



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Human Rights (One Law for All)
Amendment Bill 2006

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 266 of the Standing Orders of the House
of Representatives*

I have considered the Human Rights (One Law for All) Amendment Bill 2006 (“the Bill”) for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). I have concluded that clause 5 of the Bill authorises measures that limit the rights affirmed in sections 19(1) and section 20 of the Bill of Rights Act. These limitations cannot be justified in terms of section 5 of that Act. As required by section 7 of the Bill of Rights Act and Standing Order 266, I draw this to the attention of the House of Representatives.

Anti-Discrimination Legislation in New Zealand

Under New Zealand human rights legislation, discrimination arises where there is different treatment of individuals or groups in comparable situations and, as a result, an individual or group is disadvantaged. The Government is generally obliged to act in a non-discriminatory way. Not all different treatment is considered to be discriminatory. For example, special measures may be employed to address discrimination or disadvantage by providing assistance to a particular group.

Human Rights Act Non-Discrimination Act Standard

The legal tests for identifying unlawful discrimination differ under the Human Rights Act and the Bill of Rights Act. Under the Human Rights Act non-discrimination standard, conduct that treats a person or groups differently on one of the prohibited grounds of discrimination is unlawful under Part 2 of the Act, unless an exception under that Part applies. Conduct that has the effect of treating a person or groups differently on one of the prohibited grounds of discrimination (i.e. indirect discrimination) will be lawful if there is good reason for it (section 65 of the Human Rights Act).

Measures to ensure equality are considered to be an exception to discrimination (section 73 Human Rights Act). This means that, any act or omission that would otherwise constitute a breach of Part 2 of the Human Rights Act will not constitute a breach if:

- (a) 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 by virtue of Part 2 of the Act; and
- (b) those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

Bill of Rights Act Non-Discrimination Standard

Under the Bill of Rights Act non-discrimination standard, it is unlawful for the Government or public bodies to discriminate against persons or groups on the grounds set out in the Human Rights Act. However, measures designed to address disadvantage to any group against whom discrimination is unlawful do not constitute discrimination (see section 19(2) of the Bill of Rights Act). The Bill of Rights Act standard is read into Part 1A of the Human Rights Act and applies to the majority of public sector activities.

Where section 19(2) does not apply, for a court or the Human Rights Review Tribunal (HRRT) to find that conduct is unlawfully discriminatory under the Bill of Rights Act standard, it would have to determine the conduct was not justified in a free and democratic society (section 5 of the Bill of Rights Act). Whereas under Part 2, the HRRT would be required to find conduct unlawful if the conduct involved a distinction based on one of the prohibited grounds of discrimination which was detrimental, and no exception was available legitimising that conduct. There is no similar provision in Part 2 of the Human Rights Act to section 5 of the Bill of Rights Act allowing otherwise unlawful conduct if it can be demonstrably justified in a free and democratic society. The HRRT, however, does have discretion under section 97 of the Human Rights Act to declare conduct that would otherwise be unlawful under Part 2 not to be unlawful because there is a genuine justification for it.

The Bill

The Bill proposes to amend section 21A of the Human Rights Act. Section 21A sets out the areas in which acts or omissions by the Government and public bodies¹ are subject to the Human Rights Act non-discrimination standard. These are discrimination in employment matters, racial disharmony, sexual and racial harassment and victimisation. The remainder of acts or omissions by the Government and public bodies are subject to the Bill of Rights Act non-discrimination standard.

The effect of the proposed amendment is to apply the non-discrimination standard in Part 2 of the Human Rights Act to any act or omission by the Government or a public body where that act or omission discriminates on the prohibited grounds of colour, race, ethnic or national origins (which includes nationality or citizenship) in the following areas (set out in sections 42 to 60 of the Act):

- access by the public to places, vehicles and facilities;
- the provision of goods and services;
- the provision of land, housing and other accommodation; and
- access to educational establishments.

With respect to public sector activity that falls within Part 2 of the Human Rights Act (currently set out in section 21A(1)(a)), section 21A(1)(b) provides that the exceptions set out in sections 65 (indirect discrimination) and 73 (measures to ensure equality) of the Human Rights Act apply to such activity.

New section 21A(1)(c) does not refer to section 21A(1)(b). This means that government policies, practices or services that draw distinctions directly or indirectly on the grounds of colour, race or ethnic or national origins will not be able to be legitimised on the basis that they are measures designed to ensure equality.

¹Section 3 of the Bill of Rights Act defines Government and public bodies as: (a) the legislative, executive, or judicial branch of the Government of New Zealand; and (b) a person or body in the performance of any public function, power of duty conferred or imposed on that person or body by or pursuant to law.

Inconsistency with Section 19 of the Bill of Rights Act (Freedom from Discrimination)

Section 19 of the Bill of Rights Act provides that:

- (1) *Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.*
- (2) *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.*

Taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether an infringement under section 19(1) exists are:

- Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
- Does the distinction involve disadvantage to one or more classes of individuals?

If these questions are answered in the affirmative, the legislation gives rise to an "infringement" of section 19(1) of the Bill of Rights Act. Where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.

Sections 19(1) and 19(2) of the Bill of Rights Act read together afford the Government the ability to offer targeted programmes to groups that it identifies as disadvantaged.

Clause 5 of the Bill has the effect of making the Government liable under Part 2 of the Human Rights Act for discrimination on the grounds of race, colour and ethnic or national origin. Because it does not amend section 21A(1)(b), it removes the application of sections 65 and 73 of the Human Rights Act, which relate respectively to indirect discrimination and measures to ensure equality, to unlawful conduct under sections 42 to 60. As stated above, the proposed amendment will prevent the Government from providing targeted programmes based on race, colour and ethnic or national origins to groups that it identifies as disadvantaged and in need of assistance or advancement in order to achieve an equal place with other members of the community.

Clause 5 of the Bill raises a prima facie breach of section 19 of the Bill of Rights Act on the grounds of race, colour and ethnic or national origins. The provision discriminates against those groups of a particular race, colour, ethnic or national origin that the Government identifies as needing assistance because of disadvantage. This is because it denies the Government the ability to assist them to achieve substantive equality with groups of other races, colours, ethnic or national origins that are not disadvantaged.

It could be argued that the removal of the Government's ability to provide targeted programmes on the grounds of race, colour, ethnic or national origin

is not discriminatory. This is because it denies the Government the ability to assist groups of any race, colour, ethnic or national origin through targeted programmes and therefore affects all groups equally. This argument is not valid because it assumes that all groups are equal, whereas there may be some groups that, because of disadvantage, require assistance or advancement in order to achieve substantive equality with other groups. Therefore the proposed amendment will have a disproportionate effect on those groups.

The provision is also discriminatory because it allows the Government to continue to provide targeted programmes to groups defined by any other ground of discrimination in the Human Rights Act, such as sex or family status. In addition, it may have the effect of reinforcing and perpetuating disadvantage and discrimination on the grounds of race, colour, ethnic or national origins and sending the message that groups defined by those characteristics are not worthy of the benefit of targeted programmes.

According to the Supreme Court of Canada in its decisions of *Vriend v Alberta*² and *Newfoundland (Treasury Board) v N.A.P.E.*³, an act that denies one group protection from discrimination that is provided to other disadvantaged groups would be discriminatory. The Court has taken the view that an act that denies a group access to substantive equality in relation to other analogous groups is discriminatory because the act has a disproportionate effect on that group.

Justifiable Limitations

A limitation on a right can be justified under section 5 of the Bill of Rights Act where that limitation meets a significant and important objective, and where there is a rational and proportionate connection between the limitation and that objective.⁴

Significant and Important Objective

If the objective of the Bill is taken to be the prevention of discrimination on the basis of race, colour, or ethnic or national origins (rather than preventing measures to achieve equality on these grounds), then it can be considered to have a significant and important objective. Some overseas jurisdictions have distinguished between those grounds of discrimination where limitations require strict scrutiny and those grounds that simply require some rational justification. Discrimination on the basis of race is one of those grounds that are considered to require strict scrutiny.⁵

Establishing such a formal “hierarchy” of grounds is problematic because gross discrimination can occur on any grounds. Nevertheless, there are some

² 156 D.L.R (4th) 385

³ 244 D.L.R. (4th) 294

⁴ *Ministry of Transport (MOT) v Noort* [1993] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.

⁵ *San Antonio School District v Rodriguez* 411 US 1, 29 (1973); per Butler & Butler, 506

grounds of discrimination that, due to their nature, are less likely to be amenable to justification than others. Any justifications for different treatment based on grounds such as race, sex or sexual orientation will be subject to intense scrutiny by the courts.⁶

Rational and Proportionate Connection

Targeted programmes per se do not violate the absolute prohibition on racial discrimination. Where such programmes are applied, the objective is to correct existing inequalities. Targeted programmes will only be discriminatory if they are not being carried out for a legitimate purpose, are not effective in advancing that purpose and the infringement on the rights of others is not proportional to the importance of that purpose. Accordingly, there appears to be no rational connection between the objective of preventing discrimination and effect of the Bill of preventing the use of targeted programmes. Such a course of action would appear to promote, rather than prevent, such discrimination from occurring.

Inconsistency with Section 20 of the Bill of Rights Act (Rights of Minorities)

I have also considered whether the Bill is consistent with section 20 of the Bill of Rights Act, which provides that “a person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority”. To the extent that the Bill removes the ability of the Government or public bodies to actively assist minorities in the enjoyment of that right, there might be circumstances in which section 20 would be breached.

Conclusion

I conclude that clause 5 of the Human Rights (One Law for All) Amendment Bill 2006 authorises measures that limit the rights affirmed in sections 19(1) and 20 of the Bill of Rights Act. These limitations cannot be justified in terms of section 5 of the Bill of Rights Act and therefore the Bill appears to be inconsistent with the rights and freedoms contained in that Act.



Hon Michael Cullen
Attorney-General

⁶ Ghaidan v Mendoza [2004] UKHL 30; [2004] 3 All ER 411, 421