



## Superdiversity Stocktake

Implications for Business,  
Government and New Zealand

By Mai Chen

Chair, Superdiversity Centre  
for Law, Policy and Business

The Superdiversity Stocktake  
has been sponsored by:

**CHENPALMER**  
NEW ZEALAND PUBLIC AND EMPLOYMENT LAW SPECIALISTS

**bnz** ★★  
Be good with money

The  
**Law**  
Foundation  
NEW ZEALAND



 perpetual guardian

**Designworks.**

  
Human Rights  
Commission  
Te Kaitiaki Take Kōwhiri

  
**MINISTRY OF EDUCATION**  
TE TĀHUHU O TE MĀTAURANGA

If you would like to know more about  
the Superdiversity Stocktake and the  
Superdiversity Centre's work, please contact  
the Centre at: [info@superdiversity.co.nz](mailto:info@superdiversity.co.nz)

Other publications of the Superdiversity  
Centre include: Superdiversity, Democracy  
and New Zealand's Electoral and Referenda  
laws, 3 November 2015, funded by the  
NZ Law Foundation and also published  
on the Centre's website.

Superdiversity Stocktake  
Implications for Business,  
Government and New Zealand



**L**

**E**

**G**

**A**

**L**

## Existing Legal Framework for the Protection of Minority Rights

- 4.1 As the diversity of the population increases, it is likely that the legal framework against discrimination and for the protection of minority rights in New Zealand, which includes the HRA, the NZBORA and the Employment Relations Act 2000 (“ERA”) will be utilised more frequently.
- 4.2 The ERA prohibits employers from discriminating against their employees and requires them to protect employees from racial harassment. It allows employees to bring personal grievance claims against current or former employers on grounds including the employee being discriminated against in their employment<sup>879</sup> or being racially harassed.<sup>880</sup>
- 4.3 Most legal challenges to date have been resolved under the HRA, which contains anti-discrimination provisions designed to protect the rights of minorities, particularly in the employment context. Those that have been brought under the NZBORA have, for the most part, invoked ss 13 (freedom of thought, conscience and belief), 15 (freedom to manifest religious belief) and 19 (non-discrimination) rather than s 20, which provides protection for the rights of minorities and, in particular, their right to enjoy their culture, to profess and practise their religion, and to use their language. Section 20 is not as potent as the Treaty of Waitangi as a source of protection for Māori rights, but it is legally enforceable against the Crown in a way that the Treaty is not, unless the Treaty is expressly incorporated into law, and may add positive obligations beyond the protections in the HRA for non-indigenous minorities.

### Recommendation for Legal Implications Section

- New migrants should be educated about employment laws, the HRC and the Human Rights Review Tribunal (“HRRT”) and its powers to enforce the prohibitions on discrimination in the HRA. The education programme should also explain the dispute resolution role of the HRC, and that the Director of Proceedings can bring a case on behalf of an applicant.

## The Human Rights Act 1993

- 4.4 The HRA prohibits discrimination on grounds including religious belief,<sup>881</sup> ethical belief (which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions),<sup>882</sup> colour,<sup>883</sup> race,<sup>884</sup> or ethnic or national origins (which includes nationality or citizenship).<sup>885</sup>

### Discrimination by the Government

- 4.5 Part 1A of the HRA applies to acts or omissions by the legislature, judiciary or the executive, or 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.<sup>886</sup>
- 4.6 The HRRT can grant remedies for breaches of the HRA,<sup>887</sup> including declarations of inconsistency where enactments are in breach of Part 1A.<sup>888</sup>

### Discrimination by Private Individuals or Entities

- 4.7 Part 2 applies to acts or omissions by private entities and prohibits discrimination on prohibited grounds in various circumstances, including, in particular, employment.
- 4.8 The HRA states that, where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, by reason of any prohibited ground of discrimination:<sup>889</sup>
- a. to refuse or omit to employ the applicant on work of that description which is available; or
  - b. to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same

or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

- c. to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
- d. to retire the employee, or to require or cause the employee to retire or resign.

4.9 The HRA also protects against indirect discrimination:<sup>890</sup>

*Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.*

4.10 In assessing whether an employer has discharged his or her obligations under the HRA, the relevant tribunal or court will engage in an evaluative analysis of the reasonableness or proportionality of the employer's response, which will involve considering the significance of the right in question and the purpose of the HRA.<sup>891</sup>

4.11 There are various exceptions to the general rule against discrimination in employment matters in ss 24–34 of the HRA, including, for example, national security work, work in organised religion, or the armed forces (among others).

4.12 Pursuant to s 28(3), employers must accommodate practices that are required by an employee's religious or ethical belief, so long as any adjustment of the employer's activities "does not unreasonably disrupt the employer's activities".

4.13 In *Nakarawa v AFFCO New Zealand Ltd*, the employer had made no effort to accommodate the employee's religious practices, and was thus found to have breached the HRA.<sup>892</sup> The plaintiff, who was a member of the Church of God, was fired for not working on Friday nights and Saturdays prior to sunset in order to observe the Sabbath. The HRRT, in examining the meaning of "unreasonably disrupt", concluded that the term was "relative" and could not be given a "hard and fast meaning".<sup>893</sup> The Tribunal explained that "[e]ach case will necessarily depend on its own facts and circumstances and it will come down to a determination of 'reasonableness' under the unique circumstances of the particular employer-employee relationship".<sup>894</sup>

4.14 Referring to the Canadian Supreme Court's decision in *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, the Tribunal noted that the scope of the individualised nature of the duty to accommodate "varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made".<sup>895</sup> The Tribunal was clear, however, that it is not only incumbent on the employer to try to find a suitable solution in such cases, but "[t]he search for an accommodation must also involve the employee and the employee concerned must, to a certain extent, help out with efforts to arrive at an accommodation".<sup>896</sup>

4.15 Section 28(3) is also engaged when the religious practice of employees requires them to wear certain pieces of clothing, for example, a turban, hijab or yarmulke. Difficulties arise when a neutral dress or grooming code requirement has adverse impacts on employees whose religious belief requires them to observe a particular dress or grooming code.<sup>897</sup> If the code conflicts with one particular cultural or religious code, this may constitute indirect discrimination under s 65 of the HRA. However, where an employer can show "good reason" for the code (for example, on grounds of health, safety or hygiene), that indirect discrimination can be justified.

4.16 The HRA also establishes other exceptions to the prohibition of discrimination on the basis of religion in relation to employment matters. For example, the HRA does not prevent different treatment based on sex where the position is for the purposes of an organised religion and is limited to one sex so as to comply with the doctrines or rules or established customs of the religion.<sup>898</sup> The HRA also does not prevent different treatment based on religious or ethical belief in the employment of principals or teachers in private or integrated schools, or of social workers by particular faith-based organisations.<sup>899</sup>

4.17 However, even where an exception is provided for in relation to employment matters, the HRA states that the exception cannot be used:<sup>900</sup>

*... if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.*

4.18 An employer therefore must act reasonably when confronted with requests to accommodate different cultural and/or religious practices in the workplace.

4.19 In *Haupini v SRCC Holdings Ltd*, the plaintiff, a Māori employee, was asked to cover up a moko on her left forearm at a social catering event.<sup>901</sup> The plaintiff claimed that her employer had afforded her less favourable conditions at work and/or subjected her to detriment on the basis of her race and/or ethnic or national origins, which constituted direct discrimination contrary to the HRA. The HRRT held that the employer's request for the plaintiff to cover up was not so closely linked with her ethnicity or race that it could be said to be an act of direct (or for that matter, indirect) discrimination.

4.20 The Tribunal considered that the plaintiff's direct discrimination claim may have had greater prospects of success had "culture" been a prohibited ground of discrimination under the HRA.<sup>902</sup> However, the Tribunal concluded that it would be wrong to force what was really a claim for direct discrimination on the basis of culture into concepts of race and/or national or ethnic origin.<sup>903</sup> Even if culture had been a prohibited ground, the Tribunal was reluctant to accept the plaintiff's general proposition that Māori would consider the employer's "no tattoos" policy to be "disrespectful of their whakapapa, cultural tradition and custom" in the absence of evidence supporting such a contention.<sup>904</sup>

4.21 In light of the Tribunal's comments, would the plaintiff in this case have fared better by relying on s 20 of the NZBORA, which specifically protects minority rights to the enjoyment of culture?<sup>905</sup> The likely answer is that, even if a breach of s 20 had been established – which was by no means certain in this case given that evidence would have been required to establish that a sufficient proportion of Māori would have seen the "no tattoos" policy as a denial of their right to enjoy their culture – the limit the employer imposed may, in any case, have been held to be reasonably justified under s 5 of the NZBORA. Although the Tribunal expressed no final view on whether the employer had "good reason" for the policy, it did note that there was certainly room for such a view.<sup>906</sup>

## Enforcement

### Human Rights Review Tribunal

4.22 Where a dispute about compliance with the requirements of Parts 1A and 2 of the HRA cannot be resolved by the HRC's own dispute resolution process, the complainant may ask the Director of Human Rights Proceedings to represent them in proceedings before the HRRT.<sup>907</sup> Even if the Director decides not to provide representation to the complainant, the complainant or the HRC may still bring civil proceedings before the HRRT.

4.23 The details of how the Tribunal operates, along with some of its significant decisions, are addressed in detail in the second edition of the *Public Law Toolbox*.<sup>908</sup> In short, the Tribunal sits with a Chair and two lay members appointed from a panel by the Chairperson for the purposes of each hearing.<sup>909</sup> The Tribunal operates much like a court in terms of the treatment of evidence and persons entitled to be heard.<sup>910</sup>

- 4.24 The Tribunal must act according to the substantial merits of the case, without regard to technicalities, and must act:<sup>911</sup>
- *in accordance with the principles of natural justice; and*
  - *in a manner that is fair and reasonable; and*
  - *according to equity and good conscience.*
- 4.25 If the Tribunal finds that there has been a breach of Part 1A of the HRA, the only available remedy is a declaration of inconsistency with the NZBORA.<sup>912</sup> Otherwise, the Tribunal may grant one or more of the remedies listed in s 92I(3), including:
- A declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint;
  - An order restraining the defendant from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach;
  - Damages in accordance with ss 92M–92O;
  - An order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach;
  - An order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of the HRA;<sup>913</sup> and
  - Any other relief the Tribunal thinks fit.<sup>914</sup>

### Recommendation

- New migrants should be educated about employment laws, the HRC, and the HRRT and its powers to enforce the prohibitions on discrimination in the HRA. The education programme should also explain the dispute resolution role of the HRC, and that the Director of Proceedings can bring a case on behalf of an applicant.

### Racial Hostility

4.26 Section 61 of the HRA makes it unlawful to excite hostility or bring into contempt a group of people by reason of their colour, race, or ethnic or national origins. Section 61(1) states:

(1) *It shall be unlawful for any person—*

(a) *to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting; or*

(b) *to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or*

(c) *to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,— being matter or words 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 the colour, race, or ethnic or national origins of that group of persons.*

4.27 Section 61(2) provides an exemption for the media if they report material accurately.

4.28 Racial harassment is also unlawful under s 63 of the HRA. Section 63(2) provides an exhaustive list of areas in which racial harassment is unlawful for the purposes of s 63, specifically:

- a. The making of an application for employment:
- b. Employment, which term includes unpaid work:
- c. Participation in, or the making of an application for participation in, a partnership:
- d. Membership, or the making of an application for membership, of an industrial union or professional or trade association:
- e. Access to any approval, authorisation, or qualification:
- f. Vocational training, or the making of an application for vocational training:
- g. Access to places, vehicles, and facilities:
- h. Access to goods and services:
- i. Access to land, housing, or other accommodation:
- j. Education:
- k. Participation in fora for the exchange of ideas and information.

4.29 Section 131 of the HRA creates a criminal offence of inciting racial disharmony in substantially similar terms to s 61 of the HRA. However, in contrast to s 61, it is necessary to establish mens rea, that is, that the offence was committed with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons. A person convicted under s 131 is liable to imprisonment for a term not exceeding three months or to a fine not exceeding \$7,000.

4.30 As I wrote in the second edition of the *Public Law Toolbox*, the threshold for the offence of inciting racial disharmony is high, and prosecution requires the consent of the Attorney-General.<sup>915</sup> The justification given for the Attorney-General's approval is that laws criminalising speech are undesirable.<sup>916</sup> For example, Kyle Chapman (leader of the Right Wing Resistance group and former leader of the New Zealand National Front) organised pamphlet drops attacking Asian minorities in Auckland, New Plymouth and Christchurch. The Race Relations Commissioner publicly said that the statements and pamphlets were despicable, but Mr Chapman had the right to free speech, and this had not crossed the line and breached the HRA.<sup>917</sup>

4.31 Sections 61, 63 and 131 have rarely been used since the introduction of the HRA.<sup>918</sup> This contrasts with the high number of complaints alleging race discrimination. In the 2014 reporting year, the HRC received 456 enquiries and complaints alleging racial discrimination, which comprised 30 per cent of the total complaints received by the HRC.<sup>919</sup> Between 1 July 2014 and 30 June 2015, the HRC received 419 complaints about unlawful discrimination on race-related grounds, or 34 per cent of the total complaints received (see [2.123] for further discussion of discrimination complaints to the HRC).<sup>920</sup>

4.32 Where the threshold in ss 61, 63 and 131 cannot be met, however, other legislation may still apply. For example, if a publication represents (directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by virtue of their race, nationality, ethnic origin or religious beliefs, this must be taken into account in determining whether the publication is "objectionable" for the purposes of the Films, Videos and Publications Classification Act 1993.<sup>921</sup> It is an offence to make, copy, import, supply, distribute, possess, display or exhibit an objectionable publication.<sup>922</sup>

4.33 A person who acts in an offensive or disorderly manner towards a person because of their ethnicity or religious beliefs in a public place may also be liable for an offence under s 3 or s 4 of the Summary Offences Act 1981, which criminalise disorderly behaviour and offensive behaviour or language respectively.<sup>923</sup> In order to be liable for disorderly behaviour, a

person must behave (or incite or encourage another person to behave) in a riotous, offensive, threatening, insulting or disorderly manner that is likely to cause violence against persons or property. A person will only be liable for offensive behaviour if the offence caused disturbance or disrupts public order.<sup>924</sup> Whether a person has committed an offence will depend on the nature and circumstances of the case and whether the behaviour has offended against contemporary community standards of propriety and decency.<sup>925</sup>

4.34 Racial, religious and cultural considerations are also relevant at the sentencing stage and when determining whether to bring a prosecution. Under the Solicitor-General's Prosecution Guidelines issued by Crown Law, it is a public interest consideration in favour of prosecution "[w]here the offence was motivated by hostility against a person because of their race, ethnicity, gender, sexual orientation, disability, religion, political beliefs, age, the office they hold, or similar factors".<sup>926</sup>

4.35 Further, under the Sentencing Act 2002, it is an aggravating factor in sentencing where the offence is motivated by hostility towards a certain group of people (for example, racially motivated). Section 9 states:<sup>927</sup>

*(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:*

*... that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and*

*(i) the hostility is because of the common characteristic; and*

*(ii) the offender believed that the victim has that characteristic ...*

4.36 Superdiversity may also challenge quasi-judicial bodies such as the Advertising Standards Authority's ("ASA") view of community standards. The majority of the ASA's members continue to be from New Zealand European backgrounds.<sup>928</sup> For example, the ASA's refusal to uphold a complaint by the New Zealand Chinese Association ("NZCA") and others regarding AA Smartfuel's card advertisements is a good example of the need for legal institutions to remain apprised of evolving community standards as the population becomes more superdiverse.<sup>929</sup> The advertisements featured an Asian taxi driver driving various customers around while speaking to the audience in broken English with an exaggerated accent and over-the-top hand gestures. The NZCA contended that the advertisements portrayed Asian people in a stereotypical manner that was reasonably likely to cause serious or widespread offence in contravention of Principles 3, 4 and 6 of the Code for People in Advertising. The NZCA also argued that the rapid growth of Asian communities since 2006 had resulted in a "significant shift in the values, expectations and standards held by the New Zealand community as a whole", and that New Zealanders now had a more sophisticated and better understanding of ethnic diversity. However, the Authority concluded that the allowance provided for humour under Principle 6 of the Code offset any negative racial connotations caused by the driver's accent and behaviour, which meant that the advertisements did not reach the threshold of causing serious or widespread offence to Asians on the basis of their ethnicity.

## The Employment Relations Act 2000

4.37 As well as the general prohibition on discrimination in the workplace under the HRA, and the obligation under s 28(3) of the HRA on employers to try and accommodate the religious practices of an employee (insofar as doing so does not cause the employer unreasonable disruption), under the ERA, parties to an employment relationship have an overriding obligation to deal with each other in good faith.<sup>930</sup> This will therefore overlay any negotiations within the workplace regarding faith or cultural requirements.

4.38 The issue of migrant employers exploiting migrant employees, and failing to comply with New Zealand's employment laws, is discussed at [3.43].

## Time Off

- 4.39 More ethnically-diverse staff means more issues arising from religious diversity. The religious practices of employees can raise tensions between employers and employees. For example, a religious employee may require time off to attend a religious festival, or require regular “time-out” to pray, which can cause disruption for employers and to the normal functioning of the workplace.
- 4.40 Since 1 April 2011, employees and employers can agree in writing to transfer public holidays to another working day in order to celebrate a religious festival.<sup>931</sup> In addition, where an employee suffers bereavement, the employer must take into account any cultural responsibilities the employee might have in relation to the death in determining whether to allow a request for bereavement leave.<sup>932</sup>

## Promotion or Imposition of Religious Practices at Work

- 4.41 The right to have a religious belief and the right not to hold religious beliefs are equally protected under the law.<sup>933</sup> Accordingly, workers should not be required to attend a religious activity or act in accordance with a certain religious practice in the workplace. This could extend to, for example, the recitation of karakia or the singing of hymns in the workplace.
- 4.42 In *Proceedings Commissioner v Boakes*, an employer who belonged to the Exclusive Brethren terminated the employment of an employee because it was against his religious beliefs to employ married women.<sup>934</sup> The Complaints Review Tribunal (the predecessor of the HRRT) concluded that this act was discriminatory and therefore amounted to a breach of the Human Rights Commission Act 1977 (the precursor of the HRA), as the dismissal occurred in circumstances where other employees with work of the same description would not have been dismissed.<sup>935</sup>

## Health and Safety

- 4.43 Health and safety requirements in a workplace may also conflict with particular religious practices. For example, the requirement to wear a hard hat presents difficulties for Sikhs, who are required to wear a turban. Under the Land Transport (Road User) Rule 2004, the Land Transport Agency can grant a “person a written exemption from the requirement to wear a safety helmet [for cyclists] on the grounds of religious belief or physical disability or other reasonable grounds”.<sup>936</sup>

## Personal Grievance Claims

- 4.44 Of particular relevance to superdiversity is the ability of an employee to bring a personal grievance claim against a current or former employer where the employee has been discriminated against in the employee’s employment<sup>937</sup> or has been racially harassed in the employee’s employment.<sup>938</sup>

## Discrimination

- 4.45 Subject to the exceptions in s 106, an employee is discriminated against in his or her employment if the employer (or the employer’s representative):<sup>939</sup>

(1) ... by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105 ...

(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or

(c) retires that employee, or requires or causes that employee to retire or resign.

- 4.46 “Detriment” is defined as encompassing anything that has a “detrimental effect on the employee’s employment, job performance, or job satisfaction”.<sup>940</sup>
- 4.47 The prohibited grounds of discrimination in s 105 mirror those set out in s 21 of the HRA, and include religious or ethical belief, colour, race and ethnic or national origins. A personal grievance claim may allege indirect or direct discrimination, as is the case under the HRA.

### Racial Harassment

- 4.48 Section 109 of the ERA provides that an employee may bring a personal grievance claim against an employer where the employee has been racially harassed in the course of employment if:

*... the employee’s employer or a representative of that employer uses language (whether written or spoken), or visual material, or physical behaviour that directly or indirectly—*

*(a) expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour, or ethnic or national origins of the employee; and*

*(b) is hurtful or offensive to the employee (whether or not that is conveyed to the employer or representative); and*

*(c) has, either by its nature or through repetition, a detrimental effect on the employee’s employment, job performance, or job satisfaction.*

- 4.49 An employer may be liable even where a person other than the employer or his or her representative carried out the harassment.<sup>941</sup> If an employee experiences harassment at work, he or she is entitled to complain to the employer.<sup>942</sup> The employer must undertake an inquiry into the alleged harassment and,<sup>943</sup> if satisfied that the harassment occurred, he or she must take “whatever steps are practicable to prevent repetition of the harassment”.<sup>944</sup> If the employer fails to take such steps, the employee is deemed to have a personal grievance for the purposes of the ERA.<sup>945</sup>

### Remedies

- 4.50 Where the Employment Relations Authority (“ERA”) or the Employment Court determines that a claim for personal grievance is made out, it may order one or more of the remedies set out in s 123 of the ERA, including:

- Reinstatement of the employee to his or her former position, where this is reasonable or practicable;<sup>946</sup>
- Reimbursement of wages lost as a result of the grievance;<sup>947</sup> and
- Payment of compensation for humiliation, loss of dignity and injury to the employee’s feelings, and loss of any benefit the employee might reasonably have been expected to obtain if the grievance had not arisen.<sup>948</sup>

- 4.51 In addition, where the ERA or the Employment Court finds that any workplace conduct or practices were a significant factor in the grievance, it may issue recommendations to the employer setting out how to prevent similar employment relationship issues arising in the future.<sup>949</sup> In the case of racial harassment, recommendations may be made setting out the actions the employer ought to take in respect of the employee and the person responsible for the harassment.<sup>950</sup> This may include transferring the harassing party, taking disciplinary or rehabilitative action against him or her, or “about any other action necessary” to prevent further harassment against the complaining employee or any other employee.<sup>951</sup>

### The New Zealand Bill of Rights Act 1990

- 4.52 Operating in concert with the HRA, the NZBORA provides specific protection for minority rights, alongside its protection of democratic and civil rights.
- 4.53 The Government has also responded to New Zealand’s increasing ethnic diversity over the years by ratifying a number of international conventions based on the affirmation

of fundamental human rights for all citizens, including minority groups, and the elimination of discrimination. This includes the International Convention on the Elimination of All Forms of Discrimination, the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights.

4.54 Unlike the HRA, the NZBORA only applies to acts done by the legislative, executive or judicial branches of government, or by any person or body in the performance of a public function, power or duty.<sup>952</sup> The evolution of what constitutes a “public function”,<sup>953</sup> however, means the reach of the NZBORA extends to the whole of government, to all public entities, and to private entities where the government has contracted out or privatised such services.<sup>954</sup>

#### Sections 4, 5 and 6

4.55 The rights affirmed in the NZBORA of relevance to superdiversity include:

- The right to freedom of thought, conscience, religion and belief;<sup>955</sup>
- Freedom of expression;<sup>956</sup>
- The right to manifest a person’s religion or belief (in worship, observance, practice, or teaching either individually or in community with others whether in public or in private);<sup>957</sup>
- Freedom of peaceful assembly;<sup>958</sup>
- Freedom of association;<sup>959</sup>
- Freedom of movement;<sup>960</sup>
- Freedom from discrimination;<sup>961</sup> and
- The rights of minorities.<sup>962</sup>

4.56 As I said in the *Public Law Toolbox*, these rights are not, however, absolute.<sup>963</sup> Section 5 states that the rights and freedoms contained in the NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. That is, any limit on rights must be not only “reasonable”, but must also meet the separate requirement of being “prescribed by law”.

4.57 Section 6 of the NZBORA provides that, where possible, legislation will be interpreted consistently with the rights and freedoms contained within the NZBORA.<sup>964</sup> However, s 4 preserves Parliament’s supremacy in law making, by stating that a court may not hold any enactment (or provision thereof) to be impliedly repealed or revoked, or to be in any way invalid or ineffective, or decline to apply any provision of the enactment, by reason only that the provision is inconsistent with any provision of the NZBORA. The rights and freedoms contained in the NZBORA are therefore subordinate to inconsistent enactments.

4.58 Reconciling ss 4 and 6 involves a “fine constitutional balancing act”.<sup>965</sup> An NZBORA-consistent interpretation may only be authorised under s 6 where such an interpretation is “reasonably”, “properly” or “tenably” available: s 6 does not authorise a “strained” interpretation.<sup>966</sup> The Supreme Court in *R v Hansen*,<sup>967</sup> established how the interrelationship between ss 4, 5 and 6 is to be approached in judicial decision making:<sup>968</sup>

Step 1. Ascertain Parliament’s intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament’s intended meaning prevails.

Step 5. If Parliament’s intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning that is consistent, or less inconsistent, with the relevant right or freedom to be found. If so, that meaning must be adopted.

step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

#### Right to Freedom of Thought and Religion

4.59 New Zealand's growing ethnic diversity has also meant growing religious diversity, which engages ss 13 and 15 of the NZBORA.

4.60 Section 13 provides that "[e]veryone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference". Section 15 provides that "[e]very 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".

4.61 The protection afforded by ss 13 and 15 will have particular importance in a super-diverse society, where the religious observances of some ethnic minorities may be objectionable to other groups.

4.62 The meaning and scope of ss 13 and 15 has not been widely addressed by the New Zealand courts, though international jurisprudence and commentary on similar provisions is instructive given the similarity with comparative provisions. The long title to the NZBORA expressly states that it is an Act "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

4.63 Article 18 of the ICCPR states that:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

4.64 Article 9 of the European Convention on Human Rights ("ECHR") states that:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

4.65 The scope of ss 13 and 15 has been described by the UNHRC as "far-reaching and profound".<sup>969</sup> The scope of these provisions' protection "is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions".<sup>970</sup> Rather, the rights encompass "freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others".<sup>971</sup>

4.66 Sections 13 and 15 are premised on what has been described as the "elementary distinction between having thoughts and expressing them".<sup>972</sup> Section 13 of the NZBORA provides protection for the internal expression of thought, religion and belief. On the other hand, s 15 provides protection for the outward expression of a person's religion and

belief through worship, observance, teaching and practice (within reason), but not the outward expression of thought and conscience, which is protected by s 14 (freedom of expression). Importantly, the exercise of s 13 cannot be limited, while the exercise of s 15, by virtue of its implicit effect on others, can be.<sup>973</sup>

4.67 Butler and Butler contend that the right to freedom of thought would protect recording one's own thoughts for personal use, including taping oneself or writing down one's thoughts in a diary.<sup>974</sup> ECHR jurisprudence suggests that s 13 may also oblige the state to protect vulnerable individuals against improper coercion or indoctrination aimed at changing their beliefs, for instance through improper pressure. In *Larissis v Greece*, the European Court of Human Rights ("ECTHR") concluded that art 9 of the ECHR restrained commanding officers in the Greek Air Force from proselytising their subordinates, as it would be difficult for the subordinates to rebuff persons of a superior rank in a military setting.<sup>975</sup> Similarly, state warnings and reports informing the public about dangerous sects across Europe also raise issues as to freedom of thought and religion.<sup>976</sup>

4.68 With regards to s 15, the MoJ has issued the following guidelines with respect to what is afforded protection:<sup>977</sup>

- "Worship" includes building places of worship, using ritual formulae and objects, displaying symbols, and observing holidays and days of rest.
- "Observance" includes dietary regulations, wearing of distinctive clothing, participation in rituals associated with certain stages of life, and use of particular language customarily spoken by a group.
- "Practice" and "Teaching" include choosing religious leaders, priests and teachers, establishing seminaries or religious schools, and preparing and distributing religious texts or publications.

#### Positive or Negative Duties?

4.69 Sections 13 and 15 do not impose positive duties on the state; rather, they affirm freedoms of the individual which the state is not to breach. As noted by the Court of Appeal in *Mendelssohn v Attorney-General*, the very nature of these rights and freedoms means that they are freedoms from state interference.<sup>978</sup> However, this requirement may nevertheless place limitations on the state in certain circumstances. For example, in *Mendelssohn*, the Court noted that the state may be obliged "under international law or on a more general basis, to intervene to protect religious freedom against private oppression or coercion".<sup>979</sup>

4.70 Where the state has adopted an official state religion or ideology, this must not result in the impairment of a person's rights who does not follow that religion, or who holds a different belief.<sup>980</sup> Further, where the state offers privileges for certain religions, it may be required to offer those benefits to all religions. In the case of *Religionsgemeinschaft der Zeugen Jehovas v Austria*, the ECtHR found that Austria had violated the rights of Jehovah's Witnesses.<sup>981</sup> This finding was based, among other things, on the long waiting period imposed on "new" religious communities by the state before the religious community could acquire "religious society" status, which offered substantial benefits.

4.71 The freedom of religious communities to choose employees or to approve persons as leaders according to criteria specific to that community is afforded statutory protection in New Zealand by way of ss 28 and 39 of the HRA. In *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland*, the HRRT had to decide whether the Bishop of Auckland had breached the HRA by refusing to allow the plaintiff to participate in the process of discernment because he was in an unmarried relationship, and therefore could not be ordained into the ministry.<sup>982</sup> The Tribunal found against the plaintiff on the basis of ss 38 and 39 of the HRA and the religious freedom provisions of the NZBORA, stating that this was the only possible outcome. To find otherwise:<sup>983</sup>

... would undermine in the most fundamental way the religious autonomy of the Church, its right to be selective about those who will serve as the very embodiment of its message and its voice to the faithful.

## Limitations

4.72 There are no recognised limitations to ss 13 and 15 in the NZBORA itself, but limitations recognised in comparable international provisions provide some guidance as to what the New Zealand courts might consider to be “justified limits” under s 5.

4.73 In relation to the right to manifest religion, art 18(3) of the ICCPR states that the right may be subject to limitations “*as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*” (emphasis added). The ECHR includes similar recognised limitations.

4.74 In *R v Lee*, the High Court was required to consider whether a religious practice or ritual must still conform to the general law.<sup>984</sup> The defendant faced alternative counts of manslaughter for his role in the death of a person on whom he was conducting an exorcism. In discussing the defendant’s right to manifest his religion, the Court noted that:<sup>985</sup>

*The right does not override the provisions of the Crimes Act 1961. Thus, while Mr Lee had the right to practise exorcism in this country as part of his religion or belief in worship, he does not have the right when doing so to commit offences under the provisions of the Crimes Act. Mr Lee has therefore no legal right to carry out exorcisms in a manner which is likely to cause serious bodily harm to the person being exorcised.*

4.75 On appeal, the Court of Appeal noted that it would be no defence to a charge of murder for a defendant to claim that his religion required ritual sacrifices. In those circumstances, s 63 of the Crimes Act 1961, which provides that no person has the right to consent to death, would apply and s 15 of the NZBORA would give way to the right to life affirmed in s 8.

4.76 In another case, *B v Director-General of Social Welfare*, the Court of Appeal recognised that the right to manifest religion extends to bringing up and educating children in that religion.<sup>986</sup> However, the Court emphasised that “the parents’ right to practice their religion cannot extend to imperil the life or health of the child”.<sup>987</sup> The scope of s 15 thus excludes doing, or omitting to do, anything likely to place at risk the life, health and welfare of the child (see also discussion at [3.120]).<sup>988</sup>

4.77 Finally, in *Feau v Department of Social Welfare*, the appellant appealed against a sentence of periodic detention, arguing that it was manifestly excessive because of the effect it would have on his rights under s 15 of the NZBORA.<sup>989</sup> The appellant was a committed Seventh Day Adventist, which required him to rest on Saturdays, the Sabbath. The induction programme for the periodic detention took place on Saturday. Though the Court recognised that “some incursion of the appellant’s religious beliefs is entailed in requiring him to attend the induction course on a Saturday”, the Court took the view that “this is a limitation on his general right which is reasonable within the meaning of s 5” of the NZBORA.<sup>990</sup> The Court did note, however, that the approach taken by the Periodic Detention Centre had been “somewhat inflexible”.<sup>991</sup>

## Interface with Right to Freedom of Expression

4.78 In *Browne v CanWest TV Works Ltd*, the High Court was required to consider the interrelationship between ss 14 and 15.<sup>992</sup> The case concerned the broadcasting of a cartoon on television which depicted the Virgin Mary menstruating over a cardinal and the Pope. The Broadcasting Standards Authority found that the programme was not in breach of the relevant standards. The Catholic Bishops Conference appealed this decision. On appeal, the High Court considered that an assertion that the broadcasting of the show was an unjustified infringement on the religious freedom provisions of the NZBORA was implicit in the Conference’s arguments.<sup>993</sup>

4.79 In dismissing the appeal, Wilde J noted that the right to manifest a religious belief must extend to the right of others not to uphold those religious beliefs.<sup>994</sup> It had been open to the Authority to find that the right to freedom of expression was a weightier consideration than religious rights under the NZBORA, as the Authority was better qualified than the Court to strike the balance between the competing rights and apply the relevant standards in this context.<sup>995</sup> Citing the majority decision in *Otto-Preminger-Institut v Austria*, Wilde J held that:<sup>996</sup>

*The issue before the Court involves weighing up the conflicting interests of the exercise of two fundamental freedoms guaranteed under the Convention, namely the right of the applicant association to impart to the public controversial views and, by implication, the right of interested persons to take cognisance of such views, on the one hand, and the right of other persons to proper respect for their freedom of thought, conscience and religion, on the other hand. In so doing, regard must be had to the margin of appreciation left to the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole.*

4.80 Whether the right to religious freedom extends to the right to have others respect that religion was not directly addressed by the Court. Citing the dissenting opinion in *Otto-Preminger-Institut v Austria*, however, the Court noted that:<sup>997</sup>

*The [ECHR] does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinion of others.*

*Nevertheless, it might be accepted that it may be “legitimate” for the purpose of Article 10 [freedom of expression] to protect the religious feelings of certain members of society against criticism and abuse to some extent; tolerance works both ways and the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed. Consequently, it must also be accepted that it may be “necessary in a democratic society” to set limits to the public expression of such criticism or abuse.*

## Non-Discrimination and Minority Rights

4.81 Affirming the strength of the legislative protection against discrimination provided by the HRA, s 19 of the NZBORA provides that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the HRA. Affirmative action measures taken in good faith are also protected by s 19, which affirms that such measures do not constitute unlawful discrimination for the purposes of the HRA.<sup>998</sup>

4.82 Section 19 is central to the protection of minority rights in New Zealand. However, s 20 of the NZBORA provides specific protection for minorities in New Zealand, and to date has received very little attention. Accordingly, s 20 will be the key focus in the following analysis.

4.83 Section 20 of the NZBORA provides that a person belonging 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.*

4.84 The questions that arise are:

- What does s 20 add in terms of the minority rights protection afforded by the HRA and other more general NZBORA rights?
- Does s 20 afford additional protection over that in ss 13 and 15 for the rights of religious minorities?
- Is s 20 especially relevant to ethnic and linguistic minorities given there are no other specific rights to language or culture in the NZBORA?

## Scope

4.85 The purpose of s 20 is to prevent “oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which go to the heart of their very identity – their language, culture and their religion”.<sup>999</sup> The UNHRC has further observed that art 27 of the ICCPR, on which s 20 is based, is “directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole”.<sup>1000</sup>

4.86 As the Royal Society of New Zealand noted in *Languages in Aotearoa New Zealand*:<sup>1001</sup>

*The social and institutional tolerance for an individual or group to use a language has been understood as a human right for many decades (United Nations 1966). Since this recognition, international consensus has moved towards the philosophy that it is not enough for a language to be tolerated, but that it should be actively provided for and promoted (United Nations 1992). This is partly in recognition that even with tolerance-based language rights, languages are becoming extinct at increasing rates (Austin et al. 2011). This is in recognition that people need proficiency in their own language/s for important social and cultural reasons such as intergenerational communication and security of personal identity.*

4.87 There has been little case law in New Zealand under s 20. Rather, actions breaching minority rights have tended to be analysed by the courts in the context of the right to be free from discrimination (s 19) and the right to freedom of religion (s 13). Thus, we have to refer to overseas and international case law to determine the scope of s 20.

4.88 The word “minority” is not defined in the NZBORA or in the ICCPR. However, the UNHRC has observed that “minority” tends to relate to a group “numerically inferior” to the rest of the national population.<sup>1002</sup> Further, minority rights are not restricted to citizens or permanent residents of a country.<sup>1003</sup> Thus, the rights of migrants and visitors to New Zealand would also be protected under s 20. This is highly important given the huge number of migrants and visitors to New Zealand, particularly the growing international student population.<sup>1004</sup> As export education is New Zealand’s fifth largest export earner, it is essential for New Zealand to have sufficient legal protections in place to protect international students.<sup>1005</sup>

4.89 In terms of identifying an “ethnic minority” for the purposes of s 20, the test adopted by the Court of Appeal in *King-Ansell v Police* is likely to be useful.<sup>1006</sup> First, members of the group must hold a subjective belief that they are alike and share historical bonds. Second, other people must recognise the group as sufficiently distinct in the community. The use of this mixed objective/subjective test has been approved by the House of Lords.<sup>1007</sup>

4.90 Although the meanings of “religious minority” and “linguistic minority” have not been subject to such consideration by the courts, MoJ Guidelines suggest that these terms will be given a broad and liberal construction.<sup>1008</sup> The Guidelines suggest that most religions in New Zealand would constitute a religious minority, “particularly if denominations were counted separately”. Similarly, groups that use a language other than English are likely to qualify as linguistic minorities for the purposes of s 20.

4.91 The right affirmed in s 20 is not absolute and nor can it be used to circumvent other rights affirmed in the NZBORA.<sup>1009</sup> Accordingly, interference with the right is capable of being justified in accordance with s 5 of the NZBORA. The UNHRC has taken into account the relevant degree of the interference in assessing whether there has been an unjustifiable denial of minority rights. For instance, where the interference has only had a limited impact on the minority’s right, this will not necessarily represent a denial of the right.<sup>1010</sup> The UNHRC has also paid regard to whether the relevant minority group has been meaningfully consulted where state actions have the potential to interfere with the group’s enjoyment of its cultural activities.<sup>1011</sup>

### Does s 20 Impose Positive Obligations on the State?

4.92 Section 20 is expressed in negative terms, which suggests that the only obligation on the state is to refrain from interfering in particular minority activities: the state has no positive duty to foster a minority’s enjoyment of its culture, religion or language. This was essentially the conclusion of the Court of Appeal in *Mendelssohn v Attorney-General* in rejecting the plaintiff’s contention that the Government was obliged to protect his religious beliefs from criticism.<sup>1012</sup> The Court considered that, in contrast to other rights in the NZBORA (such as the rights of persons charged with criminal offences), s 20 affirmed a negative freedom and therefore did not impose a positive duty on the state to act.<sup>1013</sup> This can be contrasted with, for example, the Crown’s duty of active protection under the Treaty of Waitangi.

4.93 However, some commentators have contended that s 20 is similar to a number of other NZBORA rights, such as the right to life (s 8) or the right not to be subject to cruel treatment (s 9), both of which require the state to “avoid known threats in particular

circumstances”.<sup>1014</sup> This interpretation appears to have been endorsed in the ICCPR jurisprudence. For example, the UNHRC, in discussing the scope of art 27, observed that, “[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion”.<sup>1015</sup>

4.94 Consequently, the state might be required in some circumstances to implement positive measures, not only in relation to government acts but also in respect of third party acts, in order to ensure that the “existence or exercise of this right are protected against their denial or violation”.<sup>1016</sup> This is a greater duty than simply “guaranteeing tolerance or non-interference with expression of minority rights: ‘specific action’ must be embraced to address the practical burdens applicable to minority groups”.<sup>1017</sup> For instance, the UNHRC has recommended that the United States Government strengthen programmes aimed at reducing “the high incidence of poverty, sickness and alcoholism among Native Americans” in discussing its obligations under art 27.<sup>1018</sup>

4.95 Whether such an approach will be adopted by the New Zealand courts is uncertain. However, the courts have typically been reluctant to extend the scope of other negatively expressed NZBORA rights to impose positive duties on the state. For example, in *Seales v Attorney-General*, the Court held that the right to life (s 8) and the right not to be subjected to torture or cruel treatment (s 9) could not be interpreted to require the state to guarantee terminally ill individuals the right to die by euthanasia.<sup>1019</sup>

## Enjoyment of Culture, Religion and Language

### Religion

4.96 It is arguable whether s 20 affords additional protection for the rights of religious minorities in light of ss 13 and 15.<sup>1020</sup> As addressed above, ss 13 and 15 do not place any positive obligations on the state; rather, they affirm individual freedoms which the state must not breach. However, if the New Zealand courts were to follow the UNHRC’s approach to art 27 when interpreting s 20, this would suggest that s 20 does in fact provide additional protection for religious minorities beyond that afforded by ss 13 and 15. Specifically, the state would not only have a duty not to interfere with the freedom of religious minorities, but it would also have a positive obligation to protect a minority’s rights to practise its religion in community with the other members of the group.

### Culture

4.97 In contrast to the situation of religious minorities, who are also afforded rights under ss 13 and 15, there are no specific rights to language or culture elsewhere in the NZBORA. Accordingly, s 20 is especially relevant to ethnic and linguistic minorities.

4.98 The term “culture” is not defined in the NZBORA or the ICCPR. The UNHRC has emphasised that whether there has been a breach of a person’s right to enjoy a minority culture must be determined on a case-by-case basis.<sup>1021</sup> However, the UNHRC has found that spiritual activities and economic activities crucial to the minority’s culture, including hunting and fishing, fall within the ambit of minority cultural rights.<sup>1022</sup> Further, the right also protects modern practices and technologies, not just “traditional means of livelihood” for minorities.<sup>1023</sup>

4.99 In *Mahuika v New Zealand*, the applicants alleged that the 1992 Sealord Fishing Settlement between Māori and the Crown denied them the ability to exercise their traditional fishing rights.<sup>1024</sup> However, the UNHRC concluded that art 27 had not been infringed, as the Settlement benefited a substantial majority of the minority group, despite creating divisions within it.<sup>1025</sup> The UNHRC has also taken into account whether the minority group has been able to meaningfully participate in the making of decisions potentially interfering with the enjoyment of their minority rights. For example, in *Mahuika*, the UNHRC considered that there had been no denial of the applicants’ right to enjoy their culture, as the New Zealand Government had engaged in broad consultation with Māori over the sustainability of Māori fishing practices.<sup>1026</sup>

4.100 In another case, *New Zealand Underwater Association Incorporated v Auckland Regional Council*, the Council granted the Ports of Auckland the right to dump harbour dredgings

onto the seabed of the Hauraki Gulf.<sup>1027</sup> The Hauraki Māori Trust Board contended that dumping the dredgings in this location would be offensive to Māori religious and spiritual values.<sup>1028</sup> The Planning Tribunal concluded that, while local iwi may have been “profoundly affronted” by the discharge, this did not in itself amount to a denial of their enjoyment of their culture or the practice of their religion.<sup>1029</sup>

## Language

4.101 The UNHRC has distinguished the right of linguistic minorities to enjoy the use of their language from the general right to freedom of expression, as the latter right is available to every person, regardless of whether they belong to a minority.<sup>1030</sup> The UNHRC has also taken the view that the minority right to enjoyment of the use of language encompasses the right of members of a linguistic minority to use their language among themselves, both in public and private, and is distinct from the right of accused persons to the assistance of an interpreter if the person cannot understand or speak the language used in court.<sup>1031</sup>

4.102 There have been few cases examining the rights of linguistic minorities under art 27.<sup>1032</sup> The UNHRC’s approach to date has been to focus on art 26, which prohibits discrimination on various grounds, similar to s 19 of the NZBORA.<sup>1033</sup> The protection offered by anti-discrimination provisions such as s 19 and art 26 is far narrower than that offered by s 20 and art 27: while the former provisions are geared towards ensuring procedural due process and equality, the latter provisions create a substantive protection for minorities.

4.103 It is unclear what kinds of measures the state might be required to implement to protect the rights of linguistic minorities. The *Guide on the Language Rights of Linguistic Minorities* developed by the Office of the High Commissioner for Human Rights in response to a 2013 report by the Special Rapporteur on minority issues<sup>1034</sup> suggested that initiatives focussed on promoting the use of minority languages in education were crucial, as:<sup>1035</sup>

... [e]ducation deals with what is perhaps the central linguistic rights for minorities, as well as [being] fundamental for the maintenance of linguistic diversity: a language which is not taught is a language which ultimately will vanish.

4.104 The UNHRC in *Mavlonov v Uzbekistan* has also observed that “in the context of article 27 [of the ICCPR], education in a minority language is a fundamental part of minority culture”.<sup>1036</sup>

4.105 Overall, the key question is, does s 20 require the state to take positive steps to protect language, religion and culture and, if so, in what circumstances?

## Relationship between ss 19 and 20

4.106 In order to properly assess the nature and scope of the state’s duties under s 20, it is necessary to examine the relationship between ss 19 and 20. The relationship between these two provisions, both of which are grouped under the subheading of “non-discrimination and minority rights”, has not yet been addressed by the courts. It is important to note that s 20 only applies to individual members of a class of persons qualifying as a “minority”, whereas s 19 protects the right of “everyone” to be free from discrimination.

4.107 Affirmative action measures taken to benefit groups of persons disadvantaged due to discrimination are protected under s 19(2). This is likely to encompass individuals belonging to a minority for the purpose of s 20, as a person’s race, ethnic or national origins, and ethical and religious beliefs are all prohibited grounds of discrimination under s 21 of the HRA.<sup>1037</sup>

4.108 Butler and Butler argue that the “combined effect of these provisions is that the state must not discriminate as between different minorities in how it protects them from the denial of cultural, religious or language practices”.<sup>1038</sup> This means that, if the state adopts any positive measures to prevent the denial of a minority’s s 20 rights, these measures must not be discriminatory as between different minorities, unless this differential treatment is justifiable in accordance with s 5 or s 19(2) of the NZBORA.<sup>1039</sup> This interpretation is consistent with the approach of the UNHRC to arts 26 and 27 of the ICCPR.

4.109 The distinction between arts 26 and 27 is illustrated by the UNHRC's decision in *Di-ergaardt v Namibia*.<sup>1040</sup> In that case, the applicants, who were members of the Baster community, claimed that Namibia had violated arts 26 and 27 of the ICCPR by denying them the right to use their mother tongue, Afrikaans, in "administration, justice, education and public life", and by forcing them to use English instead.<sup>1041</sup> They further claimed that the state had "instructed [its] civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they were perfectly capable of doing so".<sup>1042</sup> The UNHRC held that art 26 had been breached, as state policy "intentionally targeted against the possibility" of using Afrikaans but had not done so with the multiple other minority languages spoken in Namibia.<sup>1043</sup> Accordingly, the UNHRC ordered that the state permit its officials to respond in languages other than the official language "in a non-discriminatory manner".<sup>1044</sup> The UNHRC was therefore focussed on ensuring the protection of "procedural fairness and state neutrality, not the importance of cultural diversity or the protection and promotion of the Basters' minority language" under art 27.<sup>1045</sup>

4.110 It is difficult to envisage how the state could actively protect a minority's language, culture or religion, without falling foul of s 19. Where the state undertakes positive steps in relation to one minority, s 19 would suggest that it is required to provide equivalent measures in respect of other similar minorities. It is possible that it is only in such circumstances (that is, where the state has provided one minority active protection, but not others) that a claim for positive duties under s 20 might be brought. Any such case, however, could equally rely on s 19. Therefore, it is difficult to see how s 20 could be invoked to require the state to take positive action in the absence of a parallel s 19 claim. The following examples taken from the New Zealand context are used to assess what a successful claim brought under s 20 might look like.

## Examples of Possible s 20 Claims

### Example One: Funding of Pacific Language Resources in Early Childhood Education

4.111 In 2010, the MoE cut funding for the future production of Pacific language and literacy materials. Public outcry from Pacific families, teachers and organisations led to the formulation of the Bilingual Leo Pacific Coalition, which submitted a petition to Parliament in 2011 requesting that the Government continue production of Pacific language resources and fund Pacific languages literacy and English literacy development through bilingual education programmes for Pacific students.<sup>1046</sup> The Coalition considered that the lack of special status for Pacific languages (in contrast to Te Reo Māori and New Zealand Sign Language) was also inconsistent with New Zealand's growing Pacific community and its unique constitutional relationship with Pacific Island nations. Consequently, the Coalition began drafting a Pacific Languages Bill, which would have resulted in Pacific languages gaining the status of official minority languages of New Zealand.<sup>1047</sup>

4.112 As a result of the Coalition's efforts, the Education and Science Committee launched an inquiry into the promotion of Pacific languages, though its scope was limited to ECE.<sup>1048</sup> Although a majority of the Committee concluded that the promotion of Pacific languages primarily remained the responsibility of Pacific communities, not the Government, it recommended that the Government consider how equity funding could be used more effectively to support heritage language learning, for example to target an increase in the number of Pacific language teachers, and that it encourage growth in the number of Pacific Island language immersion early childhood centres.<sup>1049</sup>

4.113 Had the Coalition attempted to rely on s 20 to secure its objectives, it is likely that such a claim would have been unsuccessful: the ICCPR jurisprudence suggests that s 20 cannot be relied on to insist that the Government fund the advancement of a minority language or give it special legal status in the absence of providing similar status for other minority languages. The role of the state in determining its own official languages was acknowledged in *Di-ergaardt*.<sup>1050</sup> In that case, various members of the UNHRC emphasised that "each sovereign State may choose its own official language and ... the official language may be treated differently from non-official languages ... this differentiation constitutes objective and reasonable

distinction which is permitted under article 26".<sup>1051</sup> These observations suggest that the state would not be required to give a minority language official legal status in order to comply with s 20.

#### Example Two: ECE Teacher Qualifications for Pacific ECE Centres

4.114 Under the Education Act 1989, the New Zealand Teachers Council ("NZTC") must determine standards for teacher registration and establish and maintain standards for qualifications that lead to teacher registration. In exercising this statutory function, the NZTC has determined that candidates for whom English is a second language must be able to show that they are proficient in English or Te Reo Māori by attaining Level 7 or higher in an internationally recognised English language test, such as IELTS. This accords with the NZTC's requirement that candidates must be proficient in English or Te Reo Māori in order to be eligible for provisional registration.

4.115 Say candidates who had secured employment in Pacific ECE centres after graduating from a specialised Pacific ECE course were refused provisional registration by the NZTC on the basis that they did not meet the requisite English language proficiency requirement. Most Pacific ECE services are managed and run by Pacific communities, and teaching is in at least one Pacific language (as opposed to English) and culture.

4.116 In terms of s 20, it could have been argued that the NZTC's requirement for teachers to reach Level 7 in an IELTS test essentially prevented Pacific ECE centres from hiring appropriate staff for their particular needs, thereby amounting to a denial of the minority right to enjoyment of their language. However, even though the NZTC's requirement may have represented a prima facie breach of s 20, it would probably have been held to be a reasonable limitation on the minority's s 20 rights under s 5 of the NZBORA. In order to teach in a New Zealand school or ECE centre, where English is an official language, it would arguably be reasonable to require prospective teachers to have a sufficient level of English proficiency.

#### Example Three: Adoption of a Formal Multicultural Policy

4.117 As discussed in the Stocktake of public agencies, the state's approach to diversity in the policy arena to date has been fragmented, with most departments and agencies left to implement their own strategies (which, for the most part, have focussed on the Treaty of Waitangi and working with Māori) rather than working under one overarching diversity strategy.

4.118 It is recommended at [5.76] and [3.113] respectively that the Government should consider adopting a formal multicultural policy and a national languages strategy. The adoption of such policies may be supported by the state's obligations under s 20 of the NZBORA.

4.119 Assimilationist policies which fail to acknowledge diversity are illegal under ss 19 and 20 of the NZBORA. But if it is accepted that ss 19 and 20 require the state to undertake positive steps to support minority groups, it is arguable that the state is not only obliged to refrain from implementing assimilationist policies, but is required to develop and implement a formal multicultural diversity strategy accommodating and promoting the cultural, religious and linguistic rights of Māori and other ethnic minorities. This is because, if social cohesion is not actively promoted, for example in the form of public education campaigns, there is the risk that migrants and ethnic minorities will be forced to conform to New Zealand's culture and values to escape hostility, and discrimination at work.<sup>1052</sup> This, in turn, undermines the ability of minorities to practise their religion, culture and language in breach of their rights under the NZBORA.

4.120 However, it could be argued that the broad functions conferred on the HRC and the Race Relations Commission regarding the promotion of public education and human rights fulfils any responsibility on the state to take positive action under ss 19 and 20. The HRC's primary functions under the HRA 1993 are:<sup>1053</sup>

- a. to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society; and
- b. to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.

4.121 This includes promoting and protecting respect for, and observance of, human rights through education and publicity, for example through the making of public statements and developing a national plan of action, in consultation with interested parties, for the promotion and protection of human rights.<sup>1054</sup> Similarly, the Race Relations Commissioner's primary responsibilities involve leading discussions of the HRC in matters of race relations and providing advice and leadership on matters relating to race relations when consulted.<sup>1055</sup>

4.122 The question is whether the HRC and the Office of the Race Relations Commissioner receive sufficient funding to carry out these functions. For example, despite the decreasing number of complaints to the HRC, the resources allocated to the HRC's dispute resolution function have not been redistributed, for example, to the HRC's focus on public education.<sup>1056</sup> On the contrary, the HRC has posted budget deficits in 2012/13 and 2013/14, together with a reduction in overall staff levels.

### Legal Pluralism

4.123 The rights of minorities under s 20 are particularly relevant to the concept of "legal pluralism". Since its emergence in the 1970s, the concept of legal pluralism has been subject to much debate.<sup>1057</sup> Put simply, legal pluralism refers to a situation where multiple "legal orders" exist within a population and/or geographic area.<sup>1058</sup> In contrast, "legal centralism" is the idea that there should be one uniform law imposed by the state on all persons, "exclusive of all other law, and administered by a single set of state institutions".<sup>1059</sup>

4.124 Various studies have found that legal pluralism is particularly prevalent in colonial and post-colonial nations, such as New Zealand, where customary legal norms or institutions have either been accommodated or recognised within state law or have operated independently alongside it.<sup>1060</sup> Globalisation, including increased migration across national borders, has also given rise to a "wave" of legal pluralism.<sup>1061</sup>

### Recognition of Māori Customary Law

4.125 As I wrote in *Public Law Toolbox*, the s 20 rights of minorities have recently been considered by the Supreme Court in *Takamore v Clarke*.<sup>1062</sup> This was the final decision in a long-running legal dispute. Mr Takamore and his partner, Ms Clarke, had lived in Christchurch for a long time and, after his death, she arranged for him to be buried there. Before the funeral, Mr Takamore's family took his body to the North Island for burial in accordance with Tūhoe custom. His partner and children applied to the High Court for an order requiring the return of Mr Takamore's body.

4.126 The High Court held that the body should be returned to Ms Clarke for her to arrange burial in Christchurch.<sup>1063</sup> The Court of Appeal agreed.<sup>1064</sup> The majority of the Supreme Court (Tipping, McGrath and Blanchard JJ) considered that the decision relating to the deceased's burial is for the personal representative, subject to the Court's ability to intervene if that decision is inappropriate.<sup>1065</sup> The minority (Elias CJ and William Young J) considered that any dispute should be determined in the High Court.<sup>1066</sup>

4.127 On the one hand, the majority held that the common law still applies when the deceased is of Māori descent, but that Māori burial practice must be taken into account where it is relevant.<sup>1067</sup> However, Elias CJ, dissenting, stated that it would be "paying lip service to the importance of culture recognised by the New Zealand Bill of Rights Act and in particular the importance of Māori society and culture in New Zealand ... to conclude that the wishes of the spouse will always prevail over other interests".<sup>1068</sup> However, in this particular case, Elias CJ considered that Ms Clarke should be given the right to determine where Mr Takamore should be buried, because he had put his Christchurch family first in his life, rather than maintaining strong family connections in the North Island.<sup>1069</sup>

4.128 *Takamore* was considered in the 2013 Court of Appeal case of *Mason v R*, where the appellant, who had been convicted of murder and attempted murder, appealed his conviction on the basis that he should have been dealt with in accordance with tikanga Māori.<sup>1070</sup> The appellant based his argument on the right to self-determination in art 1 of the IC-CPR and the protection of the right of ethnic minorities to enjoy and practise their own culture

in art 27 of the ICCPR and in s 20 of the NZBORA. In giving the Court's reasons, Ellen France J distinguished the case of *Takamore*, saying it "illustrates the role of custom in informing the common law",<sup>1071</sup> and concluded that the Māori system for dealing with wrongdoing relied on by the appellant had been extinguished by the Crimes Act 1961. The Court of Appeal found that neither the ICCPR nor the NZBORA altered that position.<sup>1072</sup>

## Recognition of Other Cultural Traditions, Attitudes and Customs

### The Court System

4.129 The New Zealand courts do appear to have been willing to take into account different cultural traditions, attitudes and customs in the criminal and family law context, but only to the extent that these values are consistent with New Zealand laws and values. The reasoning of the courts in these cases suggests that the public interest in a uniform, even approach to criminal and inheritance matters irrespective of cultural background would have been held to be a reasonable limit on the right to the enjoyment of culture under s 5 of the NZBORA. Such an approach is also consistent with New Zealand's obligations under art 5 of the Convention on the Elimination of All Forms of Discrimination against Women, which requires state parties to take all appropriate measures to:

*... modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women ...*

4.130 For example, in *Young v Young*, Tompkins J concluded that the deceased's will failed to adequately provide for his daughters in breach of the Family Protection Act 1955.<sup>1073</sup> The Court accepted that the deceased had acted in accordance with Chinese custom, which dictates that daughters' husbands are meant to provide for them, not their fathers.<sup>1074</sup> However, while the Court considered that it should take into account different cultural attitudes where appropriate, it was ultimately bound to assess the case with regard to the "moral standards of the New Zealand community".<sup>1075</sup>

4.131 The same conclusion was reached in *Cartlidge and Khandu v Khandu*,<sup>1076</sup> where the parties were of Indian heritage. According to Indian custom and tradition, the bulk of a deceased's estate is given to his or her male heirs, because upon marriage a daughter joins the family of her husband, whose obligation it then becomes to provide for her.<sup>1077</sup> The Court held that a wise and just testator whose judgement reflects the "norms of conduct morally acceptable to the community at large" would "reject the concept of preferment of male heirs to the virtual exclusion of female heirs irrespective of their relative needs, so as to leave the daughters of a family to benefit only by the goodwill of their brother or brothers".<sup>1078</sup> Accordingly, the deceased was in breach of her "moral duty" to make adequate provision for her daughters.<sup>1079</sup>

### Alternative Dispute Resolution Processes

4.132 One interesting example of legal pluralism operating overseas is the establishment of "sharia courts" in the United Kingdom. These tribunals, which usually operate from mosques, can settle financial and family disputes according to religious principles, which can then be enforced through the state courts. The jurisdiction of these tribunals derives from the Arbitration Act 1996 (UK), which permits parties to elect their own rules to determine a dispute. It is estimated that there are around 85 sharia courts currently operating in the United Kingdom.<sup>1080</sup> The tribunals have generated considerable public controversy, largely due to fears that women in particular are being coerced into settling private disputes in accordance with sharia principles, under which women do not hold equal status to men.<sup>1081</sup>

4.133 Similar concerns arose in the Canadian province of Ontario in late 2004 after a report for the Ontario Government by the former Attorney-General recommended that disputes be allowed to be arbitrated in accordance with religious law in family and inheritance law cases.<sup>1082</sup> The public backlash resulting from the report's recommendations was such that the Arbitration Act 1991 (ON) was quickly amended to prohibit any form of religious-based arbitration in February 2006.<sup>1083</sup>

4.134 There is theoretically scope for a similar development to occur in New Zealand. The Arbitration Act 1996 provides that the parties to a dispute can elect the rules of law to apply.<sup>1084</sup> However, according to Dr Anwar Ghani, President of the Federation of Islamic Associations of New Zealand, the development of sharia courts is not a pressing issue for the Muslim community in New Zealand, and the Muslim population abides by New Zealand laws.<sup>1085</sup> For instance, Muslim couples are being married in mosques by religious leaders, but only once they have reached the age of 18 – the legal age of marriage in New Zealand.<sup>1086</sup> Rather, the key issues facing the Muslim population are discrimination in daily life and in employment, particularly among young people (who are not being employed despite their high-level qualifications),<sup>1087</sup> and the Government's lack of consultation with the Muslim community over recently enacted terrorism laws.<sup>1088</sup>

## Cultural Defence

4.135 Cultural and religious diversity has raised a multitude of issues in the criminal law context. For example, overseas jurisdictions have increasingly had to grapple with the concept of “cultural defence” in recent years; that is the idea that cultural or religious norms are factors which may influence a person's thoughts and actions in such a way as to “render them less blameworthy in the relevant legal sense”.<sup>1089</sup> Thus, in circumstances where a person's violation of criminal law is motivated by that person's cultural values, he or she may have a partial or total defence to criminal liability or a basis for arguing he or she should receive a reduced sentence.

4.136 Although the idea of a “cultural defence” to criminal offending has been subject to only limited consideration in New Zealand, the courts have only accommodated different cultural practices and views to the extent that these are compatible with New Zealand law and standards, as in the family law context. The primary reason for this approach has been to ensure that the law is applied equally and evenly to all persons, regardless of race, religion or cultural background – in other words, “one law for all”. In the criminal law context, this has meant that cultural considerations have been taken into account at the sentencing stage as a potential mitigating factor rather than as a partial or total defence to liability for an offence.

4.137 Framing this in terms of s 20, the individuals in the following cases could have relied on s 20 to support an argument that their cultural values were relevant in determining the appropriate punishment, on the basis of their right to the enjoyment of their culture. However, even if the courts had concluded that s 20 required them to take such a course of action, the courts are likely to have gone on to find that the countervailing public interest in ensuring the law is applied evenly to all individuals, irrespective of race, religion or cultural background, was a justified limitation on s 20.

4.138 In *R v Talataina*, the defendant pleaded guilty to sexually violating the complainant. Both parties were Samoan, and the Samoan custom of ifoga was subsequently undertaken, whereby the defendant's family presented significant gifts to the complainant's family in order to effect reconciliation.<sup>1090</sup> The ritual of ifoga operates in place of a formal criminal justice system.<sup>1091</sup> The Court of Appeal considered that, although the ritual certainly held value in its ability to mend relationships, the law of New Zealand had to be administered in the interests of society as a whole.<sup>1092</sup> The serious nature of the offending and its long-term emotional consequences for the complainant could not be “expunged even by the most sincere acts of reconciliation”.<sup>1093</sup> Thus, the ritual could only be taken into account as an indication of a defendant's genuine remorse or capacity for rehabilitation.<sup>1094</sup>

4.139 In another case, *Police v O*, two Samoan boys were charged with sexual violation by rape, indecent assault and detaining a girl under the age of 14 years with the intent to have sexual intercourse.<sup>1095</sup> The defence requested the Court to exercise its discretion under s 275 of the Children, Young Persons, and Their Families Act 1989 to have the matter heard in the Youth Court. Counsel for the defendants submitted that the Youth Court system, where the emphasis is on family empowerment and dealing with offending within the offender's community, was more compatible with the traditional Samoan manner of dispute and conflict resolution.<sup>1096</sup> The defendants would receive significant terms of imprisonment between four to six years if found guilty of the charges in the District Court, but would only face a maximum of three years'

imprisonment if the charges were proved in the Youth Court.

4.140 Although the victim, her family and the community preferred the matter to be resolved in the traditional Samoan manner, Judge Harvey expressed concern at adopting this approach given the seriousness of the offending:<sup>1097</sup>

*Should a defendant's cultural background and the adoption by a defendant and his or her family of a particular method of dispute resolution mean that an otherwise appropriate but culturally different course be put to one side or discounted? The problem that such a course of action raises is in overall evenness and equality of approach. New Zealand is a country that has wide cultural diversity. It is an aspect of our society that gives it richness and vitality. New Zealanders have prided themselves for some time upon their ability to accept a diversity of cultures under the umbrella of a common legal system. To use another metaphor, the law is the glue that binds all members of society together. Regardless of race, religion, or cultural background, the law is applied evenly to all.*

4.141 Accordingly, although the parties considered the matter to essentially be resolved, the state would be seen to be failing in its duty to protect members of the community if the matter was transferred to the Youth Court; the public interest demanded that allegations of such a serious nature were determined in the appropriate forum.

4.142 The Court of Appeal also rejected the idea of a cultural defence in the cases of *R v Fui-moana*<sup>1098</sup> and *R v Matefeo*, both of which involved serious child abuse.<sup>1099</sup> In the latter case, an appeal against sentence, the appellant submitted that the sentencing judge should have taken into account that disciplining children through the application of force was an accepted Samoan cultural practice. The Court rejected this argument, concluding that violence of this nature could not be a “legitimate means of discipline in any section of the community”.<sup>1100</sup>

4.143 In *Tahaafe v Commissioner of Inland Revenue*, the appellant appealed against his convictions for tax evasion under the Tax Administration Act 1994.<sup>1101</sup> The Inland Revenue Department found that a number of taxpayers had claimed rebates on the basis of receipts indicating donations to “Tongan Anglican Mission Saint Columer Grey Lynn” or “Tongan Mission Anglican Church Auckland”. These churches were not on the department’s list of donee organisations, which prompted further investigations revealing that some of the rebates had been credited to the appellant’s bank account. The appellant, relying on ss 13, 14 and 15 of the NZBORA, argued that the trial judge had failed to consider his actions in the context of Tongan Christian church culture and practice, which he alleged differed “greatly from mainstream Christian cultures and practices of the secular population”.<sup>1102</sup> He argued that, viewed in the context of Tongan Christian culture, his actions in believing that church members had made legitimate and significant donations to the church (when they had not done so) were reasonable. On appeal, Chisholm J acknowledged that, while ss 13, 14 and 15 of the NZBORA conferred freedoms on the appellant in terms of religion, those provisions did not provide him with a defence to the charges faced.<sup>1103</sup>

4.144 Finally, a Muslim man and his wife have recently been charged and convicted for repeatedly beating their teenage daughter because they thought she was gay.<sup>1104</sup> The charging document’s summary of facts stated that the man was angry because homosexuality is “contrary and in direct conflict to his interpretation of the Islamic faith”. The fact that prosecutions are brought in cases such as this indicates that cultural and religious differences will not be tolerated where these differences are irreconcilable with New Zealand’s prevailing community standards.

### Freedom of Association, Assembly and Movement

4.145 Although not directly related to protecting minority rights, these rights complete the framework of legal protection for minorities.

4.146 The rights to freedom of assembly and association are likely to be particularly engaged in a superdiverse society, for example in situations where a cultural, ethnic, religious or linguistic minority group wish to gather to protest a particular cause important to that group. The right to freedom of movement has been particularly relevant in the context of foreign

terrorist fighters. As discussed at [1.73], the higher rates of religious diversity in New Zealand and the increased opportunity for extremism means this right may be invoked more frequently in the future.

## Freedom of Peaceful Assembly

4.147 The right to freedom of peaceful assembly has long been recognised by the common law, and comparable provisions can be found in both the ICCPR<sup>1105</sup> and the ECHR.<sup>1106</sup> Though it tends to be associated with protest, it is widely thought to have a broader application, encompassing any gathering of two or more people for a common purpose,<sup>1107</sup> held in either a public or private space.<sup>1108</sup>

4.148 The right to freedom of assembly requires the state not to prevent people from assembling peacefully. Overseas courts have also held that the right imposes a positive duty on the state to ensure that the appropriate infrastructure is in place so people might exercise the right. For example, the ECtHR in *Appleby v United Kingdom* (in discussing the right to freedom of expression) observed that:<sup>1109</sup>

*... genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.*

## Limitations

4.149 Freedom of peaceful assembly is not an absolute right, and is subject to reasonable limitations in the circumstances under s 5 of the NZBORA. The Court in *Police v Beggs*, in considering whether the Speaker of the House could warn protesters to leave Parliament grounds, observed that:<sup>1110</sup>

*If a protest assembly is unlawful or individuals behave in a disorderly manner, or breach or threaten to breach the peace, or unreasonably infringe the rights of others, or create a civil nuisance, then the Speaker could not be said to be acting unreasonably in requiring their departure.*

4.150 The Court also considered the following other relevant factors to the reasonableness inquiry:<sup>1111</sup>

- i. Whether the assembly is unreasonably prolonged ...
- ii. The rights and freedoms of other people ...
- iii. The rights of the occupier and those whose business and duties take them to Parliament ...
- iv. The size of the assembly and its duration ...
- v. The content of what is being expressed ... [for example] where the message is one of hatred, racial abuse, intolerance or obscenity ...
- vi. The concept of “ordre public”.

4.151 In addition, art 21 of the ICCPR provides that restrictions may be imposed on the right to freedom of peaceful assembly which are:

*... imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

4.152 However, provided that the relevant assembly is “peaceful” (that is, where there is no actual violence intended by the participants), the content of what is being expressed during a protest is generally treated as irrelevant.<sup>1112</sup> As such, the subject of the assembly can be unpopular, or even offensive. In *Bradford v Police*, the Court observed that the right to freedom of peaceful assembly “is a right for everyone, whether their cause is attractive or unattractive and whether the form of protest is attractive or unattractive”.<sup>1113</sup> On this basis, a peaceful group protest in favour of ISIS would be permissible in theory, though the Government might be able to legitimately prevent it from occurring on the grounds that such an activity:<sup>1114</sup>

- Is likely to seriously disrupt public order to the extent that the activity is an offence under the Summary Offences Act 1981, the Crimes Act 1961 or some other legislation;
- Is actually violent or is likely to be violent;
- Is in breach of a clear statutory obligation or prohibition, such as the Trespass Act or the Terrorism Suppression Act 2002; or
- Is occurring on private property without the consent of the land owner.

### Freedom of Movement

4.153 Section 18 states that:

- (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.*

### Limitations

4.154 Though recognised as fundamental to a democratic society, the right to freedom of movement is not unlimited and is subject to extensive statutory limitations.

4.155 Section 18 protects the right to leave and enter New Zealand and the right to move freely within New Zealand. It is worth noting, however, that the position in international human rights law has long been that foreign nationals have no inherent right to enter or remain in a country, and there is no right preventing their removal from a state.<sup>1115</sup> Rather, states have a considerable discretion in relation to immigration policy, provided individual rights are respected.<sup>1116</sup>

4.156 For example, the phrase “lawfully in New Zealand” in s 18(1) and (4) is one significant limitation on the right to freedom of movement. Under the Immigration Act 2009, a person is only “lawfully in New Zealand” if he or she is a citizen, holds a valid permit or has been granted entry permission to be in New Zealand.<sup>1117</sup>

4.157 Most recently, the Countering Terrorist Fighters Legislation Bill, which has passed into law, contains several limitations on s 18, as was recognised in the s 7 report prepared for the Attorney-General on the Bill’s consistency with the NZBORA. The Bill amended the Passports Act 1992, the New Zealand Security Intelligence Service Act 1969 and the Customs and Excise Act 1996, with the aim of ensuring they were adequate to respond to the threat posed by foreign terrorist fighters and other violent extremists. With regards to the limitations on freedom of movement, the s 7 report stated that:<sup>1118</sup>

*The objective of restricting movement of FTFs [foreign terrorist fighters] is proportional to the protection of national security, public order and the rights and freedoms of others. This is especially the case where violent extremists are involved in gross and extensive violations of human rights and international humanitarian law.*

4.158 In particular, the Bill limited a person’s ability to leave New Zealand in prescribed circumstances. The right to leave has been held to encompass a person’s right to choose his or her destination, subject to the chosen state’s agreement (irrespective of whether the person is lawfully in New Zealand), and the right to a passport.<sup>1119</sup> Despite this, the Minister of Internal Affairs may now refuse to issue a New Zealand passport to a person if the Minister believes on reasonable grounds that the person intends to engage in or facilitate terrorism, the proliferation of weapons of mass destruction or unlawful activity likely to cause devastating economic damage to New Zealand.<sup>1120</sup>



# Endnotes

- 879 Employment Relations Act 2000, s 103(1)(c).
- 880 Employment Relations Act 2000, s 103(1)(e).
- 881 Human Rights Act 1993, s 21(1)(c).
- 882 Human Rights Act 1993, s 21(1)(d).
- 883 Human Rights Act 1993, s 21(1)(e).
- 884 Human Rights Act 1993, s 21(1)(f).
- 885 Human Rights Act 1993, s 21(1)(g).
- 886 Human Rights Act 1993, s 20J(1).
- 887 Human Rights Act 1993, s 92I.
- 888 Human Rights Act 1993, s 92J.
- 889 Human Rights Act 1993, s 22.
- 890 Human Rights Act 1993, s 65.
- 891 *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 at [74.8].
- 892 *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9. See also *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51.
- 893 *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 at [74.7].
- 894 *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 at [74.7].
- 895 *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 at [74.7], citing *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal* 2007 SCC 4, [2007] 1 SCR 161 at [22].
- 896 *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 at [74.5].
- 897 Human Rights Commission *Religious Diversity in the New Zealand Workplace: Questions & Concerns* (December 2011) at 6.
- 898 Human Rights Act 1993, s 28(1).
- 899 Human Rights Act 1993, s 28(2). Pursuant to s 58(1), the Act permits educational establishments to be maintained wholly or principally for students of one religious belief.
- 900 Human Rights Act 1993, s 35.
- 901 *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20 (28 September 2011).
- 902 *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20 (28 September 2011) at [53].
- 903 *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20 (28 September 2011) at [53].
- 904 *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20 (28 September 2011) at [62.b].
- 905 Although s 3 of the NZBORA states that the NZBORA only applies to government acts, or exercises of public function, as is discussed below, the United Nations Human Rights Committee, in its General Comment on the interpretation of art 27 of the ICCPR, the equivalent of our s 20, noted that art 27 required the state to take positive steps to prevent the denial of the right by third parties: UNHRC *General Comment 18 – Non-discrimination* UN Doc HRI/GEN/1/Rev 1(1994). A similar conclusion has been reached, for example, in respect of the right to life and the right to freedom from torture, both of which oblige the state to also take action to prevent threats to these rights by private persons or entities.
- 906 *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20 (28 September 2011) at [68].
- 907 This process is addressed in more detail in M Chen *Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at [16.125]–[16.129].
- 908 M Chen *Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at [16.131]–[16.134].
- 909 Human Rights Act 1993, s 98. The Chair is appointed by the Governor-General on the recommendation of the Minister of Justice for a five-year term: ss 99, 99A and 100 of the Human Rights Act 1993. The panel is made up of 20 members appointed by the Minister of Justice on the recommendation of the Governor-General: s 101. At least three of the panel members must be barristers or solicitors of the High Court with at least five years' practising experience: s 101(2A).
- 910 For example, non-attendance after being summoned to attend to give evidence or to produce papers is an offence under s 113 of the Human Rights Act 1993, and s 114 concerns the power to commit a person into custody for contempt. The Tribunal can dismiss any proceedings that it is satisfied are trivial, frivolous or vexatious and are not brought in good faith (s 115), and it must give reasons for its decisions (s 116). A decision of the majority of the members shall be the decision of the Tribunal (s 104(3)). The Tribunal regulates its procedure in such manner as it thinks fit, subject to the provisions of the HRA, and under the Human Rights Review Tribunal Regulations 2002 (s 104(5)).
- 911 Human Rights Act 1993, s 105.
- 912 Human Rights Act 1993, s 92J(1). A declaration that an Act is inconsistent with the NZBORA does not affect the validity, application or enforcement of the Act, and nor does it prevent the continuation of the act, omission, policy or activity that was the subject of the complaint.

- The declaration must, however, be brought to the attention of the House of Representatives. See Human Rights Act 1993, s 92K.
- 913 This provision was inserted in response to the High Court's decision in *New Zealand Van Lines Ltd v Proceedings Commissioner* [1995] 1 NZLR 100, [1994] 2 ERNZ 140 (HC).
- 914 The High Court held in *BHP New Zealand Steel Ltd v O'Dea* (1997) 4 HRNZ 456 (HC) at 477 and 478 that this provision was not to be interpreted as an "open cheque" to provide any relief. The "operative moving force" for any remedy was the remedy sought by the plaintiff.
- 915 See M Chen *Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at [16.94] and Human Rights Act 1993, s 132.
- 916 See also M Chen "Free Speech Safety Valve allows Political Debate without Violence" *New Zealand Herald* (online ed, 28 July 2011). Section 132 is not the only provision in the Human Rights Act 1993 which requires the consent of the Attorney-General before proceedings can be brought; it is also found in s 135, which attaches to the offence of refusing to allow entrance by the public to vehicles, facilities or places. This section replaced s 3 of the now repealed Race Relations Act 1971. Section 3 prohibited anyone from refusing the public access to places, vehicles or facilities due to discrimination on the basis of colour, race, ethnic or national origin. That section, and the new s 135, are both intended to criminalise segregation. For example, it would prohibit bus owners from refusing to allow any member of the public to sit on their bus, or to sit only in certain places. These provisions are rarely used, but remain a threat to deter behaviour that may incite racial disharmony. Other statutes also confer a similar discretionary power. See for example s 124 of the Crimes Act 1961 (indecent exhibition) or s 144 of the Films, Videos, and Publications Classification Act 1993 (objectionable publication).
- 917 Race Relations Commissioner *Commission Statement on Right Wing Resistance Leaflets* (12 May 2011).
- 918 A survey of cases brought under these provisions at the time of writing found only one successful case establishing a breach of s 61 (*Proceedings Commissioner v Archer* (1996) 3 HRNZ 123 (CRT)) and only two cases involving a breach of s 63 (*B Osborne & H Jakobsen & Wanganui Polytechnic Complaint No A3*, 2 September 1998 (Office of the Race Relations Conciliator) and *Satnam Singh v Shane Singh and Scorpion Liquor* (2006) [2015] NZHRRT 8). To date, there have been no successful cases brought under s 131. A successful claim was brought, however, under s 25(1) of the Race Relations Act 1971 (the precursor of s 131 of the HRA) in *King-Ansell v Police* [1979] 2 NZLR 531 (CA).
- 919 Human Rights Commission *Annual Report 2014* (October 2014) at 28.
- 920 Email from Pele Walker, Chief Mediator, Human Rights Commission to Mai Chen regarding unlawful discrimination statistics (7 August 2015).
- 921 Film, Videos, and Publications Classification Act 1993, s 3(3)(e).
- 922 Films, Videos, and Publications Classification Act 1993, s 123(1). Where no mens rea is established on the part of the defendant, the penalty is a fine (s 123(2)), but individuals may be liable for a maximum penalty of 14 years' imprisonment on conviction where they knew or had reasonable cause to suspect the publication was objectionable (s 124(2)(a)). Companies may be liable for a fine of up to \$200,000 (s 124(2)(b)). Different penalties apply in respect of possession of an objectionable publication: see ss 131 and 131A. There is a presumption of imprisonment in the case of repeat offenders: s 132B.
- 923 The penalty for disorderly behaviour is a fine not exceeding \$2,000 or three months' imprisonment. The penalty for offensive behaviour or language is a fine not exceeding \$1,000 (or \$500 where the person uses indecent or obscene words).
- 924 See *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1, (2011) 25 CRNZ 174.
- 925 See Adams on Criminal Law *Offences and Defences* (online ed) at [SO4.01] for a full discussion of relevant factors in this assessment.
- 926 Crown Law *Solicitor-General's Prosecution Guidelines* (July 2013) at [5.8.17].
- 927 Emphasis added.
- 928 Although one current member is a first generation New Zealander (Samoan, with Chinese and Tokelauan blood).
- 929 *AA Smartfuel Television and YouTube Advertisement ASA 15/223*, 23 June 2015. The Authority relied on its 2007 decision not to uphold a complaint about the way an Asian actor in the "30 Second Spray and Walk Away" advertisement spoke and acted when portraying the character. See *30 Second Spray and Walk Away Television Advertisement ASA 07/417*, 13 November 2007.
- 930 Employment Relations Act 2000, s 4.
- 931 Holidays Amendment Act 2010, s 12, which inserted ss 44A–44C into the Holidays Act 2003. Requests for such transfer must be made and dealt with in good faith and cannot reduce the total number of public holidays that an employee is entitled to, avoid the payment of public holiday penal rates, or an employee's entitlement to alternative holidays for working on public holidays.
- 932 Holidays Act 2003, s 69(3)(c).
- 933 Human Rights Act 1993, s 21(1)(d).
- 934 *Proceedings Commissioner v Bookes* CRT Decision 1/94, 13 April 1994 (NZCRT).

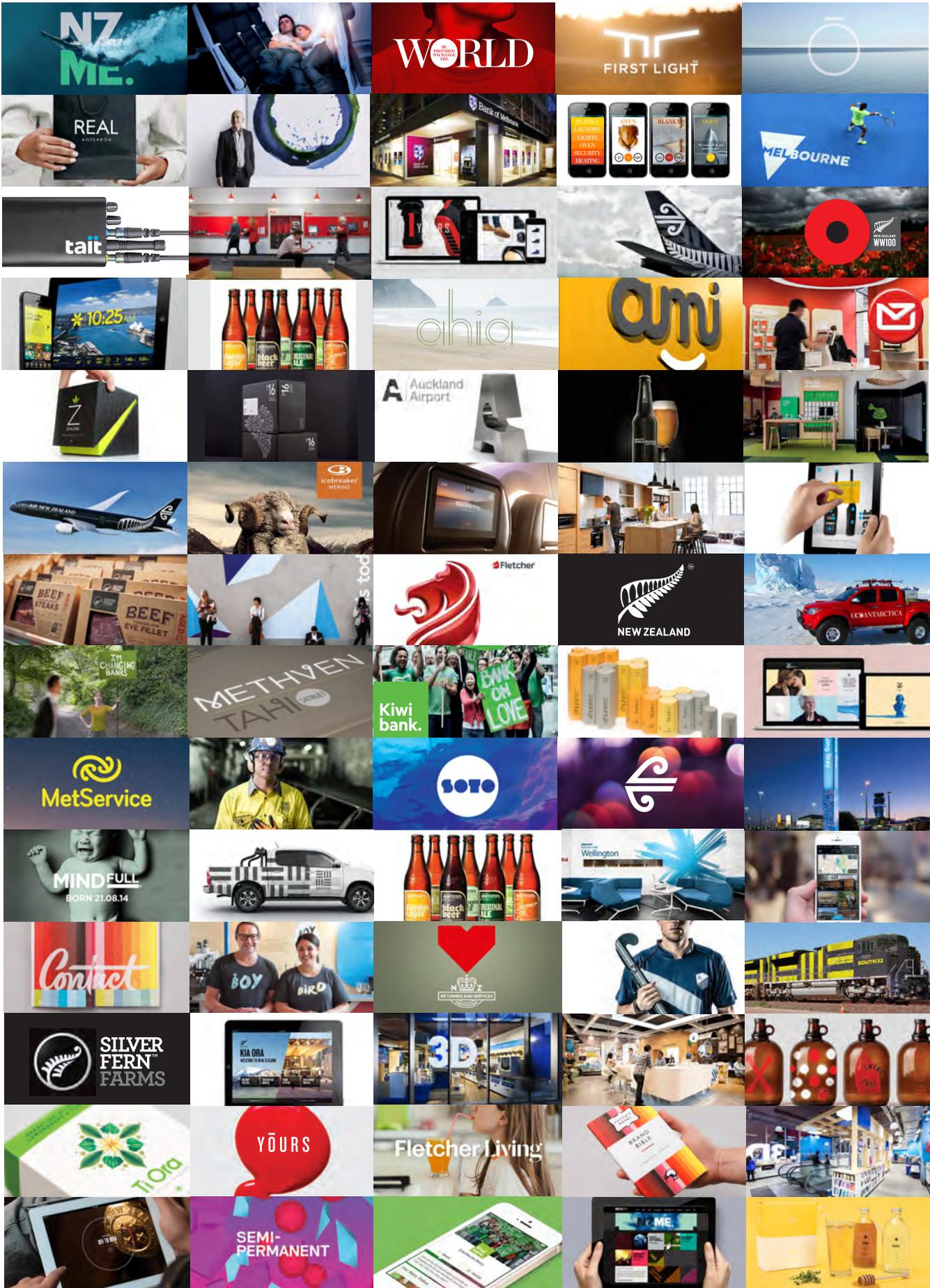
- 935 *Proceedings Commissioner v Boakes* CRT Decision 1/94, 13 April 1994 (NZCRT) at 7.
- 936 Land Transport (Road User) Rule 2004, r 11.8(7).
- 937 Employment Relations Act 2000, s 103(1)(c).
- 938 Employment Relations Act 2000, s 103(1)(e).
- 939 Employment Relations Act 2000, s 104(1).
- 940 Employment Relations Act 2000, s 104(2).
- 941 Employment Relations Act 2000, s 117(1)(c).
- 942 Employment Relations Act 2000, s 117(2).
- 943 Employment Relations Act 2000, s 117(3).
- 944 Employment Relations Act 2000, s 117(4).
- 945 Employment Relations Act 2000, s 118(2).
- 946 Employment Relations Act 2000, ss 123(1)(a) and 125(2).
- 947 Employment Relations Act 2000, s 123(1)(b).
- 948 Employment Relations Act 2000, s 123(1)(c).
- 949 Employment Relations Act 2000, s 123(1)(ca).
- 950 Employment Relations Act 2000, s 123(1)(d)(ii).
- 951 Employment Relations Act 2000, s 123(1)(d)(i) and (ii).
- 952 New Zealand Bill of Rights Act 1990, s 3.
- 953 New Zealand Bill of Rights Act 1990, s 3(b).
- 954 For a full discussion of the application of the NZBORA, see A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at ch 5. See also A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).
- 955 New Zealand Bill of Rights Act 1990, s 13.
- 956 New Zealand Bill of Rights Act 1990, s 14.
- 957 New Zealand Bill of Rights Act 1990, s 15.
- 958 New Zealand Bill of Rights Act 1990, s 16.
- 959 New Zealand Bill of Rights Act 1990, s 17.
- 960 New Zealand Bill of Rights Act 1990, s 18.
- 961 New Zealand Bill of Rights Act 1990, s 19.
- 962 New Zealand Bill of Rights Act 1990, s 20.
- 963 M Chen *Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at [16.18]–[16.19].
- 964 Judges do not have an obligation to raise NZBORA issues if the parties to a dispute do not do so. Supreme Court Justice Peter Blanchard suggests in his paper “New Zealand Bill of Rights Act 1990: Where have we got to after 16 years?” (2008) 2 NZLR 263, that maybe judges should have such an obligation.
- 965 A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [7.11.2]. See also A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).
- 966 See *Ministry of Transport v Noort* [1992] 3 NZLR 260, (1992) 8 CRNZ 114 (CA); *Police v Curran* [1992] 3 NZLR 260 (CA) at 272; *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 581; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
- 967 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
- 968 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92]. For critical discussion, see C Geiringer “The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*” (2008) 6 NZJPIL 59. See also C Geiringer “It’s Interpretation, Jim, but not as we know it: *Ghaidan v Godin-Mendoza*, the House of Lords and Rights-Consistent Interpretation” in P Morris and H Greatrex (eds) *Human Rights Research, Victoria University of Wellington: Papers presented at the Symposium on Interdisciplinary Approaches to Human Rights held at Victoria University of Wellington on 25 August 2004* (Victoria Human Rights Programme, 2005); J McLean “Legislative Invalidity, Human Rights Protection and s 4 of the New Zealand Bill of Rights Act” [2001] NZ L Rev 421. For discussion of the operation of the NZBORA in a specialised administrative context, see C Geiringer “Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority” in J Finn and S Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington, 2008).
- 969 UNHRC *General Comment No 22 – Article 18* UN Doc HRI/GEN/1/Rev 1 (1994) at [1].
- 970 UNHRC *General Comment No 22 – Article 18* UN Doc HRI/GEN/1/Rev 1 (1994) at [2].
- 971 UNHRC *General Comment No 22 – Article 18* UN Doc HRI/GEN/1/Rev 1 (1994) at [1].
- 972 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [36].
- 973 *Police v Razamjoo* [2005] DCR 408 (DC) at [97]. See also *Regina v Secretary of State for Education and Employment and others, ex parte Williamson* [2005] UKHL 15 (HL); UNHRC *General Comment No 22 – Article 18* UN Doc HRI/GEN/1/Rev 1 (1994).
- 974 A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [14.6.13]; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [14.6.16].
- 975 *Larissis v Greece* (1998) 27 EHRR 329 (ECtHR) at [51].
- 976 See A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at

- [14.8.5]–[14.8.6]; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [14.6.18]–[14.6.20].
- 977 See also UNHRC *General Comment No 22 – Article 18* UN Doc HRI/GEN/1/Rev 1 (1994).
- 978 *Mendelssohn v Attorney-General* (1999) 5 HRNZ 1 (CA).
- 979 *Mendelssohn v Attorney-General* (1999) 5 HRNZ 1 (CA) at [20].
- 980 UNHRC *General Comment No 22 – Article 18* UN Doc HRI/GEN/1/Rev 1 (1994) at [9] and [10].
- 981 *Religionsgemeinschaft der Zeugen Jehovas v Austria* (40825/98) Section I, ECtHR 31 July 2008.
- 982 *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36, (2013) 9 HRNZ 612.
- 983 *Gay and Lesbian Clergy Anti-Discrimination Society Inc v Bishop of Auckland* [2013] NZHRRT 36, (2013) 9 HRNZ 612 at [92].
- 984 *R v Lee* HC Auckland T10974, 3 December 2001.
- 985 *R v Lee* HC Auckland T10974, 3 December 2001 at [13]. The defendant later successfully appealed against his conviction in *R v Lee* [2006] 3 NZLR 42, (2006) 22 CRNZ 568 (CA) on the basis that the trial Judge should have let the defence of consent be put to the jury.
- 986 *B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) at 145.
- 987 *B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) at 146.
- 988 *B v Director-General of Social Welfare* [1996] 2 NZLR 134 (CA) at 146.
- 989 *Feau v Department of Social Welfare* (1995) 2 HRNZ 528 (HC).
- 990 *Feau v Department of Social Welfare* (1995) 2 HRNZ 528 (HC) at 530.
- 991 *Feau v Department of Social Welfare* (1995) 2 HRNZ 528 (HC) at 530.
- 992 *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654, (2007) 8 HRNZ 499 (HC).
- 993 *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654, (2007) 8 HRNZ 499 (HC) at [48].
- 994 *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654, (2007) 8 HRNZ 499 (HC) at [50].
- 995 *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654, (2007) 8 HRNZ 499 (HC) at [50].
- 996 *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654, (2007) 8 HRNZ 499 (HC) at [50].
- 997 *Otto-Preminger-Institut v Austria* [1994] ECHR 26 (ECHR) at 6, cited in *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654, (2007) 8 HRNZ 499 (HC) at [50].
- 998 New Zealand Bill of Rights Act 1990, s 19(2).
- 999 *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A.6 at [10.83].
- 1000 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [9].
- 1001 The Royal Society of New Zealand *Languages in Aotearoa New Zealand* (March 2013) at 2.
- 1002 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [5.1]–[5.2].
- 1003 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [5.1]–[5.2].
- 1004 See S Ryan “Growing but not that fast” *Weekend Herald* (29 November 2010); Ministry of Business, Innovation and Employment *Migration Trends and Outlook 2013/2014* (December 2014) at i; Ministry of Education *Exchange Rates and International Student Enrolments in New Zealand 2003–2013* (25 June 2014) at 5; Ministry of Education *Export Education Levy Key Statistics from 1 January to 30 April (2003–2014)* at Table 4.
- 1005 D McKay *Review of Central Government Policy, Implementation, Strategy and Leadership Effectiveness in Auckland: Report for Chief Executives Governance Group* (August 2014) at 5.
- 1006 *King-Ansell v Police* [1979] 2 NZLR 531 (CA) at 538.
- 1007 *Mandla v Dowell Lee* [1983] 2 AC 548 (HL).
- 1008 See Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act 1990* (November 2004).
- 1009 See the comments of Judge Moore in *Police v Taurua* [2002] DCR 306 (DC) at [50].
- 1010 See *Lansmann v Finland* Comm No 511/1992, 26 October 1994 (UNHRC) at [9.4]; *Mahuika v New Zealand* (2000) 7 HRNZ 629 (UNHRC) at [9.4].
- 1011 See for example *Lansmann v Finland* Comm No 511/1992, 26 October 1994 (UNHRC) at [9.5]; *Mahuika v New Zealand* (2000) 7 HRNZ 629 (UNHRC) at [9.5].
- 1012 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA).
- 1013 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [14].
- 1014 See A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [17.27.1]; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.22.9].
- 1015 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [6.2].

- 1016 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [6.1].
- 1017 S Joseph and M Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press, Oxford, 2013) at [24.53].
- 1018 UNHRC *Concluding Observations on the United States* UN Doc CCPR/C/79/Add 50 (1995) at [37].
- 1019 *Seales v Attorney-General* [2015] NZHC 1239.
- 1020 See for example P Rishworth "Minority Rights" in P Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) at 408.
- 1021 *Kitok v Sweden* Comm No 197/1985, 27 July 1998 (UNHRC) at [9.3].
- 1022 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [7].
- 1023 *Mahuika v New Zealand* (2000) 7 HRNZ 629 (UNHRC) at [9.3].
- 1024 *Mahuika v New Zealand* (2000) 7 HRNZ 629 (UNHRC).
- 1025 *Mahuika v New Zealand* (2000) 7 HRNZ 629 (UNHRC) at [7.8]–[7.9].
- 1026 *Mahuika v New Zealand* (2000) 7 HRNZ 629 (UNHRC) at [9.6] and [9.8].
- 1027 *New Zealand Underwater Association Incorporated v Auckland Regional Council* PT A131/91, 16 December 1991.
- 1028 *New Zealand Underwater Association Incorporated v Auckland Regional Council* PT A131/91, 16 December 1991 at 49.
- 1029 *New Zealand Underwater Association Incorporated v Auckland Regional Council* PT A131/91, 16 December 1991 at 49.
- 1030 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [5.3].
- 1031 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [5.3]. See New Zealand Bill of Rights Act 1990, s 24(g); ICCPR, art 14.3(f). See also *Diergaard v Namibia* CCPR/C/69/D/760/1997, 6 September 2000 (UNHRC).
- 1032 See for example UNHRC *CLD v France*, *Comm No 228/1987* UN Doc Supp No 40 (A/43/40) (1988), where the applicant contended that the French Postal Administration's refusal to issue him postal cheques printed in the Breton language constituted a violation of art 27. The UNHRC concluded that it had no jurisdiction to hear the claim, as France had entered a reservation to art 27. *Mavlonov v Uzbekistan* UN Doc CCPR/C/95/D/1334/2004 (2009) is the only case on the rights of linguistic minorities where art 27 has successfully been relied on. In that case, the Press Department of the Samarkand region refused to re-register a newspaper written in the Oina language. The newspaper contained educational and other materials for Tajik students and young persons on events and matters of cultural interest. The UNHRC held at [8.7] that:
- In the circumstances of the present case, the Committee is of the opinion that the use of a minority language press as means of airing issues of significance and importance to the Tajik minority community in Uzbekistan, by both editors and readers, is an essential element of the Tajik minority's culture. Taking into account the denial of the right to enjoy minority Tajik culture, the Committee finds a violation of article 27, read together with article 2.
- 1033 For further discussion on the UNHRC's approach to the rights of linguistic minorities under the ICCPR, see M Paz "The Failed Promise of Language Rights" (2013) 54(1) *Harvard International Law Journal* 157.
- 1034 Special Rapporteur *Report of the Special Rapporteur on Minority Issues* UN Doc A/HRC/22/49. See also Special Rapporteur *Report of the Special Rapporteur on Minority Issues* UN Doc A/HRC/28/64/Add 1 (2015).
- 1035 Office of the High Commissioner for Human Rights *Language Rights of Linguistic Minorities: A Practical Guide for Implementation* (2015) at 14.
- 1036 UNHRC *Mavlonov v Uzbekistan* UN Doc CCPR/C/95/D/1334/2004 (2009) at [8.7].
- 1037 Although language and culture are not prohibited grounds of discrimination, a person's language and culture are likely to be regarded as an intrinsic part or manifestation of his or her ethnicity and/or nationality.
- 1038 A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [17.29.2]; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.22.14].
- 1039 A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [17.29.2]; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.22.8]; Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act 1990* (November 2004) at [20.07].
- 1040 UNHRC *Diergaard v Namibia Comm No 760/1997* UN Doc CCPR/C/69/D/760/1997 (2000).
- 1041 UNHRC *Diergaard v Namibia Comm No 760/1997* UN Doc CCPR/C/69/D/760/1997 (2000) at [10.10].
- 1042 UNHRC *Diergaard v Namibia Comm No 760/1997* UN Doc CCPR/C/69/D/760/1997 (2000) at [10.10].
- 1043 UNHRC *Diergaard v Namibia Comm No 760/1997* UN Doc CCPR/C/69/D/760/1997 (2000) at [10.10].
- 1044 UNHRC *Diergaard v Namibia Comm No 760/1997* UN Doc CCPR/C/69/D/760/1997 (2000) at [12].
- 1045 M Paz "The Failed Promise of Language Rights" (2013) 54(1) *Harvard International Law Journal* 157 at 195.

- 1046 Petition Number 2008/139, presented by Su'a William Sio, 1 September 2011.
- 1047 Bilingual Leo Pacific Coalition "Call for Recognition of Pacific Languages" (press release, 24 March 2011).
- 1048 Education and Science Committee *Inquiry into Pacific Languages in Early Childhood Education* (November 2013).
- 1049 Education and Science Committee *Inquiry into Pacific languages in early childhood education* (November 2013) at 5.
- 1050 UNHRC *Diergaardt v Namibia Comm No 760/1997* UN Doc CCPR/C/69/D/760/1997 (2000).
- 1051 See individual opinion of Nisuke Ando (dissenting). See also individual opinion of Abdalfattah Amor (dissenting) and individual opinion of PN Bhagwati, Lord Colville, and Maxwell Yalden (dissenting).
- 1052 This has been the experience in Europe. See A Rudiger and S Spencer "Social Integration of Migrants and Ethnic Minorities: Policies to Combat Discrimination" (paper presented to OECD's Economic and Social Aspects of Migration Conference, Brussels, 21–22 January 2003) at 4. Rudiger and Spencer recommend that the European Commission develop a coherent integration policy framework at EU level, which builds on the experiences of Member States but overcomes national constraints, based on a twin track approach of promoting equality and managing diversity.
- 1053 Human Rights Act 1993, s 5(1).
- 1054 Human Rights Act 1993, s 5(2).
- 1055 See Human Rights Act 1993, s 16.
- 1056 Interview with Pele Walker, Chief Mediator, Human Rights Commission regarding cross-cultural disputes in New Zealand (27 July 2015).
- 1057 BZ Tamanaha "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375 at 390.
- 1058 J Griffiths "What is Legal Pluralism" (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1 at 38.
- 1059 J Griffiths "What is Legal Pluralism" (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1 at 3.
- 1060 BZ Tamanaha "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375 at 390.
- 1061 BZ Tamanaha "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375 at 386.
- 1062 *Takamore v Clarke* [2012] NZSC 116. See *M Chen Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) at [16.41]–[16.42]. See also F Adcock "Māori and the Bill of Rights Act: A Case of Missed Opportunities?" (2013) 11 *NZJPIL* 183 at 194.
- 1063 *Clarke v Takamore* [2010] 2 NZLR 525 (HC).
- 1064 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573.
- 1065 *Takamore v Clarke* [2012] NZSC 116 at [164].
- 1066 *Takamore v Clarke* [2012] NZSC 116 at [175].
- 1067 See discussion in *M Chen Public Law Toolbox* (2nd ed, LexisNexis, Wellington, 2014) ch 21 at [21.51].
- 1068 *Takamore v Clarke* [2012] NZSC 116 at [101].
- 1069 *Takamore v Clarke* [2012] NZSC 116 at [105].
- 1070 *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464.
- 1071 *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 at [35].
- 1072 *Mason v R* [2013] NZCA 310, (2013) 26 CRNZ 464 at [3] and [35].
- 1073 *Young v Young* HC Auckland M1732/88, 16 May 1995.
- 1074 *Young v Young* HC Auckland M1732/88, 16 May 1995 at 7.
- 1075 *Young v Young* HC Auckland M1732/88, 16 May 1995 at 8.
- 1076 *Cartlidge and Khandu v Khandu* HC Wellington CP551/86, 26 November 1987.
- 1077 *Cartlidge and Khandu v Khandu* HC Wellington CP551/86, 26 November 1987 at 5.
- 1078 *Cartlidge and Khandu v Khandu* HC Wellington CP551/86, 26 November 1987 at 10.
- 1079 *Cartlidge and Khandu v Khandu* HC Wellington CP551/86, 26 November 1987 at 11.
- 1080 D MacEoin *Sharia Law or 'One Law For All'?* (Institute for the Study of Civil Society, London, June 2009) at 69.
- 1081 D MacEoin *Sharia Law or 'One Law For All'?* (Institute for the Study of Civil Society, London, June 2009) at 4–5.
- 1082 M Boyd *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (December 2004) at 113.
- 1083 Family Statute Law Amendment Act 2006 (ON), s 1.
- 1084 Arbitration Act 1996, sch 1, art 28. For further discussion on the possibility of Islamic arbitration of family law disputes in New Zealand see L Ashworth "Islamic Arbitration of Family Law Disputes in New Zealand" (2010, dissertation submitted for LLB (Hons) Programme, University of Otago, October 2010).
- 1085 Interview with Dr Anwar Ghani, President of the Federation of Islamic Associations of New Zealand (27 March 2015).
- 1086 Marriage Act 1955, s 2(1), definition of "minor", and s 18. Minors who are 16 years old or over may be married with parental consent.
- 1087 See discussion at [2.123].
- 1088 See [4.157] for further discussion of extremism and the recently enacted terrorism laws.

- 1089 W Kymlicka, C Lernestedt and M Matravers "Introduction" in W Kymlicka, C Lernestedt and M Matravers (eds) *Criminal Law and Cultural Diversity* (Oxford University Press, Oxford, 2014) at 4. For a further discussion on the use of cultural defence in overseas jurisdictions, see M-C Foblets and A Dundes Renteln *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing, Oxford and Portland Oregon, 2009).
- 1090 *R v Talataina* (1991) 7 CRNZ 33 (CA).
- 1091 *R v Talataina* (1991) 7 CRNZ 33 (CA) at 35.
- 1092 *R v Talataina* (1991) 7 CRNZ 33 (CA) at 36.
- 1093 *R v Talataina* (1991) 7 CRNZ 33 (CA) at 36.
- 1094 *R v Talataina* (1991) 7 CRNZ 33 (CA) at 36. Ifoga has been taken into account as a mitigating factor in *R v Semisi* (1990) 6 CRNZ 360 (HC) and *R v Aiono* [2012] NZHC 1752. See also *Tugaga v Police* HC Christchurch AP225/89, 14 December 1989 at 3, where Holland J noted that:
- There is a great danger in this Court being asked to invoke only part of a person's culture without being fully informed of the totality of the culture of all that occurs. Having said all that, however, this offence occurred in New Zealand, and it is appropriate that the appellant be punished according to New Zealand law unless there is some special reason by way of his background or make-up deserving special treatment for him.
- 1095 *Police v O* (1993) 11 FRNZ 322, [1993] DCR 1080 (DC).
- 1096 *Police v O* (1993) 11 FRNZ 322 (DC) at 327.
- 1097 *Police v O* (1993) 11 FRNZ 322 (DC) at 327.
- 1098 *R v Fuimoana* CA276/95, 27 July 1995.
- 1099 *R v Matefeo* (1996) 14 CRNZ 276 (CA). See also *Tiwari v New Zealand Police* [2014] NZHC 2509, where the defendant, a Hindu priest, assaulted his wife during an argument after she cut her son's hair, which was against the parties' religion. The defendant appealed against his conviction, arguing he should be granted a discharge without conviction. The trial judge obliquely referred to the relationship between the defendant's faith and his actions, noting at [9] that "the faithful members of the Hindu community would consider the nature of the offence and all surrounding circumstances".
- 1100 *R v Matefeo* (1996) 14 CRNZ 276 (CA) at 279, quoting *R v Fuimoana* CA276/95, 27 July 1995.
- 1101 *Tahaafe v Commissioner of Inland Revenue* HC Auckland CRI-2009-404-102, 10 July 2009.
- 1102 At [66].
- 1103 At [69].
- 1104 P Dougan "Abuse trial: Muslim man beat daughter he thought was gay" *New Zealand Herald* (online ed, 19 May 2015).
- 1105 ICCPR, art 21
- 1106 ECHR, art 11.
- 1107 G Huscroft "Freedom of Peaceful Assembly, Association, and Movement" in P Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Oxford, 2003) 348 at 348; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [15.62]; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [15.8].
- 1108 See *Rassemblement Jurassien Unite Jurassienne v Switzerland* [1979] ECHR 7 at 2, where the European Commission on Human Rights (now abolished) held that:
- ... the right of peaceful assembly ... is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society ... As such this right covers both private meetings and meetings in public thoroughfares.
- 1109 *Appleby v United Kingdom* (2003) 37 EHRR 783 (ECtHR) at [39].
- 1110 *Police v Beggs* [1999] 3 NZLR 615 (HC) at 628.
- 1111 *Police v Beggs* [1999] 3 NZLR 615 (HC) at 628–630.
- 1112 Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act 1990* (November 2004) at Part 3 – Section 16 Freedom of peaceful assembly; *Bradford v Police* [1995] 2 HRNZ 405 (HC); *Cisse v France* (51346/99) Section II, ECtHR 9 June 2002.
- 1113 *Bradford v Police* [1995] 2 HRNZ 405 (HC) at 407.
- 1114 *Police v Beggs* [1999] 3 NZLR 615 (HC) at 627.
- 1115 *Chahal v United Kingdom* (1996) 23 EHRR 443 (ECHR) at [73]; UNHRC *General Comment 15 – The position of aliens under the Covenant* UN Doc HRI/GEN/1/Rev1 (1994) at [5].
- 1116 *Abdulaziz, Cabales, Balkandali v United Kingdom* (1985) 7 EHRR 471 (ECHR) [59] and [60]; UNHRC *General Comment 15 – The position of aliens under the Covenant* UN Doc HRI/GEN/1/Rev1 (1994) at [5]–[6].
- 1117 Immigration Act 2009, s 9.
- 1118 Attorney-General *Section 7 report on Countering Terrorist Fighters Legislation Bill* at [20].
- 1119 UNHRC *General Comment 27 – Freedom of movement (Art 12)* UN Doc CCPR/C/21/Rev1/Add9 (1999) at [8].
- 1120 Countering Terrorist Fighters Legislation Bill 2014 (1-1), sch, cl 1(1)(a).



Superdiversity Stocktake  
is sponsored by :

Chen Palmer  
Designworks  
Human Rights Commission

BNZ  
Perpetual Guardian  
Ministry of Education

Xero  
The Law Foundation

