

## Chapter 7 Discrimination and distinguishing between different groups

Unjustified discrimination causes harm to people and may stigmatise already vulnerable groups. This chapter will assist in identifying whether proposed legislation might unjustifiably discriminate on its face or in its application, and how that might be avoided.

Section 19(1) of the [New Zealand Bill of Rights Act 1990](#) (NZBORA) affirms that everyone has the right to freedom from discrimination on the 13 grounds of discrimination set out in section 21 of the [Human Rights Act 1993](#). Those grounds are:

- Sex (including pregnancy, childbirth, and gender identity)
- Marital status
- Religious belief
- Ethical belief
- Colour
- Race
- Ethnic or national origins
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation

Some of these terms are further elaborated on and defined in the Human Rights Act 1993, which also contains various exceptions and modifications.

The starting point is that it ought to be rare for legislation to differentiate between people on the basis of these characteristics. That said, some of the grounds—especially age—may well be used to make important distinctions necessary to the very policy of the statute. Examples include making special provisions in criminal justice and family law for children and young people, and creating minimum age thresholds in various other areas of life (as with driving, voting, ability to marry, and purchasing tobacco and alcohol).

The courts have established that a law (or a policy or practice) unjustifiably discriminates when:

- it draws a distinction on one of the prohibited grounds of discrimination;
- the distinction involves a material disadvantage to the affected person or group; and
- making that distinction cannot be justified, in terms of section 5 of NZBORA, as a reasonable limit on the right to be free of discrimination that is “demonstrably justified in a free and democratic society” (refer to Chapter 6).

Be alert for both *direct* and *indirect* discrimination. The former occurs when a legislative provision discriminates on its face, by expressly treating a group differently on the basis of a prohibited ground of discrimination. Indirect discrimination occurs when a provision is not on its face discriminatory

because it does not expressly contravene a prohibited ground, but its *effect* is that a group is disadvantaged. For example, a generally expressed provision may not include any reference to a person's religion yet impose some requirement or restriction that impacts differently on people of a particular religious belief. In both cases, there is a need to consider whether the difference in treatment involves a material disadvantage and, if so, whether it is capable of justification.

The Ministry of Justice holds policy responsibility for matters related to NZBORA and the Human Rights Act 1993 and provides detailed [guidance](#) for the public sector on its website.<sup>14</sup>

The [Cabinet Manual](#) requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Human Rights Act 1993.<sup>15</sup>

If there is any doubt whether new legislation will discriminate or authorise discrimination on one of the prohibited grounds, officials should consult their legal advisers.

## Guidelines

### 7.1 Does the legislation affect the right to freedom from discrimination in section 19 of NZBORA?

*Legislation should not discriminate on any of the prohibited grounds.*

The starting point is that legislation should not discriminate on any of the prohibited grounds. However, it is not unlawful to discriminate by taking steps in good faith to assist or advance those disadvantaged by discrimination (section 19(2) of NZBORA). It will generally be important to take legal advice on the application of section 19(2), having regard to its requirement that the measures must be premised on assisting or advancing those disadvantaged due to discrimination.

Where discrimination by a State sector organisation on a prohibited ground is the only means of achieving an important policy objective, clear language must be used in the legislation and the limitation must be justified in a free and democratic society (refer to the general discussion on limiting NZBORA rights in [Chapter 6](#)). The courts will presume that Parliament has intended to legislate consistently with NZBORA and will interpret the legislation as such in the absence of clear indicators in the legislation.

Particular care should be exercised in social policy areas such as welfare, health, or education, where it is often necessary to treat groups differently to achieve a positive outcome for those groups. For example, it may be necessary to consider and treat people differently by reason of age, sex, marital status, and certain other characteristics. Early consultation with legal advisers is recommended for officials working in such areas.

The Human Rights Act 1993 also contains a number of exceptions to the right to freedom

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<sup>14</sup> Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector: Guidelines on how to apply the standards and who is covered* (March 2002).

<sup>15</sup> Cabinet Office *Cabinet Manual 2017* at 7.65(b).

from discrimination that may be relevant to legislation. For example:

- it is not unlawful to exclude people of one sex from participating in competitive sporting activity in which the strength, stamina, or physique of competitors is relevant (section 49(1)); and
- it is not unlawful to provide goods, services, or facilities at a reduced fee, charge, or rate on the ground of age, disability, or employment status (section 51).

Seeking legal advice is important when the exceptions will be relied upon.

## **7.2 Has the option that results in the least amount of discrimination been selected?**

*Any discrimination should be no greater than is necessary to achieve the policy objective.*

When faced with multiple options for achieving the policy objective, an option that achieves the policy objective without discriminating on a prohibited ground should be selected. If differential treatment is required by the policy, the option that results in the least discrimination should be preferred and additional measures to reduce the infringement of rights and freedoms or promote accountability and transparency should be considered. [Chapter 6](#) provides a list of the types of measures that may be appropriate.

## **7.3 Has the Human Rights Commission been consulted?**

*Consult the Human Rights Commission early in the policy development process.*

The [Human Rights Commission](#) is an independent body that advocates and promotes respect for human rights. It has a key role in educating the public on human rights issues and in providing a service to resolve disputes and complaints.

## **7.4 Have all the consequences of non-compliance with NZBORA and the Human Rights Act 1993 been considered?**

*Consider the full range of consequences of passing legislation or taking action that does not comply with section 19 of NZBORA and the Human Rights Act 1993.*

The consequences that may result where legislation is inconsistent with NZBORA are described in [Chapter 6](#).

If the [Human Rights Review Tribunal](#) finds that a piece of enacted legislation is inconsistent with the right to freedom from discrimination, it may also make a declaration that the legislation is in breach of the right to freedom from discrimination. The declaration does not affect the operation of the legislation, but the Minister must report the declaration to Parliament and table a response.