

HUMAN RIGHTS ACT 1993

Discrimination

Sylvia Bell

Principal Legal & Policy Analyst

Human Rights Commission

Structure of Human Rights Act

- Part 1 lists functions and powers of the Commission and allows for policy intervention or inquiry into “any matter that the Commission considers may involve infringement of human rights”;
- Part 1A applies to discrimination by the public sector including legislature (and therefore discriminatory legislation & policy);
- Part 2 applies to services offered to the public by the private sector;
- Part 3 deals with resolution of disputes about compliance with Parts 1A & 2 including role of Director of Human Rights Proceedings;
- Part 4 deals with the Human Rights Review Tribunal

Prohibited Grounds of Discrimination:

s.21 HRA

- **Sex** which includes pregnancy & childbirth
- **Marital status** which means being single; married or in a civil union or defacto relationship; the survivor of such a relationship; separated from a spouse or civil union partner or party to a relationship that is now dissolved;
- **Religious or ethical belief**
- **Colour**
- **Race**
- **Ethnic or national origin** including nationality or citizenship
- **Disability**
- **Age**
- **Political opinion**
- **Employment status**
- **Family Status** which means having responsibility for care of dependants; or not having responsibility; being married to, or being in a civil union or defacto relationship with a particular person; or being a relative of a particular person
- **Sexual Orientation**

HRA also applies if ground relates to a relative or associate; or it currently exists, has existed in the past or is suspected or assumed to have existed

Discrimination

- To access the complaints process under Part 1A or Part 2 (and access to the Tribunal) there needs to be some evidence of discrimination on one of the grounds in s.21
- Discrimination is not defined in either the HRA or the Bill of Rights
- Not all different treatment amounts to discrimination
- Not all discrimination is illegal

Different standards apply to Part 1A & Part 2

- Under Part 1A the standard is that in the Bill of Rights Act.
- An action will be discriminatory if it involves distinction on a prohibited ground that leads to disadvantage **and** it cannot be justified under s.5 of the Bill of Rights, i.e. the restriction cannot be justified as a reasonable limitation – compare *Child Poverty Action* case (discrimination but justified) and *Atkinson & Ors v Ministry of Health* (discrimination, cannot be justified)
- Under Part 2 an action will be discriminatory if a person is treated differently because of one of the prohibited grounds in certain areas (broadly employment, access to public places, the provision of services, access to education and accommodation), they are disadvantaged in some way and a specific exception does not apply
- Because the present situation relates to the application of the law the relevant provision of the HRA is Part 1A.

Test for discrimination

- Discrimination itself is not defined in either the HRA or the Bill of Rights and there is little relevant case law
- Agreed that there is a “two step” process:
 - i. Is there discrimination that is prohibited under s.19 Bill of Rights (right to freedom from discrimination)?
 - ii. If so, is it a justified limitation under s.5 of the Bill of Rights?

Step one – Prima facie discrimination: comparison and disadvantage

To establish discrimination there must be:

- [a] a distinction based on a prohibited ground;
- [b] disadvantage

To establish disadvantage it is usually necessary to identify a comparator to compare the treatment complained of and decide whether there is disadvantage:

McAlister v Air New Zealand

Approach to identifying an appropriate comparator

- *McAlister* in Court of Appeal - Court adopted complex test that limited discrimination
- Test was followed in *Smith v Air New Zealand* with the result there was no discrimination
- *McAlister* in Supreme Court – Court adopted a less technical approach, Tipping J noting that a comparator is not appropriate if it “rules out discrimination at an early stage in the inquiry” as it can fail to reflect the policy of human rights legislation which is designed to be wide and liberal, allowing identification of prima facie discrimination but allowing the person/agency alleged to be discriminating to justify it if it falls within a recognised exception
- Supreme Court position adopted most recently by the HRRT in *Atkinson & Ors*

Disadvantage

- Having identified a comparator, it is then necessary to establish different treatment
- That is, whether a prohibited ground is a factor
- Ground needs only to be a material ingredient
- Does the treatment result in disadvantage, If so, can the treatment be justified?

Justification

Test in *R v Hansen*

- (a) Does the limitation serve a purpose sufficiently important to justify curtailing the right?
- (b) (i) is the measure ***rationally connected*** to the purpose?
(ii) does it impair the right or freedom ***no more than is reasonably necessary*** to achieve the purpose?
(iii) is the restriction ***proportionate*** to the importance of the objective?

If all these criteria are satisfied then the even though the measure is discriminatory it is justified and will not reach the HRA or Bill of Rights. In practice the s.5 test depends on particular facts