

HUMAN RIGHTS REVIEW TRIBUNAL

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"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

"Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom ...¹

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ..."²

What's the relevance?

"It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public—

(a) To refuse or fail on demand to provide any other person with those goods, facilities, or services; or

(b) To treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case,—

by reason of any of the prohibited grounds of discrimination."³

But

"It shall not be a breach of ...this Act to offer or provide ..., life insurance policies, accident insurance policies, or other policies of insurance, whether for individual persons or groups of persons, on different terms or conditions for each sex or for persons with a disability or for persons of different ages if the different treatment—

(a) Is based on—

(i) Actuarial or statistical data, upon which it is reasonable to rely, relating to life-expectancy, accidents, or sickness; or

¹ Opening of Preamble to the Universal Declaration of Human Rights, 10 December 1948.

² Article 2, Universal Declaration.

³ Section 44 Human Rights Act 1993 ('HRA'). By s.44(2), insurance is expressly included within the phrase 'goods, facilities or services'. Prohibited grounds are in s.21(1) - that is, sex; marital status; religious belief; ethical belief; colour; race; ethnic/national origin; disability; age; political opinion; employment status; family status and sexual orientation.

(ii) Where no such data is available in respect of persons with a disability, reputable medical or actuarial advice or opinion, upon which it is reasonable to rely, whether or not contained in an underwriting manual; and

(b) Is reasonable having regard to the applicability of the data or advice or opinion, and of any other relevant factors, to the particular circumstances.⁴

[2] Note also the possibility of indirect discrimination, where a policy or practice that appears to treat all without distinction in reality impacts on particular groups in society differently.⁵

[3] So:

[a] Can an insurer insist on higher premiums or other less favourable terms from young male drivers than (for example) female drivers, or drivers over (say) 25?

[b] What about (for example) health insurance for people of, say, different ages; or race; or same-sex sexual orientation?⁶

[c] If there is an issue, how long can the insurer take to make its mind up as to whether or not to provide cover, or cover on restricted terms, before the delay in making a decision itself becomes discriminatory?

[d] How can/should the issue of pre-existing health conditions be approached?⁷

[e] What is reasonable under s.48, and how can/should whatever is proposed be justified?

[f] Does a discrepancy between premiums for income protection for women and those for income protection for men amount to indirect discrimination?⁸

[4] Moving away from strictly HRA considerations, in the case of cover for people with medical issues, what level of disclosure can an insurer require?⁹

[5] No doubt there are many, many other issues besides.¹⁰ This paper does not purport to try to answer any of them. The point is only to demonstrate the

⁴ Section 48(1) HRA. By s.48(2) the Human Rights Commission can call for justification of any assertion that different treatment is reasonable, in the form of data and/or by looking for advice from the Government Actuary. As to what the assessment of reasonableness see *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

⁵ E.g., *Northland Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218.

⁶ Note that under s.48 the list of grounds to which defence of what is reasonable applies is limited to sex; disability and age and does not extend to (e.g.) race or sexual orientation.

⁷ And when is a pre-existing condition a 'disability' under s.21(1)(h) to which s.52 rather than s.48 might be relevant?

⁸ E.g., *Why women pay double for income protection insurance* NZ Herald 12 August 2009; *Women have grounds to fight high premiums* NZ Herald 14 August 2009.

⁹ E.g., *Insurance demands may break privacy law* Dominion Post 30 June 2009 p5; *Sovereign stands grounds on records* NZ Doctor 15 July 2009 p 3; *Pleas for medical notes must be justified – Commissioner* The Press, 30 July 2009, p2. Note the Privacy Commissioner was quoted in this exchange as saying "If insurers breach the law, then I would expect to direct the complaint be referred to the Human Rights Review Tribunal for determination and possible award of damages."

obvious, namely that human-rights related issues (including privacy issues) can be significant in the insurance industry, and therefore to the work of those who practice in the area.¹¹

- [6] Practitioners are familiar with the processes for dispute resolution through the courts, by mediation, arbitration and so on. The contribution that the Human Rights Review Tribunal¹² has to make in the area may be less well understood. Hopefully there is something of value in a discussion about what the Tribunal is, what powers it has, and the kinds of cases that come before it.

The Tribunal

- [7] The Human Rights Review Tribunal was originally established in 1977 under the Human Rights Commission Act as the Equal Opportunities Tribunal. Its name was changed to the Complaints Review Tribunal in 1993, and then in 2002 it was changed again to become the Human Rights Review Tribunal.
- [8] The Tribunal is not the Commission, nor any part of it. Tribunal members are not Human Rights Commissioners.¹³
- [9] The Tribunal is comprised of a Chairperson and a panel of up to 20 other members. Panel members are appointed for their knowledge or experience in aspects of matters likely to come before the Tribunal; human rights law (domestic and/or international); public administration; economic, employment or social issues; cultural issues and the needs, aspirations and experiences of different communities and population groups in New Zealand society. Deputy Chairpersons have been appointed from time to time to deal with particular cases.
- [10] In each hearing the Tribunal is made up of the Chairperson and two other members, selected on the basis of geographic location, availability, experience with the issues in the particular case and so on.
- [11] There are presently 9 Tribunal members aside from the Chairperson. Appointment to the panel is by the Minister of Justice.¹⁴
- [12] Cases are usually heard where the events giving rise to them have taken place.

Sources of jurisdiction

- [13] The Tribunal has three sources of jurisdiction:

[a] The Privacy Act 1993

¹⁰ Including issues around the difficulties of defining mental disability; the use of genetic information and/or the possibility of recourse to genetic testing; issues in the provision of group cover for example in employee healthcare schemes.

¹¹ Those interested in particular discrimination issues in the context of insurance law will I imagine be aware of the guidelines issued by the Human Rights Commission in November 2007 under s.5(2)(e) of the HRA; *Guidelines: Insurance and the Human Rights Act 1993* (available, with a copy of the Actuaries' Guidance note, at www.hrc.co.nz/home/hrc/newsandissues/).

¹² 'The Tribunal'

¹³ Compare ss.4 to 20H of the HRA with the provisions of Part 4 of the HRA (ss.93 to 126).

¹⁴ It is anticipated that further members will likely be appointed in the near future.

[b] The Health and Disability Commissioner Act 1994

[c] The Human Rights Act 1993.

[14] Each of these statutes has different rules as to who can bring a claim to the Tribunal. Although the remedies that the Tribunal can award in each case are similar, they are not identical. As a result care needs to be taken before making generalised statements about what the Tribunal can do in any case. In broad terms, however:

[a] There are powers to make formal declarations;

[b] The Tribunal can award compensatory damages for actual losses suffered and/or lost benefits – although typically awards are in the nature of general damages for injury to feelings, humiliation and/or loss of dignity;

[c] The Tribunal has the same monetary limit as the District Court (in some situations cases can be remitted to the High Court if a greater award is indicated). The highest single award to date is \$40,000 made in respect of a claim under the Privacy Act – see *Hamilton v The Deanery 2000 Limited* [2003] NZHRRT 28; although in *Director of Health and Disability Proceedings v Mogridge* [2007] NZHRRT 27 awards totalling \$88,000 were made (and costs were later awarded in the further sum of 22,500 – see *Director of Health and Disability Proceedings v Mogridge (Costs)* [2008] NZHRRT 9);¹⁵

[d] There is a power under the Health and Disability Commissioner Act 1994 (but only that Act) to award punitive damages where flagrant disregard of the plaintiff's rights is demonstrated – see *Director of Health and Disability Proceedings v DG (Fan)* [2005] NZHRRT 3; *Director of Health and Disability Proceedings v Peters* [2006] NZHRRT 36; and *Director of Health and Disability Proceedings v Mogridge* (supra).

[e] The Tribunal can make restraining orders to prevent repetition of any contravening conduct - see, e.g., *E F G v Police* [2006] NZHRRT 48;

[f] The Tribunal has power to make various other orders – e.g., an order requiring a health care provider to undergo remedial training (as in *Director of Health and Disability Proceedings v DG (Fan)* [2005] NZHRRT 18).

[g] There is power to award costs. These can be significant – a survey of the cases in the period 2003 to date shows that 'reasonable contribution' awards to successful litigants after a hearing in the Tribunal fall around an average close to \$3,750 per hearing day or part thereof.¹⁶

[15] Since 1 January 2002 the Tribunal has had the power to declare acts or omissions of:

[a] the legislative, executive or judicial branches of government, or

¹⁵ Note that (almost) all decisions of the Tribunal since 2002 can be accessed at www.nzlii.org/nz/cases/NZHRRT/

¹⁶ See the detailed tables at <http://www.justice.govt.nz/tribunals/human-rights-review-tribunal/forms-and-guides> under 'Costs in the Human Rights Review Tribunal' (stated as at 31 October 2009) or (for *viva voce* matters) in *Orlov v Ministry of Justice and the Attorney General* [2009] NZHRRT 28 (stated as at 5 October 2009)

[b] a person or body in the performance of any public function, power or duty

to be inconsistent with the right to freedom from discrimination affirmed by s.19 of the New Zealand Bill of Rights Act 1990. An act or omission will not be inconsistent with those rights if it is shown to be a 'justified limitation', -i.e., one which is a reasonable limit on the right in question such as can be demonstrably justified in a free and democratic society. In the case of an enactment, any declaration of inconsistency must be reported to Parliament, and the government is then obliged to attend to the matter within certain set time limits: see generally Part 1A of the Human Rights Act.

[16] Appeals are to the High Court and (with leave) to the Court of Appeal on a question of law. There is also a possibility of appeal to the Supreme Court.

Privacy Act 1993

[17] Cases are brought in respect of alleged infringements of the Privacy Principles in the Privacy Act (or the Rules of Codes issued by the Privacy Commissioner; usually being the Health Information Privacy Code 1994). The Privacy Act governs agencies in dealing with personal information, e.g. in its collection, storage, use and disclosure, and in respect of allowing access to and correction of personal information by the individual to whom it relates.

[18] The provisions controlling access to the Tribunal – particularly for aggrieved individuals where the case is not taken by the Director of Human Rights Proceedings or the Privacy Commissioner – have been considered in a number of cases including *Lehmann v The RadioWorks Limited* [2005] NZHRRT 5 and *KI (Haydock) v Gilligan Sheppard* [2005] NZHRRT 21. Anyone contemplating the possibility of bringing a claim under the Privacy Act in the Tribunal (or faced with the prospect of defending such a claim) should give the relevant provisions careful consideration. It is not uncommon for a claim (or parts of it) to be dismissed or struck out on the basis that statutory requirements have not been met.

[19] To illustrate the kind of cases that come before the Tribunal, see

[a] *Pointu v Employrite* [2002] NZHRRT 11 - confidentiality of a pre-employment reference;

[b] *Hamilton v The Deanery 2000 Limited* (supra) – disclosure of personal health information;

[c] *MacMillan v Department of Corrections* [2004] NZHRRT 41 – access to personal information¹⁷;

[d] *Waugh v New Zealand Association of Counsellors* [2005] NZHRRT 24 – access to personal information, correction and use;

¹⁷ The decision gave rise to considerable public discussion (see, e.g. Cunliffe, *If the law's an ass, kick it* Dominion Post [date?]; Price, *Even killers have rights* Dominion Post [date??]). Not long afterwards the Prisoners' and Victims' Claims Act 2005 was passed to deal with this kind of situation and (of course) that under consideration in *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC).

- [e] *Director of Human Rights Proceedings v Richardson* [2005] NZHRRT 36 – discovery/inspection of documents in Privacy Act claims;
- [f] *Herron v Speirs Group Limited* [2006] NZHRRT 12¹⁸) – use of information and whether interference with privacy established;
- [g] *Dijkstra v Police* [2006] NZHRRT 16 – access to personal information held by Police;
- [h] *K I v Gilligan Sheppard* [2006] NZHRRT 31 – storage of personal information;
- [i] *Director of Human Rights Proceedings v Police* [2007] NZHRRT 5 - disclosure of personal information; name suppression¹⁹
- [j] *Stoves v Police* [2008] NZHRRT 30 - access to information.²⁰

Health and Disability Commissioner Act 1994

[20] The Health and Disability (Code of Health and Disability Services Consumers' Rights) Regulations 1996 ('the Code') is promulgated under the Health and Disability Commissioner Act 1994. It sets out standards expected of health care providers in areas such as respecting patient privacy, ensuring that services comply with relevant legal, ethical or other professional standards, providing full information, informed choice and consent, and so on.

[21] Some examples of cases under the Code:

- [a] *Director of Health and Disability Proceedings v A (Huang)* [2003] NZHRRT 35 – failure to respect privacy; failure to comply with relevant ethical standards; failure obtain informed consent;
- [b] *Director of Health and Disability Proceedings v Marks* [2005] NZHRRT 37 – issues as to whether 'secondary victim' can claim compensatory damages²¹
- [c] *Director of Health and Disability Proceedings v Peters* [2006] NZHRRT 36 – sexual relationship between provider and consumer of health care services – breach of relevant ethical standards – exemplary damages.
- [d] *Director of Health and Disability Proceedings v Mogridge* [2007] NZHRRT 27 - sexual relationship between provider and consumer of health care services – breach of relevant ethical standards – exemplary damages.
- [e] *Director of Health and Disability Proceedings v Wilson* [2008] NZHRRT 1 – services alleged not to be of appropriate standard – failed vasectomy – claim for damages relating to subsequent pregnancy

¹⁸ In the High Court, *Herron v Speirs Group Limited* (Unreported, High Court, Auckland, CIV 2006-404-002277, 21 March 2007 per Andrews J, Ms J Binns and Ms D A Clapshaw.

¹⁹ In the High Court see *Commissioner of Police v Director of Human Rights Proceedings* (Wellington High Court, CIV 2007-485-000644, 2 October 2007 per Clifford J, S Ineson & A D Trlin).

²⁰ In the High Court see *Stoves v Police* (Christchurch High Court, CIV 2009-409-000011, 20 April 2009 per French J)

²¹ Note decisions of the Tribunal and the High Court reversed in the Court of Appeal *Marks v Director of Health and Disability Proceedings* [2009] NZCA [??]

- [f] *Director of Health and Disability Proceedings v O'Malley* [2009] NZHRRT 2 – healthcare services for intellectually challenged man – inappropriate sexualised conduct by provider – compensatory and exemplary damages.

Human Rights Act 1993

[22] The HRA deals with things like unlawful discrimination (discrimination on grounds e.g. of race or ethnic origin, gender, sexual orientation, political opinion, employment status, disability) including sexual harassment, inciting racial disharmony and indirect discrimination. Some examples of cases under the Human Rights Act:

- [a] *Main v Topless* [2004] NZHRRT 6 - sexual harassment;
- [b] *Bissett v Peters* [2004] NZHRRT 33 – inciting racial disharmony – Tribunal's powers to strike out/dismiss for want of a tenable cause of action;
- [c] *Williams v Pacific Plastic Recyclers Limited* [2004] NZHRRT 47 - sexual harassment and the liability of employers/ employees;
- [d] *Director of Human Rights Proceedings v Smith* [2004] NZHRRT 50 - sexual harassment – whether in the course of employment;
- [e] *Smith v Air New Zealand* [2005] NZHRRT 30 - discrimination on grounds of disability²²
- [f] *Lewis & Edwards v Talleys Fisheries Ltd.* [2005] NZHRRT 19 - gender discrimination and victimisation;²³
- [g] *Morrison v Housing Corporation* [2006] NZHRRT 45 – access to housing – whether under Part 2 or Part1A of the HRA;
- [h] *Howard v Attorney-General* [2008] NZHRRT 10 - declaration of inconsistency;²⁴
- [i] *Child Poverty Action Group Inc v Attorney-General* [2008] NZHRRT 31 - Part 1A of the Human Rights Act – whether provisions of the tax statutes relating to the 'Working For Families' tax credits contrary to the right to freedom from discrimination affirmed by s.19 New Zealand Bill of Rights Act 1990 – whether justified or not.

[23] The Tribunal's Part 1A 'declaration of inconsistency' jurisdiction in more detail in *Rights against Legislated Discrimination: A Sleeping Giant? Part 1A of the Human Rights Act 1993* [2008] New Zealand Law Review 213.

²² In the High Court see *Smith v Air New Zealand* (Wellington High Court, CIV 2005-485-2198, 15 December 2008 per Clifford J); still under appeal to the Court of Appeal.

²³ In the High Court see *Talleys Fisheries v Lewis & Edwards* (Wellington High Court, CIV 2005-485-1750, 14 June 2007 per Simon France J, S Ineson & A Trlin).

²⁴ An appeal has been filed although there is an issue as to whether it was properly filed – see *Attorney-General v Howard* (High Court, Wellington, CIV-2008-485-1291, 7 April 2009 per Joseph Williams J). The issues of procedure are presently before the Court of Appeal.