

## Background Cont'd

Ensuring that people enjoy rights equally will not always involve treating all people the same. To achieve genuine equality it may be necessary to treat people differently, if treating them the same will simply perpetuate existing differences. The point of special measures is to ensure equal outcomes rather than simply equal treatment.

In New Zealand the Bill of Rights Act 1990 and the Human Rights Act 1993 make discrimination unlawful on several grounds including sex, race, age and disability. In keeping with the international human rights treaties New Zealand has ratified, both Acts recognise that overcoming discrimination may require not only measures to protect vulnerable people but positive action to assist them to "achieve an equal place with other members of the community" (section 73(1) of the Human Rights Act).

The Human Rights Commission's primary functions under s.5 (1) of the Human Rights Act include promoting respect for, and an understanding of, human rights and encouraging harmonious relations in New Zealand society. The Equal Employment Opportunities Commissioner provides advice and leadership on equal employment opportunities (EEO). To facilitate these functions both the Human Rights Commission and the EEO Commissioner may develop guidelines to avoid acts or practices that may be inconsistent with the Human Rights Act (section 5(2)(e)) and promote best practice (s.17(d)).

### Reference Notes

- 1 Rishworth, supra at 391
- 2 Rishworth supra at 392
- 3 P Rishworth et al. (2005) THE NEW ZEALAND BILL OF RIGHTS ACT (Oxford University Press, Auckland) 367
- 4 General comments are statements made by committees established to monitor states' compliance with the treaty in question. See for example General Comments 4, 18, 25 of Human Rights Committee relating to the International Covenant on Civil and Political Rights and Comment 13 by the Economic and Social Council on the interpretation of the International Covenant on Economic, Social and Cultural Rights.



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# Guidelines on Measures to Ensure Equality

The Human Rights Commission has developed the following guidelines.

1. **Measures to ensure equality contribute to but can never be a substitute for programmes for all New Zealanders designed to ensure access to decent work, healthy affordable housing and effective delivery of health, education and other services.**

It is important to recognise that special measures are just one way of ensuring equality of outcomes for the diverse groups that make up New Zealand society. Special measures are only part of a tool kit to address inequality and it is incumbent on government to target inequalities through universal programmes rather than relying on special measures.

2. **Measures to ensure equality are not only permitted but at times required, to ensure equality for disadvantaged groups.**

Treating groups who have been discriminated against in the past the same as those who have not been can perpetuate existing inequalities. As a result, to ensure genuine equality at times it will be necessary to treat individuals or groups differently. Special measures should therefore not be seen as discrimination but rather as a way of realising equality for everyone.

3. **The measure must be necessary to address disadvantage or ensure equality with other members of the community for groups against whom it is unlawful to discriminate.**

Although the wording of section 73(1) of the Human Rights Act and section 19(2) of the Bill of Rights Act are different both are designed to ensure equal outcomes by addressing disadvantage that is the result of unlawful discrimination.

#### **4. The measure must be carried out in good faith.**

'Good faith' is difficult to define. In a legal sense an absence of malice or not taking inappropriate considerations into account in reaching a decision is considered to amount to good faith. Honesty of purpose is also enough<sup>1</sup>.

#### **5. The measure must be tailored to reduce the actual disadvantage of the group it is aimed at.**

Measures that target specific problems are far more likely to be consistent with the Bill of Rights Act<sup>2</sup>. The measure should address the actual disadvantage of the group targeted and there must be a demonstrable link between the measure and what it seeks to achieve. If a programme is designed to redress under-representation in a particular area, it is necessary to establish that the under-representation is the result of the disadvantage faced by the group targeted and it is reasonable to expect the measure to ameliorate the disadvantage.

#### **6. The impact of the measure on those to whom it does not apply should be considered.**

Special measures may affect people who do not belong to the group targeted. This is particularly so when people who do not need a measure benefit simply because they belong to the targeted group while others who may need it are denied the benefit because they belong to a group considered not to be disadvantaged. For example, the effect of providing the opportunity to gain qualifications to people of an ethnic group without offering an equivalent to those who are not of that group but who may be equally disadvantaged because they may both belong to low income groups, can be significant.

#### **7. Measures to ensure equality should be proportional to the degree of under-representation or disadvantage.**

The more entrenched the disadvantage the greater the need for measures to ensure equality. Where a group, for example, has been denied access to education because of their race then that group may need preferential admission to redress the resulting disadvantage. Where the disadvantage is not widely entrenched or applicable to the group as a whole, then the measure should be less intrusive. It also follows that if there is a less intrusive way of providing a benefit then that is preferable.

#### **8. Measures to ensure equality should be temporary.**

Measures to ensure equality are designed to remedy disadvantage related to one of the prohibited grounds of discrimination. If properly designed the need should diminish and the measure should only last until the issue it is designed to address is substantially resolved. As a general proposition, therefore, programmes should be regularly monitored and evaluated to determine if they are having the intended effect and whether there is a continuing need for them. To do this, the purpose of the measure should be clearly defined at the outset, procedures put in place to measure its effect and those directly affected should have the opportunity to participate in its evaluation.

#### **Background**

Human rights are the civil and political, social, economic and cultural rights found in international law. These rights apply equally to everybody because each individual matters and matters equally<sup>3</sup>.

The two major human rights treaties are the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Both emphasise the need for people to be treated equally and without discrimination.

Other treaties refer more specifically to special measures. For example, article 1(4) of the International Covenant on the Elimination of All Forms of Racial Discrimination states that special measures taken for the sole purpose of advancing certain racial or ethnic groups to ensure equal enjoyment of human rights and fundamental freedoms shall not be considered discrimination – provided they do not result in separate measures for different races and they do not continue once they have achieved their objective. Article 4 of the International Covenant on the Elimination of All Forms of Discrimination against Women states that special measures to ensure equality between men and women, or aimed at protecting maternity, should not be considered discrimination. The Convention on the Rights of People with Disabilities also refers to special measures in similar terms.

The General Comments, which are considered to be the most authoritative interpretation of the treaties, repeatedly state that prevention of discrimination requires not only measures to protect vulnerable people but positive action to ensure full enjoyment of rights<sup>4</sup>.