

Legislative Statement

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

Third Reading

Presented to the House of Representatives

in accordance with Standing Order 272

Legislative Statement for the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill

Third Reading

Introduction

1. The New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (the Bill) seeks to 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 Act) or the Human Rights Act 1993 (the Human Rights Act).

Background

2. 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 Act or the Human Rights Act. 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.
3. The Human Rights Act 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 Act. 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 Act. This was settled in November 2018 when the Supreme Court, in *Attorney-General v Taylor*,¹ determined that senior courts have the power to issue a declaration of inconsistency under the Bill of Rights Act.
4. When the senior courts make such a declaration, there is currently no mechanism to bring the matter to the attention of the House of Representatives. This means lawmakers may not have full regard for the declaration and breaches of rights may go unaddressed.

Provisions of the Bill

As introduced

5. The Bill amended the Bill of Rights Act to require the Attorney-General to present a report on a declaration of inconsistency to the House of Representatives. The Attorney-General must present a report within six sitting days after the declaration of inconsistency becomes final. A declaration becomes final when all proceedings relating to the declaration are concluded, including the time available for appeals.
6. The Bill did not prescribe the process that the House must follow after the Attorney-General presents a report on a declaration.

¹ *Attorney-General v Taylor* [2018] NZSC 104; [2019] 1 NZLR 213 (SC)

7. The Bill amended both the Bill of Rights Act and the Human Rights Act so that declarations about consistency of legislation with those Acts are treated in the same way.
8. When the Human Rights Review Tribunal makes a declaration of inconsistency, the Human Rights Act requires the Government to present the declaration to the House of Representatives along with the Government response. This must be done within 120 days of the declaration being finalised. The Bill removed the statutory requirement for a Government response in the Human Rights Act and shortened the time available for presenting the declaration to six sitting days.

As reported by the Privileges Committee

9. The Privileges Committee recommended the following changes.

Attorney-General to notify Parliament

10. The Committee recommended a change to new section 7A of the Bill of Rights Act and in new section 92WA of the Human Rights Act to clarify that the Attorney-General must notify, rather than report to, Parliament. The Committee saw the Attorney-General's role as being to bring the declaration into the House's consideration, rather than reporting substantively on the declaration.

Requirement for a Government response

11. The Committee recommended that the Bill be amended to require the Government to respond to declarations of inconsistency within six months of a declaration being brought to the attention of the House. The Government's response would be presented by the Minister responsible for the administration of the law to which the declaration of inconsistency relates. This requirement would be contained in new section 7B of the Bill of Rights Act and new section 92WB of the Human Rights Act. The intent of this requirement is to ensure that declarations and the issues they raise are given due consideration by the executive and are responded to publicly.
12. The Committee recommended that the House of Representatives be empowered to vary the deadline for the Government's response by making a resolution specifying a new deadline. This is provided for in subsection (2) of proposed new sections 7B of the Bill of Rights Act and new section 92WB of the Human Rights Act. The Committee considered that a default deadline, together with an ability to vary it, would strike a balance between catering for varying levels of complexity in the issues raised by declarations and clear legislative intent to guide the Government's preparation of a response.

Proposed Parliamentary process and rules

13. The Committee recommended that the notification of a declaration to the House of Representatives by the Attorney-General would trigger a Parliamentary process to be included in the Standing Orders. The proposed Parliamentary process would involve:
 - a) a declaration of inconsistency being referred to a select committee allocated by the Clerk of the House;

- b) select committee consideration of, and reporting on, the declaration within four months (unless the Business Committee determines a different deadline); and
 - c) debate in the House on the declaration, the select committee report, and the Government's response to the declaration, upon presentation of the latter.
14. The aim of this process is to ensure that declarations of inconsistency are given active consideration by the House of Representatives. It would also ensure that the House discharges its constitutional functions of representation and scrutiny in respect of declarations.
 15. The Committee has recommended that the proposed rules for declarations of inconsistency be adopted through a sessional order, for the current term of Parliament. The Committee has written to the Leader of the House proposing that he lodge a notice of motion containing the proposed rules, so they could be debated alongside the Bill's third reading.
 16. The notice of motion would provide for the rules to take effect on the day on which the Bill came into force. The Committee also recommended that the procedure for declarations of inconsistency subsequently be incorporated permanently in the House's rules when the next review of the Standing Orders takes place.