

3. Equality and Freedom from Discrimination

Te Ōritenga me te Whakawāteatanga



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

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Universal Declaration of Human Rights, Article 1

Introduction

Timatatanga

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 the International Covenant on Economic, Social and Cultural Rights (ICESCR);² and 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 cannot be justified objectively.⁶

International context

Kaupapa ā taiao

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

1 ICCPR, Article 2

2 ICESCR, Article 2

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 United Nations Convention on the Rights of the Child (UNCROC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights Of Persons With Disabilities (CRPD); and the Convention Against Enforced Disappearances. The texts of the international human rights instruments are available on the website of the Office of the High Commissioner for Human Rights, accessible online at www.ohchr.org. The text of most of the instruments New Zealand has ratified can be found in Ministry of Foreign Affairs and Trade (2008), *The New Zealand Handbook on International Human Rights* (3rd ed), (Wellington: MFAT).

4 ILO Convention 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.HR/INGEN/1/Rev.1, para 26).

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

7 Fredman S (2002), 'Equality: Concepts and Controversies', in Fredman, *Discrimination Law* (Oxford: OUP), p 7

◀ Lynda Stoneham, a plaintiff in what has become known as the parents as caregivers case, with her daughter Kelly. The plaintiffs in this landmark discrimination case, had a resounding decision in their favour in the Human Rights Review Tribunal, however the decision has been appealed by the Crown.

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, which defines discrimination as including denial of reasonable accommodation. The Convention also clarifies that specific measures which might be required to promote equality do not amount to discrimination.

Effectively, therefore, a state's obligation to respect, protect, promote and fulfil the right to freedom from discrimination is not limited simply to avoiding negative measures, but includes 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.

New Zealand context

Kaupapa o Aotearoa

EQUALITY

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, in which 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 affirms it only 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 was 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, and 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 1993 (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

8 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\GEN\1\Rev.1, para 10)

9 Rishworth P, Optican S and Mahoney R (2003), *the New Zealand Bill of Rights* (Melbourne: OUP)

10 Palmer G (1985), *A Bill of Rights for New Zealand: A White Paper* (Wellington: AJHR 1, A6), para 10.8

11 Butler P and Butler A (2005), *The New Zealand Bill of Rights Act: A Commentary* (Wellington: LexisNexis), para 17.4.1

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

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 (BoRA)

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 directs how the act is to be interpreted; part 2 identifies the substantive rights (including freedom from discrimination on the same grounds as in the HRA); and part 3 deals with miscellaneous matters.

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 that 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 (HRA)

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. During the consultation process for this chapter, a number of submitters suggested increasing the grounds of prohibited discrimination to include type of employment,¹⁶ social class and size. The Commission itself considers that the existing grounds could be clarified to make explicit that the HRA covers trans people and women who breast-feed.

12 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\GEN\1\Rev.1, para 368)

13 [1998] 1 NZLR 523

14 ICCPR, Article 26

15 Until 1993 it was only unlawful to discriminate on the grounds of sex, marital status, religious or ethical belief, colour, race, and ethnic or national origin. After 1993 there were 13 grounds: 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.

16 Submission by the Prostitutes Collective to the Review of Human Rights in New Zealand (2010). The collective noted that the inability to complain about discrimination leaves their members particularly vulnerable and makes it difficult to transition out of the industry.

APPLICATION OF THE HRA

Part 1A

Part 1A applies to the actions of the legislative, executive or judicial branches of Government, as well as to 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 cannot be justified under section 5 of the BoRA. A limitation will be justified under section 5 if it serves a purpose that is 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.¹⁷

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 applies only to certain areas: 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, the material or comment concerned must be not only threatening, abusive or insulting, but also 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. For practical purposes – albeit for good reason – the combination of the criteria in the HRA and the protection of freedom of expression¹⁸ create a threshold that is almost insurmountable.

¹⁷ R v Hansen [2007] 3 NZLR 1

¹⁸ In addition to the civil sanction in section 61, the HRA provides for criminal prosecution under section 131.

¹⁹ '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.

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 being over a certain age in order 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 be performed only 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. They include reasonable accommodation, genuine occupational qualifications or genuine justifications, and special measures to ensure equality.

Reasonable accommodation¹⁹

'Reasonable accommodation' or 'reasonable measures' refers to the provision of goods and services and employment. In the employment context it is used to describe changes to a workplace to ensure that 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 cannot reasonably be provided, then the employer or service provider 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.

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*,²⁰ the tribunal accepted that the practice of rental car companies passing on to the client the higher insurance cost they incurred hiring vehicles to drivers under 25 was justified.

Special measures to ensure equality

Both the HRA²¹ and the BoRA²² 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.

EXAMPLES OF SPECIAL MEASURES

- **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, then 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)*²³ – 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 and the measure is necessary for them to achieve equality with others. However, 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.²⁴ 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 should last only as long as necessary to achieve equality.

Part 3

Part 3 of the HRA covers 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, who will attempt to help the parties resolve the issue in the most efficient, informal and cost-effective manner. Most complaints are resolved either informally or through mediation. Settlement may involve an apology, an agreement not to repeat the action, education, training or compensation.

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

21 HRA section 73, 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.

22 The BoRA, section 19(2), 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.

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

24 ICERD, Article 4(1)), and 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)

The mediation process has many positive aspects, but some challenges remain. The Commission is required to provide a neutral, objective service. In doing so it actively promotes understanding of the HRA to the parties involved. The mediators, as well as the process itself, mitigate any power imbalance to a large extent; but at times individuals will come up against well resourced organisations (including in the state sector) with access to legal advice, which can cause some individuals to find it difficult to advocate for their position without similar support.

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, although costs can be awarded against an unsuccessful applicant. Legal representation 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)*,²⁵ for example, the tribunal observed that:

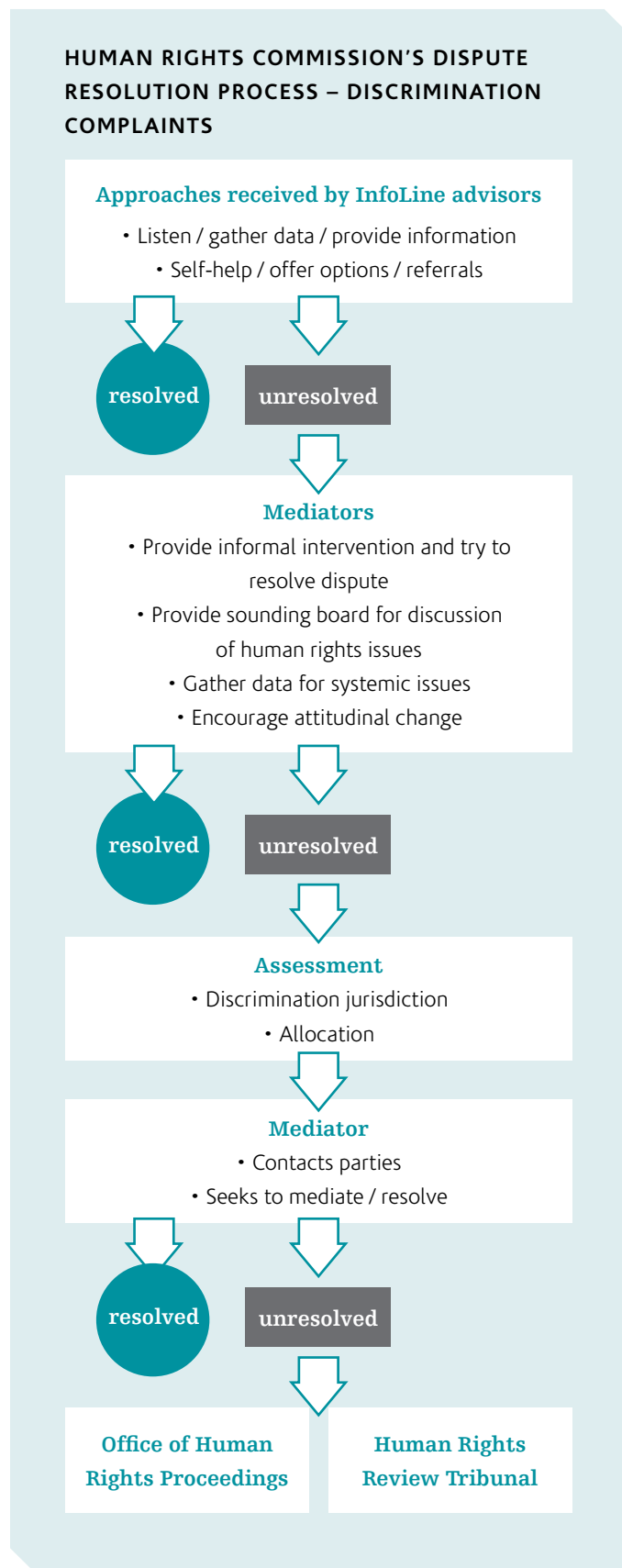
... there are dangers in trying to resolve novel and complex issues in a situation in which there has, in effect, been argument on one side only.

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 Maori and non-Maori in access to education, and the high drop-out rates, especially among Maori children and young people and disadvantaged and marginalised groups.²⁶ It also commented

25 (2008) 8 HRNZ 378

26 CESCR E/C.12/1/Add.88 (2003), para 20



on the gap in employment conditions between men and women, particularly in the area of pay equity.²⁷ In 2010 the UN Human Rights Committee raised concerns, in its concluding observations on New Zealand's performance under the ICCPR,²⁸ about the low representation of women in high-level and managerial positions and on the boards of private enterprises.

It is difficult to report on compliance with international obligations, in the absence of an agreed-on reporting framework and comprehensive analysis of available data across the range of human rights standards. The UN General Assembly recently issued a compilation of guidelines of the monitoring committees of the major treaties on the form and content of reports to be submitted by state parties.²⁹ This is designed to reinforce accountability of states, and harmonise reporting by developing 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.³⁰

Reporting of discrimination in New Zealand has improved over recent years. The Ministry of Social Development's Social Report includes a section on perceived discrimination.³¹ 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.³² The Commission

publishes an annual report on race relations, and a biennial benchmarking report on women's progress in senior levels of governance and management.³³

The Commission has also improved how it records its own data.³⁴ The system is now more sophisticated, allowing a greater range of inquiries to be recorded other than just discrimination. For example, concerns about other 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, because the information is either not provided or cannot 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 Office of 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.

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

27 CESCR E/C.12/1/Add.88 (2003), para 14

28 CCPR/C/NZLCO/5 (2010), para 9

29 HRI/GEN/2/Rev.6 (3 June 2009)

30 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]

31 However, it does not measure actual discrimination, making it difficult to conclude whether levels of discrimination have increased or decreased. Ministry of Social Development (2009), Social Report 2009 (Wellington: MSD), accessed 4 November 2010 from www.socialreport.msd.govt.nz/2009/civil-political-rights/perceived-discrimination.html

32 Statistics New Zealand (2009), *New Zealand General Social Survey: 2008* (Wellington: StatsNZ)

33 Human Rights Commission (2004, 2006, 2008), *New Zealand Census of Women's Participation* (Auckland: HRC), 2004 census accessible online at www.hrc.co.nz/hrc_new/hrc/cms/files/documents/11-Aug-2005_21-35-04_CensusofWomens_Participation.pdf, 2006 census accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/29-Mar-2006_17-46-13_2006_Women_Census_of_Womens_Participation.pdf, 2006 census accessible online at www.hrc.co.nz/hrc_new/hrc/cms/files/documents/28-Mar-2008_12-59-39_2008_Census_of_Womens_Participation.pdf

34 The number of complaints over the past five years has been relatively consistent: Part 1A complaints have ranged from 398 (2007) to 343 (2009), and part 2 complaints from 1505 (2006) to 898 (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 that the act complies 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. 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, developing a litigation strategy and identifying areas where it could usefully intervene or initiate proceedings to contribute to the development of a more substantial body of jurisprudence, so as to better inform understanding of human rights.

CASES

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)**³⁵ 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 v Attorney-General (CPAG)**³⁶ involved an application by CPAG for a declaration 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 that the policy was discriminatory, it considered it could be justified under section 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 to establish if it can be justified (citing the test in **R v Hansen**³⁷). This 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 an unfettered discretion to legislate in a discriminatory manner in the area of social policy.³⁸

- In **Attorney-General v Human Rights Review Tribunal**,³⁹ the High Court affirmed that it was not essential for a complainant to have personally suffered detriment to bring a complaint, noting that “... the complainant need not act in a representative capacity for an aggrieved person ... it has always been the case that anyone may lodge a complaint with the Commission”.
- In **Atkinson & Ors v the Ministry of Health**,⁴⁰ 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 that it was discriminatory and that it could not be justified under section 5 of the BoRA.

35 (2008) 8 HRNZ 378

36 16/12/08 HRRT Decision 31/08

37 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.HR\GEN\1\Rev.1, para 368)

38 16/12/08 HRRT Decision 31/08, para 214

39 (2006) 18 PRNZ 285

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

- **McAlister v Air New Zealand Ltd**⁴¹ 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 ICAO. 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 that 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**⁴² involved an application for a declaration that the Ministry of Health's funding policy discriminated on the ground of disability, because Ms Trevethick would have received greater support under the ACC scheme if her disability had been caused by an accident. The plaintiff was unsuccessful but, of necessity, the case involved consideration of the definition of 'disability'. The High Court recognised that 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**⁴³ and **Easton v Human Rights Commission & Anor**⁴⁴ both, in different ways, endorsed the Commission's approach to section

61 and the need to balance the inciting of racial disharmony against the right to freedom of expression.

- **Talleys Fisheries Ltd v Lewis**⁴⁵ 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**,⁴⁶ 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.

Conclusion Whakamutunga

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, and discriminatory legislation can be challenged by obtaining a declaration of inconsistency from the Human Rights Review Tribunal.

There have also been some significant developments in the area of discrimination law, including a number of cases which have clarified the interpretation of aspects of the HRA. However, the body of jurisprudence is still not large. The Commission has therefore adopted a more proactive approach to this area of work since 2004. It has developed a litigation strategy, and identifies cases where it can intervene or initiate proceedings to contribute to a more substantial body of local jurisprudence, so as to better inform the understanding of human rights.

Despite this (as can be seen throughout this review), discrimination persists and inequalities remain.

41 [2009] NZSC 78

42 [2008] NZAR 454

43 10/08/04 HRRT Decision 33/04

44 HC WN CIV-2009-485-762 (10/2/10), para 25

45 (2007) 8 HRNZ 413

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

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to progress equality and freedom from discrimination:

Substantive equality

Incorporating a specific reference to equality in the Bill of Rights Act and the Human Rights Act to promote substantive equality.

Strengthening legal protection

Extending the Human Rights Review Tribunal and the courts' power to make a declaration of inconsistency under the Human Rights Act to other rights and freedoms in the Bill of Rights to strengthen the legal protection of human rights in New Zealand.

