

# Human Rights

## Executive summary

Human rights legislation in New Zealand has recently undergone a series of changes. Government and agencies carrying out a “public function” are now subject to the Human Rights Act. Individuals are now able to receive public funding to take complaints against Government under the Human Rights Act to the Human Rights Review Tribunal.

The purpose of the Human Rights Act, protecting people from unlawful discrimination, is consistent with the values and objectives of the health and disability sector. The recent changes to the human rights legislation do, however, present some new risks for the sector.

Opinions on the potential risk for the health and disability sector under the amended human rights legislation differ greatly. As the changes to the legislation are so recent, very little case law exists to provide guidance on how the legislation will be interpreted. It is therefore difficult to assess the likely long-term legal risk for the health and disability sector.

It is likely that these changes will result in the health and disability sector facing an increased number of challenges under the Human Rights Act. Importantly, however:

- wherever policies to discriminate can be justified by good evidence, risks associated with such discrimination are likely to be minimal;
- evidence-based decisions on clinical grounds are unlikely to constitute discrimination; and
- positive discrimination is explicitly covered in human rights legislation. Affirmative action programmes are likely to be lawful where they are supported by appropriate evidence.

In anticipation of the expiry of the Government exemption to the Human Rights Act (at the end of 2001), the Ministry of Health identified risks in the Ministry’s legislation, policy and practice and is currently addressing areas of potential inconsistency with the human rights legislation. The Ministry also has an ongoing process in place to educate Ministry staff on human rights issues.

The Ministry has made efforts to raise awareness in the health and disability sector of the changes to human rights legislation and to provide the sector with helpful information. Guidelines for sector have recently been released, [Changes to the Human Rights Act 1993 Guidelines for the health and disability sector](#), July 2002 (copy attached).

The Ministry of Health will maintain a watching brief on human rights as case law is established. It will be important to ensure that in decision-making good processes are followed and documented, particularly where decisions result in discrimination. The Ministry will provide further information to the health and disability sector on human rights compliance as case law is established.

## Summary of the changes

The Government exemption from the Human Rights Act 1993 expired at the end of 2001. Before the expiry of the exemption, the Government took the opportunity to re-evaluate the overall framework of human rights protections in New Zealand, and to make some key changes to the structures, processes and institutions under the Human Rights Act 1993. Consequently, the Human Rights Amendment Act came into effect on 1 January 2002.

In summary, the changes to human rights legislation have:

- introduced the Bill of Rights Act standard as the non-discrimination standard for most areas of Government<sup>1</sup>;
- expanded the publicly funded complaints process; and
- altered the structure and function of human rights institutions.

### Bill of Rights Act standard – the test for discrimination

Government and organisations carrying out a “public function” (including DHBs and other publicly-funded health providers<sup>2</sup>) are now subject to Part 1A of the Human Rights Act 1993. This means that now most activities of Government can be tested against the non-discrimination standard in the New Zealand Bill of Rights 1990.<sup>1</sup>

The Bill of Rights Act non-discrimination standard prohibits discrimination on the basis of certain grounds (such as sex, age, disability and ethnicity), except where that discrimination is justifiable in a “free and democratic society”.<sup>3</sup>

Discrimination occurs when differentiation on a prohibited ground<sup>4</sup> results in disadvantage to a person or group of people.

In order to justify discrimination, you must:

- be able to link the policy or practice that discriminates back to a legislative framework;
- have a robust policy justification; and
- have good evidence for the need to discriminate.

It should be noted that the process of demonstrating justification for discrimination through the complaints process (outlined below) is likely to be costly and time consuming for agencies.

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1 Excepting the areas of employment, racial disharmony, sexual harassment and victimisation, which are covered by Part 2 of the Human Rights Act.

2 It should be noted that the provision of goods and services by hospitals and other providers in the sector has always been covered by the Human Rights Act.

3 Justified limitations to freedom from discrimination are recognised in the Bill of Rights Act (s.5), as ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

4 See Appendix I for the prohibited grounds of discrimination under the Human Rights Act.

## Changes to human rights institutions

The [Human Rights Commission](#) is now focused on human rights education and advocacy. The Commission receives complaints and mediates cases where appropriate. The Commission now includes the Office of the Race Relations Conciliator.

When mediation fails or is inappropriate, the Human Rights Review Tribunal adjudicates complaints taken under the Human Rights Act.

The [Office of Human Rights Proceedings](#) makes decisions on whether complainants receive publicly funded representation to take their case forward to the above Tribunal.

## Remedies

If Government policies or practices are found by the Human Rights Review Tribunal to contain unjustified discrimination, the full range of remedies in the Human Rights Act 1993 will be available.

The Tribunal can:

- make a declaration of a breach;
- award damages;
- order an agency to redress any loss or damage suffered; and
- for statutes or regulations, make a declaration of inconsistency. The responsible Minister will be required to bring the declaration to the attention of the House of Representatives, along with a report containing advice on the Government's response to that declaration.

## How does human rights fit with obligations under the Treaty of Waitangi?

The [relationship between the Treaty of Waitangi and the two Acts](#) (the Human Rights Act and the New Zealand Bill of Rights Act) has not been defined in those Acts.

Positive discrimination is explicitly covered in the Human Rights Act and the Bill of Rights Act. The Bill of Rights Act states that it is not unlawful to positively discriminate to assist people if they have been disadvantaged due to illegal discrimination (section 19(2) of the Act). This is, however, a difficult test to meet. It is likely that the Ministry's affirmative action programmes will be justified through the 'justified limitations' section in the Bill of Rights Act, which is more general.<sup>5</sup>

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<sup>5</sup> Justified limitations – limitations to freedom from discrimination are 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. That is, discrimination is likely to be considered 'justified' if it is supported by robust policy justification and good evidence.

Positive discrimination is also recognised in the New Zealand Public Health and Disability Act 2000 (s.3(3)). This Act recognises that measures to ensure equality can be implemented, as long as such measures do not result in preferential treatment for individual patients on the basis of race.

When targeting Māori for particular services, it will be important to have evidence of greater need or ability to benefit. If a complaint is taken under the Human Rights Act, using a Treaty justification alone is unlikely to be sufficient justification for discriminating. Having evidence of greater need or ability to benefit when targeting Māori for particular services as well as acknowledgement of Treaty obligations is likely to constitute a solid justification for such affirmative action.

There is some concern that health and disability providers may be reluctant to provide targeted services to Māori and Pacific peoples due to a fear that such targeting may be challenged under the Human Rights Act.

However, human rights legislation applies to both acts and omissions, and a failure to act where a group is disadvantaged may also raise issues of compliance with human rights legislation.

The Human Rights Commission is currently drafting a discussion document on the relationship between the Treaty and human rights legislation.

## **Ministry of Health Responses**

The Ministry of Health has received positive feedback from the Human Rights Commission for the work that the Ministry has done to raise awareness in the Ministry of Health and the health and disability sector about the recent changes to human rights legislation.

In response to the changes to the human rights legislation, the Ministry has:

- audited Ministry legislation, policy and practice. This audit highlighted some areas of potential conflict with the Human Rights Act. The Ministry of Health is currently working through these issues;
- presented seminars for Ministry staff on the implications of the changes;
- developed guidelines on the changes.

In terms of the wider health and disability sector, the Ministry has:

- sent a letter last year to a wide variety of providers, informing them of the impending changes;
- held a workshop for DHBs;
- provided guidelines (mentioned above) to DHBs and other providers.

# Appendix I

## Purpose of the Human Rights Act

The Human Rights Act 1993 aims to enhance basic human rights protection in New Zealand by promoting freedom from discrimination.

### Prohibited grounds of discrimination

The act prohibits discrimination against a person or group on the prohibited grounds of discrimination set out in section 21 of that Act.

The prohibited grounds are:

- a) Sex (including pregnancy)
- b) Marital status
- c) Religious belief
- d) Ethical belief
- e) Colour
- f) Race
- g) Ethnic/national origin
- h) Disability
- i) Age (16 and over)<sup>6</sup>
- j) Political opinion
- k) Employment status
- l) Family status
- m) Sexual orientation

Since the Human Rights Act first became legislation in 1993, the Government has had an exemption from that Act (which expired end-2001). That exemption protected:

- all legislation and regulations from challenge under that Act; and
- any discriminatory actions under the “new” grounds of discrimination (from (h)-(m) above).

It applied to government and any agencies (such as DHBs) acting on behalf of government.

As a result of the end of the exemption on 31 December 2001, the Government is now subject to the full range of prohibited grounds laid out above.

### Intra-ground discrimination

Intra-ground discrimination is when discrimination occurs within a ground. For example, when people with different *types* of disability receive a different level of service.

As at January 2002, there have been no New Zealand cases on intra-ground discrimination. The Canadian Supreme Court has, however, considered this issue and recognised intra-ground discrimination.<sup>7</sup>

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<sup>6</sup> Although children under the age of 16 years can be lawfully discriminated against on the ground of age, they cannot be lawfully discriminated against on any of the other grounds.

<sup>7</sup> See *Lovelace v Ontario* 2000 SSC 37