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Deceived by Ornament:

An Evaluation of Indirect Discrimination Law in New Zealand

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I INTRODUCTION

This paper offers an evaluation of indirect discrimination law in New Zealand. Indirect discrimination is a particular area of anti-discrimination law that has been developed in the common law world over the last thirty-five years. Indirect discrimination is a complex concept that I will attempt to demystify in this paper. I will explain the concept, examining its origins, purposes and principles. I will then analyse New Zealand's indirect discrimination provision, comparing it with similar enactments in other countries and will investigate how it has been interpreted in the courts. After examining New Zealand's indirect discrimination law, I will discuss criticisms of the area and explore possible reasons why it has very seldom been used in New Zealand.

In my opinion the New Zealand indirect discrimination provision is a valuable and necessary part of the law. It is well drafted and avoids many of the problems found in comparable statutory provisions. The main problem with New Zealand's law is that it is not used as often as it perhaps should be.

II THE CONCEPTUAL BASIS OF INDIRECT DISCRIMINATION LAW

A *The Concept of Indirect Discrimination*

> So may the outward shows be least themselves:
> The world is still deceived by ornament.[1]

Anti-discrimination law primarily addresses direct discrimination, that is, when someone actively treats one person differently from another because, for example, of their race or sex. When anti-discrimination laws were first being introduced it was generally thought that the meaning of discrimination encompassed only this deliberately prejudiced treatment.[2] However, over the last thirty-five years, courts and legislatures have recognised that addressing discriminatory treatment is not enough. The recent emphasis on discriminatory effects in the absence of overt discrimination has seen the rise of the doctrine of indirect discrimination, also known as "disparate impact", "disproportionate impact", "adverse effect", "unintentional discrimination", "constructive discrimination"[3] and "inferred discrimination".[4]

Indirect discrimination occurs when someone's actions cause a discriminatory result even though they seem neutral and lawful at first glance. It occurs when, for example, an employer imposes a six foot height requirement. Such a requirement appears to discriminate on the basis of height, which is perfectly lawful, but in fact discriminates indirectly on the basis of sex, since more women than men would be excluded by the requirement. Unless the employer could show that the job genuinely

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[1] William Shakepeare *The Merchant of Venice* III ii 73-74 (London, JM Dent & Sons, 1921).
[2] Christopher McCrudden "Introduction" in Christopher McCrudden (ed) *Anti-discrimination Law* (New York University Press, New York, 1991) xiv.
[3] Isaacus Adzoxornu "Indirect Discrimination in Employment" [1997] NZLJ 216, 216.
[4] *Wheen v Real Estate Agents' Licensing Board* (1997) 4 HRNZ 15, 23 (HC).

required employees to be that tall, the requirement would be unlawful as indirect discrimination.

Indirect discrimination addresses discriminatory effects rather than discriminatory treatment. The material point in the height example is that women are in fact disproportionately excluded, regardless of the intentions of the employer.

B The Significance of Indirect Discrimination Law

The concept of indirect discrimination is useful in a diverse range of situations. It has been used to attack height and weight requirements, as in the example above,[5] ill-treatment of part-time workers as discriminatory against women,[6] the policies of insurance companies not to cover those who had participated in anal sexual activity as discriminatory against homosexuals,[7] ill-treatment of pregnant women as discrimination on the grounds of sex,[8] job requirements of high school diplomas in the 1960s as discriminatory against African Americans,[9] requirements of New Zealand qualifications as discriminatory on the grounds of national origins[10] and many other situations.

Indirect discrimination law is particularly useful for several different reasons. First, because it focuses on discriminatory effects rather than discriminatory

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[5] For example *Dothard v Rawlinson* (1977) 433 US 321.
[6] For example *Jenkins v Kingsgate* [1981] IRLR 228 (ECJ); *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110 (ECJ).
[7] Unreported complaints to the Human Rights Commission (2 February 1994) C 213/94 and (16 May 1995) C 352/94.
[8] For example *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* Case C-177/88 [1990] IRLR 211 (ECJ).
[9] *Griggs v Duke Power* (1971) 401 US 424.
[10] *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37 (HC); *Wheen v Real Estate Agents' Licensing Board* (1997) 4 HRNZ 15 (HC).

treatment, it can address discrimination that is unintentional,[11] whereas direct discrimination usually requires intent. Secondly, it can stop discrimination that is furtive, where, for instance, an employer deliberately excludes a group by indirect means, for example, by using height restrictions deliberately to exclude women.[12]

Thirdly, there is a strong need for good indirect discrimination law because of the major impact it can make on society through addressing systemic or structural discrimination:[13]

> [S]ystemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job". To combat systemic discrimination, it is essential to create a climate in which both negative practices and negative attitudes can be challenged and discouraged.

Ronalds describes indirect discrimination as "obviously the most important type of discrimination to eliminate" because the reforms that occur when it is addressed have widespread effect, beyond just remedying a particular individual's complaint.[14] Similarly, Fredman has described indirect discrimination as "the most sophisticated of the legal tools available to

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[11] For examples, see *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37 (HC); *Wheen v Real Estate Agents' Licensing Board* (1997) 4 HRNZ 15 (HC).
[12] For an example, see *Griggs v Duke Power* (1971) 401 US 424.
[13] *Action Travail des Femmes v Canadian Railway Co* [1987] 1 SCR 1114, 1139, quoted in Rosemary Hunter *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1992) 13-14 [Hunter *Indirect Discrimination in the Workplace*].
[14] Chris Ronalds *Anti-discrimination Legislation in Australia: A Guide* (Butterworths, Sydney, 1979) 8.

challenge structural discrimination".[15] One of the key elements of indirect discrimination is that a whole group is underrepresented. So even if a particular individual is principally affected, any rectification opens doors for members of the whole group.

Indirect discrimination is as significant a problem in New Zealand as in any other country. In her recent Law Commission Study Paper, *Women's Access to Legal Services*, Morris writes:[16]

> Laws such as [the Bill of Rights Act 1990 (section 19), the Human Rights Act 1993 (section 21) and the Domestic Violence Act 1995 (section 5)], and the attitudes which underlie them, have been particularly effective in preventing direct (or overt) discrimination against women. However, the persistence of social and economic inequalities between women and men suggests that indirect discrimination, by policies and practices which have the effect of prejudicing women as a group compared to men as a group, remains an obstacle to the achievement of their equality.

In New Zealand, the Bill of Rights Act 1990[17] and the Human Rights Act 1993 (HRA) have been enacted to protect people from both direct and indirect discrimination. While the main body of the HRA primarily addresses direct discrimination, section 65 specifically covers indirect discrimination, and has the effect of giving it all the same sanctions as direct discrimination.

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[15] Sandra Fredman *Women and the Law* (Oxford University Press, New York, 1997) 287 [Fredman].

[16] Joanne Morris *Women's Access to Legal Services: Study Paper 1* (New Zealand Law Commission, Wellington, 1999) 7.

[17] The Bill of Rights Act 1990 s 19(1) was held to mean cover both direct and indirect discrimination by Cartwright J in *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37, 59 (HC).

C *Illustrations of the Concept of Indirect Discrimination*

Indirect discrimination can be a difficult concept to grasp, and this paper argues that the biggest problem with indirect discrimination law is that it has sometimes been misunderstood and misapplied by judges. I believe that the problem is a misunderstanding of the basic concept of indirect discrimination rather than of the indirect discrimination provision in the law. This section therefore further explains and illustrates the conceptual basis of indirect discrimination law to provide a background for the analysis of New Zealand's indirect discrimination provision.

First, the section examines the origins and essential characteristics of indirect discrimination as evidenced by the case that first introduced the concept. Secondly, the New Zealand case of *Wheen v Real Estate Agents' Licensing Board*[18] will be discussed in detail to show the consequences of misunderstanding those essential characteristics.

1 Griggs v Duke Power

The concept of indirect discrimination was first articulated in the American case of *Griggs v Duke Power*,[19] which then inspired the indirect discrimination law of every other major common law jurisdiction.[20] The background facts and the ratio of this case show clearly what indirect discrimination is and how it is identified.

The defendant company, Duke Power, originally had a policy that African Americans were allowed to be employed only in its very lowest department.

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[18] *Wheen v Real Estate Agents' Licensing Board* (1997) 4 HRNZ 15 (HC).
[19] *Griggs v Duke Power* (1971) 401 US 424 [*Griggs*].
[20] Hunter *Indirect Discrimination in the Workplace* above n 13, 15.

When that practice was outlawed by the Civil Rights Act 1964, Duke Power changed its policy to one which required anyone wishing to transfer out of the lowest department to produce a high school diploma and achieve certain scores on aptitude tests. The tests did not purport to measure any skills or abilities relevant to the jobs. No intent to segregate was proven, but the company admitted that the effect of the new policy was such that " 'whites register far better on the Company's alternative requirements' than Negroes."[21] The Court found that this was because African Americans had "long received inferior education in segregated schools".[22]

The ratio in *Griggs* added a gloss to the general anti-discrimination law contained in the Civil Rights Act 1964 (CRA). Section 703(a) of that Act makes it unlawful for an employer:

> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Despite the fact that section 703(a) appears to address only direct discrimination, the Court found that it covered Duke Power's conduct. Its ruling was based on three elements: the disproportionate effect of the requirement, the requirement being unrelated to job performance, and the history of discrimination.[23] An extract from the judgment of the Court, delivered by Burger CJ, sums up the Court's attitude and intentions in making this decision:[24]

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[21] *Griggs*, above n 19, 430.
[22] *Griggs*, above n 19, 430.
[23] *Griggs*, above n 19, 425, 426.
[24] *Griggs*, above n 19, 431.

> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
>
> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has – to resort again to the fable – provided that the vessel in which the milk is proffered be one all seekers can use.

The use of Aesop's fable about the stork and the fox is helpful. Briefly, the fable is as follows: The fox invited the stork to a meal, politely offered her a drink of milk, but played a trick on her by serving the milk in a saucer, from which the stork, having a long beak, could not drink. The stork retaliated by inviting the fox home and serving milk in a slender pitcher which the fox could not use.

Similarly, an apparently neutral offer of work or promotion to all employees is discriminatory if an unnecessary condition is attached, like the use of a saucer or pitcher, that prevents a group of people from taking up the offer. The focus is on the "posture and condition" of the employee, which must be accommodated. The only defence recognised in the case is that the condition was objectively justifiable as part of "business necessity".[25]

The Court limited the ratio of the case to situations where there was a history of overt discrimination before the enactment of the CRA. This effectively meant that *Griggs* applied only to cases where there was circumstantial evidence of intent to discriminate, although no actual proof was required. Later developments in the United States and other jurisdictions have discarded this element and left out any requirement of intent.

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[25] *Griggs*, above n 19, 431.

2 Wheen v Real Estate Agents' Licensing Board

Wheen v Real Estate Agents Licensing Board is one of only two High Court cases to consider indirect discrimination in detail.[26] A brief analysis of this case shows the conceptual pitfalls lawyers and judges can fall into when discussing indirect discrimination. The Human Rights Commissioner urged the Court in *Wheen* to consider it a test case, but the tangled history of the proceedings before the case reached the High Court, Mr Wheen's odd behaviour[27] and his eventual absence from the hearing led the Court to remark that "the precedent value of this decision will inevitably be somewhat diminished".[28]

The facts of the case can be summarised as follows.[29] Mr Wheen was born in England, trained and practised there as a property practitioner, surveying and selling real estate. He claimed to have received various qualifications, including a Master of Science in Urban Land Appraisal, and to be a Professional Associate of the Royal Institute of Chartered Surveyors. In 1993 he migrated to New Zealand, and wished to continue his profession in this country.

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[26] *Wheen v Real Estate Agents' Licensing Board* (1997) 4 HRNZ 15 (HC) [*Wheen*]; *Wheen* was decided on the same day as the other High Court case, *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37 (HC) discussed below. The only other High Court case on s 65 deals with it very briefly.

[27] Mr Wheen behaved very strangely throughout the whole matter. The Complaints Review Tribunal commented that it found Mr Wheen evasive and reluctant to answer questions, was sceptical of some of his convenient memory lapses and concluded that he was hiding something. It also commented on his intemperate language to the Tribunal. His 102-page submissions to the High Court included further immoderate language, including allegations of lying and deception against the Board and a "whitewash" decision by the Tribunal. There is also a suggestion that Mr Wheen may not have held the qualifications he claimed. The High Court judgment recounts these and other details: *Wheen*, above n 26, 23, 25, 27.

[28] *Wheen*, above n 26, 27.

[29] The facts and details of the prior proceedings are set out at length in *Wheen*, above n 26, 18-27.

In New Zealand, practice in this field is governed by the Real Estate Agents Act 1976. The Act obliges all real estate agents to obtain certain specified qualifications and become members of the professional body, the Real Estate Institute of New Zealand.[30]

When Mr Wheen came to New Zealand and wanted to practise he found that there was no system for recognising his United Kingdom qualifications. The Real Estate Agents' Licensing Board (the Board) confirmed that it had "no discretion to accept" overseas qualifications and experience.[31] Mr Wheen then complained to the Human Rights Commission that the Board's administration of the 1976 Act was discriminatory in its effect on the basis of national origins. After several months of investigation, the Commission formed the opinion that Mr Wheen's complaint lacked substance and he appealed that finding to the Complaints Review Tribunal.

By the time the Tribunal proceedings were concluded, in March 1996, the Board had reviewed its policy and created a system for recognising overseas qualifications. The Tribunal found that the former lack of such a system did constitute indirect discrimination under section 65 of the HRA, but since the Board had remedied the situation, there was no longer any discrimination and Mr Wheen's action must fail.[32] Instead of applying for a licence under the new system, Mr Wheen appealed to the High Court.

In the High Court Williams J heard the case with the Honourable Margaret Shields and WAC Abiss appointed as additional members of the Court pursuant to section 126 of the HRA. In a joint judgment they overturned the Tribunal's discrimination ruling, finding that the lack of a system for

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[30] Real Estate Agents Act 1976 ss 17 and 67.
[31] Letter from the Board, quoted in *Wheen*, above n 26, 19.
[32] *Wheen*, above n 26, 24, 29.

recognising overseas qualifications did not amount to indirect discrimination.[33] I will argue that their reasoning for so finding is problematic, particularly in their misunderstanding and misapplication of section 65.

The Court looked at the period before the Board instituted the new system (in September 1994), and its essential reasoning was as follows:[34]

> [T]o be successful an applicant for a licence must ... pass the prescribed examinations. That obligation applied irrespective of the national origins of the applicant (or any other prohibited grounds for discrimination). The lack of a system for recognising qualifications other than the passing of the approved examinations applied equally to all applicants, New Zealanders and non-New Zealanders alike, irrespective of their national origins. The lack of a system for recognising overseas qualifications bore no more heavily on applicants of New Zealand origin who might have acquired qualifications overseas than on similarly qualified applicants of any other national origin. The lack of a system for recognising overseas qualifications therefore, in this Court's view, may have discriminated against persons who had not passed the Institute's examinations – but such is not unlawful. But if that discrimination applied, as it did, equally to all persons who had not acquired that qualification, irrespective of national origin, it cannot be said to have amounted to different treatment of persons on the ground of their national origin.

The Court based its reasoning on the idea that if a condition was applied equally to all, then it is not discriminatory, regardless of its actual effect. This is plainly wrong. Indirect discrimination law exists precisely for situations where a condition seems to be neutral and non-discriminatory but nevertheless has a discriminatory effect. The last quoted sentence clearly shows that the Court failed to consider the disproportionate effect the Board's

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[33] *Wheen*, above n 26, 29-30.
[34] *Wheen*, above n 26, 29-30.

system had on foreign applicants and erroneously focused on the overt treatment, thereby confusing direct and indirect discrimination.[35] In another part of the judgment the Court actually quotes a passage of the Supreme Court of Canada case of *Ontario Human Rights Commission & O'Malley v Simpsons-Sears Ltd* which clearly points out that indirect discrimination involves "a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect...".[36]

The Court in *Wheen* evidently believed it was applying the indirect discrimination rule from section 65 and *Griggs*.[37] When the facts of *Griggs* are substituted into the Court's reasoning in the passage above, it is clear that the Court in *Wheen* was mistaken:

> [T]o be successful an applicant for a [transfer to a higher department] must ... pass the prescribed examinations [and hold a high school diploma]. That obligation applied irrespective of the [race] of the applicant (or any other prohibited grounds for discrimination). The [requirements] applied equally to all applicants, [white] and [black] alike, irrespective of their [race]. The [requirement] bore no more heavily on [white applicants without a high school diploma] than on similarly [un]qualified [black] applicants. The [requirement of a high school diploma] therefore, in this Court's view, may have discriminated against persons who [had not completed high school] – but such is not unlawful. But if that discrimination applied, as it did, equally to all persons who had not acquired that qualification, irrespective of [race], it cannot be said to have amounted to different treatment of persons on the ground of their [race].

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[35] This confusion is also apparent in subsequent sections of the judgment; for examples, see *Wheen*, above n 26, 30, 35.
[36] *Ontario Human Rights Commission & O'Malley v Simpsons-Sears Ltd* [1985] 7 CHRR D/1302, D/3106 [*O'Malley*].
[37] *Wheen*, above n 26, 30, 35.

If the Court in *Griggs* had indeed reasoned thus, Duke Power would have won. The *Wheen* ruling effectively eliminates the difference between direct and indirect discrimination.

After stating its findings in the first quoted passage above, the Court also justified its position by considering the authorities on indirect discrimination. It recounted the major decisions in the United States,[38] Canada[39] and Australia,[40] but did not note that all are either clearly distinguishable on the facts or supportive of a finding of indirect discrimination.[41]

The Court then examined the New Zealand decision of *Lal v Residence Appeal Authority*.[42] Unfortunately, the Court in *Lal* made the same mistakes. Mr Lal was a tailor from Fiji who was applying for a residence permit. The immigration rules required him to have a trade certificate from Fiji before he could be credited with the points for being a tailor, but as such a certificate did not exist in Fiji, Mr Lal had been denied the points and the permit. Temm J in the High Court considered section 65 very briefly before deciding it did not apply, and even if it did, section 153(3) of the HRA exempted immigration policy from the Act's requirements. In finding that section 65 did not apply, the Court relied on the fact that the requirement in question was "not directed" at the Fijians or any other national group, and it applied to all applicants for residence permits. The Court said "[a]ny Fijian

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[38] Griggs, above n 19 and *Wards Cove Packing Co v Atonio* (1989) 490 US 642 both support a finding of indirect discrimination.

[39] *O'Malley*, above n 36 supports a finding of indirect discrimination; *Jamorski v Ontario (A-G)* (1988) 49 DLR (4th) 426 (Ont CA and *Taylor v Institute of Chartered Accountants of Saskatchewan* (1989) 59 DLR (4th) 656 (Sask CA).

[40] *Australian Medical Council v Wilson* (1996) 137 ALR 653 (FCA); *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 (FCA).

[41] The Australian and Canadian cases discussed in *Wheen* were all distinguishable on the facts as outlined in *Wheen*, above n 26, 30-34. All four cases involved accreditation of foreign qualifications, as in *Wheen*, but in all four, the accrediting bodies considered the applicants' particular qualifications to be improper for accreditation for reasons of substantive quality. In none of these cases was there a blanket policy of not accrediting foreign professionals as there was found to be in *Wheen*.

[42] *Lal v Residence Appeal Authority* [1997] NZAR 299 (HC) [*Lal*].

citizen who is the holder of a trade certificate as a tailor would be entitled to apply to be so classified".[43] This is analogous to arguing that any stork who is able to may drink from a saucer, despite the fact that *no* stork can drink from a saucer. The Court in *Wheen* quoted this passage from *Lal* without comment, apparently accepting its incorrect focus on intent and direct discrimination.

The next part of this paper argues that New Zealand's indirect discrimination law is well-drafted and gives good effect to the conceptual principles of indirect discrimination. The lesson from *Wheen* is that this commendable statutory provision is at risk of being misunderstood by courts and rendered useless. A clear and correct understanding of the purposes and characteristics of indirect discrimination law, absent in *Wheen*, is vital if the statute is to be effective.

III INDIRECT DISCRIMINATION IN NEW ZEALAND

A *New Zealand's Legislative History*

New Zealand first made explicit the difference between indirect and direct discrimination in section 27 of the Human Rights Commission Act 1977,[44] the predecessor to the current Human Rights Act 1993. A select committee member described section 27 as "a provision enabling the [Human Rights Commission] to look behind the words or appearance of some situation, and penetrate the actuality of it."[45] These are sentiments consistent with the *Griggs* focus on effects and reality, showing New Zealand's intended alignment with the heart of the original doctrine.

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[43] *Lal*, above n 42, 7.
[44] Section 27 is reproduced in the Appendix.
[45] Hon Dr AM Finlay (7 July 1977) 411 NZPD 1249.

Section 27 and the current indirect discrimination provision, section 65 of the HRA, are very similarly worded. The only significant difference between the two is in the defence. Section 65 has a defence of "good reason" but under section 27 the discriminating party has to both establish good reason for the discrimination and show "that its imposition is not a subterfuge to avoid complying with" the Act's provisions. This may be a hangover from the *Griggs* decision. Early indirect discrimination law, and particularly *Griggs*, was developed to deal with situations where organisations disguised their discriminatory practices instead of ceasing them. Like the Civil Rights Act 1964 in the United States, the Human Rights Commission Act 1977 was the first piece of national legislation to extensively outlaw even direct discrimination.[46] An immediate result of the new legislation in the United States was a merely superficial change in the practice of companies like Duke Power; the discrimination by subterfuge section may have been included in New Zealand to prevent the same thing happening here after the passing of the new 1977 Act.

The subterfuge element of indirect discrimination was omitted in the 1993 Bill, giving section 65 a wider coverage. This broadening of the scope of the section was not mentioned at all in the Parliamentary discussion of the Bill. This is partly because there were other issues, in particular the inclusion of sexual orientation as a prohibited ground of discrimination, which took up an exceptional amount of debate time.[47] It may also have been because section 65 is in all other respects so similar to its predecessor.

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[46] Except for the limited Race Relations Act 1971.

[47] (15 December 1992) 532 NZPD 13202-13220; (22 July 1993) 536 NZPD 16741-16752; (27 July 1993) 537 NZPD 16903-16978.

B *The Current New Zealand Legislation*

Indirect discrimination is currently prohibited in New Zealand law by section 65 of the Human Rights Act 1993:

> **65. Indirect discrimination** - Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination[48] in a situation where such treatment would be unlawful under any provision of this Part of this Act other than this section, that conduct, practice, condition, or requirement[49] 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.

Section 65 is significantly different from the equivalent statutes in the United States, United Kingdom, and Australia. The following analysis will discuss the significance, interpretation and comparative merit of the different elements of the section 65 test for indirect discrimination.

In the United States and Canada, discrimination was interpreted by the respective Supreme Courts to include indirect discrimination. Neither country's indirect discrimination law was created by statute, but the United States has codified the *Griggs* principles in the Civil Rights Act 1991.[50] As Canada's indirect discrimination law is not codified, it is not as relevant to the discussion of the New Zealand statute.

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[48] For s 21 of the Human Rights Act 1993, which contains the prohibited grounds, see Appendix.
[49] The apparently accidental change within s 65 of the order of "conduct, practice, requirement, or condition" is present in the statute but has no significance in the application of s 65.
[50] See Appendix; for legislative history and intent see Philip S Runkel "The Civil Rights Act of 1991: A Continuation of the *Wards Cove* standard of Business Necessity?" (1994) 35 W & M L Rev 1177.

In the United Kingdom, the two relevant statutes are the Sex Discrimination Act 1975 and the Race Relations Act 1976. Both have sections 1(1)(b)[51] which address indirect discrimination. The provisions are materially identical and will be referred to collectively as the United Kingdom legislation.

Australia has several relevant Commonwealth,[52] state and territory statutes,[53] the indirect discrimination provisions of which are all essentially the same.[54] They are based on,[55] and very similar to, the United Kingdom legislation. Where the Australian and British provisions are materially the same, the Australian ones will not be discussed separately.

1 *"Conduct, practice, requirement or condition"*

Section 65 of the Human Rights Act 1993 (HRA) requires a "conduct, practice requirement, or condition" to be the cause of the indirect discrimination. The section 65 wording is comparatively wide, explicitly allowing some elements of systemic discrimination to be attacked. This contrasts particularly with the United Kingdom and Australian legislation which covers only requirements and conditions, excluding less overt policies and attitudes. Courts in both jurisdictions have, however, interpreted the terms broadly "so as to cover any form of qualification or prerequisite demanded"[56] by the alleged discriminator. This interpretation still falls short of covering systemic discrimination as effectively as section 65.

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[51] See Appendix.
[52] Racial Discrimination Act 1975, Sex Discrimination Act 1984.
[53] Australian Capital Territory Discrimination Act 1991; New South Wales Anti-Discrimination Act 1977; Queensland Anti-Discrimination Act 1991; South Australia Equal Opportunity Act 1984; Victoria Equal Opportunity Act 1984; Western Australia Equal Opportunity Act 1984.
[54] See Appendix for a typical formulation.
[55] Chris Ronalds *Anti-discrimination Legislation in Australia: A Guide* (Butterworths, Sydney, 1979) 9.
[56] *Australian Iron and Steel v Banovic* (1989) 168 CLR 165, 185 (HCA) adopting the United Kingdom decision of *Clarke v Eley Kynoch* [1983] ICR 165 (EAT).

Systemic discrimination is found in discriminatory patterns or practices which are not explicit.[57] For example, a company could have a discriminatory hiring practice that is not spelt out in advertisements but is nevertheless part of the hiring policy. This kind of discrimination is included in the section 65 wording but not in the United Kingdom and Australian legislation.

The New Zealand wording much better encompasses the proper width of indirect discrimination law. Discrimination which is only covered by the wider New Zealand terms "conduct" and "practice" need not be particularly ephemeral. Overt policies of promotion criteria, for example, are well within a conservative estimate of what acts should be covered by anti-discrimination law, but if they are not circulated, they are caught only by these wider terms, not by the narrower "condition" or "requirement".

Interestingly, the inclusion of all four terms also gives more power to any statistical evidence of discriminatory effect as some conduct and practices will be difficult to pinpoint as discriminatory without such evidence. Such statistical evidence brings out the main point of indirect discrimination law, that discriminatory effects must be addressed.

The drafters of the Human Rights Act 1993 were right to include all four terms in section 65, thereby giving a remedy to as many victims of discrimination as possible. We have yet to see in New Zealand many examples of what acts or attitudes courts will include under section 65, but this limb of the section is wide enough that it is unlikely to pose problems for future complainants.

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[57] Isaacus Adzoxornu "Indirect Discrimination in Employment" [1997] NZLJ 216, 217.

2 *"Person or group of persons"*

Whether anti-discrimination legislation should be aimed at disadvantaged groups or only individuals is a complex and extensively debated question, but one which is beyond the scope of this paper. Section 65 explicitly covers both individuals and groups, which is comparatively unusual. Further, the effect of indirect discrimination law is to provide remedies of both individuals and groups. Individual instances of indirect discrimination are covered by section 65, but as mentioned above, the ramifications of any redress tend to advantage whole groups.

Lacey has recommended that class actions be adopted as a way of making anti-discrimination legislation more effective.[58] The HRA allows the Proceedings Commissioner to bring proceedings on behalf of a class of persons.[59]

3 *"Differently"*

Section 65 requires that the complainant be treated "differently". The wording of this element of the test begs the question: differently from whom? There are two broad issues raised by this wording. First, there is a practical problem of proportionality, of how a comparison is technically to be conducted. Secondly, there are ideological and also practical problems of comparison, raised primarily by feminist philosophies on whether men and women are alike enough to be compared and the effects of such a comparison.

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[58] Nicola Lacey *Unspeakable Subjects* (Hart Publishing, Oxford, 1998) 19-45.
[59] Human Rights Act 1993, s 83(2).

(a) Proportionality

Indirect discrimination is dependent on proof of disproportionate ill-treatment, that is, proof that more people in one group than another are disadvantaged by the treatment. Deciding how to judge this disproportionality is an important element of a legal judgment and the main technical issue under this limb. It was addressed comprehensively by the only other High Court case to consider section 65 in detail, *Northern Regional Health Authority v Human Rights Commission*.[60]

If the allegedly disadvantaged group is a minority, such as, for example, Russians in New Zealand, it is obviously not correct to say that there needs to be just as many Russian employees in a company as there are New Zealanders. That would skew the comparison in favour of the minority; to avoid this the court needs to consider the numbers as proportions of a 'base group'.[61] In a simple case the base group might be the general population. Applying this to the Russian example, if Russians make up 2% of the general population, then, all things being equal, they should make up roughly 2% of employees.

Unfortunately real life cases are not usually that simple, and a common problem courts face is who to include in the base group. An option at one extreme is the whole population as in the Russian example above, but usually it needs to be further restricted. There are international precedents for several different approaches, but there is no one view that has attracted sufficient support to be persuasive. This is partly because decisions on the groups to be compared are so dependent on the facts, but perhaps also partly

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[60] *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37 (HC) 61 [*North Health*].

[61] *North Health*, above n 60, 61-64; *Australian Medical Council v Wilson* (1996) 137 ALR 653 (FCA), 669; *Styles v Department of Foreign Affairs* (1988) 84 ALR 407, [1989] EOC 92-265 (FCA) [*Styles*]; *Australian Iron and Steel v Najdovska* (1988) 12 NSWLR 587 (NSW CA).

because the logic seems to defeat some judges. In one case in the High Court of Australia, two judges took the restrictive approach to a ridiculous extreme and took as the base group those people who could comply with the discriminatory condition, thus dividing those people by *themselves* to get the proportion.[62]

By an odd coincidence, *North Health* and *Wheen*, the only two High Court decisions to consider section 65 in any detail, were decided on the same day. Cartwright J in *North Health* was therefore effectively the first judge in New Zealand to interpret the section and she recognised the importance of determining the method of comparison. She examined the overseas approaches thoroughly and logically and established a method of comparison that is likely to be highly persuasive to future courts.[63]

Briefly, the problem in *North Health* began when the Northern Regional Health Authority (North Health), decided to limit the number of general practitioners (GPs) it would subsidise, to address a general oversupply of GPs, but a shortage in some poor areas. It subsidised GPs through what were known as 'section 51 notices'. Doctors without such a notice would be effectively out of business because of the much higher fees they would have to charge to cover their costs.

North Health limited the number of section 51 subsidy notices it issued by refusing them to those GPs who had undergraduate qualifications from outside New Zealand. The original complainant argued that this criterion

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[62] *Styles*, above n 61, per Bowen CJ and Gummow J; Rosemary Hunter "Two Views on Indirect Discrimination" (1990) 3 Austl J Lab Law 72.
[63] *North Health*, above n 60, 61-64.

was a "condition or requirement"[64] that indirectly discriminated on the basis of national origins.[65]

When determining the method of comparison, Cartwright J took as the base group all those people to whom the condition practically applied. In the case of *North Health*, that meant all doctors registered to practise in New Zealand, as registered doctors were the only ones who could apply for section 51 notices.[66]

Cartwright J then compared the proportion of registered foreign and New Zealand doctors who were awarded section 51 notices by North Health. The comparison made it obvious that foreign doctors who were entitled to practise in New Zealand were far less likely to get section 51 notices than New Zealand doctors, and the proportionality ground was made out.

(b) Comparison

Discrimination legislation around the world has been attacked because of its evidential need to compare a complainant to someone else. Feminist writers particularly find it problematic that a woman has to show that she has been treated less favourably than a man; that unfavourable treatment alone does not suffice.[67] This point is not applicable to indirect discrimination law, where a disproportion is the foundation of a discrimination case. The

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[64] North Health conceded that it was a "condition or requirement": *North Health*, above n 60, 61.

[65] The original complainant formally discontinued his proceedings for financial reasons. North Health, the Human Rights Commission (the HRC) and the Race Relations Conciliator (the RRC) agreed that the Court should determine the issues raised by the case, and new proceedings were issued with North Health as plaintiff, the HRC as first defendant and the RRC as second defendant.

[66] *North Health*, above n 60, 64.

[67] Nicola Lacey "Legislation Against Discrimination: Questions from a Feminist Perspective" (1987) 14 Journal of Law and Society 411.

problem lies with the practical difficulties created by the need for a male comparator. This problem arises where there are real differences between men and women, for example, in pregnancy discrimination cases.

Some feminist writers have long been concerned about the idea of the male as the norm, particularly in the area of law. As Fredman puts it, the Aristotelian principle that likes be treated alike raises the question: when are two people similar enough to be treated alike?[68] Writers who can be classed as 'difference' feminists maintain that women and men are indeed too different to be compared,[69] so a need in indirect discrimination law for comparison would not be appropriate from their point of view. Writing from another point of view, MacKinnon also contends that the Aristotelian model is "stunningly inappropriate to sex"[70], but for different reasons. She argues that 'equality' in practice means that women are measured by how close they are to men, that "man has become the measure of all things."[71]

Each school of thought is critical of comparisons of men and women; the latter for purely ideological reasons, the former because of practical impossibility of any sex comparison. I suggest that it is the 'difference' feminist point of view that is most relevant to indirect discrimination law. This is because, as mentioned above, the existence of a disproportion is the heart of the doctrine. Removing the comparison element from indirect discrimination law would eliminate the difference between it and direct discrimination, and this would be to the detriment of disadvantaged groups.

The important point, therefore, is that the use of the male as the yardstick leads to difficult logical problems because of the difference between women

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[68] Fredman, above n 15, 15.
[69] For example Carol Gilligan *In a Different Voice* (Harvard University Press, Cambridge, Mass, 1982).
[70] Catherine MacKinnon "Sex Equality" (1991) 100 Yale LJ 1281, 1290.

and men. This is best exemplified in the area of pregnancy discrimination. In the United Kingdom, the need for a male comparator caused this problem: if sex discrimination is being treated differently from a man, and men are never pregnant, how can discrimination on the grounds of pregnancy be legally characterised as sex discrimination? In the early case of *Turley v Allders Department Stores Ltd*, the Employment Appeal Tribunal ruled that the logical problem of the lack of a male comparator meant pregnancy discrimination simply could not be unlawful sex discrimination under the Sex Discrimination Act 1975.[72]

Pregnancy is the area where the difference between women and men is perhaps most manifest. New Zealand has dealt with this obvious difficulty by explicitly including pregnancy as part of sex as a prohibited ground of discrimination.[73] This is commendable but is only a partial answer to the general concern about the need to prove *comparatively* unfavourable treatment.

In New Zealand, a similar problem could occur in part-time work cases. Indirect discrimination has been used successfully in this area, particularly in the United Kingdom, where over 80 per cent of part-time workers are women.[74] Women whose part-time work conditions were worse than their full-time colleagues' have won actions in indirect discrimination because discriminating on the basis of how many hours a week one works has the effect of discriminating against women.[75] The potential problem is that in fields dominated by women, such as teaching or nursing, the lack of a group

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[71] Catherine MacKinnon *Feminism Unmodified: Discourses on Law and Life* (Harvard University Press, Cambridge (Mass), 1987), 33.
[72] *Turley v Allders Department Stores Ltd* [1980] IRLR 1 (EAT).
[73] Human Rights Act 1993 s 21(1)(a).
[74] Fredman, above n 15, 309.
[75] For example, *Jenkins v Kingsgate* [1981] IRLR 228 (ECJ); *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110 (ECJ).

of similarly placed males could mean indirect discrimination actions would be difficult to win.[76]

The comparison element in section 65 may be more flexible than indirect discrimination provisions of other countries. Section 65 requires that the victim be treated '"differently", wording which appears much less rigid than that in the United Kingdom and Australian statutes.[77] It was this lack of a strict guideline that compelled Cartwright J to set out the detailed proportionality test she used in *North Health*. Her Honour's test was convincingly appropriate for the situation in that case, and probably in most cases. If, however, a particular case came before the court where a proportional comparison was inappropriate, perhaps in a part-time nurse's case, it may be possible for the *North Health* test to be modified or the case distinguished.

(c) Causation

A disproportion of a certain category of people is a necessary but insufficient element to prove indirect discrimination. The American case of *Wards Cove Packing Co v Atonio* clarified that a causative link between some action by the employer and the disproportion still had to be proven.[78] This is a logical part of indirect discrimination that is included in section 65 in the linking of the requirements that there be a "conduct, practice, requirement or condition that ... has the effect" of discriminating. Cartwright J ended her reasoning on the comparison point by connecting the section 51 notice policy causally with the discrimination effect.[79]

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[76] Fredman, above n 15, 288.
[77] See Appendix: United Kingdom Sex Discrimination Act 1975 and Race Relations Act 1976 s 1(1)(b)(i); Hunter formulation of Australian statutes (i).
[78] *Wards Cove Packing Co v Atonio* (1989) 490 US 642, 653.
[79] *North Health*, above n 60, 64.

In the United States, the *Griggs* decision was an expansion of the definition of discrimination as used in the Civil Rights Act 1964. That Act prohibits discrimination on five grounds: race, colour, religion, sex and national origin. In the United Kingdom, the concept of indirect discrimination has been legally recognised only in the Sex Discrimination Act 1975 and the Race Relations Act 1976, so it applies only to sex and race discrimination.

The thirteen prohibited grounds of discrimination in the Human Rights Act 1993 make indirect discrimination law in New Zealand much more comprehensive than most jurisdictions. Section 21 of the Act lists the grounds: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation.[80] Thus the simple fact that indirect discrimination is included in such a comprehensive anti-discrimination Act gives it much wider application than elsewhere.

The only jurisdictions that have more comprehensive prohibited grounds of discrimination are some states and territories in Australia.[81] There is some variation between these jurisdictions. Prohibited grounds found in Australian statutes that are not included in the New Zealand Human Rights Act 1993 include medical record,[82] trade union activity[83] and personal association.[84]

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[80] See Appendix for s 21 of the Human Rights Act 1993.
[81] Particularly the Australian Capital Territory Discrimination Act 1991 (ACTDA) and the Queensland Anti-Discrimination Act 1991 (QADA).
[82] ACTDA, QADA, Victorian Equal Opportunity Act 1984, Western Australian Equal Opportunity Act 1984 .
[83] QADA.
[84] ACTDA, QADA, Racial Discrimination Act 1975 (Cth).

The party that has imposed the allegedly discriminatory condition has a defence if s/he can prove s/he had "good reason" for imposing it. This is the only defence under section 65 and it is not defined.

All the other jurisdictions also have some defence in their indirect discrimination law. The United States has a limited defence of "business necessity".[85] In the United Kingdom the Sex Discrimination Act 1975 and the Race Relations Act 1976 include a sole defence of justifiability.[86] The Australian defence is the only one markedly different from the New Zealand HRA as it requires merely that the condition be reasonable and this standard has been criticised as being too wide.[87]

The extent of the defence is an important part of indirect discrimination law. American commentators have pointed out that:[88]

> The appropriate linguistic formulation of the business justification defence is not a mere rhetorical dispute among scholars. It has the potential for genuine practical impact ... [I]t 'defines the outer limits of the Act's potential effectiveness'.

For this reason it is fortunate that Cartwright J dealt comprehensively with the meaning of "good reason" in section 65 in *North Health*. An important general principle she articulated is that the defence is about justification, not

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[85] *Griggs*, above n 19, 431; Civil Rights Act 1964 s703(K)(1)(A) (1991 amendment).
[86] Sex Discrimination Act 1975, s 1(1)(b)(ii); Race Relations Act s 1(1)(b)(ii).
[87] Thomas Cox "Indirect Discrimination: the Requirement of Reasonableness" (1992) 5 Corp & Bus LJ 313, 314.

reasonableness. The defendant must prove that its conduct, practice, requirement, or condition is based on "objectively justified factors which are unrelated to any prohibited form of discrimination".[89] The central prohibition on discrimination will not be easily overridden by the defendant's reason for discriminating. In finding the point where the reason is good enough to provide a defence, Cartwright J adopted the test from *Bilka-Kaufhaus GmbH v Weber von Hartz*[90] and ruled that:[91]

> a practice can be justified if ... the means chosen meet a genuine need of the enterprise, that they are suitable for attaining the objective pursued by the enterprise and are necessary for that purpose.

These elements, "genuine need" and "suitable and necessary for attaining the objective", are discussed below.

Having a justification type of defence makes sense because, as Burger CJ wrote in *Griggs*, indirect discrimination law is fundamentally about "the removal of artificial, arbitrary, and unnecessary barriers". The point of the concept is to ensure that significant advantages like employment are conferred only on relevant grounds. So if a condition which is applied to someone receiving a benefit *is* relevant, indirect discrimination as a concept does not apply.

(a) Genuine need

The main point that arises from Cartwright J's treatment of "genuine need" is that the discriminatory effect must be justified as necessary and not merely

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[88] Theodore Y Blumoff & Harold S Lewis Jr "The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task" (1990) 69 NCL Rev 1, 25, quoted in Hunter *Indirect Discrimination in the Workplace*, above n 13, 225.
[89] *North Health*, above n 60, 64.
[90] *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110, 113 (ECJ) (*Bilka*).
[91] *North Health*, above n 60, 64.

convenient.[92] This is supported by the original case of *Griggs* and subsequent international cases which have adopted the principle, such as *Steel v Union of Post Office Workers*.[93]

The comparable American defence of "business necessity" was blatantly not made out in *Griggs*. The defendant company had imposed the requirement of a high school diploma purely in order to continue its old practice of overt discrimination which had recently been made illegal. In such cases, the "genuine need" principle can target all people who impose arbitrary barriers in order to act out their prejudices.

(b) Suitable and necessary for attaining the objective

The requirement that a condition be suitable and necessary for attaining the objective is found in indirect discrimination doctrines in other jurisdictions. The House of Lords adopted the *Bilka* test in *R v Secretary of State for Employment, ex parte Equal Opportunities Commission*, ruling that the practice must be "suitable and requisite"[94] and the Supreme Court of Canada applied a similar test in *R v Oakes*.[95] Cartwright J followed these foreign cases and also laid emphasis on the similar ruling in the New Zealand Court of Appeal decision in *Ministry of Transport v Noort*.[96] Her Honour pointed out that Richardson J adopted the same approach of necessity in relation to the Bill of Rights Act 1990 in *Noort*.[97]

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[92] *North Health*, above n 60, 64-65.
[93] *Steel v Union of Post Office Workers* [1978] ICR 181 (EAT).
[94] *R v Secretary of State for Employment, Equal Opportunities Commission* [1994] 2 WLR 409, 421 (HL).
[95] *R v Oakes* (1986) 26 DLR (4th) 200, 227 (SCC).
[96] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 283 (CA) [*Noort*].
[97] *North Health*, above n 60, 67.

Cartwright J regards "necessary" as an absolute term. She ruled that to prove that a practice is necessary, the defendant must show that there are no other non-discriminatory mechanisms that would meet the objectives.[98] Significantly, she ruled that economic considerations could not save a policy. Her Honour ruled that using discriminatory methods for economic reasons is just as unjustifiable as "hiring school children or importing foreign nationals to work at below subsistence rates."[99]

The requirement that the practice must be suitable for attaining the objective was the main failing of North Health's defence. It had a genuine, two-part problem to solve in that there were too many GPs overall, but they were unevenly distributed throughout the region so there were too few in poor areas. Instead of employing a strategy to redistribute the region's GPs and reduce their numbers, North Health applied an arbitrary standard to the doctors in order to cut down the numbers of section 51 notices they conferred. Its discriminatory practice did nothing to achieve one of its stated objectives of redistribution and was not even directly related to it. Its way of cutting back on GPs was not the most suitable and was certainly not the only possible solution.

(c) The consequences of *North Health's* interpretation of "good reason"

To make out the sole defence under section 65, the defendant must show that there was an objectively justified genuine need to employ the discriminatory practice, that there were no non-discriminatory alternatives to that practice, and that the practice was suitable to attain the legitimate objective.

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[98] *North Health*, above n 60, 67.
[99] *North Health*, above n 60, 64.

These very clear and thorough guidelines on how to assess "good reason", will, it is to be hoped, help courts in New Zealand avoid the mistakes of courts in other jurisdictions who have tried to assess justifiability in a sweeping way, based on their overall impression of what sounds reasonable. In some cases, courts have failed dismally at the task of assessing justifiability and have admitted objectionable reasons as justifiable.

One example is the United Kingdom case of *Clay Cross v Fletcher*.[100] In *Clay Cross* a male employee was paid more for work that was identical to that of his female colleague purely because in his previous job he had been paid more than her. The court upheld this discrepancy as justifiable. This decision has been widely criticised because it serves to reinforce discriminatory attitudes. Fredman writes that the Court "was unable to see that it was simply perpetuating a deeply discriminatory market in which men could demand a higher price for their labour than women."[101]

If the Court had considered the employer's defence in terms of the *North Health* test of genuine need, necessity and suitability for attaining a legitimate objective, it could not have made the decision it did. There may be a necessity to pay the man high wages to ensure he accepted the position, but there is no necessity for the company to pay the woman lower wages than the man simply because it could. Paying both employees the higher wage is a non-discriminatory option available which attains the employer's legitimate objective.

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[100] *Clay Cross v Fletcher* [1977] ICR 868 (EAT); (1979) ICR 1 (CA) [*Clay Cross*].
[101] Fredman, above n 15, 255.

The role of intent in indirect discrimination law has varied over time and in different jurisdictions. No intent is required in section 65, making the provision of comparatively wide effect.

When *Griggs* was decided, intent was not required to be proven, but the Court limited the ratio to cases where a defendant had had an overtly discriminatory policy before the passing of the Civil Rights Act, and now had a different, facially neutral policy which had the same discriminatory effect. The Supreme Court was obviously seeking to catch people who had discriminatory intent, but it stopped short of requiring proof of intent, merely requiring circumstantial evidence of it, by way of the defendant's history of direct discrimination. Lack of intent was no defence. *Griggs* again influenced other jurisdictions, and intent plays no role in the indirect discrimination law of other common law countries. Current indirect discrimination law in all the jurisdictions discussed, including the United States, requires neither intent nor a history of discrimination.

Indirect discrimination law's lack of concern with intent emphasises the area's core message: that discriminatory results and effects are just as important and damaging as deliberate discriminatory treatment.

Further, if indirect discrimination law is to be effective, it must not include intent to discriminate as an element of the provision. Not only is the problem of proving discriminatory intent immense,[102] there are many situations which it is desirable to address through indirect discrimination law but which would be excluded by an intent requirement.

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[102] See WS Tarnopolsky "The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada" [1968] Can Bar Rev 565; D Pannick "The Burden of Proof in discrimination cases" (1981) 131 New Law J 895; MA Bamburger & N Lewin "The Right to Equal Treatment" Enforcement of Anti-discrimination Legislation" (1961) 74 Harv LR 520.

First, there are situations where decision-makers are careless and unaware of the discriminatory effect of their conduct. A generous reading might place North Health's conduct in this category. Indirect discrimination law forces companies in similar positions to make their decisions more carefully.

In other situations, indirect discrimination law can get to people's unconscious prejudices, by looking past the face of things. The string of United Kingdom cases that dealt with the ill-treatment of part-time workers, and therefore women, may fit in here.[103] Employers saw their part-time workers as inferior, and on the face of it, it was the number of hours they were doing that led to that opinion. But the fact that most of those workers were women, and most were part-time because of domestic responsibilities, may well have influenced the employers' opinion that they were less important, less like 'real' employees and therefore entitled to fewer benefits.

Also, it is extremely likely that some employers may instead be genuinely ignorant of the disproportionate effects their practice has on certain groups. Section 65 serves to educate them and remedy the situation, and can do so without labelling offenders unfairly as bigots. Legal action may not be necessary as discussions held against the backdrop of a statute can be effective.

To require discriminatory intent to bring an indirect discrimination action would be to go against the principles and uses of the concept. This is another area where section 65 is well drafted to achieve the purposes of indirect discrimination law.

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[103] For example, *Jenkins v Kingsgate* [1981] IRLR 228 (ECJ); *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110 (ECJ).

C *Evaluation of Section 65*

The indirect discrimination law expressed in New Zealand's Human Rights Act 1993 compares very favourably with other jurisdictions. It is clearly and comprehensively worded and is not unnecessarily strict or specific in its elements.

In comparison, O'Donovan and Szysczak are critical of the United Kingdom's indirect discrimination legislation:[104]

> In British law the concept is defined in a complicated and procedural fashion. Instead of applying a straightforward 'effects' doctrine the British courts and tribunals have frequently scuttled the indirect discrimination claim in a sea of semantic inquiries as to the meaning of particular words.

Thornton sees similar faults in the Australian indirect discrimination legislation:[105]

> Far from addressing systemic discrimination, the complexity of the Australian indirect discrimination provisions constitutes a set of herculean obstacles to be overcome by intrepid complainants in order to challenge a discriminatory practice...

For example, a much-criticised element of the United Kingdom and Australian indirect discrimination legislation is that the condition or requirement must be to the complainant's "detriment because [s/he] cannot comply with it."[106] This is an unhelpfully absolute phrase which the House of Lords has tempered to some extent. In *Mandla v Lee*[107] a Sikh refused to

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[104] Katherine O'Donovan and Erika Szyszczak *Equality and Sex Discrimination Law* (Basil Blackwell, Oxford, 1988), 98-99.
[105] Margaret Thornton *The Liberal Promise* (Oxford University Press, Melbourne, 1990) 192.
[106] Sex Discrimination Act 1975, s 1(1)(b)(iii) (UK); Race Relations Act 1976 s 1(1)(b)(iii) (UK).
[107] *Mandla v Lee* [1983] 2 AC 548.

comply with a requirement to wear a hat because it would prevent him from wearing his religiously prescribed turban. Their Lordships ruled that if a person cannot comply with the condition or requirement consistently with his or her customs and cultural conditions, the test of "cannot comply" is met.[108] Later, in *Perera v Civil Service Commission (No 2)* the Employment Appeal Tribunal made it clear that the pattern of non-compliance was important, not the reason.[109]

As interpreted, the "cannot comply" element adds nothing to the provision in the United Kingdom legislation. Commendably, section 65 excludes the element entirely.

The New Zealand provision allows more people to achieve redress through section 65 than is possible under the indirect discrimination law in other jurisdictions. Because it includes the terms "conduct" and "practice", section 65 is a comparatively more useful tool to attack systemic discrimination. This element and the inclusion of thirteen prohibited grounds of discrimination, mean that section 65 provides very broad protection to New Zealanders.

The loosely worded "differently" element avoids the "herculean obstacle" that comparison has become in other jurisdictions, while Cartwright J's clear explanation of how to judge disproportionality provides guidance that makes the law more clear and accessible than has been the experience elsewhere.[110]

The defence of "good reason" follows similar defences in the United States and the United Kingdom, avoiding the undesirable Australian defence of reasonableness. Again Cartwright J's analysis makes the defence more detailed and clear. Her ruling gives good effect to the principles of indirect

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[108] *Mandla v Lee* [1983] 2 AC 548, 565-566.
[109] *Perera v Civil Service Commission (No 2)* [1982] ICR 350, 359, cited in Hunter *Indirect Discrimination in the Workplace*, above n 13, 223.
[110] Practical problems of access still exist and are discussed below in Part IV, C.

discrimination law and unpacks the brief wording of section 65, rather than adding to it.

The drafters wisely avoided including an element of intent or a requirement that the condition be an absolute bar to success, and these omissions, as much as the eventual wording of section 65, contribute to its quality. The section is clearly and broadly expressed and is not nearly as complex in its requirements as other countries' law. Overall, section 65 seems to be the best expression of the principles and purposes of indirect discrimination law that can be found in the major common law jurisdictions.

D Evaluation of the Case Law

As discussed, Cartwright J in *North Health* convincingly interpreted and applied section 65 in accordance with the principles of indirect discrimination law. In stark contrast, the Court in *Wheen* interpreted section 65 in a manner that would, if followed, eliminate the difference between direct and indirect discrimination. This is clearly not the intention of the legislature which enacted section 65 specifically to address this difference.

In my opinion, for the reasons given above,[111] *Wheen* contains an incorrect statement of the law. In the interpretation of section 65, *North Health* should be followed in preference to *Wheen* in order to give the section its full effect.

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[111] See Part II, C, 2.

IV CRITICISMS OF INDIRECT DISCRIMINATION LAW

There are three broad areas of criticism of the indirect discrimination legislation in New Zealand. The first criticism is a general one, that using rights law as a solution to discrimination is at least ineffective and is perhaps even detrimental. The second is particular to indirect discrimination law. It has been argued that indirect discrimination law actually subordinates already disadvantaged groups by entrenching historical disadvantages. The third criticism is implied in the form of a question: if the drafting of indirect discrimination law in New Zealand is excellent, why then is section 65 so underused?

A Philosophical Opposition to the Use of Rights

In the struggle for advancement of disadvantaged groups, the main opposition to the use of legal tools, such as "rights-talk",[112] has come from various feminist and Critical Legal Studies writers and these views will be the focus of the following discussion. The criticism is based around the idea that the law has been created for and by one group of people and disadvantages other groups. Feminist writers emphasise the male influence on lawmaking but this idea can be extrapolated to become relevant to other disadvantaged groups since the parliamentarians and judges who have made our law have generally been not only male, but also pakeha, wealthy, middle-aged, heterosexual and able-bodied.

These issues are too complex to be discussed in enough detail in this paper. The following discussion outlines the principle criticisms and applies them to anti-discrimination law in general and indirect discrimination law in particular.

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[112] Mark Tushnet "An Essay on Rights" (1982) 62 Texas LR 1363 [Tushnet].

even be detrimental to the development of progressive policies supported by the Women's Movement."[113] She writes that there have always been risks in using the law as a tool for advancement. In the early days of feminism, the gains justified risking the potential harms, but in the late twentieth century, the "rhetoric of rights has become exhausted,"[114] and it is therefore no longer worth the risks she identifies. Similarly, Tushnet writes that "it is not just that rights-talk does not do much good. In the contemporary United States, it is positively harmful".[115] Such Critical Legal Studies writers as Tushnet would replace "rights" discourse with a focus on "needs".[116]

One significant problem with using rights is the possibility of backlash as those with power feel that they are losing it. Elsewhere a backlash could be violent, but in New Zealand it is much more likely to be legislative. Pakeha males still make up the vast majority of lawmakers in New Zealand and could, if they felt sufficiently strongly about it, use their power to reinstate discriminatory laws. More likely is that those in power will give less effect to rights as they become aware of their potency. The chronic underfunding of institutions like the Human Rights Commission[117] may constitute a form of backlash.

Baylis considers the risk of backlash in New Zealand to be smaller than the gains to be made by using rights. She writes that backlash is something to be aware of, but is not a good enough reason to abandon the use of rights altogether.[118]

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[113] Carol Smart *Feminism and the Power of Law* (Routledge, London, 1989) 158 [Smart].
[114] Smart, above n 113, 139.
[115] Tushnet, above n 112, 1386.
[116] For example, Tushnet, above n 112, 1394.
[117] The Human Rights Commission *Annual Report 1997* refers frequently to its strained resources and the consequences of underfunding on its programmes of education and publicity.
[118] Claire Baylis "Feminist Legal Theory Debates: Rights" (1996) 5 Feminist Law Bulletin 1, 1.

A second concern is that the use of rights oversimplifies power relations.[119] Thus, it can be easy to believe that if the anti-discrimination legislation has been satisfactorily enacted, then equality has been achieved. Freeman counters that:[120]

> as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of anti-discrimination law.

Lacey,[121] too, has recently criticised this difference between the form and substance of rights. This is an important point. Having good law on the books is not enough; to make an impact on people and their substantive rights, it must be combined with action. This point will be expanded below.

There is also the risk that individual discrimination claims will be regarded as solving more problems than they in fact deal with. For example, when an employer is found to have discriminated against women when hiring, that is the only issue addressed. Any other discrimination in that workplace, for instance in the areas of promotion, parental leave or sexual harassment, is left uncorrected while parties may have the impression that nothing more needs to be done.

Smart also criticises the appropriation of rights by traditionally advantaged groups.[122] Not only are men protected against sex discrimination just as much as women are, but also, advantaged groups can counter rights claims with emphasis on their own, conflicting or competing rights. This becomes problematic when an advantaged group uses a rights instrument to achieve a

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[119] Smart, above n 113, 144-145.
[120] Alan David Freeman "Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine" (1978) 62 Minn LR 1049, 1050.
[121] Nicola Lacey *Unspeakable Subjects* (Hart Publishing, Oxford, 1998) 243.
[122] Smart, above n 113, 145-146.

result contrary to its original purposes. An explosive example of this is the ongoing debate over affirmative action. In the United States particularly, the very provision of the constitution which was enacted to protect African Americans from discrimination is now relied on by the advantaged majority to vilify affirmative action measures.[123]

This appropriation of rights by advantaged groups has been prevented by the wording of some anti-discrimination instruments. The United Nations sex equality document is described in gender-specific terms and is entitled the Convention on the Elimination of Discrimination Against Women. Similarly, the United Kingdom Sex Discrimination Act 1975 protects women specifically.

Lord Denning disagreed with this approach when he wrote extrajudicially: "Equality is the order of the day. In both directions. For both sexes. What is source for the goose is sauce for the gander".[124]

New Zealand's Human Rights Act protects all people from all the types of discrimination it addresses, allowing advantaged groups to benefit from those rights; it is therefore open to criticism based on misappropriation of rights. The inclusive approach does have an advantage though. If, for example, women have special legislation that does not protect men, there is the risk of reinforcing the stereotype that women are weaker than men and in need of special protection. Cartwright J in *North Health* endorsed the inclusive approach. The defendant had contended that anti-discrimination protected only traditionally disadvantaged groups, but Her Honour confirmed that "[l]egislation concerned with human rights is concerned with the rights of all humanity."[125]

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[123] For example *Regents of the University of California v Bakke* (1278) 438 United States 265.
[124] Lord Denning *The Due Process of Law* (Butterworths, London, 1980) 245.
[125] *North Health*, above n 60, 58.

Finally, there are practical problems with. If, as in New Zealand, rights are the mechanism of ensuring equality, access and information problems also arise. These will be canvassed below in section C.

One simple argument supporting the use of rights is that they have worked in the past. Williams is strongly in favour of rights because of the successes they have brought for disadvantaged groups in the past.[126] Because rights are already recognised by the legal system they provide an entrance point for these groups, and sometimes represent their only hope.[127] Indirect discrimination in particular provides mechanisms for addressing discrimination that cannot be attacked any other way. This is perhaps especially true for systemic discrimination.

While Smart is extremely critical of the concept of rights and the current system, she concedes that "[t]o couch a claim in terms of rights is a major step towards a recognition of a social wrong."[128] Even if the legal system's focus on rights is open to criticism, it is not wholly ineffective, and is worth using to advance the position of disadvantaged groups.

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[126] Patricia Williams *The Alchemy of Race and Rights* (Harvard University Press, Cambridge, Mass, 1991) 149 [Williams].
[127] Williams, above n 126, 148-161.
[128] Smart, above n 113, 143.

B *Subordination*

A specific criticism of indirect discrimination law is that it may reinforce disadvantages that are associated with certain groups.[129] Direct discrimination is primarily concerned with inherent characteristics, like race or sex, which are held to be irrelevant in most situations. In contrast, indirect discrimination can focus on secondary characteristics, for example height or care of dependents as related to gender. Whereas height is a secondary feature that is also inherent, the caregiving role women frequently fulfill is not. It is a present social reality but it could be changed. The criticism that arises from this observation is that by accommodating such incidental features as caregiving through the concept of indirect discrimination, the law reinforces social constructs like the notion that women should take responsibility for looking after dependents.[130]

Griggs too provides a potential example of this. It could be argued that the ruling in *Griggs* had the result of excusing African Americans from getting high school diplomas. An example that McLean gives shows the issue in a New Zealand context.[131] Many more Maaori women than other groups smoke, and an employment-related restriction on smoking or against smokers could be said to indirectly discriminate against Maaori women on the grounds of sex, race or both. This clearly raises the issue of the law reinforcing a secondary characteristic that should not be encouraged; if the law says Maaori women cannot be disadvantaged by their smoking, is it not indirectly encouraging them to carry on with this harmful behaviour? And is this relevant enough to be taken into account when formulating indirect discrimination law?

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[129] Hunter *Indirect Discrimination in the Workplace*, above n 13, 8.
[130] Hunter *Indirect Discrimination in the Workplace*, above n 13, 8.
[131] Janet McLean "Equality and Anti-discrimination Law: Are They the Same?" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms* (Brooker's, Wellington, 1995) 263, 279-280.

The answer to these concerns is twofold. First, these issues are generally beyond the scope of anti-discrimination law. It is the function of wider government, not the Human Rights Act, to, for example, encourage Maaori women to stop smoking and encourage educationally disadvantaged groups to improve their academic skills.

Secondly, it is slightly fantastic to suggest that an indirect discrimination ruling on one of these issues would influence the behaviour of whole groups of people towards harmful or disadvantageous actions. Not only are such rulings relatively unpublicised, they are acknowledged by courts to be confined to particular social eras and circumstances. As the position of a disadvantaged group improves, indirect discrimination will have less application to its circumstances. For example, in the thirty years since *Griggs* was decided, the position of African Americans has improved significantly. It is unlikely that a court today would find that an educational requirement discriminated indirectly against African Americans.

Indirect discrimination law does not actually subordinate groups of people. There may be a small risk that it could reinforce undesirable, extraneous characteristics, but there is a much larger possibility that it will improve the situation of disadvantaged groups, particularly, as discussed previously, because of its potential to attack systemic discrimination.

C *Why Is Section 65 So Underused?*

Despite the excellent state of New Zealand's law of indirect discrimination, there have been very few cases under section 65 in the six years it has been in operation. In the years that such information was collected, such complaints

comprised only 1.5 per cent of complaints to the Human Rights Commission.[132] Further, only four prohibited grounds of discrimination have been involved; national origins, age, employment status and family status.

The absence of cases about gender discrimination is particularly noticeable, since there are far more people in that sector than in other traditionally disadvantaged groups. Many women who are disadvantaged because they work part-time have litigated overseas,[133] but no such cases have been argued in New Zealand. The inclusion of caregiving as a prohibited ground in the New Zealand legislation[134] provides even more opportunities for addressing discrimination.

Why do so few people, and especially women, take legal action against indirect discrimination?

Some answers can be found in Morris' recent Law Commission publication, *Women's Access to Legal Services*.[135] Morris concluded that in many different ways women find that the legal system does not accommodate or provide for them to the extent that many simply do not use it if they can avoid it. Many of the problems she identified affect women in particular but are likely to deter other groups as well.[136] They include prohibitive cost,[137]

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[132] Human Rights Commission *Annual Report 1994* 16; Human Rights Commission *Annual Report 1995* 16; Human Rights Commission *Annual Report 1996* 28; Human Rights Commission *Annual Report 1997* 21.

[133] For example, *Jenkins v Kingsgate* [1981] IRLR 228 (ECJ); *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110 (ECJ).

[134] Human Rights Act 1993 s 21(1)(l)(i) (in Appendix).

[135] Joanne Morris *Women's Access to Legal Services: Study Paper 1* (New Zealand Law Commission, Wellington, 1999) [Morris].

[136] Morris, above n 135, 13; compare New Zealand Law Commission R53 *Justice: the Experiences of Maori Women / Te tikanga o te ture: te matauranga o nga wahine Maori e pa ana ki tenei* (New Zealand Law Commission, Wellington, 1999) [*Experiences of Maori Women*].

[137] Morris, above n 135, 51-56, 65-68, 125-128; *Experiences of Maori Women*, above n 136, 34.

communication problems,[138] practical difficulties with accommodating dependents[139] and lack of publicly available information.[140] All of these problems probably contribute to the lack of indirect discrimination legal action that is taken in New Zealand, despite Morris' observation that indirect discrimination is a significant problem here.[141]

Even for those on incomes low enough to qualify for civil legal aid, it is difficult to obtain and is applied for sparingly – less than 10 per cent of civil legal aid is used for anything other than family and mental health matters.[142] Any legal action is prohibitively expensive for many people, and especially women.[143]

The Human Rights Commission (the Commission) provides some solutions here, as it can help for free. When complaints are not settled during the Commission's investigation and conciliation procedures, the Proceedings Commissioner can take further legal action.[144] Even when the unusual step of appealing to the High Court is made, the Commission can appear as the plaintiff,[145] saving the complainant legal costs; this happened in *North Health*. Direct legal costs, however, are only part of the problem. Even a complainant to the Commission may still have to take time off work and face transport and dependent-care costs to attend conciliation and other meetings.

The Commission is caught in a vicious cycle, in that the fact that it deals with very few indirect discrimination cases is itself a cause of problems. The Commission notes that the small volume of case law in general

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[138] Morris, above n 135, 34-47, 188-191, 196-201
[139] Morris, above n 135, 37-38, 50-51, 191-193; *Experiences of Maori Women*, above n 136, 29.
[140] Morris, above n 135, 34-44; *Experiences of Maori Women* above n 136, 33-34.
[141] Morris, above n 135, 7.
[142] Morris, above n 135, 143.
[143] Morris, above n 135, 51-56.
[144] Human Rights Act 1993 ss 81, 83.
[145] Human Rights Act 1993 s 84(1).

discrimination matters causes difficulties in interpreting the Act with confidence.[146]

Public ignorance of rights is probably the biggest barrier to the use of section 65. People who have been indirectly discriminated against may not realise their experiences have legal solutions. An enquiries officer I spoke to commented that around 80 per cent of enquiries to the Commission have nothing at all to do with discrimination, as people generally have a limited understanding of the Commission's role. This is in spite of its work in publicity and education.[147]

Awareness of rights issues in the legal profession is also a concern. The Commission process itself may perpetuate this, as it is built on conciliation and investigation. These methods raise numerous issues which are beyond the scope of this paper, but a brief comment is necessary.[148] Principally, under the HRA every complaint must be conciliated[149] and currently around 45 per cent of complaints solved solely by conciliation without any need for further investigation.[150] Conciliation is confidential which can mean that normative standards relating to the law and its application cannot be established.[151]

If discrimination is not understood widely or accurately, so much more so for the complicated area of indirect discrimination. Even the Court in *Wheen* did not grasp the concept, so perhaps it is unsurprising that there have been very few complaints about it in New Zealand.

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[146] Human Rights Commission *Annual Report 1997* 21.
[147] Human Rights Act 1993 s 5 (a) - (e).
[148] See Hilary Astor & Christine M Chinkin *Dispute Resolution in Australia* (Butterworths, Sydney, 1992) in particular chapter 12 "Conciliation in Discrimination Disputes" [Astor & Chinkin].
[149] Human Rights Act 1993 s 80.
[150] Human Rights Commission *Annual Report 1997* 34.
[151] Kathy Mack "Alternative Dispute Resolution and Access to Justice for Women" (1995) 17 Adel LR 123, 128; Astor & Chinkin, above n 148, 274-275.

V CONCLUSION

The doctrine of indirect discrimination is a vital part of anti-discrimination law. Without it we are able to deceive ourselves by never looking beyond appearances to see a discriminatory reality. Indirect discrimination rulings can have a tremendous impact on the community as broad policies are overturned, affecting whole groups of people, not just individuals. Indirect discrimination law is therefore necessary and valuable. In my opinion, the many criticisms of rights law, including the specific risk of subordination, do not outweigh the benefits of having an indirect discrimination provision in the Human Rights Act 1993.

As long as *North Health* is followed in preference to *Wheen*, New Zealand's indirect discrimination law is in a good state. Section 65 is clear, as simple as is possible in this area, broadly protective and gives good effect to the principles of indirect discrimination law. Cartwright J's interpretation of the section, and in particular her rulings on the defence and the method of comparison are very helpful and preserve the section's effect.

The main problem with indirect discrimination law in New Zealand is that public and professional ignorance of it prevent it from being fully used. It is a shame that a law that can have such a positive and significant effect on the community is not more widely recognised.

Indirect discrimination law opens our eyes to discrimination and allows us to put it right, helping an individual and a whole group. Direct discrimination law alone is not enough to ensure we see past seemingly neutral practices:[152]

> Thus ornament is but the guiled shore
> To a most dangerous sea; the beauteous scarf
> Veiling an Indian beauty; in a word,
> The seeming truth which cunning times put on
> To entrap the wisest.

[152] William Shakepeare *The Merchant of Venice* III ii 97-101 (London, JM Dent & Sons, 1921).

Appendix

1 *STATUTORY PROVISIONS*

A New Zealand

New Zealand Human Rights Act 1993:

65. Indirect discrimination – Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part of this Act 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.

21. Prohibited grounds of discrimination – (1) For the purposes of this Act, the prohibited grounds of discrimination are –

(a) Sex, which includes pregnancy and childbirth:

(b) Marital status, which means the status of being –

(i) Single; or

(ii) Married; or

(iii) Married but separated; or

(iv) A party to a marriage now dissolved; or

(v) Widowed; or

(vi) Living in a relationship in the nature of a marriage:

(c) Religious belief:

(d) Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:

(e) Colour:

(f) Race:

(g) Ethnic or national origins, which includes nationality or citizenship:

(h) Disability, which means –

(i) Physical disability or impairment:

(ii) Physical illness:

(iii) Psychiatric illness:

(iv) Intellectual or psychological disability or impairment:

(v) Any other loss or abnormality of psychological, physiological, or anatomical structure or function:

(vi) Reliance on a guide dog, wheelchair, or other remedial means:

(vii) The presence in the body or organisms capable of causing illness:

(i) Age, which means, [sic] -

(i) For the purposes of sections 22 to 41 and section 70 of this Act and in relation to any difference treatment based on age that occurs in the period beginning with the 1st day of February 1994 and ending with the close of the 31st day of January 1999, any age commencing with the age of 16 years and ending with the date on which persons of the age of the person whose age is in issue qualify for national superannuation under section 3 of the Social Welfare (Transitional Provisions) Act 1990 (irrespective of whether or not the particular person qualifies for national superannuation at that age or any other age):

(ii) For the purposes of sections 22 to 41 and section 70 of this Act and in relation to any different treatment based on age that occurs on or after the 1st day of February 1999, any age commencing with the age of 16 years:

(iii) For the purposes of any other provision of this Act, any age commencing with the age of 16 years:

(j) Political opinion, which includes the lack of a particular political opinion or any political opinion:

(k) Employment status, which means –

(i) Being unemployed; or

(ii) Being a recipient of a benefit or compensation under the Social Security Act 1964 or the Accident Insurance Act 1998:

(l) Family status, which means-

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

(ii) Having no responsibility for the care of children or other dependants; or

(iii) Being married to, or being in a relationship in the nature of a marriage with, [sic] a particular person; or

(iv) Being a relative of a particular person:

(m) Sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

(2) Each of the grounds specified in subsection (1) or this section is a prohibited ground of discrimination, for the purposes of this Act, if –

(a) It pertains to a person or to a relative or associate of a person; and

(b) It either-

(i) Currently exists or has in the past existed; or

(ii) Is suspected or assumed or believed to exist or have existed by the person alleged to have discriminated

Human Rights Commission Act 1977:

27. Discrimination by subterfuge – Where a requirement or condition which is not apparently in contravention of any provision of this Part of this Act or of sections 3 to 6 of the Race Relations Act 1971 has the effect of giving preference to a person of a particular colour, race, ethnic or national origin, sex, marital status, or religious or ethical belief in a situation where such preference would be unlawful under any other provision of this Part of this Act or of sections 3 to 6 of the Race Relations Act 1971, the imposition of that condition or requirement shall be unlawful under that provision unless the person imposing it establishes good reason for its imposition and shows that its imposition is not a subterfuge to avoid complying with that provision.

B United Kingdom

Sex Discrimination Act 1975, section 1(1):

A person discriminates against a woman in any circumstances relevant for the purposes of any provision of the Act if -

...

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but-

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
(iii) which is to her detriment because she cannot comply with it.

Race Relations Act 1976, section 1(1):

A person discriminates against another in any circumstances relevant for the purposes of any provision of the Act if -

...

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but-

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it who can comply with it, and
(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied, and
(iii) which is to the detriment of that other because he cannot comply with it.

C United States of America

United States Civil Rights Act 1964:

Section 703 –
It shall be unlawful employment practice for an employer-

...

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

United States Civil Rights Act 1991:

Section 105. Burden of Proof in Disparate Impact Cases.

(a) Section 703 of the Civil Rights Act of 1964 ... is amended by adding at the end the following new subsection:

"(K)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if –

" (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity... "

D Australia

Hunter gives the following formulation as representative of the many similar indirect discrimination provisions in Australia:[1]

A discriminator discriminates against an aggrieved person, on the ground of the aggrieved person's status, if the discriminator requires the aggrieved person to comply with a requirement or condition –

(i) with which a substantially higher proportion of persons of a different status comply or are able to comply; and
(ii) which is not reasonable having regard to the circumstances of the case; and
(iii) with which the aggrieved person does not or is not able to comply.

[1] Rosemary Hunter *Indirect Discrimination in the Workplace* (Federation Press, Sydney, 1992) 25.

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