

The right to equality and freedom from discrimination

Te tika mo te oritenga, me
te watea mai i nga mahi
takahi i te tika o te tangata

Draft for discussion



Human Rights
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Foreword

Mihi

All human beings are born free and equal in dignity and rights.

Universal Declaration of Human Rights,
Article 1

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Universal Declaration of Human Rights,
Article 2

The Human Rights Commission is reviewing human rights in New Zealand. In 2004, the Commission first published Human Rights in New Zealand Today, which formed the basis for the New Zealand Action Plan for Human Rights 2005-2010 – Mana ki te Tangata. The Action Plan has led the direction of the Commission's work as a guardian of and advocate for human rights.

This year we are asking what has happened since 2004 – where New Zealand has done well and where we might do better. As part of this work, the Commission has released a draft chapter on the right to equality and freedom from discrimination.

New Zealand generally meets the international standards for protection of the right to freedom from discrimination through the Human Rights Act 1993 and the Bill of Rights Act 1990. The prohibited grounds of discrimination are reasonably comprehensive by international standards and discriminatory legislation can be challenged by obtaining a declaration of inconsistency from the Human Rights Review Tribunal. Despite this, discrimination persists and inequalities remain.

Two suggested priorities for action are identified at the end of this paper. These are to:

- promote substantive equality by incorporating specific reference to equality in the Bill of Rights Act and the Human Rights Act
- strengthen the legal protection of human rights in New Zealand by extending the Human Rights Review Tribunal and courts' power to make a declaration of

inconsistency under the Human Rights Act to other rights and freedoms in the Bill of Rights.

The Commission wants to hear from organisations and individuals with views on human rights in relation to equality and freedom from discrimination. In particular, we are interested in your answers to the following questions:

1. Are there any inaccuracies?
2. Are there any major omissions?
3. Each chapter ends with recommendations for how New Zealand might do better. Do you agree with the recommendations? If not, what would you suggest instead?
4. Is there anything else?

If you wish to comment on this draft discussion document, please complete the online feedback questionnaire at www.hrc.co.nz.

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Feedback is due by 1 October 2010.

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International context

Kaupapa ā taiao

The principles of non-discrimination and equality are fundamental to human rights law. They are referred to in the International Covenant on Civil and Political Rights (ICCPR)¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).² They are referred to in the international treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families and persons with disabilities.³ Other treaties require the elimination of discrimination in specific areas, such as employment and education.⁴ Article 26 of the ICCPR also guarantees equal and effective protection before, and of, the law.

In 1989, the United Nations Human Rights Committee issued a general comment relating to discrimination under the ICCPR⁵ that defined “discrimination” in the Covenant as:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth, or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Discrimination can be direct or indirect

Direct discrimination occurs when an individual is treated less favorably than someone else in a similar situation for a reason related to a prohibited ground. Direct discrimination also includes detrimental acts or omissions even where there is no comparable situation (for example, in the case of a woman who is pregnant).

Indirect discrimination describes the situation where an apparently neutral practice or condition has a disproportionate, negative impact on one of the groups against whom it is unlawful to discriminate and the practice or condition can not be justified objectively.⁶

The international instruments require States to ensure both formal and substantive equality. Formal equality is equal treatment

1 Article 2 ICCPR.

2 Article 2 ICESCR.

3 See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child (CROC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons With Disabilities. The text of the international human rights instruments are available on the website of the Office of the High Commissioner for Human Rights <http://www.unhcr.ch/>. The text of most of the instruments New Zealand has ratified can be found in *The New Zealand Handbook on International Human Rights* (3rd ed.), Ministry of Foreign Affairs & Trade (2008).

4 ILO Convention No.111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.

5 United Nations Human Rights Committee (1989) General Comment 18, Non-discrimination: Compilation of general comments and general recommendations adopted by human rights treaty bodies (UN Doc.HRI\GEN1\Rev.1 at 26).

6 Committee on Economic, Social and Cultural Rights, General Comment No. 20: E/C.12/GC/20 (2 July 2009) at para 8.

before the law. It reflects the Aristotelian notion that to ensure consistent treatment, like should be treated alike.⁷ However, equal treatment does not always ensure equal outcomes, because past or ongoing discrimination can mean that treatment simply reinforces existing inequalities. To achieve substantive equality – that is, equality of outcomes – some groups will need to be treated differently. It follows that not all different treatment will be considered discriminatory. As the UN Human Rights Committee notes:

... the principle of equality sometimes requires States to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.⁸

The most recent definition of discrimination in an international treaty is found in the Convention on the Rights of Persons with Disabilities. Discrimination is defined as including denial of reasonable accommodation. The Convention also clarifies that specific measures that might be required to promote equality do not amount to discrimination.

Effectively, therefore, a State's obligation to respect, protect, promote and fulfill the right to freedom from discrimination is not limited to simply avoiding negative measures, but will include taking positive measures to ensure equal results. In a democracy such as New Zealand, where the courts play a significant role in interpreting constitutional concepts, the convergence between parliamentary sovereignty and the rule of law takes place through the litigation process.

7 Fredman S (2002). "Equality: Concepts and Controversies" in *Discrimination Law* OUP at 7.

8 *Supra* fn 5 at para 10.

New Zealand context

Kaupapa o Aotearoa

Equality is the most powerful idea in modern political thought; it underlies all major political theories, and animates the very idea of a bill of rights: individuals have rights because each individual matters, and matters equally.⁹

The clearest statement on equality in New Zealand is found in Article 3 of the Treaty of Waitangi. The Crown extended to Māori the Queen's protection and imparted to them "all the rights and privileges of British subjects". Apart from this, there is no specific reference in New Zealand law to equality, a fact that the United Nations Committee on Human Rights has consistently criticised in assessing New Zealand's compliance with international standards on equality and freedom from discrimination.

The New Zealand Bill of Rights Act 1990 (BoRA) does not address equality and only affirms it indirectly by referring to the ICCPR in the long title. It is not an accident that there is no reference to equality in the BoRA. The idea of including an equality statement was considered during the drafting of the BoRA but rejected for a variety of reasons. The white paper¹⁰ recorded concerns about the vagueness and uncertainty of what was actually meant by "equality before the law" or, for that matter, "equal protection of the law".

However, this position has changed over recent years. A human rights approach to equality based on the idea of "treatment as an equal, not equal treatment" has gained ascendancy. In 2009, the Human Rights Commission recommended to the Minister of Justice that an explicit reference to equality in the Human Rights Act (HRA) and the BoRA was now necessary to ensure equal outcomes, not just equal treatment.

Right to freedom from discrimination

The principle of non-discrimination has been described as a substantial contributor to a society based on equality and a core feature of a society based on democracy and freedom where each individual is valued as a person worthy of dignity and respect.¹¹

Although closely related, equality and the right to freedom from discrimination are not the same.

Discrimination and equality are terms that are often used to describe the opposite conclusions that may be reached in analysing government action. Distinctions thought wrongful are said to be discriminatory, while those considered appropriate are said to respect equality. This has led some to suppose that freedom from discrimination and equality are the same thing. But a world without discrimination is not necessarily a world of equality.¹²

9 Rishworth et al (2003). *The New Zealand Bill of Rights*. Melbourne, OUP.

10 At 10.8.

11 Butler & Butler (2005). *The New Zealand Bill of Rights Act: A Commentary*. LexisNexis at 17.4.1.

12 *Supra* fn 8 at 368.

New Zealand courts have identified links between freedom from discrimination and the concept of equality in international human rights standards. In *Quilter v Attorney-General*,¹³ for example, the Court of Appeal noted that equality is one of the core principles underlying New Zealand's law on discrimination.

Statutory protection of freedom from discrimination

The New Zealand Bill of Rights Act 1990

The BoRA affirms New Zealand's commitment to the ICCPR, although there is no explicit reference to equality before the law.¹⁴ The right to privacy or reputation and family and children's rights (which are also found in the ICCPR) are not found in the BoRA but are partly addressed in other legislation.

Although the BoRA is not entrenched legislation and it does not confer the power on the courts to strike down inconsistent legislation, it has acquired special status as a result of the rights it protects. The BoRA is directed principally at public sector activity, including actions of the legislature, the executive and the judiciary. It is made up of three parts: Part 1, which directs how the Act is to be interpreted; Part 2, which identifies the substantive rights (including freedom from discrimination on the same grounds as in the HRA); and Part 3, which deals with miscellaneous matters.

13 [1998] 1 NZLR 523.

14 ICCPR, Art.26.

15 The new grounds were those introduced in 1993. Until 1993, it was only unlawful to discriminate on the grounds of sex, marital status, religious or ethical belief and colour, race, ethnic or national origin. The most problematic of the new grounds were disability and age, which had significant implications for the distribution of public goods and services.

While both the HRA and the BoRA protect the right to freedom from discrimination, they do it differently. The BoRA affirms a general right to freedom from discrimination but allows it to be restricted if the restriction can be established as a justified limitation. The HRA, on the other hand, makes it unlawful to treat people differently in certain areas unless, a specific exception applies.

In 2001, an amendment to the HRA meant for the first time since the "new grounds" were introduced in 1993,¹⁵ the public sector became accountable on all the grounds of discrimination. As the BoRA standard was thought more appropriate to address government compliance, for the purposes of Part 1A, the procedures of the HRA apply, but the interpretation of the right to be free from discrimination is decided by reference to the BoRA.

Human Rights Act 1993

The HRA makes it unlawful to discriminate on the grounds of sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origin (including nationality or citizenship), disability, age, political opinion, employment status, family status and sexual orientation. The grounds apply if they are assumed to relate to a person, relative or associate, and if they exist at present or have existed in the past (for example, if a person has recovered from an illness but is treated as though they still have it).

Although the grounds substantially reflect New Zealand's international commitments, the international monitoring bodies have been critical of the omission of "language" as a ground of unlawful discrimination. The omission of social origin or social class is also considered significant.

Application of the Human Rights Act

Part 1A

Part 1A applies to the actions of the legislative, executive or judicial branches of government, as well as the actions of any person or body performing a public function, power or duty conferred or imposed by law.

An action will be discriminatory under Part 1A if it involves a distinction based on a prohibited ground that leads to disadvantage and can not be justified under section 5 of BoRA. A limitation will be justified under section 5 if it serves a purpose sufficiently important to justify some limitation of the right, is rationally connected to that purpose, impairs the right no more than is reasonably necessary to achieve what it sets out to do and is in due proportion to the objective it seeks to achieve.¹⁶

Part 2

An action will be considered discriminatory under Part 2 if a person is treated differently because of a prohibited ground, resulting in disadvantage and a statutory exception does not apply. Part 2 of the HRA deals with services offered to the public by the private sector. It only applies to certain areas. The areas are employment (including

partnerships, and discrimination by industrial and professional associations, qualifying bodies and vocational training bodies); access to public places and vehicles; the provision of goods and services; the provision of accommodation; and access to educational establishments. The employment provisions in Part 2 apply to both the private and public sectors.

Part 2 also includes sexual and racial harassment and exciting racial disharmony. To establish racial disharmony, material or comment must not only be threatening, abusive or insulting, but must also be likely to excite hostility against people, or bring them into contempt, because of their colour, race, or ethnic or national origins. The critical factor is whether the material is likely to provoke a reaction in those who hear the words or read the material. Section 61 must be balanced against the right to freedom of expression.¹⁷ For practical purposes, albeit for good a reason, the combination of the criteria in the HRA and the protection of freedom of expression create a threshold that is almost insurmountable.

The exceptions in Part 2 are both specific and general and have the effect of legitimising behaviour that would otherwise be discriminatory.

Specific exceptions apply to particular areas. For example, in the area of employment, there are exceptions for domestic employment in private households or where one of the prohibited grounds is a characteristic required to do a job, such as

¹⁶ R v Hansen [2007] 3 NZLR 1.

¹⁷ In addition to the civil sanction in section 61, the HRA provides for criminal prosecution under section 131.

being over a certain age to work in a public bar. All the areas include exceptions relating to disability, which permit disabled people to be treated differently if the position could only be performed with adjustments to the workplace, or the work environment is such that there is a risk to the person or others.

General exceptions apply to the HRA more generally and include reasonable accommodation, measures to ensure equality and genuine occupational qualifications or genuine justifications.

i. Reasonable accommodation¹⁸ (or reasonable measures) is a technical term that refers to changes to a workplace to ensure a person with a disability, family commitments or religious requirements can do a job. This may be as simple as swapping shifts with another employee to accommodate religious observance or installing a ramp for a person in a wheelchair. Whether an employer must make such changes is balanced against the unreasonable disruption that may result. If a person requires special services or facilities (for example, relocation of an office) that can not reasonably be provided, then the employer is not obliged to provide them. In addition, if there is a risk of harm to the individual or others, but measures can be taken to reduce the

risk without unreasonable disruption, then the provider or employer should take those measures. If it is not reasonable to take the risk, or the measures necessary to reduce the risk to a normal level are unreasonable, then an employer or provider may be justified in discriminating.

ii. Genuine occupational qualification or genuine justification.

Section 97 allows the Human Rights Review Tribunal to declare that an act that would otherwise be unlawful under Part 2 is permissible because it amounts to a genuine occupational qualification or is a genuine justification. For example, in *Avis Rent A Car Ltd v Proceedings Commissioner*¹⁹ the Tribunal accepted that the practice of rental car companies passing the higher insurance cost they incurred hiring vehicles to drivers under 25 on to the client was justified.

iii. Special measures to ensure equality.

Both the HRA²⁰ and the BoRA²¹ provide for special measures. The provisions are similar. Both require any measures to be taken in good faith and permit actions that would otherwise be unlawful. The person or groups must also need, or be reasonably supposed to need, assistance in order to achieve an equal place in the community.

18 Reasonable accommodation is a term used to describe the creation of an environment that will ensure equality of opportunity for people with disabilities, family commitments or particular religious practices.

19 *Avis Rent A Car Ltd v Proceedings Commissioner* (1998) 5 HRNZ 501.

20 Section 73 of the HRA provides that anything that would otherwise amount to unlawful discrimination, will not be unlawful if it is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful; and those persons or groups need or may reasonably be supposed to need assistance to achieve an equal place with other members of the community.

21 Section 19(2) BoRA states that measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

- An imbalance of doctors of a particular ethnicity, because it has been difficult for members of that group to access higher education in the past, could be redressed by reserving a specific number places at medical schools for that group.
- Where gender inequality is a feature of a particular trade, special measures could be justified as a way of attracting people from the under-represented group to join the industry.

As a consequence of *Amaltal Fishing Co Ltd v Nelson Polytechnic (No.2)*²² – at present the only case on special measures – it is necessary to establish that the target group does not occupy an equal place in a community. The measure is necessary for them to achieve equality with others. Although, if a law, policy or practice under s.19(2) does not meet the Amaltal criteria, it may still be justified under section 5 of the BoRA. For example, if a policy advantages a particular group against whom it is unlawful to discriminate and its purpose is not to assist persons who are disadvantaged by discrimination, it may still be lawful if it is done in good faith and there is a rational connection between the purpose of the scheme and what it seeks to achieve.

Special measures are referred to in many international treaties.²³ Although the wording may differ, there is international agreement on the need for such measures to advance the cause of vulnerable or disadvantaged groups or address historical disadvantage. The international instruments stipulate that special measures should not unfairly benefit any one group and last only as long as necessary to achieve equality.

Part 3 – dispute resolution

Dispute resolution services of the HRA are free and confidential. If a complaint falls within the Commission's jurisdiction – that is, it appears to involve discrimination on one of the prohibited grounds – it will be referred to a Commission mediator. The mediator will attempt to assist the parties resolve the issue through a mediation process. Most complaints are either resolved informally or through mediation. Settlement may involve an apology, an agreement not to repeat the action, education, training or compensation.

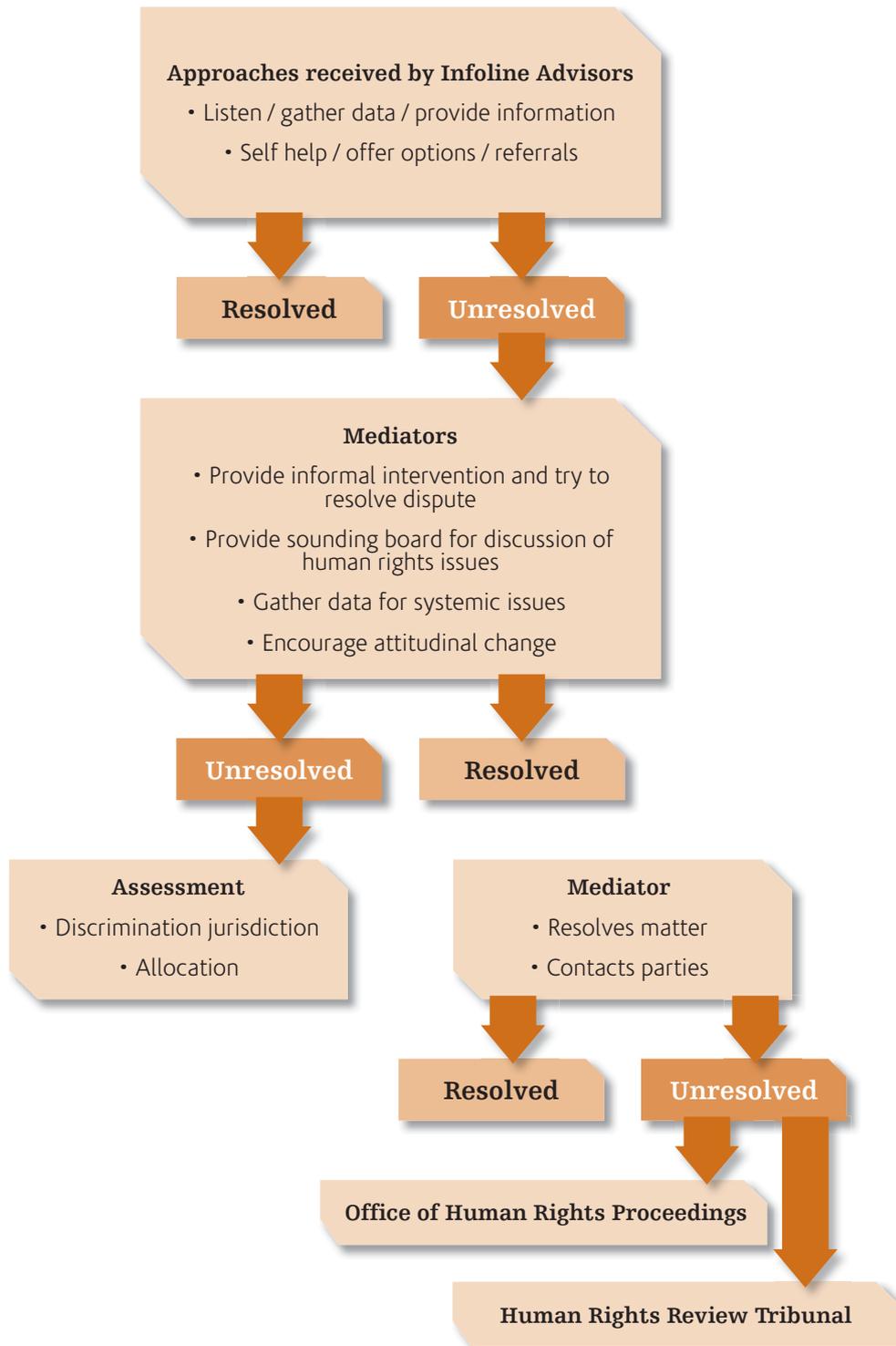
If mediation is unsuccessful, the parties can take their complaint to the Human Rights Review Tribunal. The Office of Human Rights Proceedings provides free legal representation (subject to certain criteria) to applicants who have been unable to resolve their complaint through mediation.

Access to the Tribunal itself is designed to reduce barriers to participation. There are no filing fees and procedures are reasonably informal and inclusive. Legal representation

²² *Amaltal Fishing Co Ltd. v Nelson Polytechnic (No.2)* (1996) 2 HRNZ 225.

²³ International Convention on the Elimination of All Forms of Racial Discrimination (CERD, Article 4(1)) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, Article 4(1)), in the jurisprudence of the ILO supervisory bodies, and in ILO instruments such as ILO Convention 111 concerning Discrimination in Employment and Occupation (Article 5(2)).

Discrimination complaints - dispute resolution process



is unnecessary, but it can be difficult for lay litigants to fully comprehend the technicalities involved and may result in an unfair outcome if one or both parties are not legally represented. In *Howard v Attorney-General (No.3)*,²⁴ for example, the Tribunal observed that “...there are dangers in trying to resolve novel and complex issues in a situation in which there has in effect been argument on one side only.”

Indicators of inequality and discrimination

International treaty bodies have repeatedly expressed concern about inequalities in New Zealand. For example, the most recent report of the Committee on Economic Social and Cultural Rights commented on the persistent inequalities between Māori and non-Māori. This included access to education and high drop-out rates, especially among Māori children and young people and disadvantaged and marginalised groups.²⁵ The Committee also mentioned the gap in employment conditions between men and women, particularly in the area of pay equity.²⁶ In 2010, the Human Rights Committee raised concerns about the low representation of women in high-level and managerial positions and on the boards of private enterprises in its concluding

observations on New Zealand's performance under the ICCPR.²⁷

Reporting on compliance with international obligations in the absence of an agreed reporting framework and comprehensive analysis of available data across the range of human rights standards is difficult. Recognising the need for better indicators, the chairpersons of the human rights treaty bodies and the Office of the High Commissioner for Human Rights have been developing a conceptual and methodological framework to monitor compliance with international human rights instruments and reinforce accountability of States.²⁸ Further work is being done to identify context specific indicators and develop cross-cutting norms as a guide to identifying what data is necessary. It is generally agreed that to reflect the human rights norms of non-discrimination and equality, a starting point is to seek disaggregated data by prohibited grounds of discrimination, such as sex, age, disability, religion, language, social, economic, regional or political status.²⁹

Reporting discrimination in New Zealand has improved over recent years. The Ministry of Social Development's Social Report includes a section on perceived discrimination.³⁰

24 (2008) 8 HRNZ 378.

25 CESCR E/C.12/1/Add.88 (2003) at para 20.

26 Ibid. at para 14.

27 CCPR/C/NZLCO/5 (2010) at para 9.

28 Inter-committee meeting of human rights treaty bodies, Report on Indicators for Monitoring Compliance with International Human Rights Instruments HRI/MC/2006/7[11/5/06].

29 Ibid. at para 21.

30 However, it does not measure actual discrimination, which makes it difficult to conclude whether levels of discrimination have increased or decreased. Ministry of Social Development, Social Report 2009. Available from www.socialreport.msd.govt.nz/civil-political-rights/percieved-discrimination.html.

Statistics New Zealand now includes a specific question on discrimination in the New Zealand General Social Survey, which provides information about key social and economic outcomes.³¹ The Race Relations Commissioner publishes an annual report on race relations and the EEO Commissioner publishes biennial benchmarking reports on women's progress in senior levels of governance and management.³²

The Commission has also improved how it records its own data.³³ The system is now more sophisticated, allowing a greater range of enquiries to be recorded, other than just discrimination. For example, concerns about broader human rights issues, legal advice about the effect of the HRA or the BoRA, or requests for some other form of engagement are now recorded. Some limitations remain, however, as it is not always possible to obtain disaggregated data about complainants and complaint types – the information is either not provided or can not be easily obtained.

Despite these advances, the extent of discrimination remains difficult to gauge nationally, as there is no complete record of who complains, where they complain and what they complain about. A range of statutory agencies, such as the Employment Relations Service, the Ombudsmen and the Health and Disability Commissioner, also have responsibility for dealing with complaints about discrimination but employ

different criteria to record those complaints. It is difficult, therefore, to provide a comprehensive national overview of the extent of unlawful discrimination.

Generally, although there have been improvements in the collection of data over the past five years, there is still no framework for evaluating the data overall to allow assessment and analysis of the extent of discrimination nationally or to identify trends or developments.

31 Statistics New Zealand (2009). New Zealand General Social Survey: 2008.

32 Human Rights Commission (2004, 2006, 2008). New Zealand Census of Women's Participation. Available from <http://www.hrc.co.nz/home/hrc/eoo/eeopublications/eeopublications.php>.

33 The number of complaints over the past five years has been relatively consistent: Part1A complaints ranged from 398 in 2007 to 343 in 2009; complaints under Part 2 ranged from 1505 in 2006 to 898 in 2008.

New Zealand today

Aotearoa i tēnei rā

There have been some significant developments in the area of discrimination law since 2004, including changes to Part 2 of the HRA – principally in the employment related provisions – to ensure the Act complied with the United Nations Convention on the Rights of Persons with Disabilities.

There have also been a number of cases involving the interpretation of discrimination and aspects of the HRA, partly as a result of the ability to challenge discriminatory

legislation and policy under Part 1A of the HRA.

Recognising the power and importance of litigation, the Commission has taken a more proactive approach since its 2004 review of human rights in New Zealand. It has developed a litigation strategy and identified areas where it could usefully intervene or initiate proceedings to contribute to the development of a more substantial body of jurisprudence to better inform understanding of human rights.

Over the past five years, the following cases have addressed issues relating to the interpretation of discrimination and aspects of the HRA:

- *Howard v Attorney-General (No.3)*³⁴ was the first case under Part 1A. Mr Howard complained that the Injury Prevention Rehabilitation and Compensation Act discriminated against him on the ground of age because he was no longer eligible for rehabilitation when he turned 65. The Tribunal agreed that it was discriminatory and could not be justified.
- *Child Poverty Action Group Inc (CPAG) v Attorney-General*³⁵ involved an application for a declaration by CPAG that aspects of the Income Tax Act relating to the eligibility for tax credits under the Working for Families scheme discriminated against families on benefits. While the Tribunal found the policy

was discriminatory, it considered it could be justified under s.5 of the BoRA. The Tribunal also endorsed a test for identifying discrimination – namely, it is enough to establish different treatment on one of the prohibited grounds (not whether it is wrong) and then if it can be justified (citing the test in *R v Hansen*³⁶). It clarified certain procedural issues, including whether a complainant had to actually experience detriment in order to make a complaint, and affirmed that the Government does not have unfettered discretion to legislate in a discriminatory manner in the area of social policy.³⁷

- In *Attorney-General v Human Rights Review Tribunal*,³⁸ the High Court affirmed it was not essential for a complainant to have personally suffered detriment to bring a complaint. It noted “...the complainant need not act in a representative capacity for an aggrieved

34 (2008) 8 HRNZ 378.

35 16/12/08 HRRT Decision 31/08.

36 *Supra*, fn. 12.

37 *Supra*, fn. 22 at para 214.

38 (2006) 18 PRNZ 285.

person...it has always been the case that anyone may lodge a complaint with the Commission.”

- In *Atkinson and Ors v the Ministry of Health*,³⁹ parents who were caring for family members with disabilities challenged the Ministry of Health’s policy of not paying them as discrimination by reason of family status. The Tribunal agreed it was discriminatory and that it could not be justified under s.5 of the BoRA.
- *McAlister v Air New Zealand Ltd*⁴⁰ involved a pilot who was demoted by Air New Zealand when he turned 60, because he could no longer fly to countries which were signatories to the International Civil Aviation Organisation. Captain McAlister complained that he had been discriminated against because of his age. To establish discrimination, it was necessary to identify that he had been treated less favourably by reason of his age than those in a comparable situation. The Supreme Court stated the comparator selected should not be so complicated and technical that it ruled out discrimination at an early stage of an inquiry, this being inconsistent with the purpose of anti-discrimination legislation. Although *McAlister* was decided in the context of employment legislation, the process for defining discrimination is now much clearer.
- *Trevethick v Ministry of Health*⁴¹ involved an application for a declaration that the Ministry of Health’s funding policy discriminated on the ground of disability. Trevethick said she would have received greater support under the ACC scheme if her disability had been caused by an accident. The plaintiff was unsuccessful. However, the case involved consideration of the definition of “disability”. The High Court recognised the definition needs to be considered in the context of the legislation as a whole. While the definition is exhaustive, there is still scope for argument about the meaning of terms such as disability, impairment, illness and abnormality.
- *Bissett v Peters*⁴² and *Easton v Human Rights Commission and Anor*⁴³ in different ways endorsed the Commission’s approach to section 61 and the need to balance exciting racial disharmony against the right to freedom of expression.
- *Talleys Fisheries Ltd v Lewis*⁴⁴ was a landmark sex discrimination case that found a major employer had segregated women into work which, although substantially similar to that performed by men, was paid less.
- In *Re AMM and KJO*,⁴⁵ the High Court held that the word “spouses” can be read as applying to a de facto couple of the opposite sex, in respect of an application made under the Adoption Act 1955.

39 HRRT 33/05, Decision No.01/2010.

40 [2009] NZSC 78.

41 [2008] NZAR 454.

42 (Strike out application).

43 HC WN CIV-2009-485-762 (10/2/10) at para 25.

44 (2007) 8 HRNZ 413.

45 HC WN CIV-2010-485-328 (28/6/10).

Conclusion

Kōrero whakatau

New Zealand generally meets the international standards for protection of the right to freedom from discrimination through the HRA and the BoRA. The prohibited grounds of discrimination are reasonably comprehensive by international standards. Discriminatory legislation can be challenged by obtaining a declaration of inconsistency from the Human Rights Review Tribunal. Despite this (as can be seen throughout this review), discrimination persists and inequalities remain.

Priorities for action

- Promoting substantive equality by incorporating specific reference to equality in the Bill of Rights Act and the Human Rights Act.
- Strengthening the legal protection of human rights in New Zealand by extending the Human Rights Review Tribunal and courts' power to make a declaration of inconsistency under the Human Rights Act to other rights and freedoms in the Bill of Rights.



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Commission

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