

6. Discrimination and distinguishing between different groups

Unjustified discrimination causes real harm to people and stigmatises already vulnerable groups. It can also result in reputational and financial consequences for the Government. This chapter will assist in identifying where proposed legislation might result in discrimination and how it might be addressed.

Section 19(1) of NZBORA³³ affirms that everyone is entitled to be free from discrimination on the grounds set out in s. 21 of the Human Rights Act 1993³⁴:

- sex (including pregnancy and childbirth);
- disability;
- marital status;
- age (starting at 16);
- religious belief;
- political opinion;
- ethical belief;
- employment status;
- colour;
- family status;
- race;
- sexual orientation;
- ethnic origin;
- national origin.

A provision will likely limit the right to freedom from discrimination where:

- it draws a distinction on one of the prohibited grounds of discrimination; and
- the distinction involves a material disadvantage to one or more classes of individuals.

Direct discrimination will occur when a provision in legislation expressly disadvantages a group. Disadvantage includes giving an advantage to another group. Indirect discrimination occurs when a provision might not expressly give one group an advantage over another, but the effect of the provision is that one group is disadvantaged. For example, a provision that does not include any reference to a person's sex but imposes criteria such as minimum height requirements will generally disadvantage women compared to men.

The Ministry of Justice holds policy responsibility for matters related to the Human Rights Act and provides detailed guidance for the public sector on its website.³⁵

The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Human Rights Act (see paragraph 7.60(b)).³⁶

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

³³ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

³⁴ <http://www.legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html>

³⁵ <http://www.justice.govt.nz/publications/publications-archived/2002/the-non-discrimination-standards-for-government-and-the-public-sector-guidelines-on-how-to-apply-the-standards-and-who-is-covered-march-2002/the-non-discrimination-standard-for-the-public-sector>

³⁶ <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>

Guidelines

6.1. Does the legislation affect the right to freedom from discrimination in s. 19 NZBORA?

Legislation should not discriminate on one of the prohibited grounds.

The starting point is that legislation should not discriminate on any of the prohibited grounds. However, it is not unlawful to discriminate by taking steps in good faith to assist or advance those disadvantaged by discrimination (s 19(2) NZBORA).

Discrimination by a state sector organisation on a prohibited ground will be, on its face, a limit on the NZBORA right to be free from discrimination. Where the discrimination is the only means of achieving an important policy objective, clear language must be used in the legislation and the limitation must be justified in a free and democratic society (see Chapter 5). The courts will presume that Parliament has intended to legislate consistently with NZBORA and will interpret the legislation as such in the absence of clear indicators in the legislation.

Particular care should be exercised in social policy areas such as welfare, health or education, where it is often necessary to treat groups differently to achieve a positive outcome for certain groups. Early consultation with legal advisers is recommended for officials working in such areas.

The Human Rights Act also contains a number of exceptions to the right to freedom from discrimination that may be relied on by both State sector and private organisations. For example:

- it is not unlawful to discriminate in employment matters on the grounds of sex or age, where for reasons of authenticity being a particular sex or age is a genuine qualification for the job (s 27(1));
- it is not unlawful to discriminate in certain circumstances in relation to insurance (s 48) or superannuation (s 70), where the discrimination is based on actuarial or statistical data.

6.2. Have you selected the option that results in the least amount of discrimination?

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

When faced with multiple options for achieving the policy objective, the option that results in no discrimination should be selected. If that is not possible, the option that results in the least discrimination is to be preferred. Choosing the option that involves the least limitation on the right to freedom from discrimination will result in legislation that is more likely to be consistent with NZBORA.

6.3. Have you consulted the Human Rights Commission?

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

The Human Rights Commission³⁷ is an independent body that advocates and promotes respect for human rights. It has a key role in educating the public on human rights issues and in providing a service to resolve disputes and complaints.

6.4. Have you considered all the consequences of non-compliance with NZBORA?

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

The consequences that may result where legislation is inconsistent with NZBORA are described in Chapter 5.

If the Human Rights Review Tribunal³⁸ finds that a piece of enacted legislation is inconsistent with the right to freedom from discrimination, it may also grant a declaration that the legislation is in breach of the right to freedom from discrimination. The declaration does not affect the operation of the legislation, but the Minister must report the declaration to Parliament and table a response.

³⁷ <http://www.hrc.co.nz/>

³⁸ <http://www.justice.govt.nz/tribunals/human-rights-review-tribunal>