

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

Government Bill

Explanatory note

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 involves both legislation and the Standing Orders of the House of Representatives.

This Bill requires the Attorney-General to present to the House a report on a declaration of inconsistency. This Bill does not, however, prescribe the process the House of Representatives must embark on, as that is a matter properly for Parliament. This Bill also does 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 is 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.

This 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). This Bill is currently not intended to be divided, by select committee or committee of the whole House, into two separate amendment Bills.

Departmental disclosure statement

The Ministry of Justice is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2020&no=230>

Regulatory impact assessment

A regulatory impact assessment is not required for this Bill.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 relates to commencement. The Amendment Act is to come into force on the day after Royal assent. The statutory changes are to operate, however, as a package with related changes to Standing Orders. Amendments to Standing Orders, or a Sessional Order, will therefore need to be developed and adopted in time to be effective in connection with that commencement. The Minister of Justice will therefore engage with the Speaker and the Standing Orders Committee of the House of Representatives with a view to achieving that outcome.

Part 1

Amendment to New Zealand Bill of Rights Act 1990

Clause 3 says that the Part amends the New Zealand Bill of Rights Act 1990 (the **Bill of Rights**).

Clause 4 inserts a *new section 7A*. This provision requires the Attorney-General to report to Parliament a declaration of inconsistency. *New section 7A* applies to a declaration that an enactment is inconsistent with the Bill of Rights (and not made under section 92J of the Human Rights Act 1993). The declaration will be one made by a senior court (as defined in section 4(2) of the Senior Courts Act 2016). *New section 7A* applies only if the declaration becomes final because—

- no appeals, or applications for leave to appeal (under sections 73 to 77 of the Senior Courts Act 2016), against the making of the declaration are lodged in the period for lodging them; or
- all lodged appeals, or applications for leave to appeal, against the making of the declaration are withdrawn or dismissed.

New section 7A requires the Attorney-General to present to the House of Representatives, not later than the sixth sitting day of the House of Representatives after the declaration becomes final, a report bringing the declaration to the attention of the House of Representatives.

New section 7A applies to a declaration to the effect that an enactment is, under section 4 of the Bill of Rights, “inconsistent with any provision of” the Bill of Rights. (That the High Court or, on an appeal, the Court of Appeal or the Supreme Court, has power, under all or any applicable law (whether legislation alone, or legislation and common law), to make such a declaration of inconsistency is shown by *Attorney-General v Taylor* [2018] NZSC 104; [2019] 1 NZLR 213 (SC).) *New section 7A* therefore applies to inconsistency with any right or freedom affirmed by the Bill of Rights (for example, inconsistency with the right to freedom from discrimination affirmed by section 19 of the Bill of Rights). However, *new section 7A* does not apply to a declaration of inconsistency made under section 92J of the Human Rights Act 1993. A declaration made under section 92J is subject to *new section 92K(2) and (3)* of that Act (*see clause 6(2)*)).

An enactment includes a portion of an Act or regulations (*see* the definition of enactment in section 29 of the Interpretation Act 1999). It also does not matter when the enactment is passed or made. For example, it does not matter whether the enactment is passed or made before, on, or after—

- the commencement of the principal Act (compare section 4 of the Bill of Rights):
- the commencement of the Amendment Act.

New section 7A applies only to a declaration that becomes final after the commencement of *new section 7A* (*see* section 7 of the Interpretation Act 1999).

Part 2

Amendments to Human Rights Act 1993

Clause 5 says that the Part amends the Human Rights Act 1993.

Clause 6 amends section 92K, which is about the effect of a declaration of inconsistency made under section 92J. Section 92J enables the Human Rights Review Tribunal to declare that an enactment that the Tribunal has found is in breach of Part 1A of the Human Rights Act 1993 is inconsistent with the right to freedom from discrimination affirmed by section 19 of the Bill of Rights.

Clause 6(1) inserts a new subprovision heading before section 92K(1).

Clause 6(2) inserts *new section 96K(2) and (3)*. These provisions require the Attorney-General to report to Parliament a declaration of inconsistency made under section 92J. The declaration will be one made by the Human Rights Review Tribunal, or by a senior court (as defined in section 4(2) of the Senior Courts Act 2016) on an appeal against a decision of that Tribunal. *New section 96K(3)* applies only if the declaration becomes final because—

- no appeals, or applications for leave to appeal (under section 124(1) or (3) of the Human Rights Act 1993 or sections 73 to 77 of the Senior Courts Act 2016) against the making of the declaration are lodged in the period for lodging them; or
- all lodged appeals, or applications for leave to appeal, against the making of the declaration are withdrawn or dismissed.

New section 96K(3) requires the Attorney-General to present to the House of Representatives, not later than the sixth sitting day of the House of Representatives after the declaration becomes final, a report bringing the declaration to the attention of the House of Representatives.

New section 96K(3) applies only to a declaration that becomes final after the commencement of *new section 96K(3)* (*see* section 7 of the Interpretation Act 1999). Section 92K(2) and (3) of the Human Rights Act 1993 continues to apply, despite its repeal, to a declaration made under section 92J and that becomes final before that commencement (*see* sections 17(1)(b) and 18 of the Interpretation Act 1999).

Hon Andrew Little

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act **2020**.

2 Commencement

This Act comes into force on the day after the date of Royal assent.

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Part 1**Amendment to New Zealand Bill of Rights Act 1990****3 Amendment to New Zealand Bill of Rights Act 1990**

This Part amends the New Zealand Bill of Rights Act 1990.

4 New section 7A inserted (Attorney-General to report to Parliament declaration of inconsistency) 5

After section 7, insert:

7A Attorney-General to report to Parliament declaration of inconsistency

- (1) This section applies if a declaration made by a senior court that an enactment is inconsistent with this Bill of Rights (and not made under section 92J of the Human Rights Act 1993) becomes final because— 10
- (a) no appeals, or applications for leave to appeal, against the making of the declaration are lodged in the period for lodging them; or
 - (b) all lodged appeals, or applications for leave to appeal, against the making of the declaration are withdrawn or dismissed. 15
- (2) The Attorney-General must present to the House of Representatives, not later than the sixth sitting day of the House of Representatives after the declaration becomes final, a report bringing the declaration to the attention of the House of Representatives.

Part 2 20**Amendments to Human Rights Act 1993****5 Amendments to Human Rights Act 1993**

This Part amends the Human Rights Act 1993.

6 Section 92K amended (Effect of declaration)

- (1) Before section 92K(1), insert: 25

Effect on enactment, or act, omission, policy, or activity, concerned

- (2) Replace section 92K(2) and (3) with:

Attorney-General to report to Parliament declaration of inconsistency

- (2) **Subsection (3)** applies if a declaration made under section 92J (by the Tribunal, or by a senior court on an appeal against a decision of the Tribunal) becomes final because— 30
- (a) no appeals, or applications for leave to appeal, against the making of the declaration are lodged in the period for lodging them; or
 - (b) all lodged appeals, or applications for leave to appeal, against the making of the declaration are withdrawn or dismissed. 35

- (3) The Attorney-General must present to the House of Representatives, not later than the sixth sitting day of the House of Representatives after the declaration becomes final, a report bringing the declaration to the attention of the House of Representatives.