New Zealand Bill of Rights

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Policy statement and principles

What

The New Zealand Bill of Rights Act 1990 (NZBORA) is designed to affirm, protect and promote human rights and fundamental freedoms in New Zealand. NZBORA provides that individuals have the right to:

- be secure against unreasonable search and seizure
- not be deprived of life
- not be subjected to torture or cruel treatment
- not be arbitrarily arrested or detained
- freedom of expression, peaceful assembly and movement
- freedom from discrimination.

NZBORA applies to many policing activities. It imposes specific obligations on police officers. For example, section 23 of NZBORA sets out the rights of persons who are arrested or detained and requires, for example, that such persons be informed of the reason for the arrest or detention.

This chapter summarises the rights protected by NZBORA and outlines Police obligations under NZBORA.

Why

Police officers are entrusted by law to exercise very significant powers, such as the power of arrest and detention, and without warrant entry to private premises. NZBORA is a statement of legal principles that limits the powers that the state may bring to bear on individuals. NZBORA applies to acts done by executive branches of the government (such as Police) and to persons performing a public function, power or duty at law (such as constables).

NZBORA requires agencies such as police to exercise their powers in a manner that is consistent with the rights and freedoms guaranteed under NZBORA. Exercise of police powers in a Bill of Rights consistent manner:

- is required by law
- fosters trust and confidence in police decision making and therefore in New Zealand Police
- limits claims against police by persons who feel aggrieved by police actions.

Failure to act consistently with NZBORA may lead to exclusion of evidence and failure of prosecutions, and successful civil claims against Police.

How

To ensure its obligations under the NZBORA are met Police will:

- include the rights and freedoms granted under the Act in the training of frontline staff
- appropriately reflect the rights and freedoms provided by the Act in its policies and procedures, particularly those relating to arrest and detention, questioning, investigation of offences, searching people, use of force and managing demonstrations
- comply with the ‘Chief Justice’s Practice Note on Police Questioning’ and provide advice about rights to people who are arrested or detained, or where police want to question a person where there is sufficient evidence to charge them with an offence
- treat potential breaches of the NZBORA by its employees seriously and investigate and respond to them appropriately.

Summary of the Act and its application to policing

Purpose of this chapter

This chapter contains:

- a brief summary of the New Zealand Bill of Rights Act 1990 (NZBORA)
- detailed discussion of Police obligations under sections 21 to 25 of the Act.

Section 23 relates to the procedures Police must follow when arresting and detaining suspects. It must be considered alongside the 'Chief Justice's Practice Note on Police Questioning'. It is the section of the Act with the most potential to impact on frontline Police. (See 'Rights of people arrested or detained' in this chapter)

Key rules for Police arising from the Act

These are some of the most important rules associated with the NZBORA.

	Rule
1	When you are investigating an offence and you locate suspects or other people you think may provide useful information, you may ask questions but must not suggest that it is compulsory for the person to answer.
2	If you want to question someone and you have sufficient evidence to charge that person with an offence, you must caution the person before inviting them to make a statement or answer questions about that offence.
3	If you have arrested or detained a person pursuant to any enactment, you must caution them, even if you had already given the caution before the suspect was arrested or detained.
4	There is no power to detain a person for questioning or to pursue enquiries, although a person can assist voluntarily with enquiries.

Summary of the Act

The NZBORA applies only to:

- acts done by the legislative, executive or judicial branches of the government (the actions of a trading company, such as TVNZ Ltd, even though a State enterprise under the State Owned Enterprises Act 1986, are not done in the performance of a public power and hence the NZBORA does not apply).
- the performance of any public function, power or duty pursuant to law.

The NZBORA is primarily intended to affirm, protect and promote human rights and fundamental freedoms. It provides:

- protection against the powers of government agencies
- minimum standards for public decision-making
- protection for human rights and basic freedoms.

The Act:

- gives statutory authority to many rights that have always existed but have done so only in common law (examples include the right not to be deprived of life and the right not to be subjected to torture or cruel treatment)
- requires that any limits on the rights and freedoms contained in NZBORA are to be reasonable such that they are capable of being "demonstrably justified in a free and democratic society".

The Act applies to almost every aspect of policing. For example, policing demonstrations may impact on the rights to freedom of expression, manifestation of religion and belief, or peaceful assembly (ss14, 15, 16). Intelligence and prevention activities may impact on the protection against discrimination on the basis of race (s19). A killing by police or death in custody impacts on the right to life (s8).

The New Zealand Bill of Rights Act also imposes some specific obligations on Police:

- s21 - protection against unreasonable search and seizure

- s22 - protection against arbitrary arrest and detention
- s23 - rights of persons arrested or detained
- s24 - rights of persons charged with an offence
- s25 - minimum standards of criminal procedure

Summary table

This table gives a broad outline of the sections in the Act and identifies matters relevant to Police.

Part	Content
Part 1, sections 2-7	General provisions of the Act relating to interpretation and application of the Act and other NZ law
Part 2, sections 8-20	Relate to the life and security of the person, democratic and civil rights, and minority rights. These sections affirm existing rights not previously included in statute.
Part 2, sections 21-22	Relate to actions Police might take while conducting investigations, e.g. searching, seizing, arresting and detaining. (Prior to the Act, these sections were not regulated by statute but by cases such as Entick v Carrington (1765) 19 State Tr 1029 and Blundell v Attorney-General [1968] NZLR 341).
Part 2, section 23	Relates to the rights of people when they have been arrested or detained.
Part 2, section 24	Sets out the rights of persons charged with an offence. Applies to defendants appearing before the courts and prisoners detained in Police cells after being arrested for an offence.
Part 2, sections 25-27	Relate to the administration of justice.
Part 3, sections 28-29	Have no direct effect on Police.

Further information

For further information about the application of the NZBORAin specific situations refer to these Police Manual chapters:

- Arrest and detention
- People in Police detention
- Investigative interviewing suspect guide
- Chief Justice's Practice Note on Police Questioning
- Youth justice
- Search
- Searching people
- Use of force
- Behaviour offences
- Unlawful assembly and/or rioting
- Demonstrations
- People with mental impairments
- Sudden death
- Hate crimes and hate incidents investigations
- Police involvement in deaths and serious injuries.

Right not to be deprived of life

Rights under section 8

Under section 8 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.

Deaths involving Police

Police officers are occasionally required to use force in self defence or defence of another, and in keeping the peace and apprehending offenders. Section 8 of the Act applies where a person dies as a result of Police actions. Such actions must be lawful and justifiable, for example in self defence or defence of another.

For more information see:

- Use of force
- Police firearms
- Homicide and Serious Crime Investigations
- Police involvement in deaths and serious injuries.

Deaths in Police custody

There is no general obligation on Police to prevent deaths. However, there is a positive obligation towards vulnerable people under Police control, such as prisoners and people in Police detention. See these chapters for the applicable procedures:

- People in Police detention
- People with mental impairments
- Youth justice
- 'Care and suicide prevention' in Arrest and detention.

Right not to be subjected to torture or cruel treatment

Rights under section 9

Everyone has the right not to be subjected to torture, or to cruel, degrading, or disproportionately severe treatment or punishment. The purpose of section 9 is to ensure that all persons are treated with respect for their inherent dignity and worth.

Section 9 is particularly relevant to the treatment of prisoners. For example, deliberately strip searching a prisoner in a public area in order to humiliate or subdue them, may breach section 9.

Section 9 and the 'UN Convention Against Torture' include an obligation to investigate credible claims of torture and cruel, degrading and disproportionately severe treatment. Police will often be involved in such investigations. The IPCA is the National Preventative Mechanism for torture and cruel treatment, and oversees investigations into complaints of torture and cruel treatment by Police. (See 'Independent Police Conduct Authority (IPCA)' in the 'Police investigations of complaints and notifiable incidents' chapter.

Breach of section 9 may lead to a substantial award of compensation by the courts (seeTaunoa v Attorney-General [2008] 1 NZLR 429).

Torture

'Torture' is defined under the Crimes of Torture Act 1989 as any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as:

- obtaining information or a confession
- punishment for any act or omission
- intimidation or coercion; or
- for any reason based on discrimination of any kind.

Cruel, degrading or disproportionately severe treatment

'Cruel, degrading or disproportionately severe treatment' covers a range of treatment which deliberately inflicts severe suffering, gravely humiliates and debases the person, would shock the conscience of the community, or is grossly disproportionate to the circumstances. The circumstances and the nature of the treatment are relevant:

- state of mind of the victim and whether he/she is especially vulnerable, e.g. suffers a mental health condition
- motive of the perpetrator and whether the treatment was deliberate
- the duration of the treatment
- the severity of harm.

In some cases, the courts have identified a breach of section 23 (detailed below) where the Police actions have not amounted to cruel, degrading or disproportionately severe treatment in breach of s 9. For example, in *S v Police* [2018] NZHC 1582, the detainee S was prevented from accessing bathroom facilities, which caused him to defecate in his pants. S was offered no help to clean up. The High Court held that Police had breached s 23(5) of the NZBORA, but had not breached s 9.

Freedom of expression and peaceful assembly

Freedom of expression under section 14

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

'Expression' covers manifestations of ideas and information of any kind and in any form, including behaviour bordering on the offensive or disorderly. This right is particularly relevant to policing demonstrations, offences of disorderly and offensive behaviour and breach of the peace.

The right is limited by the criminal and civil law, for example 'offensive' and 'disorderly' behaviour, insulting language, breach of the peace, hate speech, contempt of court, and censorship laws. The limit must be reasonable in the circumstances of the behaviour - an issue which will be decided by the court in each case.

Freedom of peaceful assembly under section 16

Everyone has the right to freedom of peaceful assembly.

An 'assembly' is two or more people meeting with a common goal. Assemblies must be 'peaceful' to be protected by the right. An assembly which inconveniences members of the public may still be peaceful, and one non-peaceful person does not extinguish the right for the rest of the assembly. For an assembly to be found non-peaceful, a serious and aggressive effect on people or property is required.

Demonstrations, behaviour offences and breach of the peace

The rights to freedom of expression, association and peaceful assembly underpin public protests, demonstrations and occupation of public spaces. When policing protests and demonstrations, cognisance must be taken of:

- the rights to freedom of expression and peaceful assembly
- the extent to which the expression/demonstration is impinging on the rights of others to use the public space, and
- whether the behaviour warrants the intervention of the criminal law.

The courts take a liberal approach to expressive behaviour by demonstrators. The level of behaviour required for 'disorderly' and 'offensive' behaviour or 'insulting language' is much higher for demonstrators conveying an opinion on a matter of public interest, than for other types of behaviour. In order to reach the threshold of offensive or disorderly, protestors' behaviour must either:

- substantially inhibit other people from enjoying their right to use the public amenity, and/or
- cause greater offence than those affected can reasonably be expected to tolerate, to the extent that it is seriously disruptive of public order.

(Refer *R v Morse* [2009] NZCA 623, *Brooker v Police* [2007] 3 NZLR 91, *Wakim v Police* [2011] 9 HRNZ 318, *Thompson v Police* [2012] NZHC 2234, *Pointon v Police* [2012] NZHC 3208, *Police v Chiles* [2019] NZDC 3860 - in the context of obstructing a public way).

Breach of the peace is not an offence, but carries a power of arrest (s42 Crimes Act). The rights to freedom of expression and peaceful assembly will impact on the validity of a decision to arrest to prevent a breach of the peace (refer *Police v Beggs* [1999 3 NZLR 615).

The legal tests for disorderly and offensive behaviour and insulting language and breach of the peace are likely to evolve further in the protest context. Generally, Police employees should consider:

- Does the behaviour express a view on a matter of public interest?
- Does the behaviour intrude on the rights of others in a public space?
- Does this intrusion go beyond what a reasonable person, respectful of the rights to freedom of expression and assembly, could be expected to tolerate?
- Does the behaviour pose an actual risk of public disorder (e.g. is it intimidation, victimisation, bullying or is there a real risk of violence occurring)?
- Does the behaviour warrant the intervention of the criminal law?

Protesters have a right to protest in government spaces (e.g. the entrance foyer of a building), subject to limitations that are

reasonable and demonstrably justifiable. Before police become involved with a protester who has been asked to leave a government space, you should do your own assessment of the reasons why the official says that the protester has to be moved on. You should ask yourself, does the official's reasoning make sense and does it justify police action, given an individual's right to peaceful protest. If the protester is causing a hazard, or disrupting business, one option is to see if the protest action can be modified. (*Routhen v Police* [2016] NZHC 1495)

For more information see these parts of the 'Public Order Policing' chapter:

- Behaviour offences
- Unlawful assembly and-or riot
- Demonstrations
- Mass arrest planning.

Non-publication orders and contempt of court

Generally, judicial proceedings should be published to ensure transparency of the justice system. However, in criminal cases the defendant's right to a fair trial may overcome the right to freedom of expression, and may justify a non-publication order. Breach of a non-publication order, or other expression which interferes with the administration of justice may lead to conviction for contempt of court and imprisonment. See the 'Sub-judice' 'Media' chapter.

Freedom of movement

Rights under section 18

- Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
- Every New Zealand citizen has the right to enter New Zealand.
- Everyone has the right to leave New Zealand.
- 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.

There are many prescribed limits on the right to freedom of movement, such as immigration decisions, extradition, bail conditions, imprisonment and home detention.

Police often curtail individuals' freedom of movement within New Zealand. Police actions in detaining and arresting people are generally covered by section 22 arbitrary arrest and detention. However, bail conditions, road closures (see 'Powers>To close roads' in the 'Unlawful assembly and-or riot' chapter) and other short-term curtailments may impinge on the right and must be reasonable.

Some examples of section 18 breaches

- In *Baylis v R* [2018] NZCA 271, Police wrongly invoked section 113 of the Land Transport Act 1998 to obtain the details of passengers in a stopped car. After this point, the vehicle and passengers were unlawfully detained as no other power was invoked to detain the vehicle. These actions breached section 18.
- In *Police v FB* [2020] NZYC 600, Police wrongly invoked section 114 of the Land Transport Act 1998 to stop FB's vehicle because the stop did not concern a land transport purpose. FB and his vehicle were unlawfully detained by Police and section 18 was breached.
- In *Carr v Police* [2021] NZHC 2208, another unlawful section 114 LTA stop amounted to a serious breach of section 18. The High Court found that Police wanted to talk with C regarding a suspected drug deal and not a Land Transport Act purpose.

Freedom from discrimination

Rights under section 19

Everyone has the right to freedom from 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. Affirmative action to advance a particular group does not amount to discrimination.

Discrimination means treating someone detrimentally because of one of the prohibited grounds (such as race). A policy may also be discriminatory where it has the effect of treating a group of people differently, even if this is not the intention. However many government policies and social programmes target specific groups, and are not discriminatory. Policing operations or prevention programmes which target a particular harm are unlikely to be discriminatory.

Police employees interact with people from all walks of life with all characteristics, and should ensure conduct does not discriminate on any of the prohibited grounds. Respect for people and avoiding discrimination is one of the principles of the Police 'Code of Conduct'**:**

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☒	Code of Conduct Ngā Tikanga Whakahaere (2024)	**4.86 MB**

Examples of Police policies outlining affirmative actions for certain groups of people or procedures to ensure that discrimination does not occur in certain situations include:

- Identifying drivers with face coverings (see the section 'Process to follow for religious or cultural face coverings')
- Police cultural groups
- Neighbourhood Policing Team (NPT) guidelines
- Deploying Iwi, Pacific and Ethnic Liaison Officers
- People with mental impairments
- Youth justice.

For discrimination in the workplace, see the 'Discrimination and harassment policy'.

Right to be secure against unreasonable search and seizure

Rights under section 21

Under section 21, everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence, or otherwise.

The basis of the right is the need to protect an individual's reasonable expectation of privacy from intrusion by the government. This will vary depending on the nature, place and extent of the intrusion on the privacy interest (R v Grayson & Taylor [1997] 1 NZLR 399 (CA), Hamed v R [2012] 2 NZLR 305 (SC), *R v Alsford* [2017] NZSC 42).

Generally, a search or seizure will be reasonable if it is conducted under a statutory power and the public interest in administering criminal justice outweighs the individual's privacy interest (R v Thomas (2001) 19 CRNZ 392 (CA)). Police have extensive search and seizure powers, with and without warrant, provided in statute. (See the 'Search' Police Manual chapter).

The protection against unreasonable seizure does not amount to a right to property (P F Sugrue Ltd v Attorney-General [2006] 3 NZLR 464 (PC).

What is a 'search'?

There is no set definition of a 'search', either in statute or case law. Recent case law suggests a 'search' requires a conscious act of state intrusion into an individual's reasonable expectation of privacy, as opposed to a mere observation (Pollard v R [2010] NZCA 294; Lorigan v R [2012] NZCA 294 applying Hamed v R per Blanchard J).

A search is not:

- kneeling and using a torch to observe an article secreted inside a car headlight (R v Dodgson (1995) 2 HRNZ 300 (CA))
- asking a person to hold up a bicycle so the serial number can be checked (Everitt v A-G [2002] 1 NZLR 82 (CA)
- asking a person to hold out their hands for inspection (R v Yeung HC Akl 22 May 2009)
- a voluntary request to a power company for aggregated monthly power usage data (*R v Alsford* [2017] NZSC 42 and *R v Gul* [2017] NZCA 317)
- incidentally sighting the contents of a bag from outside a car in a public place (*Carr v Police* [2021] NZHC 2097.

What is a 'seizure'?

There is no statutory definition of 'seizure'. Seizure is 'removing something from the possession of someone else' (Hamed v R). An item generated by exercising a search or surveillance power (e.g. a photograph) is not a 'seizure' (s 3 Search & Surveillance Act).

Unreasonable searches and seizures

A search is unreasonable if the circumstances giving rise to it make the search itself unreasonable or if the search is carried out in an unreasonable manner. (R v Grayson & Taylor [1997] 1 NZLR 399). The principles of reasonable search by Police are set out in the chapter on 'Search' (see 'General principles applying to searches' in the 'Search introduction' chapter).

Where a warrantless search power is exercised and obtaining a written or oral warrant was not considered, this may amount to an unreasonable search (*Renson v Police* [2021] NZHC 2342).

A lawful search that infringes upon a person's dignity can be an unreasonable search (see, for example, *S v Police* [2018] NZHC 1582).

Unlawful searches and seizures

Unlawful searches will almost always be unreasonable and breach s 21. However, a search undertaken in good faith where the searcher was mistaken about their power of search may not be unreasonable (R v Jefferies [1994] 1 NZLR 290). For example, a search may be reasonable where the wrong search power was used, but the search could have lawfully been conducted under other powers (R v Abraham 30/8/05, CA253/05, R v Timutimu [2006] DCR 38, *Haliday v R* [2017] NZCA 108).

In *M v R* [2019] NZCA 203, an unlawful search undertaken in good faith where the officer was mistaken about their power was held

unreasonable because of the degree of intrusiveness of the search. The searching officer took finger swabs and fingernail clippings from M, citing section 88 of the Search and Surveillance Act 2012, but M had not been arrested or detained as required by the section.

Minor irregularities during search

A search that is unlawful because of a minor irregularity may, depending on the circumstances, not be unreasonable. In such a case, the evidence obtained in the search may be admissible - see R v Faasipa (1995) 2 HRNZ 50 (CA). However, even where a breach is minor or technical, a search or seizure will not normally be held to be reasonable if the police realised the error beforethe search or seizure was undertaken. (R v Williams [2007] 3 NZLR 207, para [21]).

Searches carried out in an unreasonable manner

A search that would otherwise be reasonable is unreasonable if it is carried out in an unreasonable manner (e.g. a strip search conducted in the street where there are no law enforcement considerations necessitating that approach and when the search could have easily been carried out in private). (R v Pratt [1994] 3 NZLR 21; R v S (10 May 2001, High Court Auckland, Paterson J, T001794), R v Williams; Van Essen v A-G[2013] NZHC 917.

Rub-down and strip searching a person

Unwarranted strip or rub-down searches may breach section 21 or s23(5) (see 'Rights of people arrested or detained'). Deliberate degrading and repeated strip searching to punish a detainee may breach section 9(see Right not to be subjected to torture or cruel treatment). (Refer Forrest v A-G [2012] NZAR 798 (CA), Reekie v A-G [2012] NZHC 1867, Taunoa v A-G (CA)). The remedy for unjustified rub-down and strip searches is usually compensation, although this may be limited by the Prisoners and Victims Claims Act 2005.

Electronic surveillance

Searching includes electronic surveillance. In *Police v Vennell* [2022] NZHC 536, the Court found that there is a reasonable expectation of privacy in GPS data that tracks an individual's movements, and that the act of electronic monitoring by the Department of Corrections constitutes a search and seizure. Again, there is no set definition whether surveillance without special capabilities (such as night vision) will be a 'search' (Lorigan v R, Hamed v R).

Powers and duties regarding surveillance activities are set out in the Search and Surveillance Act 2012and the 'Search' chapter.

Remedies for unreasonable search

The usual remedy for a breach of section 21 is exclusion of evidence under section30 Evidence Act (Hamed v R).

Some unreasonable searches may also warrant compensation (Baigent's Case [1994] 3 NZLR 667; Forrest v A-G [2012] NZAR 798 (CA)). However, for prisoners in Police custody, compensation may be limited by the Prisoners and Victims Claims Act 2005.

Right to not be arbitrarily arrested or detained

Rights under section 22

Under section 22 everyone has the right not to be arbitrarily arrested or detained.

Police employees have powers to arrest and detain under various statutes (see 'Arrest and detention').

'Arbitrarily'

What constitutes a sufficient restraint on liberty to amount to an arbitrary detention will depend on the circumstances. It involves considerations of the nature, purpose, extent, and duration of any constraint (*Ronaki v R* [2023] NZCA 85).

In *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA), the Court of Appeal confirmed that arbitrary in section 22 means 'capricious, unreasoned, and without reasonable cause'.

'Arrest'

The term 'arrest' has been thoroughly discussed by the Court of Appeal in R v Goodwin:

"...arrest must have its Crimes Act meaning of a**communicated intention** on the part of the police officer to hold the person under lawful authority." (R v Goodwin (No 1) [1993] 2 NZLR 153; (1992) 9 CRNZ 1)

'Detention'

A person will be regarded as 'detained' if:

- there is physical deprivation of a person's liberty, or
- there are statutory restraints on a person's movement, or
- they have a reasonably held belief induced by police conduct (or other official conduct) that they are not free to leave.

(R v M [1995] 1 NZLR 242 (per Blanchard J); (Police v Smith and Herewini[1994] 2 NZLR 306).

Where a deprivation or restraint is only temporary, detention is less likely to have occurred.

Examples of arrest or detention include when a person has been:

- formally arrested
- handcuffed (R v Royal (1992) 8 CRNZ 342)
- locked in a room or building, or put in a place that they cannot leave voluntarily
- placed in a police vehicle against their will.

Each of these acts can be described as a positive act of physical detention that communicates an intention to hold a person under lawful authority. In such a situation, the suspect is under arrest within the meaning of the Crimes Act and Police must inform the suspect of their rights under section 23 by giving the caution:

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Rights caution **87.86 KB**

Powers to arrest and detain are discretionary, and a Police employee must determine whether to arrest or detain in the circumstances of each case. (See 'Deciding whether to arrest' in 'Arrest and detention'). An arrest or detention will be 'arbitrary' if it is capricious or without reasonable cause. Also if the arrest/detention was unlawful or proper procedures were not followed.

Before an arrest is made, the arresting officer must be clear in their own mind that the arrest is justified and reasonable, and that alternative action, such as a summons, is not appropriate. (Neilsen v Attorney General[2001] 3 NZLR 433; (2001) 5 HRNZ 334 (CA)). A failure to consider the discretion to arrest will be arbitrary. (Attorney-General v H [2000] NZAR 148).

Holding in custody while making enquiries

A reasonable arrest/detention may also become arbitrary if it lasts longer than necessary, for example longer than required to bring an

offender before the Court. (See 'Releasing arrested or detained people' in 'Arrest and detention').

A suspect arrested on one offence cannot be kept in custody for "mere convenience sake" while enquiries are made into another offence for which he or she may later be interviewed. If the suspect is eligible for bail, you must give it as soon as practicable.

(R v Rogers (1993) 1 HRNZ 282)

Stopping vehicles to arrest

You cannot stop a vehicle to undertake general enquiries (*R v Bailey* [2017] NZCA 211, *Ghent v Police* [2014] NZHC 3282). It may be classed as an arbitrary detention. You can stop a vehicle to enforce any of the provisions of the Land Transport Act or Traffic Regulations under section 114 of the Land Transport Act 1998.

You are entitled to stop a vehicle under section 9 of the Search and Surveillance Act 2012 for the purpose of arresting any person in the vehicle, if you have good cause to suspect that person of having committed an imprisonable offence or of being unlawfully at large (e.g. a person for whose arrest a warrant (other than a warrant issued under Part 3 of the Summary Proceedings Act 1957 in relation to fines enforcement) is in force). Any deviation from the above procedure will be viewed as an arbitrary detention, and any evidence seized as a result is likely to be ruled inadmissible. (R v P & F (31 July 1996, Court of Appeal, CA219/96 CA270/96))

Note: The powers incidental to stopping a vehicle under section 9 are set out in section 10.

Roadside breath screening

In *Chadderton v R* [2014] NZCA 528, the Court of Appeal identified six principles which apply when someone who is detained for the purposes of breath/blood alcohol testing alleges Police arbitrarily detained them in breach of s 22:

1. Detention for the purpose of breath/blood alcohol testing under s69(1) of the Land Transport Act 1998 is not subject to any express time limit.
2. Despite the absence of an express time limit, detention should not last for longer than is reasonable in light of the statutory purpose.
3. Whether a person has been detained for an unreasonable period can only be a matter of fact and degree in each case.
4. There is some scope for delay in the process without giving rise to a breach of s22. That is, there is no strict requirement that the defendant be transported to the appropriate site and tested immediately.
5. There is no absolute rule preventing an officer from prolonging the defendant's detention in order to effect a secondary purpose of his own. The issue will likely be one of reasonableness.
6. The time reasonably required may vary considerably depending on the locations involved and other pressing demands on the enforcement officer's time, such as arriving at the scene of any incident.
7. Delay is less likely to render detention arbitrary where there is no evidence the defendant was prejudiced by the passage of time.

Remedies

An arbitrary arrest or detention may lead to exclusion of evidence, release from detention, or compensation. For further information see Arrest and detention, Youth Justice, People with mental impairments.

Rights of people arrested or detained

Rights under section 23

Section 23 codifies Police duties during arrest and detention, so that basic human rights and freedoms are protected. Under the section, people who are arrested or detained under an enactment have the rights to:

- be informed of the reason for arrest or detention at the time of the arrest or detention
- consult and instruct a lawyer without delay and to be told of that right
- have the arrest or detention's validity determined by the Court by way of habeas corpus and to be released if it is not lawful
- after arrest, to be charged promptly or released
- if not released after arrest, to be brought before a court or tribunal as soon as possible
- refrain from making any statement and to be informed of that right
- be treated with humanity and respect.

'Arrest' and 'detention'

See 'Right to not be arbitrarily arrested or detained' (s22) for determining whether a person has been arrested or detained. See also the 'Arrest and detention' chapter.

Giving the caution

The Chief Justice's Practice Note on Police Questioning issued under section 30(6) of the Evidence Act 2006, provides guidance on police questioning. It includes a caution, containing the advice requirements of section 23.

The wording of this caution for adults and young persons is detailed on an insert card in constable's notebooks.

A caution must be given to:

- adults who are arrested or detained, or where Police want to question an adult where there is sufficient evidence to charge that person with an offence
- children or young persons when detained or arrested and, in accordance with section 215 of the Children's and Young People's Well-being Act, before questioning a child or young person when there are reasonable grounds to suspect them of having committed an offence, or before asking any child or young person any question intended to obtain an admission of an offence. (See the 'Youth Justice' chapter.

Failure to give the caution may result in a finding that evidence was improperly obtained and the evidence excluded under section 30 of the Evidence Act.

Questions about statements or other evidence

Whenever a person is questioned about statements made by others or about other evidence, the substance of the statements or the nature of the evidence must be fairly explained (Chief Justice's Practice Note on Police Questioning).

Guidance on detention

Not every restraint will amount to a detention for the purposes of section 23(1). The courts have recognised particular circumstances in which a short delay in affording rights may be necessary to preserve evidence or to ensure personal safety. In such cases, there is no detention under an enactment for the purposes of section 23(1)(b)(right to consult and instruct a lawyer without delay and to be informed of that right) - examples include:

- When a motorist is stopped at the roadside to undergo a breath-alcohol screening test (Temese v Police (1992) 9 CRNZ 425 (CA))
- When a motorist is stopped at the roadside and asked to supply his or her particulars as permitted by the land transport legislation
- When a motorist is taken to hospital following an accident and a doctor is requested to take a blood sample for alcohol testing (Police v Smith and Herewini [1994] 2 NZLR 306 (CA))
- When undertaking the execution of a search warrant reasonable directions may be given to persons whom there are reasonable grounds to believe will obstruct or hinder the search, e.g. persons may be excluded from the house or instructed that if they remain in the house, they are to stay in a specified room (Powerbeat International Ltd v Attorney-General (1999) 16 CRNZ 562

(HC), section 116 Search and Surveillance Act 2012).

Treatment with humanity and respect

There is a positive obligation on Police to ensure that all people who are arrested, detained or deprived of their liberty are treated with humanity and respect for the inherent dignity of the person. Serious deliberate or reckless ill-treatment of a detainee may breach section 9.

The High Court stated in Hughes v R [2023] NZHC 3491:
"Section 23(5) is engaged by conduct that is regarded as unacceptable in contemporary New Zealand society (though not rising to a level deserving to be called outrageous). It captures conduct which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so. … [D]etermining whether there has been a breach of s 23(5) requires a highly contextual and fact-specific evaluative exercise. Relevant factors may include the nature and severity of the treatment, the duration and frequency of the impugned conduct, the nature and extent of the impact on the detainee, any particular vulnerability or condition of the detainee, the purpose of the treatment, and the detainee's own conduct."

Treatment in breach of section 23(5) includes:

- excessive use of force against a detainee (*Archbold v A-G*, *Falwasser v A-G*)
- failure to provide medical treatment when requested
- unlawful restraint to prevent self-harm (Reekie v A-G)
- failure to comply with regulations or policies which provide minimum entitlements, such as food, clothing, exercise time (Taunoa v A-G, Reekie v A-G)
- routine or deliberate unnecessary strip searching (*Taunoa v A-G*, *Reekie v A-G*)
- failure to ensure the detainee's safety and protect them from other detainees
- preventing a detainee from access to bathroom facilities, causing them to defecate themselves and refusing to assist clean-up (*S v Police* [2018] NZHC 1582)).

Whether the conduct or treatment was deliberate is not determinative of a breach. Upholding s 23(5) is an absolute obligation. The assessment of whether a breach has occurred will turn on how the person has been detained and what happened to them during their detention. This approach is consistent with a rights-centred focus. (*Pere v Attorney-General* [2022] NZHC 1069)

Remedies for breach of section 23(5) typically include compensation ($30,000 in Falwasser - excessive use of O/C spray against a detainee in Police cells; $35,000 in Taunoa- long-term policy of reduction in minimum entitlements in prison, designed to reduce prisoner's resistance; $4,000 in *A-G v Udompun* [2005] 3 NZLR 204 - failure to provide sanitary products or allow a shower). However, the Prisoners and Victims Claims Act 2005 may impact on compensation for prisoners.

Further information

Refer to the 'Arrest and detention' chapter for information about what constitutes arrest and detention.

Notifying rights

Ensuring rights are understood

"Unless there is an evidential basis justifying a contrary conclusion, proof that the Police advised the suspect of the section 23(1)(b) rights should lead to the inference that the suspect understood the position." (R v Mallinson [1993] 1 NZLR 528; (1992) 8 CRNZ 707)

However:

- "...it is the detainer's obligation to ensure the whole right is conveyed and understood...or at least in a manner open to understanding." R v Hina (24 June 1992, High Court Wanganui, Greg J, T7/92), and
- "It may be necessary to inform an arrested or detained person more than once of his rights...it may not be in compliance with the Act for a person to be told 'perfunctorily' of the stipulated right..." (R v Tunui (1992) 8 CRNZ 294), (R v Dobler [1993] 1 NZLR 431).

This extended obligation would apply, for example, where the suspect:

- is stressed, confused or fatigued at the time of the arrest
- has a poor command of the English language
- has a passive nature, or limited intelligence
- may have difficulty hearing because of background noise
- needs an interpreter (e.g. of sign language or a foreign language).

However, over a period of time, re-advising a suspect may be necessary, depending on how long the interview has lasted. If a serious offence is uncovered in the interview, the best practice would be to re-advise.

Note there are particular requirements relating to explanations of rights to be given to children or young persons. These must be given in a manner and in language that the child or young person can understand (section 218 Children's, and Young People's Well-being Act 1989 , R v Z [2008] 3 NZLR 342; (2008) 24 CRNZ 1 (CA)) (See the 'Youth Justice' Police Manual chapter).

Written notifications

If the suspect is given the caution (see PDF below) in approved written form, the Act has been complied with. "There is nothing in the Act which requires that an arrested person be advised of his/her rights verbally rather than in writing." (R v Grant (1992) 8 CRNZ 483).

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Rights caution		87.86 KB

Timing of the notification

The admissibility of a confession will be jeopardised if the person was not informed of their rights at the proper time.

Exceptions

There are exceptions:

"Police officers cannot be expected to be concerned with uttering warnings while their safety is threatened. However, once control is established by Police the suspect should be informed of his/her rights." (R v Butcher & Burgess[1992] 2 NZLR 257; (1991) 7 CRNZ 407)

Where time is of the essence (e.g. where delay will cause danger to others, or an ongoing and real danger that evidence will be lost) then efforts to contact a lawyer will be considered in the light of those dangers.

"The expression 'without delay' is not synonymous with 'instantly' or 'immediately'...was the delay reasonable in all circumstances, having regard to the purpose of the right." (R v Mallinson [1993] 1 NZLR 528; (1992) 8 CRL 707))

See also 'Detaining while searching'.

Lawyers

Part of the right to consult and instruct a lawyer without delay, and to be informed of that right, requires Police to provide detainees sufficient information to be able to make an informed decision regarding whether to speak to counsel. The detainee must know the substance of the likely allegations against them at the point of interview. This includes the general nature and the seriousness of the risk faced (*Deliwala-Gedara v R* [2021] NZHC 570).

Police Detention Legal Assistance Scheme

When cautioning someone who is arrested or detained, or someone against whom there is sufficient evidence to charge with an offence, the person must be told:

- of their right to consult and instruct a lawyer without delay and in private, and
- that the right may be exercised without charge under the Police Detention Legal Assistance Scheme.

The interviewing officer can continue the interview once the suspect has consulted and instructed a lawyer. However, the court will decide whether any evidence elicited before the lawyer's arrival will be admissible. If the lawyer is on their way, best practice would be to suspend the interview until they arrive (R v Aspinall (13 March 1992, High Court, Christchurch, Holland J, T8/92))

Right to privacy

The Chief Justice's Practice Note states that a suspect is entitled to consult a lawyer in private. However, Butler & Butler, The New Zealand Bill of Rights: A Commentary, p 681, consider that advice as to privacy must be given on detention as this is part of the right to a lawyer guaranteed by section 23(1)(b).

The test for whether the entitlement to consult a lawyer in private has been fulfilled is “whether in this particular set of circumstances a reasonable person would have concluded that a right of privacy to discuss his or her case without fear of being overheard had been avoided” (*Police v Duncan* [2019] NZDC 8783, *Robertson v Police* AP366/92, HC).

Police cannot deny privacy on the grounds that no private room is available.

However, in some circumstances, the right to privacy may be overridden by other considerations. In R v Piper [1995] 3 NZLR 540; (1995) 13 CRNZ 334, the Court of Appeal stated that Police may be justified in not offering privacy, where it would not be safe to leave the accused alone or because there was a risk that the appellant would try to dispose of evidence and warn others.

Privacy may not be necessary where the suspect has indicated that they do not require it.

Reasonable assistance

In some situations, contacting a lawyer will require considerable time and effort on the part of the interviewing officer.

You must make a reasonable, honest and determined effort to contact a lawyer. (*R v Himiona & Anor* (10 February 1992, High Court Rotorua, Doogue J, T69/91)). However, police are under no obligation to find for the suspect their lawyer of choice when the contact phone number cannot be found. (*R v Tallentire* [2012] NZHC 1546)

The time and effort given to contacting a lawyer before the interview is continued need only be 'reasonable'. If Police can convince the courts that an honest and determined effort was made to contact a lawyer, the failure of this effort will not automatically exclude an admission made after the suspect has asked for a lawyer. There is no obligation to guarantee the availability of a lawyer- for example, a cell tower outage might make this impossible (*Kerr v Police* [2020] NZCA 245).

Kerr v Police [2020] NZCA 245 provides some general guidance as to what adequate facilitation will require:

a. Making a cellphone or telephone available to the detainee (if needed) in circumstances of reasonable privacy (see ‘Right to privacy’ above).
b. Enabling the detainee to ring their own lawyer if requested, and helping them by obtaining the telephone number from the internet or the Register of Lawyers maintained by the New Zealand Law Society website, if required.
c. If the detainee cannot immediately contact their own lawyer, or does not have one, allowing the detainee to ring one or two others (MoT v Noort). That will require the officer to have available a telephone book or list of lawyers willing to give advice to detained motorists.

d. Fulfilling these obligations throughout the drink-driving procedures (or other relevant Police procedure).

In Kerr, Police made unsuccessful calls to 13 lawyers on K's behalf (including his own lawyer on three occasions) from the PDLA list. The Court held that Police had fulfilled the reasonable effort duty.

By contrast, In *Lee v R* [2020] NZCA 276, L was given his rights by one Police officer and L said he wanted to speak to a lawyer. This was recorded by the officer but not actioned by him. L was left in the custody of a second officer who repeated L's rights to him and asked if he wanted to speak to a lawyer. L responded "don't want to answer" and the officer did not seek to clarify this statement. The Court held that L's right to counsel was breached because Police made no reasonable efforts to facilitate legal advice for L.

Subject to reasonable and practical limitations, detainees are entitled to consult a lawyer of their choice. This is based on the social value of freedom of choice and the importance of there being no interference by the State in the private and professional relationship that exists between a lawyer and client (*Ahuja v Police* [2019] NZCA 643).

Detainees also bear responsibility for informing Police if they have a particular lawyer, or particular kind of lawyer in mind. In*Tonga v Police* [2020] NZHC 1106, the Court found that Police discharged the obligation to facilitate counsel even though T wished to speak to a Tongan-speaking lawyer. T never expressed to Police that he had a particular lawyer in mind, or that he wished to speak to a Tongan-speaking lawyer.

Other phone calls

The right to consult a lawyer is not a right to consult any other person or organisation. The person can do this for the purpose of obtaining a lawyer, but not for the purposes of obtaining advice that a lawyer might give if contacted directly. Ellis v Police (AP 93/94) and *Chisholm v Police* (AP 92/94, 12 October 1994, High Court, Dunedin).

There is no legal requirement for police to offer a suspect the opportunity to phone multiple lawyers if they are not satisfied with the legal advice they have obtained when their rights have been properly facilitated. (*Police v Hendy* [2011] DCR 263)

Waivers

A suspect is not obliged to have a lawyer present during the interview. However, the waiver of the right to a lawyer under section24(c) must be established in an unequivocal manner (Butler and Butler, The New Zealand Bill of Rights: A Commentary, p 762).

"The right conferred by section 23(1)(b) to consult a lawyer is clearly a right which the arrested person is able to waive, provided that this is done clearly and with full knowledge of that right." (*R v Biddle* (1992) 8 CRNZ 488)

"A valid waiver requires a conscious choice that is both informed and voluntary, and it cannot be implied from silence or failure to request rights." (*Police v Kohler* [1993] 3 NZLR 129)

Questioning a person in custody

When rights are requested

If the suspect indicates a desire to exercise their right to consult a lawyer, the interview must be stopped until they have contacted a lawyer.

Once the suspect has invoked the lawyer access right, Police have a duty to refrain from attempting to elicit evidence from thatperson until they have had a reasonable opportunity to consult a lawyer (*R v Taylor* [1993] 1 NZLR 647 (CA)).

"The detainer is required to refrain from attempting to gain evidence from the detainee until the detainee has had a reasonable opportunity to consult and instruct a lawyer."

MOT v Noort; *Police v Curran* [1992] 3 NZLR 260, 280 (CA), quoted in Butler & Butler, The New Zealand Bill of Rights Act: A Commentary, p463.

However, in *R v Ormsby* (8/4/05, CA493/04), the Court of Appeal concluded that there is no absolute prohibition on Police questioninga suspect who has received legal advice and has told Police that the burden of that advice is that the suspect should remain silent but despite this the suspect continues to answer questions.

Right to silence and waiver

Section 23(4) NZBORA provides that everyone who is arrested or detained for any offence of suspected offence has the right to refrain from making any statement and to be informed of that right.

Interviewing Police officers may still put questions to a detainee who has waived their right to silence, but must not do or say anything that suggests to the detainee that they *must* participate in the interview. This is an involuntary waiver of the right to silence. (*Li v R* [2022] NZCA 35)

If a police officer does ask questions of a detainee knowing they have exercised their right to silence, then the admissibility in evidence of any answers given to the questions will depend on the relevant context of the questioning and giving of answers (*Mateparae v R* [2021] NZCA 114).

In *R v Perry* [2015] NZCA 530 the Court of Appeal considered the authorities on what encouragement or persuasion may be applied to encourage a suspect to answer questions when they have asserted a right to silence:

"[32]…..The authorities establish the following principles:

(a) There is no absolute prohibition on further questioning by the police after the right to silence has been asserted.

(b) Rights earlier asserted may be waived, provided the waiver is an informed and voluntary one.

(c) In determining whether there has been an informed and voluntary waiver of the rights earlier asserted, an evaluative approach is applied.

[33] In applying the evaluative approach, we consider that the following points emerge from the authorities. First, if the police take "positive or deliberate step[s] to elicit incriminating evidence" once the right to consult a lawyer is asserted but before the consultation has taken place, the suspect is not regarded as having given a voluntary waiver in respect of any statements that are made in response to those steps…

[34] Secondly, where the police have agreed with the lawyer that there will be no further discussion with an accused without the lawyer being present (that being the accused's instructions to his or her lawyer), an informed voluntary waiver must be given if the discussion is to continue. A waiver will be informed and voluntary where the police inform the accused of the arrangement that has been made with the lawyer and ask whether he or she wishes to change the instructions to the lawyer or waive the need for compliance with them….

[35] Thirdly, where the suspect has received advice to assert the right to silence, the police may not take steps to "undermine the value of the legal advice" that has been given….

[36] Fourthly, where a suspect has exercised his or her right to silence but is then further questioned, the suspect's rights are not

necessarily subverted or eroded. Notwithstanding, an initial reliance on advice from a lawyer, matters can evolve. Where there has been no cajoling by the police to change the suspect's mind, a valid waiver can be given even though the lawyer is not further consulted….

[38] Finally, there are the cases where a person has exercised their right to silence but subsequently makes incriminating statements not knowing that they are talking to the police. In that context the Supreme Court has adopted the "active elicitation" test…."

Recording statements

Where a person in custody or in respect of whom there is sufficient evidence to charge makes a statement, that statement should preferably be recorded on video or DVD. If not, the statement must be recorded permanently on audiotape or in writing. The person making the statement must be given the opportunity to review the tape or written statement or to have the written statement read over, and must be given the opportunity to make corrections and or add anything further.

Where the statement is recorded in writing the person must be asked if they wish to confirm the record as correct by signing it (Chief Justice's Practice Note on Police Questioning).

Interactions between police officers and detainees which are closely connected to a statement which the suspect is, or is contemplating, making and which are likely to be material to what the suspect says or does should, where practicable, be recorded. (*R v Perry* [2016] NZSC 102)

Further information

For further information about recording suspect's statements refer to the 'Account: statements and notes' section in the 'Investigative interviewing suspect guide'.

Questioning must not amount to cross-examination

Any questions you put to a person in custody, or in respect of whom there is sufficient evidence to file a charge, must not amount to cross-examination (Chief Justice's Practice Note on Police Questioning).

Breach of rights and admissibility

"Once a breach of section 23(1)(b) has been established, the trial judge acts rightly in ruling out a consequent admission unless there are circumstances in the particular case satisfying him or her that it is fair and right to allow the admission into evidence."

(*R v Kirifi* [1992] 2 NZLR 8; (1991) 7 CRNZ 427)

Breaches of other people's rights cannot be relied upon by third parties to secure a personal remedy of evidentiary exclusion: *R v Williams* [2007] 3 NZLR 207; (2007) 23 CRNZ 1; *R v Wilson* [1994] 3 NZLR 257 (CA).

Court appearances

An arrested person must be charged promptly or be released, whether without charge or on police bail following charge (see information on police bail in the 'Bail' chapter> Deciding whether to grant or oppose bail). There is an urgency about this requirement but matters such as reasonable time for processing, obtaining legal advice and other police emergencies are 'justified limitations' on it (*R v Rogers* (1993) 1 HRNZ 282).

A person charged must appear at the next available court sitting. They cannot be held while enquiries are conducted into separate offences. (*R v T* (1994) 11 CRNZ 380)
