

Departmental Disclosure Statement

New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

28 February 2020.

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Part One: General Policy Statement

This Bill is to help provide a mechanism for the Executive and the House of Representatives to consider, and, if they think fit, respond to, a declaration of inconsistency made under the New Zealand Bill of Rights Act 1990 (the Bill of Rights) or the Human Rights Act 1993.

A declaration of inconsistency is a formal statement by a court or tribunal that an enactment is inconsistent with a plaintiff's fundamental human rights protected by the Bill of Rights. A declaration does not affect the validity of an Act, or anything done lawfully under that Act. However, it does signal that the court or tribunal considers an Act to infringe fundamental human rights in a way that cannot be justified in a free and democratic society.

The Human Rights Act 1993 empowers the Human Rights Review Tribunal to declare an Act to be inconsistent with the right to be free from discrimination affirmed in section 19 of the Bill of Rights. However, until recently, it has been less clear whether the courts can make declarations of inconsistency in respect of other rights affirmed in the Bill of Rights. This was settled in November 2018 when the Supreme Court, in *Attorney-General v Taylor* [2018] NZSC 104; [2019] 1 NZLR 213 (SC), determined that the Senior Courts have the power to issue a declaration of inconsistency under the Bill of Rights.

In February 2018, following decisions by the High Court and Court of Appeal in *Taylor*, Cabinet agreed, in principle, to amend the Bill of Rights to provide for declarations of inconsistency made by the Senior Courts. Also in February 2018, the Speaker of the House of Representatives referred to its Privileges Committee a question of privilege about declarations of inconsistency and their implications for Parliament. The question remains business before the Committee.

The important constitutional relationship of mutual respect between Parliament and the judiciary gives rise to an expectation that the House should be informed of a declaration and be given an opportunity to consider it. Once the House has been informed about, has considered, and, if it thinks fit, has responded to, a declaration of inconsistency, the Executive can then consider its approach to initiating legislative change to remedy the inconsistency.

The proposed response mechanism for declarations of inconsistency will involve both legislation and the Standing Orders of the House of Representatives.

Legislation will require the Attorney-General to present to the House a report on a declaration of inconsistency. Legislation will not, however, prescribe the process the House of Representatives must embark on, as that is a matter properly for Parliament. Legislation will also not amend or alter the power of the Senior Courts to grant relief, including making declarations of inconsistency under the Bill of Rights.

How, and when, the House of Representatives responds will be for it to determine, and prescribe, by adoption of appropriate Standing Orders. The Minister of Justice will propose that the Standing Orders Committee consider potential changes to the Standing Orders, including -

- a referral to a select committee; and
- report back to the House with any recommendations; and
- a debate in the House on the Select Committee's report, and
- a vote on whether to accept the Select Committee's report.

The Bill is introduced under Standing Order 263(a). That Standing Order permits an omnibus Bill to amend more than one Act to be introduced if the amendments deal with

an interrelated topic (namely, declarations of inconsistency) that can be regarded as implementing a single broad policy (namely, providing, under a package of changes to legislation and related changes to Standing Orders, a mechanism for the Executive and the House of Representatives to consider, and, if they think fit, respond to, declarations of inconsistency). The Bill is currently not intended to be divided, by select committee or committee of the whole House, into two separate amendment Bills.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
Court ruling by the New Zealand Supreme Court <i>Attorney-General v Taylor</i> [2018] NZSC 104 determined that Senior Courts have the power to issue a declaration of inconsistency under the New Zealand Bill of Rights Act 1990. This can be accessed in the New Zealand Law Reports.	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	NO
The Treasury Regulatory Quality Team has determined that the regulatory decisions sought in this paper are exempt from the Regulatory Impact Analysis requirements as they have no or only minor impacts on businesses, individuals, or not-for-profit entities.	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>The Cabinet paper <i>Declarations of Inconsistency with the New Zealand Bill of Rights Act</i> outlines the costs and benefits of the policy to be given effect by this Bill.</p> <p>The proposal will not affect how the Senior Courts make declarations of inconsistency. However, incentives for people to seek declarations of inconsistency may be strengthened by the proposal to provide for a formal response by the Executive and the House of Representatives.</p> <p>The Ministry of Justice anticipates that any increased costs for the senior courts and the Human Rights Review Tribunal will be able to be absorbed within baseline.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The New Zealand Bill of Rights Act 1990 affirms New Zealand's commitment to the International Covenant on Civil and Political Rights. New Zealand does not have international obligations to comply with in respect of declarations of inconsistency.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The Ministry of Justice considered the government's Treaty of Waitangi obligations when developing the policy to be given effect by this Bill. We consider the Bill is consistent with those obligations.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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Advice has been provided to the Attorney-General by the Crown Law Office. This advice will be available on the Ministry's website at https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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While the Bill requires a response to a Declaration by the senior courts, how Parliament chooses to conduct that response will be decided by them, under Standing Orders. Therefore, the Bill preserves parliamentary sovereignty while also enabling Parliament to reflect on a finding of inconsistency.

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
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External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The Ministry of Justice engaged with the following organisations and experts on the policy to be given effect by this Bill: Crown Law, Parliamentary Counsel Office, Office of the Clerk of the House of Representatives, the Legislation Design and Advisory Committee, the New Zealand Law Society, the Human Rights Commission, faculty members of university law schools, and other constitutional and human rights law experts.</p> <p>The Department of the Prime Minister and Cabinet, the Treasury, the State Services Commission and Crown Law were consulted on the policy and the draft Bill.</p> <p>The Minister of Justice met with the Speaker of the House of Representatives about the policy proposal and matters relating to the Standing Orders of the House of Representatives. The Minister of Justice intends to continue to engage with the Speaker and the Standing Orders Committee prior to the introduction and enactment of legislative amendments.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
<p>Some proposed changes in the Bill are based on current practice in other jurisdictions. The requirement that the Attorney-General present the declaration to the House within six sitting days after the conclusion of court proceedings is based on current practice in equivalent legislation in the Australian Capital Territory (ACT).</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
Declarations of Inconsistency support the rights affirmed in the New Zealand Bill of Rights Act 1990 by providing a mechanism for inconsistencies to be recognised and acknowledged.	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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