



The **New Zealand** Legal System

A guide to
the constitution,
government and
legislature of
New Zealand.

MINISTRY OF

JUSTICE

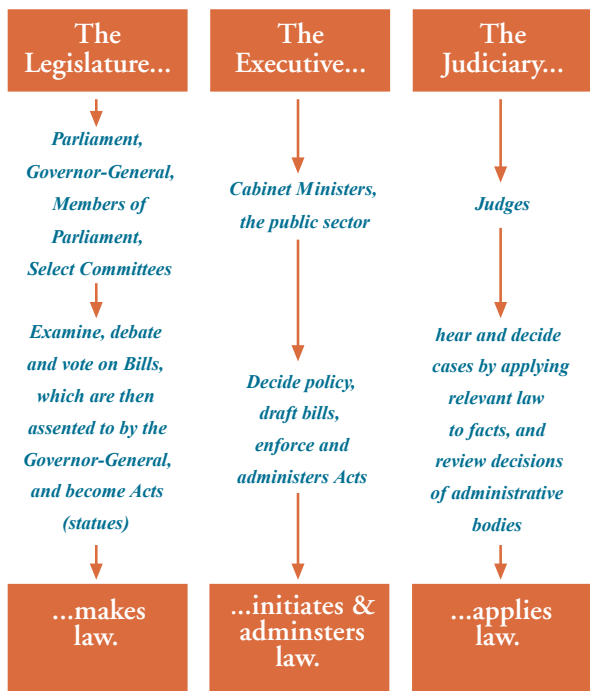
THE NEW ZEALAND LEGAL SYSTEM

When many people think of the legal system, they think of lawyers and courts. While the courts are an important part of New Zealand's legal system, it also has many other parts.

The New Zealand legal system is derived from the English one and comes from two main sources:

- The common law, which is a body of law built up from decisions made in the United Kingdom and in New Zealand. Developments made by New Zealand courts mean that New Zealand now differs from the United Kingdom on some aspects of the common law.
- Statute law, which is all the law made by Parliament.

The Three Branches of Government



An integral feature of our system is the separation of power among three different branches of government. The division of power seeks to ensure that no one branch can act unconstitutionally. Although each branch has a different role, the separation is not absolute.

The Legislature

New Zealand's Parliament has developed from the British parliamentary system known as the Westminster system of government and is the highest law-making body in New Zealand.

Parliament has two parts:

1. The Head of State of New Zealand (Queen Elizabeth II) who is represented by the Governor-General.

The Governor-General is appointed by the Sovereign on the Prime Minister's recommendation for a term of five years.

The Governor-General exercises the Queen's royal powers (prerogative powers) which are found in the Letters Patent 1983. The Governor-General's main constitutional function is to invite the Leader of the majority party to form a government. The Governor-General is also able to make regulations and his or her assent is required for all Bills passed by the House of Representatives before they can become law. He or she also holds the figurehead position of Commander-in-Chief of the armed forces.

The Governor-General is required by constitutional convention to follow the advice of ministers. This means the Governor-General does what the Government advises him or her to do. Although there could be situations where the Governor-General could be required to exercise independent judgement, this has not happened for a long time.

2. The House of Representatives

The New Zealand Parliament has one chamber, called the House of Representatives. The second chamber, known as the Legislative Council, was abolished in 1951.

One hundred and twenty Members of Parliament (MPs) are elected to the House of Representatives for a three year term. They meet in the Parliamentary Buildings in Wellington. New Zealanders aged 18 years and over, elect the Members of Parliament by voting in elections. This is how New Zealanders have a say in who runs the country.

The House's responsibilities are to debate and pass legislation, provide a Government, supervise the Government's administration by requiring it to explain policies and actions, supply money, and represent the views of the people of New Zealand. It has a number of Select Committees which examine proposed legislation (Bills) in detail, often hearing submissions from interested members of the public.

The Executive

The Executive is made up of the Prime Minister, Cabinet and the public sector. The Executive conducts the Government, deciding on policy and administering legislation.

All important Government policy decisions and legislative proposals either come from or are agreed to by Cabinet. Cabinet also co-ordinates the work of Ministers. Cabinet consists of Ministers who are members of the governing party or parties in Parliament and is presided over by the Prime Minister. Usually each Cabinet Minister is responsible for one or more government departments, but there can be Ministers "without portfolio", who do not have permanent responsibility for any department. Cabinet, like Parliament, has committees that examine specific subjects in detail. Cabinet Ministers are advised by public servants.

Although it has great power, Cabinet is not a body established by statute. Its power comes from long-recognised convention. In contrast, the Executive Council, which is formally constituted, does not have the power to make policy decisions. It gives legal effect to decisions made elsewhere, eg regulations, Orders and Notices. The Executive Council is presided over by the Governor-General and in practice the other members are the Cabinet of the day.

The Judiciary

The independence of the judiciary is an important principle of the New Zealand constitution, so freedom from political interference is an essential feature of the judiciary's position. This reflected in the standing orders of the House of Representatives (their rules) which prohibit members from criticising a judge.

A judgement may be criticised but personal attacks on or attempts to influence a judge are not allowed, and could put the people concerned in contempt of court. If an MP does not like the decision reached in a case, the proper course is to introduce a Bill to change the law in question.

It is the Judges' role to apply the law to every case that comes before the Court. Judges, however, also develop the law by deciding what legislation passed by Parliament means by interpreting it. A growing area of the Judiciary's work is judicial review, examining the acts of government and private administrative bodies to see whether they acted fairly and within their powers.

Judges are appointed by the Governor-General. All judges are lawyers with at least seven years experience.

New Zealand's Constitution

A constitution is central to a country's legal system because it defines the principles on which the system is based. It sets up the most important institutions of government, states their principal powers and makes broad rules about how those powers can be used. In some countries the constitution is written down in one place and that document is called the constitution.

New Zealand's constitution, which is the foundation of our legal system, is drawn from a number of important statutes, judicial decisions, and customary rules known as constitutional conventions.

New Zealand does not have a single written constitution. New Zealand's constitutional arrangements can be found in a

number of key documents. These, together with New Zealand's constitutional conventions, form the nation's constitution. Key written sources include the Constitution Act 1986, the New Zealand Bill Of Rights Act 1990, the Electoral Act 1993, the Treaty of Waitangi and the Standing Orders of the House of Representatives. Aspects of the constitution are also found in United Kingdom and other New Zealand legislation, judgments of the courts, and broad constitutional principles and conventions.

Constitutional Conventions

Constitutional conventions are rules that have become established by frequent use and custom. Conventions are an important part of the relationships between and within the legislature and the executive. Although some conventions have been put into statutes, most of them are not enforceable laws. Their continued existence depends on people respecting and obeying them. An example of a constitutional convention is that the Governor-General acts on the advice of his or her ministers.

The Rule of Law

The rule of law also forms a significant part of the New Zealand constitution. The principles of the rule of law are not easily defined, but encompass ideas such as:

- the powers exercised by parliamentarians and officials are based on legal authority;
- there are minimum standards of justice to which the law must conform, eg laws affecting individual liberty should be reasonably certain and clear;
- the law should have safeguards against the abuse of wide discretionary powers;
- unfair discrimination should not be allowed by the law;
- a person should not be deprived of his or her liberty, status or other substantial interest without the opportunity of a fair hearing before an impartial court or tribunal.

The Treaty of Waitangi

The Treaty of Waitangi was signed in 1840, as an agreement between the British Crown and a large number of the Māori of New Zealand. Today the Treaty is widely accepted to be a constitutional document, which establishes and guides relationships between the Crown in New Zealand (as embodied by our government) and Māori. The Treaty of Waitangi had at its heart a promise to protect a living Māori culture; to enable Māori to continue to live in New Zealand as Māori, while at the same time conferring on the Crown the right to govern in the interests of all New Zealanders. This means that the Treaty relationships between the Government and Maori are ongoing and dynamic.

The status of the Treaty in New Zealand law is, however, less than settled. The orthodox view is that where legislation makes no reference to the Treaty, then Treaty rights are unenforceable. Where the Treaty is referred to expressly in statute, the current approach of the courts has been to give effect to the reference. There are a number of statutes which contain references of this type.

There is also evolving jurisprudence to suggest that where relevant, Treaty principles could guide the actions of executive government and permeate domestic statutes without express incorporation. In addition, New Zealand is to some degree under an international obligation to maintain some of the rights ascribed to the Treaty, as Parliament has incorporated into domestic law the International Covenant on Civil and Political Rights which upholds the individual and group rights of minorities. Article III Treaty of Waitangi rights (the right to equality before the law) are largely protected under the New Zealand Bill of Rights Act and Human Rights Act.

Although there are limits on the extent to which Treaty rights can be argued in the courts system, as indicated above, the Waitangi Tribunal provides a forum for the hearing of historical and contemporary grievances regarding breaches of the Treaty of Waitangi. Under the Treaty of Waitangi Act 1975, any Māori may take a claim to the Tribunal that he or she (or the group to which he or she belongs) has been

prejudicially affected by any legislation, policy or practice of the Crown since 1840. The Tribunal has the power to make recommendations to the Government. These recommendations are non-binding except in relation to particular assets, including forestry assets and other assets, owned or formerly owned by State Owned Enterprises and certain other state institutions.

The main means through which claims concerning historical breaches of the Treaty are settled is by direct negotiation with the Crown (through the Office of Treaty Settlements). This often occurs after the Waitangi Tribunal has issued a report on the grievance.

The Electoral System

The 1996 general election was the first held in New Zealand under the mixed member proportional system (MMP). Under the MMP system voters have two votes; a party vote and an electorate vote. Voters can choose what party they want in Parliament with their party vote and which person they want to represent their electorate with their electorate vote.

New Zealand is divided geographically into 61 general electorates and 6 Māori ones. There are also 53 seats for list MPs. The number of general electorates changes as the population changes. All voters live in an electoral area and vote in that same area. People of Māori descent can choose whether to be on the Māori or general electoral rolls. The Māori seats can change as the number of Māori voters on the Māori roll changes.

The Electoral Act 1993, which sets out the way the New Zealand electoral system works, is the only statute in New Zealand with entrenched provisions. Being “entrenched” means that if certain changes to the Electoral Act are to be made, for example the length of the Parliamentary term, they must be passed by either:

- 75 percent of MPs; or
- a majority vote in a referendum of all voters on the electoral rolls.

Usually a simple majority (51 percent) of MPs is all that is required to make changes to an Act.

The New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 safeguards the civil and political rights of New Zealanders.

The Act protects the following categories of rights and freedoms: life and security of the person; democratic and civil rights; non-discrimination and minority rights; search, arrest and detention; criminal procedure; and right to justice.

The Act is not higher law and does not “override” other laws, but it does nevertheless provide protection for the rights in it. The Courts must interpret other laws consistently with the Bill of Rights Act if at all possible. Further, all bills are assessed for consistency with the Bill of Rights Act before they are introduced into Parliament. Where there is an inconsistency in a bill, the Attorney-General must inform Parliament. While this does not prevent Parliament passing inconsistent laws, it does ensure that any issues are fully debated.

The Human Rights Act 1993

The Human Rights Act 1993 is aimed at giving all people equal opportunities and preventing unfair treatment on the basis of irrelevant personal characteristics. The Human Rights Act covers discrimination on the grounds of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation. It is unlawful to discriminate on these grounds in the following areas of public life: employment, education, access to public places, provision of goods and services, and housing and accommodation. People who think they have been discriminated against may complain to the Human Rights Commission.

GENERAL LEGAL SYSTEM INFORMATION

Civil and Criminal Law

There are two main divisions of law - **civil law** and **criminal law**.

Civil law covers disputes between individuals, companies and sometimes local or central government, and usually doesn't involve the police. The disputes usually involve money, with a wide range of cases coming before the courts - disputes over business contracts, wills, tax, land or other property; cases where negligence has caused another's loss; and family matters such as custody of children and division of matrimonial property. Many civil cases are settled without a court hearing being needed - all parties agree on a solution, usually after negotiations by the parties' lawyers. In a civil case, the plaintiff (the person who brings the action or "sues") must prove their case to the balance of probabilities - it must be more likely than not that the plaintiff's version of events is correct.

Criminal law has a high profile as it usually involves the police investigating crimes eg theft, murder, and trials which are often reported by the news media. The accused has the right to be represented by a lawyer and to have the evidence against him or her heard in an open court (open to the public) and tested by cross-examination. The offence must be proved beyond reasonable doubt. If convicted of a crime, a person will be sentenced in accordance with the law, and has a right to appeal against conviction and sentence.

Criminal prosecutions are usually brought by the police but are also brought by others, for example, the Ministry of Transport, Department of Inland Revenue and Local Authorities.

Court Proceedings

In the District Court and High Court the Judge sits alone or with a jury. A jury is made of 12 ordinary people selected at random from the jury roll (which is based on the electoral roll), and its role is to decide questions of fact. Various laws say when there has to be a jury, and when there is a choice to have

one or not. Questions of law are decided by the Judge, who also directs the jury on the law where necessary.

In New Zealand courts the adversary system is usually used to determine issues. In this system, the Judge generally plays the role of a neutral referee while each party presents evidence and arguments (on the facts and on the law) in support of its own case. Rules of evidence determine what can and cannot be presented to the court. These rules are aimed at ensuring a fair trial of hearing for each party. The verdict (decision on the case) is given after all evidence and arguments have been presented. Where a person is tried without a jury, the verdict is given by the Judge.

An inquisitorial system similar to that used, for example, in France is used to a certain extent in administrative tribunals and commissions of inquiry. In this system the judge or person in charge takes a more active role, asking questions and in general the proceedings take the form of an investigation rather than a trial.

Legal Profession

In the New Zealand legal profession most lawyers are both barristers and solicitors. This means they are able to appear in court and deal directly with the public. A small number are barristers only (“barristers sole”) who have chosen to specialise in arguing cases in court. Barristers in general do not deal directly with members of the public, and instead clients are referred to them by solicitors.

Legal Aid

A government funded Legal Aid scheme enables those who cannot afford legal representation to be represented by lawyers in both civil and criminal cases.