The Non-Discrimination Standards for Government and the Public Sector

Guidelines on how to apply the standards and who is covered

MINISTRY OF JUSTICE

March 2002

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Introduction

What is the aim of these guidelines?

These guidelines are intended to help you:

- Become familiar with the non-discrimination standards for government and the wider public sector[1];
- Become more familiar with identifying discrimination and how this exercise is relevant to the development and consideration of legislation, public sector policies, practices, and services in New Zealand;
- To provide guidance on the types of functions and bodies which are covered by these non-discrimination standards.

There are two non-discrimination standards. Both are set out in the Human Rights Act 1993.[2] One applies to the majority of public sector activities. This first standard is referred to as the Bill of Rights Act non-discrimination standard, because it reads in relevant sections of the New Zealand Bill of Rights Act 1990 to Part 1A of the Human Rights Act 1993.[3] The other standard is that set out in Part II of the Human Rights Act and, unsurprisingly, is referred to as the Human Rights Act non-discrimination standard. This second standard applies to private sector activity and to a minor amount of public sector activity. The precise activities to which each of these two standards apply is set out below in these guidelines.

The overall aim of these guidelines is to ensure that, so far as possible, the human right of New Zealanders to be free from discrimination, as affirmed by the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, is not unjustifiably infringed by the actions of the public sector.

Who are these guidelines for?

Because these guidelines are intended to help in the development and consideration of legislation, public sector policies, practices, and services, the guidelines are primarily aimed at:

- Advisers;
- Public sector managers and staff;
- Staff who service Cabinet, Cabinet Committees and Officials' Committees.

These guidelines are also intended to inform the policies and practices of the wider public sector regarding non-discrimination, so they are also for:

- Crown entities, SOEs, etc;
- Local Government;

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[1] **Please note: For ease of reference throughout these guidelines, the government and the wider public sector is simply referred to as the 'public sector'.**

[2] As amended by the Human Rights Amendment Act 2001, which came into force as of 1 January 2002.

[3] Please note: Throughout these guidelines the New Zealand Bill of Rights Act 1990 is referred to as "the Bill of Rights Act" and the Human Rights Act 1993 is referred to as the "Human Rights Act".

- Staff who work with non-government agencies and other service providers who are performing a "public function" (the "public function" test is outlined further below at page 14).

Note: In March 2000, the Ministry of Justice published Guidelines for Government Policy Advisors on the Human Rights Act 1993. In light of the changes to the Human Rights Act, and the adoption of the Bill of Rights Act standard for assessment of discrimination in most Government activities, those previous guidelines should no longer be used to identify public sector obligations under the Human Rights Act.

Summary of the Guidelines

This quick guide is intended to provide a brief overview of key elements in these guidelines.

Part 1A Human Rights Act - The Bill of Rights Act non-discrimination standard

Part 1A of the Human Rights Act 1993 applies the Bill of Rights Act non-discrimination standard to public sector activities. This standard affects all governmental action and measures, other than certain discrete areas where the Human Rights Act non-discrimination standard set out in Part II still applies (for example, employment).

To comply with the Bill of Rights Act non-discrimination standard, officials need to consider whether the activity infringes upon section 19(1) of the Bill of Rights Act. Section 19(1) provides that everyone has the right to be free from discrimination on the grounds set out in section 21 of the Human Rights Act (for example, on the grounds of sex, race, or age). However, section 5 of the Bill of Rights Act provides that section 19 may be subject to reasonable limits prescribed by law, which have been demonstrably justified.

A Checklist of the 6 Steps to follow to complete a Part 1A analysis is set out on page 13 of these guidelines. This is followed by a detailed discussion of the 6 Steps, which are:

Step 1. Whose actions are covered by Part 1A of the Human Rights Act? This Step uses section 3 of the Bill of Rights Act to identify the public sector activities to which Part 1A applies.

Step 2. What actions are covered by Part 1A of the Human Rights Act?

Step 3. Is there discrimination under section 19(1) of the Bill of Rights Act? This involves asking:

(1) Is there a distinction based on one of the prohibited grounds of discrimination (from section 21 of the Human Rights Act, such as sex or race)? If so,

(2) Does this distinction involve disadvantage to the person or group?

Step 4. Is it affirmative action, exempted under section 19(2) of the Bill of Rights Act? (If so, it will not be discrimination and you need go no further).

Step 5. Is the discrimination justifiable under section 5 of the Bill of Rights Act? The test for section 5 can basically can be summed up in two enquiries:

1. Does the activity have an important and significant objective? If yes,

2. Is there a rational and proportional connection between that objective and the activity, or is there another means by which to achieve the objective which infringes less upon the right to be free from discrimination?

If one or both of these section 5 questions are answered in the negative, then the activity cannot be justified and will amount to discrimination.

Step 6. What to do if you find discrimination under Part 1A.

There are various negative consequences which then may result from a finding of discrimination. Through good practice and common sense, discrimination can be avoided. For example:

- Be aware of the grounds of discrimination in section 21 of the Human Rights Act;
- Be alive to distinctions being made on those grounds;
- Keep a record of the motivation and policy reasons for such distinctions and why they are considered necessary, proportional and the only way to achieve the objective aimed at;
- Discuss issues with your legal adviser or one of the contact group if you are in doubt or think the policy may discriminate - rather be safe than sorry later;
- Change the legislation, policy, practice or service.

Part II Human Rights Act - The Human Rights Act non-discrimination standard

Part II of the Human Rights Act 1993 applies to public sector activities in respect of employment and the related areas of racial, or sexual harassment, racial disharmony and victimisation. This non-discrimination standard under Part II of the Human Rights Act differs from the Bill of Rights Act standard in Part 1A. To comply with the Human Rights Act standard, officials need to consider whether the activity makes a distinction on one of the grounds of discrimination in section 21 of the Human Rights Act and whether the activity falls within an area specified in the Human Rights Act. Then ask whether there is an exception or justification for the discrimination. The 6 Steps to go through to complete a Part II analysis are set out in a Checklist on page 28 followed by detailed discussion on pages 29 to 34. The 6 Steps are:

Steps 1 and 2. What public and private sector activities are covered by Part II?

Steps 3a and 3b. Is the action in relation to employment, racial, or sexual harassment, racial disharmony or victimisation (if it is in relation to racial or sexual harassment, racial disharmony or victimisation, see later discussion at pages 35 to 37)?

Step 4. Is there discrimination? This involves asking:

1) Does the action make a distinction based on one of the prohibited grounds of discrimination in section 21 of the Human Rights Act?

2) Does the action relate to one of the defined areas in the Human Rights Act?

3) Does detriment need to be established?

Step 5. Is there an exception for the activity, either specifically or generally in the Human Rights Act?

Step 6. What to do if there is discrimination under Part II of the Human Rights Act.

The Human Rights Act 1993 (Overview)

The structure of the Human Rights Act

Following amendment in 2001, the five main parts of the Human Rights Act are:

- Part I: sets out the functions of the Human Rights Commission;
- Part 1A: sets out the Bill of Rights Act non-discrimination standard; it deals with discrimination by those in the public sector, except in relation to employment, sexual harassment, racial disharmony, racial harassment, and victimisation;
- Part II: sets out the Human Rights Act non-discrimination standard; it deals with discrimination by those in the private sector, and those in the public sector in relation to employment, sexual harassment, racial disharmony, racial harassment, and victimisation; it sets out the prohibited grounds of discrimination (these are reproduced in full in Appendix 2), the areas of life in which such discrimination is prohibited, and various exceptions where discrimination is lawful;
- Part III: deals with complaints processes through the Human Rights Commission and remedies;
- Part IV: which establishes a Human Rights Review Tribunal and provides for its functions and powers.

Part 1A: The incorporation of the Bill of Rights Act non-discrimination standard into the Human Rights Act

Part 1A of the Human Rights Act will apply to the majority of public sector activity. Part 1A provides that where a complaint of discrimination is made against a person or agency in the public sector, the complaint will generally be upheld if the discrimination is inconsistent with the right to freedom from discrimination in section 19, and cannot be justified in terms of section 5 of the Bill of Rights Act. This Bill of Rights Act non-discrimination standard, which has applied to all public sector activity since 1990, is discussed on pages 13 to 27 of these guidelines.

Part II: Employment, Racial Disharmony, Sexual and Racial Harassment, and Victimisation

Part 1A does not apply to the public sector in respect of discrimination in employment matters, racial disharmony, sexual harassment, racial harassment and victimisation. This recognises that in these (mostly employment-related) situations, covered by Part II of the Human Rights Act, there should be no difference between the legal obligations imposed on the private and public sectors. This Human Rights Act non-discrimination standard is discussed on pages 28 to 34 of these guidelines.

The New Zealand Bill of Rights Act (Overview)

What does the Bill of Rights Act deal with?

The Bill of Rights Act deals with aspects of the human rights of New Zealanders (see Appendix 1 for a full copy of the Bill of Rights Act.) It affirms a range of civil and political rights and freedoms, including:

- The right not to be deprived of life
- The right not to be subjected to torture or cruel treatment
- Electoral rights
- Freedom of thought, conscience and religion
- Freedom of expression
- Freedom of peaceful assembly
- Freedom of movement
- Freedom from discrimination
- Freedom from unreasonable search and seizure
- The right not to be arbitrarily arrested or detained
- The rights of people who are arrested or detained
- Minimum standards of criminal procedure
- The right to justice.

The Bill of Rights Act does not deal with other human rights such as the right to food, the right to adequate housing, the right to education. The Bill of Rights Act remains a separate statute from the Human Rights Act and can be used to challenge, through the courts, public sector activity - independently of the Human Rights Act.

How does the Bill of Rights Act fit with other legislation?

The Bill of Rights Act is an ordinary statute and so does not override other legislation.

However, section 6 provides that so far as possible, legislation should be interpreted in a way that is consistent with the Bill of Rights Act. Where a law cannot be given an interpretation that is consistent with the Act, section 4 provides that the law cannot be overridden by the Bill of Rights Act. The principle underlying section 4 is that it is Parliament, not the Courts, that should have the ultimate law-making power. This does not mean, however, that laws can be passed without any regard to the Bill of Rights Act.

It is important to recognise, for example, the duty of the Attorney-General under section 7 of the Bill of Rights Act to bring to Parliament's attention any provision in a Bill that appears to be inconsistent with any of the rights and freedom in the Bill of Rights Act, and the power of the Human Rights Review Tribunal to make a declaration of inconsistency (for more see page 38). One of the ways to ensure that these things do not happen is through policy makers being familiar with, and using, these guidelines. We suggest that you try to integrate the points raised by these guidelines into all policy work from the outset, rather than use this as a checklist against which to check your final product.

The next part of these guidelines sets out a step-by-step guide to assessing whether a particular law, policy, practice or service is discriminatory under Part 1A of the Human Rights Act. This is then followed by similar guidance in relation to Part II of the Human Rights Act.

The Non-Discrimination Standard for the Public Sector

Background

Until December 2001, the public sector was subject to two different non-discrimination standards and processes in relation to public sector activities – one through the application of the Bill of Rights Act and the other through the application of the Human Rights Act.

While the Bill of Rights Act applied and still applies to all public sector activities, there was previously no publicly-funded complaints process available through which to lodge complaints about allegedly discriminatory public sector activities. Such matters had to be (and still can be) pursued through the courts.

Prior to 31 December 2001, section 151 (now repealed) of the Human Rights Act protected the public sector from the full impact of the Human Rights Act non-discrimination standard. Section 151(1) stated that the Human Rights Act did not override other enactments, and those enactments stood even if there was discrimination. Section 151(2) provided a temporary exemption in respect of some of the grounds of discrimination in the Human Rights Act (namely, disability, age, political opinion, employment status, family status and sexual orientation). For those grounds which did apply to allegedly discriminatory public sector activities (namely, sex, marital status, religious belief, ethical belief, colour, race, and ethnic or national origins), a publicly funded complaints process was available through the Human Rights Commission.

Changes made by the Human Rights Amendment Act 2001

The 2001 amendments to the Human Rights Act[4] provided that the Human Rights Act non-discrimination standard, in Part II of that Act, applies to private sector activities, and to public sector activities only in relation to employment, racial harassment, sexual harassment, racial disharmony and victimisation. The 2001 amendments also provided that the Bill of Rights Act non-discrimination standard set out in Part 1A of the Human Rights Act applies to all public sector activities except employment, racial harassment, sexual harassment, racial disharmony and victimisation. A publicly-funded complaints process through the Human Rights Commission is available in relation to all activities. Actions may now be taken to seek a declaration that another Act is inconsistent with the Bill of Rights Act standard. (See page 38 for further details, remedies, etc).

Non-discrimination under the Bill of Rights Act: Relevant sections

Part 1A of the Human Rights Act provides that, in general, an activity by a person or body in the public sector will be in breach of the Human Rights Act if it is inconsistent with section 19 of the Bill of Rights Act and cannot be justified under section 5 of that Act.

[4] Effective from 1 January 2002.

Section 19 of the Bill of Rights Act provides that everyone has the right to freedom from discrimination (see Steps 3 and 4 for the details).

Section 5 of the Bill of Rights Act provides that section 19 can only be subjected to reasonable limits, prescribed by law, that can be demonstrably justified in a free and democratic society (see Step 5 for the details).

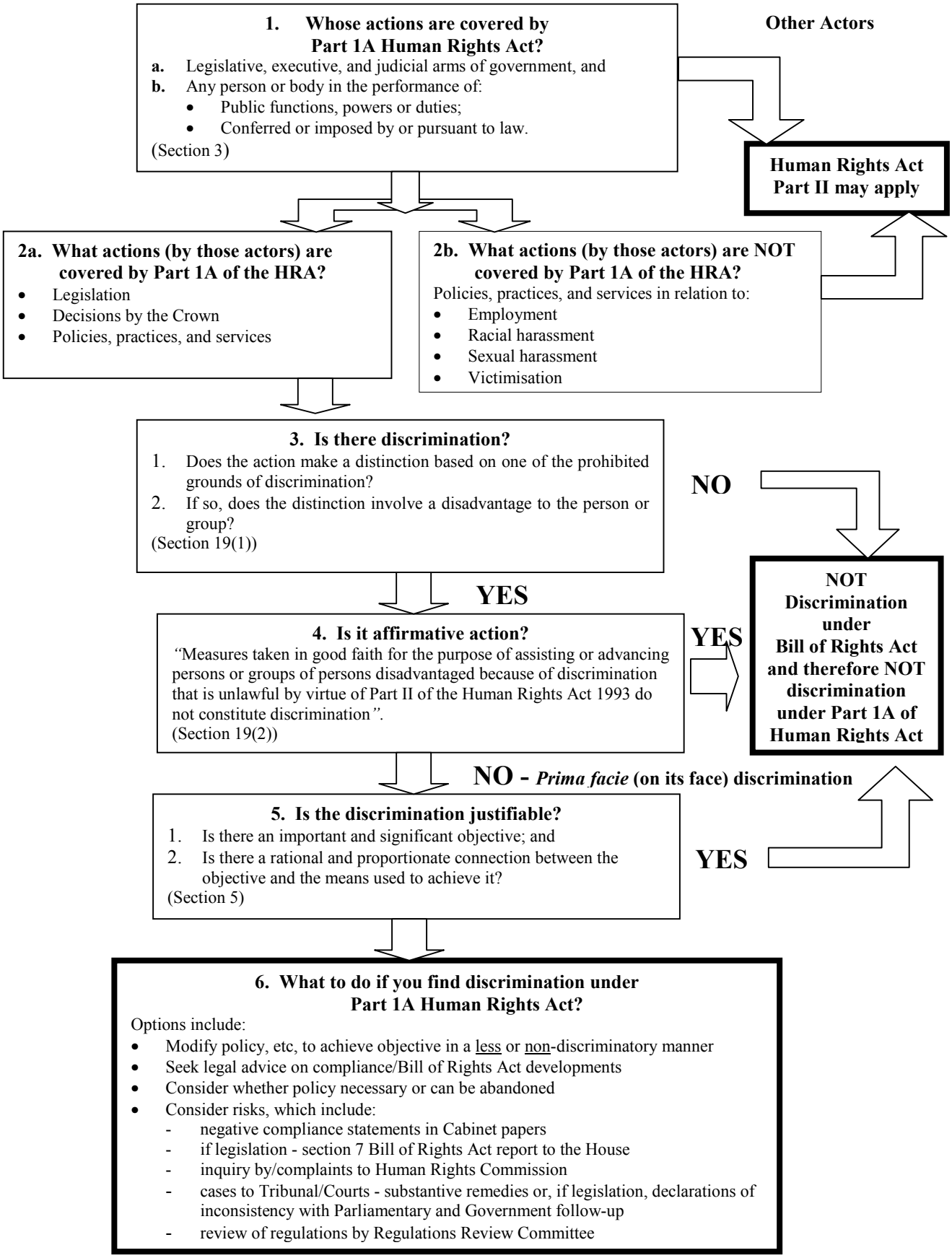
In essence, the Bill of Rights Act non-discrimination standard means that if the government seeks to limit the right to freedom from discrimination by differentiating on the basis of certain personal characteristics, like ethnicity or sex, then it will need to provide robust empirical and policy justifications for that discrimination. The standard requires the public sector to justify its actions and demonstrate that it has an important and significant objective and that it has discriminated as little as possible in order to achieve its objective. This accords with the basic principle that government decisions should be more transparent and open to public scrutiny than decisions taken in the private sector.

How do you apply the non-discrimination standard?

There are six steps to follow when considering whether legislation, a policy, practice, or service discriminates in a way that cannot be justified under the Bill of Rights Act as shown in the following diagram.

CHECKLIST – Applying the Bill of Rights Act Non-Discrimination Standard

(as set out in Part 1A of the Human Rights Act)



The next part of these guidelines explains each of these six steps with examples.

STEP ONE

Whose actions *are covered by Part 1A of the Human Rights Act?*

Part 1A of the Human Rights Act applies to acts by a person or body covered by section 3 of the Bill of Rights Act. Keep in mind that the Bill of Rights Act is designed to protect individuals from the actions of the government. When considering whether the Act applies to you or your agency, the first step is to look at whether you or your agency falls within section 3 of the Bill of Rights Act (as restated in section 20J of the Human Rights Act). Section 3 states that the Bill of Rights Act applies to any acts done by:

(a) the legislative, executive and judicial branches of government; or
(b) a person or body in the performance of a public function, power or duty conferred or imposed by or pursuant to law.

The Bill of Rights Act has applied to all these bodies and activities since it became law in 1990, but the same definition is now relevant to determining which Part of the Human Rights Act applies.

Section 3(a) is relatively self-explanatory.

Section 3(b) is not so clear. While the courts have not settled the precise margins of the "public function" test, they have clarified that it is the nature of the activity that an organisation performs which is the key, rather than the identity of that organisation (such as the particular "legal person" or the ownership of the organisation). That means the fact that a particular organisation is essentially private in nature does not, by itself, mean that it is never performing a "public function, power or duty". For example, consider the case of a private health provider who is under contract to provide certain public health screening services. If it is performing a "public function", even though it is essentially a private organisation, compliance with the Bill of Rights Act is necessary. Relevant factors in the "public function" test include whether the organisation is:

- acting in the public interest;
- conferring a public benefit;
- acting to implement or in furtherance of government policy or strategy;
- under special obligations or responsibilities that other (private) bodies do not have
- receiving or involved with public funding (although this is not determinative on its own)
- exercising powers under statute or regulation.

For example, the provision of boarding school services by a public school has been found to fall outside the scope of public sector activity, as it was undertaken on a commercial basis separate from the public functions of the school.[5] In contrast, the Advertising Standards Complaints Board, a privately-funded non-statutory industry self-regulating body, has been held to fall within the scope of public sector activity because of the public nature of its functions.[6]

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[5] *M v Board of Trustee of Palmerston North Boys' High School* [1997] 2 NZLR 60.
[6] *Electoral Commission v Cameron & Ors* [1997] 2 NZLR 421 (CA).

What does "conferred or imposed by or pursuant to law" mean?

The term "conferred or imposed pursuant to law" has not received extensive consideration in the courts. Decisions of the European Court of Human Rights (and followed by the New Zealand and Canadian courts) have set out that words and phrases such as "conferred or imposed by law", "pursuant to law", and "prescribed by law", can to a large extent be treated the same. This is discussed in more detail, and with relevant references, under the heading 'What Does "Prescribed by Law" Mean?' in Step 5 (see pages 25 to 26).

STEP TWO

*1. **What actions are** covered under Part 1A of the Human Rights Act?*

Part 1A of the Human Rights Act, applies to **any** act done by the legislative, executive, or judicial arms of government or by a person or body performing a public function, power, or duty. This means you should assume that all actions are subject to the Bill of Rights Act standard including legislation, regulations, policy development, service delivery, and programmes run by your agency.

However, Part 1A does not apply to the public sector in respect of discrimination in employment matters, racial disharmony, sexual harassment, racial harassment and victimisation.

The following are examples of actions that **are** covered by the Bill of Rights Act standard in Part 1A:

- Legislation regulating or governing certain activities;
- A decision by a Minister on whether to grant a statutory licence;
- A decision by a parole board on whether to release an inmate on parole;
- An agency decision on whether to grant an income support payment to an applicant;
- Policies regulating education or vocational training, unless they form part of employment practices;
- Regulations dealing with the rights of children and young people in state care;
- A policy on the ways in which decisions on applications for funding will be made.

*2. What actions are **not** covered by Part 1A of the Human Rights Act?*

There are some actions that are **not** covered by the Bill of Rights Act standard, as applied by Part 1A of the Human Rights Act. First, as mentioned above, employment-related matters, racial harassment, and sexual harassment are not covered by Part 1A even where they involve public sector activity. Second, actions of private individuals, including actions of public officials in their private capacity, are not covered. Third, the Human Rights Act contains a number of general exemptions relating to immigration policies and decisions, and to the judgments and other actions of the courts.

The following are examples of actions that **are not** covered by the Bill of Rights Act standard in Part 1A:

- A public official who behaves in a way that is discriminatory when they are **not** exercising a public function or duty or otherwise acting in an official capacity;
- A public official who acts in a discriminatory way outside the scope of their employment (such as in the employment of a person in a private company or community group);
- A court order.

If you and your agency's actions are not covered by section 3 of the Bill of Rights Act, then you are not covered by Part 1A of the Human Rights Act. However, the actions may still fall within other areas (Part II) of the Human Rights Act and you should check with your legal advisers if you are in any doubt.

If you or your agency's actions do fall within the scope of section 3 then you should proceed to Step Three of the checklist.

STEP THREE

Is there discrimination?

The Bill of Rights Act non-discrimination standard in section 19 of that Act, and which is incorporated into the Human Rights Act in section 20L, states:

> *(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 purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.*

The grounds of discrimination in the Human Rights Act are:

- Sex
- Marital status
- Religious belief
- Ethical belief
- Colour
- Race
- Ethnic/national origin
- Disability
- Age
- Political opinion
- Employment status
- Family status
- Sexual orientation

A more detailed definition of these grounds is set out in **Appendix 2**.

Section 19 of the Bill of Rights Act does not define "discrimination". It is therefore useful to look to the ways the courts have interpreted the term. Taking into account the leading decisions of the New Zealand and Canadian courts on the meaning of "discrimination"[7], the key questions in assessing discrimination under our Bill of Rights Act are:

1. **Is there a distinction based on one of the prohibited grounds of discrimination?**

2. **Does this distinction involve disadvantage to the person or group?**

1. Is there a distinction based on one of the prohibited grounds of discrimination?

The prohibited grounds of discrimination are set out in Appendix 2. In identifying potential discrimination, you should bear in mind that discrimination can arise <u>directly</u> (for example, a provision in an Act that explicitly advantages men in relation to women) and <u>indirectly</u>[8] (for example, a practice that does not necessarily refer to or make

[7] *Quilter v Attorney-General* [1998] 1 NZLR 523; *Egan v Canada* (1995) 124 DLR (4th) 609; *Law Society of British Columbia et al v Andrews* [1989] 1 SCR 143; *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497; *M v H* [1999] 2 SCR 577; *Lovelace v Ontario* [2000] SCC 37. Please Note: Some cases suggest that at this stage it may be asked whether the difference of treatment is justifiable differentiation and not discrimination, but when developing policy it is probably best to adopt the approach outlined in these Guidelines.

[8] *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218.

distinctions on the basis of sex but uses criteria that favour men over women, such as physical fitness requirements more easily met by men).

The key thing to look for with discrimination which arises indirectly is a disproportionate impact of a provision or practice on a group that is protected by one of the grounds of discrimination. Unlike Part II of the Human Rights Act, section 19 of the Bill of Rights Act treats discrimination all the same regardless of whether it arises directly or indirectly. Indirect discrimination should be considered under section 5 of the Bill of Rights Act in the same way as direct discrimination.

Discrimination can also arise on more than one ground. For example, policies which consider persons under 20 years of age to be "minors" and treat such persons aged 16 to 19 years differently from adults (unless the minor is married) raise discrimination issues on the grounds of age and marital status.

Further, because same-sex couples cannot marry the partner of their choice, such policies may also raise discrimination issues on the ground of sexual orientation. Another example would be provided by a health programme aimed at men in one specific racial group which may raise discrimination issues on the grounds of both sex and race. Discrimination can also arise intra-ground, for example, with different services provided to people with disabilities, according to the nature of their disability.[9]

2. Does this distinction involve disadvantage to the person or group?

The second and important question under section 19(1) concerns whether the distinction involves disadvantage. This is because simply differentiating between persons or groups will not by itself amount to discrimination. Clearly, different treatment between persons or groups can have either a positive or a negative effect. Therefore, the element of disadvantage, suffered by person(s) protected by one of the grounds of discrimination, is required. Under the Bill of Rights Act it is immaterial whether this disadvantage has already occurred or whether it is being assumed that it will occur as a result in the future.

If the answers to the two above questions under section 19(1) are yes, then the legislation, policy, practice, or service gives rise to a *prima facie* (on the face of it) issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the legislation, policy, practice, or service then needs to be justified under section 5 of the Bill of Rights Act. However, you should first consider whether the measure can be considered one in "good faith" under section 19(2) of the Bill of Rights Act.

[9] As at January 2002, there have been no New Zealand cases on intra-ground discrimination, although the Canadian Supreme Court has considered the issue and found intra-ground discrimination possible (see, for example, *Lovelace v Ontario* 2000 SCC 37).

STEP FOUR

Is this affirmative action?

Section 19(2) of the Bill of Rights Act 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 … do not constitute discrimination.*

The reason for section 19(2) is that sometimes the effects of discrimination require specific policies or programmes in order for those effects to be addressed – for example, where discrimination has resulted in one group being under-represented in education out of proportion to their relative population in New Zealand as a whole or in the particular local community. These are sometimes referred to as "affirmative action", or "positive discrimination" policies or programmes.

A technical difficulty in applying section 19(2) can be that it requires the subject of the affirmative action to first have been the sufferer of discrimination on the grounds in the Human Rights Act. In other words, there is a requirement that the assisted group first be disadvantaged because of discrimination. A problem arises because it may not always be possible to establish actual discrimination against this assisted group, in other words, to match up the group who has suffered discrimination with the group being targeted by the affirmative action measure. This might be the case where, for example, a particular age bracket or ethnic group may be underrepresented in a certain activity by reason of general social disadvantage, but that disadvantage may not be directly connected to particular discriminatory acts.

In looking at whether a provision in legislation, a policy, practice, or service is an affirmative action measure under section 19(2) of the Bill of Rights Act, you will need to consider the following questions:

- Is your legislation, policy, practice, or service shaped this way because it is aimed at assisting or advancing people who are disadvantaged by discrimination?
- If it is an affirmative action measure, what is the nature of the disadvantage suffered by the group?
- Is there any evidence to support the existence of that disadvantage and that it was caused by discrimination?
- How will your legislation, policy, practice, or service assist in addressing that disadvantage?
- Can you measure the results of your action? For example, can you say whether, to date, it has been successful in assisting or advancing persons who have been disadvantaged by discrimination?

For example, if there was a proposal to provide special assistance to a group historically excluded from a given area of activity, such as women in some areas of the armed forces, it may be possible to identify actual discrimination that an affirmative action measure under section 19(2) would remedy. In contrast, a proposal to provide assistance to a group who have not been excluded from a given area of activity but are underrepresented for other reasons, for example male primary school teachers, may not involve actual discrimination and would not, therefore, fall within section 19(2).

If you can demonstrate that your legislation, policy, practice, or service is an affirmative action measure, then it will not be discrimination under the Bill of Rights Act. However, due to the complexities in applying section 19(2), we suggest that you always consult your legal adviser when considering whether section 19(2) might be applicable to your legislation, policy, practice, or service.

If your proposed legislation, policy, practice, or service is not an affirmative action measure, then you will need to continue to Step Five of the Checklist.

STEP FIVE

Is the discrimination justifiable?

All rights and freedoms contained in the Bill of Rights Act, including the right to freedom from discrimination in section 19(1), need to be balanced with competing interests and responsibilities. Therefore, they may be subject to reasonable limitations. A balancing exercise is needed in assessing what reasonable limits are possible. Section 5 of the Bill of Rights Act, which is incorporated into the Human Rights Act in section 20L(2)(b), provides:

> *Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

Put simply then, the section 5 test means that once you have decided that there is *prima facie* (on the face of it) discrimination under section 19(1), you must decide whether that limitation on the right to freedom from discrimination can be "demonstrably justified in a free and democratic society". If it fails this test, then the legislative provision, policy, practice, or service is inconsistent with section 19 of the Bill of Rights Act and so will be discrimination within the meaning of Part 1A of the Human Rights Act.

What does "demonstrably justified" mean?

Where a legislative provision, policy, practice, or service appears to be inconsistent with the right to be free from discrimination, it is up to you or your agency to establish how that inconsistency is justified under section 5 of the Bill of Rights. That means justifying your policy or proposed law with evidence such as research, empirical data, findings from consultation, reports or the results of inquiries or reviews. As with any good policy development, it is important not to act on assumptions, but to provide a well-argued case, based on high quality analysis and research, that clearly establishes why a particular course of action is necessary.

What does "free and democratic society" mean?

There is some guidance available from the Courts on what the phrase "free and democratic society" means. For example, the Canadian Supreme Court in *R v Oakes*[10], interpreting a similar provision in the Canadian Charter, said that some of the core principles and values of a free and democratic society include:

- Respect for the inherent dignity of the human person;
- Commitment to social justice and equality;
- Accommodation of a wide range of beliefs;
- Respect for cultural and group identity;
- Faith in social and political institutions which enhance the participation of individuals and groups in society.

[10] *R v Oakes* [1986] 15 CR 103.

How to apply section 5 of the Bill of Rights Act

The New Zealand Court of Appeal, in *Moonen v Film & Literature Review Board,*[11] has developed a set of guidelines for assessing whether any limitation imposed on a right or freedom affirmed by the Bill of Rights Act is "demonstrably justified" in terms of section 5 of the Act. In *Moonen*, the Court of Appeal set out the relevant process as follows:

- first identify the objective which the legislature was endeavouring to achieve by the provision in question;
- assess the importance and significance of that objective;
- the way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective;
- the means used must also have a rational relationship with the objective;
- in achieving the objective there must be as little interference as possible with the right or freedom affected;
- the limitation involved must be justifiable in the light of the objective.

In essence, the inquiry under *Moonen* can be seen as a two-step test:

- **first,** whether the provision, policy, practice, or service in question serves an important and significant objective; and
- **second,** whether there is a rational and proportionate connection between that objective and the provision, policy, practice or service, or whether the objective may be achieved in another way which interferes less with the right or freedom affected.

It is important to realise that this test is not simply a mechanical or mathematical exercise. The balancing required by section 5 means that advisers and others working in the public sector must exercise their judgement in weighing the various elements of this test. Sufficient justificatory material must be put forward to satisfy each question in turn – in other words, it is very much a case of '[s]he who asserts must prove'.

In all cases where you are unsure, you should check with your legal advisers, the Ministry of Justice, or another of the agencies referred to in Appendix 3.

1. Does the legislation or policy in question serve an important and significant objective?

Good quality policy advice and service delivery will always be focused on achieving a clearly defined objective. You will need to determine what the specific objective is that you are trying to achieve in this instance and then to assess its importance and significance.

Identifying whether the goal/objective of the provision, policy, practice, or service is significant and important is best approached as a matter of common sense – that is, what seems significant and important to you. There is some direction available. The New Zealand Courts have said that they will look to see whether the "concerns are pressing

[11] *Moonen v Film & Literature Review Board* [2000] 2 NZLR 9.

and substantial in a free and democratic society".[12] The Canadian Supreme Court has further added that:

> "the standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain …protection".[13]

For objectives in the criminal law, the Canadian Supreme Court in *Zundel v R*[14] has commented that if the:

> "content-free goal of protecting the public from harm could constitute a pressing and substantial objective, virtually any law would meet the first part of the onus imposed by the Crown under section 1 [which is the equivalent Charter provision to our section 5]. Justification under section 1 requires more than a general goal of protection from harm common to all criminal legislation, it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees."

If the objective is not clear then you will need to reconsider what you are doing and try to articulate the objective more precisely. If the objective is clear, but does not seem to be important or significant, you will need to think about whether there are other ways to achieve the objective without limiting the right to be free from discrimination (see the discussion on Options under Step 6 in these guidelines).

If the goal/objective does appear to be important and significant, you can proceed to the next question of the inquiry to be made under section 5 of the Bill of Rights Act.

2. Is there a rational and proportionate connection between that objective and the legislative provision, policy, practice, or service, or can the objective be achieved in another way which interferes less with the right or freedom affected?

At the heart of this element of section 5 is the concept that it is important not to use a legislative or policy sledgehammer to crack a nut. This means that how you achieve your policy objective must be rationally connected *and* proportionate to that objective.

For example, if the policy objective is aimed at minimising the risk of the spread of infectious diseases such as HIV and TB, but the legislation or policy only focuses on refugees who are at risk of those diseases and proposes that they be detained indefinitely, there may be little rationality and no proportionality between your objective and the means used to achieve it. In that case the policy would not address all the other means by which infectious diseases could be spread, meaning the policy objective was unlikely to be achieved. In addition, the power to detain individuals indefinitely seems out of proportion to risk of the spread of such diseases, given the many other ways to manage that risk and which could be taken in respect of all people, not simply those who are refugees.

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[12] *Ministry of Transport v Noort* [1992] 3 NZLR 260, citing the Canadian Supreme Court in *Reference re Public Service Employee Relations Act* [1987] 1 SCR 313, 373 to 374, in which the Chief Justice of Canada summarised the essential ingredients of the enquiry.
[13] Dickson CJ in *R v Oakes* (1986) 26 DLR (4th) 200 SCC.
[14] *Zundel v R* [1992] 2 SCR 731.

As a rule, while it is reasonable to take into account economic issues, you should not rely upon a resource issue alone to justify the rationality or proportionality aspects of section 5. The Canadian Supreme Court has said that economic concerns are not, by themselves, sufficient to justify a limitation on the rights and freedoms in the Canadian Charter of Rights.[15] To date, the New Zealand Court of Appeal has not specifically considered whether an economic argument alone is sufficient at any stage in the section 5 justification process under the Bill of Rights Act. It has, however, stated that economic concerns are one of the several factors to take into account. In *Moonen v Film & Literature Review Board*[16] the Court held that social, legal, moral, economic, administrative, ethical and other considerations may be relevant.

The following is a list of the sorts of questions you should ask yourself in assessing whether the means used to achieve the objective (namely, the legislative provision, policy, practice or service you are dealing with), are rationally connected and proportionate to that objective:

- Is your legislation, policy, practice, or service shaped this way because of a requirement of law, or because of a public sector requirement? For example, does it comply with health and safety legislation, or with relevant State Service Commission guidelines, or with an international standard?
- Do you have any empirical evidence that supports the need for your legislation, policy, practice, or service to discriminate in this way, rather than in a more rational and proportionate way?
- To what extent is cost a factor in your determining the chosen means? Remember that while cost or resource implications can be taken into account, they are unlikely by themselves to provide sufficient reason for limiting the right to be free from discrimination. For example, have some changes been made to accommodate disabled people, but is the cost of further changes considered prohibitive?
- What else could you or your agency do to prevent or remove the discrimination in this policy or practice?
- Do you need to make the distinction based on a ground of discrimination in order to achieve this objective? For example, could you simply amend your policy to avoid making the distinction and still meet your overall objective?

What does "Prescribed by Law" mean?

Section 5 provides that limitations on section 19 of the Bill of Rights Act (and the other rights in the Bill of Rights Act) must be "prescribed by law", in short, it must be accessible and ascertainable for all. Clearly "laws" in New Zealand can be found in numerous places, such as for example, legislation, regulations, codes of practice, and common law. However "prescribed by law" does not mean just these specific sources. For something to be "prescribed by law" it needs to have the following four factors:[17]

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[15] *Singh et al v Minister of Employment and Immigration* [1985] 1 SCR 177, at 218 to 220; *R v Lee* [1989] 2 SCR 1384 at 1420 Wilson J dissenting; See also Hogg Peter *Constitutional Law of Canada* 1997 Looseleaf edition Vol 2, at 35.9.

[16] *Moonen v Film & Literature Review Board* [2000] 2 NZLR 9, at 17. Likewise, in *Ministry of Transport v Noort* [1992] 3 NZLR 260, at 283, Richardson J (as he then was) of the Court of Appeal noted that "section 5 will properly involve consideration of all economic, administrative and social implications".

[17] As set out in the European Court of Human Rights decisions *Malone v United Kingdom* 2 August 1984, Series A, No 82, 7 EHRR 17 at paragraph 66; *The Sunday Times v United Kingdom* 26 April

- The "law" can be **written or unwritten;**
- It must have some **basis in domestic, that is, New Zealand law;**
- It must be **adequately accessible**. In general, a person can only be expected to comply with a law if they can find out what the law actually is – what legal rules apply in a given situation. So you will need to think about where the policy, regulation, or law is to be published or publicised and just how available it will be to the public;
- Be expressed with **sufficient precision**. A clear and well-defined law, policy, or practice will make it easier for a person to comply with it and to foresee or to find out what the consequences of their actions will be, which means it is more likely the aims or objectives of the law or policy will actually be achieved. It will also help officials to know exactly what they are supposed to do. So you will need to think about how detailed the law, policy, or practice should be.

In other words, identifying limits "prescribed by law" under section 5 of the Bill of Rights Act, involves looking to the substance rather than form of the legislation, policy, practice, or service in question. The reason is to make sure that where the government limits a right or freedom, it does so on a clear and transparent basis.

Summary under Step Five

If you are able to answer the two questions under section 5 adequately, the result is likely to be that the limitation on the right to freedom from discrimination is justifiable under section 5 and will, therefore, not be discrimination under Part 1A of the Human Rights Act. This means that the non-discrimination standard in the Bill of Rights Act will have been met and you can proceed to implement the legislation, policy, practice, or service.

However, if you are not able to justify the limitation on the freedom from discrimination,[18] the limitation will be inconsistent with section 19 of the Bill of Rights Act and will be discrimination under Part 1A of the Human Rights Act. In this case you will need to proceed to Step Six of these guidelines.

1979, Series A, No 30, 2 EHRR 245 at paragraphs 46, 47 and 49. See also the following cases which uphold the ECHR approach: Canadian Supreme Court decisions of *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606; *R v Thomsen* [1988] 1 SCR 640; *R v Therens* [1985] 1 SCR 613; *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 (on 'prescribed by law' in relation to statutory conferrals of discretion); New Zealand Court of Appeal *Ministry of Transport v Noort* [1992] 3 NZLR 260. In that last case, the operational requirements of the law have been held to be covered by the term "prescribed by law".

[18] Or the limitation on the freedom from discrimination is not "prescribed by law".

STEP SIX

What to do if you find discrimination under Part 1A of the Human Rights Act

The possible consequences of discriminatory legislation, policies, practices and services include:

- A non-compliance statement in Cabinet papers;
- A report by the Attorney-General to the House of Parliament under section 7 of the Bill of Rights Act – only in relation to legislation;
- An inquiry by the Human Rights Commission;
- A complaint to the Human Rights Commission – with the necessity of participating in dispute resolution processes;
- A case before the Human Rights Review Tribunal or the Courts – with the possible award of a range of remedies;
- A declaration of inconsistency by the Human Rights Review Tribunal or the Courts – only in relation to legislation, such a declaration will require the Government to prepare a report to Parliament setting out what it intends to do in response to the declaration; and
- Review of regulations by Regulations Review Committee.

Options: What to do if there is discrimination

If you are not able to support the need to limit the right to freedom from discrimination (in other words, to justify a discriminatory legislative provision, policy, practice or service), there are several things that you can do:

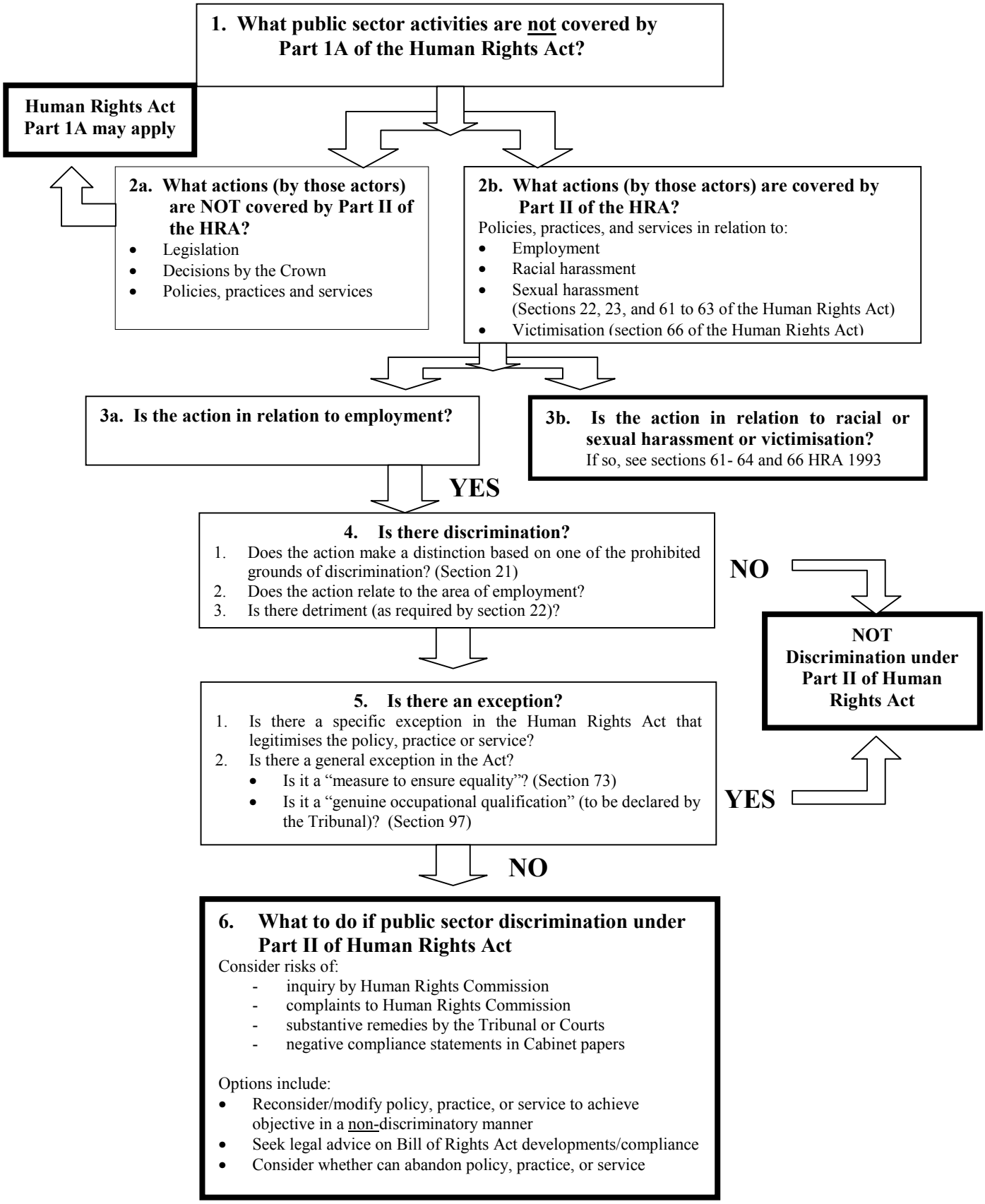
- Modify your legislation, policy, practice, or service so that you can achieve your objective in a non-discriminatory manner or a way that can be justified in terms of section 5 of the Bill of Rights Act;

- Seek legal advice on compliance, and whether there have been new developments in Bill of Rights Act cases that might help you work out how to comply with the Act;

- Consider whether you or your agency really needs this legislation, policy, practice, or service or whether it should be abandoned altogether.

CHECKLIST – Applying the Human Rights Act Non-Discrimination Standard

(as set out in Part II of the Human Rights Act)



Employment Discrimination, Racial Disharmony, Sexual and Racial Harassment, and Victimisation under Part II of the Human Rights Act

The six steps for applying the Human Rights Act non-discrimination standard, in Part II of the Act, to the public sector, are as follows:

STEPS 1 AND 2a

See the relevant discussion under Steps 1 and 2 of the Bill of Rights Act non-discrimination standard.

STEP 2b

What actions by the public sector are covered by Part II?

Part 1A of the Human Rights Act sets out the non-discrimination standard for the public sector. However, Part 1A will not apply to public sector policies, practices, and services in the employment area, or to public sector policies, practices, and services that result in racial disharmony, sexual or racial harassment, or victimisation. The non-discrimination standard applied in these situations is the same as that currently applied to the private, non-government sector under Part II of the Human Rights Act. Accordingly, the relevant non-discrimination obligations are set out in sections 22, 23 (discrimination in employment matters), 61 (racial disharmony), 62 (sexual harassment), 63 (racial harassment) and 66 (victimisation).

It is important to acknowledge that the provisions in Part II of the Human Rights Act take a different approach to discrimination than Part 1A. Accordingly, careful attention should be paid to the actual wording of the particular provisions referred to above and consultation with your legal adviser is recommended when issues arise.

While these guidelines contain a more detailed checklist relating to discrimination in the employment area, there is only a brief discussion of racial disharmony, sexual harassment, racial harassment, and victimisation as they are unlikely to result from public sector policies and practices. However, advisers should be familiar with the provisions relating to discrimination in employment and these other forms of discrimination and should contact the Human Rights Commission for more detailed educational material or information on these non-discrimination obligations.

STEPS 3a and 3b

Is the action in relation to racial or sexual harassment or victimisation?

For information see pages 35 to 37.

Is the action in relation to employment?

"Employment" covers, for example, procedures for employment, employment agreements, conditions of employment. (Sections 22 and 23 of the Human Rights Act refer.)

STEP 4

Is there discrimination?

The following is a brief checklist for advisers to use when considering any proposed public sector policies, practices, or services in the area of employment for consistency with the Part II of the Human Rights Act 1993.

In contrast to the "justified limitation" approach taken in the Bill of Rights Act non-discrimination standard in Part 1A, the basic "formula" for determining discrimination in the area of employment under Part II of the Human Rights Act is to look for:

1. Distinction based on one of the grounds in the Human Rights Act (as set out in section 21 of the Human Rights Act)

2. In the area of employment under the Human Rights Act (as set out in sections 22 and 23 of the Human Rights Act)

3. Actual or Assumed Detriment (as required in section 22 of the Human Rights Act)

1 + 2 + 3 = DISCRIMINATION

No exception applies or not a genuine occupational qualification (under sections 24 to 35, 65, 73 or 97)

= UNLAWFUL DISCRIMINATION

1. Is there a distinction based on one of the grounds in the Human Rights Act?

The relevant questions are:

- Does the policy, practice or service **directly** identify a particular group of persons for different treatment? If so, does that group of persons fit one of the following prohibited grounds?

  - Sex
  - Marital status
  - Religious belief
  - Ethical belief
  - Colour
  - Race
  - Ethnic/national origins
  - Disability
  - Age
  - Political opinion
  - Employment status
  - Family status
  - Sexual orientation

The full grounds are set out in section 21 of the Human Rights Act (and also in **Appendix 2)**.

OR

- Does the policy, practice, or service appear neutral, yet have an **indirect,** disproportionate effect on a particular group of persons? Section 65 concerns this indirect discrimination – it provides that such discrimination is unlawful unless there is "good reason". This can be when a seemingly benign requirement has a disproportionately adverse effect on a particular person or group of people. If this is the case, you should inquire whether that person or group of persons fits one of the above prohibited grounds. For example, height restrictions which appear to apply equally to all may indirectly discriminate against women because they tend to be shorter than men. Similarly, certain fitness requirements may indirectly discriminate by reason of sex, age, or disability.

2. Does the policy, practice, or service relate to employment?

The relevant questions are:

- Does the different treatment in the public sector activity, or proposed activity, relate to employment policies, practices, or services that are covered by sections 22 and 23 of the Human Rights Act?

(It should be noted that if the policy, practice, or service is not something that is covered by sections 22 and 23, then Part 1A would apply.)

3. Actual or Assumed Detriment

In most of the areas covered by the Act, **actual** detriment must be established before an action can be said to contravene the Human Rights Act. For example, in section 22(1)(b), a complainant must show that they were offered "less favourable terms of employment" before that action can be found to have breached the Human Rights Act. Note that intention is not relevant – the question is how others see your actions.

However, in a few of the areas covered by the Human Rights Act, there is an underlying **assumption** that some behaviour always leads to a disadvantageous outcome. In these areas, particular behaviour may breach the Act even though a complainant may be unable to show that they have **actually** been disadvantaged by that behaviour. So, for example, section 22(1)(a) of the Act assumes that the refusal to employ a qualified person on the basis of one of the prohibited grounds will, in every case, be disadvantageous to the refused person.

Because the Act has an underlying **assumption** that some behaviour always causes disadvantage, a policy or practice may fulfil the three elements of discrimination required by the Act (differentiation on the basis of a prohibited ground, in an area covered by the Act, causing actual or assumed detriment) even though the policy is not **actually** detrimental to anyone. Accordingly, once you have established that a proposed policy or practice differentiates between people on the basis of a prohibited ground (as defined by the Act), in the employment area, **it is very important that you look at the requirements of the relevant section(s) regarding "detriment" or seek legal advice as to the policy's compliance with the Act.**

The relevant questions are:

- Does the policy, practice, or service **actually** lead to detriment by creating benefits or disadvantages only for a particular group or groups? Is another group treated more or less favourably?

OR

- Does the policy, practice, or service lead to an outcome which the Act **assumes** is detrimental? You may have to consult the Act or your legal adviser to answer this question.

If you answered "yes" **to any of the questions under each of the headings 1, 2, and 3 above, then the employment policy, practice, or service you are considering is "discriminatory".**

You should now consider whether any exceptions or justifications are relevant.

STEP 5

Is there an exception?

Having established that a policy, practice, or service amounts, on its face, to discrimination in terms of the Human Rights Act, the next step is to consider whether an exception applies and the policy, practice, or service is thereby lawful.

The Act provides a number of exceptions that, once satisfied, have the effect of legitimising otherwise unlawful discrimination. In the case of a policy, practice, or service, the onus of proving that a particular exception applies will lie with the government department that developed the policy, practice or service. Accordingly, **if you intend to rely on an exception to legitimise a discriminatory policy, practice, or service, you should ensure that you can satisfy all the elements of that exception.**

The relevant questions are:

- Is there a **specific** exception in the Act which legitimises the particular policy, practice, or service? The Act contains many specific exceptions. You will need to check whether any are relevant to your proposal. In relation to employment matters, consideration should be given to sections 24 to 35 of the Act.

OR

- Does one of the **general** exceptions in the Act legitimise the policy, practice, or service?

- Is the policy, practice, or service a **"measure to ensure equality"**? (Section 73 refers.)

Anything done or omitted that would otherwise be discriminatory is lawful if it is done or omitted in "good faith" for the purpose of assisting or advancing a person or group of persons, where those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place in society with other members of the community. The courts, in interpreting this exception, have required the identification of a similar (as opposed to broad) comparator group against whom those assisted can be assessed, in order to determine whether reasonable assistance was necessary. For example, when considering a commercial fishing training scheme which provided places specifically for Māori and Pacific Island students, the Complaints Review Tribunal looked to non-Maori and Pacific Island persons wanting to take the course or to pursue careers in the fishing industry as the appropriate comparator group.[19]

- Is the policy, practice, or service a **genuine occupational qualification** (Section 97 refers.) Consider whether:
    - the discrimination is a result of a policy which is imposed honestly and in good faith
    - the person seeking to rely on the exemption has a sincerely-held belief that discrimination is demonstrably justified in the circumstances
    - the policy or practice has not been introduced for any ulterior or extraneous reasons aimed at defeating the purposes of the Human Rights Act
    - the extent of the effect of the discrimination on the relevant group or groups
    - the parameters of the group sought to be discriminated against
    - the nature and extent of the benefit to the general community of the discriminatory policy or practice.[20]

OR

- If the policy, practice, or service is **indirectly discriminatory** (that is, if section 65 applies as described on page 31) then do you have "**good reason"** for it? Remember that Courts tend to interpret any exceptions to the Human Rights Act *restrictively*. Consider, for example, whether:
    - the policy meets a genuine need of the enterprise;
    - the policy is suitable for attaining the objective pursued by the enterprise;
    - the policy is necessary for that purpose.

If you answered "yes" **to any of the above questions under 4, it is likely that the employment policy, practice, or service you are examining complies with Part II of the Human Rights Act 1993. You should seek confirmation of this from your legal adviser.**

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[19] *Amaltal Fishing Company Ltd v Nelson Polytechnic* [1996] NZAR 97.
[20] *Avis Rent A Car Ltd v Proceedings Commissioner (Human Rights Commission)* CRT 28/97 (16/98).

If you answered "no" **to all of the above questions, you will need to consider what steps you can take next, as set out below.**

STEP 6

What to do if you find that a policy, practice or service is discriminatory and is not saved by an exception

- Reconsider what the aims and objectives of the policy, practice, or service are, and how the proposal you have made relates to those aims or objectives. Could the aims and objectives be achieved in another, non-discriminatory manner?

- Ensure that you have an accurate and complete definition of the objectives of the policy, practice, or service.

- Consult with others and look for other policies, practices, or services which achieve similar aims in a non-discriminatory manner.

- Consider splitting the policy, practice, or service into a number of separate strategies that achieve the same result as the original proposal, but more effectively address the different needs and experiences of target groups.

- Consult with groups representing those potentially affected.

OR

- Consider advising, or having discussions with the State Services Commission.

- Ensure that before you approach the State Services Commission, you have confirmed your view of the Human Rights Act implications of your policy, practice, or service with your legal adviser.

- Consider abandoning the proposed policy, practice, or service. Departments should consider why the proposed policy, practice, or service is necessary, and whether it is essential. If it isn't essential, then perhaps it was an undesirable policy, practice, or service in the first place.

Racial Disharmony

Those working in the public sector remain covered by the law on racial disharmony as set out in the Human Rights Act. Section 61 of the Human Rights Act provides that it will be unlawful to publish, broadcast, or publicly state any threatening, abusive or insulting matter or words that are likely to excite hostility against or bring into contempt any group of persons in (or who may be coming to) New Zealand on the ground of colour, race, or ethnic or national origins of that group of persons. The section excludes newspapers, magazines, periodicals, radio, television, etc, when reporting this type of behaviour by others.

Racial Harassment

Those working in the public sector remain covered by the law on racial harassment as set out in the Human Rights Act. Section 63 of the Human Rights Act defines racial harassment as behaviour that is uninvited and that humiliates, offends, or intimidates someone because of their race, colour, or ethnic or national origin. In general the behaviour must be repeated, although significant behaviour that has a very detrimental effect on a person, even if only a single incident, may be racial harassment.

Racial harassment does not need to be intentional – the most important aspect is how the person at whom the behaviour is directed is affected. The Human Rights Act stipulates that racial harassment can occur in any of the areas of life to which the Act applies (such as employment, education, access to public places, access to goods and services, or access to land, accommodation or housing).

Racial harassment can involve:

- Mimicking the way a person speaks
- Making jokes about their race
- Calling them racist names.

Both racial harassment and racial disharmony can be addressed under the Employment Relations Act 2000 (as a personal grievance against an employer within 90 days of the incident) or under the Human Rights Act 1993 (as a complaint whether against an employer or some other person if the complaint is lodged up to 12 months after the incident).

A variety of remedies are available under the Human Rights Act for racial harassment including a declaration that the Act has been breached, restraining orders, an apology, reimbursement of lost wages and compensation (including damages for humiliation and pecuniary loss).

Sexual Harassment

Those working in the public sector also remain covered by the law on sexual harassment in the Human Rights Act. The following is a brief summary of what sexual harassment is

and the available remedies. Section 62 of the Human Rights Act defines two types of sexual harassment:

(a) requests for sexual contact or activity with an implied or overt promise of preferential treatment or threat of detrimental treatment if the request is refused;
(b) behaviour of a sexual nature that is unwelcome or offensive and which is either repeated or of such a significant nature that it has a detrimental effect on another person.

In both cases the harassment must take place in one of the areas of life to which the Act applies (such as in employment, education, access to public places, access to goods and services, or in access to land, accommodation or housing).

Sexual harassment can involve:

- Personally sexually offensive comments
- Sexual jokes
- Repeated comments about a person's alleged sexual activities or private life
- Offensive hand or body gestures
- Physical contact such as patting, pinching, or touching
- Following someone home from work
- Provocative posters with a sexual connotation
- Sexual assault and rape.

Sexual harassment can be dealt with under the Employment Relations Act 2000 (as a personal grievance against an employer within 90 days of the incident) or under the Human Rights Act 1993 (as a complaint whether against an employer or some other person). In serious cases the matter may also be referred to the Police.

A variety of remedies are available under the Human Rights Act for sexual harassment, including a declaration that the Act has been breached, restraining orders, an apology, reimbursement of lost wages and compensation (including damages for humiliation and pecuniary loss).

Victimisation

Those working in the public sector remain covered by section 66 of the Human Rights Act. Section 66 of the Human Rights Act provides that it shall be unlawful to treat, or to threaten to treat, any other person less favourably:

- On the ground that that person, or any relative or associate of that person, makes use of, or promotes the use of, rights or procedures under the Human Rights Act 1993 or makes or intends to make a disclosure under the Protected Disclosures Act 2000; or

- On the ground that the person, or any relative or associate of that person, intends to make use of, or promote the use of, rights or procedures under the Human Rights Act 1993 or under the Protected Disclosures Act 2000.

This provision will not protect those persons who knowingly make false allegations or otherwise act in bad faith.

What happens if a complaint is made to the Human Rights Commission?

Amendments to the Human Rights Act introduce new procedures for resolving disputes about discrimination, sexual and racial harassment, racial disharmony, and victimisation. These procedures apply to alleged breaches of both Part 1A and Part II of the Act. The new procedures are intended to achieve timely resolution of disputes by mediation and other means, by the Human Rights Commission. When a dispute cannot be so resolved, a binding decision can be sought from and enforced by the Human Rights Review Tribunal.

Implications for those in the public sector

These new complaints processes have significant implications for those working in the public sector. Where a complaint is made to the Human Rights Commission about the actions of a person or agency in the public sector, policy makers will be required to account for their policy work and decisions. This means that quality policy decisions need to have a good audit trail. Policy advisers should, therefore, keep good records of their policy analysis and legislative drafting work and clearly track policy decisions. The change in focus of the complaints system to a mediation or conciliation one, also means that parties to complaints will be expected to co-operate to ensure that complaints are resolved as quickly and fairly as possible.

Remedies

If the matter is not resolved through mediation and conciliation by the Human Rights Commission, it may proceed to the Human Rights Review Tribunal, which may award the following remedies where it finds unjustified discrimination:

- A declaration that a breach of the Human Rights Act has occurred;
- An order restraining the breach;
- Damages (monetary compensation) against the person or agency who committed that breach;
- An order that a person or agency act in a particular way to redress any loss or damage suffered; and
- In respect of legislation, a declaration that there has been an inconsistency with the Bill of Rights Act (and, therefore, a breach of Part 1A of the Act) in relation to a public sector agency. Where a declaration of inconsistency is made, the declaration must be drawn to the attention of Parliament by the Minister in whose portfolio the discrimination has been found, along with the Executive's response to that declaration.

For more information on dispute resolution processes and the role of the Human Rights Commission, contact the Human Rights Commission (for contact details see Appendix 3).

Appendix 1 – New Zealand Bill of Rights Act 1990

1. **Short Title and commencement—**
   (1) This Act may be cited as the New Zealand Bill of Rights Act 1990.
   (2) This Act shall come into force on the 28th day after the date on which it receives the Royal assent.

PART I - GENERAL PROVISIONS

2. **Rights affirmed—**
   The rights and freedoms contained in this Bill of Rights are affirmed.

3. **Application—**
   This Bill of Rights applies only to acts done—
   (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
   (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

4. **Other enactments not affected—**
   No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
   (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
   (b) Decline to apply any provision of the enactment—

   by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. **Justified limitations—**
   Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. **Interpretation consistent with Bill of Rights to be preferred—**
   Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

7. **Attorney-General to report to Parliament where Bill appears to be inconsistent with Bill of Rights—**
   Where any Bill is introduced into the House of Representatives, the Attorney-General shall,—
   (a) In the case of a Government Bill, on the introduction of that Bill; or
   (b) In any other case, as soon as practicable after the introduction of the Bill,—

bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

PART II - CIVIL AND POLITICAL RIGHTS

Life and Security of the Person

8. **Right not to be deprived of life—**
No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

9. **Right not to be subjected to torture or cruel treatment—**
Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

10. **Right not to be subjected to medical or scientific experimentation—**
Every person has the right not to be subjected to medical or scientific experimentation without that person's consent.

11. **Right to refuse to undergo medical treatment—**
Everyone has the right to refuse to undergo any medical treatment.

Democratic and Civil Rights

12. **Electoral rights—**
Every New Zealand citizen who is of or over the age of 18 years—
(a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
(b) Is qualified for membership of the House of Representatives.

13. **Freedom of thought, conscience, and religion—**
Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

14. **Freedom of expression—**
Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

15. **Manifestation of religion and belief—**
Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

16. **Freedom of peaceful assembly—**
Everyone has the right to freedom of peaceful assembly.

17. **Freedom of association—**
Everyone has the right to freedom of association.

18. **Freedom of movement**—

(1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.

(2) Every New Zealand citizen has the right to enter New Zealand.

(3) Everyone has the right to leave New Zealand.

(4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

Non-Discrimination and Minority Rights

19. **Freedom from discrimination**—

(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 II of the Human Rights Act 1993 do not constitute discrimination.

20. **Rights of minorities**—

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.

Search, Arrest, and Detention

21. **Unreasonable search and seizure**—

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

22. **Liberty of the person**—

Everyone has the right not to be arbitrarily arrested or detained.

23. **Rights of persons arrested or detained**—

(1) Everyone who is arrested or who is detained under any enactment—

(a) Shall be informed at the time of the arrest or detention of the reason for it; and

(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and

(c) Shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.

(2) Everyone who is arrested for an offence has the right to be charged promptly or to be released.

(3) Everyone who is arrested for an offence and is not released shall be brought as soon as possible before a court or competent tribunal.

(4) Everyone who is—

(a) Arrested; or

(b) Detained under any enactment—

for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.

(5) Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.

24. **Rights of persons charged**—

Everyone who is charged with an offence—

(a) Shall be informed promptly and in detail of the nature and cause of the charge; and

(b) Shall be released on reasonable terms and conditions unless there is just cause for continued detention; and

(c) Shall have the right to consult and instruct a lawyer; and

(d) Shall have the right to adequate time and facilities to prepare a defence; and

(e) Shall have the right, except in the case of an offence under military law tried before a military tribunal, to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for more than 3 months; and

(f) Shall have the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for that assistance; and

(g) Shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.

25. **Minimum standards of criminal procedure**—

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

(a) The right to a fair and public hearing by an independent and impartial court;

(b) The right to be tried without undue delay;

(c) The right to be presumed innocent until proved guilty according to law;

(d) The right not to be compelled to be a witness or to confess guilt;

(e) The right to be present at the trial and to present a defence;

(f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution;

(g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty;

(h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both;

(i) The right, in the case of a child, to be dealt with in a manner that takes account of the child's age.

26. **Retroactive penalties and double jeopardy**—

(1) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.

(2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

27. **Right to justice—**

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

PART III - MISCELLANEOUS PROVISIONS

28. **Other rights and freedoms not affected—**

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

29. **Application to legal persons—**

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

Appendix 2 – Prohibited Grounds of Discrimination

The following grounds, listed in section 21 of the Human Rights Act and referred to in section 19 of the Bill of Rights Act, are the prohibited grounds of discrimination:

- Sex, which includes pregnancy and childbirth;
- Marital status, which means the status of being:
    - Single;
    - Married;
    - Married but separated;
    - A party to a marriage now dissolved;
    - Widowed; or
    - Living in a relationship in the nature of a marriage;
- Religious belief;
- Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions;
- Colour;
- Race;
- Ethnic or national origins, which includes nationality or citizenship;
- Disability, which means:
    - Physical disability or impairment;
    - Physical illness;
    - Psychiatric illness;
    - Intellectual or psychological disability or impairment;
    - Any other loss or abnormality of psychological, physiological, or anatomical structure or function;
    - Reliance on a guide dog, wheelchair, or other remedial means;

- The presence in the body of organisms capable of causing illness;

- Age, which means any age commencing with the age of 16 years;

- Political opinion, which includes the lack of a particular political opinion or any political opinion;

- Employment status, which means:

  - Being unemployed; or

  - Being a recipient of a benefit under the Social Security Act 1964 or an entitlement under the Accident Insurance Act 1998;

- Family status, which means:

  - Having the responsibility for part-time care or full-time care of children or other dependants;

  - Having no responsibility for the care of children or other dependants;

  - Being married to, or being in a relationship in the nature of a marriage with, a particular person; or

  - Being a relative of a particular person;

- Sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

Appendix 3 – Contacts for Assistance, Training and Legal Advice

- **Human Rights Commission**
  4th Floor, Tower Centre
  Corner Queen and Customs Street
  PO Box 6751, Wellesley Street
  AUCKLAND
  Phone: 0800 496 877 or (09) 309 0874
  Fax: (09) 377 3593
  Website: www.hrc.co.nz

- **Ministry of Justice**
  Charles Fergusson Building
  Bowen Street
  PO Box 180
  WELLINGTON
  Phone: (04) 494 9700
  Fax: (04) 494 9701
  Website: www.justice.govt.nz

- **Crown Law Office**
  St Paul's Square
  45 Pipitea Street
  PO Box 5012
  WELLINGTON
  Phone: (04) 472 1719
  Fax: (04) 473 3482
  Website: www.crownlaw.govt.nz

- **State Services Commission**
  100 Molesworth Street
  PO Box 329
  WELLINGTON
  Phone: (04) 472 5639
  Fax: (04) 472 5979
  Website: www.govt.nz/ssc

- **Ministry of Women's Affairs**
  48 Mulgrave Street
  PO Box 10 049
  WELLINGTON
  Phone: (04) 473 4112
  Fax: (04) 472 0961
  Website: www.mwa.govt.nz