclosure by the prosecution to the defence of evidence to be used in any proceeding goes to the overall fairness of the proceedings as it enables the defence to respond to allegations by providing alternative explanations or interpretations of events. As the Court in *Police v Nimmo* pointed out, the common law duty of disclosure is subject to the Official Information Act and the Privacy Act as well as the Bill of Rights Act. [638] In *Nimmo*, Williams J referred to the application of the Official Information Act in the context of criminal proceedings. In his judgment he referred to the decision of the Court of Appeal in Commissioner of Police v Ombudsman [639] which dealt with an accused's request under the Act for copies of the briefs of evidence of witnesses the prosecution proposed to call in a summary case. The views of the Court of Appeal hold some relevance for the application of the Bill of Rights Act in this context. The Court held:

...that unless there was some special risk of interference with witnesses, fabrication of evidence or other perversion of justice which could amount to a good reason within s 6(c) [of the Official Information Act] for withholding from a person making the request information to which they would otherwise be entitled, the general practice after a criminal prosecution has been commenced should be disclosure of personal information contained in briefs, witness statements or notes of interviews. The duty of disclosure was held not to be dependent on defence requests and the enactment of the Official Information Act 1982 did not alter the existing requirements for disclosure (*R v Connell* [1985] 2 NZLR 233 (CA), at p 241). [The] source of the information is irrelevant provided it otherwise comes within the definition of official information and the principles of openness and fairness (*Police v Tyson* [1989] 3 NZLR 507, 512).

The obligation under common law to disclose information in the absence of any specific request is said to relate to:

1. The name and address of any person interviewed by the prosecution who can give material evidence but is not going to be called as a witness. However, there is no requirement to produce written
statements from such persons unless a failure to do so would prejudice
the defence.

2. Statements made by any witness that bring to light significant
inconsistencies with the intended evidence of that witness. Any
information relating to possible bias of a witness should also be
disclosed.

3. Briefs of evidence, witness statements, and notes of interview. [640]

And even though the prosecution may be required to provide any additional
information, it is for the defence to make the specific request. [641] There is
also no obligation for the prosecution to provide the defendant with
information that they do not possess or do not have authority over. [642] The
defence may still be able to obtain that information directly from the third
party, or may be able to gain access to it by way of a subpoena or witness
summons. [643]

Sufficient or necessary or full and complete?

It would therefore seem that the prosecution is not under any obligation to
provide the defence with all the information related to the proceeding. As the
Court of Appeal noted, the right to adequate time and facilities to prepare a
defence is concerned with what is "sufficient or necessary" rather than that
which is "full and complete". [644] The defence has an obligation to be
diligent in its preparation of the defence - as more than one court has said:

...The prosecutor's duty is to prosecute the case fairly and openly in the
public interest. It is not part of his duty to conduct the case for the defence.
[645]

However, the courts have been critical of prosecution practices that have led
to the destruction of evidence or the loss of evidence. The prosecution's duty
of disclosure may give rise to an obligation to preserve evidence to enable
the defence to provide "full answer and defence." [646] The issue of whether
the prosecution may still be able to rely on the evidence derived from the
original physical evidence will depend largely on the reasons why that
original evidence was destroyed, [647] and the prejudice that resulted from
its destruction.
**Is there a positive obligation on the state to assist the accused?**

There is also more than the suggestion that the right to adequate facilities means more than a duty not to obstruct the defence from carrying out its investigations; and that there may be a positive obligation on the part of the state to assist the defence. [648] The Court of Appeal in *R v Donaldson* [649] discussed whether an enforcement officer was required to assist a person who was accused of committing an offence obtain evidence that would enable her to raise reasonable doubt as to her guilt.

**Facts of the case**

Donaldson failed an evidential breath screening test and was taken to a police station. She was told that she would undergo an examination by a doctor. She asked that a sample of her blood be taken and was told that one would not be taken. Although Donaldson made repeated requests, a blood sample was not taken. The appellant consented to the doctor examining her. The doctor formed the opinion that the appellant was clinically under the influence of drugs and alcohol and unfit to drive a motor vehicle safely.

By the time Donaldson left the police station 5½ hours had elapsed since she had been breathalysed. The Court held that by this time there was no longer any opportunity of her obtaining useful chemical evidence about blood alcohol levels, even had facilities for blood testing been available to her.

In this case Donaldson was completely reliant on the law enforcement authorities to gather the evidence upon which the charge was based and she had no other means of contesting the charges. The Court of Appeal looked to North American caselaw for assistance. The Canadian and US courts have considered whether there is a positive obligation so that a person charged with an offence can make "full answer and defence" in response to the charge. [650] These factors are therefore integral to the accused's right to a fair trial.

The key questions appear to be:

1. What was the nature of the evidence and what role was the enforcement officer required to play in obtaining it?
2. Was that evidence likely to play a significant role in the accused person's defence?
3. Was the accused person otherwise able to obtain that evidence? [651]
The Court went on to say [652] that:

It is likely that there will in practice be a fine line between:

a. Requiring the police not to obstruct the preparation of a defence, which must be implied in the right recognised in s 24(d); and
b. Imposing on the police a new and affirmative duty to assist in the collection of evidence useful for the defence.

Omissions to obtain or preserve evidence likely to be material to the defence will fall on one or other side of the line according to a wide variety of factors. Clearly bad faith on the part of the police would point towards obstruction. In other cases the degree and foreseeability of materiality of the lost evidence, and the existence and extent of any practical difficulties in obtaining or preserving that evidence, will often be relevant.

Even though the Court of Appeal in Donaldson did not express a final view as to whether the prosecution had a positive duty to assist the accused gather evidence, the Court alludes to such a possibility when Thorpe J observed: [653]

...a more limited interpretation [of section 24(d)] is likely to render the right ineffective in cases such as the present. For what real opportunity does a driver have to obtain his or her own blood test in the evening or night hours?

Cases subsequent to Donaldson have highlighted the fact that there is no obligation on the state to assist the defence to obtain evidence where:

- the accused has had a reasonable opportunity to obtain evidence [654] or examine evidence [655] but has failed to do so; and
- the failure to preserve the evidence is unlikely to lead to a miscarriage of justice. [656]

Although there is no fixed rule requiring the state to assist the accused by preserving evidence, authorities should exercise care to ensure that evidence material to the charge is preserved. As a general rule, the more likely the evidence is to point to exonerating the accused, the greater the obligation on the authorities to preserve the evidence or to assist the accused to obtain the evidence.
Key cases


History of the section

**The White Paper**

Section 24(d) is identical in form to that proposed in the *White Paper*.

**Section 24(d) origins in international treaties and overseas legislation**

Article 14(3)(b) of the ICCPR provides

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.

Article 6(3)(b) of the European Convention states

Everyone charged with a criminal offence has the following minimum rights:

... (b) to have adequate time and facilities for the preparation of his defence

**Section 24(e) Right to trial by jury**

Section 24(e) of the Bill of Rights Act is as follows:

**Trial by jury**

Everyone who is charged with an offence shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months.
**Policy triggers: do I need to consider section 24(e)?**

You may need to consider section 24(e) if you are developing policies or practices that:

- establish a framework for introducing regulatory offences and have these offences tried summarily;
- amend or alter procedures in the Summary Proceedings Act;
- alter the threshold under the Summary Proceedings Act for when a person may elect to be tried by a jury;
- restrict the period during proceedings within which a person can elect to be tried by jury.

**What every policy analyst needs to know about section 24(e)**

The right to elect to be tried by a jury, when charged with an offence punishable by more than three months' imprisonment, is long-standing. The procedures for informing the accused of the right are set down in statute.

**Measures to achieve compliance**

Means of ensuring your policy is consistent with section 24(e) include:

- Developing offence provisions that maintain the right to elect trial by jury where the maximum penalty is more than three months' imprisonment.
- Establishing procedures for the accused to be informed of the right to elect trial by jury.

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion below.

**Related rights and freedoms**

When considering whether your policy or practice is consistent with section 24(e) of the Bill of Rights Act, you should also consider the right to a fair trial (section 25(a)).
Further discussion on the meaning of section 24(e)

Section 66(1) of the Summary Proceedings Act provides that any person charged summarily with an offence punishable by a term of imprisonment exceeding three months is able to elect to be tried by jury at any time before the trial has, to a large extent, commenced. A decision as to whether or not a charge, in the language of section 66(1), has been "gone into" will depend on the facts, but the courts in the past have given a robust interpretation to the accused's right to elect trial by jury. [657] The implementation of the right will, by and large, be governed by the Summary Proceedings Act. Section 24(e) of the Bill of Rights should be read as supporting and enhancing this entitlement. And even though statutory provisions in the past have expressly provided that a person charged with certain offences cannot elect trial by jury, [658] section 24(e) has an effective role to play in ensuring that the standard procedure remains that a person charged with certain offences has a right to be tried by his or her peers. Although the courts have not addressed this point, section 24(e) may reinforce current standards and procedures governing jury trials and jury selections (such as the requirement that the jurors are selected from the community at large, that jurors remain disinterested parties, that 12 persons serve on a jury, and that jurors deliberate in private and so forth). [659]

Although an accused person may elect to forego their right to a trial by jury, [660] it is self-evident that section 24(e) would require that the person making that election is making it in a fully informed manner and in a clear and unequivocal fashion. The Canadian Supreme Court has previously held that the mere fact that the accused has chosen not to turn up to trial does not constitute a waiver of the right. [661]

It would seem that the definition of what constitutes an offence under military law should be restricted to those offences connected with military service, rather than offences committed by military personnel in other capacities. [662]

The Canadian courts have also taken the position that the right to elect a trial by jury is not affected by a judge's summing up at the conclusion of the hearing of evidence. The right to elect a trial by jury is not undermined where the judge elects not to put part of a defendant's defence to the jury. [663] The role of the trial judge in such a case is to determine whether the defence had raised sufficient evidence to put the issue to the jury. [664]
Key cases


History of the section

The White Paper

This section is identical to that which was proposed in the *White Paper*.

Section 24(e) origins in international treaties and overseas legislation

There is no equivalent provision in either the ICCPR or the European Convention of Human Rights. However, section 11(f) of the Canadian Charter provides:

Any person charged with an offence has the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury where the maximum penalty for the offence is imprisonment for 5 years or a more severe punishment.

Section 24(f) Right to legal assistance

Section 24(f) of the Bill of Rights Act is as follows:

Legal assistance

Everyone who is charged with an offence shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance.

Policy triggers: do I need to consider section 24(f)?

You may need to consider section 24(f) if you are:

- changing the criteria under which a person is able to apply for criminal legal assistance;
- amending the income thresholds under which a person is able to qualify for assistance;
- amending the range of proceedings for which criminal legal aid may be granted.
What every policy analyst needs to know about section 24(f)

- The significance and scope of section 24(f) should be considered in the context of the Legal Services Act 2000.
- What constitutes "the interests of justice" is a legal matter, not an operational or administrative one.
- The interests of justice are served by providing legal services where the nature of the offending is grave, the accused has limited ability to effectively represent him or herself, or the potential consequences of such a failure are significant.
- The overall concern therefore appears to be one of fairness to the accused - is the accused able to prepare and present a full defence to a charge? Is the accused able to adequately protect their interests prior to and during the proceedings?
- The right to legal assistance does not confer a right for an accused person to choose his or her representative.
- The quality of representation is relevant only where it becomes apparent to the judge that the lawyer's behaviour was incompatible with the interests of justice.
- The right to receive legal assistance refers not only to the period prior to the proceedings, but also to the appeals process.

Measures of increasing compliance

If you are developing policy or practices that may affect a person's eligibility to receive legal assistance without cost:

- Ensure that the grounds under which an assessment can be made are sufficiently certain that irrelevant considerations cannot be taken into account.
- Re-assess the grounds under which a person can appeal the decision to refuse to provide legal assistance - are the grounds too restrictive?

The information set out above is based on the decisions of courts in New Zealand and overseas. If you require further information, refer to the discussion below.
Related rights and freedoms

When considering whether your policy or practice is consistent with section 24(f) of the Bill of Rights Act, you should also consider:

- the right to be free from discrimination (section 19);
- the right to consult and instruct a lawyer without delay (section 23(b));
- the right to consult and instruct a lawyer (section 24(c));
- the right to have adequate time and facilities to prepare a defence (section 24(d));
- the right to be present and present a defence (section 25(e));
- the right to appeal to a higher court (section 25(h)).

Further discussion on the meaning of section 24(f)

The Legal Services Act

The *White Paper* anticipated that the right in section 24(f) would be given effect to at an operational level by legislation dealing with what is referred to as legal aid. The Legal Services Act 2000 therefore governs how our legal aid system will work on a daily basis; defining who is eligible for legal aid under what criteria and so forth. As this legislation confers a discretionary power on decision-makers, section 24(f) will be relevant when considering the merits of particular decisions. As the courts have been quick to point out, the issue of what constitutes "the interests of justice" is a legal issue and not an operational or administrative one. [665] The courts therefore seem to have created a residual discretion to determine whether a decision by the Legal Services Agency was consistent with section 24(f) or not. This position was expressed in a forthright way by Williamson J when he stated that, even though the Legal Services Agency was required to determine where the "interests of justice" lie, the court must still be vigilant to ensure that administrative and procedural steps do not unjustly limit or prevent the exercise of the right. [666]

Serving the interests of justice

The European Court of Human Rights has held that the interests of justice are served by providing legal services where the legal issues are complex, [667] the accused has limited ability to effectively represent himself, or the potential consequences of such a failure are significant (that is, the severity of the penalty). [668] The interests of justice may also be served where an
accused is not represented in a situation where his co-accused have obtained representation. [669] The overall concern appears to be one of fairness. A key question would therefore appear to be whether there is likely to be a miscarriage of justice because the accused was unable to obtain legal representation.

**Choice of legal representation**

The United Nations Human Rights Committee, European Court of Human Rights, and the courts here have taken the consistent stance that the right to legal assistance does not confer a right on an accused person to choose his or her representative. [670] Similarly, although section 24(f) affirms the right to be provided with legal representation, there does not appear to be any requirement that the legal representation must meet a particular standard. However, in some circumstances the quality of that representation may disadvantage the accused to the extent that the accused suffers from a miscarriage of justice. The Human Rights Committee, in referring to its jurisprudence on this issue, has said that: [671]

a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.

The distinction appears to lie in what the courts see as strategic decisions made by counsel during the course of a trial as opposed to general competence. A decision whether or not to call or cross-examine a particular witness, for example, is more likely to be regarded as a strategic decision which the courts are less likely to interfere with no matter how flawed that decision is.

**Representation at all stages of the process**

The right in section 24(f) does not appear to be restricted to the initial proceedings. Not only is a person charged with an offence eligible to receive legal assistance prior to the proceedings, but also on appeal. Even though the Legal Services Agency may have regard to the grounds for appeal in determining whether to grant legal aid, [672] it is not clear from the Act whether the merits of the appeal can be considered. [673] It would seem from the European caselaw that the merits of the appeal will of themselves not be sufficient reason to decline an application if the penalties are severe or the legal issues are complex. [674] However, legal aid can only be granted for appeals to the Privy Council in special circumstances. [675]
Key cases


History of the section

*The White Paper*

This section is identical to the provision that was proposed in the *White Paper*.

*Section 24(f) origins in international treaties and overseas legislation*

Article 14(3)(d) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

... (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment in any such case if he does not have sufficient means to pay for it.

Article 6(3)(c) of the European Convention for Human Rights provides:

Everyone charged with a criminal offence has the following minimum rights:

... (c) to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
Section 24(g) Right to the assistance of an interpreter

Section 24(g) of the Bill of Rights Act is as follows:

**Access to an interpreter**
Everyone who is charged with an offence shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

**Policy triggers: do I need to consider section 24(g)?**

Are you developing policies or practices:

- That attempt to set down guidelines for the use of translators and interpreters in courts?
- That attempt to establish rules or procedures for the use of interpreters or translators in proceedings?

If you answer "yes" to any of these questions, then you should consider whether your policy or practice is consistent with section 24(g) of the Bill of Rights Act.

**What every policy analyst needs to know about section 24(g)**

Section 24(g) has strong links with section 25(a) and the right to a fair trial as well as a number of other associated rights. As the right in section 24(g) is directed at enhancing the accused's participation both during and prior to proceedings, the following matters are worth considering:

- It is not sufficient that an accused has some understanding of and ability to speak the language used in Court: they must be able to understand and speak it sufficiently well to be able to obtain, enjoy and exercise all their rights in the proceedings to the best of their other abilities.
- The phrase "language used" in section 24(g) is broad enough to encompass both spoken and written language.
- Although the right extends to written documents, it does not require all documents to be translated - just those critical to the maintenance of a fair trial.
• The costs of providing a translation of the documents may rest with the prosecution.
• It is the responsibility of the Courts to ensure that the defence receives copies of translated documents in a timely fashion.

Measures for increasing compliance

If you are developing policies or practices on the administration of court proceedings, and particularly the use of interpretation and/or translation services, you should consider:

• Consulting with interpretation and translation service providers over the way in which the delivery of services could be enhanced.
• Seeking the views of groups in the community who are representative of those who may be affected by such policies such as people of different ethnic and national origins, or who have particular disabilities.

Related rights and freedoms

Section 24(g) intersects with a whole host of rights, both those directly related to court proceedings as well as a number of other rights. These include:

• the right to receive information in any form and of any kind (section 14);
• the right to be free from discrimination (section 19);
• the right to consult and instruct a lawyer without delay (section 23(b));
• the right to be informed promptly and in detail of the nature and cause of the charge (section 24(a));
• the right to consult and instruct a lawyer (section 24(c));
• the right to adequate time and facilities to prepare a defence (section 24(d));
• the right to a fair trial (section 25(a));
• the right to be present and present a defence (section 25(e));
• the right to examine witnesses (section 25(f));
• the right to the observance of the principles of natural justice (section 27(1)).
Further discussion on the meaning of section 24(g)

Effective participation

Section 24(g) is another aspect of the right to a fair trial - a person's ability to participate effectively in proceedings is directly related to their ability to comprehend what is taking place.

In *R v Cooper* [676] the Court said

At first glance [section 24(g)] might seem to be a very limited right, but it cannot be if it is interpreted as part of the fabric of the rights enacted by that legislation, particularly in sections 23, 24 and 25. It is not sufficient that an accused has some understanding of and ability to speak the language used in Court: they must be able to understand and speak it sufficiently well to be able to obtain (or should it better be put 'attain'), enjoy and exercise all their rights in the proceedings to the best of their other abilities. Unless they have that level of understanding and speaking ability, to deny them the services of an interpreter would be to deny or unreasonably derogate from the pivotal right to a fair hearing (section 25(a)) and would be a failure to observe the principles of natural justice (section 27(1)).

For this reason it would appear that the requirement for interpretation must be genuine and necessary in order to secure effective participation. [677] The fact that there are two official languages in New Zealand may act to qualify this requirement here. There is therefore no requirement for a party to establish the need for the proceedings to be conducted in Te Reo. [678]

As the objective of the right in section 24(g) is to secure effective participation, the right extends to preparation for trial as well as the conduct of the proceedings themselves. [679]

Interpretation versus translation

The courts have held that there is no substantive distinction to be made between interpretation and translation. The right therefore extends to written as well as oral evidence. [680] In *Alwen Industries* the Court held:

If the purpose of the right is to ensure an accused person understands and participates meaningfully in the proceeding, then to restrict interpretative assistance to the spoken word (when much of significance in legal proceedings appears in written form) would rob the right of its true force.
The right to assistance is triggered by the fact that a person is unable to understand or speak the language used in Court. Once that criterion is met, the right to interpretative assistance should attach generally, not in a restricted capacity.

The phrase "language used" is broad enough to encompass both spoken and written language - not just, as counsel for the respondent argued, the extracts from the documentary exhibits which are read out or articulated in Court.

The reference to the language being used "in court" does not restrict the application of the section to the actual trial, but can include the production of hand up briefs of evidence at the depositions stage. [681]

However it might not be necessary for all written documents to be translated; documents that are not seen as critical to the defence are not required to be translated. The Court in *Alwen Industries* considered that:

...the "touchstone" will be the overall need to ensure the accused receives a fair trial. Specifically, this refers to the need to ensure the accused understands the proceedings, is able to instruct counsel fully and prepare a defence. [682]

Similarly, it would not be necessary to translate documents if the accused has demonstrated an ability to understand the contents of the documents in another context.

**Bearing the costs of translation**

The Court in *Alwen Industries* also considered certain procedural aspects of the right in section 24(g). The Court held that, by virtue of section 3(a) of the Bill of Rights Act, it was arguable that it was for the prosecution to meet the costs of translation given its responsibility to present evidence in an intelligible form. [683] However, this issue has not been conclusively determined and such a requirement may depend on the relevance of the documents to the proceedings and the number of documents needing translation. The European Court of Human Rights has also expressed the view that the accused should not bear the cost of interpretation or translation. [684]

However, it remains for the Court to arrange on request for an interpreter or translator as the case may be, and to make available to the defence a translation of the briefs of evidence in a timely fashion. [685]
Key cases


**History of the section**

**The White Paper**

This provision is unchanged from that which was proposed in the *White Paper*.

**Section 24(g) origins in international treaties and overseas legislation**

Article 14(3)(f) of the ICCPR provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...  
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court

Article 6(3)(e) of the European Convention for Human Rights provides:

Everyone charged with a criminal offence has the following minimum rights:

...  
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court


Section 14 of the Canadian Charter provides:

A party or a witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Although the US Constitution does not have a specific right to an interpreter, it is considered that the right is found in a number of provisions but principally the 14th and the 6th Amendments.
Footnotes:

571. The latest version can be found on the Internet at http://www2.justice.govt.nz/lac/.
573. *Martin v Tauranga District Court* [1995] 2 NZLR 419.
577. General Comment 13. Adopted on 13/04/84.
578. *R v Gibbons* (1997) 14 CRNZ 552, 562. Such an approach is consistent with the views of the minority in *R v Kalanj* where Lamer and Wilson JJ both considered that a person is charged for the purposes of the Charter when "the impact of the criminal process is felt by the accused" *R v Kalanj* [1989] 1 SCR 1594, 1621.
581. This point was raised but not decided in *Drew v Attorney-General (No 2)* (2001) 18 CRNZ 465 (CA) 481.

593.  Note though that the scope of Article 6(3) may be limited by the language of the provision in that it refers to persons being "charged with a criminal offence".

594.  Lamer J in *R v Delaronde* [1997] 1 SCR 213, indicated that the purpose of the equivalent provision in the Canadian Charter went further than the right to "make full answer and defence".

595.  There is, therefore, some overlap between this provision and sections 24(d) and 25(e) of the Bill of Rights Act.


602.  Italy 10889/84 May 11, 1988, 56 DR 40. In this case the accused was sent notification of the charges by mail. The accused denied having received the notification.


607.  See section 7(5) of the Bail Act 2000.


610.  Section 8(2)(a) of the Bail Act provides that the belief that the person charged has committed an offence is a discretionary factor that the courts can take into account when considering whether to detain the accused in custody. Obviously the right to be presumed innocent is a relevant consideration - see the discussion on section 25(c) of the Bill of Rights Act in these guidelines.

612. *Kemmache v France* No 1 November 27, 1991, Series A, No 218; 14 EHRR 83, para 45


615. *Guzzardi v Italy* November 6, 1980, Series A, No 39; 3 EHRR 333.


618. It should be noted that article 5(3) of the Convention does not provide for a right to bail, but the caselaw reflects many of the same considerations with regards the ability to detain persons prior to trial.

619. See Hardie-Boys J in *R v Barlow* (1995) 14 CRNZ 9, 43. Note however, that Gault J took a contrary view in holding that the right in section 24(c) extended only to assured access to legal counsel when required - see Gault J at page 52 of the judgment.


623. *Drew v Attorney-General* [2002] 1 NZLR 58. Although this case turned on whether the observance of the principles of natural justice required an inmate to be legally represented at a disciplinary hearing, the policy rationale is equally applicable here. See, too, *R v Jays* 24/08/89 CA 177/89.

624. *Neilson v R* 15/06/93 CA 53/93.

625. *R v Ru* 4/10/01, CA 238/01, para 28.


629.  Section 341(3) of the Resource Management Act provides that the statutory defence to a charge in Section 341(2): Except with the leave of the Court does not apply unless, within 7 days after the service of the summons or within such further time as the Court may allow, the defendant delivers to the prosecutor a written notice-
(a) Stating that he or she intends to rely on subsection (2); and
(b) Specifying the facts that support his or her reliance on subsection (2).

630.  *Melin v France* June 22, 1993, Series A No 261-A; 17 EHRR 1. The majority in this case felt that this wasn't an automatic obligation as there may be instances where, like in *Melin*'s case, the accused ought to have known the procedures. Melin was a lawyer.


632.  See *R v Waetford* CA 406/99, 2/12/1999 where the Court of Appeal held that a self-represented accused was entitled to be provided with relevant copies of legal material, cases and statutes.


634.  See *R v Accused* CA 357/94 (1994) 12 CRNZ 417, 425-427. As these comments were only observations, they do not form part of the law on section 24(d) but are influential given that the views expressed come from the Court of Appeal. See Brown v Stott [2001] 2 WLR 817 (PC), per Lord Bingham at p 827. The concept of equality of arms is discussed at more length in the discussion on the right to a fair trial in these guidelines.

635.  The accused had been convicted under s 138 Crimes Act 1961 on a charge of having sexual intercourse with a severely subnormal woman. Despite requests by the defence, a defence psychologist had not been permitted to test and examine the complainant in order to reach an opinion if the complainant was "severely subnormal". Note the dissenting judgment of Gault J in *R v Griffin* [2001] 3 NZLR 577; (2001) 19 CRNZ 47 (CA), 588 para 49.
636.  

R v Griffin [2001] 3 NZLR 577; (2001) 19 CRNZ 47 (CA), 584, para 29

637.  


638.  See also sections 344C and 368 of the Crimes Act and sections 13A, 13B, 23AA of the Evidence Act 1908 which deal with the disclosure of information about, or concern appearance at trial of witnesses.

639.  


640.  


641.  


642.  

Attorney-General v District Court at Otahuhu (2001) 19 CRNZ 29 (CA)

643.  

R v Dobson 8/6/95, CA 25/95.

644.  

Attorney-General v District Court at Otahuhu (2001) 19 CRNZ 29 (CA), 44 para 49

645.  

R v Brown [1997] 3 All ER 769 (HL) per Lord Hope of Craighead, 778, referring to statements made by Diplock LJ in Dallison v Caffery [1964] 2 All ER 610 at 622, [1965] 1 QB 348 at 375 cited with approval in R v Shaqlane, 5/3/01, CA341/00.

646.  

R v Bero (2000) 151 CCC (3d) 545 (Ont CA).

647.  

On the routine destruction of evidence see R v McLeay 4/4/97, CA 349/96 and the dissenting judgment of Gault J in Griffin cited above.

648.  


649.  


650.  

This is regarded as part of a person's right to "fundamental justice" and "due process" in the context of criminal proceedings. See section 7 of the Charter and Article V of the American Bill of Rights.

651.  


652.  


653.  


654.  

Simpson v Police HC Auckland AP 67/98, Williams J.

655.  

R v Ruka CA 74/97 17/09/97.
656. *R v Bevin* CA 389/96 16/12/96.
657. See, for example, *Ratu v Harlow* [1960] NZLR 861.
658. See section 43 of the Summary Offences Act 1981. These statutory exemptions will continue to apply despite section 24(e) by virtue of section 4 of the Bill of Rights Act. See *Birch v Ministry of Transport* (1992) 2 CRNZ 83, 86.
659. See generally the provisions of the Juries Act 1981.
661. *R v Lee* [1989] 2 SCR 1384. Note that the Court was divided as to whether the limit on the right to elect trial by jury was justifiable in terms of section 1 (our section 5) of the Charter. The majority held that it was.
667. The Legal Services Act refers to the "gravity of the offence" rather than complexity of the legal issues although see *Turton v R* CA38/02 17/2/03 where one of the accused was able to establish that there was a material misdirection to the jury in relation to her responsibility as a party where she was unrepresented.
669. *Darvell v Auckland District Legal Services Subcommittee* [1993] 1 NZLR 111, 128. See also the comments of the trial judge referred to with approval by Williams J in Darvell at 118.
673. Section 8(2)(b)(ii) of the Legal Services Act refers to "any other circumstances that, in the opinion of the Agency, are relevant". The decision of the Court of Appeal in *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 has since been overruled by the Privy Council in *Taito v R* (2002) 19 CRNZ 224; (2002) 6 HRNZ 539. Prior
to the enactment of the Legal Services Act 2000, the Court of Appeal considered applications for legal aid on the merits of the appeal.


675. Those circumstances being where "the Attorney-General certifies that a question of law of exceptional public importance is involved and that the grant of aid is desirable in the public interest". See sections 6(b) and 7(1)(c)(ii) of the Legal Services Act.


678. See section 4 of the Maori Language Act 1987. Section 4 provides that any party to a proceeding may speak Maori but there is no requirement that other parties address that person in Maori.


Section 25: Minimum standards of criminal procedure -

Section 25 of the Bill of Rights Act is as follows:

**Minimum standards of criminal procedure**
Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

a. The right to a fair and public hearing by an independent and impartial court:

b. The right to be tried without undue delay:

c. The right to be presumed innocent until proved guilty according to law:

d. The right not to be compelled to be a witness or to confess guilt:

e. The right to be present at the trial and to present a defence:

f. The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution:

g. The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty:

h. The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:

i. The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

**Policy Triggers: do I need to consider section 25?**

Are you developing policy creating or amending

- criminal offences?
- criminal penalties?
- criminal procedures?

OR
Are you developing policy of a regulatory nature that creates or amends offence or penalty provisions or policy that imposes disciplinary sanctions and

- The offences are, by their very nature, of a criminal character, or
- The offence carries a penalty of imprisonment or a fine that is intended to indicate that the conduct was socially harmful?

If your response to any of these questions is "yes" then it is likely that the proposal you are working on will raise issues of consistency with section 25 and the rights contained in that section.

If, on the other hand you answer "no" to the above questions, but your policy still seeks to establish a regime with civil or administrative penalties, you should still go on to consider whether your policy is consistent with the right to the observance of the principles of natural justice, as found in section 27(1) of the Bill of Rights Act.

**What every policy analyst needs to know about section 25**

- Section 25 is concerned with rights related to criminal procedure regardless of the seriousness of the offence.
- Section 25 may also apply to regulatory offences.
- The word "offence" in section 25 is not qualified by reference to "criminal activities" that are prosecuted through the ordinary criminal courts. [686]
- Although criminal offending would appear to be the principal context within which the rights in section 25 would be applied, offences other than criminal offences (such as military offences) might come within the meaning of "offence" for the purposes of section 25. This is more likely to be the case if the resulting penalty (whether a fine or imprisonment) is punitive and/or intended to act as a deterrent to prevent future offending.
- Section 25 applies to all stages of the process, from the pre-trial hearing to the completion of the appeal process. This is indicated by the words "in relation to the determination of the charge".
Methods to increase the compliance of your policy with section 25

In the development of any policy that may raise issues of consistency with section 25, consider:

- The nature of the conduct that you are seeking to regulate or the harm that you are seeking to address via offences or penalties.
- Whether the interests of persons charged with the offence are adequately recognised and taken into account.
- The impact that the policy or practice may have on the public’s perception of the way in which justice is administered.
- If you are considering developing a new offence, you should refer to the Legislation Advisory Committee Guidelines (Guidelines on Process and Content of Legislation). This publication contains a useful chapter on criminal offences, which sets out other relevant considerations when developing offences. [687]

Related rights and freedoms

Many of the rights in section 25 are inter-related. You should therefore consider if more than one of the rights in section 25 is triggered by an issue of inconsistency. If you are developing policies or practices that you think might give rise to issues of compliance with section 25, you should also consider whether those practices are consistent with the other rights governing criminal offences, including:

- the rights of persons arrested or detained (section 23)
- the rights of persons charged with an offence (section 24)
- retroactive penalties and double jeopardy (section 26).

Aside from those considerations, think about whether those policies or practices are consistent with:

- the right to the observance of the principles of natural justice (section 27(1)).

Further discussion on the meaning of section 25

The word "offence" in section 25 is not qualified by reference to criminal activities. An offence is generally conceived of as being an act punishable
under criminal law. Section 2 of the Crimes Act 1961 defines an offence to be "any act or omission for which any one can be punished under this Act or under any other enactment, whether on conviction on indictment or on summary conviction." It would appear that the courts in New Zealand, for the purposes of applying section 25, would generally interpret the word "offence" consistently with this definition as section 25 is primarily concerned with criminal procedure rights regardless of the seriousness of the offence. The Court of Appeal in *Daniels v Thompson* [1998] 3 NZLR 22 (CA) adopted the approach that the Canadian Supreme Court has taken in respect of the prohibitions against double jeopardy; that is the protection against double jeopardy only applies in respect of a further criminal prosecution for a criminal offence for which the accused has already been convicted or acquitted. [688]

However, there are indications that the Courts might not apply such a strict definition in respect of sections 24 and 25 of the Bill of Rights Act. The Court of Appeal in *Drew v Attorney-General* (No 2) (2001) 18 CRNZ 465 (CA) was asked to consider whether disciplinary offences in prisons were of sufficient character to meet the definition of an offence for the purposes of sections 24 and 25 of the Bill of Rights Act. The Court of Appeal did not reach a finding on this matter but left a clear signal to suggest that offences other than criminal offences might fall within the definition. [689] Military offences are likely to be considered to be an offence for the purposes of section 25.

Although criminal offending would appear to be the principal context within which the rights in section 25 would be applied, the courts in Canada have given extensive consideration to the equivalent provision in the Canadian Charter. The Canadian Supreme Court has stated that the ambit of section 11 of the Charter is slightly broader than just criminal offences - a matter could fall within the scope of the provision if, because of its nature it is a criminal proceedings or because a conviction in respect of the offence may lead to a penal consequence (for example, imprisonment or a substantial fine)

The discussion in these guidelines on the scope and application of section 24 of the Bill of Rights Act traverses these issues in more detail.

**Key cases**

History of the section

The White Paper

The rights set out in section 25 as minimum standards of criminal procedure were contained in Articles 16, 17, and 18 of the proposed Bill of Rights Act as it appeared in the White Paper. However, these were re-organised into four main sections - sections 23, 24, 25 and section 26 in the Bill of Rights Act without any discussion.

Section 25 (a) The Right to a Fair Trial

Section 25(a) of the Bill of Rights Act is as follows:

Fair trial
Everyone who is charged with an offence has, in relation to the determination of the charge, the right to a fair and public hearing by an independent and impartial court.

Policy Triggers: do I need to consider section 25(a)?

- Are you developing policies or practices amending the way in which evidence is presented in a court or tribunal?
- Are you developing special procedures to provide safeguards for witnesses when testifying in court?
- Are you developing policy or practices that will regulate the way in which the media is able to report on trials or pending court cases or other hearings?
- Are you developing policies or practices concerning the way in which juries are selected?
- Are you amending policies or practices governing legal aid?
- Are you seeking to amend the procedure allowing for a change of trial venue?
- Are you developing policy that creates new offences or amends existing offence or penalty provisions allowing enforcement officers to issue infringement offence notices with "instant" fines for breaches of legislation?
If your response to any of these questions is "yes" then it is likely that the proposal you are working on will raise issues of consistency with section 25(a) and the right to a fair trial.

**What every policy analyst needs to know about section 25(a)**

**Fair trial**

- Consideration of whether a person has received a fair trial involves an assessment of a range of factors, many of which are individually identified in section 25.
- What constitutes fairness will require a weighing of a number of public interest factors including the rights of the accused and the victim.
- The right is concerned with the quality of the trial process rather than the merits of the decisions of tribunals and courts.
- An assessment of whether any trial is fair will need to consider whether the trial procedures strike an appropriate balance between the legitimate interests of the state in having allegations of criminal offending prosecuted and the broader public interest in ensuring that an accused receives a fair trial.

**Public hearing**

- The right to a public hearing is in accord with the principles of open justice.
- The right to a fair trial may require that certain information is withheld from the public.

**Impartiality**

- Proceedings must be free from bias and the objective perception of bias.
- Impartiality does not mean that the Court or jury would have to have no knowledge of the accused or the circumstances of the complaint.
Independence

- The independence of tribunals and courts is needed to enable judges and others acting in a judicial capacity to act without fear of interference.
- The independence of the tribunal and courts is to preserve the integrity of the decision-making process.
- There are three essential ingredients pointing to the independence of courts and tribunals and those performing adjudicative functions. These are:
  - security of tenure for adjudicators;
  - financial security;
  - administrative autonomy.

Measures to achieve compliance

In the development of any policy that may raise issues of consistency with the right to a fair and public hearing or independence and impartiality of the court, consider:

- Whether and to what extent the interests of the accused, the interests of the complainant, and the interests of the community are addressed.
- Whether there is an appropriate balance between the legitimate interests of the state in having allegations of criminal offending prosecuted and the broader public interest in ensuring that an accused receives a fair trial.
- The impact that the change in policy or practice may have on the public's perception of the way in which justice is administered.
- Whether there are any persuasive reasons why a hearing should not be held in public.
- Whether decision-makers and adjudicators are likely to be sufficiently impartial to conduct of proceedings.
- Whether there are adequate opportunities for shifting the venue of the proceeding where it is considered that this is necessary to preserve the impartiality of the court.
- Whether the policy will maintain the independence of the court or tribunal by preserving rules relating to tenure and appointment of adjudicators, or the way in which institutions are funded.
Related rights and freedoms

If you are developing policies or practices that you think might give rise to issues of compliance with the right to a fair trial, you should also consider whether those practices are consistent with the remaining rights governing criminal procedure in section 25(b) - (i). Aside from those considerations, think about whether those policies or practices are consistent with:

- the right to freedom of expression (section 14);
- the right to the observance of the principles of natural justice (section 27(1)).

Further discussion on the meaning of section 25(a)

What is a fair trial?

The idea of a fair trial is central to human rights doctrine, not only as a right in itself, but because without this one right, all the others are at risk; if the state is unfairly advantaged in the trial process, it cannot be prevented in the courts from abusing all other rights. [690]

Section 25(a) of the Bill of Rights Act reflects the common law principle of a right to a fair trial. What constitutes a fair trial cannot be stated with precision because what is "fair" will frequently depend on the facts of the particular case. [691] The right to a fair trial though, is concerned with the quality of the trial process rather than the merits of the decisions of tribunals and courts. [692]

Access to the courts

The right to a fair trial ensures that a person who is charged with an offence is able to contest the allegation before an impartial and independent decision-making body. The accused needs to be able to have access to the courts for this purpose. The courts in New Zealand do not appear to have considered whether section 25(a) provides a right of access to the courts. However, this matter has been considered in Europe. Although Article 6 of the European Convention contains no express right of access to a court, the Court in Golder v UK [693] held that it would be 'inconceivable' that Article 6 should not first protect that which alone makes it possible to benefit from such guarantees, namely access to a court. That is, a right to access to the courts, subject to reasonable limits, is the doorway through which the remaining rights of criminal procedure may be invoked. [694]
The European Court has said that while the right of access to a court might be subject to limitations-

...the final decision as to the observance of the convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with art 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved ... [695]

Equality of arms

Whether section 25(a) also provides for equality of arms (that is, that a defendant in a criminal trial is placed on an equal footing with the prosecution) has been briefly considered by the courts in New Zealand. However, the courts have yet to consider whether it applies in the context of the right to a fair trial or the possible scope of the concept. [696]

The courts in Europe have considered that the principle of equality of arms between the defence and prosecution is an integral part of a fair trial. The Court in Brown v Stott [697] cited with approval the decision in Fitt v UK [698] which set out the reasoning for this as follows:

It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party...

An assessment of a range of factors

Despite this, the broad scope of section 25(a) remains evident as it is seldom referred to without consideration of at least one of the other rights in the section. Consideration of whether a person has received a fair trial involves an assessment of a range of factors. Many of these factors are individually identified in section 25. The European Commission on Human Rights has described the role of other rights in section 25 this way:

They exemplify the notion of a fair trial ... but their intrinsic aim is always to ensure, or to contribute to ensuring, the fairness of the criminal proceedings
as a whole. The guarantees enshrined in [the equivalent of sections 25(b) - (i)] are therefore not an aim in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings.

It is also possible that factors other than those expressly included in section 25 (such as the failure to fully disclose relevant information prior to trial) may be considered if their presence or absence contributes to a risk of a miscarriage of justice or otherwise have an effect on the fairness of a trial.

Although it is therefore fair to say that, if one of the other rights in section 25 has been breached then it is likely that section 25(a) has also been breached, compliance with the individual rights contained in sections 25(b) - (i) may not always ensure fairness.

Public interest factors

The New Zealand caselaw suggests that what constitutes fairness will require a weighing of a number of public interest factors such as: the interests of the accused; the interests of the complainant; and the interest of the community to have "allegations of serious criminal activity prosecuted". [699] This weighing process can perhaps be best illustrated by way of an example. The right to cross-examine the witnesses for the prosecution is considered an important ingredient of a fair trial as it provides the defence and the court with an opportunity to test the veracity of the witnesses' evidence, particularly where the witnesses' evidence is crucial to the prosecution's case. [700] However, where a witness is unable to give evidence in court (for example if a witness dies before the proceedings take place), any written or recorded testimony by that witness may be submitted in evidence. The evidence may be admissible if the evidence is considered to be inherently reliable and trustworthy. [701]

Special procedures may be appropriate in cases where it is not in the public interest to require witnesses to testify in open court. However, such procedures may only be permissible where the defendant or his or her counsel can test that evidence. For example, witness screens or video tapes presenting the evidence of children under 17 years of age can be used in sex abuse cases. [702] There are also a number of common law mechanisms to protect witnesses and complainants in cases involving sexual offences. However, although the courts have employed these methods as a way of "getting to the truth" they have also been diligent in ensuring that the right of the accused to a fair trial is preserved. [703]
**Why hearings should be public**

Not only should justice be done, it should be seen to be done. The requirement for a hearing to be held in public is therefore in accord with the principles of open justice. [704] That the media and the public should have free access to the courts is implicit in the provisions of the Criminal Justice Act. [705]

Lord Diplock in *Attorney-General v Leveller Magazine Ltd* [706] set down the rationale for the requirement for open justice:

As a general rule the English system of administering justice does require that it be done in public: *Scott v Scott* [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

Thomas J in *Police v O'Connor* [707] discussed the public nature of a trial in some detail. After citing the above statement from Lord Diplock he said:

[708]

The conduct of proceedings in open Court, to which I would add the freedom of reporting such trials, provides an assurance to the wider public that justice is being administered openly and under public scrutiny...

In a real sense, the fact that the Courts are open to the public, and that proceedings may be freely reported in the media, is the method by which Judges remain answerable to the public.

There are, however, occasions where restrictions on the media or the public's ability to gain access to the courts or information before the courts is necessary to facilitate a fair trial. As Thomas J pointed out in *O'Connor*, [709] "the principle of open justice must be balanced against the objective of doing justice."
Public hearings and the presumption of innocence

Restrictions on the ability of the media to report matters coming before the courts may also be necessary to ensure that the court remains impartial and the presumption of innocence is maintained. [710]

Name suppression is possibly one of the more common examples of where the courts restrict the media's right of access to information. [711] Name suppression orders are available where the possible harm to the accused or to associates or family of the accused outweighs the advantages that accrue to the public as a result of disclosure. [712] The courts have been careful to ensure that the application of suppression orders do not accrue beyond those situations where there is evidence of special harm. [713] The Court of Appeal, when considering whether the name of an "extraordinarily successful businessman, community leader and philanthropist" should continue to be suppressed on account that the public interest in him was "undue", said: [714]

The Court cannot enter into assessment of whether media or public interest is appropriate or "undue"...in the absence of identified harm from the publicity which clearly extends beyond what is normal in such cases, the presumption of public entitlement to the information prevails. Any other approach risks creating a privilege for those who are prominent which is not available to others in the community and imposing censorship on information according to the Court's perception of its value.

Section 138 of the Criminal Justice Act confers on the courts the power to suppress a wide range of information if, in the court's view, suppression is necessary in the interests of justice, or public morality, or the reputation of any victim of any alleged sexual offence or offence of extortion, or the security or defence of New Zealand. [715]

Even then, where possible, the effect of section 25(a) demands that the interests of the public may still be able to be accommodated to the fullest extent practicable. [716] In Tukuafu v R Chambers J held that: [717]

In the interest of a fair trial, various prejudicial matters about an accused may quite legitimately need to be suppressed. Generally speaking, once a trial is over, the balance tilts the other way... [718]

It would therefore appear that the duration of name suppression would depend on the need for name suppression. If name suppression is needed in order to preserve the interests of a fair trial, then name suppression may be
lifted at the completion of the proceedings. However, name suppression may be permanent where the interests of the parties to the proceedings need to be protected beyond the completion of proceedings (for example, to protect the identity of a victim of a sexual offence).

**Impartial courts**

Courts and tribunals are required to be impartial in order to ensure that they are free from bias. Courts and tribunals should therefore be independent from the other branches of government (see below). Adjudicators - including juries - are also required to be impartial. On a robust reading of the requirement that the court is impartial, the courts have said that such a requirement does not mean that the court or jury would have to have no knowledge of the accused or the circumstances of the complaint. Section 322 of the Crimes Act 1961, which is strengthened by the right to a fair trial, provides for a procedure allowing for a change of trial venue where a change of venue can be sought and granted because of concerns that media coverage may affect the impartiality of any jury. [719] However, the courts have observed that:

It is not possible to obtain a human tribunal which is totally devoid of any preconceptions or ideas which are sometimes referred to as prejudice...including ones which may be subtle or inbred but, once aware of the possibility and conscious need to act independently and impartially, the Judge or juror is capable of weighing the relevant issues and reaching a just conclusion. In the view of our modern society there can be no guarantee that jurors will be unaware of the facts of a particular case.

**Independence**

Courts and tribunals are required to be independent from the other branches of government in order to preserve the appropriate constitutional checks and balances in our democracy.

The independence of courts and tribunals are likely to be determined with reference to the following: [721]

i. tenure of office - judges and others serving in the courts and tribunals should only be able to be removed from their positions for reasons relating to their ability to perform the functions of the position;

ii. financial security - the level of remuneration provided to judges and other persons serving in a judicial capacity should be set by an
independent body and at a sufficiently high level to minimise the possibility of corruption; and

iii. institutional autonomy - courts and tribunals should be able to independently arrange the functions of the institution.

Key cases


History of the section

_The White Paper_

The provision as originally proposed in the _White Paper_ provided that everyone charged with an offence has the right to a fair and public hearing by a competent, independent, and impartial court.

The phrase "competent" was omitted from the final version of the Bill on the grounds that it was not considered to enhance the guarantee of independence and impartiality. Submissions were also made to the Select Committee that the word "competent" may enable arguments to be made on the basis of the calibre of the judge or jury dealing with a particular matter. [722]

Section 25(a) origins in international treaties and overseas legislation

Article 14(1) of the ICCPR provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... [723]
Article 10 of the UDHR provides that:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights and obligations and of any criminal charge against him.

Section 11(d) of the Canadian Charter provides:

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Article 6(1) of the European Convention on Human Rights states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

Section 25(b) Right to be tried without undue delay

Section 25(b) of the Bill of Rights Act is as follows:

**Undue delay**
Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be tried without undue delay

**Policy Triggers: do I need to consider section 25(b)?**

Although it is unlikely that the policy or practice that you are working on will, of itself, give rise to issues of inconsistency with this right, the implementation of this policy or practice might have practical implications for the courts. So:

- Are you developing new practices or procedures for the management of caseloads in the courts?
- Are you developing policies that may increase the workloads of the courts by, for example, creating a range of new criminal offences where the conduct has previously been dealt with by an administrative tribunal?
• Are you developing policies or practices that may reduce the number of tribunals or limit the range of persons who are able to act in a judicial capacity?

• Are you developing practices concerning procedures for the investigation and prosecution of offences?

What every policy analyst needs to know about section 25(b)

• The right to be tried without undue delay seeks to protect interests other than the right to a fair trial, including the liberty interest of the accused, the preservation of public confidence in the administration of justice, and to prevent unnecessarily prolonged detention or control.

• The right to be tried without undue delay applies once a person has been officially accused of an offence, and complements principles against abuse of process.

• This right is narrower than the courts' power to discharge an accused person under section 347 of the Crimes Act 1961 or the courts' common law power to stay proceedings as an abuse of process. For example, both of those powers can be used if there is delay before or after a person is officially accused.

• The New Zealand Courts have been willing to consider whether any delays in the pre-charge period have meant that delays in the post-charge period are "undue".

• The New Zealand Courts have not yet considered whether this right includes the right to be sentenced within a reasonable time.

• Delay may be caused by a variety of factors including actions by the Crown, the accused, the court system or the intricacies of the offence itself, but lack of resources may not be an acceptable explanation by itself for the delay.

• While an accused person may waive his or her right to be tried without undue delay, their consent must be a fully informed decision and must be made express.

• The prejudice that accrues to the accused as a result of the delay may be a decisive factor in determining whether a delay is undue, particularly where there is no one contributing factor causing the delay.
Measures to achieve compliance

If you are developing policy that will affect the caseloads of the courts or that relates to the management of caseloads, consider:

- The additional funding needed to effectively implement the changes.
- The implications for the courts if those policies are implemented without the required level of funding.
- Whether penalties, other than those imposed by a court, are an adequate means of addressing the conduct that you are attempting to sanction.

If you are amending the laws relating to the granting of bail:

- ensure that there are adequate protections built into the legislation to enable a person held on remand to apply at suitable intervals for bail; or
- if the person is on bail, adequate opportunity to seek a review of bail conditions.

These measures may help minimise the effects caused by delays in holding proceedings.

Related rights and freedoms

When considering whether your policy or practice is consistent with section 25(b) you should also consider whether it is consistent with:

- the right to a fair and public hearing by an independent and impartial tribunal (section 25(a));
- the right to be presumed innocent until proven guilty (section 25(c));
- the right to the observance of the principles of natural justice (section 27(1)).

Further discussion on the meaning of section 25(b)

In *Martin v Tauranga District Court* Casey J stated: [725]

... the early trial objective of para (b) is aimed at the perceived affront to human dignity caused by drawn-out legal process, as recognised over the
centuries in those jurisdictions acknowledging the worth and liberty of the individual.

Objectives of section 25(b)

Section 25(b) serves three purposes. Firstly, it ensures that persons charged with an offence are afforded a fair trial. Delays in the trial process may lead to a miscarriage of justice as witnesses' memories of events fade or they no longer remain available to testify for whatever reason. Secondly, delays to the start of a trial may mean that an accused is held in custody or subject to stringent bail conditions for a longer period than necessary. And thirdly, section 25(b) seeks to preserve an individual's security or liberty interest. That is, the courts have acknowledged that lengthy delays may have an impact on an individual's sense of certainty about his or her future, even if they are not held in custody. The independence of the liberty interest was identified in *Hughes v Police* where Gallen J stated: [726]

The Courts have accepted the pressures and personal consequences arising from an extended delay on the person subjected to such delay, can of themselves amount to prejudice for the purposes of an abuse of process application, even where they are not seen as directly impinging upon the ability of the person concerned to defend him or herself.

These interests have been said to apply to corporations in the context of regulatory offences as well as individuals who are charged with what are known as truly criminal offences. [727]

The European Court of Human Rights has also included a fourth consideration: the desire to avoid delays which might jeopardise the effectiveness and credibility of the administration of justice. [728]

Scope of section 25(b)

Section 25(b) is said to be narrower in application than section 347 of the Crimes Act 1961 (which sets out the power of a court to discharge an accused) or the common law power of the superior courts to stay proceedings as an abuse of process. Undue delay in the context of s25(b) is concerned with delay after a charge is laid whereas the existence of delay before the charge can be considered in deciding whether there has been abuse of process. Pre-trial delay giving rise to an abuse of process is likely to give rise to consideration as to whether the accused would receive a fair trial. [729] The scope of section 25(b) is broader than what may otherwise be the case.
because the courts have been willing to consider whether any delays in the pre-charge period have meant that delays in the post-charge period are "undue". Also the word "charge" under section 25(b) has been defined by the courts to refer to "the first official accusation". [730]

The UN Human Rights Committee has also said that the guarantee in article 14(3)(c) of the ICCPR relates not only to the time by which a trial should commence, but also the time by which it should end and judgement rendered. While the issue of delays in sentencing has not been considered by the New Zealand courts, the Supreme Court of Canada has held that the right to be tried without unreasonable delay also includes the right to be sentenced within a reasonable time. [731] The Court considered that extending the scope of section (11)(b) of the Canadian Charter to delays in sentencing protected the same interests as trial delays.

Factors leading to the delay

In fixing the period of delay that is reasonable, the Supreme Court of Canada has distinguished four types (reasons) of delay: (1) delay that is inherent in the proceedings; (2) delay that is attributable to the Crown; (3) delay that is attributable to the accused; and (4) delay that is institutional or systemic to the court system. [732]

In R v Dodunski Nicholson J reviewed the state of law in New Zealand on section 25(b) and stated: [733]

What constitutes undue delay such as to breach an accused person's right under s25(b) will depend on all the circumstances. Aspects of the lapse of any significant time may be attributable to different matters. No one matter will necessarily be dominant. The overall length of time must be considered in light of the nature of the charges, whether the liberty of the accused has been curtailed, the steps taken in the proceedings, whether the accused has contributed to, or acquiesced in, the delay and the overall circumstances of the case.

When is delay undue?

The leading case on what constitutes undue delay in New Zealand is Martin. The Court of Appeal provided support for the reasoning in the Supreme Court of Canada decision in R v Morin. [734] The key considerations in considering whether a delay was undue should be:
1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including:
   a. inherent time requirements of the case;
   b. actions of the accused;
   c. actions of the Crown;
   d. limits on institutional resources; and
   e. other reasons for delay, and
4. prejudice to the accused.

Even though an accused may be said to have waived their rights to be tried without undue delay by agreeing to or requesting adjournments to proceedings, the courts have said that the waiver must be "clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights". [735] In other words, the consent to the waiver must be informed and made express.

**Causes of the delay**

The reasons for the delay are also significant. The courts are less likely to find that a delay in trial is undue where the trial raises matters of significant complexity or involve a lot of witnesses. The UN Human Rights Committee observed "that investigations into allegations of fraud may be complex and the author [needs to show] that the facts did not necessitate prolonged proceedings". [736] Any contribution that the accused makes to the delay is also of consequence as it suggests that the impact of the delay on the accused is not significant.

Although a delay caused by lack of resources is not of itself reason to find the delay was undue, [737] the United Nations Human Rights Committee has said that economic hardship or availability of resources does not excuse a State from full compliance with article 14 of the ICCPR, because they are minimum standards that all States have agreed to observe. The courts in New Zealand have also indicated that they will not necessarily accept a lack of resources as an adequate reason for explaining a delay. [738] However, the courts may take into consideration the steps that the Crown has taken to address causes of systemic delay when assessing whether any delay is unreasonable.
Prejudice caused by delay

The prejudice caused to the accused by the delay is likely to be of great significance. This is particularly the case where the accused is held in custody pending trial, or is subject to stringent bail conditions. [739]

Key cases


History of the section

*The White Paper*

The *White Paper* proposed that the equivalent provision to section 25(b) should contain reference to "undue" as opposed to "unreasonable" delay.

*Section 25(b) origins in international treaties and overseas legislation*

Article 14(3)(c) of the ICCPR states:

In the determination of any criminal charge against him, everyone shall be entitled in full equality, to be tried without undue delay.

Section 11(b) of the Canadian Charter provides that:

Any person charged with an offence has the right to be tried within a reasonable time.

Article 5(3) of the European Convention on Human Rights provides that:

Everyone arrested or detained shall be brought promptly before a judge or other authorised officer and shall be entitled to trial within a reasonable time or to release pending trial.

Article 6(1) of the Convention provides that:

In the determination of his civil rights or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law.
Section 25(c) The right to be presumed innocent until proved guilty

Section 25(c) of the Bill of Rights Act is as follows:

Presumption of innocence
Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.

Policy triggers: do I need to consider section 25(c)?

Are you drafting offence provisions that contain any of the following features?

Presumptions

- Presumptions (presumed facts) where there is an evidential burden on the defendant to rebut the presumption and thereby put the burden of proof back on the prosecution.
- Presumptions which impose a persuasive burden on the defendant to displace the presumption.
- Irrebuttable presumptions, which cannot be displaced at all.

Reverse onus provisions

- Where the offence provides that a qualification, proviso, excuse or other defence is to be established by the defendant.
- Where there is a statutory defence relating to an element of the offence.
- Where there is a statutory "absence of fault" defence which must be proved by the defendant on the balance of probabilities.
- A summary offence that contains reference to a qualification, proviso or excuse.

Or, do you intend to:

- Alter the criteria under which an accused person may apply for bail?
- Amend the conditions under which a person can be released on bail?
If your answer is "yes" then your policy might give rise to issues of consistency with section 25(c) of the Bill of Rights Act.

- Offence provisions that require the defence to disprove some element of the offence in order to avoid conviction are referred to as reverse onus provisions because they place the burden of proof on the defendant to free themselves from blame. As reverse onus provisions may lead an accused person to be convicted despite the existence of a reasonable doubt as to their guilt, they are likely to infringe against the presumption of innocence - the question is then whether these provisions are justifiable.

**What every policy analyst needs to know about section 25(c)**

- Section 25(c) reflects the fundamental common law rule that every person has the right to be presumed innocent until proven guilty. The rule ordinarily requires that: (1) the burden of proving guilt rests with the state; (2) guilt should be proved beyond reasonable doubt and (3) the matter to be proved is guilt, which means that the offence should not ordinarily cover conduct that involves no moral fault. [740]
- The most common statutory exceptions to the presumption of innocence include strict liability offences (reverse onus provisions), offences containing presumptions (of fact or law) and statutory defences to be proved by the defendant (see above).
- Statutory limitations to 25(c) need to be justified in terms of section 5.
- When interpreting an offence provision the courts will require the prosecution to prove all elements of the offence unless there is clear language to the contrary.
- Summary offences that contain an exception, exemption (etc) in effect contain a reverse onus provision that places a burden of proof on the defendant by virtue of section 67(8) of the Summary Proceedings Act (see below).
- Public welfare regulatory offence provisions that reverse the onus of proof are more likely to be justifiable where the penalty levels are at the lower end of the scale.
- Evidential burdens and mandatory presumptions that require an accused person to displace some statutory presumption may infringe
against the right even though the accused may not be required to establish their innocence to a particular standard of proof.

- The presumption of innocence may necessitate the granting of name suppression where it is considered that there is a significant risk that an accused person would otherwise not receive a fair trial.
- The presumption of innocence also requires that the accused person be released on bail unless there is sufficient public interest in that person being held in custody prior to trial.

**Measures to achieve compliance**

Where possible, offence provisions should be drafted so that they are consistent with the right to be presumed innocent until proven guilty. [741] Offences complying with the presumption require the prosecution to prove two things: (1) that defendant caused the prohibited act (actus reus) to take place and, (2) that he or she intended the act, or was reckless as to whether it would occur or knew what the consequences of their action would be (mental element or mens rea). [742] In other words the prosecution must prove the prohibited act and an associated guilty mind.

In general terms, offence provisions are likely to infringe against the presumption of innocence where the prosecution is not required to prove the actus reus and mens rea elements of the offence beyond all reasonable doubt. This is because a defendant's failure to discharge an onus of proof or rebut an evidential burden or prove an absence of fault will permit their conviction even where doubt may exist as to their guilt.

An offence provision that creates any departure from the presumption of innocence requires justification under s.5. If you are developing such provisions, there are a number of factors that you need to consider:

1. the nature and context of the conduct that you are attempting to regulate;
2. the reason why you want the defendant to provide evidence or prove on the balance of probabilities that they were not at fault;
3. the ability of the defendant to exonerate themselves; and
4. the penalty level that you wish to impose.
These factors are considered in turn below.

1. **The nature and context of the conduct that you are attempting to regulate.**

**Public Welfare Regulatory Offences**

The Courts have generally accepted that there is a distinction between "truly criminal offences" and offences that are considered to be in the realm of "public welfare regulatory offences" ("regulatory offences"). [743]

The distinction was explained by Cory J in *Wholesale Travel* this way: [744]

The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of *otherwise lawful activity*. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. (emphasis added)

There is an argument that this distinction is relevant in considering the right to be presumed innocent. The basic tenet of the argument is that a regulatory regime exists to protect the wider values of the public and this important objective may provide some justification for a reverse onus of proof.

**Licensing Regime offences**

A related argument may be put forward in relation to licensing regimes which contain offences for non-compliance. The argument goes that those who choose to participate in the licensed regime (e.g. transport service licensing) have knowingly accepted the enhanced standards of behaviour required of them and the reverse onus of proof is therefore justified. This "licensing" argument was described by Cory J in *Wholesale Travel* as: [745]

...rest[ing] on the view that those who choose to participate in regulated activities have, in so doing, placed themselves in a responsible relationship with the public generally and must accept the consequences of the responsibility. Therefore, it is said, those who engage in regulated activity should ... be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere.
If you intend to strictly regulate certain types of activity, particularly commercial activity (such as the sale of alcohol, tobacco or motor vehicles) then it is more likely to be justifiable to require participants in that field to provide explanations as to why they have infringed the specific conditions therein.

Similarly, persons who participate in activities that carry with them risks to public health and safety or take place in a situation of significant social or public interest, then that person should be expected to meet certain expectations of care. The argument runs that if they are unable to meet those predetermined standards, then they should be required to show why they were not at fault.

**Truly criminal offences**

Criminal offences are those offences that involve activity which contains an element of moral fault and that are aimed at punishing wrongdoing rather than preventing future harm. Notwithstanding the rule of the presumption of innocence, criminal provisions may be drafted containing statutory limitations on s25(c) in some circumstances by, for example, containing presumptions of fact or a statutory defence to be proved by the defendant. In assessing whether such provisions are a justified limitation on the section 25(c) right, the courts have considered the nature and context of the specific offences and whether the presumption is relevant, rational and proportionate to the objective served by the offence provision itself.

By way of example, legislation that provides for the prevention of misuse of drugs frequently include provisions that impose a burden on defendants to disprove an intention to supply where the defendant has been found in possession of a quantity of the prohibited drug. The Canadian Supreme Court in *R v Oakes* [746] considered such a provision in the Narcotic Control Act which provided that, upon possession of drugs, a defendant is required to prove that she or he was not trafficking the drug. While the court held that the objective of the law - protecting society from the 'grave ills' of drug trafficking - was laudable, the provision was not rationally connected to that objective. This was because the reverse onus provision operated once it was proved that the accused possessed any quantity of the drug. By comparison, the New Zealand Court of Appeal considered that a similar provision in the Misuse of Drugs Act, which imposed a burden on the defendant to disprove an intention to supply where the defendant had been found with more than a specified quantity of drug, was consistent with section 25(c). This is because
the specified quantity of the drug was viewed as a rational threshold to impose. [747]

2. The reason why you want the defendant to provide evidence or prove on the balance of probabilities that they were not at fault.

Is there something about the nature of the offence that makes it impracticable for the prosecution to prove the traditional elements of the offence (mens rea and actus reus)?

Although the Court of Appeal has noted that in the case of regulatory/licensing offences it may be easier for the defendant to point to information explaining why they acted in a particular manner, [748] the same could be said for all criminal offending. After all, the person accused of murder knows, better than anyone, whether they intended to kill the victim or not. For this reason, simply categorising an offence as a regulatory or licensing offence is not sufficient justification for a reverse onus or presumptive offence.

However, where the offence turns on a particular matter that is peculiarly within the knowledge of the defendant, there may be reasons why it is reasonable to expect the defendant to either point to it or prove it. The conduct and the context within which the alleged offending took place are particularly relevant factors to consider as is the availability of exculpatory evidence.

Provisions requiring a defendant to simply provide evidence (known as an evidential onus) in reply to the prosecution case rather than actually prove a fact or defence (a persuasive onus) will be easier to justify. [749] This is because it will be easier for the defendant to discharge the requirement in the first instance. However, such a provision may still be inconsistent with s25(c) if the effect of it is that, in the absence of any evidence from the defendant, they can be convicted without the Crown proving all elements of the offence in the usual way.

3. The ability of the defendant to exonerate themselves.

You may assume that it will be easy for defendants to explain why they behaved in a particular manner or to provide relevant evidence to support a claim that they acted without fault. However, this is not always the case. It is not always possible for the defendant to produce documents or other objectively assessable information that can be used as evidence. A reverse
onus or presumption provision may not be justifiable if it is going to be impracticable or impossible for the defendant to make out a valid defence.

So, before deciding that a defendant should be required to provide or prove particular evidence, consider whether the relevant information or evidence would in fact be practically available to him or her. How easy would it be for him or her to obtain this information? How complex is the material?

4. The penalty level that you wish the courts to impose.

As a general principle, offences where the prosecution is not required to prove both the actus reus and the mens rea should carry penalties at the lower end of the scale for that type of offence. As imprisonment over 1 year is usually a penalty associated with indictable offences, offences with terms of imprisonment for longer periods are generally considered to require the prosecution to prove all the elements of the offence beyond reasonable doubt.

The Canadian Supreme Court in R v Wholesale Travel Group [750] has considered that imprisonment for a regulatory offence is justifiable as the stigma associated with imprisonment for a regulatory offence is less than that for a truly criminal offence. However, while an offence that reverses the burden of proof and contains a penalty of a term of imprisonment may, in limited situations, be justifiable, the penalty must be clearly associated with the seriousness of the offence and the importance of the objective to which the offence is aimed.

Related rights and freedoms

When considering whether the policy or practice that you are working on complies with the right to be presumed innocent, also consider:

- the right to freedom of expression (section 14);
- the right of every person charged with an offence to be released on reasonable terms and conditions unless there is just cause for continued detention (section 24);
- the right to a fair trial (section 25(a));
- the right to the observance of the principles of natural justice (section 27(1)).
Further discussion on the meaning of section 25(c)

The common law principle

Section 25(c) confirms the basic common law principle that it is for the prosecution to prove all the elements of the offence, and thereby the guilt of the accused, beyond reasonable doubt. The obligation requires the prosecution to prove, beyond reasonable doubt, that the defendant committed the prohibited act (by act or omission) with a particular state of mind (i.e. intentionally, deliberately, knowingly or recklessly).

The principle was explained in *Woolmington v DPP* [751] by Viscount Sankey:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject ... to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner ... the prosecution has not made out its case and the prisoner is entitled to an acquittal ... the principle that the prosecution must prove the guilt of the prisoner is part of the common law and no attempt to whittle it down can be entertained.

The decision in *Woolmington* emphasises that the presumption of innocence ought not to be eroded as a common law doctrine. Section 25(c) of the Bill of Rights Act serves to protect against the erosion of the presumption of innocence by statute.

Statutory exceptions to the presumption of innocence

There a number of ways in which exceptions to the principle in *Woolmington* may arise. This is because both the common law rule and its corollary provision in section 25(c) can be overridden by other statutory provisions. [752]

However, the courts have indicated that the statutory scheme should make it clear if the onus is to be reversed. The Legislative Advisory Committee points out for example that even though section 67(8) Summary Proceedings Act makes it clear that summary offences [753] that contain a reverse onus provision place a burden of proof on the defendant, the issue of who bears the burden of proof for indictable offences [754] is less clear.
Statutory exceptions and their interpretation

It has been said that it is fundamental to New Zealand's criminal law that the onus of proof remains throughout on the Crown. [755] Generally speaking every offence establishes a level of blame or culpability. [756] However, as noted above, offence provisions can be framed so that they require different types of proof. In this respect there are three main types of offence provision.

A truly criminal offence requires the prosecution to prove two things: (1) that the defendant caused the prohibited act (actus reus) to take place and, (2) that he or she intended the act, or was reckless as to whether or not it would occur or knew what the consequences of their action would be (mens rea). [757] In other words the prosecution must prove the prohibited act and an associated guilty mind. It is on the basis of the guilty mind that the moral culpability of a criminal act accrues.

Public welfare/regulatory offences typically require proof only of the prohibited act or state of affairs. Proof of the mental or fault element is not necessary but if the defendant can show that he or she wasn't at fault then liability is avoided. These offences are normally called strict liability offences.

Absolute liability offences occur where even proof of an excuse or absence of fault will not remove liability from a defendant. Once the prosecution has proved the act beyond reasonable doubt the entire offence is proved. [758]

Where the intent of Parliament as to the type of offence intended is unclear, the courts will frequently return to first principles for interpretation. For present purposes these may be stated quite shortly as:

... a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted. [759]

The New Zealand Court of Appeal [760] has observed that in the process of determining where a statutory provision requires the burden of proof to lie, consideration should be given to what is an eminently fair outcome. [761]

Reverse onus provisions

On occasions, statutory provisions will clearly require the accused to prove or rebut a particular fact, defence, excuse or element of the offence. In such cases the burden of proving guilt switches from the prosecution to the
defence once the prosecution has proved that the accused has acted or omitted to act in contravention of a statutory requirement. This is known as a reversal of the onus of proof and is inconsistent with the presumption of innocence in section 25(c) of the Bill of Rights Act.

As noted above, reverse onus provisions include offences where:

- there is a statutory "absence of fault" defence which must be proved by the defendant on the balance of probabilities;
- there is a statutory defence relating to an element of the offence;
- a summary offence contains reference to a qualification, proviso or excuse covered by s67(8) Summary Proceedings Act; or
- an indictable offence provides that a qualification, proviso, excuse or other defence may be established by the defendant.

**Interpretation of reverse onus provisions**

The Canadian Supreme Court [762] considered the interpretation of a reverse onus provision in a truly criminal offence provision and the majority held that:

In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in section 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue [emphasis added].

On that basis the Supreme Court confirmed that the provision requiring the defendant to disprove an important element of the offence violated the presumption of innocence without sufficient justification and was therefore invalid.

The Canadian Supreme Court considers that the approach established in *R v Oakes* requires offences to be viewed holistically. [763] In *Whyte* [764] the court further explained that the specific factor the defendant needed to prove or disprove (i.e essential element, a collateral factor, an excuse or a defence)
was not important. The key consideration was the impact that the presence or absence of this factor would have on the verdict. [765] The right to be presumed innocent is infringed where the accused, while being able to raise doubt as to their fault is unable to prove absence of fault to the required standard. They are thereby liable to be convicted where doubt as to their guilt remains.

Summary offences

The interpretation of summary criminal offences is affected by s 67(8) of the Summary Proceedings Act 1957 ("SPA") which provides that:

Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, ... need not be negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant.

Section 67(8) of the SPA has traditionally been interpreted to place a burden of proof on the defendant. However, notwithstanding s67(8) there have been some cases where the Court has used s25(c) to interpret summary offence provisions to put only an evidential burden on the defendant. [766] This means that the prosecution retains the overall burden of proving all elements of the offence (see below).

Burden of proof or evidential burden?

Although a number of statutory provisions appear to require the accused to prove a total absence of fault on his or her part, these offence provisions may simply require the accused to present evidence pointing to the existence of some doubt as to their guilt. This is called an evidential burden (in contrast with a burden of proof) and may not infringe s25(c).

For example, section 29 of the Summary Offences Act provides that "every person [commits an offence] who is found without reasonable excuse ... in a building ...". The High Court [767] noted that the phrase "reasonable excuse" must have a wider meaning than a purely "lawful excuse", and rejected the argument that an excuse under the section would be an "excuse" within the meaning of section 67(8) of the Summary Proceedings Act 1957. Hammond J considered that if that were so, a defendant would face the burden of establishing the defence on the balance of probabilities. However, Hammond J was inclined to think that, in the form the legislation is now, it is for the
defendant to raise an evidentiary basis for the defence, but it is the
prosecution that ultimately has the persuasive burden. The Court noted that,
having regard to section 6 and 25(c) of the Bill of Rights Act, such an
interpretation was to be preferred. [768]

The House of Lords in *R v Lambert* [769] adopted a similar approach when it
observed that even if it appeared obvious that a statutory offence provision
imposed a legal burden on the accused, the provision should be read down to
impose only an evidential burden. Such an approach should be adopted
wherever practicable so as to give effect to human rights principles. [770]

*Public welfare regulatory offences* [771]

The approach to the interpretation of reverse onus provisions in public
welfare regulatory offences was discussed by the Court of Appeal in
*MacKenzie v Civil Aviation Department*. [772] In that case the Court of
Appeal held that regulatory offences will ordinarily permit a defence of
'absence of fault', with the burden of proving the absence of fault resting with
the defendant. The court accepted that a reversal of the onus of proof can be
justified notwithstanding the presumption of innocence. The Court discussed
the approach of the Canadian Supreme Court in *R v City of Sault Ste Marie*
[773] in relation to recognising public welfare offences as a new category of
offences and stated:

Courts must be able to accord sufficient weight to the promotion of public
health and safety without at the same time snaring the diligent and socially
responsible. The principle of English criminal law, that the burden of proof
of a requisite mental state rests on the prosecution, is not whittled down
where, in matters of public welfare regulation in an increasingly complex
society, the defence of due diligence is allowed because it is recognised that
the price of absolute liability is too high ... the defendant will ordinarily know
far better than the prosecution how the breach occurred and what he had done
to avoid it. In so far as the emphasis in public welfare regulations is on the
protection of the interests of society as a whole, it is not unreasonable to
require a defendant to bear the burden of proving that the breach occurred
without fault on his part...

Following *MacKenzie*, some public welfare regulatory offences reverse the
onus of proof by requiring the defendant to prove on the balance of
probabilities that he or she was without fault, once the prosecution has
proved beyond reasonable doubt that the accused committed the offence (*the
actus reus*). [774] These provisions appear inconsistent with the presumption
of innocence because there is a risk that the accused may be convicted despite a reasonable doubt about his or her guilt.

Consideration will therefore need to be given to the relevant factors outlined above, namely the: nature and context of the offence, penalty level, ability of the defendant to exonerate themselves, and the specific reason that the prosecution should not be required to prove all elements of the offence.

Presumptions

Presumptions are a further form of statutory exception to the rule in Woolmington. The Supreme Court of Canada in R v Downey identified three types of presumptions that require proof of a basic fact: [775]

Permissive inferences: Where the trier of fact is entitled to infer a presumed fact from the proof of the basic fact, but is not obliged to do so. This results in a tactical burden where the accused may wish to call evidence in rebuttal, but is not required to do so.

Evidential presumption: Where the trier of fact is required to draw the conclusion from proof of the basic fact in the absence of evidence to the contrary. This mandatory conclusion results in an evidential burden whereby the accused will need to call evidence, unless there is already evidence to the contrary in the Crown's case.

Presumption with persuasive burden: Similar to evidential burdens except that the evidential fact must be disproved on a balance of probabilities instead of by the mere raising of evidence to the contrary.

The courts in New Zealand have considered that offence provisions containing permissive inferences may not necessarily give rise to issues of consistency with section 25(c) if they do not detract from the requirement of the prosecution to prove that the accused is guilty beyond reasonable doubt. [776]

Presumptions that put an evidential burden on the defendant are more likely to be inconsistent with s25(c). This is particularly so when the presumption leads to acceptance of a fact that is an element of the offence. In Downey, the Supreme Court in Canada held that mandatory presumptions requiring the accused to provide evidence raising reasonable doubt as to the existence of a fact may give rise to issues of consistency with the presumption of innocence. Such presumptions work on the basis that proof of the existence of one fact - for example being found late at night carrying a bag of tools - is
proof of the existence of an element of the offence - the intention to commit a burglary - unless the accused is able to provide evidence to the contrary. The Court said in Downey that such presumptions may, in situations where the defendant is unable to adduce sufficient evidence to rebut the presumption, lead to the conviction of a person even though reasonable doubt exists as to their guilt.

Nevertheless, not all presumptions will be inconsistent with the right to be presumed innocent in s25(c). The issue of consistency will depend in each situation on the particular drafting of the offence provision and the relevance and proportionality of the presumption to the offence and the overall objective of the act.

The European Court views persuasive presumptions this way: [777]

Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law ... Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.

In considering the relative merits of evidential burdens or persuasive presumptions, Lord Hope in R v DPP, ex p Kebilene stated: [778]

The cases show that, although art 6(2) is in absolute terms, it is not regarded as imposing an absolute prohibition on reverse onus clauses, whether they be evidential (presumptions of fact) or persuasive (presumptions of law). In each case the question will be whether the presumption is within reasonable limits.

It seems therefore that whether or not the presumption can be justified depends on the relevance and rationality of the presumption in the context of the particular offence provision.

Other matters

The right to be presumed innocent also appears in other contexts, such as name suppression and bail applications.
Name suppression

Suppression of the identity of the accused prior to trial or retrial may be necessary in order to protect the right to be presumed innocent. However the presumption of innocence cannot of itself displace the principles of freedom of expression and the right to an open trial. [779] The application of section 25(c) in this context complements the right of the accused to receive a fair trial. However, it would appear that the principles of open justice would support the presumption allowing the publication of an individual's identity unless there is evidence of harm accruing to the accused or others resulting from that publicity. [780]

The Court of Appeal, when reviewing the leading caselaw on suppression orders and in applying the principles required when considering whether to grant or revoke a suppression order, said: [781]

The public's right to receive information, the principle of open justice, the type of information in question, its public importance and interest, its likely circulation, methods of diluting its effect on the mind of potential jurors, the presumption of innocence, and other issues are to be balanced against its prejudicial effect. But once this exercise has been completed and it has been determined that there is a significant risk that the accused will not receive a fair trial, the issue ceases to be one of balancing ...there is no room in a civilized society to conclude that, 'on balance', an accused should be compelled to face an unfair trial.

Bail applications

The Court of Appeal has also considered the relevance of the presumption of innocence to the application of bail laws. In noting the right under section 24(b) of the Bill of Rights Act that every person charged with an offence shall be released on reasonable terms and conditions unless there is just cause for continued detention, the Court of Appeal has said: [782]

The seriousness of the charge faced will not in itself provide a justification for refusal of bail. Refusal can be justifiable only when the prosecution demonstrates not merely that the charge is a serious one but also that there is something additional which favours detention of the accused in the public interest, and that combination of factors is not outweighed by considerations favouring bail. The societal interest must be unable to be met by the granting of bail upon terms as to residence, reporting to police, curfew, non-association, travel restrictions and the like.
Having noted that the charge faced is serious, the Court will need to be satisfied concerning the strength of the prosecution case for it would be wrong in principle to cause an accused to be held in custody pending trial if the case appears weak.

Considering the circumstances when the courts will not consider bail, the Court of Appeal, in implicitly taking into account the right to be tried without undue delay, said: [783]

Someone who has pleaded not guilty must be presumed to be innocent of the charged offending until proven guilty according to the law ... Such a person also enjoys the benefit of section 24 [of the Bill of Rights Act] which requires that there be 'just cause' for continued detention ...

Another important consideration is the likely length of the detention before trial. Where it is unlikely to occur within a few months the delay will be a factor favouring the granting of bail but is not in itself determinative...

It is the task of the Judge hearing a bail application to balance these various factors, giving due weight of course to the Bill of Rights guarantees, and to form a judgment upon whether bail should be granted and, if so, the conditions to attach to it.

It is therefore clear that, where possible, the Courts need to apply the provisions of the Bail Act 2000 consistently with not only section 24(b) of the Bill of Rights Act, but also sections 25(b) and 25(c) of that Act.

**Pre-trial conduct**

The courts have said that the right to be presumed innocent does not extend to pre-charge conduct even where it is alleged that the police have maliciously pursued a prosecution. The scope of the right is restricted to the trial process and does not extend to the conduct of the investigation. [784]

**Key cases**

History of the section

The White Paper

Section 25(c) of the Bill of Rights Act appears in the same form as it was proposed in the White Paper.

Section 25(c) origins in international treaties and overseas legislation

Article 14(2) of the ICCPR provides:

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Article 6(2) of the European Convention on Human Rights states:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Section 11(d) of the Canadian Charter provides:

Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Footnotes:

686. See the earlier discussion of "what is meant by charged with an offence" at pages 231-234 of these guidelines.
687. The latest version can be found on the Internet at http://www2.justice.govt.nz/lac/
688. See, for example, R v Wigglesworth (1989) 2 SCR 541. 2
691. There are a number of statutory provisions directed at providing for a fair hearing, see section 67 of the Summary Proceedings Act, the Juries Act and Jury Rules, and sections 138 to 140 of the Criminal Justice Act.

692. *R v Barlow* [1996] 2 NZLR 116; (1995) 13 CRNZ 503; 3 HRNZ 40. Though the issue of whether the accused is able to plead, understand the nature or purpose of the proceedings and to communicate with counsel for the purpose of conducting a defence may be relevant, see *R v Duval*, High Court Whangarei T 84/94, 2 August 1995, Thomas J.


694. *Golder v UK* (1975) 1 EHRR 524 at 537 (para 38).


696. *R v Heemi* (1998) 16 CRNZ 221, 228. This issue is discussed in further detail at pages 298, 303, and 305 of these guidelines.


700. The complainant in *R v Metcalf* (1996) 14 CRNZ 184 resided overseas and did not wish to return to give evidence against the accused. The court held that her statement was inadmissible because the accused would not be given an opportunity to cross-examine the witness.

701. In contrast to the decision in *Metcalf*, the Court of Appeal *R v L* [1994] 2 NZLR 54 held that the deceased's evidence was admissible. There was no information before the Court to suggest that cross-examination would have affected the reliability of the deceased's testimony.

702. Sections 23C - 23I of the Evidence Act 1908; section 158CA of the Summary Proceedings Act 1957 and the Evidence (Videotaping of Child Complainants) Regulations 1990

704. See the Concluding Comments of the Human Rights Committee in *Campos v Peru* (577/94) where the committee was critical of a system that allowed for secret trials.
705. Section 138(1) of the Criminal Justice Act 1985
706. *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 449-450
711. See section 140(1) of the Criminal Justice Act.
712. Section 138(8) of the Criminal Justice Act.
716. Sections 138(2) and 140(2) - (4) of the Criminal Justice Act, see also *O'Connor*
717. *Tukuafu v R* High Court, Auckland, A205/01, 17 December 2001
718. See also *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 569 where the court said "where there is a conflict between fair trial values and freedom of expression... the latter may be suspended or delayed until a trial is completed".
719. *R v Middleton* 26/9/00, CA218/00.
720. *R v Sanders* [1994] 2 NZLR 568, 574
721. For a more complete discussion of these points see Paul Rishworth (2003) "Minimum Standards of Criminal Procedure for Trial, Sentencing and Appeals" in *The New Zealand Bill of Rights*, OUP, pp 671-673
723. Article 14(1) goes on to self-define the possible limits to the right.
724. Article 6(1), like Article 14(1) of the ICCPR, defines the scope of the right with reference to access by the media and the public.
734. *R v Morin* [1992] 1 SCR 771 - note that section 11(d) of the Canadian Charter refers to a test of "unreasonableness" rather than considering what is undue.
738. *R v Haig* [1996] 1 NZLR 184, 193. See also, Martin at 421 where Cooke P made the same point. However, Cooke P went on to make the observation that, where the court is aware that the government is conscious of a problem and is taking prompt steps to deal with it, the courts would be reluctant to stay proceedings on the ground of systemic delay only.
739. *Martin v Tauranga District Court* [1995] 2 NZLR 419.
740. For an overview of the general principals of criminal law and the classification of offences see Chapter 12 of the LAC Guidelines or *Adams on Criminal Law* Vol 1 Commentary on section 20 of the Crimes Act 1961 and Vol 2, Chapter 2.1 Evidence: Evidence in Criminal Cases
741. For general guidance on developing offence provisions in legislation, see Chapter 12 of the LAC Guidelines.
742. A true crime is able to be distinguished from other types of offences by means of the statutory context within which it appears, the penalty level, or the stigma associated with the conviction for the behaviour.


749. Refer to further discussion of the interpretation of provisions and types of presumptions below.


752. See discussion on section 4.

753. Summary offences are criminal offences that can be heard in the District Court without a jury trial.

754. An indictable offence is, for these purposes, any offence in the Crimes Act or other enactment that is of a more serious nature than a summary offence. Conviction of an indictable offence may lead to the imposition of heavier penalties than summary offences.


757. A true crime is able to be distinguished from other types of offences by means of the statutory context within which it appears, the penalty level, or the stigma associated with the conviction.

758. For an overview of the general principals of criminal law and the classification of offences see Chapter 12 of the LAC Guidelines or *Adams on Criminal Law* Vol 1 Commentary on section 20 of the Crimes Act 1961 and Vol 2, Chapter 2.1 Evidence: Evidence in Criminal Cases

759. *Sweet v Parsley* [1970] AC 132; [1969] 1 All ER 347, per Lord Reid

760. *Civil Aviation Authority v MacKenzie* [1983] NZLR 78

761. The combined effect of section 5 and section 25(c) are likely to be influential in making this assessment. To see how the courts have applied section 6 and 25(c) see *R v Rangi* [1992] 1 NZLR 385 and *Grey v Police* (Hammond J High Court, Hamilton, AP65/01, 31
October 2001). The High Court in Grey was considering the correct interpretation of section 29 of the Summary Offences Act.


766.  *Grey v Police* 31/10/01 Hammond J, HC Hamilton, AP 65/01.


768.  See also *R v Rangi* [1992] 1 NZLR 385.


774.  Note that the balance of probabilities is a lesser standard of proof than beyond reasonable doubt.


776.  *R v Rangi* [1992] 1 NZLR 385, 390. See too *R v Osolin* [1993] 4 SCR 595 where the court stated that a defendant had to do more than assert his mistaken belief as to a fact, the assertions needed to have some "air of reality".


Part III: Section 25(d) Right not to be compelled to be a witness or to confess guilt

Section 25(d) of the Bill of Rights Act is as follows:

No-one to be compelled to be a witness
Everyone who is charged with an offence has, in relation to the determination of the charge, the right not to be compelled to be a witness or confess guilt.

Policy Triggers: do I need to consider section 25(d)?

- Are you developing policies for developing a regulatory regime containing enforcement functions?
- Does the policy contain proposals providing for the ability for enforcement officers to question any person in connection with an investigation?
- Would enforcement officers under the proposed regime be able to demand that persons under investigation or persons employed by companies under investigation, provide them with documents or other records?
- Does your policy contain proposals to require persons being investigated, or persons employed by companies being investigated, to co-operate with, and assist the enforcement officers?

What every policy analyst needs to know about section 25(d)

- The right is intended to protect the person from making statements that the accused or person being questioned wishes to refrain from making.
- However, it is yet to be decided whether a statutory power requiring the production of documents may infringe the right if the demand is backed up by a coercive sanction for a failure to comply.
• The privilege against self-incrimination may extend to situations where a person is required by statute to answer questions and those answers may be used in evidence in subsequent hearings.
• Provisions that allow inferences to be made concerning a person's guilt as a result of their refusal to answer questions or their continuing silence will infringe section 25(d).

Measures to achieve compliance

You should consider whether it is necessary for a person to be required to answer questions put to him by investigators. Consider whether the information is able to be obtained in other ways or from other sources. Ask yourself whether the information gained in the course of questioning a person needs to be used in evidence, particularly where other independent evidence is available? If an accused person or witness subsequently gives different testimony in court you may still take proceedings for perjury.

As the burden of proof is on the state to prove that a confession has been obtained without duress, you should consider implementing certain techniques, such as audio or video recording of interviews to satisfy the court if there are subsequent concerns.

Related rights and freedoms and considerations

When developing your proposals that might give rise to issues under section 25(d) you should also consider whether the proposals are consistent with:

• the right to freedom of expression and the right not to be compelled to provide information (section 14);
• the right to be secure against unreasonable search and seizure (section 21);
• the right to silence (section 23(4));
• the right to a fair trial (section 25(a));
• the right to be presumed innocent (section 25(c)).

Further discussion on the meaning of section 25(d)

Section 25(d) complements the right not to be compelled to express oneself [785] and the right of silence enjoyed by every person arrested or detained. [786] Section 25(d) also complements the common law discretion of the
court to exclude confessions if the confession was obtained in an unfair manner by the oppressive or unfair use of power by an interrogator. [787]

The Court of Appeal has stated that the purpose of the right to silence and against self-incrimination is: [788]

... to protect a suspect in the coercive atmosphere of interrogation by the police or other legal authority where that person may feel pressed to give an answer when he or she is actually not obliged to speak. They affirm the common law right to refrain from saying anything. They are relevant where the point has been reached where the suspect is going to be charged or has been charged and is under questioning or is seeking to volunteer a statement. [789]

**When are statements made that are "independent of the will of the accused"?**

The right not to be compelled to be a witness or confess guilt refers to statements that the accused may make that exist independently of the will of the accused. [790] That is, section 25(d) is not so much concerned with statements that an accused may, of his or her own volition, choose to make, but rather the right is directed at the right of the accused to refuse to answer any questions put by enforcement officers investigating an offence. However, consideration will still need to be given as to the reasons why the accused decided to make self-incriminating statements.

The New Zealand courts have indicated their willingness to consider whether the right in section 25(d) has been infringed where there is the suggestion that the accused was subject to some degree of coercion to make a statement prior to being charged. This is particularly where that statement is being used as evidence during trial. [791] Such an approach is consistent with the stance taken in Europe where the admissibility of such statements may go to the overall fairness of those proceedings. [792]

The UN Human Rights Committee [793] has said that:

...the wording of article 14, paragraph 3 (g) [of the ICCPR], that no one shall be "compelled to testify against himself or to confess guilt", must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt. [794]
Statutory provisions that require a person to provide information that could be used to establish guilt raise issues of consistency with section 25(d) of the Bill of Rights Act (see below).

**Does the right apply in respect of documents?**

The courts in New Zealand have not clearly indicated whether the right under section 25(d) extends to situations where statutory powers are used to gain access to documents. However, pre-Bill of Rights Act caselaw and caselaw from the Europe and Canada provides some guidance. The New Zealand Court of Appeal in *Taylor v New Zealand Poultry Board* [795] has previously held that the privilege against self-incrimination can apply outside court proceedings where there is a statutory obligation to answer questions or produce documentation.

The European Court has previously held that the right does extend to documents that form evidence against the person required to produce the information. [796] However, there are indications that the European Court may adopt a position that the right to silence and the privilege against self-incrimination as read in to article 6(1) of the European Convention extends only to verbal forms of communication or records of that conversation. This is because physical or tangible forms of evidence such as documents or property exist independently of the will of the accused. That is, they are independently accessible. Documents produced under warrant would therefore not appear to be protected by the privilege against self-incrimination. [797]

The courts in Canada have taken a similar view when considering whether the requirement to produce documents containing self-incriminatory statements infringes section 7 of the Charter and the right to fundamental justice. The Supreme Court of Canada discussed the privilege in the context of documents found as a result of compelled testimony. La Forest J created a distinction between compelled testimony and information that a person is required to provide in the course of an investigation. He stated that: [798]

Compelled testimony is evidence that simply would not have existed independently of the exercise of the power to compel it; it is in this sense evidence which could have been obtained only from the accused.

La Forest J went on to say that documents exist independently of the compelled testimony of the accused. That is, there was a probability that the information may have been obtained or discovered irrespective of any
assistance given by the accused. [799] As such, its value as evidence has to be assessed in its own right. La Forest J considered prejudice would accrue to the accused only where that evidence could not have been found except for the compelled evidence of the accused. [800]

It would therefore appear that while a requirement to comply with statutory demands to answer questions during an investigation might infringe section 25(d) where such responses are to be used in evidence, the same might not apply in respect of other types of evidence. However, the coercive element of a requirement to produce documents may be sufficient to transform the power from a reasonable to an unreasonable search for the purposes of section 21 of the Bill of Rights Act, depending on how that requirement is framed. The use of the evidence in any proceedings may also be considered to infringe the right of the accused to a fair trial.

Adverse comment and inferences at trial

Section 25(d) is also not infringed where the accused is required to provide some sort of explanation as to the reasons for his or her actions or presence at the scene of a crime where the prosecution has established a prima facie case. [801] The accused may still elect to remain silent or choose to cast doubt through the evidence of other witnesses. [802] As a person is not obliged to speak, the right to silence extends to protect the accused from adverse inferences made by investigators, prosecutors or the courts where the accused does not answer a question. [803]

Key cases


History of the section

The White Paper

The wording of section 25(d) of the Bill of Rights Act is identical to that proposed in the White Paper.
Section 25(d) origins in international treaties and overseas legislation

Article 14(g) of the ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled, in full equality, not to be compelled to testify against himself or to confess guilt.

Section 11(c) of the Canadian Charter states that:

Any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.

Section 13 of the Charter also provides:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Section 25(e) The right to be present at trial

Section 25(e) of the Bill of Rights Act is as follows:

Right to be present at trial and present a defence
Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be present at trial and present a defence

Policy Triggers: do I need to consider section 25(e)?

Are you:

- Developing or amending policies and procedures relating to the right of the defendant to be present at trial and/or circumstances when the trial may proceed in the absence of the defendant?
- Developing policy and procedures regarding the representation of the interests of the defendant at trial and in related proceedings?
- Developing criteria for determining whether a person is capable of understanding the court process?
- Developing a process for the appointment of fully or partially publicly funded legal representatives?
If your answer to any of these questions is "yes", then you should consider whether your policy or practice is consistent with section 25(e).

**What every policy analyst needs to know about section 25(e)**

The key points from section 25(e) can be summarised as follows:

- **Section 25(e)** goes to the fairness of the proceedings to allow the accused to know the case against him or her, make oral representations and respond to and challenge the allegations against him or her.
- The right to be present at trial does not oblige or require the accused to be present - however the reasons for his or her absence may go to the overall fairness of the trial.
- The overriding concern of the Court should be that the accused receives a fair trial and that the outcome of the proceedings is just or fair even if the accused is absent.
- The seriousness of the charges faced by the accused are not considered to be relevant consideration for the Courts when considering fairness.
- Procedural safeguards such as an oral hearing help ensure the correctness of the overall decision on the substance of cases.
- The notion that a person must be fit to plead and stand trial is concerned with the ability of the person to understand the nature or purpose of the proceeding, and their ability to communicate adequately with counsel for the purpose of conducting a defence.

**Measures to achieve compliance**

If you are developing or amending policies or practices that govern the procedures for responding to delays in trials caused by the absence of the accused or his or her legal representative, consider whether the policy is consistent with the principles set down in the decision of the House of Lords in *R v Jones*. [805]

If the policy sets down some criteria governing the circumstances under which the trial may proceed in the absence of the accused and/or his or her legal representatives, consider whether sufficient weight is accorded to the public interest of a fair trial and the prospect of a miscarriage of justice.
Related rights and freedoms

When considering whether your policy or practice is consistent with section 25(e), you should also consider whether it is consistent with the right to:

- adequate time and facilities to prepare a defence (section 24(d));
- the right to legal assistance (section 24(f));
- a fair and public hearing (section 25(a));
- the right to examine witnesses for the prosecution (section 25(f));
- the observance of the principles of natural justice (section 27(1)).

Further discussion on the meaning of section 25(e)

There are two aspects to section 25(e): the right for every person charged with an offence to be present and the right to be able to put forward a defence. Essentially, section 25(e) goes to the fairness of the proceedings. It allows the accused to know the case against him or her, to make oral representations and to respond to and challenge the allegations against him or her.

The UN Human Rights Committee has said "The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair." [807]

The Courts have said that the rights in 25(e) will be lost to those who do not exercise reasonable diligence in respect of their right to be present at trial. In other words, an accused who without good excuse fails to attend and to avail him or herself of the right to be present at trial cannot allege a deprivation of the right if the trial proceeds in their absence. [808] However, a defendant who gives notice that he is unable to negotiate stairs to a courtroom because of a disability and who is unable to attend the proceedings because no arrangements have been made to accommodate the disability cannot be tried in his absence. [809]

Conduct of trials in the absence of the accused

The right to be present at trial does not oblige or require the accused to be present. However, the reasons for his or her absence may go to the overall fairness of the trial. In Hodges v Police, in allowing an appeal for a re-hearing, Justice Hammond held: [810]
Arranging for the hearing of a defended infringement notice does give rise to a good deal of practical difficulties in the District Court. And regrettably persons do sometime seek to avoid unwelcome outcomes after the event, or when (as here) they do raise concerns for good and sufficient reasons about not having had notice, they get the appropriate procedures for trying to do something about what has occurred wrong. Nevertheless, expediency, or the practical difficulties which can arise cannot displace the right of a defendant to a hearing. Whether or not Mr Hodges received the 6 August letter, and on the probabilities it seem that he did not, this case has gone off and in my view a re-hearing is required.

The court has a discretion as to whether a proceeding should be deferred by the absence of the accused. [811] In exercising the discretion, a balance needs to be struck between the administration of justice and the expense of a long trial caused by delays. [812] The courts are likely to consider the likely prejudice against one of the accused by not being present against the likely impact of the delay in the context of the length of the hearing and the reasons for the absence of the accused. [813]

The UN Human Rights Committee has held that a trial in absentia is compatible with article 14 of the ICCPR only when the accused is summoned in a timely manner and informed of the proceedings. [814]

**Fairness to the accused**

The courts are only likely to allow criminal proceedings to take place in the absence of the accused on rare occasions. The House of Lords in *R v Jones* [815] considered the right to be present at trial in the context of an accused who absconded while on bail. The trial proceeded and the accused was found guilty. On appeal, the House of Lords held, bearing in mind the right of the accused to a fair trial, that despite the court's residual discretion to conduct a trial in the absence of the accused, the discretion should be exercised cautiously. The overriding concern of the court should be that the accused receives a fair trial and that the outcome of the proceedings is just despite the absence of the accused. [816] The seriousness of the charges faced by the accused is not considered relevant. The court in *Jones* went on to add that "it was generally desirable that a defendant should be represented even if he had voluntarily absconded, since that would provide a valuable safeguard against the possibility of error and oversight." [817]
Right to be present at an appeal

The right to be present at trial may also extend to the right to be present on appeal depending on the nature of the proceedings. The Privy Council has held that procedural safeguards such as an oral hearing help ensure the correctness of the overall decision on the substance of cases. [818] While a statutory scheme may provide for appeals to be determined "on the papers", the procedures for determining the outcome of the appeal should contemplate the justness of the outcome and the fairness of the process for the accused. In other words, the procedure should be in accord with the principles of natural justice (see the discussion on section 27(1) in these guidelines).

Hearing of witnesses

It has also been said that the use of closed circuit television cameras or other devices such as screens to protect witnesses for the prosecution does not infringe the right of the accused to be present at a hearing. The Court of Appeal in M v A-G stated that the use of such devices does not prevent the accused from remaining in court, hearing the testimony, or communicating with his or her representative. The testimony of witnesses is considered 'live'. [819]

Presenting a defence

Capacity to understand & effective legal representation

In order for the accused to receive a fair hearing, not only should she or he be present, but he or she should be in a position where they understand what is taking place. Thomas J in R v Duval held that: [820]

The notion that a person must be fit to plead and stand trial is not just a matter of procedural fairness, as has been suggested, but a substantive requirement firmly rooted in an accused's constitutional rights to a fair trial. The doctrine defines the limits to which society may go in prosecuting persons who are unable to defend themselves.

Thomas J, after considering various academic articles and commentaries, [821] held that while there are no rigid rules as to the form of a disqualifying disability, the governing legislation provides the framework for determining whether the accused is capable of understanding the nature of the proceedings. [822] But in all events:
What is imperative in any trial is that an accused is able to plead, to understand the nature or purpose of the proceeding, and to communicate adequately with counsel for the purpose of conducting a defence. [823]

Although section 25(e) does not specify or limit who may present the defence for the accused, it would, on its face, appear to be broader than section 354 of the Crimes Act 1961. This section provides that: "every person accused of any crime may make his full defence thereto by himself or by counsel."

A full defence would require the accused to have: [824]

... the capacity to appreciate the case against them and to present a defence to that case. It may also be said that a person's right to the observance of the principles of natural justice under s 27 of the [Bill of Rights] Act is in point for it is a fundamental principle that persons must know the case against them and have an opportunity to answer that case. Accused who are unable to understand the case against them cannot be guaranteed that right.

Although the right to present a defence includes, amongst other things, legal representation, there does not appear to be any requirement that the legal representation is effective. [825] However, the quality of representation must go to reflect the fairness and justness of the outcome of the trial. [826]

*Examination of the evidence*

The right to present a defence includes the idea that the defence has opportunity to examine the evidence available to the Crown for the purposes of preparing a defence capable of rebutting the Crown's evidence. If the defence is prevented from being able to gather evidence to the point where the defence is unable to effectively cross-examine a witness then the Courts may consider that there has been a miscarriage of justice. [827]

*Key cases*

History of the section

*The White Paper*

Section 25(e) is identical to that which was proposed in the *White Paper*.

*Section 25(e) origins in international treaties and overseas legislation*

Article 14(3)(d) of the ICCPR states:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; and to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Article 6(1) of the European Convention on Human Rights states, in part, that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Section 7 of the Canadian Charter provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

*Section 25(f) Right to examine and cross-examine witnesses*

Section 25(f) of the Bill of Rights Act is as follows:

*Cross-examination of witnesses*
Everyone who is charged with an offence has, in relation to the determination of the charge, the right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution.
Policy triggers: do I need to consider section 25(f)?

Are you developing policy or practices that:

- Alter the laws of evidence on the admissibility of evidence that is hearsay?
- Alters the laws on discovery or limits the ability of the defence to gain access to evidence?
- Makes it easier to admit written documents into evidence without the consent of the other party?
- Protect the interests of witnesses for the prosecution by enabling them to present testimony other than in an open court thereby limiting the ability of the defendant to "confront" the witness for the prosecution (for example, video testimony, the use of protective screens)?

If you answer "yes" to any of these questions then you need to consider whether your policy or practice is consistent with section 25(f) of the Bill of Rights Act.

What every policy analyst needs to know about section 25(f)

- The central purpose of cross-examination is to enable the Crown and the defence to test the veracity of evidence presented by the other party's witnesses.
- The opportunity of the court to observe prosecution witnesses' demeanour when giving evidence in the presence of the accused is normally important to the assessment of the credibility of the witness.
- In order for the defence to effectively examine the prosecution's witnesses, the defence must be able to prepare and have access to evidence that will challenge evidence presented by the Crown.
- The right to cross-examine witnesses for the prosecution is consistent with the general principle that witnesses should give their evidence orally in a courtroom in the presence of the accused.
- The use of measures to protect vulnerable witnesses for the prosecution may be consistent with the legitimate interests of the state in having allegations of criminal offending prosecuted while balancing the rights of the accused to a fair trial in all circumstances.
- As the effect of any measures designed to protect a witness may be prejudicial to the accused, the accused's right to a fair trial requires that the measures be limited to what is strictly necessary to achieve the aim.
- Additionally, it is for the prosecution to establish the need for the measures and there must be a proper assessment of any alleged threat to a witness.
- The use of modified procedures should not limit the ability of the defendant or his counsel to examine and test the credibility of the evidence presented by witnesses for the prosecution.
- The right to examine witnesses for the prosecution may therefore not be infringed where the defendant has the opportunity to examine a prosecution witness or other means of discrediting the written testimony of the witness.
- The defendant should not be convicted on the basis of written evidence where the defendant has not had an opportunity to test the reliability of that evidence.
- But the defendant's rights may not be infringed where it is considered that written evidence is able to be independently corroborated by other evidence and cross-examination would not have affected the reliability of the evidence.
- The right of the defence to summons witnesses goes to the fairness of the proceedings.
- The mere fact that the defence was unable to secure an expert witness to examine or challenge the evidence of an expert witness for the Crown may not, of itself, infringe the right where that testimony is not considered material.
- A decision by the defendant's counsel not to call material witnesses is essentially a matter of strategy and the Courts are unlikely to interfere in what they regard as a matter for counsel's professional judgement.

**Measures to achieve compliance**

If you are developing policy or practices that may determine or shape the way in which the defence may examine witnesses for the prosecution or obtain witnesses for the defence, consider developing the policies in such a way that:
- The proposals provide the defendant with sufficient opportunity to challenge the reliability of evidence.
- The changes will enable the defendant to present a defence.
- There are alternative means of enabling a defendant to challenge the reliability of the witnesses' testimony other than by way of direct cross-examination, such as with the use of third parties.
- Witnesses are able to present evidence in ways other than by way of open testimony in an open court only where certain tightly drawn criteria are able to be satisfied.
- The defence is able to challenge or test the expert testimony of witnesses for the prosecution by way of their own expert witnesses.
- Legal aid becomes more readily available for the purposes of allowing the defence to call its own expert witnesses.
- Provides the defence with sufficient opportunity to locate and produce witnesses.

**Related rights and freedoms**

When developing proposals or practices that you consider might give rise to issues of consistency with the right under section 25(f), you should also consider:

- the right of a person charged with an offence to have "adequate time and facilities to prepare a defence" (section 24(d));
- the right to a fair and public hearing (section 25(a));
- the right to be present at trial and present a defence (section 25(e)).

**Further discussion on the meaning of section 25(f)**

**Testing the evidence**

As the central purpose of cross-examination is to enable the Crown and the defence to test the veracity of the evidence presented by the other party's witnesses, cross-examination plays an important role in establishing the existence of, or removing, reasonable doubt. The defence must, therefore, be able to prepare for cross-examination by having access to evidence that will rebut evidence presented by the Crown. [828] A failure by the prosecution to adequately disclose material information under the laws of discovery may infringe section 25(f) where: [829]
non disclosure has created a real risk of a miscarriage of justice. Conventionally such a real risk might be perceived if, being evidence, the information might reasonably have left the jury in a state of reasonable doubt, or being other information might have been used by the defence in meeting the Crown case, or might otherwise have affected a significant decision in respect of the defence case. Examples of the principle may be found in *R v Wickliffe* [1987] 1 NZLR 55 and *Re Appelgren* [1991] 1 NZLR 431. The application of the principle must have regard to materiality in the circumstances of a particular case and additionally, in some cases, credibility.

**Confronting the accuser**

The general principle is that witnesses should give their evidence orally in a courtroom. In this way the defence is able to test the reliability of the evidence and credibility of the witness. This goes towards ensuring that the outcome is fair. [830] It is also seen as providing the defendant with an opportunity to 'confront his or her accuser' either directly or by way of her or his legal representative. [831] On the issue of the right of the defendant to confront his or her accuser, the Court of Appeal in *R v L* has said: [832]

But neither the specific legislation nor the Bill of Rights guarantee elevates the opportunity to cross-examine into an absolute right to confront and question the witness at the trial itself. On the contrary both s 184 [of the Summary Proceedings Act 1957] and s 3 [of the Evidence Amendment Act (No 2) 1980] proceed on the premise that testimony may be admitted at the trial even though the witness is not available for cross-examination. And in terms of s 25 of the Bill of Rights the right to examine the witnesses for the prosecution applies "in relation to the determination of the charge". It is directed to the overall process and is not tied to the actual trial itself.

In other words, the interests of the defendant in obtaining a fair trial may be achieved where the reliability and credibility of the witness is able to be tested in arenas other than open court (for example, the opportunity to cross-examine the witness in a pre-trial hearing may be sufficient).

**Protecting vulnerable witnesses**

The courts have also established a number of procedures to ensure that hearings remain fair to all parties, including witnesses. This is because the courts recognise the vulnerability of particular witnesses either because of the nature of the offence, the age of the witness [833], or the threat of reprisals on the witness or their family. It is also possible that a witness is unable to
give evidence in court because they have since died. [834] For this reason, the courts may allow witnesses to give evidence using closed circuit television [835], special protective screens, measures to preserve their identity, or written statements. [836]

The use of such devices is not of itself likely to give rise to issues of inconsistency with the right to examine witnesses for the prosecution or the right to a fair trial (section 25(a)) in all circumstances. The European Court of Human Rights in *Doorsen v Netherlands* has said, in respect of such measures, that: [837]

It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake...Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.

The Court added in respect of the connection between the right to examine prosecution witnesses and the right to a fair trial: [838]

However, if the anonymity of prosecution witnesses is maintained, the defence will be faced with difficulties which criminal proceedings should not normally involve. Accordingly, the Court has recognised that in such cases Article 6 para. 1 taken together with Article 6 para. 3 (d) of the Convention (art. 6-1+6-3-d) requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities.

With such concerns in mind, it is for the prosecution to establish the need for the witness to give evidence anonymously. There must, for example, be a proper assessment of any alleged threat to a witness. [839] The European Court of Human Rights in *Van Mechelen v Netherlands* held that: [840]

Having regard to the place that the right to a fair administration of justice holds in a democratic society, any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied.
Unexamined witnesses

There are a number of guiding principles on using written statements or written evidence from unexamined witnesses. The first of these is that witnesses should give their evidence orally in the presence of the accused. [841] Despite this, the defendant's right to examine witnesses for the prosecution may not be infringed where a defendant who does not have the opportunity to examine a prosecution witness has other means of testing the written testimony of the witness. [842] For example, the reliability of the written testimony could be tested by the testimony of the accused or witnesses for the defence. It is also possible that a defendant's rights have not been infringed where a witness provides written testimony at an earlier hearing (for example, depositions), but is unable to provide oral testimony during a subsequent proceeding. [843] But it is generally recognised that the defendant's rights have been infringed where the defendant has been convicted for the most part on the basis of written evidence where the defendant has not had an opportunity to test the reliability of that evidence.

Although the principle is that witnesses for the prosecution be available at trial for examination by the defence, it is evident that exceptions to this principle exist. However, these exceptions are only seen to apply where they do not affect the right of the accused to a fair trial. The key area of assessment will be whether cross-examination will have exposed concerns about the reliability of the evidence. These exceptions therefore only apply where:

i. there are good reasons for the witness not to appear in person; [844] and
ii. there are sufficient opportunities for the defence to test the reliability and credibility of that evidence.

Witnesses for the defence [845]

The right in section 25(f) refers not only to the right to examine witnesses for the prosecution, but to "...obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution."

The White Paper suggested that this provision would ensure "that the accused and the prosecution are on an equal footing with regard to the summoning and hearing of witnesses." [846] However, it is uncertain whether the concept of the prosecution and defence being on equal footing applies to more than providing a legal means of obtaining the attendance and
examination of witnesses or whether it also extended to the provision of resources for enabling the defence to search for and bring witnesses to testify. [847] What should be borne in mind is that the courts have a measure of discretion in governing their proceedings to ensure that any hearing is fair.

This aspect of the right is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It should therefore be read alongside section 24(d) of the Bill of Rights Act, which provides for the right of a person charged with an offence to have "adequate time and facilities to prepare a defence". It has been held that the equivalent article of the ICCPR (Article14(3)(e)) is not concerned with the right to call witnesses per se; it is concerned with equality of rights to call witnesses as between the defence and the prosecution. [848] It does not "require the attendance and examination of every witness on the accused's behalf: its essential aim, as is indicated by the words 'under the same conditions' is a full 'equality of arms' in the matter." [849] Otherwise the accused may engage in unnecessary time wasting or irrelevant questioning.

It is for the defendant to establish for the court that the examination of a certain witness or evidence is necessary in order to secure a fair trial. As Gault J in R v Griffin [850] suggests, the mere fact that the defence was unable to secure an expert witness to examine or challenge the evidence of an expert witness for the Crown may not, of itself, infringe the right where that testimony is not considered material. [851] However, where the evidence goes to the central core of the case then where practicable that evidence should be put to the court. [852]

On the other hand it would seem that a decision by the counsel for the accused not to call material witnesses is unlikely to raise an issue of consistency with this right. The rationale for this is that the calling of witnesses is essentially a matter of strategy and the courts are unlikely to interfere in what they regard as a matter for counsel's professional judgement. [853]

**Key cases**


History of the section

The White Paper

Section 25(f) is identical to that proposed in the White Paper.

Section 25(f) origins in international treaties and overseas legislation

Article 14(3)(e) of the ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Article 6(3)(e) of the European Convention on Human Rights provides:

Everyone charged with a criminal offence has the following minimum rights:
(d) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Section 7 of the Canadian Charter provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 25(g) Right to lesser penalty when penalties changed

Section 25(g) of the Bill of Rights Act is as follows:

Retroactive penalties
Everyone who is charged with an offence has, in relation to the determination of the charge, the right, if convicted of an offence in respect of which the
penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

**Policy triggers: do I need to consider section 25(g)?**

- Are you developing policies that seek to introduce a new range of sentencing initiatives that expand or reduce the scope of possible sanctions or impose further or remove restrictions on convicted offenders?
- Are you altering the penalties or penalty levels for offences, or introducing or making changes to orders on conviction that are in the nature of a penalty?

If your answer to these two questions is "yes" then you should consider whether your policy or practice is consistent with section 25(g).

**What every policy analyst needs to know about section 25(g)**

- Section 25(g) applies irrespective of whether the subsequent penalty is greater or less than the sentence originally imposed.
- Section 25(g) applies only in the context of penalties applied during court proceedings and which have a punitive objective - administrative adjustments to the implementation of the sentence are not covered by the right.
- The severity of the order may not of itself be a sufficient guide as to whether it is a penalty or not.
- The range of penalties is not restricted to fines or terms of imprisonment, but the nature of the penalty should be closely associated with the commission of the offence.
- Relevant factors to consider include the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.
- The judicial imposition of non-parole periods at the time of sentencing is likely to be regarded as a penalty.
Measures to achieve compliance

If you are developing policies proposing to amend the penalty levels for specific offences or introduce new penalties, consider whether you need to include transitional provisions to ensure that the changes to the legislation will be applied in accordance with 25(g).

Related rights and freedoms

When considering whether your policy complies with section 25(g) you should also consider:

- the right to a fair trial (section 25(a));
- the right not to be subject to retroactive penalties (section 26(1));
- the right to the observance of the principles of natural justice (section 27(1)).

Further discussion on the meaning of section 25(g)

When section 25(g) applies

The right in section 25(g) to the benefit of a lesser penalty applies where the penalty has been changed at any time between the commission of an offence, the determination of the charge and sentencing. It therefore applies up until the time any appeal process has been completed and applies irrespective of whether the subsequent penalty is greater [854] or less [855] than the sentence originally imposed. The judicial imposition of a minimum non-parole period following conviction after a second trial was therefore inconsistent with section 25(g) where a minimum non-parole period was not available at the time the person was initially charged with the offence. [856]

Section 25(g) only applies in respect of a person who has been convicted of an offence. [857] In applying section 25(g), the courts have given consideration to different aspects of the sentence and any penalty that has been imposed: section 25(g) applies to penalties other than maximum fines or terms of imprisonment. [858]

Penalties and administrative sanctions

The New Zealand courts have considered the issue of what constitutes a penalty in the context of the phrase "punishment" in section 26(2) of the Bill of Rights Act. The Court of Appeal considers that the phrase refers simply to
punitive sanctions imposed as part of criminal proceedings. [859] In *Palmer v Superintendent Auckland Maximum Security Prison*, Wylie J held that the word "penalty" in section 25(g) relates to the official imposition of a sanction authorised by law. [860] However, measures taken to administer the sentence imposed at those proceedings that may operate to the disadvantage of the offender are not likely to be considered to be a penalty if they are "directed at reducing the risk of reoffending, protecting the public, and rehabilitating the offender." [861]

The UN Human Rights Committee has taken a similar approach. In *ARS v Canada* (91/81) the Committee held in relation to "mandatory supervision" for convicted persons released before the expiration of their term of imprisonment:

that mandatory supervision cannot be considered as equivalent to a penalty, but is rather a measure of social assistance intended to provide for the rehabilitation of the convicted person, in his own interest. The fact that, even in the event of remission of the sentence being earned, the person concerned remains subject to supervision after his release and does not regain his unconditional freedom, cannot therefore be characterized as the imposition or re-imposition of a penalty incompatible with the guarantees laid down in article 15 (1) of the Covenant.

The imposition of a minimum non-parole period at sentencing has been recognised as a penalty for the purposes of section 25(g). In the High Court in *R v Poumako*, Salmon J held that the imposition of a minimum term of imprisonment was an order in the nature of a penalty. Salmon J applied the following definition of "penalty": [862]

any suffering in person or property by way of forfeiture, deprivation or disability, imposed as a punishment by law or judicial authority in respect of . . . an act prohibited by statute.

Although the decisions of the New Zealand courts and the Human Rights Committee are illustrative of what, other than fines and terms of imprisonment, is not considered to be a penalty, decisions from Europe are more useful in providing us with examples of what is. [863]

The European Court of Human Rights in *Welch v UK* considered whether a confiscation order made under the Drug Trafficking Offences Act 1986 constituted a 'penalty' within the meaning of article 7 of the European Convention. The Court set out the approach to be taken to the question
whether, in any given case, a measure amounted to such a penalty. It stated:

the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

The House of Lords in *Gough & Anor v Chief Constable of the Derbyshire Constabulary* noted [865] that many court orders contained punitive and preventive characteristics. [866] The Court in Gough also noted in relation to the severity of the orders that:

It is important also to have in mind the fact, obvious as it is, that there are various instances in which a familiar form of order may bear with great severity on the person against whom it is made without there being the least question of its amounting to a 'penalty' for the purposes of art 7. [867]

Laws LJ in *Gough* expressed the view that the categorisation of orders as civil/criminal was unhelpful. He stated that there are a variety of circumstances in which criminal courts are empowered to make orders that would not be classed as penalties. [868] A conviction for an offence may act as a gateway criterion permitting the imposition of such orders, but this does not make the orders themselves a penalty. [869] Much will depend on whether the order for the most part serves to punish the offender or protect the public. The Court in *Gough* reached the conclusion that an order was more likely to be regarded as a penalty the more closely tied the order was to the commission of an offence as it is primarily intended to punish the offender.

Consideration of whether an order is a penalty for the purposes of section 25(g) should therefore focus on the intention of the order. An order is likely to be a penalty if it could be seen as part of society's response to the actions of the offender even though the public or offender may benefit from the order. [870]

**Key cases**

*R v Pora* [2001] 2 NZLR 37; (2000) 18 CRNZ 270 (CA); *R v Poumako* (1999) 17 CRNZ 294; *Daniels v Thompson* [1998] 3 NZLR 22 (CA); *Palmer*

History of the section

The White Paper

Section 25(g) of the Bill of Rights Act is identical to that which was proposed in the White Paper.

Section 25(g) origins in international treaties and overseas legislation

Article 15(1) of the ICCPR provides that:

No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Article 7(1) of the European Charter of Human Rights provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Section 11(i) of the Canadian Charter provides that:

Any person charged with an offence has the right if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
Section 25(h) The right to appeal

Section 25(h) of the Bill of Rights Act is as follows:

Right to appeal
Everyone who is charged with an offence has, in relation to the determination of the charge, the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or both.

Policy triggers: do I need to consider section 25(h)?

Are you working on policies or practices:

- That amend or alter the criteria under which legal aid is granted for appeals?
- Amending or altering the procedures under which a person convicted and sentenced for an offence is able to appeal those decisions?
- That relate to the granting of name suppression for either the accused person or any complainant?
- That are likely to restrict the ability of a person to appeal any decision from the court?

If you answer "yes" to any of these questions, consider whether your policy or practice is consistent with section 25(h) of the Bill of Rights Act.

What every policy analyst needs to know about section 25(h)

- The right to an appeal should be given substance so that it is an effective right of appeal - the mere presence of an appeal process may not be sufficient if the person is unable to adequately present their case.
- The opportunity to "seek leave to appeal" does not constitute an exercise of an appeal right for the purposes of section 25(h).
- An appeal hearing carries with it the same guarantees that are afforded the defendant at trial.
- Not all appeals will require an oral hearing, but this may depend on the nature of those proceedings and the scope of the appeal.
- The right of appeal refers to one appeal only.
Measures to achieve compliance

If you are establishing a regulatory framework containing offences:

- Establish a statutory framework setting out the procedures for lodging an appeal.
- Establish a timeframe for the lodging of an appeal that takes into account potential delays that a person may be faced with in reaching a decision to lodge an appeal.
- Clearly set out what the avenues for the rights of appeal are.
- Enable the appellant to make oral submissions unless there are good reasons for restricting the form of appeal to one that is done simply "on the papers" (without hearing oral submissions).

Related rights and freedoms and considerations

If you consider that the policy or practice you are working on gives rise to issues under section 25(h) of the Bill of Rights Act, also consider:

- the right to a fair and public hearing by an independent and impartial tribunal (section 25(a));
- the right to be presumed innocent (section 25(c));
- the right to the observance of the principles of natural justice (section 27(1)).

Further discussion on the meaning of section 25(h)

Substance over form

The right in section 25(h) is:

... intended to be an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process. The context is one of access to justice. [871]

The Privy Council in Taito also said that the issue was one of substance over form. Section 25(h) requires that the right to appeal must be "effective". An effective appeal requires a "collective judicial decision" that is arrived at after a hearing that is held in public. [872]
For this reason, the New Zealand Court of Appeal has held that a defendant granted name suppression during the first trial, should have that order continued until such time as the appeals process is completed in order to ensure that the defendant continues to receive a fair trial. [873]

This view has been supported in Europe where the European Court has held that the right to a fair trial and other minimum guarantees found in section 25 of the Bill of Rights Act do not cease with the decision at first instance as:

[A] criminal charge is not really 'determined' as long as the verdict of acquittal or conviction has not become final. Criminal proceedings form an entity and must, in the ordinary way, terminate in an enforceable decision. [874]

**Oral versus written hearings**

Although the decision of the Privy Council in *Taito* suggests that section 25(h) requires appeals to be carried out by way of oral hearings, the European Court of Human Rights has taken a less strict approach. The European Court has considered the conduct of the appeal in the context of the right to a fair hearing as contained in Article 6(1) of the Convention. In *Morris and Monnell v United Kingdom* [875] the European Court considered that the principles of the equality of arms as provided for in section 25(e) of the Bill of Rights Act were applicable:

in order to determine whether the requirements of fairness in Article 6 (art. 6) were met in the present case, it is necessary to consider matters such as the nature of the leave-to-appeal procedure and its significance in the context of the criminal proceedings as a whole, the scope of the powers of the Court of Appeal, and the manner in which the two applicants' interests were actually presented and protected before the Court of Appeal.

It would seem that though the right of appeal in particular circumstances carries with it the right to make oral submissions before the court, reasonable limits might be placed on the right. The reasonableness of those limits will depend on the nature of the proceedings, the statutory provisions setting out rights of appeal, and the scope of the appeal. [876] If the appeal requires a determination of facts and law, then it is less likely that a body hearing the appeal could make a determination without hearing the applicant in person. [877] The appellant in such circumstances must have access to all judgments and documents necessary to "enjoy the effective exercise of the right of appeal". [878]
**Ongoing rights of appeal**

The right of appeal in section 25(h) provides the right to one appeal. Section 25(h) does not confer a right of ongoing appeal. It does not therefore give every person accused with a summary offence the right to appeal to the Court of Appeal. The right does not refer to the "highest" court but simply a higher court. [879] A person convicted of a summary offence simply has the right under section 25(h) to appeal to the High Court. The Court of Appeal in *Slater* also held that the right to appeal to a higher court is a right that is affirmed "according to law". It is therefore a right which must be exercised according to the terms of section 144 Summary Proceedings Act. [880]

**Key cases:**


**History of the section**

*The White Paper*

Section 25(h) of the Bill of Rights Act is identical to that proposed in the *White Paper*.

**Section 25(h) origins in international treaties and overseas legislation**

Article 14(5) of the ICCPR states

Everyone convicted of a crime shall have the right to his conviction and sentence reviewed by a higher tribunal according to law.

Article 2 of Protocol 7 of the European Convention [881] provides:

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person
concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.
Section 25(i) The right for a child to be dealt with in a manner that takes account of the child's age

Section 25(i) of the Bill of Rights Act is as follows:

Age of the child to be considered
Everyone who is charged with an offence has, in relation to the determination of the charge, the right, in the case of a child, to be dealt with in a manner that takes into account the child's age.

Policy triggers: do I need to consider section 25(i)?

- Are you developing policy that will amend or alter the way in which child and young offenders are dealt with by the courts?
- Are you developing policy that will create a range of offences that will have a major impact on children or young people?
- Are you developing policy to change the definitions of "child" and "young offender"?

If you answer "yes" to any of these questions, consider whether your policy or practice is consistent with section 25(i) of the Bill of Rights Act.

What every policy analyst needs to know about section 25(i)

Section 25(i) requires that authorities develop a proportionate and considered response to the issue of child and youth offenders. It provides for a framework that enables authorities to deal with offenders in a way that takes into account the offender's right to a fair trial bearing in mind:

- the age of the offender;
- the offender's capacity to appreciate the nature of the proceedings and the legal implications;
- the gravity of the offence;
- the level of public and media interest.

Section 25(i) is considered relevant to the treatment of children and youth at the time of trial, and not the time at which the offence is committed.
Measures to increase compliance

If you are developing criminal law policy that will impact on children consider:

- Does the policy make any special provision for the fact that children will be affected by these arrangements?
- Have you consulted with persons who have knowledge and/or expertise on child and youth issues about the impact of your proposal on children?

Related rights and freedoms

If you are developing policy that you consider might give rise to issues under section 25(i), also consider the rights of a person arrested or detained and the rights of a person charged with an offence under sections 23 and 24 of the Bill of Rights Act in addition to:

- the right to a fair and public hearing (section 25(a));
- the right to be present and present a defence (section 25(e)).

Further discussion on the meaning of section 25(i)

Flexible standards

The UN Human Rights Committee notes that there does not appear to be any universal standards regarding:

- the minimum age at which a juvenile may be charged with a criminal offence;
- the maximum age at which a person is still considered to be a juvenile;
- the existence of special courts and procedures;
- the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation."

Despite this, the Committee has noted that juveniles should enjoy at least the same guarantees and protections as are accorded to adults under article 14 of the ICCPR. [882]
The rights to a fair trial afforded to adult offenders under section 25 of the Bill of Rights Act should apply equally to child and youth offenders as a minimum standard. However, a child's age and capacity to understand what is taking place during a proceeding may not be the same as an adult's. Modifications to trial procedure may be necessary to enable the offender to understand what is taking place.

The *White Paper* commentary on section 25(i) states that the provision establishes a "flexible standard and leaves room for a wide measure of flexibility in legislation, it creates a right for children to be dealt with in special and appropriate ways." [883] The *White Paper* adds that the meaning of "child" in this provision is not intended to be used in a specialised way, but should cover any case and any circumstance where the youth of the person called for special protection or treatment. [884]

**When age is relevant**

Internationally, there does not appear to be any commonly accepted minimum age for the imposition of criminal responsibility. In New Zealand, that minimum age is 14 years. [885] The Court of Appeal has indicated that section 25(i) is relevant to treatment at the time of trial and not the time at which the offence was committed. [886]

**A fair trial**

The European Court of Human Rights has also held that trial procedures for youth offenders need to be tailored to take into account the youth's right to a fair trial. What is considered fair in the context of adult offenders will not always be considered fair for young offenders. [887] The Court in *T* considered that:

It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition. [888]

In a separate but concurring judgment, Lord Reed in *T* said the following in respect of providing for the ability of a young offender to participate in his or her trial [889]:

There is on the other hand nothing in art 6 [of the European Convention] to indicate that there can be any derogation, in cases involving children from the principle that the trial process should provide for the effective
participation of the accused who must be able to follow the proceedings and
to give instructions where necessary to his lawyer. In order for that principle
to be respected in cases involving children, however, the conditions under
which the trial is held (including the procedure followed) have to be such as
will permit such participation, taking into account the age, level of maturity
and intellectual and emotional capacity of the child concerned.

Lord Reed went on to say:

If a child is to be held accountable to the criminal law, then he must enjoy the
same right as an adult to understand what is happening at the trial and to play
an active role in his defence. It has to be acknowledged that there are
inevitable limitations to the participation which can be expected of a child in
legal proceedings, whatever form those proceedings may take, since the
understanding and maturity of a child are unlikely to equal those of an adult.
[890]

**Jurisdiction of the Youth Court**

The Children Young Persons and their Families Act 1989 sets out the
procedures for dealing with children and young persons under 17 years of
age who offend against the law. This Act established the Youth Court for the
hearings of proceedings relating to such offending. Subject to certain
exceptions, any young person under 17 years of age who is charged with an
offence must be brought before a Youth Court to be dealt with in line with
the provisions of the CYPF Act. The only exception to this is where a young
person is charged with either murder or manslaughter. [891] Section 10(1) of
the CYPF Act imposes an obligation on the Court and the person's legal
representative or family to fully explain the nature of the proceedings and the
implications of those proceedings. Section 11 of the CYPF Act imposes an
identical duty on the Court and counsel to encourage and assist the
participation of the child or young persons in those proceedings. [892]

**Key cases:**

*Police v Edge* [1993] 2 NZLR 7, 14; (1992) 9 FRNZ 659; *T v United
Kingdom* (16/12/99) ECHRR; 7 BHRC 659
**History of the section**

*The White Paper*

The wording of section 25(i) is virtually identical to that which appeared in the *White Paper*.

*Section 25(i) origins in international treaties and overseas legislation*

Article 14(4) of the ICCPR provides:

In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

The United Nations Convention on the Rights of the Child (UNCROC) [893] states:

3(1) In all actions concerning children, whether undertaken by private or public welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.

... 40(1) States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

40(2) To this end and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians and to have
legal or other appropriate assistance in the preparation and presentation of his or her defence;
(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings.

40(3). States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

40(4). A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.
Footnotes:

785. Section 14 of the Bill of Rights Act.
786. Section 23(4) of the Bill of Rights Act.
787. See the section on the admissibility of confessions in Laws of New Zealand.
789. To this end, the courts have held that section 25(d) is of more relevance in pre-trial proceedings. Even though a person charged with an offence cannot be compelled to testify in proceedings, "the present law certainly allows an inference adverse to an accused to be drawn if he remains silent at trial in the face of evidence pointing to his guilt." *R v Butcher* [1992] 2 NZLR 257, 268.
790. Such statements may not only incriminate the accused but other parties who may be incriminated by such statements. You should therefore also carefully consider the Laws of Evidence and particularly those on the privilege of witnesses, see Part III of the Evidence Amendment Act (No. 2) 1980.
792. *Saunders v United Kingdom*
793. *Berry v Jamaica* 330/88
794. It therefore stands to reason that any action taken that is inconsistent with section 9 of the Bill of Rights Act (torture, cruel, disproportionately severe treatment etc) will run foul of section 25(d) if that treatment leads to an accused person making a self incriminatory statement, see *Berry v Jamaica* 330/88; *Cadoret and Le Bihan v France* (221/87, 323/88).
796. *Funke v France* 16 EHRR 297.
797. See *Saunders v United Kingdom* at para 69 and A-G's Reference (No 7 of 2000) [2001]2 Cr App R 286 (CA) at 59-60. For similar reasons the right in section 25(d) is not seen to extend to other evidence such as: blood samples or breath tests (*R v Altseimer* (1982) 38 OR (2d) 783 (CA), bodily samples taken for the purpose of taking DNA (*Saunders*); or the taking of property of the accused for the
purpose of comparison with evidence found at the scene of a crime (Toka v R, HC Christchurch 11/5/94, T 12 94).

798. Thomson Newspapers Ltd v Director of Investigation & Research (1990) 54 CCC 417.

799. Thomson Newspapers Ltd v Director of Investigation & Research (1990) 54 CCC 417, 508g.

800. Thomson Newspapers Ltd v Director of Investigation & Research (1990) 54 CCC 417, 518d.

801. See for example the doctrine of recent possession as set out in Trompert v Police [1985] 1 NZLR 357.

802. See John Murray v United Kingdom R v Clarke Court of Appeal, 16/12/93, CA417/93; and Drain v Police (1994) 11 CRNZ 576.

803. Section 366(1) of the Crimes Act 1961 prohibits anyone other than the person charged or his or her counsel or the Judge from commenting on the fact that the accused refrained from giving evidence as a witness. See also section 364 of the Crimes Act. Section 67(5) of the Summary Proceedings Act 1957 forbids adverse comment by the informant on the failure of the defendant to testify. For further information on this issue, see Adams on Criminal Law: Chapter 2 Evidence in Criminal Cases.

804. Note that even though the European Convention on Human Rights does not contain an express reference to the right not to be compelled to give self-incriminating evidence, the European Court has held that it is such a significant right at common law that it forms part of what constitutes a fair trial, see Funke v France 16 EHRR 297; Saunders v United Kingdom. It is also considered contrary to Article 6(2) of the Convention and the right to be presumed innocent.


806. This right is also affirmed by section 376(1) of the Crimes Act 1961 and section 158(1) of the Summary Proceedings Act 1957.


808. Downey v MAF Court of Appeal, 11/5/92, CA 355/91. See too section 376 of the Crimes Act 1961 and section 158 of the Summary Proceedings Act 1957. These Acts authorise the continuance of a trial in the absence of the accused where the behaviour of the accused in the course of that trial or preliminary hearing renders their continued
presence impracticable. Section 61(b) of the Summary Proceedings Act permits the court to proceed with the hearing in the absence of the defendant in certain very limited circumstances.

822. *R v Duval* [1995] 3 NZLR 202, 205. Note that the Criminal Procedure (Mentally Impaired Persons) Act 2003 provides the legislative framework for determining whether a person is fit to stand for trial or not.
825. See the discussion on effective legal representation under section 24(f) of these guidelines.
828. See also the sections in these guidelines dealing with facilities to prepare a defence (24(d)) and presenting a defence (25(e)).
829. *Takiari v R* 22/07/1999 CA 274/98 at page 11; see too the
decision of the Court of Appeal in *R v Griffin* [2001] 3 NZLR 577;
(2001) 19 CRNZ 47 (CA).

830. You should also refer to the Laws of Evidence concerning
hearsay.

EHRR 251. Although an inability to confront one's accusers may not
lead to an infringement of the right where the courts are able to
independently assess the credibility of the witnesses *Doorsen v

832. *R v L*[1994] 2 NZLR 54, 61. The Court in *R v L* at p 59 set out
relevant considerations of principle governing the exercise of the
discretion to exclude such otherwise admissible evidence. See also *R v
L* (D.O) [1993] 4 SCR 419; *R v Levogiannis* [1993] 4 SCR 475 and the
Evidence of Children and Other Vulnerable Witnesses*.

833. Sections 23C - 23I of the Evidence Act 1908; section 158CA of
the Summary Proceedings Act 1957 and the Evidence (Videotaping of
Child Complainants) Regulations 1990.

834. See the discussion of *R v L* [1994] 2 NZLR 54 above in relation
to the right to a fair trial.

835. *R v Drabble* Court of Appeal 18/2/92 CA 355, 356/91 and *M v
A-G* 29/5/97 CA60/97 where the Court of Appeal has found that the
use of CCTV technology and special witness protection screens do not
limit the defendant's rights as the defendant is still able to put questions
to the witnesses.

CRNZ 184 where the key issue was the reliability of the witnesses
statement. See the section of guidelines on the right to a fair trial
(section 25(a)) above.

470, para. 70.

471, para. 72.

EHRR 251.


845. See also the discussion on 'equality of arms' at p280 of the guidelines.


847. See discussion of "Equality of arms" at page 280 of these guidelines. See also Adams on Criminal Law Ch 10.17.03.


849. See *Vidal v Belgium* April 22, 1992, Series A, No. 235 - B.


852. On the issue of a defendant's right to seek medical examination of an alleged victim of a sexual assault, see *R v B* [1995] 2 NZLR 172 (CA); and *R v B (No.2)* [1995] 2 NZLR 752 at 758 -764.


858. See also section 6 of the Sentencing Act 2002, which is identical in scope to section 25(g).

859. *Daniels v Thompson* [1998] 3 NZLR 22 (CA), 47.


862. *R v Poumako* (1999) 17 CRNZ 294, 298. This approach was supported by the Court of Appeal *R v Poumako* (2000) 17 CRNZ 530; 5 HRNZ 652 (CA).

863. Refer to the discussion in these guidelines on the definition of offences in the introduction to section 24 of the Bill of Rights Act.


866. For example, criminal proceedings for breach of the peace leading to a binding over order were considered criminal in nature as they contain a deterrence aspect (an incentive to keep the peace) and a punitive aspect (the consequence of a failure to keep the peace) - see *Steel & Ors v United Kingdom* September 23, 1998 Reports 1998 -VII.


870. *Gough & Anor v Chief Constable of the Derbyshire Constabulary* [2001] 4 All ER 289, 327. at para 38. The Court in Gough held that a football banning order, that prevented the offender from attending regulated football matches, was not a penalty as it was not intended to act as a punishment.


876. Section 392A of the Crimes Act provides that there is a presumption that appeals will be heard by way of oral submissions. However section 392A provides that that presumption can be rebutted in certain cases. Section 392A sets out the procedures and relevant
criteria for determining whether an appeal should be heard orally or on the papers.

877. *Ekbatani v Sweden* May 26, 1988, Series A, No 134; 13 EHRR 504. The Court in this case expressly stated that Article 2 of Protocol 7 to the Convention could not be read to limit the right to a fair trial at appeal - see para 27 of *Ekbatani*.

878. *Henry v Jamaica* (230/87). See also section 392(1A) of the Crimes Act 1961. Section 392(1A) requires the Registrar for the Court to prepare a preliminary case on the appeal including documents, exhibits, or other things connected with the proceedings that the Registrar considers are relevant to the grounds of appeal. These documents must be made available to the parties to the appeal.


881. See too Article 6 of the Convention.


885. Section 272(1) of the Children Young Persons and Their Families Act 1989 (CYPF Act)


889. *T v United Kingdom* (16/12/99) ECHRR; 7 BHRC 659, 697.


891. Section 272(3)(a) and (b) of CYPF Act.


Section 26 Retroactive penalties and double jeopardy

Section 26 of the Bill of Rights Act is as follows:

Retroactive offences and double jeopardy

1. No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
2. No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

Section 26(1) Retroactive offences

No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

Policy Triggers: do I need to consider section 26(1)?

- Are you amending offence provisions in the legislation to expand or broaden the range of activities to which it applies?
- Are you developing policy that creates and offence for acts done before the legislation comes into effect?

If the answer to either of these questions is "yes" then you will need to consider if the policies are consistent with the section 26(1).

What every policy analyst needs to know about section 26(1)

- Section 26(1) is concerned with ensuring that persons are not punished by the criminal law for doing something that was not unlawful at the time
- Section 26(1) reflects that persons are entitled to expect the law to be sufficiently clear and certain so that he or she can confidently carry out certain activities or decide not to carry out those activities with the knowledge that those acts or omissions are in compliance with the law
• Section 26(1) is an affirmation of the general principle that matters of substantive criminal law should not be applied with retrospective effect.

**Measures to achieve compliance**

• If amending offence provisions consider employing transitional provisions that will enable conduct prior to the new act coming into force to be dealt with under previous legislation.
• Avoid giving offence provisions retrospective effect.
• If you are amending an offence provision, test the scope of the new offence provision to ensure it does not accidentally go beyond the range of activities it is intended to capture.
• If you are seeking to decriminalise certain conduct or provide a new defence to an offence, develop proposals that accommodate a person who committed an offence before the law change, but is not tried until after the law change.

If you are considering developing a new offence refer to the Legislation Advisory Committee Guidelines (Guidelines on Process and Content of Legislation). This publication contains a useful chapter on criminal offences that sets out other relevant considerations when developing offences that may be of assistance. [894]

**Related rights and freedoms and freedoms**

If you are developing policy that you consider might give rise to issues under section 26(1), you should also consider:

• The right to a fair trial (section 25(a))
• The right to the lesser penalty when penalties changed (section 25(g))
• The right to the observance of the principles of natural justice (section 27(1))

**Further analysis on the meaning of section 26(1)**

**In what situations does this right apply?**

Section 26(1) as applies only in respect of offences that have a retrospective effect. That is, section 26(1) is concerned with substantive changes to the law that either result in extending current offences to capture a broader range of
conduct or that prohibits certain activities and applying those changes to a previous period of time where the conduct or activities were lawful. It is not concerned with procedures that do not form part of the penalty or punishment of an offender [895] or changes to procedural law, (such as changes in trial practice or changes to the law of evidence). [896] Changes to procedural law may, however, infringe 26(1) where they affect the basic ingredients of a fair trial.

The right has been described as follows:

It is a fundamental right that no one should be held criminally liable for an act or omission which did not constitute an offence at the time it was committed, or be subjected to a sentence which was not in force at that time. A defendant's conduct is to be judged by the law at the time of the conduct; not in retrospect. If Parliament chooses to depart from this principle it must surely take care to ensure that it does so with due deliberation and with firm adherence to proper form. [897]

The right to be free from liability under a retrospective offence contained in section 26(1) of the Bill of Rights Act has always been a fundamental principle, and a "plank of the common law" [898] in New Zealand. Section 26(1) is concerned with ensuring that the law is sufficiently certain and clear that it enables individuals to refrain from, or perform, activities with the confidence that their behaviour is in compliance with the law. That is, the individual must be able to foresee the consequences of their actions. Amendments to the criminal law that apply to conduct prior to enactment and that have the effect of clarifying an element of an offence may offend against the principles of retrospectivity if the amendment extends to conduct previous thought to be lawful or increases the severity of the offence. [899]

Section 26(1) does not apply in circumstances where the courts provide clarification on the application of an offence so long as the developments in caselaw are reasonably foreseeable and do not alter the essence of the offence. [900] The European Court of Human Rights has also taken the approach that as long as the development in the law is reasonably foreseeable, whether as the consequences of Parliamentary scrutiny or judicial interpretation, then the prohibition against retrospective offences does not apply. It is unclear whether the courts in New Zealand would take a similar approach. Developments in the law may be reasonably foreseeable in situations where a person who is engaged in an activity that entails a degree of legal risk, searches out legal advice as to the legal risks associated with a course of action. [901] However, where conduct is of an ongoing nature and
is only unlawful for a part of that period, only the conduct that took place after the law change can be prosecuted. [902]

**The general principle**

The Legislation Advisory Committee has previously provided comment on the issue of retrospectivity. [903] The LAC sets out the general principle in the following way [904]:

a. Legislation should, in general, have prospective effect only. In particular it should neither interfere with accrued rights and duties, nor should it create offences retrospectively; and

b. Legislation should, in general, neither deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law, nor to continue proceedings asserting rights and duties under the law.

The European Court of Human Rights has also taken the view that the prohibition against retrospective offences is to guard against arbitrary prosecution, conviction and punishment. [905]

Although the general principle applies to all statutory provisions that have retrospective effect, section 26(1) is concerned with retrospective offences. [906]

**Key cases**


**History of the section**

**The White Paper**

The right, as set out in the Bill of Rights White Paper, is intended to apply only to offences, [907] not apply to all legislation, policies or practices that have retrospective effect. The right now contained in section 26(1) is the
same as that contained in the White Paper, the only difference is that it was relocated to a new clause.

Section 26(1) origins in international treaties and overseas legislation

Article 15 of the International Covenant on Civil and Political Rights (ICCPR) provides:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) is an example of a regional instrument that affirms the protection against retrospective offences. Article 7 of the European Convention states:

(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed that the one that was applicable at the time the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.

Section 11(g) of the Canadian Charter of Rights and freedoms contains a similar right to section 26(1) of the Bill of Rights Act:

11 Any person charged with an offence has the right ... (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or
was criminal according to the general principles of law recognized by the community of nations;

Article 1 (Section 9) of the United States Constitution prohibits the passing of *ex post facto* laws (or laws that have retrospective effect). Specifically, any law that makes an act criminal that was not criminal when it was committed is prohibited. [908]

### Section 26(2) Protection against double jeopardy

Section 26(2) of the Bill of Rights Act is as follows:

**Double jeopardy**

No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

**Policy Triggers: do I need to consider section 26(2)?**

- Are you considering changes to existing offences that would allow a person to be tried a second time for the same alleged crime?
- Are you amending any criminal procedure rules relating to previous convictions and acquittals?
- Are you designing a regulatory regime that provides for the imposition of a punishment for doing something that would also amount to a crime?
- Is the offence part of a new regime, if so are there any offences that may already apply to the activity?
- Do you wish to provide a person with access to exemplary or compensatory damages for criminal activities of another person or company, (see for example: 319 of the Injury Prevention, Rehabilitation, and Compensation Act 2001)?

**What every policy analyst needs to know about section 26(2)**

- A person who has been tried once, in proceedings that may involve the imposition of a true penal consequence, cannot be tried again on a charge that is substantially the same as the original charge.
- Only applies in respect of criminal offences and not trials that may result in a form of civil liability.
Only applies where a person has been finally acquitted, convicted or pardoned (i.e.: after all the appeals have been exhausted) for the "same" offence; and

Penalties and sanctions imposed by professional disciplinary bodies do not usually form a punishment for the purposes of this section

A person who faces more than one charge relating to the same conduct is not at risk of being punished twice for the same offence if the essential elements of the offences differ

**Measures to achieve compliance**

If you are considering developing a new offence refer to the Legislation Advisory Committee Guidelines (Guidelines on Process and Content of Legislation). This publication contains a useful chapter on criminal offences that sets out other relevant considerations when developing offences that may be of assistance in formulating disciplinary powers. [909]

**Further discussion on the meaning of section 26(2)**

The decision by the Court of Appeal in *Daniels v Thompson* is the leading New Zealand case on section 26(2). In this decision the Court clearly establishes that the right applies only to the prosecution of criminal offences (see below). The fundamental principles underlying the right are succinctly set out by Justice Thomas in *Daniels*. [910] These fundamental principles have been recognised in both New Zealand [911] and overseas jurisdictions: [912]

Thomas J stated:

The idea underlying protection against double jeopardy is that the state, with all its resources and power, is not to be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him or her to embarrassment, expense and ordeal and compelling them to live in a continuing state of anxiety, as well as enhancing the possibility that, even though innocent, they may be found guilty. ... The protection against double punishment prevents a person from suffering the patent injustice of being punished twice for the same offence.

**What types of proceedings does section 26(2) apply to?**

The majority of the Court of Appeal made it clear that section 26(2) must be read as referring:
Only to criminal proceedings relating to an offence against the law, for which the person has been tried. What is prohibited is further trial for the same offence, that is a trial which may also result in acquittal or conviction. The provision is not concerned with a trial which may result in a form of civil liability. [913]

Because of the decision in Daniels, section 26(2) does not apply in situations where a person may be subject to civil penalties imposed by the courts, or disciplinary penalties imposed by administrative or professional bodies and criminal penalties imposed by the courts. [914] Sanctions imposed by professional or administrative bodies [915] or civil penalties imposed by a court are considered not to come under the definition of a penalty for the purposes section 26(2) because they are not punitive. [916] In the case of civil penalties, the US Supreme Court in Hudson made the point that attempts to distinguish between punitive and non-punitive civil penalties may be unworkable and confusing. There was, therefore, too much scope for an inconsistent approach when trying to second-guess the intent of a policy agency.

The Canadian Supreme Court in R v Wigglesworth considered that professional disciplinary regimes are "primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity." Criminal sanctions on the other hand are "of a public nature, intended to promote public order and welfare within a public sphere of activity". [917]

The prohibition contained in section 26(2) also relates to new proceedings for the same offence [918] and therefore, does not apply in respect of an act that involves a number of discrete offences where the elements of the offences differ. [919] However, if the differences between the offences are considered nominal, the courts may hold that a person is being punished twice. [920]

**Who does the right protect?**

The protection only applies to the same legal person. Justice Gendall set out in the High Court judgment of Spencer v Wellington District Court: [921] "In principle, I think there can only be double punishment, so as to justify a stay if the same legal person is punished." In Spencer the employer (a corporation) had been punished under section 6 of the Health and Safety in Employment Act 1992 for the death of a worker. However, the employer was also the person who contributed to the death (i.e: failed to take the correct duty of care) and was to be prosecuted under section 56 of the Crimes Act
1961 for manslaughter. Justice Gendall considered the company and the plaintiff to be two different legal persons.

What does "finally" acquitted or convicted mean?

The principle of "finality" underpins the idea that once a person has been finally acquitted, convicted or pardoned for the offence then that person should not be tried or punished for that offence again. The High Court in Police v Gilchrist [922] considered that:

...a defendant is entitled to the certainty that, after the passing of sentence and any time for appeal, her case is over and she can get on with life. There must be finality - an end to proceedings.

The Canadian Supreme Court, like New Zealand, has noted that for someone to have been "finally" acquitted or "finally" found guilty then all appellate procedures must have been completed [923] and there must be no error of law that resulted in the acquittal. [924]

In New Zealand where someone is discharged under section 347 of the Crimes Act 1961, that discharge has the effect of an acquittal with the effect that an accused may not be punished for that offence. [925]

What happens if someone has been acquitted, or convicted and punished in a foreign jurisdiction?

The right may also apply in situations where a person is charged with an offence in circumstances where the person has been previously acquitted, pardoned, or convicted and punished for the same offence in a foreign jurisdiction. However, there are practical difficulties associated with applying the right in such circumstances because of the different ways in which different jurisdictions penalise activities. The Canadian Supreme Court held that in order for the right to apply the scope and purpose of the offences that prohibit the conduct must be the same. [926]

Key cases

History of the section

The White Paper

The Bill of Rights White Paper set out that inclusion of section 26(2) is to "enshrine the rules against double jeopardy already contained in the Crimes Act 1961 s.357." [927] The right now contained in section 26(2) of the Bill of Rights Act is substantively the same as the right proposed by the White Paper.

Section 26(2) origins in international treaties and overseas legislation

Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR):

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 4 of Protocol No. 7 to the European Convention states:

(1) No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
(2) The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
(3) No derogation from this Article shall be made under Article 15 of the Convention.

Section 11(h) of the Canadian Charter of Rights and freedoms contains a similar right to section 26(2) of the Bill of Rights Act:

11. Any person charged with an offence has the right ...
(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and ...

Footnotes:

894. The latest version can be found on the Internet at http://www2.justice.govt.nz/lac.
896. *T v Attorney-General* (Court of Appeal, CA 175/97, 27 August 1997, Elias J.
897. *R v Poumako* [2000] 2 NZLR 695, paragraph 73 per Thomas J (general principle also affirmed by majority judgment). See also *R v Pora* [2001] 2 NZLR 37, per Elias CJ.
898. *R v Pora* [2001] 2 NZLR 37, paragraph 32 per Elias CJ.
899. See for example *R v King* [1995] 3 NZLR 409. The issue in *King* was whether recent amendments to the Crimes Act would have application in this case. These changes clarified the scope of particular offences, but at the same time broadened the application of the provisions. As a result, more minor offences were now potentially much more serious.
904. Page 35, paragraph 164.
906. It is therefore arguable that the reach of section 26(1) is longer than the protection afforded by section 10A of the Crimes Act 1961.
because it applies to all offences (including military offences) and not just criminal offences. The impact of section 10A, though, may be greater because of the residual effect of section 4 of the Bill of Rights Act. Section 10A prohibits retrospective penalties in more absolute terms. It provides:

Notwithstanding any other enactment or rule of law to the contrary, no person shall be liable in any criminal proceedings in respect of an act or omission by him if, at the time of the act or omission, the act or omission by him did not constitute an offence.

907. Paragraph 10.124. Note: the protection relating to retrospective penalties is contained in section 25(g) of the Bill of Rights Act.

908. *Calder v Bull* 3 U.S. (3 Dall.) 386, 390 (1798); *Ex parte Garland* 71 US (4 Wall.) 333, 377 (1867); *Burgess v Salmon* 97 US 381, 384 (1878).


910. *Daniels v Thompson* [1998] 3 NZLR 22, Thomas J (dissenting) p.57

911. New Zealand legislation also provides protection for this right in the Crimes Act 1961:
- double punishment under section 10(4); and
- previous acquittal or conviction under sections 357 to 359.

Section 26(2) has broader application than the jeopardy provisions contained in sections 358 and 389 of the Crimes Act 1961 because the right refers to not only the acquittal and conviction of the individual but also the punishment of the individual.


916. *Hudson v US* 118 S Ct 488.


918. Sections 358 and 359 of the Crimes Act 1961 provide for a "bar" on second accusations or charges being bought for substantially the same offence for which a person has been convicted or acquitted.


921. *Spencer v Wellington District Court* [2000] 3 NZLR 102 (HC) per Gendall J, paragraphs 34 - 41.


928. Note that 4(2) provides for a very broad limitation on the right, and on the face of it, this would appear unlikely to satisfy the requirements of section 5 of the Bill of Rights Act.
Introduction to sections 27(1) to 27(3): The right to justice

The rights in section 27 affirm the requirement for decision-makers to act in accordance with certain procedures that are considered fundamental to the rule of law. These rights are concerned with ensuring that decision-makers follow correct procedures rather than arrive at fair outcomes. There are no equivalent provisions to be found in the International conventions or bills of rights employed elsewhere. It is considered that the inclusion of these protections recognises the developments in administrative law in New Zealand.

There is some interplay between these rights. The rights in section 27 are, in many ways, similar to the criminal procedure rights found in sections 23 to 25 of the Bill of Rights Act.

Section 27(1) affirms common law principles and the requirement for decision-makers to act fairly or reasonably. Essentially, the right requires decision-makers to hear both sides of the argument. It also requires decision-makers to be impartial.

Section 27(2) serves to ensure that a person may challenge the lawfulness of any decision that affects him or her.

Section 27(3) precludes the Crown from having any procedural advantage in legal proceedings between it and any person.

Section 27(1) The right to the observance of the principles of natural justice

Principles of natural justice
Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
Policy triggers: do I need to consider section 27(1)?

You may need to consider whether your policy or practice complies with section 27(1) if the policy that you are working on provides for, or the agency that you work for engages in a process of decision-making where the outcome affects or impacts on the interests of individuals (whether as part of the general public or a specific sector of the community). If so, you should ask:

- Does the policy or practice restrict the ability of a person likely to be affected by the outcome to participate in a hearing or the decision-making process?

The types of restrictions on a person's ability to participate include:

- not giving the person adequate notice of the hearing or the complaint made against the person;
- withholding from the person concerned the information that is to be relied on in reaching a particular decision;
- limiting the opportunities for a person to make written or oral representations to the decision-maker;
- not allowing the person to attend the hearing or cross-examine certain witnesses;
- not allowing the person to have legal representation at the hearing;
- not providing the person with the reasons for the decision (thereby inhibiting a person from deciding whether they will challenge the decision); and
- limiting the period within which the person can appeal or challenge any decision.

Section 27(1) also requires a decision-maker to be impartial or disinterested in the outcome of the decision-making process, so:

- Does the policy or practice allow a person who has an interest in the outcome of the process to be the decision-maker?
What a policy analyst needs to know about section 27(1)

- The observance of natural justice principles has traditionally required compliance with the right to hear the other side and the right to be free from bias or partiality on the part of the decision maker.
- Section 27(1) is concerned with procedural fairness and not the substance of the decision arrived at.
- The requirements of natural justice are flexible in practice, the scope and content of which adapts to particular situations.
- The right applies only in the context of public authorities or tribunals that make determinations of an adjudicative character and that are of direct impact on that person's rights.
- Policy decisions of "general application" taken by Ministers are not individuated assessments and are not determinations in respect of a person's rights.
- The definition of who or what is a public authority is sufficiently broad to take into account most decision-makers exercising a statutory function.
- The determination must also have a direct bearing on the individual's interests.
- The right in section 27(1) imposes a duty on decision makers to act fairly
- The more serious the consequence for the individual the greater the need for procedures to be put in place that address the interests of the affected party.

Measures to achieve compliance

The issue of what is required by the observance of the principles of natural justice will vary from case to case. However, the following suggestions will be of some use to you in the development of policies and procedures:

- Prior notice - develop procedures to ensure that anyone whose rights or interests may be affected by a decision will have sufficient notice of that impending decision or hearing and be given adequate opportunity to prepare and present their case. Prior notice is not required where the person's interests or rights are merely speculative or insignificant. Prior notice is essential to an effective right to be heard (see below). [929]
• Disclosure of relevant material - develop a practice that enables interested parties to be provided with all relevant material relating to a decision. Such a practice will aid interested parties in the preparation of their submission so that they can challenge or correct any material at issue. [930] Where disclosure of material may lead to harm to others, breach of confidence, invasion of privacy or injury to the public interest consider ways in which the interests of all parties can be accommodated.

• Opportunity to be heard - all parties to a dispute should have the right to be heard by the decision-maker. [931] Depending on the circumstances, the decision maker may be required to hold an oral hearing before reaching a decision. Oral hearings are likely to be required in situations where a person's credibility is at issue or the nature of the fact-finding task requires the hearing. In other situations, the opportunity to make written submissions will be sufficient. Ex parte applications, which provide no opportunity for one or more sides of the dispute to be notified or to be heard, are therefore prima facie inconsistent with the right to natural justice in section 27(1). Ex parte applications may, however, be justified in certain situations. In terms of justification, relevant factors may include where the ex parte process is aimed at avoidance of delay and the protection of the applicant (for example, situations involving domestic violence), or where any decision resulting from an ex parte application can be varied or discharged at a later date (that is, where the process results in interim as opposed to final orders). [932]

• Warnings as to adverse credibility findings - warn parties of any pending adverse findings in order to provide an opportunity for the affected party to respond. [933]

• Legal representation - provide opportunities for persons to be represented at public tribunals. If you are considering limiting the right to legal representation, reflect on the seriousness of the particular issue and possible consequences of the decision, whether any points of law are likely to arise, the capacity of the particular party to conduct the case without legal representation, procedural difficulties likely to be encountered, the need for speed in making the decision, and the need for fairness between the parties involved. [934]
- **Cross-examination** - natural justice generally requires the right of a person to cross-examine or test the evidence of the other side, especially in circumstances where credibility is an issue. The issue of cross-examination is unlikely to arise outside situations where natural justice requires an oral hearing.

- **Reasons for decisions** - provide the affected party with reasons for the decisions. The Court of Appeal in *Lewis v Wilson and Horton Ltd* [935] pointed to three main reasons why the provision of reasons is desirable. Firstly, providing reasons for decisions is an important aspect of openness in the administration of justice (which is affirmed by section 25(a) of the Bill of Rights Act in the context of criminal proceedings). Secondly, a failure to give reasons means that the lawfulness of what has been done cannot be assessed by a court exercising its supervisory jurisdiction (for example, by way of judicial review). Finally, providing reasons is the best protection against decision-makers giving wrong, arbitrary or inconsistent decisions. It would also serve to ensure that the decision is able to be objectively seen as being free from the taint of bias or predetermination.

- Other means of ensuring that your decision-making process is fair and is seen to be free from bias include:
  - Establishing a requirement that members of decision-making panels or bodies declare potential conflicts of interest on appointment to office, and require members to update these regularly
  - Establish an independent decision-making body or office whereby a person affected can challenge that decision.

**Related rights and freedoms and freedoms**

You may have noticed that many of the concepts mentioned above, for example, the right to prior notice, disclosure of relevant material, and the opportunity to be heard, are similar to the rights set out in section 25 of the Bill of Rights Act (minimum standards of criminal procedure). As was noted in the White Paper and in the discussion above, the principles of natural justice vary in their application depending upon the circumstances of the particular case or issue being determined, with the more serious the matter the nearer the procedures will need to approximate those in section 24 and 25 of the Bill of Rights Act if the circumstances so require.
Further discussion on the meaning of section 27(1)

Duty to act 'fairly'

Natural justice is often described as a duty on decision makers to act fairly. The majority of the Privy Council in the case of Furnell v Whangarei High Schools Board commented that "[n]atural justice is but fairness writ large and juridically, fair play in action". [936] Natural justice and fairness can therefore be seen as alternative descriptions for a single but, as noted below, flexible concept.

However, it should be noted that the duty in section 27(1) is to act procedurally fairly. In other words, section 27(1) is concerned with ensuring that the process for reaching a decision is a fair one, and not whether the decision itself is fair.

Principles of natural justice

Observance of natural justice has traditionally required compliance with two broad principles. The first principle relates to the right to hear the other side and the second to the freedom from bias or partiality on the part of the decision-maker. [937] In practice, the procedures that will be required to comply with these principles will, as noted above, vary from case to case. Essentially, the more serious the consequence for the individual, the greater the procedural protection that will be required.

Right to hear the other side

- The central concepts of the first broad principle of natural justice include [938]:
  - prior notice - anyone whose rights or interests may be affected by a decision should have sufficient notice of that impending decision or hearing
  - disclosure of relevant material - all relevant material should be disclosed to interested parties so that they can know the case against them and correct any inaccuracy
  - opportunity to be heard - all parties to a dispute should have the opportunity to put their case, whether in writing or in the form of an oral representation
- warnings as to adverse credibility findings - parties subject to an adverse finding should be given advance notice of the decision so that they have the opportunity to respond
- legal representation [939] - the principles of natural justice may require that a person be legally represented where representation is necessary in the interest of fairness

**Bias/impartiality**

The second broad principle of natural justice requires impartiality in decision making - that is, the decision-maker should be disinterested and unbiased. A decision-maker who is 'biased' (for instance, if he or she has a personal interest in the outcome) should be disqualified from hearing the issue, unless the decision-maker discloses the personal interest and the parties agree to the person's continued involvement. As we have already seen earlier, the requirement that the decision-maker be impartial does not extend to them coming to an issue without a personal view on the issue. It requires the decision-maker to approach the matter from a disinterested perspective and that there is no impropriety. [940] Justice, after all, should not only be fair, it should be seen to be fair.

**General considerations**

Section 27(1) affirms the right to natural justice in situations where a tribunal or public authority has the power to make a determination in respect of a person's rights, obligations or interests protected or recognised by law. The High Court has observed that section 27(1) is an exceptionally important provision in the Bill of Rights Act, but that surprisingly little use has been made of it in civil litigation in general. [941]

**The decision-maker**

Section 27(1) requires the decision-maker to be either a tribunal or a public authority: the tribunal or public authority must have the power to make a determination in respect of the relevant person's rights, obligations or interests. The courts have taken the approach that the terms 'tribunal' and 'public authority' should be interpreted broadly. [942] A court is clearly a tribunal, and Ministers have been held to be public authorities. [943] The courts have also held that a district law society which is investigating a complaint against a lawyer is bound by section 27(1) of the Bill of Rights Act
to observe the principles of natural justice, [944] as is the corporation that administers the accident compensation scheme. [945]

When considering whether a tribunal or public authority is making a 'determination' in respect of a person's rights, obligations or interests, the Court of Appeal has held that the determination must be of an adjudicative character and of direct impact on the person's rights and so forth. [946] Policy decisions taken by Ministers are not individuated assessments and are not determinations in respect of a person's rights - even where the outcome of that decision has a bearing on the interests of individuals. [947]

**Appeals**

The principles of natural justice do not confer an automatic right of appeal: the right of appeal is conferred by statute. [948] However, as we have seen, the interests of fairness may necessitate that an interested party be given the opportunity to appeal against a decision that affects them. [949]

**Common law principles**

The principles of natural justice has been reflected in the law for some time. As noted in the White Paper, natural justice reflects basic principles of the common law which go back to at least the sixteenth century. There is therefore a large body of case law pre-dating the enactment of the Bill of Rights Act that is relevant to determining the scope and application of section 27(1).

**A flexible concept**

The requirements of natural justice are flexible in practice, the scope and content of which adapts to particular situations. [950] The most important factor to bear in mind is that observance of the principles of natural justice is a flexible concept. What is "fair" in one context might not be fair in another.

The requirements of natural justice depend on a number of factors, including the circumstances of the case, the rules under which the tribunal or public authority is acting, the matter that is being dealt with, the sanctions that could be imposed and the nature of the inquiry or determination. [951] As one judge has pointed out

[i]t is necessary to consider carefully the circumstances, because what is, or is not, fair procedure or fair play will depend on the relevant circumstances of each and every case. [952]
Key cases


History of the section

*The White Paper*

Section 27(1) is unchanged from that which was proposed in the *White Paper*.

*Section 27(1) origins in international treaties and overseas legislation*

The right to justice in section 27 is not found in any international human rights instrument. The closest provision in terms of content is Article 14(1) of the International Covenant on Civil and Political Rights. Article 14(1) provides that everyone charged with an offence or whose interests or obligations are affected "in a suit at law ... shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

There is some equivalence to section 27(1) to be found in the Canadian Charter and the American Bill of Rights, though in both cases the provisions are broader in scope that section 27(1).

Section 7 of the Canadian Charter provides that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Fifth Amendment to the Constitution of the United States provides:

...No person shall be deprived of life, liberty or property, without due process of law.
Section 27(2) The right to a judicial review of determinations

Section 27(2) of the Bill of Rights Act is as follows:

Application for judicial review
Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

Policy triggers: do I need to consider section 27(2)?

- Does your policy seek to limit the ability of courts to review the decisions made by a tribunal or public authority?
- Does your policy intend to limit the ability of a person affected by these decisions to legally challenge the decision?

If so, then you should consider whether your policy is consistent with section 27(2).

What every policy analyst should know about section 27(2)

- The purpose of section 27(2) is to enable any individual whose rights, obligation or interests have been adversely affected by the decision to apply to the courts for a review of that decision to ensure that it has been carried out lawfully
- As the right to seek judicial review of official actions enables a person to challenge the lawfulness of those actions, any intention to limit that right should be made clear and explicit
- Statutory provisions that seek to limit the ability of the Courts to review decisions, may not prevent the courts from reviewing those decisions where the decision-maker has acted unlawfully
- The right to apply for judicial review under section 27(2) is not limited to statutory decision-making
- Statutorily imposed restrictions on the time within which an individual may apply for judicial review are not inconsistent with section 27(2)
Measures to achieve compliance

If you are developing legislation and you wish to prevent or limit the ability of the courts to review the decisions made under that legislation, consider whether your objectives can be achieved by limiting the period within which a person may apply for judicial review, or the scope of the review. However, if your policy expressly limits or precludes the right to apply for judicial review you may wish to have good justificatory material for limiting the right to apply for judicial review.

Related rights and freedoms and freedoms

There is also some overlap between section 27(1) and section 27(2) of the Bill of Rights Act. A statutory provision that allowed an interested party to appeal a decision to a court on a matter of fact or law or apply for judicial review of the decision would achieve consistency with both section 27(1) and 27(2).

The courts have said that a statutory provision that seeks to prevent a court from reviewing a decision cannot be interpreted to mean that Parliament intended for the decision-maker's decision to be immune from review where the decision-maker failed to observe the principles of natural justice.

Further discussion on the meaning of section 27(2)

Section 27(2) affirms the right of a person to apply for judicial review of a determination affecting that person's rights, obligations or interests. The purpose of section 27(2) is to enable any individual whose rights, obligation or interests have been adversely affected by the decision to apply to the courts for a review of that decision to ensure that it has been carried out lawfully. [953]

The right to seek judicial review of official actions enables a person to challenge the lawfulness of those actions. The Legislative Advisory Committee (LAC) points out that, as Parliament would not have intended to authorise unlawful action, it is not appropriate for legislation to limit or preclude judicial review. [954]

Scope of section 27(2)

The right in section 27(2) is consistent with the right to seek judicial review of official decisions or actions that exists under the common law. The right is
not limited to statutory decision-making. [955] Section 27(2) does not, therefore, create a new remedy.

**Time constraints/privative clauses**

The provision is concerned with access to justice, ensuring that, otherwise than 'according to law', judicial review proceedings may not be interfered with. [956] The phrase 'according to law' means that statutory time constraints on the period within which an individual may apply for judicial review are not likely to be inconsistent with section 27(2). The period within which an individual may apply for review should be reasonable otherwise the constraints may have the effect of limiting the purpose of the right. A statute may also regulate the manner in which review may be sought. Some specification of scope is also likely to be permissible.

A privative clause is a statutory provision that provides that the decision or part of the decision of a tribunal or statutory authority on a question of law is final. A Court is therefore prevented from reviewing that decision or any aspect of that decision. In spite of this, the courts have been hesitant to conclude that a question of law has been conclusively conferred on a statutory authority or tribunal. [957] This is particularly the case where a decision-maker has failed to observe the principles of natural justice. Where a decision-maker fails to act in accordance with the principles of natural justice, it may be said that he or she acts outside their jurisdiction. The decision cannot have been reached on a correct legal basis. A privative clause is therefore unlikely to have any effect as the Courts will assume that Parliament did not intend for decision-makers' findings to be immune from review if the decision has not been reached on the correct legal basis. [958] That can arise if it is not legally correct, not in accordance with applicable rules of natural justice or subject to *Wednesbury* unreasonableness.

The Court of Appeal in *O'Regan v Lousich* [959] described the approach of the Courts to privative clauses in this way [1995] 2 NZLR 620, 626-627 Tipping J held:

Parliament grants the decision maker the power to decide on the footing that the power is to be exercised lawfully (ie correctly in law), fairly (ie according to the rules of natural justice, if applicable) and reasonably (ie within the bounds of reason - the *Wednesbury* principle). If the decision maker goes wrong in law, acts unfairly or makes an unreasonable decision, the decision is regarded as having been made ultra vires and thereby the decision maker exceeds his or her jurisdiction.
In *O'Reilly* Lord Diplock said that if a decision maker, whose jurisdiction is limited by statute, mistakes the law, he has asked himself the wrong question, i.e., a question into which he had no power to inquire. Thus it was a question which he had no jurisdiction to determine. ...

On this basis the question is not whether the decision maker has made a wrong decision but whether he has inquired into and decided a matter which he had no right and therefore no jurisdiction to consider. This analysis was developed in cases where the decision maker had made an error of law. In doing so he had made a wrong decision and thereby asked himself the wrong question. If the decision maker acts unfairly it is not a case of asking himself the wrong question. It is rather that the power to decide is given on the implicit basis that it will be exercised fairly. Parliament gives no power to decide unfairly and therefore by doing so the decision maker exceeds his powers. His decision is therefore ultra vires and outside his jurisdiction. Similarly, if a decision is unreasonable in the relevant sense it is ultra vires and in excess of or outside the decision maker's jurisdiction.

The process of reasoning whereby a person misdirecting himself in law was said to have asked himself the wrong question can now be simplified into saying that a power to decide is given on the basis that it must be exercised on the correct legal basis. ... Thus we are back to the proposition with which I started, namely that if a decision maker goes wrong in law, acts unfairly or makes an unreasonable decision he will have acted ultra vires and in excess of jurisdiction.

It is, of course, perfectly possible for Parliament to provide, if it chooses, that the decision of a particular decision maker shall not be impugned on certain bases or indeed on any basis. With most types of tribunal and decision maker there is a presumption that Parliament does not intend the decision to be conclusive irrespective of errors of law, unfairness or unreasonableness...

**Key cases**

*Bulk Gas Users Group v Attorney-General* [1983] NZLR 129; *O'Regan v Lousich* [1995] 2 NZLR 620; *Te Runanga Whare Kauri Rekoku v AG*, unreported, High Court, Wellington, CP 682/92, 12 October 1992; *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] 4 All ER 289
History of the section

The White Paper

Section 27(2) is unchanged from that which was proposed in the White Paper.

Section 27(2) origins in international treaties and overseas legislation

The right to justice in section 27 is not found in any international human rights instrument. The closest provision in terms of content is Article 14(1) of the International Covenant on Civil and Political Rights. Article 14(1) provides that everyone charged with an offence or whose interests or obligations are affected "in a suit at law ... shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Section 27(3) Proceedings involving the Crown same as proceedings between individuals

Section 27(3) of the Bill of Rights Act is as follows:

Proceedings involving the Crown
Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard according to law, in the same way as civil proceedings between individuals.

Policy triggers: do I need to consider section 27(3)?

- Does your policy attempt to prevent or limit Crown liability or bar proceedings against the Crown for the actions of its agents?
- Does your policy exempt the Crown from paying compensation, damages or costs to individuals whose interests or rights have been affected by changes in government policy?
- Does your policy propose to remove a cause of action against the Crown, and in particular, to remove a cause of action where there may be proceedings instituted?
- Does the policy provide that proceedings between a person and the Crown will be conducted differently than between individuals?
What every policy analyst should know about section 27(3)

- Section 27(3) affirms the right of a person who sues, or is being sued by the Crown to have that litigation conducted in the same way that litigation between two individuals would be conducted.
- Section 27(3) does not guarantee a cause of action against the Crown.
- Section 27(3) requires that the Crown must not have any procedural advantages in court proceedings (that would not be available to an individual in the same situation).
- Changes to the substance of the law which limit or remove any basis for Crown liability, thereby reducing or even eliminating the prospects of success by an individual in suing the Crown, are not necessarily inconsistent with section 27(3).

Measures to achieve compliance

The right in section 27(3) of the Bill of Rights Act to bring civil proceedings against, and defend civil proceedings brought by, the Crown relates to procedural matters. The key question to ask is whether your policy results in the government having any procedural advantage when bringing or defending actions in court.

Issues of compliance with section 27(3) commonly arise in the context of policies or legislation that purport to exempt the Crown from paying compensation, damages, or costs to third parties. In light of the decision in *Westco Lagan Ltd v Attorney-General* [961], we take the view that non-compensation provisions are unlikely to breach section 27(3).

Uncertainty does, however, still exist about the extent to which the Crown can legislate to remove all liability for its actions, and at what point in proceedings (before, during or after) this occurs. Provisions that restrict the ability of a person to bring proceedings against the Crown are problematic in terms of compliance with section 27(3). Provisions that stipulate that the Crown is not liable to pay any costs or damages are similarly problematic. This is because although restrictions on the type of remedy do not by themselves represent a procedural bar to bringing proceedings, substantive restrictions on the range of available remedies may act as a procedural bar if they have the effect of rendering the proceedings irrelevant. You should therefore obtain expert legal advice if you intend to exempt the Crown from legal liability for any of its actions.
Further discussion on the meaning of section 27(3)

Section 27(3) has been interpreted by the courts as a right that relates to procedural matters in litigation. [962] The provision affirms the right of a person who sues, or is being sued by the Crown to have that litigation conducted in the same way that litigation between two individuals would be conducted. Section 27(3), in effect, requires that the Crown must not have any procedural advantages in court proceedings to enforce rights if such rights exist.

While section 27(3) protects procedural rights, to date it has not been interpreted as precluding changes to the substantive law, nor does it guarantee a cause of action against the Crown. As noted by the High Court, section 27(3) does not restrict the power of the legislature to determine what substantive rights the Crown is to have. [963] It follows that changes to the substance of the law which limit or remove any basis for Crown liability, thus reducing or even eliminating the prospects of success by an individual in suing the Crown, are not necessarily inconsistent with section 27(3). On this basis, legislation that removes the right to compensation from the Crown or legislation that has the effect of overruling the decision of a Court may not breach the right.

The leading case on section 27(3) endorses this approach. In Westco Lagan Ltd v Attorney-General, Justice McGechan commented that: [964]

Section 27(3), on a natural reading, is intended to place the Crown in the same position in relation to litigation as private individuals. It reflects the way in which Court procedures have moved away from the privileged position which the Crown historically enjoyed ... It is aimed at procedures which govern the assertion or denial of rights in the course of Court or equivalent proceedings; and is not aimed at the creation of other rights in themselves ... Section 27(3) ... cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs that the Crown shall have no procedural advantage in any proceedings to enforce rights if such rights exist.

Although the Court in Westco held that section 27(3) cannot be used to limit the power of the legislature to decide what substantive rights the Crown is to have in the context of legal proceedings, it would appear that in some instances that the determination of those substantive rights may create a procedural advantage for the Crown. It is worth noting that previous legislation which placed restrictions on procedural aspects of remedies
against the Crown, including "damages and costs", has been considered to breach section 27(3). [965] In other words, restrictions on the type of remedies may act as a procedural bar where a potential plaintiff is unable to bring proceedings against the Crown in the same way as against an individual.

It is also not clear yet in New Zealand whether the legislative removal of a cause of action against the Crown that occurs after proceedings are instituted breaches section 27(3).

It is therefore apparent that the distinction between procedural rights and substantive rights is not clearcut. We have therefore included the following discussion.

**Alternative viewpoint**

While the above interpretation of section 27(3) is consistent with recent case law and the White Paper, and is the approach that we take when vetting legislation and policy proposals, the approach is not supported by all commentators on the Bill of Rights Act. An alternative interpretation is that section 27(3) confers substantive as well as procedural rights, or that the link between substance and procedure is so close as to amount to the same thing. Some commentators argue that the remedy available in a proceeding is so closely related to the process that to remove the availability of a remedy is to affect the process. [966] Similarly, legislation which reverses a court judgment that was favourable to an individual (and unfavourable to the Crown) could, on this alternative interpretation, be seen as a breach of section 27(3). This is because an individual cannot overturn an unfavourable court judgment after litigation, so the Crown should also not be able to do so. The LAC has put it this way: "[r]egular parties to civil litigation do not have the power or ability to initiate legislation terminating litigation or nullifying its result". [967]

The European Court of Human Rights held in *Kutic v Croatia* [968] that legislative removal of a cause of action against the Crown that occurs after proceedings are instituted violates Article 6 (the right to a fair trial) of the European Convention on Human Rights. The Court stated at paragraph 25 that:

this right of access to a court [for the determination of civil disputes] does not only include the right to institute proceedings, but also the right to obtain a 'determination' of the dispute by a court. It would be illusory if a Contracting
State's domestic legal system allowed an individual to bring a civil action before a court without securing that the case would be determined by a final decision in the judicial proceedings. It would be inconceivable that Article 6(1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without guaranteeing the parties to have their civil disputes finally determined.

Article 6 of the European Convention concerns both criminal and civil hearings. Therefore, although the courts in New Zealand have not been asked to consider this, it is also possible that the legislative removal of a cause of action might give rise to an issue of consistency with the principles of natural justice (the right to be heard).

**Key cases**


**History of the section**

*The White Paper*

Section 27(3) appears in the same form to that which was proposed in the *White Paper.*

*Section 27 origins in international treaties and overseas legislation*

The right to justice in section 27(3) is not found in any international human rights instrument. Based on recent caselaw, the closest provision is Article 6(1) of the European Convention on Human Rights.

Article 6(1) of the European Convention on Human Rights states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... [969]
Footnotes:


930. See *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130. In this case the Minister of Immigration disallowed an appeal against deportation on the basis of a medical referee's report which suggested that the applicant's child was not in need of specialist treatment in New Zealand. The Court of Appeal quashed the Minister's decision as the referee's report had not been disclosed and the applicant had not had the opportunity of challenging its contents. See also *Taito v R* (2002) 19 CRNZ 224, (2002) 6 HRNZ 539 and *R v Duval* (1995) 13 CRNZ 215 where the court commented (at 218) that "a person's right to the observance of the principles of natural justice under s 27 of the [Bill of Rights] Act is in point for it is fundamental principle that persons must know the case against them and have an opportunity to answer that case".

931. See *Franic v Wilson* [1993] 1 NZLR 318 (HC) and *Upton v Green (No 2)* [1996] 3 HRNZ 179.

932. See *B v District Court* at Hamilton (1995) 13 FRNZ 413.


934. See *Drew v Attorney-General* [2002] 1 NZLR 58 where the Court of Appeal held that natural justice requires decision-makers to consider whether a person needs to be legally represented on case-by-case basis.


937. For a useful discussion of these concepts, see Philip A Joseph (2001) *Constitutional and Administrative Law in New Zealand* (2nd ed), Brookers, Wellington pages 860 - 886.

938. These concepts are dealt with in more depth below, in the methods to ensure compliance section.
939. As to whether the observance of the principles of natural justice require legal representation, see *Drew v Attorney-General* [2001] 1 NZLR 428 (CA)


946. *Chisholm v Auckland City Council* (unreported Court of Appeal CA 32/02, 29 November 2002, Tipping J, at paragraph 32. The case concerned the Council making decisions in relation to emergency responses to public health risks (emergency disposal of septic tank waste) under section 330 of the Resource Management Act, as opposed to determining the applicant's rights to use of neighbouring land.


950. See *Drew v A-G (No 2)* (2001) 18 CRNZ 460 (CA) at 479 and *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 139.

951. See *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA) at 118 per Tucker LJ (CA).


953. Applications for judicial review of a government decision usually arise within New Zealand. However the issue has recently arisen of whether, in some circumstances, judicial review (of New
Zealand government's decisions) should be available to those outside New Zealand. There is English precedent for this occurrence - see *R (on the application of Farrakhan) v Secretary of State for the Home Department* [2002] 4 All ER 289.


955. Applications for judicial review apply to applications under Part I (sections 2 - 16) of the Judicature Amendment Act 1972 and to applications for an order of mandamus or prohibition or certiorari under RR 623, 625, and 626 of the High Court Rules.


957. See *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129, 133


959. *O'Regan v Lousich* [1995] 2 NZLR 620 626-627

960. *O'Regan v Lousich* [1995] 2 NZLR 620, per Tipping J at 626-627


965. See the Attorney-General's Section 7 Report on the Casino Control (Moratorium) Amendment Bill 1997,

966. See, for example, M Taggart "Déjà vu All Over Again" [1998] NZLJ 234.


968. *Kutic v Croatia* ECHR Application No 48778/99 1 June 2002
969. Article 6(1), like Article 14(1) of the ICCPR, proceeds to define the scope of the right with reference to access by the media/public.
PART IV Remedies under the Bill of Rights Act

The New Zealand Bill of Rights Act contains no express remedies for infringement of its protected rights, in spite of what was proposed in the White Paper. The UN Human Rights Committee has expressed ongoing concern about the need to ensure availability of remedies for infringement of the Bill of Rights Act. At New Zealand's last Periodic Report in July 2002 the Committee again urged the New Zealand government to take appropriate steps to ensure remedies are available in accordance with Article 2 of the ICCPR.

What every policy analyst needs to know

- The Bill of Rights Act has no express remedy provisions, but remedies are available for a breach of the Act
- The Courts have developed and considered a variety of remedies, as appropriate based on the individual circumstances of each case, including excluding 'tainted' evidence, issuing a stay of proceedings, reducing an offender's sentence, and monetary compensation
- The Human Rights Act 1993 provides for a publicly funded complaints process for complaints about alleged breaches of section 19 (freedom from discrimination) of the Bill of Rights Act
- There are individual complaint mechanisms provided in some international instruments to which New Zealand is a party, including core UN human rights treaties
- Liability for a Bill of Rights Act breach does not require a finding of fault or bad faith on the part of the Crown - occurrence of the breach is sufficient

Further Discussion

Although the Bill of Rights Act has no remedy provisions, this does not mean remedies are not available for a breach of the Act. The New Zealand Courts have developed various remedies. The Human Rights Act 1993 provides for a publicly funded complaints process for complaints about alleged breaches of section 19 (freedom from discrimination) of the Bill of Rights Act. There are also individual complaint mechanisms provided in some international
instruments to which New Zealand is a party, including core UN human rights treaties.

Liability for a Bill of Rights Act breach does not require a finding of fault or bad faith on the part of the Crown - occurrence of the breach is sufficient. However, fault or bad faith may be relevant in determining the appropriate remedy.

**The Development of Judicial Remedies**

Although the Bill of Rights Act has no remedy provisions, the courts have developed various remedies for infringement of the rights and freedoms identified in the Act. In *Simpson v Attorney-General (Baigent's case)* [970] the Court of Appeal held that effective and appropriate remedies are available for breach of the Bill of Rights Act. The courts were seen as having a positive duty to provide remedies. As Cooke P explained in *Baigent* [971]:

we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed.

In establishing the availability of judicial remedies, the Court of Appeal placed considerable weight on New Zealand's obligations under the international human rights covenants, in particular the ICCPR that is affirmed in the long title to the Bill of Rights Act.

The freedom of the courts to grant remedies is significant. The courts are able to consider a wide range of remedies - possibly beyond the traditional forms - provided they can be seen as effective and appropriate in the circumstances [972].

**What about statutory immunity?**

Importantly, the Court of Appeal in *Baigent* characterised the remedy under the Bill of Rights Act as a public law remedy:

[it is] an independent cause of action against the Crown, and not one which arises from vicarious liability. It is the Crown, as the legal embodiment of the state which is bound by the International Covenant to ensure an effective remedy for the violation of fundamental rights [973].

The Crown's liability is direct rather than vicarious. The Crown may be held directly liable despite the statutory immunity of the individual officers or employees concerned and statutory restrictions on Crown liability.
This attribution of direct liability meant that the Crown's protection from vicarious liability under section 6(5) of the Crown Proceedings Act 1950 did not apply.

**What types of remedies are available?**

Because of their judicial nature, the remedies available as a consequence of a breach of the Bill of Rights Act are constantly evolving. A breach of a particular right does not automatically give rise to a corresponding remedy. Instead, the courts will determine the most effective and appropriate remedy based on the individual circumstances of each case. When formulating a remedy the court will consider:

- The purpose and nature of the right infringed;
- The nature and seriousness of the breach [974];
- The consequences of the breach [975]; and
- what is necessary for the vindication of the right, rather than the punishment of the wrong-doer or compensation to the person affected [976].

The Bill of Rights Act is frequently invoked in criminal cases and many of the remedies available reflect this.

The range of remedies the courts have awarded or considered include:

- Excluding 'tainted' evidence from a proceeding;
- Issuing a stay of proceedings [977];
- Awarding monetary compensation;
- Remitting a decision to the original decision-maker for reconsideration;
- Reducing the sentence of an offender;
- Issuing an injunction requiring positive action, or an order for return of property [978];
- Declaring that an action of a public body is inconsistent with the Bill of Rights Act;
- Making a formal declaration of inconsistency between the Bill of Rights Act and a particular statute.
Monetary Compensation

Following overseas authorities [979], the Court of Appeal in *Baigent* established compensation as a discretionary remedy for breaches of the Bill of Rights Act where:

- There is no existing cause of action; or
- The existing cause of action and remedy is inadequate [980].

An action for Bill of Rights Act compensation will not preclude a concurrent claim for damages based on common law or statute. The courts will, however, avoid 'double recovery' [981].

What types of actions can be compensated for?

The majority of compensation claims under the Bill of Rights Act involve rights concerning the deprivation of liberty or invasion of privacy. However, the Act offers scope for compensation to be awarded in actions not previously recognised in common law, such as non-observance of natural justice [982] or preventing freedom of movement [983].

Compensation has been awarded for a wide range loss including:

- Physical damage [984];
- intangible harm such as distress and injured feelings [985];
- Loss of liberty [986];
- Economic loss (including both past and future earnings) [987];
- Loss of opportunity [988];
- Legal costs [989];
- In addition, interest may be awarded [990].

It should be noted that the courts have been cautious to avoid extravagant awards of compensation [991]. This cautious approach is consistent with overseas jurisdictions [992].

What sorts of considerations may be relevant when awarding compensation?

It appears that awards for Bill of Rights compensation will be approached on the same basis as damages in an action in common law [993]. Relevant considerations about whether, and how much, compensation should be awarded may include:
• The value which the right protects and the seriousness of the breach [994];
• The consequences of the breach [995];
• The need to emphasise the importance of the right involved and to deter breaches [996];
• Whether the plaintiff has exercised due diligence in pursuing his or her claim [997];
• The standing of the plaintiff in the community [998], or the character of the plaintiff [999];
• Whether the breach was committed in bad faith or was deliberate [1000];
• Contributory negligence and mitigation of losses [1001];

Are punitive damages available?

The question as to whether exemplary damages are available for a breach of the Bill of Rights Act remains open. Recent academic comment and case law suggest that exemplary damages may be available in appropriate cases [1002]:

...the vindication of rights can be achieved without recourse to the concept of punitive damages - although such damages may at times be called for over and above the damages necessary to vindicate the right [1003].

Overseas courts have been willing to consider punitive damages for violations of constitutional rights in appropriate circumstances [1004].

Who is liable for compensation?

It remains unclear who is primarily liable for a Bill of Rights Act compensation claim. In Baigent, Justice McKay [1005] stated:

[w]here a right is infringed by a branch of Government or a public functionary, the remedy under the Act must be against the Crown.

Does this mean that the Crown is liable for all infringements of the Bill of Rights Act? The Law Commission suggests that the correct approach is that the Crown is primarily liable for infringements by its servants and agents (ie. those referred to in section 3(a)). Liability for infringements by other public bodies (ie those referred to in section 3(b)) should lie with the person or body
that has legal control over them [1006]. This interpretation seems to be consistent with later case law [1007].

**Referring decision back to original decision-maker**

If a decision made by an authority or tribunal is found to breach rights contained in the Bill of Rights Act, the decision can be remitted to the original decision-maker for reconsideration. The court will often direct the decision-maker to reconsider the decision with specific attention to be paid to a particular right [1008].

A recent decision of the Court of Appeal also raises the possibility of the courts quashing a defective decision, rather than remitting it to the original decision-maker [1009].

**Exclusion of evidence**

The exclusion of evidence is often the most effective remedy where an infringement of a right relating to search, arrest and detention (sections 21 to 24) results in the obtaining of incriminating evidence. The effect of this remedy is that the 'tainted' evidence is excluded from consideration in the decision-making. The Court of Appeal has recently modified the application of this remedy.

**The previous approach - a presumption in favour of exclusion**

Where evidence had been obtained in a breach of the Bill of Rights Act it was presumed to be excluded unless the courts were satisfied that there was an overriding reason to admit the evidence. The presumption in favour of exclusion could therefore be displaced for a 'good cause'. In practice the presumption led to the almost automatic exclusion of evidence once a breach had been established [1010] - often immunising a criminal against prosecution.

**The new 'balancing exercise'**

In *Shaheed* the Court of Appeal introduced a balancing exercise to assist the courts in determining whether excluding evidence is a truly proportionate response to the particular breach. Appropriate and significant weight must first be given to the nature of the right and the breach, but there is no longer a presumption that evidence will be excluded. Public interest considerations that may be relevant to the balancing exercise include:
The value which the right protects and the seriousness of the breach;
Whether the breach has been committed deliberately or recklessly;
Whether there were other avenues available that would not have resulted in a breach;
The nature and quality of the disputed evidence;
The centrality of the evidence to the prosecution's case; or
The availability of an alternative remedy or remedies.

The new balancing exercise is in line with the approach of other commonwealth jurisdictions, including the Privy Council [1011] and the House of Lords [1012].

**Declarations of Inconsistency - the development of a new judicial remedy?**

The Court of Appeal has hinted at a willingness to make formal declarations where legislation is found to be inconsistent with the Bill of Rights Act. Such declarations would be in addition to a similar remedy available through the Human Rights Tribunal in respect of section 19 of the Bill of Rights Act (freedom from discrimination).

In *R v Poumako*, Justice Thomas made a clear statement about inconsistency with the Bill of Rights Act and indicated he would have issued a declaration of inconsistency, asserting:

Where there is no other remedy, a declaration may provide the only effective remedy [1013]

The rest of the Court did not adopt his proposal. There has been no opportunity since *Poumako* for the Court of Appeal to clarify where it stands on this issue. The Court has, however, stated previously that the courts do have the power and, on occasion, the duty to indicate where a statute is inconsistent with the Bill of Rights [1014].

The ability of the courts to formally declare a piece of legislation as incompatible with the Bill of Rights Act raises an important constitutional issue: that of the relationship between parliament and judiciary. Section 4 prevents the courts from overriding legislation that is inconsistent with the Bill of Rights Act. But by making a formal declaration of inconsistency, the courts could exercise significant political pressure for law reform [1015].
**A comparative example: The United Kingdom's declaration of incompatibility**

Section 4 of the Human Rights Act 1998 gives the courts in the United Kingdom the power to make a declaration of incompatibility where it is impossible to construe legislation compatibly with the European Human Rights Convention. The incompatible legislation remains in force unless amended by parliament in order to preserve parliamentary sovereignty.

As at April 2003, 11 declarations of incompatibility had been made in accordance with section 4. [1016] Four of these were overturned on appeal. The incompatibility identified in another four of them was addressed by legislative amendment.

The House of Lords' position appears to be a cautious one:

[a declaration of incompatibility] is a measure of last resort. It must be avoided unless it is plainly impossible to do so. [1017]

**Human Rights Review Tribunal Remedies for Breach of Section 19**

**Freedom from discrimination**

An amendment to the Human Rights Act 1993 [1018] means that there is now a publicly funded complaints process available for complaints about alleged breaches of section 19 of the Bill of Rights Act (freedom from discrimination). This new complaints process does not affect the ability to pursue other judicial remedies through the courts for a breach of section 19 - it is an additional avenue for relief.

Part 1A of the Human Rights Act provides that an activity by a person or body performing a public function, power or duty will generally be in breach of the Human Rights Act if it is inconsistent with section 19 and cannot be justified under section 5 of the Bill of Rights Act.

The Human Rights Commission has power to initiate an inquiry into any matter where it appears that there may be an infringement of human rights. If the dispute cannot be resolved through mediation and conciliation, a binding decision can be sought from and enforced by the Human Rights Review Tribunal.
Where the Human Rights Review Tribunal finds an activity is an unjustified infringement of section 19 of the Bill of Rights Act it may award the following remedies:

- A declaration that a breach of the Human Rights Act has occurred;
- An order restraining the breach;
- Compensation against the person or agency who committed the breach;
- An order that a person or agency act in a particular way to redress any loss or damage suffered; and
- A declaration that a piece of legislation is inconsistent with the Bill of Rights Act (and, therefore, a breach of Part 1A of the Human Rights Act). Where a declaration of inconsistency is made, the Government is required to prepare a report to Parliament setting out what it intends to do in response to the declaration.

For more information on the dispute resolution processes and the role of the Human Rights Commission, contact the Human Rights Commission.

Note that in March 2002, the Ministry of Justice published The Non-discrimination Standards for Government and the Public Sector: Guidelines on how to apply the standards and who is covered. You should refer to the Non-discrimination Guidelines for a detailed description of how Part 1A of the Human Rights Act is applied.

**International Scrutiny**

*Reports to United Nations Committees*

As part of its international obligations, and as a consequence of previous decisions to ratify various international human rights treaties, the government is required to periodically report to a number of Committees on matters relating to this country's compliance with these human rights standards. [1019]

In the period leading up to the designated reporting date, the relevant Committee is apprised of specific issues relating to New Zealand's compliance with the international treaty in question - frequently by non-governmental organisations. Based on this information, the Committee will prepare a number of questions in advance of the receipt of the report and will also ask questions at the presentation of the report.
You should therefore be aware that, if your agency has developed policies or practices that appear to be inconsistent with these standards, those practices will be subject to international scrutiny. You will also be asked to prepare a response to those questions.

**Human Rights Treaties: Individual Complaint Mechanisms**

The individual complaint mechanisms of the core UN human rights treaties which New Zealand is currently a party to are the following:

- **Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)** - New Zealand recognises the competence of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of violation by New Zealand of any of the rights in the ICCPR (including the rights in the Second Optional Protocol).

- **Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** - New Zealand recognises the competence of the Committee on the Elimination of Discrimination Against Women to receive and consider communications from individuals or groups of individuals who claim to be victims of violation by New Zealand of any of the rights in the CEDAW.

- **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)** - NZ has made a declaration that it recognises the competence of the Committee Against Torture to receive and consider communications from individuals who claim to be victims of a violation by New Zealand of the provisions of the Convention. In addition, there is a limited right of individuals to bring a complaint under Article 26 of the International Labour Organisation (ILO) Constitution asserting that an ILO member state is not satisfactorily securing the effective implementation of an ILO Convention which it has ratified. In terms of individuals bringing such complaints, they must be a delegate of the International Labour Conference. Delegates include an employers' representative and a worker's representative.
The effect of ratification is that individuals in New Zealand can bring 'communications' to the individual Committees alleging that their rights under the international conventions have been breached by the state. Although an individual can only lodge a communication if they have exhausted all their domestic remedies, individuals and groups have lodged several communications. Although there is no legal obligation on the Government to act on an adverse decision made by the Committee, the decision of the Committee is taken very seriously, because it amounts to a conclusion that New Zealand is in breach of its international obligations. Again, practices and policies that are inconsistent with the Conventions will be subject to international scrutiny. Decisions by the Committee will also be posted on the UN web-site.

The effect of lodging a communication with the Human Rights Committee, for example, is that it enables the individual to argue their case under the ICCPR and not the provisions of the Bill of Rights Act. As you may have noted the provisions of the Bill of Rights Act and ICCPR differ in a number of respects and it is possible that the Human Rights Committee arrives at a different conclusion.

As Rishworth points out, where there are broad similarities between the provisions of the ICCPR and the Bill of Rights Act, the domestic Courts will have regard to the decisions of the Human Rights Committee.

**Key Cases**

History of the situation

The White Paper

The White Paper included a draft remedies clause, as follows, that was omitted from the final bill:

25. Enforcement of guaranteed rights and freedoms Anyone whose rights or freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The wording of this clause comes from section 24(1) of the Canadian Charter of Rights and Freedoms. The White Paper envisaged that such a clause would enable the Courts to provide traditional remedies, while also allowing for the development of additional remedies where appropriate.

The Select Committee Reports on the Bill of Rights Act Bill

The Select Committee's final recommendation as to the form of a Bill of Rights for New Zealand did not contain clause 25 or an equivalent. The reason for the omission is unclear. One suggestion is that the Select Committee saw clause 25 as being associated with the White Paper's concept of a Bill of Rights being supreme law. In abandoning the concept of supreme law, the Select Committee also abandoned the idea of an express remedy clause [1020].

Remedies under the international treaties

Unlike the Bill of Rights Act, international human rights treaties provide for express remedies. For example:

i. The International Covenant on Civil and Political Rights ("ICCPR") Article 2(3) of the ICCPR requires New Zealand to:

(a) ensure any person whose Covenant rights are violated has an effective remedy;
(b) develop the possibilities of judicial remedy; and
(c) ensure any person claiming a remedy has his or her right enforced by competent authorities.

ii. Universal Declaration of Human Rights states:

Article 8 of the Declaration states that everyone whose fundamental
rights has been violated has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Footnotes:

970. [1994] 3 NZLR 667
973. Per McKay J in Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667, 718.
977. Martin v Tauranga District Court [1995] 1 NZLR 491 for undue delay under s 25(b) of the Bill of Rights Act.
978. Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667,676 per Cooke P.
979. The Court expressly followed Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385.
981. Per Cooke P in Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667, 678.
984. Per Cooke P in Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667, 678.
985. Per Cooke P in Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667, 678.
988. *Upton v Green (No 2) (1996) 3 HRNZ 179.* In this case the plaintiff was not given the opportunity to make submissions in relation to his sentence, and therefore the opportunity to persuade the judge to impose a lesser term.


NB. The Limitation Act 1950 does not expressly provide a limitation period in respect of BORA compensation claim.

998. *Kerr v Attorney-General* (1996) 4 HRNZ 270. Police were found to have acted in breach of the plaintiff’s rights to freedom of movement (section 18). A relevant consideration in the assessment of damages was persons the plaintiff associated with.

999. In *Manga v Attorney-General* [2002] 2 NZLR 65 the fact that the plaintiff had been in prison previously was a consideration in setting the award of compensation.

1000. *Daniels v Chief Executive of the Department of Work and Income* (HC Auckland, 8 April 2002, Harrison J, M1558/PL01) 12. Justice Harrison stated that the fact that the breach was not made in bad faith or deliberate told against awarding compensation. However, it is not necessary to allege bad faith in an action for compensation. See *Kerr v Attorney-General* (1996) 4 HRNZ 270 and *Whitair v Attorney-General* (1996) 2 HRNZ 289.
1001. No case has yet expressly determined whether contributory negligence or mitigation are relevant in New Zealand.


1004. For example, Canada in R v F (G) (1991) 280 APR 11.


1008. For example in Newspaper Publishers Association of New Zealand v Family Court [1999] 2 NZLR 344 the matter was resubmitted to the Family Court to consider the ambit of the suppression order to take into account the freedom of expression under section 14. In Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 the Court of Appeal made an order directing the Film and Literature Board of Review to reconsider the classification of certain publications in accordance section 14.

1009. Living Word Distributors Ltd v Human Rights Action Group [2000] 3 NZLR 570. In his dissenting judgment, Justice Thomas found that the Film and Literature Board of Review had exceeded its decision-making jurisdiction.


1013. [2000] 2 NZLR 695, para 95.


1016. Professor Brice Dickson (Northern Ireland Human Rights Commission), The Human Rights Act in Northern Ireland after Two-and-a-half Years, a paper prepared for the Belfast Solicitors'
Association, 10 April 2003. For example, in *International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344, the statutory penalty scheme for carriers of illegal immigrants (a blanket imposition of a substantial fixed penalty without regard to the blameworthiness of the carrier) was found to be incompatible with the right to a fair hearing in the determination of a criminal charge. The Nationality, Immigration and Asylum Act 2002 corrects the incompatibility.


1019. New Zealand's reporting obligations are found in:
   - Article 40 of the ICCPR
   - Article 16 of the ICESCR
   - Article 9 of the CERD
   - Article 17 of the CEDAW
   - Article 44 of the UNCROC
   - Article 19 of the CAT

# Part V Appendices

## Section 5 checklist

<table>
<thead>
<tr>
<th>Question</th>
<th>Yes</th>
<th>No</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the objective of this policy sufficiently important to justify infringing or limiting a fundamental right?</td>
<td></td>
<td></td>
<td>A brief explanation as to why I think it is justifiable.</td>
</tr>
<tr>
<td>Do I have empirical evidence to demonstrate the significance and importance of this objective?</td>
<td></td>
<td></td>
<td>Yes □ No</td>
</tr>
<tr>
<td>Is the restriction on the right sufficiently precise to ensure that the restriction addresses only those matters that it is intended to capture?</td>
<td>Yes □ No - the impact is likely to be broader than the activity that I wish to target.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Describe effect of restriction</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Are those persons or organisations able to readily find out what the consequences of their actions will be if they fail to comply with the law, policy, or practice?</td>
<td>Yes □ No</td>
<td></td>
<td>If yes - how?</td>
</tr>
<tr>
<td>Is the policy able to be demonstrably justified for reasons other than simply economic considerations?</td>
<td>Yes □ No</td>
<td></td>
<td>What are they?</td>
</tr>
<tr>
<td>Have I considered other options for achieving this objective?</td>
<td>Yes □ No</td>
<td></td>
<td></td>
</tr>
<tr>
<td>What are they and why are they not considered suitable?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Question</td>
<td>Yes</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>-----</td>
<td>----</td>
<td></td>
</tr>
<tr>
<td>Are the persons or organisations able to easily comply with the law, policy, or practice?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is the policy, regulation, or law to be published or publicised and made accessible to the public?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>If not, how are persons or organisations affected by the law, policy, practice able to comply with it?</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Offences and penalties No.1

This is one of two checklists in the appendices to the Guidelines provided to assist you in the development of offence and penalty provisions. The checklists are intended to guide users through the range of considerations required in the policy development process to evaluate compliance with the Bill of Rights Act. The checklists will also refer back to the relevant part of the Guidelines for further clarification and discussion of particular considerations. It must be emphasised that while the checklists provide a very useful guide to Bill of Rights Act considerations, final compliance assessments will require more detailed examination of specific provisions.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Is this a new or amended offence provision?</td>
<td>2. Is there an existing offence provision that addresses this conduct?</td>
</tr>
<tr>
<td>□ yes □ no</td>
<td>□ yes □ no</td>
</tr>
<tr>
<td>(If the answer is yes, provide brief explanation as to your objective.)</td>
<td>(If the answer is no, provide brief explanation as to which provisions you considered and why these were not available)</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Is the offence: a) a criminal offence or an offence that could be described as &quot;truly criminal in nature&quot;? or b) is it of a kind more consistent with an administrative sanction?</td>
<td>4. If these offences are criminal or &quot;truly criminal&quot;, is it possible for a person subject to these offence provisions, to be potentially liable for other criminal or &quot;truly criminal&quot; offences for the same conduct?</td>
</tr>
<tr>
<td>□ yes - criminal</td>
<td>□ yes □ No</td>
</tr>
<tr>
<td>□ no - administrative</td>
<td>(See pages 348 - 352 of the Guidelines for a discussion of the right against double jeopardy)</td>
</tr>
<tr>
<td>(provide a brief explanation as to your answer - see page 225 of the Guidelines for an explanation as to the difference between the two types of offences.)</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>5. Is the penalty level in this offence in line with penalty levels for similar types of</td>
<td>6. If the penalty levels have been increased, is the new penalty:</td>
</tr>
<tr>
<td></td>
<td>Necessary as a deterrent?</td>
</tr>
<tr>
<td>Question</td>
<td>Yes</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------</td>
<td>-----</td>
</tr>
<tr>
<td>Are there any new offences?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>(If the answer is no, what other penalties have you considered and why should the penalty level be changed for this offence?)</td>
<td></td>
</tr>
<tr>
<td>☐ Yes ☐ No</td>
<td></td>
</tr>
<tr>
<td>In proportion to the nature of the conduct?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>Consistent with established guidelines for addressing the conduct?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>Likely to outrage the public conscience?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>In line with what is necessary for the achievement of a valid social aim?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>Rationally connected with your policy objective?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>(If the answer to any one or more of these questions is no it may be necessary to consider whether the penalty is disproportionately severe - see pages 65 - 70 for a further explanation)</td>
<td></td>
</tr>
<tr>
<td>7. Is the new offence intended to:</td>
<td></td>
</tr>
<tr>
<td>a) apply from the date of enactment of the legislation?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>b) apply from some other point of time?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>Have you considered including transitional provisions into the legislation?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No (See pages 343 -345 of the guidelines)</td>
<td></td>
</tr>
<tr>
<td>8. Does the proposal increase existing penalty levels?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No</td>
<td></td>
</tr>
<tr>
<td>Do you intend for the new penalty to apply:</td>
<td></td>
</tr>
<tr>
<td>a). from date of enactment? or b). from some other point of time?</td>
<td></td>
</tr>
<tr>
<td>□ Yes - at time of enactment</td>
<td></td>
</tr>
<tr>
<td>□ No - at some other point</td>
<td></td>
</tr>
<tr>
<td>Have you considered including transitional provisions into the legislation?</td>
<td></td>
</tr>
<tr>
<td>□ Yes □ No (See pages 343 - 345 of the guidelines)</td>
<td></td>
</tr>
</tbody>
</table>
Offences and penalties No.2: the onus of proof

This is the second of two checklists in the appendices to the Guidelines provided to assist you in the development of offence and penalty provisions. The checklists are intended to guide users through the range of considerations required in the policy development process to evaluate compliance with the Bill of Rights Act. The checklists will also refer back to the discussion on offences in the Guidelines for further clarification. It must be emphasised that while the checklists provide a very useful guide to Bill of Rights Act considerations, final compliance assessments will require more detailed examination of specific provisions.

This checklist provides a series of questions covering a broad range of issues relating to the onus of proof - that is, where should the onus of proving whether the accused was "at fault" lie? If you recall, the general proposition is that the prosecution needs to prove that an accused committed the prohibited act and intentionally (or knowingly, etc) performed the act beyond reasonable doubt. There are occasions where it is possible for the accused to have to prove on the balance of probabilities that they were "without fault" when performing the prohibited act, for example, they had a reasonable excuse for doing so.

<table>
<thead>
<tr>
<th>1. Are you creating or amending a new offence provision?</th>
<th>2. Does the offence provision attempt to address a matter that is of public concern?</th>
</tr>
</thead>
<tbody>
<tr>
<td>□yes □no (If so, what is the objective of the offence?)</td>
<td>□yes □no (If the answer is yes, provide a brief description of the problem and the reasons why it is considered desirable to make the conduct an offence.)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>3. Is the offence:</th>
<th>4. Are you intending to require that:</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) a criminal offence?</td>
<td>a) the prosecution prove beyond reasonable doubt that the defendant both carried out the prohibited act and did so with the required intention or knowledge and for the defence just to raise reasonable doubt?</td>
</tr>
<tr>
<td>□yes □no</td>
<td>□yes □no</td>
</tr>
<tr>
<td>b) an offence that could be described as &quot;truly criminal in nature&quot;?</td>
<td>b) (as for i) but enable the defendant raise persuasive evidence that he or she did or did not perform certain acts?</td>
</tr>
<tr>
<td>□yes □no</td>
<td></td>
</tr>
<tr>
<td>c) an offence that is directed at the prevention of future harm</td>
<td></td>
</tr>
</tbody>
</table>
through the enforcement of minimum standards of conduct and care?  □ yes □ no

(See page 296 of the guidelines for an explanation as to the differences between the types of offences)

**Provide a brief explanation as to your answer**

<table>
<thead>
<tr>
<th>Question</th>
<th>Option □ yes □ no</th>
</tr>
</thead>
<tbody>
<tr>
<td>c) simply require the prosecution to prove that the defendant committed the act but require the defendant to prove that he or she acted with total absence of fault?</td>
<td>□ yes □ no</td>
</tr>
</tbody>
</table>

(see pages 288 - 302 of the guidelines for a discussion of the difference between these options)

5. If you answered yes to the question in 4b above, does the accused:

   a) need to raise evidence pointing to a position contrary to that proposed by the prosecution?  □ yes □ no
   b) need to *disprove* an evidential fact on balance of probabilities?  □ yes □ no

6. Does the offence provision require the accused to *disprove* an evidential fact on balance of probabilities or prove that he or she acted with total absence of fault, then consider

   a) the reason why the accused person has to establish why they were not at fault.
   b) the ease with which the defendant has access to evidence that would enable him or her to discharge the burden of proof.
   c) the nature of the conduct that is being regulated.
   d) the environment within which the prohibited activity has taken place: is it highly regulated?  □ yes □ no describe
   e) the penalty level that you wish for the courts to impose

see pages 290 -293 of the guidelines.
Applying section 19 of the Bill of Rights Act

CHECKLIST — Applying the Bill of Rights Act Non-Discrimination Standard
(as set out in Part IA of the Human Rights Act)

1. Whose actions are covered by Part IA Human Rights Act?
   a. Legislative, executive, and judicial arms of government, and
   b. Any person or body in the performance of:
      • Public functions, powers or duties;
      • Conferred or imposed by or pursuant to law.
      (Section 3)

2a. What actions (by those actors) are covered by Part IA of the HRA?
   • Legislation
   • Decisions by the Crown
   • Policies, practices, and services

2b. What actions (by those actors) are NOT covered by Part IA of the HRA?
   Policies, practices, and services in relation to:
   • Employment
   • Racial harassment
   • Sexual harassment
   • Victimisation

3. Is there discrimination?
   1. Does the action make a distinction based on one of the prohibited grounds of discrimination?
   2. If so, does the distinction involve a disadvantage to the person or group?
      (Section 19(1))

4. Is it affirmative action?
   “Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.”
   (Section 19(2))

5. Is the discrimination justifiable?
   1. Is there an important and significant objective; and
   2. Is there a rational and proportionate connection between the objective and the means used to achieve it?
      (Section 5)

6. What to do if you find discrimination under Part IA Human Rights Act?
   Options include:
   • Modify policy, etc, to achieve objective in a less or non-discriminatory manner
   • Seek legal advice on compliance/hill of Rights Act developments
   • Consider whether policy necessary or can be abandoned
   • Consider risks, which include:
      - negative compliance statements in Cabinet papers
      - if legislation - section 7 Bill of Rights Act report to the House
      - inquiry by/complaints to Human Rights Commission
      - cases to Tribunal/Courts - substantive remedies or, if legislation, declarations of inconsistency with Parliamentary and Government follow-up
      - review of regulations by Regulations Review Committee

   NOT Discrimination under Bill of Rights Act and therefore NOT discrimination under Part IA of Human Rights Act

   NO - Prima facie (on its face) discrimination

   YES

   NO

   YES
Non-discrimination: statutory provisions that are inclusive in effect

The discussion on the right to be free from discrimination referred to the distinction between legislative provisions that were inclusive in their effect and provisions that were exclusive. It was suggested that if your policy makes a distinction on one of the prohibited grounds of discrimination, one way of avoiding the policy giving rise to issues of discrimination was to make sure that it is inclusive and not exclusive in its effect. An example of a statutory provision with an inclusive effect is set out here:

8. Functions—

The functions of the Agency are to—
(a) develop and implement national policies and strategies for physical recreation and sport;
(b) allocate funds to organisations and regional bodies in line with its policies and strategies;
(c) promote and advocate the importance of participation in physical activity by all New Zealanders for their health and well-being;
(d) promote and disseminate research relevant to physical recreation and sport;
(e) provide advice to the Minister on issues relating to physical recreation and sport;
(f) promote and support the development and implementation of physical recreation and sport in a way that is culturally appropriate to Māori;
(g) encourage participation in physical recreation and sport by Pacific peoples, women, older New Zealanders, and people with disabilities;
(h) recognise the role of physical recreation and sport in the rehabilitation of people with disabilities;
(i) facilitate the resolution of disputes between persons or organisations involved in physical recreation and sport:
Developing a statutory power of entry

Do you wish to develop a statutory power of entry?

1. Who is going to be authorised to exercise this power?

   Enforcement officers should be properly trained and have suitable qualifications and experience.

2. What is the purpose behind the exercise of this power?

   | Monitoring of compliance with regulatory controls. | Primarily an investigative tool for the purpose of gathering evidence in the detection and prosecution of offences. |

3. Do the enforcement officers require a warrant before exercising these powers?

   **No** if:
   - the premises are commercial premises;
   - the power is exercised at a reasonable time;
   - the person conducting the inspection is concerned with ensuring the regulatory framework is complied with.

   **Possibly** if:
   - it becomes evident in the course of conducting an inspection that a serious breach of the legislation is taking place and it is likely that further enforcement action is

   **Yes**
   - the general presumption is that an enforcement officer will require a warrant unless there are good reasons why not.

   **No** if:
   - the occupier consents;
   - the entry is necessary because of an imminent risk to public health and safety;
   - it is necessary to conduct a search to prevent the commission of a criminal offence;
   - the search takes place as a
needed.
result of an enforcement
officer having reasonable
grounds to believe that an
offence has been committed;
- the search takes place where
  there is a diminished
  expectation of privacy, e.g
  prisons, borders.

4. What actions must an enforcement officer take prior to executing their powers?

<table>
<thead>
<tr>
<th>An inspector must:</th>
<th>An enforcement officer must:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• provide evidence of his or her authority to act upon entering the premises;</td>
<td>• provide evidence of his or her authority to act upon entering the premises;</td>
</tr>
<tr>
<td>• present evidence of their identity and authority whenever asked to do so.</td>
<td>• present evidence of their identity and authority whenever asked to do so;</td>
</tr>
<tr>
<td></td>
<td>• if the occupier or owner is absent, leave a notice detailing the fact that the search took place and on what occasion, the purpose, contact details and details of any property removed.</td>
</tr>
</tbody>
</table>

5. What powers can an enforcement officer employ in the course of exercising a power of entry?

<table>
<thead>
<tr>
<th>During an inspection, an inspector can:</th>
<th>An enforcement officer can, under warrant:</th>
</tr>
</thead>
<tbody>
<tr>
<td>• obtain copies of documents;</td>
<td>• use reasonable force to gain entry;</td>
</tr>
<tr>
<td>• take samples/photographs/other things;</td>
<td>• obtain copies of documents;</td>
</tr>
<tr>
<td>• require a person to provide</td>
<td>• require a person to provide them with assistance;</td>
</tr>
<tr>
<td></td>
<td>• remove documents and goods;</td>
</tr>
<tr>
<td>them with assistance;</td>
<td>require a person to answer questions, but not encroach on the privilege against self-incrimination.</td>
</tr>
<tr>
<td>issue notices of compliance</td>
<td></td>
</tr>
</tbody>
</table>

6. What other powers can an enforcement officer have to execute the power of entry?

| An inspector may: | An enforcement officer may: |
| charge an individual or company with an offence for obstructing or hindering an officer in the course of their duties; | charge an individual or company with an offence for obstructing or hindering an officer in the course of their duties; |
| order an individual to do an act or refrain from continuing to do an act if the non/performe of the act is in contravention of the legislation. | seize any item; |
| | detain and search any individual found on the premises. |
Powers of entry

29. Inspectors

(1) The Secretary may appoint any person who has passed the prescribed examinations or acquired the prescribed experience to be a health and safety inspector for the purposes of this Act.
(2) An inspector shall perform and exercise the functions and powers of an inspector subject to the directions and conditions (if any) for the time being imposed by the Secretary.
(3) Every inspector shall have a certificate of appointment, in a form approved by the Secretary.

30. Functions of inspectors—

The functions of an inspector are—
(a) To help employers, employees, and other persons to improve safety at places of work, and the safety of people at work, by providing information and education; and
(b) To ascertain whether or not this Act is being and will be complied with; and
(c) To take all reasonable steps to ensure that this Act is being complied with; and
(d) All other functions conferred on inspectors by this Act or any other enactment.

31. Powers of entry and inspection—

Subsections (1)(a)–(e) set out the full range of powers of the inspectors, but note that these powers are subject to further controls.

(1) For the purpose of performing any function as an inspector, any inspector may at any reasonable time enter any place of work and—

- Conduct examinations, tests, inquiries, and inspections, or direct the employer or any other person who or that controls the place of work, to conduct examinations, tests, inquiries, or inspections:
- Be accompanied and assisted by any other people and bring into the place of work any equipment necessary to carry out the inspector's functions:
- Take photographs and measurements and make sketches and recordings:
- Require the employer, or any other person who or that controls the place of work, to ensure that the place of work or any place or thing in the place of work specified by the inspector is not disturbed for a reasonable period pending any examination, test, inquiry, or inspection:
- Require the employer, or any other person who or that controls the place of work, to produce documents or information relating to the place of work.
or the employees who work there and permit the inspector to examine and make copies or extracts of the documents and information:

(f) Require the employer, or any other person who or that controls the place of work, to make or provide statements, in any form and manner the inspector specifies, about conditions, material, or equipment that affect the safety or health of employees who work there.

Restrictions on the exercise of these powers in the context of a private dwelling—note that the consent of the occupier or a warrant signed out by a District Court Judge is required.

(2) Notwithstanding subsection (1) of this section, an inspector shall not enter a place of work—

(a) That is, or is within, a home; or
(b) Through a home,— except with the consent of an occupier or pursuant to a warrant issued under subsection (3) of this section.

Applications for a warrant still need to meet required threshold (note that validity of some warrants will be limited to specific time periods).

(3) A District Court Judge who, on application made on oath, is satisfied that there is reasonable ground for believing that a home—

(a) Is a place of work or has a place of work inside it; or
(b) Is the only practicable means through which a place of work may be entered, may issue to an inspector named in it a warrant to enter any part of the home that is, or is the only practicable means through which the inspector may enter, the place of work.

(4) Notwithstanding subsection (1) of this section, an inspector shall not enter a defence area (within the meaning of section 2(1) of the Defence Act 1990) except in accordance with a written agreement between the Secretary and the Chief of Defence Force entered into for the purposes of this section and for the time being in force.

An example of a restriction on the type of information that can be obtained where the information and restriction is particular to the regulatory context.

(5) Notwithstanding subsection (1)(e) of this section, if all or any part of a document, or of any information, relates to any person’s health status and identifies the person, no inspector shall, without the person’s consent,—

(a) Require any person to produce; or
(b) Examine; or
(c) Make any copy or extract from,— the document or information (or that part of the document or information).
(6) No person is required on examination or inquiry under this section to give any answer or information tending to incriminate the person.

32. **Inspectors to prove identity**

(1) Every inspector who enters any place of work under the authority of this Act shall, on first entering and, if requested, at any later time, produce to the person apparently in charge the inspector's certificate of appointment.

(2) Where an inspector enters any place of work under the authority of this Act and is unable, despite reasonable efforts, to find any person apparently in charge, the inspector shall before leaving the place of work leave a written notice stating—

(a) The inspector's identity; and

(b) The address of a place where the inspector may be contacted; and

(c) The date and time of entry; and

(d) The inspector's reasons for entering.

Further restrictions on the powers set out in section 31(1). Although the Act expressly preserves the privilege against self-incrimination, the privilege is read in where the Act is silent.

Procedural requirements for inspectors to comply with at the time they conduct an inspection. Note that requirement to produce ID goes to both time of initial entry and upon request.
33. Powers to take samples and other objects and things

(1) An inspector who enters a place of work under section 31 of this Act may, for the purpose of—
(a) Monitoring conditions in the place of work; or
(b) Determining the nature of any material or substance in the place of work; or
(c) Determining whether or not this Act is being complied with; or
(d) Gathering evidence for a prosecution for an offence against this Act—
take or remove a sample of any substance or thing for analysis, or seize and retain any material, substance, or thing.

(2) Where an inspector removes or retains a sample, material, substance, or thing under subsection (1) of this section, the following provisions shall apply:
(a) As soon as it is reasonable after removing or retaining it, the inspector shall give the employer or other person apparently in charge of the place of work concerned written notice of—
(i) What has been (or is being) removed or retained; and
(ii) Why it has been (or is being) removed or retained; and
(iii) Where it will be kept in the meantime;
(b) Subject to paragraph (c) of this subsection, within 7 days of removing or retaining it, the inspector shall give the employer or other person apparently in charge of the place of work concerned written notice of whether the inspector intends to return it or destroy it;
(c) Where it is practicable to do so the sample, material, substance, or thing shall be returned to its owner—
(i) When it is no longer required for any purpose under this Act (or any other enactment); or
(ii) If a Court earlier orders its return.
Powers of entry 3

An example of legislation conferring a power of entry under warrant on enforcement officers

Section 167 sets out both the process for obtaining a warrant and the grounds under which a warrant can be obtained. Section 167 makes it clear that a warrant will normally only be issued in limited circumstances where the need for the warrant is made out and where the statutory thresholds have been met.

167. Search warrants

(1) Any District Court Judge or Justice of the Peace [or Community Magistrate], or any Registrar (not being a constable) who, on an application by a Customs officer in writing made on oath, is satisfied that there are reasonable grounds to believe that there is in or on any place or thing—
   (a) Any thing that there are reasonable grounds to believe may be evidence of the commission of an offence against this Act or any regulations made under this Act; or
   (b) Any thing that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against this Act or any regulations made under this Act; or
   (c) Any thing that is liable to seizure under this Act;—
   may issue a search warrant in the prescribed form.

(2) The Customs officer, when applying for a warrant must, having made reasonable enquiries, disclose on the application details of any other applications that the Customs officer knows have been made within the previous 20 working days in respect of the place or thing specified, the offence or offences alleged, and the result of such application or applications.

(3) Every search warrant shall be—
   (a) Directed to and executed by a designated Customs officer, or
   (b) Directed to Customs officers generally and be executed by a Customs officer or Customs officers.

(4) Any warrant may be issued subject to such reasonable conditions as the issuer specifies in the warrant.
168. Entry and search under warrant—

(1) Every search warrant shall authorise the Customs officer executing the warrant—
(a) To enter and search the place or thing on one occasion within 10 working days of
the date of issue of the warrant at any time that is reasonable in the circumstances,
but subject to any conditions imposed by the issuer under section 167(4) of this Act;
and
(b) To use such assistance as is reasonable in the circumstances; and
(c) To use such force for making entry (whether by breaking open doors or otherwise)
and for breaking open any thing as is reasonable in the circumstances and for
preventing the removal from the premises of any thing as is reasonable in the
circumstances.

Section 168 sets out the period within which the warrant remains valid and the powers that the
warrant can confer. A party exercising a search
power under warrant cannot exceed these powers.
(2) Every search warrant shall authorise the officer executing the warrant to search for and seize any thing referred to in section 107(1) of this Act and, while on the premises pursuant to the warrant, to seize any other thing that the officer finds and has reasonable cause to suspect may be evidence of the commission of an offence in respect of which that officer could have obtained a warrant.

(3) Every search warrant authorises the officer executing it—
(a) To detain a person who is at the place referred to in the warrant when the officer arrives at that place, or who arrives at that place when the officer is executing the warrant, until the officer is satisfied that the person is not connected with the thing referred to in the warrant; and
(b) To search a person who is at the place referred to in the warrant when the officer arrives at that place, or who arrives at that place while the officer is executing the warrant if, at any time while executing the warrant, the officer reasonably believes that the thing referred to in the warrant may be on the person's body.

(3A) A person who is at the place referred to in the warrant when the officer executing the warrant arrives at that place, or who arrives at that place while the officer is executing the warrant, must remain at that place until the earlier of the following events:
(a) The search of that place is completed; or
(b) The officer, being satisfied that the person is not connected with the thing referred to in the warrant, permits the person to leave.

(3B) A person who is being searched under subsection (3)(b) must remain at the place where he or she is being searched until the search is completed.

(3C) A Customs officer or member of the police who has reasonable grounds to suspect that a person has refused or failed to comply with subsection (3A) or subsection (3B) may arrest that person without warrant under section 1174(1).

(4) Reasonable force may be used if it is necessary for either or both of the following purposes:

(a) To detain a person under subsection (3)(a);
(b) To search a person under subsection (3)(b).
This Act expressly recognises the extent to which the power to conduct a personal search intrudes onto the privacy interests of the individual. The Act has therefore built in additional protections to ensure that the power authorising the search is reasonable and the search itself is carried out in a reasonable manner.

(5) A person to be searched shall be informed of his or her right to be taken, before being searched, before an officer nominated for that purpose by the Chief Executive, or before a Justice of the Peace [or Community Magistrate].

(6) Where a person to be searched asks to be taken before a nominated officer or a Justice of the Peace [or Community Magistrate] in accordance with subsection (5) of this section, the Customs officer or member of the Police, as the case may be, must take the person forthwith before a nominated officer, or before a Justice of the Peace [or Community Magistrate], as the case may be.

(7) The nominated officer or Justice of the Peace [or Community Magistrate] before whom the person is taken may—

(a) if it appears to that nominated officer or Justice of the Peace [or Community Magistrate] that there is reasonable cause to believe that the thing referred to in the warrant may be on that person's body, direct that the person be searched; or

(b) if it does not appear to that nominated officer or Justice of the Peace [or Community Magistrate] that there is reasonable cause to believe that the thing referred to in the warrant may be on that person's body, direct that the person not be searched.

(8) Where there is no suitable searcher available at the place where the search is to take place, the person to be searched may be taken to another place to be searched.

(9) A Customs officer or member of the Police may seize any thing found in carrying out the search of the person that the Customs officer or member of the Police has reasonable cause to believe is a thing referred to in the warrant, and reasonable force may be used to seize the thing.

(10) Every person called upon to assist the officer executing the warrant has, for that purpose, the powers referred to in subsections (1)(c) and (2) of this section.
169. **Search warrant to be produced**

(1) Every Customs officer executing a search warrant must produce it for inspection upon initial entry and in response to any reasonable request thereafter and, when requested by or on behalf of the owner or occupier, must provide a copy of the warrant no later than 7 days after the making of the request.

(2) Subject to subsection (3) of this section, if the owner or occupier of the place being searched or the owner of the thing being searched, as the case may be, is not present at the time of the search, the Customs officer executing the warrant must leave in a prominent position at the place being searched or attached to the thing searched, as the case may be, a written notice stating the date and time of the execution of the warrant and the name of the officer in charge of the search.

(3) Where the officer executing the warrant believes that a notice under subsection (2) of this section would unduly prejudice subsequent investigations, that officer may refrain from leaving such notice and, in that event, must, within 7 days, apply to a Judge for confirmation of his or her decision.

(4) If the Judge refuses to confirm the decision, the officer who executed the warrant must forthwith notify, or cause to be notified, the owner or occupier of the place searched or the owner of the thing searched, as the case may be, of the particulars referred to in subsection (2) of this section.

170. **Duty to inform owner where thing seized**

(1) Except in any case to which section 169(3) of this Act applies and continues to apply following a ruling under section 169(3) of this Act or unless a Judge because of exceptional circumstances otherwise orders, the person executing the warrant must, within 7 days after the seizure of any thing, inform the owner or occupier of the place searched or the owner of the thing searched of the fact that any thing has been seized and of the place from where it was seized.

(2) The person executing the warrant must inform the owner or occupier by—

(a) Delivering to him or her a written notice containing such information; or

(b) Leaving such a notice in a prominent position at the place searched or attached to the thing searched, as the case may be; or

(c) By sending such a notice to the owner or occupier by registered mail; or

(d) in such other manner as a Judge may direct in any particular case.

(3) A person affected by the execution of a search warrant may apply to a Judge for an order for the disclosure of the application for the warrant, and any documents submitted in support of the application, and the Judge may, if satisfied that the disclosure of the information will not prejudice the prevention, investigation, or detection of offences, or endanger the safety of any person, order the disclosure of the whole or any part of the application and supporting documents.
171. Emergency warrants—

(1) In any case where a District Court Judge or Justice [or Community Magistrate], or any Registrar (not being a constable) is satisfied, on an application made by a Customs officer, that circumstances exist that would justify the grant of a search warrant under section 167 of this Act, but the urgency of the situation requires that the search should begin before a warrant under that section could with all practicable diligence be obtained, the District Court Judge or Justice [or Community Magistrate], or any Registrar (not being a constable) may, orally or in writing, grant an emergency warrant to the Customs officer making the application to search for and seize the thing that is believed to be in or on a particular place, premises, or thing.

(2) Any application for an emergency warrant may be made orally, but otherwise every such application shall comply with the requirements of section 187 of this Act.

(1) The Customs officer making the application shall, at the time of making the application, make a note in writing of the particulars of the application.

(2) Where the District Court Judge or Justice [or Community Magistrate], or any Registrar (not being a constable) grants the application for an emergency warrant, he or she shall forthwith make a note in writing of the particulars of the application. The note shall be filed in the District Court Registry nearest to where the application is made, and shall, for the purposes of section 167(1) of this Act, be deemed to be an application under that section. The District Court Judge or Justice [or Community Magistrate], or any Registrar [not being a constable] shall also make a note of the terms under which the emergency warrant is issued.
(3) Every Customs officer executing an emergency warrant must produce the note made in accordance with subsection (3) of this section for inspection upon initial entry and in response to any reasonable request thereafter and, when requested, must provide a copy of the note no later than 7 days after the making of the request.

(4) The provisions of sections 168, 169(2) to (4) and 170 of this Act, so far as they are applicable and with the necessary modifications, shall apply to emergency warrants in the same manner as they apply to search warrants.

(5) Every emergency warrant shall remain valid for 6 hours from the time when the authorisation is given, and shall then expire.

(6) As soon as practicable after an emergency warrant has expired, the Customs officer who applied for it, or, if that officer is not able to do so, another Customs officer, shall provide a written report, in the prescribed form, to the Judge or Justice [or Community Magistrate] or Registrar who granted the emergency warrant setting out the manner in which the emergency warrant has been executed and the results obtained by the execution of the warrant.

172. Use of aids by Customs officer—

(1) In exercising any power of boarding, entry, or search conferred by this Act, a Customs officer or any member of the Police may have with him or her, and use for the purposes of searching, a dog, a chemical substance, or a mechanical, electrical, or electronic device.

(2) Nothing in this section applies to a search carried out on residential premises except pursuant to a warrant issued under section 167 or 171 of this Act.

173. Conditions applying to entry of buildings—

Notwithstanding anything in this Act, every provision of this Act that confers on a Customs officer the power to enter any building, whether under the authority of a warrant or otherwise, is subject to the following conditions:

(a) Reasonable notice of the intention to enter must be given, except where it would frustrate the purpose of the entry;

(b) Entry must be made at a time that is reasonable in the particular circumstances except where it would frustrate the purpose of the entry;

(c) Identification must be produced on initial entry and, if requested, at any subsequent time;

(d) The authority for the entry and the purpose of the entry must be clearly stated to the owner or occupier of the building if he or she is present.
Consistency with principles of natural justice: administrative decision-making model 1

39 Procedure for suspending, cancelling, or refusing to amend or renew licence

(1) If the Secretary proposes to suspend, cancel, or refuse to amend or renew a licence, the Secretary must notify the [licence holder] in writing of—

(a) The proposal to suspend, cancel, or refuse to amend or renew the licence; and

(b) The reason for the proposed suspension, cancellation, or refusal; and

(c) The [licence holder’s] rights, and the procedure to be followed—

(i) Before the suspension or cancellation takes effect; or

(ii) As a result of the refusal to amend or renew the licence.

(2) The [licence holder] may make written submissions to the Secretary concerning the proposed suspension, cancellation, or refusal to amend or renew within 15 working days after the date of the notice under subsection (1).

(3) The Secretary must consider any submissions made by the society.

(4) If the Secretary decides to suspend a licence, the Secretary must notify the [licence holder] of—
(5) If the Secretary decides to cancel or refuse to amend or renew a licence, the Secretary must notify the [licence holder] of-
(a) For a cancellation, the date on which the cancellation takes effect and the reason for the cancellation;
(b) For a refusal to amend or renew, the reason for the refusal.
(6) If subsection (4) or subsection (5) applies, the Secretary must also notify the [licence holder] of-
(a) The right to appeal the decision; and
(b) The process to be followed for an appeal under section 41.
41 Appeal to Commission regarding licence

(1) A [licence holder] may appeal to the Commission against a decision of the Secretary to—
(a) Refuse to grant a licence; or
(b) Refuse an application by the [licence holder] for the renewal of a licence; or
(c) Refuse to amend a licence held by the [licence holder]; or
(d) Suspend or cancel a licence held by the [licence holder].

(2) An appeal must be in writing and must be made within 10 working days after the Secretary’s decision, or any longer time that the Commission may allow.

(2) The Commission—
(a) May request any information from the [licence holder] or the Secretary; and
(b) Is not bound to follow any formal procedure; and
(c) Does not need to hold a hearing; and
(d) Must consider any information provided by the [licence holder] or the Secretary.

(4) The Commission may then—
(a) Confirm, vary, or reverse the decision of the Secretary; or
(b) Refer the matter back to the Secretary with directions to reconsider.

(5) The Commission must give written notice of its decision, with reasons, to both the [licence holder] and the Secretary.
Consistency with principles of natural justice: administrative decision-making model 2

41 Appeal to Commission regarding licence

(1) A [licence holder] may appeal to the Commission against a decision of the Secretary to—
   (a) Refuse to grant a licence; or
   (b) Refuse an application by the [licence holder] for the renewal of a licence; or
   (c) Refuse to amend a licence held by the [licence holder]; or
   (d) Suspend or cancel a licence held by the [licence holder].

(2) An appeal must be in writing and must be made within 10 working days after the Secretary's decision, or any longer time that the Commission may allow.

(2) The Commission—
   (a) May request any information from the [licence holder] or the Secretary; and
   (b) is not bound to follow any formal procedure; and
   (c) Does not need to hold a hearing; and
   (d) Must consider any information provided by the [licence holder] or the Secretary.

(4) The Commission may then—
   (a) Confirm, vary, or reverse the decision of the Secretary, or
   (b) Refer the matter back to the Secretary with directions to reconsider.

(5) The Commission must give written notice of its decision, with reasons, to both the [licence holder] and the Secretary.
Consistency with principles of natural justice: Tribunals

A simpler way of addressing the principles of natural justice within your legislation is by including a simple reference to the requirement or by not expressly referring to it. Both of these options implicitly recognize that the principles of natural justice are so fundamental to administrative decision-making that they will, as a matter of course, be complied with. There are risks in making such assumptions. If you proceed down this path, you will need to ensure that your internal policy documents or internal procedures comply with the principles.

51. Assessment of capacity for work—

(3) Every assessment under this section shall be carried out—
(a) in accordance with the procedure for the time being determined by the Corporation under section 50 of this Act; and
(b) in accordance with the principles of natural justice.

Functions and powers of Tribunal

94. Functions of Tribunal—

The functions of the Tribunal shall be—
(a) to consider and adjudicate upon proceedings brought pursuant to sections 92B, 92E, 95, and 97:
(b) to exercise and perform such other functions, powers, and duties as are conferred or imposed on it by or under this Act or any other enactment.

95. Power to make interim order—

(1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.
(2) An application for an interim order may be made—
(a) in the case of proceedings under section 92B(1), 92B(2), 92B(3), or 92B(4), by the person or body bringing the proceedings; and
(b) in the case of proceedings under section 92E, by the Commission.
(3) A copy of the application shall be served on the defendant who shall be entitled to be heard before a decision on the application is made.

96. Review of interim orders—

Where an interim order has been made, the defendant may, with the leave of the Tribunal and instead of appealing against the order, apply to the High Court to vary or rescind the order unless that order was made with the defendant’s consent.
105. **Substantial merits—**

(1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
(2) In exercising its powers and functions, the Tribunal must act—
   (a) In accordance with the principles of natural justice; and
   (b) In a manner that is fair and reasonable; and
   (c) According to equity and good conscience.

**Functions and powers of Tribunal**

94. **Functions of Tribunal—**

The functions of the Tribunal shall be—
   (a) To consider and adjudicate upon proceedings brought pursuant to sections 92B, 92E, 95, and 97:
   (b) To exercise and perform such other functions, powers, and duties as are conferred or imposed on it by or under this Act or any other enactment.

95. **Power to make interim order—**

(1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.
(2) An application for an interim order may be made—
   (a) In the case of proceedings under section 92B(1), 92B(2), 92B(3), or 92B(4), by the person or body bringing the proceedings; and
   (b) In the case of proceedings under section 92E, by the Commission.
(3) A copy of the application shall be served on the defendant who shall be entitled to be heard before a decision on the application is made.

96. **Review of interim orders—**

Where an interim order has been made, the defendant may, with the leave of the Tribunal and instead of appealing against the order, apply to the High Court to vary or rescind the order unless that order was made with the defendant’s consent.
107. **Sittings to be held in public except in special circumstances**

(1) Except as provided by subsections (2) and (3) of this section, every hearing of the Tribunal shall be held in public.
(2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
(3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings, —
   (a) Order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
   (b) Make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
   (c) Make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
(2) Every person commits an offence and is liable on summary conviction to a fine not exceeding $3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c) of this section.

108. **Persons entitled to be heard**

(1) Any person who is a party to the proceedings before the Tribunal, and any person who satisfies the Tribunal that he or she has an interest in the proceedings greater than the public generally, may appear and may call evidence on any matter that should be taken into account in determining the proceedings.
(2) If any person who is not a party to the proceedings before the Tribunal wishes to appear, the person must give notice to the Tribunal and to every party before appearing.
(3) A person who has a right to appear or is allowed to appear before the
Tribunal may appear in person or be represented by his or her counsel or agent.

108A. Tribunal to give notice of proceedings-

The Tribunal must notify the Attorney-General promptly of the bringing of proceedings before the Tribunal alleging a breach of Part 1A, or alleging a breach of Part 2 by a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990, if the Attorney-General is not a party to the proceedings.

108B. Submissions in relation to remedies-

(1) Before the Tribunal grants any remedy under Part 3, it must give the parties to the proceedings and, if the remedy under consideration is a declaration under section 92J, the Attorney-General, an opportunity to make submissions on-
   (a) The implications of granting that remedy; and
   (b) The appropriateness of that remedy.
(2) Subsection (1) does not limit any provision in Part 3 or section 108.