Unlawful discrimination by the government and public actors: options for redress under the Human Rights Act 1993

Catherine Rodgers, Assistant Director of Human Rights Proceedings, Office of Human Rights Proceedings

Introduction

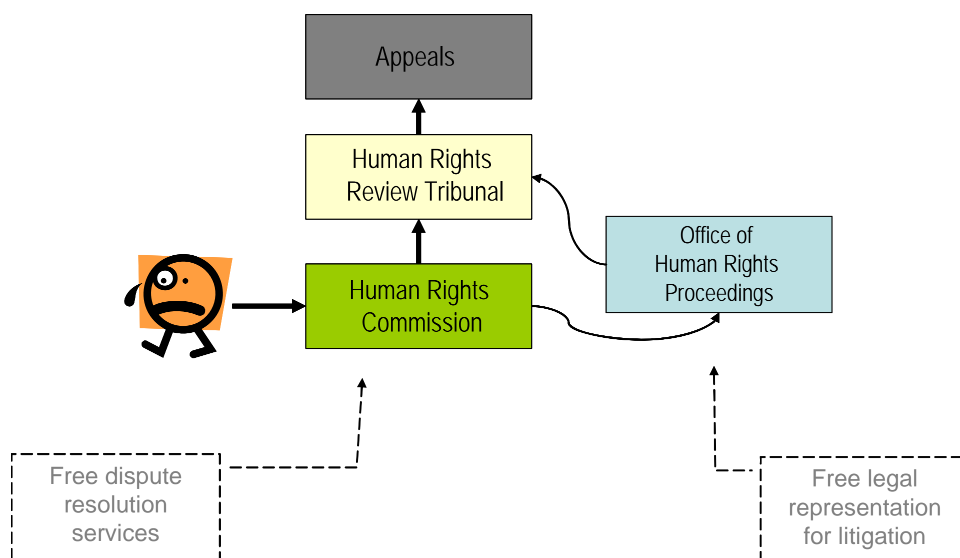
Since 1 January 2002 the activities, practices and policies of government and other public actors as well as legislation (which will be referred to collectively as public actors) have been subject to anti-discrimination provisions in the Human Rights Act 1993 (HRA).[1]

Prior to this date the actions of government and those acting on behalf of government as well as legislation were exempt from compliance with the HRA.[2] Persons and bodies in the first two categories were subject to the New Zealand Bill of Rights Act 1990 (NZBORA) which includes recognition of the right to be free from discrimination.[3] However, since 1 January 2002 the free disputes resolution processes provided by the Human Rights Commission (the Commission) have been available for complaints against public actors. The main means of resolving disputes offered by the Commission is mediation. In the 2004-2005 year the Commission received 357 complaints about the actions of public actors.[4]

Where complaints of discrimination are not able to be resolved informally by the Commission complainants can apply to the Office of Human Rights Proceedings (OHRP) for free legal representation to take legal proceedings in the Human Rights Review Tribunal (the Tribunal).

Access to free dispute resolution services and (where these fail to resolve issues) the possibility of free legal representation for litigation, apparently provide the public with a ready means of challenging any discriminatory actions by public actors.

Services available under the Human Rights Act



---

[1] Under Part 1A HRA as inserted by the Human Rights Amendment Act 2001.
[2] s 151 HRA (now repealed).
[3] s 19 NZBORA.
[4] Human Rights Commission *Annual Report 2005* p11.

Litigation as a means of seeking redress for unlawful discrimination

In many areas of law litigation is considered to be a last resort for resolving disputes because of the high cost as well as delays which are often associated with court processes. Under the HRA litigation is available only following a complaint to the Commission and following an attempt (if both parties agree) to resolve the issue by mediation.

If a complaint cannot be resolved informally the complainant can apply to the Director of the OHRP for FREE legal representation to take legal proceedings in the Tribunal. The Director does not have the resources to provide legal representation to all those who apply for it. In 2005, of 38 decisions made by the Director, legal representation was provided to five applicants.[5] One of these concerned a complaint of discrimination against the government.[6] Some applications are turned down because they do not involve discrimination issues. The Director's office cannot assist with other issues no matter how serious these may be.

The Director is required to take into account a list of factors when deciding whether to provide legal representation in any case.[7] Priority is given to cases involving systemic issues affecting large numbers of people, and/or a high level of harm, and/or significant questions of law.

Another key factor the Director is required to consider is the likelihood of success. This requires a detailed assessment of the relevant law (including case law) and the evidence which is (or may be) available. While this criterion does not prevent the Director providing legal representation for test cases he must take into account that the Tribunal operates like a court and the relevant elements of discrimination need to be proved in each case. If a person being represented by the OHRP loses a case the OHRP must pay any costs which are ordered by the Tribunal to be paid to the victor.[8] This is in addition to the resources expended by the OHRP in bringing the case. The most recent award of costs by the Tribunal, where the person represented by the OHRP was partially unsuccessful, was $15,000.[9] This consequence obviously affects the numbers of cases the Director can provide legal representation for, particularly where the outcome is clearly uncertain.

The legalistic assessment required for this criterion is an aspect of the OHRP's work which applicants/complainants have the most difficulty with, particularly when they have suffered harm. However, litigation before the Tribunal (as with any tribunal or court) is a legalistic process and the OHRP cannot shield complainants from this reality.

To date three cases have been filed in the Tribunal by the OHRP against public actors. In one case the allegation is that a government Ministry operates a discriminatory policy/practice and in two cases the allegations are that legislation is discriminatory.[10]

If the Director refuses legal representation complainants have a right to take their case to the Tribunal themselves including by using a private lawyer. Legal aid may be available. Experience to date is that while many people who have privacy complaints do so, people with discrimination complaints rarely do so.

---

[5] Human Rights Commission *Annual Report 2005* p28.
[6] Human Rights Commission *Annual Report 2005* p28.
[7] s 92 HRA.
[8] s 92C(4) HRA.
[9] *Smith v Air New Zealand Ltd* (unreported decision 13/2006, HRRT 37/2002, 4 April 2006). Note this decision is currently under appeal to the High Court.
[10] These are respectively a case against the Ministry of Health brought by seven parents of seriously disabled adult children who do not receive funding at an equivalent level to that available to non-family carers to provide full time care to children and adults with similar types and levels of disability; the Child Poverty Action Group Inc case; and a case concerning a compulsory retirement age for tenancy adjudicators.

Test for discrimination by public actors

Since 1977 Part 2 of the HRA has contained detailed anti-discrimination provisions which apply in general terms to the private sector.[11] In Part 2 different provisions cover employment as well as varying circumstances of public life.[12] In each case it is clear on the face of the provision what elements need to be proved to establish discrimination in the particular circumstance. For example pursuant to s 44 HRA it is unlawful for:

- A person who supplies goods, facilities and/or services to the public
- To treat any person less favourably in connection with the provision of those goods, facilities and/or services than would otherwise be the case
- By reason of a prohibited ground of discrimination[13]

Since 1 January 2002 discrimination by public actors has been covered by Part 1A of the HRA.[14] Discrimination for the purposes of Part 1A is defined in comparatively general terms which are largely untested in New Zealand.[15] Overseas jurisprudence indicates that to establish discrimination by the government or public actors, a complainant will need to prove:

- A distinction is made, or an exclusion, or restriction or preference operates, against a person or group
- By reason of a prohibited ground of discrimination
- Which causes that person or group disadvantage

Questions which have not yet been answered by the Tribunal or appellate courts include, for example, what level of disadvantage must be proved in order to warrant the high degree of disapprobation inherent in the term "discrimination" particularly in the complex area of public policy making involving competing demands for limited government resources.

A defence is available to public actors under Part 1A which is whether any apparent discrimination is justified.[16] To justify apparent discrimination public actors need to prove[17] that any limit on the right to be free from discrimination is:

- A reasonable limit
- Is prescribed by law
- Is demonstrably justified in a free and democratic society

There is some indication from our Court of Appeal (although not in a human rights case) that the analysis necessary to assess the third bullet point above may include identifying the objective of the legislation (or policy etc), assessing whether the means used to achieve the objective are rationally connected to the objective and are proportionate, and considering

---

[11] Unless a private sector person or body is performing a public function, refer s 20J(1)(b) HRA.

[12] Examples are access to goods and services; access to education; and access to public places and facilities.

[13] The prohibited grounds of discrimination under s 21(1) HRA are: sex (including pregnancy and childbirth), marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status (being unemployed or in receipt of a benefit or compensation payments), family status (for example having the care of children) and sexual orientation.

[14] Although exceptions to this include employment, sexual harassment, racial harassment and victimisation. These are all covered by Part 2, refer s20J(2) HRA.

[15] s 20L(1) & (2)(a) HRA and refer s 19 NZBORA.

[16] s 20L(2)(b) HRA and refer s 5 NZBORA.

[17] The onus of proof in respect of this defence is borne by the defendant, refer s 92F(1) HRA.

whether there is minimal interference with the right to be free from discrimination.[18] This analysis may involve consideration by the Tribunal of social, legal, moral, economic, administrative, ethical or other issues.[19] Some of these are issues courts are not traditionally comfortable in dealing with particularly where this involves second-guessing the government. Thus, although under Part 1A Parliament has clearly given the Tribunal a mandate to do so to some extent in respect of discrimination issues, it is difficult to assess with any certainty how the Tribunal or appellate courts will deal with the first Part 1A cases.

Protection of children and young people under the Human Rights Act

New Zealand's international obligations under the United Nations Convention on the Rights of the Child (UNCROC) have not been incorporated generally into New Zealand domestic law and therefore are not generally enforceable in this country. For example, the rights of children and young persons to an adequate standard of living and to social security without discrimination on the basis of the status of either of their parents are not specifically protected; unless in respect of the latter, CPAG's claim that the HRA does this is successful.[20]

Children and young people are protected to some extent from discrimination under the HRA. Historically, children and young people under 16 have not had access to the free dispute resolution and legal representation services under the HRA for dealing with complaints under Part 2 about age discrimination. However, since 1 January 2002 these services may be available to children and young people under 16, for complaints of age discrimination where the complaint is about the actions of a public actor, although this point is as yet untested. As well, complaints can be made by or on behalf of children and young people under 16 if the alleged discrimination arises from another prohibited ground of discrimination, for example disability and access to education.

Young people over 16 have the same access to the processes under the HRA as adults.

Child Poverty Action Group case

The Child Poverty Action Group Inc (CPAG) case alleges that provisions in the Income Tax Act 2004 which provide for payment of two particular tax credits unlawfully discriminate against families reliant upon income-tested benefits[21] (including the children in those families). One is the Child Tax Credit (CTC). The other is the In-work Payment (IWP). The latter largely replaced the former from 1 April 2006 as part of the government's Working for Families package (WFF).

Importantly, despite its name indicating an association with being "in work", the IWP is payable to a principal caregiver of children for the support of those children whether or not they themselves are in paid work. A principal caregiver can receive the IWP if their spouse or partner is in paid work.

These tax credits which are paid to principal caregivers (whether or not they themselves work for salary or wages) for the support children are therefore being used at least in part as a work incentive for at least one member of families with children. However, they do not necessarily incentivise someone with a spouse or partner in paid work to themselves work outside the home. It is possible that this top-up payment may make having one adult remaining at home to look after children more manageable for some families where otherwise

---

[18] *Moonen v Film and literature Board of Review* (1999) 5 HRNZ 224, 234.
[19] *Moonen v Film and literature Board of Review* above n 18.
[20] art 27(1) and art 26(1) in conjunction with art 2(1), respectively.
[21] Families who receive compensation payments under the Injury Prevention, Rehabilitation, and Compensation Act 2001 (or any of the earlier Acts providing for the accident compensation scheme) where the accident or injury occurred prior to 1 January 2006 are also ineligible to receive these tax credits.

it was not. Further discussion on the desirability or otherwise of such an arrangement is beyond the scope of this paper. However, the eligibility requirement of needing to be (or have a partner or spouse) in paid work, has the effect that the choice of staying at home to focus upon the care of children is not apparently seen as a valid option for single parents even where children are very young.

The families not eligible to receive the CTC or the IWP include families where the parents or a single parent cannot work because of sickness, redundancy, lack of jobs, unsuitable child care, having young or special needs children, supporting elderly parents, or facing mental illness. A work incentive in such situations will often be nonsensical, even cruel in some cases. It is difficult to see how the hardship suffered by some families under this unfocussed policy, in order to provide incentives to others, can be justified.

Some of the children in the families who miss out on the IWP are the most vulnerable children in our society and CPAG says they need assistance to ensure they have the same opportunities in life some of us and our children take for granted. The CPAG claim is therefore brought by CPAG in the interests of approximately 230,000 children in families who are ineligible to receive the CTC or IWP because those families receive income by way of income-tested benefits,[22] including, in particular, the children who are amongst the approximately 26% of New Zealand children whose living standards have recently been assessed by the government as being characterised by severe or significant hardship.[23]

CPAG says in its claim that children should not be treated differently in terms of government support because of the source of their family's income.

The CPAG case is able to be dealt with under the disputes resolution and litigation processes available under the HRA because "employment status" or being in receipt of an income-tested benefit is a prohibited ground of discrimination under the HRA. The discrimination analysis in the CPAG case is:

- Those who receive income-tested benefits are excluded from receipt of a CTC or IWP by certain provisions in the Income Tax Act 2004[24]
- Being in receipt of an income-tested benefit or "employment status" is a prohibited ground of discrimination
- This exclusion causes disadvantage to affected families

The exclusion of families reliant upon income-tested benefits for the additional assistance available as a CTC or IWP is clearly discriminatory.

In terms of the defence available to the government, it has said that the different treatment of families reliant upon income-tested benefits is justifiable because:

- Families are better off relying upon income sourced through work or other source independent of the state
- The IWP provides a work incentive
- It also recognises the additional costs associated with work where the worker is also a principal caregiver of children

Whether these factors are sufficient to justify (in legal terms) the exclusion of certain types of families with children from additional child-focussed assistance in the form of a CTC or IWP

[22] The numbers of children in families whose receipt of accident compensation payments prevents them receiving the CTC or IWP are not apparently available.
[23] Ministry of Social Development *2006 The Social Report - te purongo oranga Tangata 2006 – indicators of social wellbeing in New Zealand*
[24] s KD 2(4) & s KD 2AAA(1)(e) Income Tax Act 2004, concerning the CTC and IWP respectively.

will be the key issue in the CPAG case. As suggested earlier there are a range of circumstances where adults are unable to work and therefore such reasons do not apply.

Relevant to the justification defence is the recent extension of WFF, including eligibility for the IWP, by the Labour government to families on significantly higher incomes than were eligible for the CTC, following an election promise to do so last year. The IWP is now payable to families earning annual incomes over $100,000 depending upon the number of children in the family. One example is a family earning an annual income of $80,000, with three children, now being eligible for a fortnightly IWP payment of $105.

Remedies

The only remedy available in the CPAG case is a new remedy in New Zealand: the declaration of inconsistency.[25] This is because the alleged discrimination is contained in legislation and it has been decided it is appropriate in New Zealand that Parliament rather than the courts should ultimately make the decision as to how best to remedy unjustifiable discrimination contained in legislation.[26]

In respect of other activities, policies and practices of public actors the full range of remedies provided for in the HRA is available.[27] It is therefore possible that in the future compensation will be awarded against the government, or even a restraining order, in respect of practices or policies found to be discriminatory.

Conclusion

In theory the redress now available under the HRA for discriminatory actions by government and other public actors including against children and young people is accessible and effective. However, the theory relies upon a number of factors which include:

- Public awareness that free dispute resolution and litigation services are available for dealing with discrimination issues (however neither the Commission nor any relevant government body are funded to provide a comprehensive public education program about this)
- Members of the public identifying and raising issues (including on behalf of children and young people if they cannot do so themselves) with the Commission and then if resolution is not achieved through mediation, by raising the issue with the Tribunal and/or the OHRP
- Adequate resourcing of the Commission, the OHRP and the Tribunal to ensure that a reasonable number and range of issues can be dealt with efficiently
- Judicial officers taking Parliament at its word where discrimination by public actors is proved by responding with the imposition of remedies which are sufficient to encourage these actors to give serious and in depth consideration to discrimination issues in policy and other decision making
- Good faith on the part of the executive and Parliament demonstrated by serious consideration being given to whether alternative non-discriminatory means of accomplishing objectives can be used where legislation is found by the courts to be inconsistent with the right to be free from discrimination

Litigation is rightly the last resort even for dealing with serious discrimination issues. It is to be hoped in a liberal and democratic society that most issues can be dealt with at an informal level particularly where our Court of Appeal has upheld the principle of minimal interference by public actors with the right to be free from discrimination.

---

[25] s 92J HRA.
[26] The same applies in the United Kingdom under the Human Rights Act 1998 (UK).
[27] s 92I HRA.

However, litigation remains an important tool which human rights advocates must use where public actors will not change policies and practices which are discriminatory and harmful, particularly to vulnerable members of our community. This at least ensures that the reasons put forward for justifying those policies and practices are debated in an open and public forum. This is important not only for whatever the ultimate decision is in the courts in any particular case but as well for open and transparent government and wider public debate around social justice issues.