Struggling for Acceptance

The New Zealand Human Rights Commission

A History of the First Twenty Years
1978 – 1998

Rebecca M. Lineham
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Introduction

In the past twenty years human rights have commanded the growing attention of both the most powerful and powerless people in the world. The global focus on nuclear and biological disarmament and on the implementation of 'development' programmes in 'developing' countries is evidence of a world more aware of basic human rights. The recent vote for independence in East Timor, the resulting atrocities, and the world's swift reaction to these, further demonstrate that human rights violations will not be tolerated.

The United Nations has also renewed its emphasis on human rights, first outlined fifty years ago in the 1948 Universal Declaration of Human Rights. They have both implemented several UN Development Programmes in Asia, Africa and South America, and focused on drafting many new human rights covenants such as the Declaration of the Rights of Indigenous People.

In addition, the number of countries establishing institutions devoted to human rights has risen dramatically in recent years. The United Nations has provided strong support for these institutions, most obviously by conducting international meetings and promoting international information exchanges. Many countries have worked together effectively - for example New Zealand, while maintaining close ties with Australia and Canada has also worked with Hong Kong and Mongolia on the development of their human rights institutions. The increase in national human rights institutions in the Asia and Pacific region also demonstrates the increasing importance of human rights in this area of the world.

This study explores the development of the New Zealand Human Rights Commission from its inception in 1978 through to the present. It will examine the factors that have had the most impact on the Commission, and how the Commission has responded. As a body established by statute, the New Zealand Human Rights Commission protects and promotes human rights through a series of functions. The Commission has the authority to report any human rights issues directly to the Prime Minister, receive and mediate complaints of discrimination, make public statements on human rights issues, and examine the human rights implications of new and existing legislation. This study examines each of the Commission's key functions, how they have developed, and the Commission's overall effectiveness.

Although most obvious aspects of human rights have received academic attention over the past two decades, little work has been produced on the national human rights institutions themselves, perhaps because of their relative newness. New Zealand's Human Rights Commission, one of the first in the world, is only twenty years old. Most human rights institutions are between five and fifteen years old, and are consequently still in the early establishment stage of development.

Very little has been written about the New Zealand Human Rights Commission. The most informative works produced have been written from legal perspectives and have related more to the Commission's legal functions than to the institution. These publications have not had great relevance to this study.

The most prominent writer on the New Zealand Human Rights Commission has been Jerome Elkind, who has commented regularly on the Human Rights Commission since 1977. While Elkind has provided thorough commentary on all aspects of the Commission, his work has

taken a strong legal perspective, and as such he tends to provide detailed analysis of the Human Rights Commission Act and other legal documents rather than an historical perspective on the Commission.[1]

Other writers in New Zealand who have commented on the Commission include Margaret Wilson, Grant Huscroft, and Paul Rishworth, all of whom are law lecturers and have taken similar legal approaches. An example of a recent production by Grant Huscroft and Paul Rishworth is *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.*[2] This collection of essays has been useful in the examination of the two primary Acts - the 1977 Human Rights Commission Act and its replacement the 1993 Human Rights Act.

On the topic of the Commission, its wider role or duties past that of statutory requirements, the most helpful author has been Margaret Bedggood (formerly Mulgan), who was the Chief Human Rights Commissioner from 1989-1994. Bedggood has written about the Commission's role, position and the importance of international human rights instruments and standards.[3] While other Chief Commissioners have also written about the Commission their work has mirrored the legal interpretation of the previous authors.

Two other works deserve special mention, both being Honours dissertations for Law degrees. John Kovacevich's *The Human Rights Commission Act 1977*[4] covers the Act in close detail. Kovacevich's interpretation of the Act was unique and thorough, illuminating the links between the New Zealand Act and overseas jurisdictions. Sara Rowan's *Baigent and International Human Rights,*[5] while not specifically on the Human Rights Commission, emphasised the growing importance of international human rights standards in New Zealand courts and had several implications for the work of the Commission.

Finally, of recent value has been the newly formed journal *Brooker's Human Rights Law and Practice*. This journal has provided a forum for topical human rights debate, and while contributed to most heavily by staff of the Human Rights Commission it has nevertheless provided space for reactions to human rights issues from others outside the field.

As so little has been written on the topic of the Human Rights Commission, the most important sources for this study have been the Commission's records and publications. These contain a wealth of information regarding the Commission's development, although the supporting papers to the minutes are missing from 1980-1984. Other publications by the Commission have also been valuable. The Commission's annual reports contain much reaction to Government as do their numerous submissions to Select Committees and Ministers. Other papers in the Commission's archives are in a chaotic order and have not been sorted to great effect. Correspondence between the Commission and individuals, groups and institutions is kept well-ordered, but the notes and work of past staff and Commissioners remains largely unsorted. Due to the sensitive and confidential nature of complaints to the Commission, these files were not used, unless already summarised in case study form by the Commission.

This, then, is a study of the first twenty years of the Human Rights Commission in New Zealand. It examines its origins, the way it has operated and its various distinctive phases. This study will examine the forces shaping the evolution of the Commission and the Commission's relations with Government, the media and the public.

The Commission's first twenty years are divided into four phases - pre-1978, 1978-1983, 1984-1992 and 1993-1998. Turning points which

correspond to the greatest changes in Commission development sometimes also correspond to the Chief Commissioner terms.

Chapter one, *Leading the Way Pre-1978,* demonstrates that both national and international human rights movements were influential on the establishment of a Human Rights Commission in New Zealand. It follows the Parliamentary debates leading to the 1977 Human Rights Commission Act and draws out the political and social conditions which were necessary for the Act to come into being.

Chapter two, *Setting Standards? 1978-1983,* examines the first five years of the New Zealand Human Rights Commission. It identifies the topics the Commission first chose to focus on and the reasons why. These were the formative years during which the Commission faced some of its most difficult trials, and was probably at its least effective. Chapter two will demonstrate that the lack of Government support was the main reason for the Commission's troubles in setting standards.

Consolidation 1984-1992, chapter three, looks at the following nine years of the Commission at the end of which a new Human Rights Act was being drafted. This period is the development and consolidation phase of the Commission, during which its effectiveness and strength increased in direct relation to the external support of Government.

Chapter four, *Two Steps Forward, One Step Sideways 1993-1998* will examine the most recent years of the Commission. It analyses the new Act which was passed in 1993 to greatly extend the functions and powers of the Commission, and looks at how the Commission coped with such a large extension of its duties. Chapter four looks at the current problems facing the Commission, and the apparent withdrawal of Government support for human rights, with its curtailing of the Commission's powers.

Finally, the conclusion, *The New Zealand Human Rights Commission at 20,* brings the study to a close by the application of the findings to the wider issue of support for national human rights institutions around the world. It also supports the need for further research into human rights in New Zealand and the little recognised volatility of human rights in this country.

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[1] J.B. Elkind, 'Thoughts on the Human Rights Commission Bill 1976', *New Zealand Law Journal*, No. 6, April 1977, pp.123-9; 'Human Rights - How to Make it Work', *New Zealand Law Journal*, no.10, 1978, pp.189-199; 'Application of the International Covenant on Civil and Political Rights in New Zealand', *American Journal of International Law*, No. 75, 1981, pp.169-172; 'The Human Rights Commission as a Law Determining Agency', *New Zealand Law Journal*, June 1984, pp.198-202; 'The Optional Protocol: A Bill of Rights for New Zealand', *New Zealand Law Journal*, March 1990, pp.96-101; 'Anti-Discrimination Law in New Zealand', *Human Rights Law and Practice*, 1:1, March 1996, pp.230-243.

[2] Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, Brookers: Wellington, 1995.

[3] Margaret Bedggood, 'The Role of a National Institution', *Culture, Ethnicity and Human Rights in International Relations*, Rorden Wilkinison (ed.), New Zealand Institute of International Affairs: Wellington, 1997, pp.95-98; Margaret Mulgan, 'Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution', *Canterbury Law Review*, 5:2, 1993, pp.235-250.

[4] John Ivan Stephen Kovacevich, *The Human Rights Commission Act 1977*, LLB(Hons): University of Auckland, New Zealand, 1987.

[5] Sara Rowan, *Baigent and International Human Rights*, LLB(Hons): Otago University, New Zealand, 1995.

Chapter 1 Leading the Way, Pre-1977

Introduction

The 1977 Human Rights Commission Act was a product of both international developments in human rights and a domestic preparedness for the legal encapsulation of rights. The logical culmination of these two states of affairs produced an Act which served New Zealand citizens and also paid heed to important international human rights standards: It was 'An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights.'[1]

To understand the introduction of the Human Rights Commission Bill, it is necessary to examine the state of human rights protection prior to 1977 both nationally and internationally. The interconnection of international and domestic human rights protection should not be underestimated, and to deal with each separately would create a false dichotomy. The significance of the Human Rights Commission Act 1977 is brought to light, therefore, by reviewing New Zealand's involvement in international human rights developments and New Zealand's responses at home to international developments.

New Zealand's Involvement In the Development of International Human Rights Standards 1948 - 1977

Human rights did not truly became an international concern until 1945. In the aftermath of major human rights abuses during World War Two the United Nations (UN) was established giving priority to human rights issues irrespective of national and state boundaries.

New Zealand contributed enthusiastically to the establishment of the UN. Evidence of the country's concern to be more than just a signatory to the founding document, the UN Charter, can be read in a speech made by Peter Fraser, Prime Minister of New Zealand. Fraser spoke during the plenary session of the San Francisco Conference in 1945 on amendments to the Charter, emphasising the 'disproportionate role that is allotted to the smaller powers.'[2] Fraser clearly did not intend New Zealand to take a back seat within the new organisation. New Zealand representatives also made several submissions during the drafting of all the major international human rights instruments, especially the draft Declaration of Human Rights and the draft Covenants on Human Rights.

The Universal Declaration of Human Rights

The international human rights instrument of most importance is undoubtedly the Universal Declaration of Human Rights. The declaration was written as a result of a suggestion in 1945 that the UN Charter should contain a bill of rights. In 1947 a Drafting Committee was set up by the UN to examine possible ways for writing a list of universal human rights. The Committee suggested that two documents be drawn up - first a declaration, which would be: 'a recommendation by the General Assembly to Member States, and, as such, would have moral weight but no legal compulsion on Members';[3] and secondly a Covenant, which would be legally binding on signatory countries.

New Zealand was critical of the Declaration primarily because it felt that a legally-binding instrument on human rights was more important than a Declaration with only moral weight attached to it. NZ also felt that the Declaration was not a 'mature document', but reflected only some of the member states' views.[4] The New Zealand Government felt that the Declaration was much too long and wordy - that it would not be readable and understandable for the majority of people in the world. Along with

criticisms of the draft declaration, New Zealand also submitted its own revised version - needless to say, it was much shorter and simpler.[5] Although most of New Zealand's remarks were disregarded, it is nevertheless important that New Zealand was involved to such a scale in the drafting process - and when it came to voting on the draft Declaration, New Zealand voted for it.

International Covenants on Human Rights

New Zealand's commitment to legally binding documents was further demonstrated when the New Zealand delegate to the UN in 1948, Colin Aikman, voiced the country's support for several smaller covenants which could 'progressively elaborate and define the principles set forth in the universal declaration of human rights'.[6] Such strong support for legal protection of human rights is symptomatic of the general nature of New Zealand's early involvement in international human rights affairs.

In contrast to the Universal Declaration of Human Rights, New Zealand considered the draft Covenant to be the most integral aspect of human rights protection, and gave it full support. New Zealand submitted many comments on the draft Covenant including its own version of the Covenant. For New Zealand, the legally-binding nature of the Covenant was the 'first essential step' in the protection of human rights world-wide.[7] Although New Zealand supported the Covenant, it called for much more discussion on it and was determined not to be railroaded into accepting a document which it felt was inadequate. In fact New Zealand claimed it was

> necessary to record express reservations of the position of the New Zealand Government on certain articles proposed for inclusion in the Covenant on Human Rights until their scope and proper interpretation is clarified.[8]

New Zealand also urged the UN not to move too quickly to adopt the Covenant as many countries, New Zealand included, would not be able to adopt it in domestic law due to its lack of a written constitution. Finally, New Zealand suggested that the further advanced Covenant on Civil and Political Rights be separated from the Covenant on Social, Economic and Cultural Rights, in order not to delay its introduction.[9] Again, the outcomes of these suggestions are not as significant as the input which New Zealand made to the discussion on such documents, and their commitment to a document with more than moral force.

The Covenants were separated into the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. They were adopted by the UN General Assembly in 1966 and entered into force in 1976, once 35 countries had ratified each. These covenants required New Zealand and all other signatory countries to undertake many new commitments to human rights, including the important practice of periodic reporting to the UN Human Rights Committee and Economic and Social Council on the state of human rights in New Zealand.

With such strong support for legally binding human rights, New Zealand understood there would be a need for legislative developments. In 1968 the Minister of Justice and Attorney-General, the Hon. Josiah Ralph Hanan, stated that

> ... the present picture in New Zealand may well change in the future ... mainly for international reasons. The point here is that the United Nations sponsors a number of conventions, with the principles and spirit of which we are entirely in accord but which, if we are going to adopt them in New Zealand, would require a certain amount of legislation of a sort that we have in the past felt undesirable.[10]

Hanan's explanation of the undesirability of legislating rights was that 'legislation does not change attitudes'.[11] Even so, that members of Parliament were recognising, in 1968, that New Zealand would soon see legislative changes as a result of international pressure is significant. It demonstrates the sincerity of the Holyoake Government to do all it could to uphold the principles of human rights in which it believed.

The long title of the 1977 Human Rights Commission Act demonstrates the commitment of New Zealand to international human rights principles: 'An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in *general accordance with the United Nations International Covenants on Human Rights*'[12] [emphasis added]. This Act was written primarily to implement the Covenant on Civil and Political Rights and the Convention on Economic, Social and Cultural Rights, the most legally powerful of international human rights instruments.

New Zealand's Domestic Protection of Human Rights

There is a very strong link between international and national protection of rights. Law and civil liberties lecturer, Scott Davidson, has remarked that 'the protection of human rights at both the national and international level are intimately connected, if not symbiotic.'[13] While most instruments are legally-binding when signed, there is a wider moral force which compels a country to sign and observe such an agreement. Conversely, countries with good human rights records exert moral force within the United Nations which pressures other less scrupulous countries.

New Zealand had, by 1976, been paving the way for a major piece of human rights legislation for several decades. The most conspicuous

example of New Zealand's early consideration of human rights issues is the women's suffrage movement of the 1890s, which culminated in the 1893 Electoral Act, giving women the right to vote. The women's movement, in general, has been a strong force in New Zealand history. Many commentators on the Human Rights Commission have remarked that the women's movement was instrumental to the establishment of the Commission.[14] In fact it was a Select Committee on Women's Rights, set up in 1973, which made the first serious suggestion of a national human rights commission.

The Ombudsman Act (1962) is another example of New Zealand's involvement in human rights issues prior to the Human Rights Commission Act. The institution of an Ombudsman was a major step in the protection of New Zealand citizens from Government abuses of rights and civil liberties. It also illuminates the New Zealand Government's interest in protecting human rights through law. The role of the Ombudsman is particularly significant as it indicates the willingness of Government to be scrutinised and checked, in the interests of human rights.

The earliest direct example of New Zealand's legislative response to international human rights law is the 1971 Race Relations Act. Evidence of New Zealand's desire to ratify the Convention on the Elimination of Racial Discrimination (CERD) is stated clearly by the long title of the Race Relations Act which is: 'An Act to affirm and promote racial equality in New Zealand *and to implement the International Convention on the Elimination of All Forms of Racial Discrimination*'[15] [emphasis added]. Immediately following the passing of this Act New Zealand ratified CERD, which had been adopted by the UN in 1965 and had come into force in 1969.

Although the Race Relations Act was written to implement the Convention on the Elimination of Racial Discrimination, differences between the two documents caused some concern. While CERD prohibited all racial discrimination, it made allowances for affirmative action, where necessary, to advance the rights of particularly disadvantaged groups. It did, however, state that such exceptions were not to eventuate in separate rights for separate groups and that the practice of affirmative action must end once the original objectives had been achieved. While the Race Relations Act made provision for affirmative action, it did not include any qualifications or limits on such programmes, meaning that affirmative action programmes could continue interminably - possibly creating further discrimination.[16]

The Debate over a Bill of Rights for New Zealand

Long before the introduction of the 1977 Human Rights Commission Act, New Zealand had already become embroiled in a debate over the need for a Bill of Rights. The debate began when the Legislative Council, or upper house of Parliament, was abolished in 1950. Paul Rishworth notes that 'The abolition and lack of moves to replace [the Legislative Council] were perceived by some as creating a dangerous constitutional vacuum'[17] - a vacuum which could potentially be removed by instituting a Bill of Rights. Several draft Bills were presented to Parliament, the most noteworthy being that of the Constitutional Society for the Promotion of Economic Freedom and Justice in 1960, and another drafted by the National Government in 1963. The newly-established Ombudsman felt that the power of Government was unchecked and that a Bill of Rights could provide the kind of check that the Constitution provided in the United States. Ironically, in view of this strong position, he was not supportive of the Bill of Rights proposed by the National Government in 1963.[18]

Most of the draft Bills of Rights presented were strongly criticised. The main criticism came from academics (particularly from Victoria University of Wellington) and condemned the increased powers which a Bill of Rights would give to judges. For example, in 1978 two authors stated their reasons for not supporting a Bill of Rights as being that the power given to judges to overrule legislation would take away the fundamental right of people to take part in democratic government through their elected representatives.[19] The concept of protecting citizens from human rights abuses was not criticised.

Other concerns about the Bill of Rights, particularly that on offer from the National Government during the 1960s and 1970s, related to the Bill's rather weak protection of human rights. Human rights law specialist, Jerome Elkind, noted in 1977 that, among other omissions, there were many aspects of the Universal Declaration of Human Rights which were not included in the Bill of Rights.[20] Supporting this view, academics from Victoria University's school of Political Science wrote in 1978 that:

> We look in vain for mention of the economic, social, and cultural rights set out in the Universal Declaration of Human Rights. Does their omission imply that they are less important or fundamental?[21]

It is significant that these academics were comparing the Bill of Rights to international standards, as it demonstrates a general awareness of the importance of human rights on a grander scale.

In 1968, law professor and later Prime Minster, Geoffrey Palmer, recognised the hostility towards the idea that courts and judges be given the power to strike down laws which contravened a Bill of Rights and made the following suggestion:

> To give a Bill of Rights greater impact, someone other than those enacting the laws must measure them against the vague principle in the Bill. It would be possible to have some body other than a court doing this. *Perhaps a New Zealand Human Rights Commission could report ... on the implications for Human Rights of the government's policies.*[22] [emphasis added]

Palmer's suggestion of a Human Rights Commission was significant given his later support for the Commission.

The significance of the Bill of Rights debate (which did not come to fruition until 1990)[23] is that many people in New Zealand, particularly politicians and academics, were well aware of the complexities of human rights protection. The problems of defining human rights, protecting human rights and institutionalising human rights had already been grappled with long before the Human Rights Commission Bill was introduced in 1976.

The Influence of the Women's Movement

In 1968 the UN Secretary-General, U Thant, remarked that several countries had recently set up national commissions to deal with issues of women's rights. A UN Commission on the status of women was established as a means of exchanging ideas on these national commissions.[24] New Zealand had to reply to the Secretary-General's request for information by stating that there was no such national commission in New Zealand.[25] The New Zealand Government clearly felt the pressure being exerted by the UN, especially when the Secretary-General made remarks such as 'The Commission on the Status of Women will also recall that ... the Economic and Social Council called the attention of Member states to the "value of appointing national commissions on the status of women"...'[26]

Hence in 1973 the New Zealand Labour Government appointed a Select Committee to investigate the status of women in New Zealand. The Government requested that certain areas be given special attention, and not surprisingly, these were the same areas which the UN Committee on the Status of Women had examined in 1968.[27] The Select Committee report began by noting the recent international interest in women's rights:

> The movement to achieve full equality of the sexes has deep historical roots, but only in relatively recent times has it gained a momentum which has given rise to the involvement of governments and international bodies in its objectives.[28]

Apart from a general directive, the Committee was free to seek and receive submissions from anyone in New Zealand on any topic relating to women. The actual findings are less significant here than the recommendations which the Committee made in its report.

The report suggested that either a national commission of women's rights or a general human rights commission be established to address issues of discrimination. The report acknowledged that 'there is an obvious need for active policies in other areas to ensure the removal of all areas of disadvantage to women.'[29] Strong emphasis was placed on the need for women to be involved at higher levels in society and especially in policy-making roles, and that 'the Government be seen to give a lead in these developments by indicating in its own sphere a genuine determination to recognise the potential of women.'[30]

The Select Committee report, therefore, devoted substantial space to the concept of a national women's rights commission. Several submissions received by the Select Committee suggested that a Commission could co-ordinate research on women's rights, have the power to enforce sanctions

for sexist discrimination, and investigate cases of discrimination. Although support for the concept of a national human rights commission was voiced in the submissions received, the Select Committee warned that '...there is danger that within a commission of wide-ranging interests, the particular needs of women might tend to become submerged by the problems of other forms of discrimination'.[31] However, considering it to be a viable alternative to a women's rights commission, the Select Committee suggested that 'This could be overcome largely by structuring the human rights commission in such a way that it would incorporate separate divisions to deal with specific areas of human rights.'[32] Such rhetoric was heavily influential on the eventual shape of the Human Rights Commission in 1978.

The Human Rights Commission Bill

The Human Rights Commission Bill which established the Human Rights Commission and provided its mandate was first introduced into Parliament on 9 December 1976, one day prior to international Human Rights Day. It was introduced by David Thomson, then Minister of Justice in the new National Government which had succeeded Labour late in 1975. It received its first reading and was referred to a special Select Committee.[33] The Bill would establish a Human Rights Commission to educate on human rights, and to receive then settle individual complaints of discrimination. In addition, the Bill would set up a tribunal to enforce settlements if necessary. The original draft Bill was intended to embody the principles of the Universal Declaration of Human Rights and was afforded unlimited power over other legislation.

The Human Rights Commission Bill, as noted, had its origins in the Select Committee report on the Role of Women in New Zealand. It had also featured in the 1975 election manifestos of both the National and Labour parties. The Labour Party Manifesto stated that "... Government

recognises some areas of priorities which should be given serious consideration for early implementation. These are: ... Setting up of a Women's Rights Commission."[34] In reply the National Party Manifesto stated that "we will also establish a Human Rights Commission which will ensure that equal rights legislation is enforced and that women have an effective and inexpensive means of redress."[35] Despite the difference between the two promises, one being to establish a Women's Rights Commission, the other a Human Rights Commission, both bore reference to women's rights primarily.

Both parties outlined the roles envisaged for their Commission, and elements of each were included in the final Human Rights Commission Bill. The National Party focused the role of the Commission on extending the role of the Ombudsman, in that the Commission would examine the practices of Government departments, Government organisations, local organisations, and industrial associations and unions.[36] It also extended the scope of the Commission to specifically include race, sex and religion. A distinct omission from the National Party's manifesto was individual complaints against other individuals.

The Labour Party's manifesto, in comparison, did not restrict the Commission to examining organisations. Their view of the role of the Commission was much broader, including the functions

> (1) To investigate and act on individual complaints of discrimination;
> (2) To recommend appropriate anti-discriminatory legislation;
> (3) To co-ordinate research ...;
> (4) To promote an effective information and education programme 37

As both parties had suggested the establishment of some form of Rights Commission it is not surprising that the Human Rights Commission Bill received so much attention when introduced to Parliament. In

deliberating over the Bill the Select Committee had many viewpoints to consider.

When the Select Committee reported back to Parliament on 7 July 1977, it suggested several amendments to the Human Rights Commission Bill. One of the most significant suggestions made by the Select Committee was that the Universal Declaration of Human Rights be included in the Bill as a 'schedule' of rights to be protected. By this stage the Universal Declaration of Human Rights had been superseded by the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights as they were more specific and were legally binding instruments. It became apparent that international human rights instruments were liable to be superseded and could evolve quickly. For this reason, rather that include reference to a specific instrument in the Human Rights Commission Bill, the term 'international covenants on human rights' was included instead.

The original and second drafts of the Human Rights Commission Bill were also quite different in scope. The original Bill protected rights in the areas of race, national and ethnic origin, colour, sex, marital status, religion, age, place of origin, and parental status. Dropped during the drafting process were age, parental status and place of origin. Other grounds considered in the drafting process were political belief, physical or mental disability, and sexual orientation, although they were eventually not included in the Bill. John Harrison, member of Parliament for Hawkes Bay, in reporting on the Select Committee's findings, noted that 'Many submissions sought to extend the list to include political belief, age, sexual orientation, and several others; but the committee thought that the list in the Bill was enough to start with and that it should be left to the Commission to recommend additions to the Act.'[38]

Between 20 July and 23 August 1977 the Bill received its second reading and the comments of various Members of Parliament illustrate the controversy surrounding this Bill. The main source of contention was whether the Bill was designed to give limited protection for some rights, or whether it was designed to implement the international covenants, and therefore have a broader mandate. For example, Mary Batchelor, who was on the Select Committee, called the Bill 'the biggest non-event of this century', and remarked that 'if such legislation is truly concerned with the human rights of the individual, then surely it must cover all individuals and all groups of individuals.'[39]

The third reading of the Human Rights Commission Bill took place on 2 November 1977, at which point many MPs were still unhappy with the scope of the Bill. The member of Parliament for Onehunga summed up the thoughts of many others when he said that 'the Bill as it stands has good intentions but poor content. If we are serious about safe-guarding human rights, much more could have been done and said, and much more should have been put into the Bill.'

When the Bill received royal assent on 21 November 1977, there were several aspects which were still under debate, and the primary function of the Commission was still in doubt. The main thrust of the Commission appeared to be its educational function, whereby the Commission should promote human rights. In fulfilling this function the Commission had the freedom to promote any human rights - even those not included in the Bill. It seems unusual then that the eventual grounds of unlawful discrimination were restricted to sex, marital status, religious or ethical belief, and race.

An essential point which must be understood about the Human Rights Commission Act is that it was subordinate to all other legislation. This is

significant because the lack of a constitution or a Bill of Rights meant that there was still no guarantee that New Zealand laws would not violate human rights. While the Commission was given the responsibility of reporting to Parliament on the human rights implications of any existing or proposed legislation, it had no power to enforce change in line with human rights protection.

Summary

The 1977 Human Rights Commission Act had its origins in both international and domestic human rights developments. Examining the decades immediately preceding its introduction provides insight into these determining factors. From the beginnings of the United Nations in 1945, we find that New Zealand has paid substantial attention to international human rights developments, in particular the Universal Declaration of Human Rights (1948), and the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights (1966). The New Zealand Government's commitment to the legally-binding human rights of the International Covenants was reflected in both the Race Relations Act (1971) and the Human Rights Commission Act (1977).

At the same time as New Zealand was involving itself in international human rights developments, it was generating a domestic discussion of human rights. The debate over a Bill of Rights and the establishment of a Select Committee to examine the status of women in New Zealand are prime examples. The Bill of Rights debate was significant in that it helped prepare politicians and academics for many of the complexities involved in legislating human rights. This was enhanced by the Select Committee report on the status of women in New Zealand. Among other recommendations, the report suggested the establishment of a women's

or human rights commission, both of which had featured in the 1975 election manifestos of the Labour and National parties.

When the Human Rights Commission Bill became law on 21 November 1977 it therefore addressed both national and international human rights concerns. The Human Rights Commission which it established was charged with protecting New Zealand citizens and upholding New Zealand's commitment to international human rights standards. Over the following twenty years the Commission would do this with varying levels of success, facing many upheavals and obstacles.

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[1] *Human Rights Commission Act 1977*, No.49.

[2] Peter Fraser, 'Universal Collective Security - Amendments to the United Nations Charter', *Speeches and Documents on New Zealand History*, W. David McIntyre and W.J. Gardner (eds), Clarendon Press: Oxford, 1971, pp.378-379.

[3] *Yearbook of the United Nations*, 1948-49, Department of Public Information United Nations, Lake Success, New York, p.525.

[4] ibid., p.528-9.

[5] Commission on Human Rights (Third Session), 'Communication Received from New Zealand', *Comments From Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation*, E/CN.4/82/Add.12, 3 June 1948.

[6] United Nations, *Official Records of the Third Session of the General Assembly, Part I: Plenary Meetings of the General Assembly: Summary Records of Meetings 21 September - 12 December 1948*, p.889.

[7] Commission on Human Rights (Third Session), 'Communication Received from New Zealand', p.3.

[8] ibid., p.2.

[9] Commission on Human Rights (Seventh Session), 'New Zealand', *Observations of Governments of Member States on the Draft international Covenant on Human Rights and Measures of Implementation, as Drafted at the Sixth Session of the Commission on Human Rights, Received by the Secretary-General Under General Assembly Resolution 421 H (V) and Economic and Social Council Resolution 303 I (XI)*, E/CN.4/515/Add.12, 16 March 1951, p.3.

[10] Hon. J.R. Hanan, 'Human Rights: The Prospect', *Essays on Human Rights*, Keith K.J. (ed.), Sweet & Maxwell: Wellington , 1968, p.188.

[11] ibid., p.187.

[12] *Human Rights Commission Act 1977.*

[13] Scott Davidson, *Human Rights*, Open University Press: Buckingham, 1993, p.1.

[14] Robert Ludbrook, *Human Rights and You*, Government Printing Office, 1990, p.9. and Human Rights Commission, *Annual Report*, 1979.

[15] *Race Relations Act 1971*, No.150.

[16] Frances Joychild, 'Affirmative Action - Measures to Ensure Equality', *Human Rights Law and Practice*, 1:4, March 1996, pp.219-20.

[17] Paul Rishworth, 'The Birth and Rebirth of the Bill of Rights', *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, Grant Huscroft and Paul Rishworth (eds), Brookers: Wellington, 1995, p.5.

[18] ibid., p.7.

[19] R.H. Brookes and A.D. Robinson, 'A New Zealand Bill of Rights', *The Reform of Parliament: Papers presented in memory of Dr Alan Robinson*, Sir John Marshall (ed.), New Zealand Institute of Public Administration: Wellington, 1978, pp.127-8.

[20] Jerome Elkind, 'Thoughts on the Human Rights Commission Bill 1976', *New Zealand Law Journal*, No. 6, April 1977, p.123.

[21] R.H. Brookes, and A.D. Robinson, 'A New Zealand Bill of Rights', p.126.

[22] G.W.R. Palmer, 'A Bill of Rights for New Zealand?', *Essays on Human Rights*, p.112.

[23] *New Zealand Bill of Rights Act 1990,* No.109.

[24] Commission on the Status of Women (Twenty-first Session), *National Commissions on the Status of Women: Report by the Secretary-General*, E/CN.6/494, 26 January 1968.

[25] ibid., 'New Zealand', p.14.

[26] ibid., p.1.

[27] ibid.

[28] Select Committee on Women's Rights, *The Role of Women in New Zealand Society*, 1975, p.8.

[29] ibid., p.21.

[30] ibid., p.43.

[31] ibid., p.100.

[32] ibid., p.100.

[33] *NZPD*, 9 December 1976, pp.4687-4690.

[34] New Zealand Labour Party, *The Labour Party Election Manifesto 1975*, p.43.

[35] National Party of New Zealand, *1975 National Party Manifesto*, unpag.

[36] National Party of New Zealand, *National Party 1975 General Election Policy: announced by Hon R.D. Muldoon, Leader*, 1975, unpag.

[37] New Zealand Labour Party, *The Labour Party Election Manifesto 1975*, p.43.

[38] *NZPD*, 7 July 1977, p. 1245.

[39] ibid., 20 July 1977, p.1480.

Chapter 2 Setting Standards? 1978-1983

Introduction

When the Human Rights Commission met for the first time on 1 September 1978 expectations of what it could achieve were high. It had been brought together for the purposes of eradicating discrimination in New Zealand and thought it had the Government support necessary to do this. This was not to be the case. As it would find out, there was much groundwork to be done before it could even enforce certain parts of the Human Rights Commission Act (HRC Act), and a lack of Government support meant its work was often undermined.

Outlining the Human Rights Commission Act

The Commission's primary function was, as the long title of the Human Rights Commission Act states: 'to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights.'[1] The Act also stated five general functions:

1. The promotion of human rights through education and publicity.
2. The encouragement and co-ordination of human rights programmes and activities.
3. The ability to receive representations from the public on matters affecting human rights.
4. The power to make public statements on matters affecting human rights.
5. The power to report to the Prime Minister on the amendment or repeal of any discriminatory legislation or government practices.[2]

In addition to these general functions the Commission had three sets of specific functions. The first and most prominent set referred to the power of the Commission to investigate and conciliate any discriminatory acts,

whether an individual complaint had been received or not. The second set gave the Commission the duty to inquire into issues of privacy, and report both publicly and to the Prime Minister on privacy matters, but not to handle individual privacy complaints. The third related to complaints made of discrimination in industrial unions and professional and trade organisations, in which area it *was* given the power to investigate individual complaints. Such a diverse range of functions meant that the Commission essentially had two roles to play - as pointed out by law lecturer Margaret Wilson, it was to educate on the one hand, and enforce on the other.[3]

The Commissioners

The HRC Act provided for six members of the Commission: four Human Rights Commissioners (one of whom was to be the Chief Commissioner), the Chief Ombudsman and the Race Relations Conciliator.[4] The four Human Rights Commissioners were appointed by the Governor-General on the recommendation of the Minister of Justice and the other two were appointed in relation to their own acts.[5] At the outset, one post was left vacant. The position was not filled for six years despite repeated requests by the Commission.

The first Chief Commissioner was Patrick Downey, a lawyer who came from a background in broadcasting and radio and had been a member of the Inter-Church Council on Public Affairs.[6] The other appointees were Margaret Hutchison, an accountant who had a long involvement with women's rights, and Ria McBride, also heavily involved in Polynesian and women's affairs. These three worked alongside Harry Dansey (Race Relations Conciliator) and Graeme Laking (Chief Ombudsman). Because both the Race Relations Conciliator and the Ombudsman had their own acts to administer their role in the Commission was less than that of the other four. Although it became clear that the Ombudsman had very little to do with the Commission, the Race Relations Conciliator played an

important part in administering all sections of the HRC Act relating to race, colour, and national origin. With five out of six posts filled the Commission might have operated effectively, but when Ria McBride resigned in 1980 she was not replaced and the membership dropped to four, two of whom had other official duties to perform. This in effect left the Commission at half strength and many problems ensued.

Operations

When the Commission was established in 1978 it also took on 12 other staff, seven in typist and secretarial roles and five as human rights officers, responsible for general and legal research and education. The team at the Human Rights Commission began working in Wellington, and with only one office contact points needed to be established throughout the rest of the country. To ensure a wide contact base, the Commission developed a rapport with the Citizens Advice Bureaus, which acted as a distribution and resource network for the Commission. The Race Relations Office was in Auckland and as it administered all race aspects of the Human Rights Commission Act, the Commission also had de facto Auckland representation. In April 1980 the Commission created an office in Christchurch which was initially open three days a week but from November was open all week.

To begin full Commission meetings were held monthly to discuss such issues as legislation going through Parliament, significant complaints and other topics of relevance to human rights which the Commission would consider reporting on.

Establishing Policy

The years 1978 to 1983 are significant in the Commission's history not only because they correspond to the first Chief Commissioner's term but

because they were the formative years for Commission policy and strategies. From the very first meeting in September 1978 it is apparent that the Commission wanted to be 'bold and vigorous',[7] and to do this it had to set clear priorities and develop a plan for initiating new areas of policy.

On 5 July 1979 the Commission adopted procedures for developing policy initiatives. A prime concern was to improve communication between the commissioners and their staff, such as the human rights officers responsible for much of the research. The procedure contained the following seven steps:

1. A policy initiative would come from either staff or commissioners
2. The person/s involved would develop a brief policy statement
3. The statement would go to a Commission meeting for discussion
4. A special meeting for all interested in the policy would be held to discuss the details
5. One officer would research and issue a detailed policy paper
6. The paper would go to the Board for adoption
7. The policy would be implemented by all Commission staff.[8]

In late July 1979, the Commission, in the interests of further improving its efficiency, commissioned Mr R.E. Williams to examine and report on all aspects of its operation. His report, delivered in December 1979, made many comments and recommendations, most of which were passed over or considered inappropriate by the Chief Commissioner. One of the report's main points, however, was that the Commission needed to do a lot more work in the area of policy development and research, despite having implemented the policy initiative procedures not long before. Williams commented that 'if policy can be determined in advance on likely issues, the Commission might well be better placed to deal with complaints and issues as they arise in the future.'[9]

Initially the Commission chose to focus on privacy, employment advertising, superannuation, the definition of 'marital status' in the HRC Act, and the high level of complaints of religious discrimination.[10] Within these areas the Commission then set its priorities and the handling of complaints was given precedence over everything else.[11] Beyond that, the main concern for 1979 was research into privacy, reflecting the high public interest in the issue and because it was dealt with in some detail in the HRC Act.[12] The Commission also spent a great deal of time in its first year on priorities for education, this being its primary general function.

One of the first significant issues for the Commission was the interpretation of the HRC Act. The term presenting the most problems was 'marital status' - one of the listed grounds of prohibited discrimination. The Commission had to determine whether the term 'marital status' included de facto couples and single people as well as legally married people. Defining the term was not an easy task, as the Commission had no legal interpretative power as courts do, and was aware of disagreements between members of Parliament over the definition of the term prior to the enactment of the legislation.[13] The Commission's response was, in 1979, to begin inviting submissions from the public and to issue a policy statement on the definition of 'marital status'.[14] The report was delayed several times due to the sheer number of submissions and was not published until 1984. When it was published however, the Commission made clear its decision to include all types of marital status in its definition.[15] Due to the delay of the report many complaints of marital status discrimination were put off or investigated under another area such as sex discrimination.

Educating the Public

Developing an Education Programme

The Human Rights Commission spent a great deal of time on its education programme, stating that 'the promotion of, respect for, and observance of human rights in education and publicity [was] its key function.'[16] In 1978 David Thomson, Minister of Justice, had announced that the true promotion of human rights lay in the changing of people's attitudes through education.[17] The education function was a rather broad one, giving the Commission leave to educate on any human rights matters, including the requirements of human rights legislation, the issuing of policy statements and informing the public about international human rights instruments. In February 1979, the Commission developed a preliminary plan for its education programme. The plan noted that in order to develop effective policy the Commission needed to answer six key questions:

1. What central elements of the international covenants need developing?
2. What is the relationship between human rights and social discrimination?
3. How would the development of human rights affect social change?
4. What is the Commission's relationship to other political movements of change, particularly the women's movement?
5. Can the Commission support some aspects of a political philosophy and not others?
6. Can the Commission effectively remove discrimination through education and stay within the bounds of educating on human rights?[18]

To fulfil this plan the Commission embarked on a programme of speeches, publications and newsletters, in which political philosophies and politically controversial topics were generally avoided. This was a reflection of the Commission's decision to remain well within the accepted bounds of 'human rights', rather than branching into less secure areas of social discrimination.[19] A prime example is the Commission's

report on gay rights which stated that while the Commission did not believe homosexual law reform to be a matter affecting human rights, this did not mean that the law should not be changed.[20]

Perhaps the most demanding, yet seemingly the most effective were the many speeches given by the Commissioners and their staff to various community and business groups. The annual reports indicate that at least 50 speeches or presentations were made to different groups each year.[21] Where possible a Commissioner would deliver the speech, and in the first two years this was most often undertaken by Ria McBride, but otherwise other staff of the Commission would attend.[22] Speeches were made to groups ranging from Girls' Brigades to Law Societies and private firms, and many speeches were accompanied by training seminars in equal employment practices. The Commission also produced a few pamphlet and booklet publications on the workings of the Act, the international human rights conventions and basic outlines of the Commission. The publications were available to anyone on request and were also deposited in libraries and citizens advice bureaus.

The establishment of a newsletter, *HRC News*, in 1982 was the Commission's most pro-active education venture in this period. A staff memorandum circulated prior to the newsletter's inception indicates that it was intended to be for the 'misinformed, the unconverted as well as the converted who may be concerned at our progress.'[23] By the end of 1983 the newsletter reached a mailing list of around 5000.[24]

The Commission's first ever broad public education project was hosting a national seminar in celebration of international Human Rights Day, 10 December 1978. The seminar attracted wide support and was opened by the Hon David Thomson, Minister of Justice. Many topics were

addressed including the practicalities of enforcing domestic human rights legislation, international human rights and women's rights.[25]

Women's Rights

Many of the Commission's education campaigns focused on women's rights. Given that the Human Rights Commission Act came about almost as a direct result of a push for women's rights, and that the 1980s were the official UN decade for women, it is not surprising that this area received so much attention. Aiding the strong emphasis on women's rights was the fact that Margaret Hutchison, one of the Commissioners, had long been involved with women's organisations.[26]

One of the Commission's most innovative projects involving women's rights related to their access to credit and finance. It had come to the Commission's attention that women were consistently being denied access to credit services or else were required to gain credit under the authority only of their husbands. As a result, in 1982 the Commission contracted the Society for Research on Women to study the issue and release a report. The report was issued that same year and demonstrated that while the situation was slowly improving, due in part to pressure from the Commission on lending institutions, discrimination was still rife. The report was written both to condemn the practices of discriminatory lending, and provide women with a guideline to their rights as borrowers.[27]

The Commission also spent time on the role of women in the workforce, in particular examining the types of jobs in which women were under-represented. Projects on non-traditional occupations were initiated, providing employers and employees with resources such as videos, posters and seminars.[28] While the Commission had an interest in seeing women move into non-traditional occupations, the seminars were

designed primarily to support and encourage women already in such positions.[29]

Newspaper Advertising

The Commission's targeting of newspapers began in 1979, in relation to discriminatory employment advertising. One of the biggest employment obstacles facing women was employers' assumptions that women should work in certain limited occupations. Such attitudes were mirrored in discriminatory employment advertisements. From 1979 the Commission spent a great deal of time contacting large newspapers and informing them of the illegality of this sort of advertising. Notices on the illegality of discrimination were also placed by the Commission in the 'Situations Vacant' columns of newspapers.[30]

In the first seven-month period of the Human Rights Commission, from September 1978 - March 1979, 236 complaints of discriminatory advertising were received. Over the following two years, to March 1981, however, only 76 complaints of discriminatory advertising were received. In 1982 the Commission published a booklet aimed at employers and newspapers outlining the law regarding employment advertisements,[31] but by this stage it had already noticed a dramatic decrease in the numbers of discriminatory advertisements being placed.[32] Consequently only 14 complaints of discriminatory advertising were received between 1981 and 1983.

Affirmative Action Programmes

Affirmative action campaigns targeted at employers were also actively promoted by the Human Rights Commission. In one particular speech given to the Federation of University Women in Waikato, Downey emphasised the objective of affirmative action programmes as being

'equal acceptance of people [which would lead to] ... equal opportunity for people [which would lead to] ... equal achievement'.[33] The programmes were designed to give those who were qualified an equal chance of promotion and those who were under-qualified a chance to gain the necessary qualifications.

Because affirmative action programmes were, in essence, a form of discrimination, employers and institutions using them had to submit their plans to the Commission for approval. None were submitted for several years, prompting Downey to promote the establishment of a working committee on affirmative action under the auspices of the Employers' Federation.[34]

Race and Youth

Another major area of education for the Human Rights Commission was race and youth. Although most responsibility for matters relating to race were delegated to the Race Relations Office, which was brought under the Commission's wing with the Human Rights Commission Act, the Human Rights Commission was involved in sponsoring a series of multicultural youth forums in New Zealand. Its work on youth rights began in 1979, International Year of the Child, when it helped promote a series of conferences and forums throughout the year and headed the conference entitled 'The Rights of the Child and Law'.[35] 1979 also saw the Commission's first Multicultural Youth Forum in August.[36] These forums, five more of which were held throughout 1980 and 1981, were designed to 'awaken in dominant-culture New Zealanders an awareness of the cultural richness that exists in our country'.[37]

Cultural richness was also the concern of a 1982 Commission report on racial harmony in New Zealand, *Race Against Time.* This report was sparked by events at Auckland University which had received a great

deal of public attention. A group of engineering students had performed a 'mock' haka, and had offended many Maori students at the University, leading to a riot during which several members of the engineering students group were injured. Only the Maori students involved were arrested and charged. The events received wide press coverage because the haka had been intended as a harmless joke, but had been taken seriously by Maori students.

Prompted by the wide publicity of this event, the Commission sought and received many submissions on the issue of race in New Zealand and released an initial discussion paper. The submissions the Commission received on the issue were varied - ranging from those which stated that racism did not exist in New Zealand to those which felt that different treatment of races, in particular the according of special privileges to non-Pakeha, was a form of 'apartheid'.[38] The report which ensued highlighted continued inequities between Maori and Pakeha in New Zealand and addressed the myth of multiculturalism in New Zealand. The report sought to promote understanding, identity and cultural diversity.

One of the Commission's most wide-reaching education campaigns, also on cultural diversity, was a 1982 book and television series *'People Like Us'*. The book and television project were a collaborative effort between the Commission, the Asia Pacific Research Unit, TVNZ, and Government Print. The television series was shown in four parts, and was a documentary style production depicting the many 'faces' of New Zealanders. Its intention was to promote cultural diversity and a respect for other ways of living.[39] This, more than any other of the Commission's education ventures, probably reached the most people.

Complaints

The Complaints Procedure

While the Human Rights Commission Act stated that education was the primary function, for the Human Rights Commission complaints of discrimination would always take precedence. Much of the HRC Act concerned complaints of discrimination, and their subsequent investigation and conciliation. Part II of the Act listed the various areas and grounds in which discrimination was made illegal, and Part III empowered the Commission to investigate anything which appeared to breech the provisions in Part II.[40]

Investigations could be made pursuant to a complaint being received and deemed to have 'substance', as the Commission termed it. To have substance a complaint had to fall in a particular *area* and be on a particular *ground*. The *areas* in which discrimination was illegal were advertising, subterfuge, education, land, housing and accommodation, provision of goods and services, public access, vocational training bodies, qualifying bodies, unions and associations, partnerships, and employment.[41] In some of these areas statutory exemptions were provided - for example, employers were exempt from having to employ both men and women if they did not have separate facilities for them and it was not practicable to provide them.

The *grounds* for complaints of discrimination were sex, marital status, religious or ethical belief, race or colour, and ethnic or national origins.[42] Using this method, the Commission could receive complaints of, for example, sex discrimination in the provision of goods and services, or religious discrimination in employment.

When the Commission received a complaint it was passed to a human rights officer for investigation, which involved talking to all parties

involved. The HRC Act provided that once a complaint had been investigated and discrimination was established it was the duty of the Commission to settle the complaint between the two parties.[43] Settlements could take the form of apologies and assurances that the discrimination would not happen again, or financial compensation for lost income and other financial damages for hurt feelings and humiliation.

If the complaint could not be settled it was the duty of the Commission then to institute civil proceedings. This involved taking the complaint to the Equal Opportunities Tribunal (EOT), which was also set up under the HRC Act.[44] The EOT acted as a Commission of Inquiry, having the power to enforce its rulings, whereas the Commission did not. Not many cases had to go to the EOT, for, as will be explored, the Commission was quite successful in its negotiations between parties.

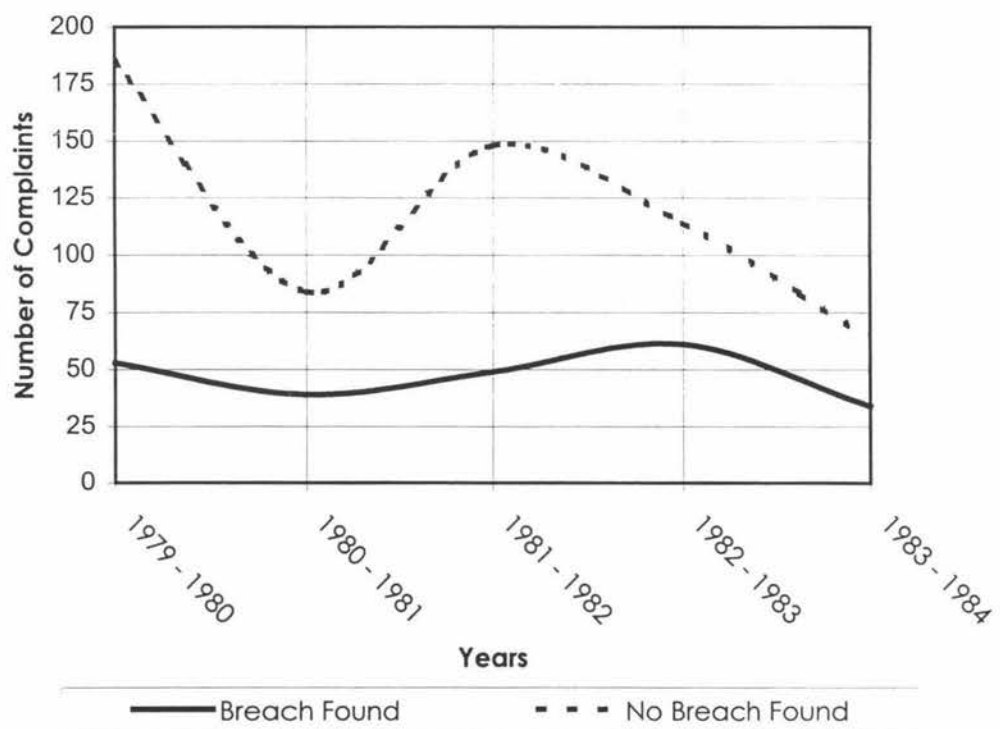
For a number of reasons, complaints could be short-lived. If either the complaint was found not to have substance, or the alleged discriminator accepted wrongdoing and was prepared to settle as per the Commission's suggestion, the process was relatively short, in many cases lasting less than a month. In cases where the Commission decided that a complaint could not be handled because it did not meet the requirements of falling within at least one area and one ground, it would try where appropriate to find alternative agencies, such as the Ombudsman or the Labour Court, which could handle such a complaint.[45]

Complaints Statistics[46]

On average over this period the Commission completed around 345 complaints per year, although not all were investigated. The complaints which the Commission received can be divided into two categories: those within Part II of the HRC Act (that is, relating to a particular ground and

area) and those relating to other aspects of the Act or not covered by the Act at all. Each complaint required attention but few were actually fully investigated as many were found outside the jurisdiction of the Act. Of those that were investigated however, the number in which discrimination was actually established were few. For example, on average for this period the Commission would find discrimination in about 45 cases per year, and no discrimination in about 120 cases. This indicates that around only 45 cases per year required the more time-consuming process of conciliation.

Figure 1 Results of Investigated Complaints 1979 - 1984



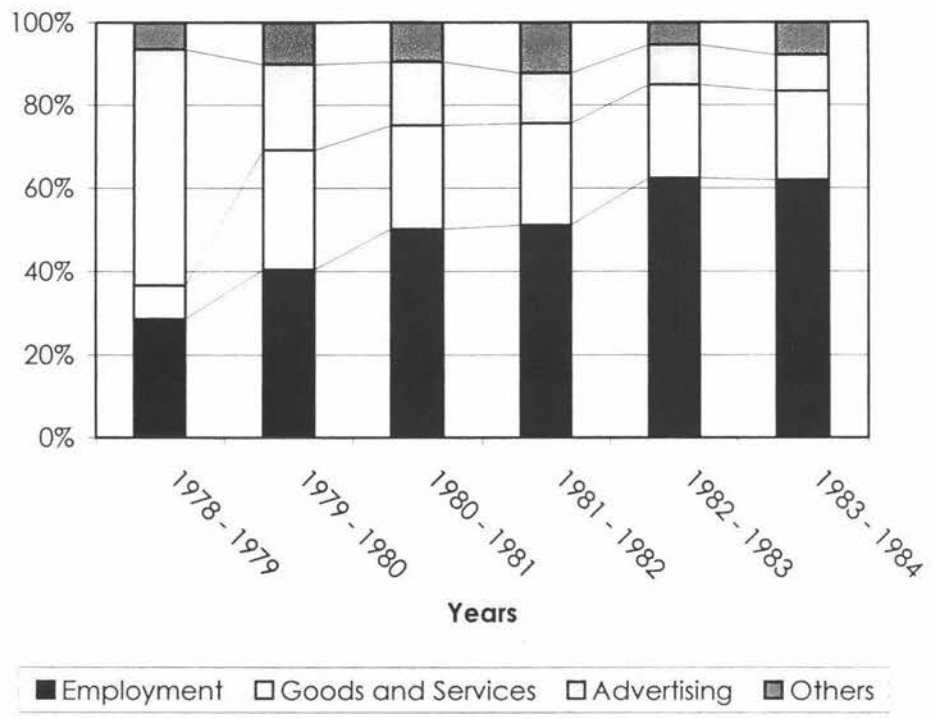
The number of complaints received by the Commission dropped after the first two years. In the first two years the Commission received a high number of complaints, 178 in 1979/80, and 253 in 1980/81. The following

year the number of complaints dropped to 131, and the Commission noted that this was probably due to less misunderstanding about what type of discrimination was covered by the Act.[47] Over the first few years only five in every twenty complaints investigated were found to have substance, compared to later on in this period when seven in every twenty were found to have substance. Over this whole period the most common *ground* for complaints was sex, which totalled between 70 and 80 percent of all complaints received, or an average of 125 complaints per year.

Figure 2 Trends in Grounds of Complaints 1978 - 1984

The most common *area* for complaints was employment which averaged around 85 complaints per year, totalling just over 50 percent of all complaints received.

Figure 3 Trends in Areas in Complaints 1978 - 1984



Of sex discrimination complaints, most were in the area of employment, and this was reflected in the significant amount of work the Commission did in educating on this issue. The most common complaint about marital status discrimination was in the area of goods and services provision, although the statistical data for marital status complaints may not be as accurate as for sex discrimination because of the difficulty which the Commission had in defining marital status. Due to the Commission's lack of a definition for 'marital status', complaints on this ground were frequently dealt with on other grounds (such as sex). Finally, the trends in complaints on religious or ethical grounds are not possible to define as there were only ten or so complaints received each year.

Three Significant Complaints

In the years 1978-1983, three complaints in particular were significant: *Ross and Others v Ocean Beach Freezing Company,* which tested the employment and sex discrimination provisions and took well over a year to be investigated, mediated and then to progress to the EOT;[48] the issue of Moslem slaughtermen, which tested religious discrimination in employment for the first time;[49] and *Robinson v Eric Sides Motors Ltd,* which again tested religious discrimination in employment but had a very different outcome.[50]

In *Ross and Others v Ocean Beach Freezing Company,* three female employees complained to the Human Rights Commission in 1979 that they had not received equal promotion opportunities. The complaint was on the grounds of sex and in the area of employment. Their employer, Ocean Beach Freezing Company claimed that it was exempt from offering promotion due to the lack of separate facilities for these women if they moved to a higher level on the chain. Investigating this complaint, then, entailed analysis of the working conditions in the factory, as well as discussions with the employers and analysis of promotion patterns within the company. When the investigation had been completed the company refused to negotiate a settlement, continuing to claim that they were exempt. Therefore, after several failed attempts at settlement the case had to go the Equal Opportunity Tribunal. It was the first complaint to ever reach the Tribunal. The EOT ruled that the women *had* been discriminated against and awarded them damages for lost wages, legal costs, and damages for loss of dignity, humiliation, and injury to feelings.

The 1979 case of the Moslem slaughtermen was also significant. In this instance the Commission had received notice that New Zealand meatworks were being encouraged by an Iranian meat delegation to employ Moslems, in preference to others, as slaughtermen. Despite no

specific complaint being received, this case was important to the Commission because it tested religious discrimination in employment and also compelled the Commission to establish 'boundaries' for its Act. The issue was investigated and it was learnt that Moslems were needed to perform specific religious rituals in the slaughter of animals destined for the Iranian market. The Commission decided therefore that this type of employment was not discriminatory.[51] This opinion caused problems, however, in relation to another case later that year, *Robinson v Eric Sides Motors Ltd.*

In the case of *Robinson v Sides* a complaint was laid in 1979 by a 16 year old that he had not been employed by Eric Sides because he was not a church-going Christian.[52] At issue were newspaper advertisements for a 'keen Christian person' to work as a service station attendant. When the complainant rang for a job interview he was asked about his religious activity, and then told that because he was not a regular church-goer there was no point in his coming in for an interview. In the investigation Mr Sides claimed that he was within his rights as an employer to indicate a preference for Christian workers and that in order to fit in with the rest of the Christian staff it was necessary to employ Christians only. Interestingly, Mr Sides felt that his case was the same as the case of Moslem slaughtermen, in that religious belief was an essential part of running his business.[53] The Commission felt that there was an obvious difference in that being Christian was not an essential requirement to pump petrol. The result was that the Commission ruled the complaint to have substance and tried to conciliate the matter. Mr Sides refused conciliation and the case went before the Equal Opportunities Tribunal, which ruled that while Sides' advertisements had indicated his intention to discriminate, the fact that he had not outrightly refused the complainant a job interview meant that he did not actually discriminate. The EOT, giving Mr Sides the benefit of the doubt, did not award the

complainant any damages, but Sides and the newspapers, having broken the law regarding the placement of discriminatory advertisements, were required to pay the costs of the hearing.[54]

Unfortunately for the Commission, the public reacted badly to the *Robinson v Sides* case. Public reaction reflected a belief that individual business owners ought to be able to employ whomever they chose. It has been noted that the public response to this case was probably due to the fact that the issue was not one where the provisions of the Act were expected to apply.[55] It has been argued that the public was prepared for issues of sex discrimination as the women's movement had played such a pivotal role in the establishment of the Human Rights Commission. In comparison, the public were not prepared for issues of religious discrimination to come to the fore of the Commission's work.

Human Rights Commission Amendment Act 1981

The most significant, yet indirect, outcome of the *Robinson v Sides* case was the Human Rights Commission Amendment Act (1981),[56] which, in essence, legalised most religious discrimination in employment. The Act was introduced to Parliament by Minister of Justice James McLay on 28 August 1981. On its introduction McLay stated that 'it is clear that many New Zealanders want an employer to have at least some capacity to prefer his co-religionists as employees....'[57] The Bill received minimal debate and was sent to Select Committee. The Amendment consisted of two sections, the first related to religious discrimination in employment, and the second related to the Commission's ability to halt the investigation of a complaint if it decided that it was unnecessary. The second section was not contested by the Commission, for the Commission welcomed the increased flexibility in its operations. But the first section was, in the view of the Commission, 'wrong in principle, unnecessary and undesirable'.[58] The contested section of the HRC Amendment Act

bears quoting in full so that an appreciation may be gained of the Commission's concerns. The following extract comes from s2 of the Human Rights Commission Amendment Act 1981:

> **2. Employment** -- Section 15 of the [Human Rights Commission Act] is hereby amended by inserting ... the following subsection:
>
> "(7A) Nothing in this section shall apply to preferential treatment based on religious or ethical belief where --
>
> "(a) That treatment is accorded by an adherent of a particular belief to another adherent of that belief; and
>
> "(b) Having regard for special circumstances that --
>
> "(i) Govern the manner in which the duties of the position are required to be carried out; and
>
> "(ii) Make it reasonable to require those duties to be carried out in that manner,--
>
> it is reasonable to accord that treatment to a person of the same belief."

As can be gathered, this section was confusing and vague, and when understood reads as having the opposite intention of the rest of the Human Rights Commission Act. The essence of part (a) was that, for example, a Christian could choose to employ another Christian rather than equally qualified people of other religious persuasions if they so chose. Part (b) qualified this by stating that this discrimination was allowable if the duties of a job required a certain "manner". Such problematic terminology was not defined in the Amendment, leaving it open to wide interpretation by employers.

When the Commission heard that this Amendment was entering the House, it immediately wrote to Mr McLay to express its concern over the amendment and to request an opportunity to provide a confidential commentary on this Bill.[59] The HRC Act allowed the Commission to comment on the human rights implications of any proposed legislation confidentially to the Prime Minister or Parliament.[60] The request was

ignored by the Minister of Justice who simply stated that the Commission's "comments [would] be borne in mind."[61]

Consequently the Commission decided to make a public submission to the Statutes Revision Committee on the Amendment Bill. In this submission the Commission's first claim was that the Bill was 'wrong in principle' as it seemed to contradict the general spirit and intention of the principal Act.[62] As evidence, the Commission stated that the Amendment was reinforcing traditional attitudes and went against overseas trends of providing increased protection from religious discrimination. The Commission also queried why preferential treatment in employment should then be restricted only to religion and not be extended to sex and race for example.[63]

The second main point made by the Commission was that the amendment was undesirable. If it was to be passed, the Commission questioned its ability to actually enforce the provision. The main problem was the wording of the Act, which used vague terminology and provided no definitions. The phrases causing the most difficulty were 'special circumstances', 'manner' and 'preferential treatment'. The Commission queried whose definition was to take precedence in these areas, for if it was up to employers the terms could be defined in such a way as to allow them to employ whomever they felt like.[64] Of concern to the Commission was the fact that these terms would require judicial interpretation by either the Equal Opportunities Tribunal or the High Court, to which appeals of EOT judgements could be made, and from which the Commission was empowered to seek declaratory statements.

The final point the Commission made in its submission was that the amendment was unnecessary. If the Government was really only intending to allow affirmative action for people of religious minorities

then there was already recourse to such action in the HRC Act as it stood. Clearly the Government was intending to allow a much broader kind of religious discrimination, one which would negate the principle of non-discrimination contained in the Human Rights Commission Act.[65]

The Human Rights Commission's submission had no effect on the Bill and it passed into law on 23 October 1981.[66] This posed several problems for the Commission. The first was that it now had to uphold a piece of legislation which every Human Rights Commissioner had disagreed with. Secondly, the fact that the Commission's submission had been passed over and it had been refused the opportunity to comment confidentially, not only on a piece of legislation with human rights implications, but on the Act which the Commission had to administer, denigrated the Commission's status. An issue which bears remembering is that in the debates prior to the enactment of the original Human Rights Commission Act, the Select Committee had stated their intention that the Commission be able to recommend the areas which required further protection from discrimination.[67] This was clearly not the case. In fact, the 1981 Human Rights Amendment Act revealed the ease with which the Commission's protection of rights could actually be diminished.

Publicity

Over these initial years, the Human Rights Commission received a substantial amount of negative publicity. Much of the criticism the Commission received was in relation to the *Robinson v Sides* case and some smaller complaints which were presented by the media as being trivial. In some instances the Commission's process and role was misunderstood, and it was assumed that the Commission had the enforcement power of a judicial body. An example of such misunderstanding was the press coverage of a Master Builders Association dinner which was cancelled, supposedly at the command of

the Human Rights Commission.[68] The dinner was 'men-only' and the Commission had in fact received a complaint regarding it, but was still investigating the complaint when the story hit the headlines. Unfortunately the fact that the Commission would have only suggested the inclusion of women was lost in the sensationalism of a cancelled dinner.

Other coverage in the media focused on the Commission's targeting of newspaper advertisements, with one author noting that "familiarity with the law has softened the wrath slightly, but the nit-picking charges continue."[69] The media, while generally attacking the Commission over this period, did so from different vantage points. For instance, while one author called the Commission "the public watchdog with little bark and less bite",[70] another warned that the Human Rights Commission Act "*does* have teeth. And they can bite."[71] Feminist issues journal, *Broadsheet,* was quick to pick up on internal factions and disruption within the Commission. Remarking on the Commission, a *Broadsheet* author states "I, and many others, cannot help but feel that the Human Rights Commission has been pretty ineffectual in its first 18 months of operation."[72]

From very early on the Commission maintained a fairly responsive publicity campaign, stating in 1978 that it would 'defer a decision on publicity and would wait and see the demands of the public upon the services of the Commission before commencing such a venture.'[73] The Commission's press releases during these first few years indicate that most were related to various cases and pieces of legislation over which the Commission was receiving criticism. The exception is 1979, during which the majority of press releases dealt with the complaints processes of the Commission, the functions of the HRC Act and the international covenants on human rights which the Commission adhered to.[74]

Reporting to Government

Because of its wide mandate, the Human Rights Commission established links with many Government departments and agencies. The Commission maintained a close relationship with the Ministry of Justice, which was responsible for financing the Commission in its first year. The Ministry of Justice was also the first port of call for the Commission when it came to its reporting on new and existing legislation. Links were also established with the Ministry of Foreign Affairs, in relation to international instruments on human rights, and the Department of Labour, in respect to International Labour Organisation treaties.

Public Representations

The Human Rights Commission Act empowered the Commission to receive and investigate any representations made by the public which affected human rights.[75] Receiving a representation was a relatively simple function which allowed the public to write to the Commission on any issue which they felt had a bearing on human rights. The Commission could then investigate the issue, and decide whether it was a human rights issue or not. Short reports or public statements were then usually released. The Commission could also issue a report to the Prime Minister on the issue if it felt it had a bearing on law or Government policy.[76] In cases where the Commission felt the issue was of great importance to human rights a longer investigation might follow an initial report, and other submissions would be called for.

The Commission issued reports on 12 representations between the years of 1979 and 1983. Representations varied widely, on topics ranging from nuclear ships in Auckland harbour,[77] to water fluoridation as forced medication,[78] to the Springbok tour.[79] The Commission duly investigated and reported on such representations, and while many of the outcomes stated nothing more than that 'the Commission will be giving further

consideration to this matter',[80] others served as a vehicle for the Commission staff to promote their own personal views. A prime example of this is the 1980 report on Gay Rights which stated that 'the fact the Commission does not consider this to be a matter of human rights or fundamental freedoms, does not necessarily mean that there are no social or political reasons for altering criminal law.'[81]

In deciding whether a representation was a 'matter affecting human rights' the Commission drew primarily from international instruments on human rights. These included the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, and others such as the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. Evidence of the importance of international instruments can be found in almost all of the reports on public representations. For example from a 1980 report on nuclear ships in Auckland Harbour:

> In receiving representations from the public ... the Commission refers in the first instance to United Nations Covenants, as ratified by New Zealand, to establish whether or not matters raised in the representations could constitute violations of those covenants.'[82]

And from a 1980 report on abortion:

> 'the Commission in discharging its general functions looks to international instruments on human rights for guidance on those fundamental rights that the international community has agreed upon. The personal views and opinions of members of the Commission clearly cannot be the basis of the policy of the Commission.'[83]

Interestingly, not only did the Commission first refer to international instruments on human rights in its analysis of representations, but in 1979 it decided that international human rights instruments that had not yet been ratified by New Zealand could also be promoted and referred to.[84]

The first public representation the Commission received was from the Auckland University Students' Association.[85] It was one of the most significant representations and reports in the Commission's early years. The representation was significant for several reasons, but primarily because it was the first the Commission had ever received. It was also significant because of the response which followed the Commission's investigation.

At issue was a South African student who was studying at Auckland University on a scholarship. The scholarship programme had been running for a number of years and like all previous holders of the scholarship, this student had had restrictions placed on her freedom of speech and association in relation to political matters. After investigating the matter the Human Rights Commission decided that the restrictions were illegal for several reasons. The reason it chose to promote, however, was that the restrictions contravened article 19(2) of the International Covenant on Civil and Political Rights, only recently ratified by New Zealand. The Commission wrote to the Minister of Immigration, Jim Bolger, and informed him of the contravention. Within two months the Minister had reconsidered the issue and replied that he believed it was no longer appropriate to place such restrictions on holders of the scholarship.[86] The Commission was openly appreciative of the willingness of Government to respond to the report, but also stated that it would have taken the issue further had such a response not been forthcoming.[87] What is truly significant about this case, however, is not

the response of Government but the fact that the Commission had invoked an international covenant and in doing so had won.

Another significant representation which the Commission received was from the *Auckland Committee on Racism and Discrimination* (ACORD) and related to the treatment of children in Social Welfare homes.[88] The ensuing investigation and report was the largest worked on by the Commission during this period. ACORD wrote to the Commission in 1979 out of concern for the way venereal disease testing was being carried out on girls in Social Welfare homes. The Commission decided to investigate the complaint, but was not able to do so until 1980 due to staffing shortages. The investigation was thorough, involving both staff and residents of the homes. During the investigation many issues of discrimination in the homes were raised. The report issued in 1982 noted that the Department of Social Welfare had already made some attempts to deal with such problems.[89]

Jerome Elkind, a legal academic who has maintained a close watch on the Commission's dealings since the beginning, has noted that the Commission's report on this issue was particularly cautious. Elkind noted that because of negative responses by the Prime Minister, the Rt. Hon. Robert Muldoon, to previous reports the Commission had backed down from the stronger stance it had adopted on issues such as the South African scholarship.[90]

The response of Government to the Commission's report, however, was to commission their own investigation of the matter. The Government report was a whitewash of the Commission's own report, watering down many of the findings and recommendations, and in parts came close to plagiarising the Commission's report.[91]

Legislation Affecting Human Rights

As well as reporting on representations and matters affecting human rights in general, the Commission also had a duty to report on legislation, existing and proposed, (as well as policies and regulations) which had implications for human rights.[92] This function of the Commission went some way towards satisfying several academics who were keen to see some form of law reform commission established.[93] This function allowed the Commission to recommend amendment or repeal of any laws which it felt were discriminatory, and gave the Commission a chance to survey proposed legislation. In both instances the Commission had to report to the Prime Minister.

This was a difficult function to administer as the Commission was neither a judicial body with legal interpretative power, nor abundantly staffed with lawyers. Neither was the Commission on good terms with the Prime Minister. Most of the work in this area fell to the one legal officer at the Commission, Carrick Morpeth. The next problem the Commission noted was its difficulty in getting access to proposed legislation - the Commission was dependent on the various ministries and departments forwarding it copies of the draft legislation.[94] The Commission also had problems with its lack of enforcement power - when the Commission made submissions to Select Committees on various pieces of proposed legislation, its voice carried the same weight as everyone else's - mainly because the Human Rights Commission Act was made subordinate to all other legislation. It was therefore quite legal and 'constitutional' for the Government to pass legislation which discriminated in areas prohibited by the Act.

The response of the Prime Minister to Commission reports during this period was not particularly positive. The primary problem was the lack of formal reporting or response mechanisms in place. This meant that

Prime Ministerial responses were rather ad hoc in nature. There is little evidence in the Commission's records to suggest that during this period the Prime Minister ever responded to the Commission's general reports.

Evidence of the Commission's ineffectiveness can be seen in the following two examples of legislative reports. The first piece of legislation the Commission reported on was the Immigration Amendment Bill of 1979. The Commission reported that this Bill contravened certain aspects of the International Covenant on Civil and Political Rights (ICCPR), but the Government disagreed with the Commission's legal interpretations and the Bill passed in its original form.[95] Later in 1983 the Commission reported on a reworking of this Bill which would again contravene aspects of the ICCPR and again its comments had no effect.[96] This time, however, the Government had obtained a Crown Law opinion to counter the Commission. In 1982 the Commission reported to the Prime Minister that the price freeze regulations put in place discriminated against women as they did not apply to women's fashion clothing.[97] The reception of this report was worse than that in 1979. Not only did the Government refuse to change the regulations, but the Commission was publicly humiliated by Prime Minister Muldoon's comments in the media, to the effect that the Commission was concerned only with trivial matters such as fashion. Elkind has noted that although the Commission's powers were only recommendatory its recommendations have suffered a worse fate than similar powers held by the Ombudsman and the Waitangi Tribunal.[98]

Summary

In promoting human rights, the Commission's functions were both broad and specific. The Commissioners and their staff spent these first five years establishing policies and strategies for effectively fulfilling the

functions of the Act. The Commission initially examined and developed policy in the areas of employment advertising, religious discrimination and marital status. Realising that the Commission's primary function was to educate the public, policy development tended to go hand in hand with education programmes, consisting of speeches, newsletters and publications. The most significant of the Commission's education programmes was in the broad area of women's rights, particularly canvassing such issues as access to credit and representation in non-traditional occupations. Another of the Commission's education programmes focused on discriminatory employment advertising. In response to their education programme the Commission was able to see a correlated decrease in the number of these types of complaints. Finally the Commission's education in the area of race and youth showed it to be a pro-active and innovative organisation, utilising both written publications and television to promote the concept of 'richness in cultural diversity'.

While education was the Commission's primary function, the Human Rights Commission always gave complaints of discrimination precedence. The high number of complaints investigated in these early years reflected both a growing awareness of the Human Rights Commission and a misunderstanding of what could be 'complained' about.

Public reaction to many of the complaints, especially *Robinson v Sides*, was frequently negative. The criticisms of the Commission's and Equal Opportunities Tribunal's handling of the *Robinson v Sides* case resulted in the 1981 Human Rights Commission Amendment Act - legalising most religious discrimination in employment. The Commission's lack of influence regarding this Amendment, which it did not support at all, was

disappointing, and illuminated the Commission's vulnerability to both public and Government opinion.

This was again reinforced in the Commission's reports to the Prime Minister on legislation and resulting from public representations. These reports were not well-received by the Prime Minister and very few elicited any kind of Government response.

Problems came to head in the latter part of 1983. The Chief Commissioner's term of five years had ended in March, leaving the Commission with only two members, and those not even full-time Commissioners, being the Ombudsman and the Race Relations Conciliator. Ria McBride had resigned in 1981 and Margaret Hutchison's term had also expired in March 1983. Appointments to the Commission were supposed to be made by the Governor-General on advice from the Minister of Justice, but the job seems to have fallen to the Prime Minister. An announcement on a replacement for Patrick Downey was expected from the Prime Minister close to the time of Downey's departure but it did not arrive. The Commission languished without leadership for around four months until the Prime Minister announced a replacement.

During this time, the media suggested that the Prime Minister was going to disband the Commission entirely, and the Prime Minister himself made several unfriendly comments about both the Commission and its former Chief.[99] When Muldoon stated in July 1983 that the new Chief Commissioner would be Justice John Wallace, a member of the High Court bench, the Commission breathed an almost audible sigh of relief. A further problem lay, however, in that an amendment to the HRC Act would be required for a judge to become the Chief Commissioner and hence he would not be able to start until February 1984. To the Commission's advantage, Patrick Downey stayed on to assist well past

his intended departure date, and despite his already having been appointed editor of the New Zealand Law Journal. When Justice Wallace arrived in February 1984 the Commission was ready to build on the foundations, some of them shaky, which it had been building over the past five years.

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[1] *Human Rights Commission Act 1977*, No.49.

[2] ibid., s 5(1).

[3] Margaret A. Wilson, 'The Human Rights Commission - Educator or Enforcer', *New Zealand Law Journal*, No.21, 20 Nov 1979, pp.467-471.

[4] *Human Rights Commission Act*, s.7.

[5] *Race Relations Act 1971*, No.150; *Ombudsmen Act* 1975, No.9.

[6] *H.R.C. News*, n.1, March 1982.

[7] Human Rights Commission, *Minutes*, 1 Sept 1978, p.1.

[8] Human Rights Commission, 'Procedures for Developing Policy Initiatives', *Supporting Papers*, 5 July 1979.

[9] R.E. Williams, *The Williams Report: The Human Rights Commission - An Administrative Survey*, A, 1979, p.1. Unfortunately, one warning which the Commission should have heeded, but did not, was that 'Minutes of Commission meetings are vital and important documents; they are the source of authority on many matters and the foundation of Commission policy. In a sense, Minutes are something of a 'legal' document and should be accorded the care and security that such important documents deserve.' As a result of bad housekeeping, the Commission has lost all the supporting papers from its meetings between 1980 and 1983 and several from later meetings - a source which has proved invaluable in researching the rest of the Commission's history.

[10] Human Rights Commission, *Annual Report*, 1979, pp.8-10.

[11] Human Rights Commission, *Minutes*, 1 Sept 1978, p.7.

[12] ibid., 1 Sept 1978, p.7.

[13] *NZPD*, 7 July 1977, pp.1245-1256.

[14] Human Rights Commission, 'Marital Status Report', *Supporting Papers*, 5 July 1979.

[15] Human Rights Commission, *Marital Status: Policy Statement on Marital Status as a Ground of Discrimination*, HRC, 1984.

[16] Human Rights Commission, *Annual Report*, 1980, p.5.

[17] David Thomson, 'Opening Address' in *Report of a Seminar on Human Rights: Held in Wellington, New Zealand on 9-10 December, 1978*, Human Rights Commission/United Nations Association and the National Commission for UNESCO, February 1979, p.6.

[18] Human Rights Commission, 'Preliminary Planning for an Education Programme', *Supporting Papers*, 13 Feb 1979.

[19] Human Rights Commission, *Gay Rights: Report on Representations By The National Gay Rights Coalition*, HRC: Wellington, December 1980.

[20] Human Rights Commission, *Gay Rights*, p.5.

[21] Human Rights Commission, *Annual Report*, 1980, pp.8-9; 1981, pp.8-9; 1982, p.7; 1983, pp.11-12; 1984, pp.11-12.

[22] Human Rights Commission, *Annual Report*, 1980, p.8.

[23] Memo from Nina Selwood to Staff, 24 Sep 1981.

[24] Human Rights Commission, *Annual Report*, 1984, p.8.

[25] UN Association and National Commission for UNESCO, *Report of a Seminar on Human Rights: Held in Wellington, New Zealand on 9-10 December, 1978*, February 1979.

[26] *H.R.C. News*, n.1, March 1982.

[27] Society for Research on Women in New Zealand (for the Human Rights Commission), *Women and Access to Credit and Finance in New Zealand*, HRC: Wellington, 1982.

[28] Human Rights Commission, *Annual Report*, 1980, p.7.

[29] ibid., 1981, p.5.

[30] ibid., 1979, p.8.

[31] Human Rights Commission, *Advertising Guidelines*, HRC: Wellington, 1982.

[32] ibid., 1980, p.17.

[33] P.J. Downey, 'Women and Discrimination: Address to Federation of University Women and Women's Electoral Lobby, Waikato Branches; University of Waikato, 9 March, 1981', *Human Rights and New Zealand: Selected Speeches of Chief Human Rights Commissioner 1979-1983*, Human Rights Commission: Wellington, 1983, p.3.

[34] P.J. Downey, 'Affirmative Action: delivered to the General Council of Employers Federation; 12 May, 1981', *Human Rights and New Zealand*, p.20.

[35] *The Rights of the Child and the Law: Papers Presented at a Conference held in Christchurch on 23, 24, 25 November, 1979*, NZ National Commission for International Year of the Child, Law and the Child Theme Committee and the NZ Human Rights Commission.

[36] Human Rights Commission, *Annual Report*, 1980, p.9.

[37] ibid., 1981, p.7.

[38] Race Relations Conciliator, 'Chapter three: Submissions', *Race Against Time*, HRC: Wellington, 1982, pp.20-34.

[39] Human Rights Commission, *Annual Report*, 1983, p.6.

[40] *Human Rights Commission Act 1977.*

[41] ibid.

[42] ibid., Part II, ss.15-33. From 1979 the Race Relations Office dealt with all complaints on the last two grounds.

[43] *Human Rights Commission Act 1977*, s.34.

[44] ibid., Part IV, ss.45-66.

[45] Human Rights Commission, *Annual Report*, 1979, p.8.

[46] All complaints statistics are taken from the complaints statistics as reported in the Annual Reports.

[47] Human Rights Commission, *Annual Report*, 1982, p.5.

[48] Human Rights Commission, *Ocean Beach: Opinion of Human Rights Commission on Complaints of Sex Discrimination Against Ocean Beach Freezing Company Limited,* HRC: Wellington, 1980.

[49] Human Rights Commission, *Moslem Slaughtermen: Opinion of the Human Rights Commission on a complaint of religious discrimination,* HRC, August 1979.

[50] Human Rights Commission, *Eric Sides Motors: Opinion of the Human Rights Commission on a complaint of religious discrimination,* HRC, 4 March 1980.

[51] Human Rights Commission, *Moslem Slaughtermen.*

[52] Human Rights Commission, *Eric Sides Motors.*

[53] ibid., p.5.

[54] Human Rights Commission, *Annual Report,* 1981, p.53.

[55] John Caldwell, 'The Law of the Equal Opportunities Tribunal.', *New Zealand Law Journal,* November 1986, p.377.

[56] *Human Rights Commission Amendment Act 1981,* No.127.

[57] *NZPD,* 28 August 1981, p.3032.

[58] Human Rights Commission, *Amendment to Human Rights Commission Act: Submission by Human Rights Commission to The Statutes Revision Committee on Human Rights Commission Amendment Bill 1981,* HRC: Wellington, 1981.

[59] Letter from P.J. Downey to J.K. McLay, dated 21 May 1981.

[60] *Human Rights Commission Act 1977,* s.6(1)(c).

[61] Letter from J.K. McLay to P.J. Downey, dated 28 May 1981.

[62] Human Rights Commission, *Amendment to Human Rights Commission Act,* pp.2-9.

[63] ibid., p.2.

[64] ibid., p.5.

[65] ibid., pp.13-15.

[66] Another submission presented to the Statutes Review Committee actually tried to prove that the Commission should be done away with altogether, because they were anti-Christian and basically Communist! See David Thompson, *Perversion of the Law: why the Human Rights Commission must go!: A submission to the Statutes Revision Committee on the Human Rights Commission Amendment Act 1981,* Conservative Publications: Auckland, 1982.

[67] *NZPD,* 7 July 1977, p.1245.

[68] Human Rights Commission, *Annual Report,* 1982, pp.15-16.

[69] Helen Paske, 'Human Rights: the struggle for acceptance', *NZ Listener,* July 5 1980, 95:2112, pp.16.

[70] Priscilla Pitts, 'The Human Rights Commission - the public watchdog with little bark and less bite', *Broadsheet,* March 1980, v.77, pp.22-25.

[71] Helen Paske, 'Human Rights: the struggle for acceptance', pp.17.

[72] Priscilla Pitts, 'The Human Rights Commission - the public watchdog with little bark and less bite', pp.23.

[73] Human Rights Commission, *Minutes and Supporting Papers,* 1 Sept 1978.

[74] Human Rights Commission file: *Publicity.*

[75] *Human Rights Commission Act 1977,* s.5(1)(c).

[76] ibid., s.6.

[77] Human Rights Commission, *Nuclear Warships: Report on representations by the United Nations Association on Nuclear Warships,* 1980.

[78] Human Rights Commission, *Report on Representations on Fluoridation of Water Supplies,* HRC: Wellington, August 1980.

[79] Human Rights Commission, *Springbok Tour: Report to the Prime Minister on Representations on the Proposed Springbok Tour,* HRC: Wellington, 1981.

[80] Human Rights Commission, *Photographic Competition for Women: report on an enquiry,* HRC: Wellington, 1980, p.7.

[81] Human Rights Commission, *Gay Rights,* p.5.

[82] Human Rights Commission, *Nuclear Warships: Report on representations by the United Nations Association on Nuclear Warships,* HRC, 1980.

[83] Human Rights Commission, *SPUC: Report on Representations by the Society for the Protection of the Unborn Child,* HRC: Wellington, 1980.

[84] Human Rights Commission, *Minutes,* 5 July 1979.

[85] Human Rights Commission, *South African Scholarship Trust Board: Report of Representations by University of Auckland Law Students Society on the Southern African Scholarship Trust Board Award,* HRC: Wellington, 1979.

[86] Letter from J. Bolger to P.J. Downey, dated 1 May 1979.

[87] Human Rights Commission, *South African Scholarship Trust Board,* 1979.

[88] Human Rights Commission, *Report of the Human Rights Commission on representations by the Auckland Committee on Racism and Discrimination: Children and Young Persons Homes: Administered by the Department of Social Welfare,* HRC: Wellington, 1982.

[89] ibid.

[90] J.B. Elkind, 'The Human Rights Commission as a Law Determining Agency', *New Zealand Law Journal,* June 1984, p. 200.

[91] See the comparison made in Human Right Commission, *Annual Report,* 1983, pp.24-25.

[92] *Human Rights Commission Act 1977,* s.5(1)(e).

[93] Jerome Elkind, 'Thoughts on the Human Rights Commission Bill 1976', *New Zealand Law Journal,* No. 6, April 1977, pp.123-9.

[94] Human Rights Commission, *Minutes,* 14 July 1982.

[95] Human Rights Commission, *Report to the Prime Minister on the Immigration Amendment Bill 1979,* 1979.

[96] Human Rights Commission, *Report to the Prime Minister on the Immigration Bill 1983,* March 1984.

[97] Human Rights Commission, *Annual Report,* 1983, p.25.

[98] Jerome Elkind, 'The Optional Protocol: A Bill of Rights for New Zealand', *New Zealand Law Journal,* March 1990, p.99.

[99] For example *Evening Post,* April 4 1983.

Chapter 3 Consolidation 1984 - 1992

Introduction

1984 has typically been marked as a turning point in New Zealand politics - it holds no less significance for the Human Rights Commission. The ten years from Justice John Wallace's arrival in February 1984 to the passing of a new human rights act in 1993 were comparative years of stability for the Commission. In the previous period the Government had done little more than undermine the Commission's importance and had openly criticised both the Commission and its personnel, and it was notable that the Commission now began to receive strong Government support. The new Labour Government from 1984 looked to strengthen the Commission and give it room to progress. Much of this support could be attributed to the fact that Geoffrey Palmer, long-time civil rights campaigner, became Deputy Prime Minister and Minister of Justice in 1984. This was followed by a brief spell between 1989 and 1990 as Prime Minister.

Wallace's own approach was to strengthen the foundations of the Commission. He immediately developed stronger roles for Commissioners and established priorities which allowed the Commission to examine many new areas and issues with a minimum of disruption to other Commission activities. This period is also significant for the Commission's work in the fields of complaints, education and publicity. Sexual harassment became the predominant issue and there was a marked increase in the number of complaints received concerning this type of discrimination. The Commission took several test cases to the Equal Opportunities Tribunal, and as a result set many significant legal precedents. The Commission finally completed work on the issue of

marital status and both the education and publicity programmes became more pro-active, built around improving the quality and distribution of publications.

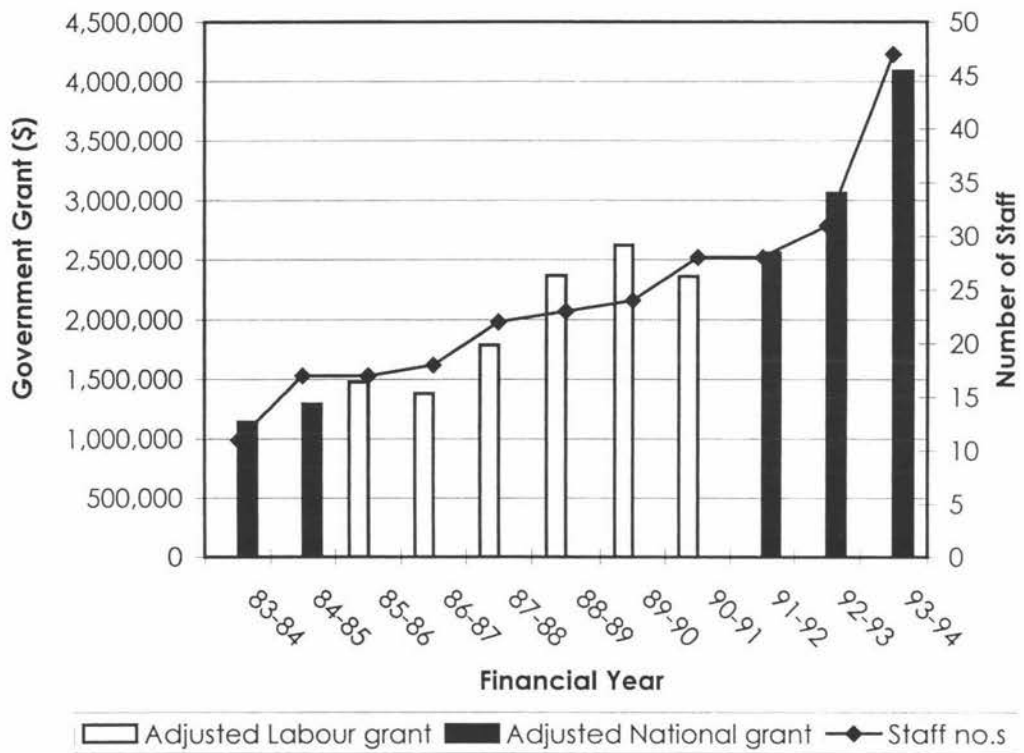
Government support allowed the Commission to capitalise on this stable environment. By developing a strong foundation the "new" Commission was better able to fulfil the requirements of the Human Rights Commission Act. The most significant area of advance was the strengthening and extension of the HRC Act. This was instigated in 1987 by an internal review of the Act conducted by the Commission at the behest of the Ministry of Justice. While the Commission was unreservedly critical of its own limitations, it was also convinced that changes were necessary to make the Act more effective. Unlike the previous team, this Commission was not reluctant to voice its concerns to the Government - and the Government listened.

From July 1984 New Zealand was led by a Labour Government which, while being radically un-Labour in its economic focus, continued to maintain a typically Labour social conscience. In the early months of 1984, however, the Commission also gathered support from the outgoing National Government. This begs the question of whether National's repeated disregard for the Commission earlier was because of Muldoon's personal dislike of Downey. When it was finally announced by the National Government that Wallace would be taking over leadership of the Commission, support from the Government increased dramatically.

The increase in Government grants to the Commission is another indicator of the Government's growing support for the Commission. From 1984 there were only two reductions in the progressively increasing grants. These occurred in 1987 and 1991. The growing financial support from the Government may indicate the improved relationship the

Commission had with the Government and the increased confidence the Government had in the Commission.[1]

Figure 4 Government Grants v Staffing Levels
(adjusted for inflation to 1997 dollars)



The increase in funding is also quite unique in the history of the Commission - both the earlier and later periods are characterised by a sustained decrease in funding. Unfortunately a direct comparison with the earlier period is impossible, since grants between 1979 and 1983 covered both the Race Relations Office and the Human Rights Commission.

The distinct correlation between funding levels and the relationship the Commission formed with the Government of the day was seen as a cause for concern by a later Chief Commissioner, Margaret Mulgan, who noted that without fixed funding a human rights institution is an easy target for political pressures and changes.[2] Some interesting political trends can also be read in the above graph. Clearly, the third National Government led by Muldoon was not supportive of the Commission, yet the fourth National Government (1990-1999) dramatically increased the Commission's funding in its first term. Similarly, the first term of the fourth Labour Government saw a slight increase in Commission funding, but in its second term funding increased substantially.

The number of staff the Commission employed also increased from 11 people in 1984 to over 30 in 1992. The Commission was able to increase its staff because of the increased funding it received from the Government over this period. The earlier graph demonstrated the correlation between staffing levels at the Commission and the Government grant received each year.

Along with enabling the increase in staff numbers at the Commission, the Government began to fill the vacant Commissioner posts. Negotiation for an amendment to the HRC Act began in Parliament on 6 October 1983 when the Hon. J.K. McLay announced that he was making an effort to 'revitalise' the Commission, and was considering increasing the number of Commission members to seven.[3] The 1984 Amendment Act did increase the number of Commissioners by creating the role of Proceedings Commissioner. Increasing the size of the Commission was unexpected considering the National Government had left both Ria McBride's and Margaret Hutchison's positions unfilled since their departures. The role of the Proceedings Commissioner was to decide whether complaints for which settlement had failed should go to the

Equal Opportunities Tribunal for resolution. His/her responsibility thereafter was to institute proceedings on behalf of the Commission at the EOT. The role was created however, as part of the agreement that a judge could be on the Commission but would not have to stand before the Tribunal, which was considered somewhat awkward. Along with the new position, the Government filled all Commissioner roles. This was the first time ever that there was full Commission membership. Not only were positions filled, but an announcement was also made on the replacement Commissioner for Margaret Hutchison who, despite her term having ended in 1983, remained till June the following year to help the limping Commission.

The replacement of Hutchison and the arrival of four new Commissioners created an entirely new Commission - the two representatives remaining from the previous period were Graeme Laking (Chief Ombudsman) and Hiwi Tauroa (Race Relations Conciliator). Laking had not been overly involved at the Commission, attending only a handful of meetings, and Tauroa was replaced only two years later. The new Commissioners were Margaret Clark, Sheila Peacocke, Diana Shand and Graeme MacCormick (Proceedings).

Alongside these Commissioners worked the new Chief Commissioner, Justice John Wallace, who had been appointed in late 1983 and arrived in February 1984. The appointment of a High Court judge to the Commission had been supported by members of both major parties as improving the status of the Commission.[4] During the discussions about Wallace it was made clear by many that the reason the Commission was in such bad repair was because of political comments made by Downey during his term.[5]

One role which created problems was that of Proceedings Commissioner. While this job was large anyway, MacCormick was twice appointed Alternate Chairman as well. The first time was in 1985 when Justice Wallace, still a high court judge, was seconded to the Royal Commission on the Electoral System which sat for eighteen months. Although available for consultation, he was unable to fulfil his duties as chairperson of the Commission. The appointment of an Alternate Chair was initially beneficial to the Commission as it was able to continue unhindered. When Wallace was again called away in 1987 to sit on the Select Committee on Maori Fishing Rights, MacCormick's workload began to pile up. In anticipation of MacCormick's impending departure from the Commission in 1988, Peter Hosking was appointed Alternate Proceedings Commissioner. When MacCormick left, Hosking took over the role of Proceedings Commissioner and immediately cleared the backlog by instituting proceedings for seven complaints at the EOT.[6]

Throughout this period there were several structural changes, aside from the changes to Commissioner roles. The first major expansion was the moving of the main Commission office to Auckland in 1984 - 1985, while retaining a smaller office in Wellington. Furthermore, the one-person Christchurch office was expanded to a four person operation in 1989, and a Commissioner was given special responsibility for the South Island. The outcome of Justice Wallace's first Commission meeting saw Diana Shand appointed to this position. In addition to the three official offices, a system of "community networkers" was established. The network of volunteers was established in 1985, and further enabled the Commission to reach and be reached by a wider range of New Zealanders. The network began with 18 people, all well-placed in their communities. The volunteers distributed Commission pamphlets and sent relevant newspaper clippings to the Commission. National meetings for the networkers were arranged in order that they could keep abreast of

Commission activities, although, it seems that when money was tight this project suffered.[7] By 1990 60 volunteers had joined the community network and their services seem to have been well utilised, particularly in arranging visits by Commissioners and staff.

In 1989, Margaret Mulgan, a law lecturer, was appointed the new Chief Commissioner, by then Minister of Justice, Geoffrey Palmer. When Mulgan took over the role her approach to the Commission was more-or-less identical to Wallace's - for example, she continued the role of 'special responsibility for the South Island', later held by Commissioner Carolyn Bull (1989 - 1995). Although on Mulgan's arrival she claimed that 'to maintain [the] aims [of the Commission] it might be necessary to make periodic changes in the Commission's content and structure'[8] this was not necessary and no major changes (excepting to the Act) were initiated. Mulgan did, however, initiate a Kaupapa Maori scheme designed to give special attention to tikanga Maori. The Kaupapa Maori scheme, which began in 1991, made provisions for Maori complainants to have their complaint mediated at a hui with Maori mediators. By 30 June 1991 the scheme had been used three times, proving its initial popularity.[9]

Complaints [10]

Over this ten year period the Commission received an average of 173 complaints and 2097 inquiries every year. The graphs below indicate the changes in complaints and inquiries over this period.

Figure 5 Total Number of Complaints 1984 - 1993

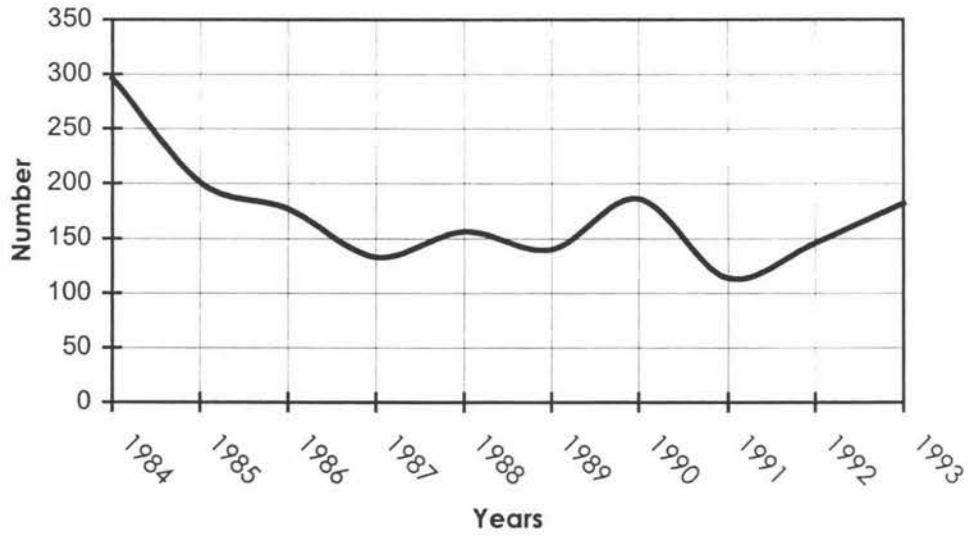
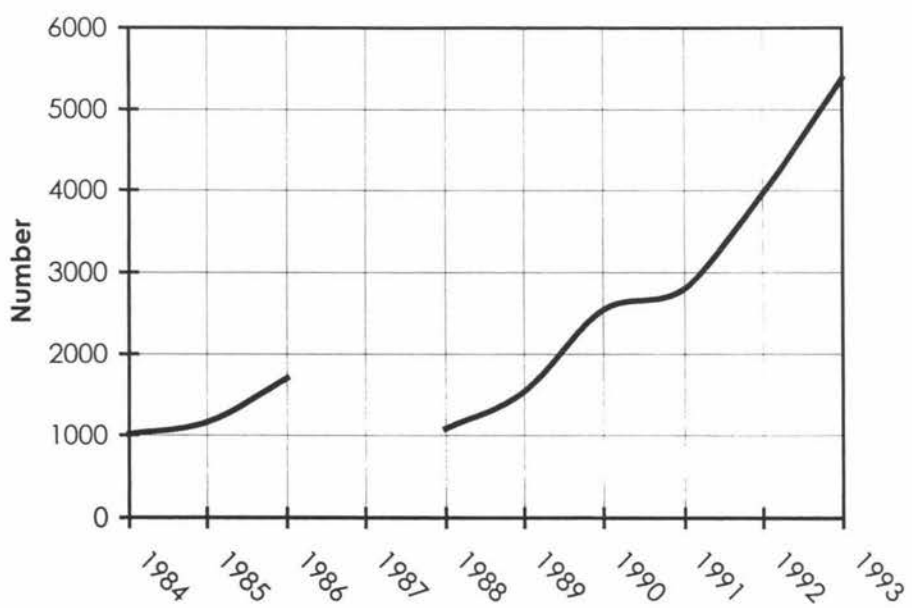


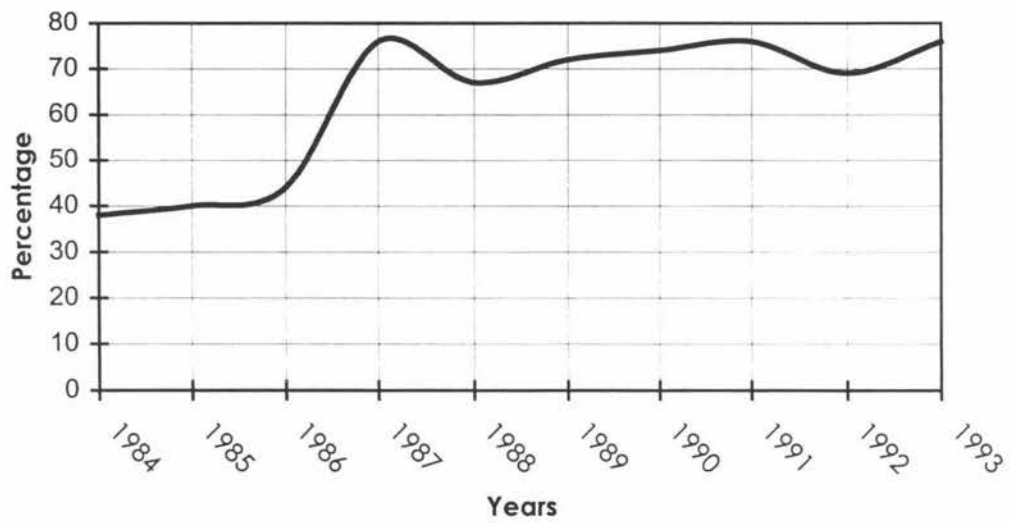
Figure 6 Number of Inquiries 1984 - 1993



* Data unavailable in 1987

Clearly, the number of complaints decreased and the number of inquiries rose. The increase in inquiries is mostly due to changes in the categorisation of statistics - the more informal complaints which were obviously not of substance or within the jurisdiction of the Commission tended to be classified as inquiries. This is reflected in the following graph which depicts the percentage of complaints which the Commission proceeded to investigate.

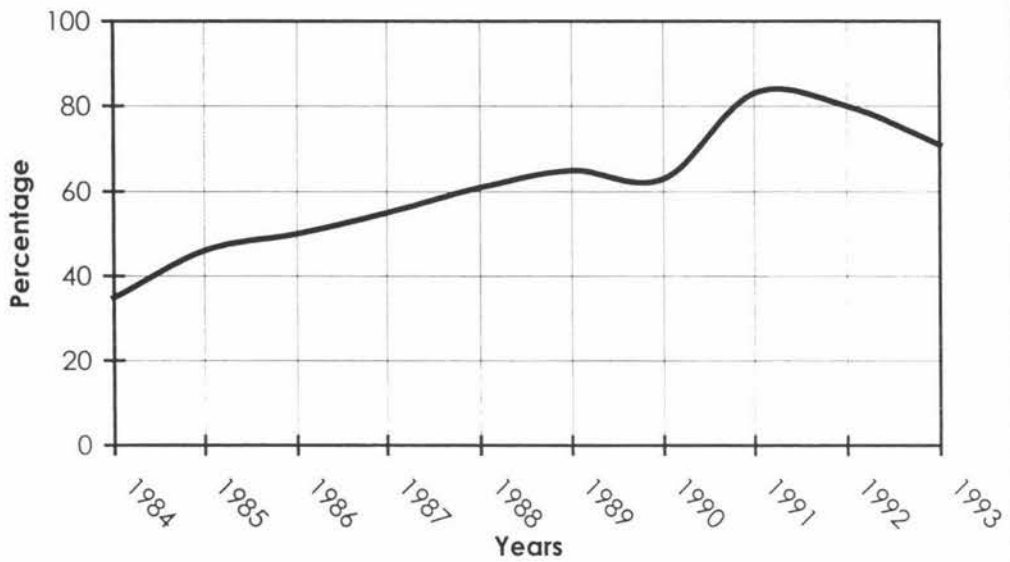
Figure 7 Percentage of Complaints Proceeded with by the HRC 1984 - 1993



This graph shows a notable increase from well below 50% of all complaints being investigated in 1984 and 1985 to around 70-80% of complaints being investigated by 1993. The number of complaints requiring investigation actually remained at about 105 per year for the whole period. Over these ten years the Commission resolved an average of 16 complaints at each of its monthly meetings - each meeting lasting at least eight hours and often spanning two days.[11]

The percentage of complaints investigated which were found to have 'substance' is of more interest. This percentage rose dramatically, as depicted in the graph below, and is the best indicator of discrimination trends in New Zealand over this period.

Figure 8 Percentage of Complaints Proceeded with Found to have Substance 1984 - 1993



Initially in this period only around forty percent of complaints were found to have substance but at the end of this period around 75-80% were found to have substance. This rise in the incidence of complaints with substance can indicate two things. Firstly, it could be that discrimination in New Zealand was getting worse, or secondly, it could be the result of a society better educated about and prepared to fight discrimination. It is near impossible to judge which was the case, although the latter seems most likely.

An interesting feature in the statistics for this period is the addition of age discrimination as a grounds for complaints. This was introduced in 1992

as an amendment to the Human Rights Commission Act and the statistics show 76 age complaints received in the 1992/1993 year.

A number of changes were made to the handling and recording of complaints in this period, reflecting the large changes in the substance of complaints.[12] The most useful change affected complaints in which a respondent agreed to settle prior to the Commission investigation. These complaints were settled and then withdrawn and so the process of investigation was spared. Unfortunately, the successful settlements were effectively hidden in the statistics due to the complaint being withdrawn.[13]

With a background of a rising number of complaints with substance and their increased seriousness, it is surprising that the Commission made progress on as many issues as it did. The reason they could was an underlying fabric of stability woven from Government support and strong leadership.

One particular issue in which progress was made was the Commission's policy on marital status. The issue was whether the term 'marital status', as a prohibited ground of discrimination, would include both de facto and separated couples with single people and legally married couples. While it had been worked on since 1979, including a 100 page draft policy statement, it took the firm leadership of Wallace and the increase in Commission membership to resolve the matter. Wallace himself contended that he gave the issue immediate consideration upon his arrival.[14] By May 1984 the Commission had adopted and released a final policy statement on marital status, claiming that it would accept all complaints from married, single, widowed, separated and divorced people and would deal with all de facto complaints in a case-by-case manner. Because of the lack of a court definition, the Commission invited

any complainants to take their case to the EOT.[15] By April 1986 the Commission reported that all the complaints of marital status discrimination which had been held over until a policy had been developed had finally been processed.[16]

The Air New Zealand Saga

Lasting almost the length of Wallace's term, the Air New Zealand complaint was arguably the most significant of this period. The complaint was received by the Commission in 1984 and was based on the promotion patterns of Air New Zealand which were claimed to have disadvantaged the 17 women making the complaint. The women had between 15 and 22 years of experience each, yet were in the bottom two ranks at the airline. On top of this they had not received the same opportunities for superannuation or redundancy as had men.

The Commission immediately began an investigation of the promotion patterns at Air New Zealand, and found that the complaint did have substance. For two years the Commission tried to effect a settlement between the two parties, including both cash reimbursements and immediate promotion for the complainants, but to no avail. Due to the fact that the complaint covered discrimination which had begun prior to the introduction of the HRC Act, the Commission decided that it could take no further legal action. The complaint required retrospective law, which the HRC Act was not set up for. Eventually the Commission took up the case again when an Australian Court ruled that retrospection was permissible if ongoing effects of past discrimination were still being suffered.[17]

The complaints were immediately passed over to the Proceedings Commissioner who initiated a case with the EOT. The Proceedings

Commissioner sought immediate promotion of the women, financial compensation for loss of earnings, loss of superannuation and redundancy opportunities, and costs for humiliation. The total claim came to $1.5 million.[18] The EOT heard evidence between November 1987 and March 1988, and in December of 1988 reached its decision. Such a delay was not unusual for the EOT at this stage. The ruling was recognised by the Commission as a landmark decision because it was the first EOT decision on sex discrimination and promotion, and also because it set future guidelines for employers.[19] Such guidelines included ensuring that there was no discrimination in promotional patterns and that complaints of discrimination were speedily resolved. The EOT ruled for the complainants but the penalties of $1.5 million were not awarded since the EOT was legally unable to award such a large amount. Instead the case went to the High Court for penalty setting.

Sexual Harassment and Discrimination

Throughout this period the most common complaint received continued to be sex discrimination in employment. While these made up the majority of complaints, another trend also noticeable was the huge increase in sexual harassment complaints. Originally the law was unclear as to whether harassment constituted discrimination. The Commission chose nonetheless to accept harassment complaints. When this became publicised the number of complaints soared - from 10 in 1983/1984 to 73 in 1992/1993.[20] Interestingly, the number of sexual harassment complaints continued to climb despite a Labour Relations Act, passed in 1987, which contained grievance procedures similar to those of the Human Rights Commission Act for sexual harassment cases.

Although sexual harassment was a new area for the Commission, outstanding progress was made. Since sexual harassment was not

mentioned directly in the HRC Act this posed several problems for the Commission. Once the initial decision had been made to treat harassment as a form of discrimination several other questions had to be answered. What counted as evidence of sexual harassment? Should the employer of an harasser be held accountable if they genuinely had no knowledge of it? The Commission began accepting and settling complaints of sexual harassment under the grounds of sexual discrimination but was keen to set a legal precedent.

The chance to get an EOT ruling on the issue arrived in 1985. A woman complained to the Commission that she had been continually harassed to the point where she felt she had to hand in her resignation. The Commission decided to send the complaint to the EOT for interpretation. In what became a landmark decision, H v. E, the EOT ruled that the resignation was equivalent to a dismissal since she hadn't wished to leave her job. John Caldwell, in examining the EOT's ruling claimed that 'the findings of the Tribunal in these disputes have often had a considerable social impact.'[21] H v. E certainly had that. In determining whether harassment could be considered discrimination the Tribunal had examined legislation from the US, Canada and Australia as well as the International Human Rights Conventions. Finally, the Tribunal ruled that the harassment did constitute discrimination since it targeted one gender only. The complainant was awarded damages and $450 for injury to feelings.[22] In the Tribunal's statement it claimed that

> the treatment of women in the workplace should be no less fair and enlightened in New Zealand than elsewhere in the common law world. Had we felt obliged to record a narrow and restrictive interpretation of this legislation we would have regarded such a result as out of step with the temperament of modern society.[23]

The Tribunal was clearly following an international lead.

Due to the sensitive nature of these complaints, the Commission's mediation officers gave sexual harassment complaints higher priority than others from 1985 onwards.[24] Since the Commission's jurisdiction to handle sexual harassment complaints had been confirmed, it decided to issue a policy statement. The 1987 statement contained guidelines on what constituted sexual harassment, and enforced the point that the Commission retained the right to distinguish serious complaints.[25] As was shown in the complaints statistics earlier, sexual harassment complaints rose dramatically after 1985.

Education and Publicity

Building on the improved Government support, the second Chief Commissioner Justice Wallace brought to the Commission a great deal more efficiency, particularly in education and publicity. By defining specific roles for each Commissioner the Commission could now target several issues simultaneously. At the first Commission meeting under Wallace on February 1st 1984 a major review of the Commission's priorities was announced.[26] As part of the review, Commissioner Margaret Clark examined the state of the education and publicity programme. Her response was that 'The publication programme has been fairly ad hoc in nature, and opportunities have been taken as they have arisen.'[27] She suggested a dramatic upgrade in quality and better targeting of education campaigns. A year later Kate Birch, the executive director, again prompted the Commission to upgrade its education programme.[28]

The results of increased attention to education first began to take shape in the Commission's newsletter, which was divided into two. *Focus* was aimed at a more general audience and took a different theme in each

issue, such as sexual harassment or employment, as well as advertising upcoming events. The other, *Newsbrief,* was a more concise and legalistic explanation of the major HRC issues and significant EOT decisions. The Commission also began printing its pamphlets in a larger range of languages. Whereas the Commission had previously used English and infrequently Maori, now all basic explanatory pamphlets were printed in Maori, Samoan, Cook Island, Niuean, and Tongan.[29]

The Commission also began to undertake preventative education. Prime examples of preventative education projects are notices regarding discrimination placed in the 'situations vacant' columns of newspapers, and a series of guidelines published by the Commission. An example of a preventative guideline from this period was the *Manual on Equal Employment Opportunities* released in 1989 by the Commission. This booklet was aimed at employers rather than at employees.[30] It addressed issues of hiring and firing as well as good management practices. Other guidelines published by the Commission addressed superannuation, advertising, insurance, and pre-employment issues.

The increase in sexual harassment complaints led the Commission to realise that it would need to begin a specialised education programme on sexual harassment. Over the following few years the Commission developed a sexual harassment kit, which contained a video, posters, pamphlets and role-plays. This quickly became the most popular publication the Commission had ever produced.[31] Within the first three months of its release 200 kits were requested by "unions, employers and educational establishments."[32] In addition to educating the public about sexual harassment it was soon clear the Commission would have to educate their own staff in order that they would know how to handle such sensitive complaints. Training schemes for Commission staff were run between 1988 and 1990.[33]

During this period, 1984-1993, the Commission expanded its operations and was able to reach many more people in New Zealand. Literally hundreds of speeches and presentations were made by all of the Commissioners. Although speeches were given by Carrick Morpeth (Office Solicitor), Frances Joychild (Mediation Officer), and Kate Birch (Executive Director), it was Rae Julian, who was at the Commission from February 1987, who seemed to deliver the most. [34]

Another feature of this period was the Commission's much improved relationship with the media. This period saw a change in the attitude of the press towards the Commission. Although the press would never paint a glowing picture of the Commission, nothing was as derogatory as the coverage it had received previously. In 1990 the Commission continued to have media problems however, and its public relations consultant noted in a letter to the then Chief Commissioner, Margaret Mulgan, that 'the public image of the Commission is in many areas either low, non-existent, or negative.'[35] The improvement in media relations had come therefore less from an improved perception of the Commission but more from a change in what was covered. In contrast to the earlier period when the press had tended to focus on individuals within the Commission, in this later period the press covered then new initiatives of the Commission such as age as a ground for unlawful discrimination and sexual harassment.[36]

The main difficulty faced by the Commission in this period was the number of misconceptions the public had about the HRC Act. These included the belief that gender discrimination was allowable if a job was considered to be "suited" to one sex or another, that employment agencies could not be held responsible for discriminatory advertising, that the Act only protected women, and at the other extreme, that the Act

covered all forms of discrimination.[37] To address these issues the Commission released a series of public and policy statements, with various topics such as marital status, pregnancy and sexual harassment,[38] but most commonly on issues of gender discrimination.

Reports to the Prime Minister

During this period the Commission submitted an unprecedented number of reports and submissions on both existing and proposed legislation to the Prime Minister and various Select Committees. In contrast to the earlier period the Commission had markedly less difficulty in obtaining copies of legislation, and in certain cases the Commission was even given special hearings at Select Committees. Around 70 reports and submissions were made, which was on average eight per year, double that of the previous period. Topics varied from sex discrimination in the law[39] to mental health issues[40] and migrant workers.[41] While reports from the previous period drew primarily on international human rights instruments to support the Commission's arguments, the reports of this period refer frequently to the "spirit" of the HRC Act. In addition, after 1990 when the Bill of Rights Act was passed the Commission was able to measure legislation against this as well,[42] although there was no formal role for the Commission in regards to the Bill of Rights.

The Government response to the Commission's reports and submissions was also much improved from 1984, and this is easily attributed to the presence of Geoffrey Palmer as both Minister of Justice and Deputy Prime Minister. Chief Commissioner Margaret Mulgan noted that a Government's response to Commission advice is usually dependent on 'how far the Government is committed to its own policy and for what reasons, as measured against its commitment to the human rights issue concerned; the time of the election cycle; ....'[43] Mulgan herself was

reproached for her comments on Government benefit cuts in December 1990. She noted that 'one of the difficulties of the Human Rights Commission is that it's[sic] funded by government but it's set up in a watchdog role over government.'[44] This was to become increasingly difficult after 1993 when a new Act replaced the HRC Act giving the Commission a specific "watchdog" project.

From 1984 the Commission began investigating and reporting on other areas. One report in 1984 dealt with the number of complainants who misunderstood the limits on exciting racial disharmony.[45] The second, also in 1984, was based on informal complaints received about discriminatory employment practices at banks.[46] The following year the Commission released the Privacy Report. This had been contracted out to Tim McBride, and surveyed New Zealand's privacy protections. It was designed as a discussion document but at 500 pages long, it is doubtful how wide an audience it would have reached. The foreword states 'The report does not include any specific recommendations because the Commission believes that there should first be a wider and more general discussion of the issues.'[47]

The Commission's legislative functions in relation to privacy were difficult to administer. On the one hand it had to inquire into issues of privacy and could make recommendations to the Government, yet on the other hand it could not receive or investigate individual complaints. The 1985 Privacy Report was clearly a device more useful to the Commission than the general public and it is not surprising that in a subsequent review of the HRC Act, the Commission suggested the appointment of a Privacy Commissioner who would deal with all the privacy aspects of the Act and 'would not be subject to any direction from the Commission as to how to deal with the privacy jurisdiction.'[48] In 1991 the Privacy Commissioner Act was passed establishing the office of a Privacy

Commissioner, although the Act had no effect on the HRC.[49] Two years later the Privacy Commissioner became a member of the HRC, under the new 1993 Human Rights Act and the 1993 Privacy Act.[50]

Other reports, issued under the general education provisions of the HRC Act, dealt with corporal punishment,[51] Social Welfare homes,[52] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[53]

Finally the Commission released two reports on the Bill of Rights. Studying the Commission's *Guide to the Proposed Bill of Rights in Question and Answer Form* is interesting. Released a year after the White Paper *A Bill of Rights for New Zealand,*[54] the booklet provided very little criticism of the Bill except to say that 'The Commission would like to see the grounds of freedom from discrimination in Article 12 accord with those contained in the Human Rights Commission Act ...'[55] and 'The Commission would like to see provision for affirmative action programmes ...'.[56] This reaction contrasts starkly with that of Elkind and Shaw in their 1986 book, *Standard for Justice*. Elkind and Shaw state in regard to freedom from discrimination that 'This provision is one of the weakest and least adequate in the entire White Paper Draft. The Draft provision takes a far too narrow approach to the concept of discrimination.'[57] Considering Elkind and Shaw were referring to the same grounds of discrimination as in the HRC Act it is perhaps surprising that the Commission did not take a similar view.

The Report on the Human Rights Commission Act

The most dramatic progress in this period was on the Human Rights Commission Act itself. In 1987 Geoffrey Palmer, Minister of Justice, gave the Commission an opportunity to pass comment on the Act, and provide

suggestions for its strengthening. Palmer had been a long-time proponent of and lobbyist for constitutional development and civil rights. Most of all, Palmer wanted a Bill of Rights for New Zealand and sparked debate on that issue in 1985 by releasing *A Bill of Rights for New Zealand: A White Paper*.[58] While the country continued to debate the value of a Bill of Rights, Palmer set about strengthening another protection of rights - the Human Rights Commission Act 1977. In 1987 Palmer wrote that 'At ten years old the Human Rights Commission has come of age, the fledgling is ready to fly ...'[59] and Palmer was the one to push it from its nest. Palmer requested that the Commission conduct an internal review of the HRC Act and recommend any changes. The Commission was finally given the opportunity to promote the extensions it had wanted.

This was an opportunity, it must be remembered, that the Commission was intended to have from the very beginning.[60] In the original Parliamentary debates, prior to the introduction of the 1977 HRC Act, much was made of the fact that the Commission would only be given a limited set of rights to enforce early on because it would later be able to suggest what extensions it required. The report on the Act which the Commission made to the Minister of Justice in August 1987 was 55 pages long and had three essential sections. The report first summarised the Commission's views of the problems, then proposed two alternative structures for the Commission, and thirdly analysed the Act in detail, outlining specific changes as was felt necessary.[61]

The strongest argument in the report was for an extension to the grounds of unlawful discrimination. At the time of the report the only grounds for unlawful discrimination were sex, marital status, and ethical or religious belief.[62] The Commission wanted these grounds extended to include physical and mental impairment, family status and responsibility, pregnancy, HIV/AIDs status, age, sexual orientation, political opinions,

trade union involvement and employment status.[63] It was felt, however, that disability was the most pressing. On the other hand, the Commission noted that there needed to be a general exemption from the anti-discrimination legislation in cases of bona fide occupational requirement. The Commission felt the few exceptions in the Act did not adequately cover all occupations where discrimination was necessary - it also pointed out that other countries such as the USA, Canada, and Australia had similar clauses in their anti-discrimination laws.[64] A bona fide occupational requirement might be the necessity of a woman worker in a clothing shop due to the need to enter female dressing rooms. The Commission's dissatisfaction with its limited jurisdiction was compounded by the feeling that members of the public were misled by the name 'Human Rights Commission', and thus felt it could deal with all kinds of discrimination.

The Commission was also dissatisfied with its limited funding and resourcing. The report notes that because of a lack of funding and staff the Commission had 'often been compelled to adopt a re-active rather than pro-active role.'[65] However, this position is debatable for the period 1984-1992, especially in comparison to the pre-1984 period.

Above all, the report states that 'the fundamental issue which needs to be discussed ... is whether it is best for the above functions [of education and the receiving of complaints] to be combined in one organisation.'[66] The Commission suggested two alternative structures for the organisation. Both were focussed on widening the mandate and reach of the Commission, regardless of whether or not any extension to the grounds of unlawful discrimination was provided. The first model kept the Commission at its current size (Chief, Proceedings, three other Commissioners and the Race Relations Conciliator), but excluded the Ombudsman and included instead the Privacy Commissioner and a yet-

to-be-established Children's Commissioner.[67] The Ombudsman was not included due to his lack of interest and his concerns that he may one day be called upon to investigate the Commission itself. The Children's Commissioner was a concept the Commission had been promoting for several years in its various studies on children's issues.[68] In this model the three human rights Commissioners would have specific individual responsibilities - one each for women, Maori issues, and disability (if the Act was extended to cover such discrimination).

The second model, suggested by the Commission as more efficient, would have seen the Commission split into four offices. It advocated the establishing of a privacy office, children's office, an equal opportunities office (which would administer anti-discrimination legislation, education and would incorporate the Race Relations Office and be run by three Commissioners), and finally a Human Rights Commission for wider education on human rights, and to act as a watchdog over legislation - this, the report suggested, could be led by four part-time Commissioners.[69] The report more strongly endorsed the second model and the validity of this model may have been reaffirmed for Wallace when he returned from a conference in Geneva in 1988 which had promoted the merits of separate functions and offices.[70]

A number of other more minor changes to the Act were also suggested. Many, such as the removal of gender-specific language, the rewording of the definition of 'ethical belief', and the ability of the Commission to conduct general inquiries, were changes which would make the Act easier to administer. Other changes were more structural, such as a staggering of Commissioners' terms of office in order that a complete change-over in Commissioners such as that which occurred in 1984 would not happen again.[71] The Commission suggested that a definition of sexual harassment as discrimination be included in the Act and that it

be the same definition used in all other legislation, such as the Labour Relations Act. One other suggestion, not unexpectedly, was to repeal the section of the 1981 Amendment which made religious discrimination in employment legal in some cases.[72] This, along with a request that systemic discrimination against women in the armed forces be removed,[73] is an example of the bold stance the Commission took with the Government.

Finally, the report sought to increase the power of the Commission. To this end the Commission sought the right to compel respondents to attend conferences, to issue interim restraining orders through the EOT, and to increase the maximum damages awarded by the EOT from $2000 to $20,000.[74] The best evidence of the Commission's frustration with its lack of power came in its denouncement of the subordinate nature of the HRC Act. The report states strongly that

> unless the Human Rights Commission Act expressly provides it does not prevail over the provisions of any other Act, no matter how discriminatory those provisions may be. The Human Rights Commission is toothless in those circumstances. All it can do is make a report to the Prime Minister.[75]

It continues,

> The Commission considers that it is now time for a more robust attitude to be taken to Human Rights legislation. ... It should be appreciated that this is a change of considerable significance. If it is thought that such an amendment is too radical then the Commission suggests that all existing legislation should be reviewed by the government for compliance with the Human Rights Commission Act ...[76]

As it would turn out, the second option was later chosen by Government and the Commission was given the task of administering it.

The Ministry of Justice's Response

On the whole the Ministry's response, in January 1988, was supportive. In regard to the two structures suggested by the Commission the Ministry immediately ruled out the second, involving separate offices, as being too confusing and using more funds, but thought there was value in the first model. The Ministry disagreed with a few other minor points such as the 'bona fide occupational requirement' clause the Commission sought, and the increase in power by allowing the Commission to compel people to be present at settlement meetings. On the other hand, the Ministry advocated the lifting of exemptions for the armed forces, agreed on sexual harassment, accepted the increase in EOT damages awardable and even acknowledged that human rights legislation ought to override other legislation.

In comparison to the Commission's long and detailed report, however, the Ministry of Justice's response to the review seems short and vague. Responses on the roles of Ombudsman and Children's Commissioner were non-committal. It was clear that the Ministry did not care much whether the Ombudsman was involved or not, and rather than create a quasi-independent Children's Commissioner the Ministry preferred to extend the scope of the Ministry of Youth Affairs.[77]

Despite having submitted a final report on the HRC Act, the Commission continued to suggest changes to the Ministry from that point on.[78] In an interesting memo from Auckland Commission office staff to the Commissioners, the suggestion was made that Treaty of Waitangi issues should have been included in the mandate of the Commission. The memo also suggested that in order to survive financial cutbacks the number of Commissioners should be reduced from seven to three, being the Chairperson, the Race Relations Conciliator, and two part-timers.[79]

The HRC Amendment Bill 1990

It was not until 1990, three years after the review, that the Commission was advised that work was finally beginning on an Amendment Bill, although the 1987 review had been an early indicator. The Commission watched closely as a bill containing many of its recommendations was introduced and debated on 6 September 1990. The Bill was brought by the Hon W. Jeffries, then Minister of Justice, and sought to add ten new grounds for complaints: health status (including HIV/AIDS), age, sexual orientation, pregnancy, political opinion, trade union involvement, employment status, beneficiary status, family status, and identity of partner or relative.[80] Jeffries admitted that sexual orientation would be controversial but stated that 'Government members will be free to vote as they judge best when sexual morality matters are determined ...'.[81] For himself, Jeffries said he would actually vote against sexual orientation being added - which certainly displayed an open approach to the Commission's suggestions. Strong support for the Bill came from both the Labour and National parties. The Bill was introduced and sent to a Select Committee. The Commission made submissions seeking to extend the Bill to cover some of its other suggestions and was given a special hearing as well as the chance to comment on other submissions. However, the Bill did not come back to the House until over a year later, in December 1991, by which time Labour had been replaced by a National Government.

By this stage the Committee had broken the Bill into several smaller Bills, in order that the less controversial sections be passed quickly. In December the aspect of the original Bill which introduced a Privacy Commissioner to the membership of the Commission was passed.[82] There was still no sign of the extension of the grounds for complaints. In March 1992 the Justice and Law Reform Committee reported back to Parliament on the addition of age as a grounds for complaint,

recommending its introduction but with several reservations and a long phase-in period. It received a long debate in the House, which covered both the implications of the anti-age discrimination provision for those around or in retirement and the fact that the other grounds had not been included in this amendment. After being at Select Committee stage for 18 months the Bill received its second and third readings in the space of a week and by 1 April 1992 it was no longer legal to discriminate on the basis of age.[83] Ironically, even though the Commission had advocated this addition, it felt the amendment had been rushed through, and was worried about the increase in workload.[84]

One commentator at the time noted that since the provisions for age discrimination had been passed it may have become harder to pass the less 'politically safe' amendments, such as sexual orientation.[85] The Commission clearly felt this too and in 1992 published a discussion paper on sexual orientation - outlining the reasons why it should have been included in the HRC Act.[86]

Summary

The period from 1984 to 1993 is marked by stability and development.

Development, seen clearly in the Commission's links with the Government, its establishment of legal precedents and its ventures into new areas of social discrimination such as sexual harassment, occurred for several reasons. The Commission was only able to achieve such progress because of an underlying stability which was created primarily in the first year of Justice Wallace's term as Chief Commissioner, and because of better favour with Government.

Although Wallace and subsequently Mulgan showed strong leadership skills in their setting of priorities and roles for staff and Commissioners,

the most important factor in the increasing of stability was Government support, mostly due to Geoffrey Palmer. The enlarged number, and filling of Commissioner roles as well as the growing funding were pivotal to the Commission's stability. As indicated, when funding rose so too did staff numbers (almost proportionally)[87] - the effect of this was to create a Commission which could tackle more projects than could the previous Commission.

The restructuring of complaints-handling procedures allowed the Commission more time by decreasing the number of complaints requiring full investigation. For this reason the Commission found that a higher percentage of complaints investigated had substance. The Commission was also able, during this period, to take two important test cases to the Equal Opportunities Tribunal - the Air New Zealand case, and the sexual harassment case, H v. E. Both these cases provided landmark decisions for the Commission and useful guidelines for employers.

The predominance of complaints relating to both sexual discrimination and sexual harassment was a clear theme in this period and resulted in specialised education programs for both the public and the staff of the Commission.

The Commission also received a more positive response from its reports to the Prime Minister. This extended to the 1987 review of the Human Rights Commission Act. The fact that the Commission's views and ideas were sought and then acted upon indicates the increased respect the Government had for the Commission. It is confirmed by a comparison with the 1980 HRC Amendment Act which limited the Commission's mandate in cases of religious discrimination. In that situation the

Commission was not consulted at all and its submission to the Statutes Revision Committee was barely acknowledged.

It took a long time before any result was seen on the suggestions the Commission made in the 1987 review. Though this is not necessarily a negative reflection on the status of the Commission. Most of the suggestions were actually included in the draft Bill which the Ministry of Justice presented to Parliament. For political reasons the Bill was separated at Select Committee stage. While this may indicate hesitancy to pass or even vote on legislation which would potentially alienate voters, it can also display a commitment to the wider principles of human rights. Had the Government not been interested in bolstering human rights protections the Bill could have fared much worse. In an unusual move Parliament allowed the Bill to be separated by the Select Committee and in doing so demonstrated their desire to pass at least some legislation extending the Commission's jurisdiction, rather than leave unprotected the least controversial freedoms from discrimination contained in the Bill, such as age.

Such support from Government has been unique in the Commission's history. Compared to the previous and latter periods, this was one of relative strength and encouragement.

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[1] The grant money shown in the graph has been adjusted for inflation. See Appendix 1 for a table explicating this calculation.

[2] Margaret Mulgan, 'Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution', *Canterbury Law Review*, 5:2, 1993, p.237.

[3] *NZPD*, 6 October 1983, v.453, p.2866.

[4] ibid., p.2868.

[5] ibid., pp.2868-2870.

[6] Human Rights Commission, *Annual Report*, 1989, p.19.

[7] ibid., 1987, p.7.

[8] 'Woman to Head Commission', *New Zealand Herald*, 2 March 1989, section 1, p.1.

[9] Human Rights Commission, *Annual Report*, 1991, p.14.

[10] All complaints statistics are taken from those reported in the Annual Reports unless otherwise indicated.

[11] Human Rights Commission, *Minutes and Supporting Papers of Commission Meetings:* Feb 1984 - Dec 1993.

[12] During this period a computer database for complaints was also set up - increasing the speed and efficiency of complaints handling. Human Rights Commission, *Minutes*, 15 February 1990.

[13] Human Rights Commission, *Annual Report* ,1987, p.13.

[14] Human Rights Commission, *Marital Status: Policy Statement on Marital Status as a Ground of Discrimination*, HRC, 1984, p.2.

[15] ibid., pp.2-3.

[16] *Newsbrief*, April 1986, n.5, p.2.

[17] Pauline Ray, 'Flying in the Face of Inequality', *NZ Listener*, 123:2550, January 21 1989, p.14.

[18] Human Rights Commission, *Annual Report*, 1988, p.26.

[19] *Newsbrief*, n.1, March 1989, p.1.

[20] Human Rights Commission, *Annual Report*, 1985, p.21.

[21] John Caldwell, 'The Law of the Equal Opportunities Tribunal.', *New Zealand Law Journal*, November 1986, p.377.

[22] ibid., p.379.

[23] *Newsbrief*, n.4, December 1985, p.1.

[24] Human Rights Commission, *Annual Report*, 1986, p.12.

[25] Human Rights Commission, *Policy Statement on Sexual Harassment*, HRC, 1987, p.1.

[26] *H.R.C. News*, No.9, March 1984.

[27] Margaret Clark, 'Agenda Item 5: Education and Publicity: Past Practice and Some Thoughts for the Future', *Minutes*, 29 February 1984.

[28] Kate Birch, 'Agenda Item 6', Human Rights Commission, *Minutes*, 21/25 February 1985.

[29] Human Rights Commission, *Annual Report*, 1986, p.6.

[30] Human Rights Commission, *A Manual on Equal Employment Opportunities*, HRC: Wellington, 1989.

[31] Human Rights Commission, *Annual Report*, 1987, pp.4, 10.

[32] ibid., 1987, p.11.

[33] Human Rights Commission, *Minutes and Supporting Papers of Commission Meetings:* 8 September 1988, and 2/3 August 1990.

[34] Human Rights Commission file, *Speaking Engagements*, file no. 240-241.

[35] Letter from J. Issac to M. Mulgan in Human Rights Commission, *Minutes,* 15 February 1990.

[36] Human Rights Commission file, *Media clippings 1991-92.*

[37] Human Rights Commission, *Annual Report,* 1984, pp.22-23.

[38] Human Rights Commission, *Marital Status: Policy Statement on Marital Status,* 1984; Human Rights Commission, *Policy Statement on Pregnancy and Health Insurance,* HRC, 1985; Human Rights Commission, *Policy Statement on Sexual Harassment,* 1987; Human Rights Commission, *Gender-Free Job Titles: A Policy Statement,* May 1987.

[39] Human Rights Commission, *Report to the Prime Minister on Sex Discriminatory Effects of Amendment No.8 of the Education (Assessment, Classification & Appointment) Regulations 1976,* January 1984.

[40] Human Rights Commission, *Submission on the Mental Health Bill 1987,* 1988.

[41] Human Rights Commission, *Report to the Prime Minister on Migrant Workers,* February 1990.

[42] Human Rights Commission, *Submission to the Labour Select Committee on the Immigration Amendment Bill 1991,* August 1991, p.1.

[43] Margaret Mulgan, 'Implementing International Human Rights Norms in the Domestic Context, p.241.

[44] Elizabeth Dickson, 'Human Rights and Wrongs', *Listener,* August 26, 1991, p.21.

[45] Human Rights Commission, *Exciting Racial Disharmony: Discussion Paper on Section 9A of the Race Relations Act 1971 which makes it unlawful to excite racial disharmony,* April 1984.

[46] Human Rights Commission, *Women in Banking: A Report of Sex Discrimination in the Employment of Women in the New Zealand Banking System,* 1984.

[47] Tim McBride, *Privacy Review: a discussion and resource paper prepared for and in consultation with the Human Rights Commission,* 1985, foreword (unpaginated).

[48] Human Rights Commission, *Review of the Human Rights Commission Act 1977: Report to the Minister of Justice,* August 1987,p.8.

[49] *Privacy Commissioner Act 1991,* No.126.

[50] *Human Rights Act 1993,* s.7(c).

[51] Human Rights Commission, *Public Statement on Corporal Punishment in Schools,* Nov 1985.

[52] Human Rights Commission, *Who Cares for the Kids? A Study of Children and Young People in Out-of-Family Care,* Feb 1992.

[53] Human Rights Commission, *Convention on the Elimination of All Forms of Discrimination Against Women: 'What's it all about' - A Review Paper,* 1984.

[54] *A Bill of Rights for New Zealand: A White Paper,* Government Printers: Wellington, 1985.

[55] Human Rights Commission, *A Guide to the Proposed Bill of Rights in Question and Answer Form,* May 1986, p.12.

[56] ibid., p.15.

[57] Jerome B. Elkind and Antony Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand,* Oxford University Press: Auckland, 1986, p.69.

[58] *A Bill of Rights for New Zealand: A White Paper,* 1985.

[59] *Focus,* n.4, December 1987, p.1.

[60] Chapter One p.19. - the Parliamentary debates show that the Act was introduced with a limited list of rights in order that the Commission could suggest where it needed extension.

[61] Human Rights Commission, *Review of the Human Rights Commission Act 1977,* August 1987.

[62] Race, national origin and ethnicity were administered by the Race Relations Office.

[63] ibid., p.23.

[64] ibid., pp.26-27.

[65] ibid., p.5.

[66] ibid., p.5.

[67] ibid., pp.6-10.

[68] For example: Human Rights Commission, *Who Cares for the Kids?;* Human Rights Commission and Youth Law Project, *The Children's Health Camp Movement: A Report to the Minister of Health,* October 1988; Human Rights Commission, *Report of the Human Rights Commission on Representations by the Auckland Committee on Racism and Discrimination: Children and Young Persons Homes: Administered by the Department of Social Welfare,* HRC, 1982.

[69] Human Rights Commission, *Review of the Human Rights Commission Act 1977,* pp.11-12.

[70] Justice John Wallace, *Report on Geneva Conference,* October 1988 (unpublished).

[71] ibid., p.22.

[72] ibid., p.31.

[73] ibid., p.32.

[74] ibid., pp.42-45.

[75] ibid., p.51.

[76] ibid., p.52.

[77] Department of Justice, *Response to 1987 Review of Human Rights Commission Act by Human Rights Commission,* unpublished, Jan 1988, pp.2-4.

[78] Human Rights Commission, *Minutes,* February 1988, June 1989.

[79] ibid., 13 October 1988.

[80] Human Rights Commission Amendment Bill introduced by Hon. W.P. Jeffries.

[81] *NZPD,* 6 September 1990, v.510, p.4344.

[82] ibid., 10 December 1991, v.521, pp. 6069-6071.

[83] ibid., 24 March 1992, v.523, pp. 7173-7184, 7361-7386; 31 March 1992, v.523, pp. 7422-7434.

[84] Human Rights Commission, *Minutes,* 1 & 2 April 1992.

[85] Grant Williams, 'The Human Rights Commission Amendment Act 1992', *Auckland University Law Review,* 7:1, August 1992, p.202.

[86] Human Rights Commission, *Discrimination on the Ground of Sexual Orientation: A Discussion Paper,* April 1992.

[87] Figure 4 Government Grants v Staffing Levels, p.61.

Chapter 4 Two Steps Forward, One Step Sideways 1993 - 1997

Introduction

The period from 1992 to 1997 has been no easy ride for the Human Rights Commission. During these years the Commission has experienced both the keen approval and the clear distrust of the Government. As a result the Human Rights Commission is once again on shaky ground.

This period began with the introduction of the Human Rights Act in 1993. The 1993 Act replaced the 1977 Human Rights Commission Act, amalgamated the Human Rights Commission and the Race Relations Office, and quite notably extended the Commission's jurisdiction in several areas of discrimination. The 1993 Act also created a project which became known as 'Consistency 2000'. This was designed to uncover every discrepancy between the 1993 Human Rights Act and all other legislation. In this way the Government could repeal the subordinate nature of the Act and become compliant with, and subject to, the provisions of the Act. However, from 1997 the Government began preparations to abandon the project due to its mammoth scope.

Due to a number of changes in the 1993 Act, it soon became obvious that major restructuring of the Commission was inevitable. Another theme which became evident through this period was the fostering of international relations. This new global awareness corresponded with New Zealand's term on the United Nations Security Council.

This chapter deals with the above issues, first by examining the 1993 Act and explaining the consequences that it had for the Commission's functions. Following that is a comprehensive analysis of the Consistency

2000 project. The internal development and constant restructuring is then examined as an indicator of the Commission's increasing difficulties. The subsequent analysis of each of the Commissions functions - complaints, education, publicity, research and international involvement - shows the effect the new Act had on the Commission's day-to-day activities.

Each section of this chapter illustrates a Commission growing decreasingly independent of Government. One to comment openly on the dangers of losing independence was Margaret Mulgan, Chief of the Commission until mid 1994. Her task during this period was to prepare the Commission for the new extended Act and to welcome it in on 1 February 1994. Mulgan's work at the Commission has been understated, yet her intense focus on international relations prepared the Commission well for the future.

Mulgan was replaced by another woman Chief Commissioner, Pamela Jefferies. Jefferies came from quite a different background to the previous three Chief Commissioners, coming not from law but accounting. Her experience on the panel of the Equal Opportunities Tribunal, however, gave her a full understanding of the role and requirements of the HRC. She was appointed initially for three years, but was reappointed for a second term in 1997.

Other notable personnel changes included the replacement of Proceedings Commissioner Peter Hosking in 1995 with Chris Lawrence. Lawrence came from the Crown Law Office and had experience in both human rights law and alternative dispute resolution. A more recent appointment to the Commission is Areta Koopu, who was appointed to part-time positions on both the HRC and the Waitangi Tribunal.

The 1993 Human Rights Act

The previous era ended with the amendment of the 1977 Human Rights Commission Act which added 'age' as a grounds for complaint. An Amendment Bill to further extend the grounds of prohibited discrimination had been introduced on Labour's last day in Government in 1990. While that Bill had sought to add ten new grounds for complaint to the Act, only 'age' successfully made it through the Select Committee.

In 1992, however, a Human Rights Bill was introduced by Doug Graham under the National Government. The Bill sought to increase the grounds of unlawful discrimination to include gender, marital status (including de facto couples), religious belief, ethical belief, colour, race, ethnic origin, disability (limited to physical and mental disability), age, political opinion, employment status and family status. If passed, the Bill would take effect from 1 November 1993.[1] Graham, in introducing the Bill, stated that it was continuing "the momentum" of social advances previously made by the National Government.[2] The Bill was debated and received its first reading on 15 December 1992.

There were striking omissions from the Bill regarding sexual orientation. Helen Clark (then Deputy Leader of the Opposition) staunchly defended the right of homosexuals and those with AIDs or HIV to protection from discrimination.[3] Clark also believed that sexual orientation ought to have been included as a ground for complaint despite Graham not supporting it. Clark pointed out that Bill Jeffries had introduced the HRC Amendment Bill in 1990 which had included sexual orientation as a grounds, regardless of his own intention to vote against it.[4] The inclusion of sexual orientation as a grounds was also supported by Lianne Dalziel (Labour MP) and Katherine O'Regan (National's Associate Minister of Health. O'Regan announced her intention to lodge a Supplementary

Order Paper with the Select Committee examining the Bill which would seek the inclusion of sexual orientation, AIDs and HIV.[5]

Debate on sexual orientation was the primary issue and often ran quite hot. One of the most ardent campaigners against the inclusion of sexual orientation was Graeme Lee (Minister of Internal Affairs) who felt that homosexuality was a learned behaviour which should be 'un-learned'[6].

Once at the Justice and Law Reform Select Committee the Bill received close examination. Ordinarily a Select Committee only accepts submissions on specific provisions in a Bill. However, in this case the Select Committee decided to allow submissions on sexual orientation, AIDs and HIV, as these were also the subject of O'Regan's Supplementary Order Paper (SOP).[7]

The Commission's Submission

To the detriment of other work,[8] the Commission took time to prepare an in-depth written submission to the Select Committee, was heard orally, and was given a 'right of reply' to all other submissions in the form of a supplementary submission. A great deal of the Commission's submission was based on studies of precedents from Canada, the USA, Australia, the Netherlands, Scandinavia, France, Ireland, and the UK.[9] The submission in general welcomed the Bill as it extended the grounds of unlawful discrimination. The submission also included the Commission's desire for a clause exempting situations where discrimination is a 'bona fide occupational qualification'.[10] The Commission also felt that a broader reference to international instruments was needed as the relevant named instruments could change. For example, while the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were the most prominent human rights instruments of the day, the Commission

felt that the new Act should allow for possible changes to these. The renaming of the Equal Opportunities Tribunal as the Human Rights Tribunal was not supported as it was considered confusing.[11]

The Commission's submission recommended the removal of several exemptions from the Act, particularly the exemptions for police, the armed forces and pilots.[12] Police and the armed forces were allowed to discriminate on the basis of sex, sexual orientation, height/weight, and age. Pilots could be discriminated against in regard to their age. Other issues raised included equal provision for unpaid and voluntary workers as for paid workers, especially since many unpaid workers were part of Equal Employment Opportunity target groups (for example, Maori and other minorities such as people with disabilities).[13] The Commission also called for the inclusion of sexual orientation as a grounds of unlawful discrimination, and for the definition to specifically include lesbians.[14] Not unexpectedly, the Commission supported O'Regan's Supplementary Order Paper.[15]

The final section of the Commission's submission took issue with the proposed new method for handling complaints of discrimination. The Human Rights Bill suggested that the Commission should be allowed to find substance in a complaint prior to an investigation if it appeared straightforward. Presumably this was designed to speed up the processing of complaints, but the Commission felt the practice could lead to inconsistency and unfairness.[16] However, the Commission welcomed the establishment of a Complaints Division within the Commission which would be responsible for the investigation and conciliation of complaints. Finally the Commission made a case for the subordinate nature of the Act to be removed. The Human Rights Commission Act and the Human Rights Bill contained provisions preventing the Act from having precedence over any other legislation. This meant, in effect, that if a piece

of legislation was discriminatory the Commission could do nothing about it. In reference to the subordinate nature of the Act, the Commission stated that

> While this provision may have been appropriate when the Human Rights Commission Act was passed in 1977 and a significant number of Acts and Regulations may have been in conflict with the anti-discrimination provisions, most legislation in existence at that time has since been repealed, amended or at least reviewed.[17]

In saying this, the Commission implied that it could do no harm to remove the subordination clause in the Act.

The rest of the Commission's submission covered the grounds of unlawful discrimination. The definitions of terms such as marital status and religious discrimination were seen as careless, and the definition of disability was seen as so broad that it would likely lead to trivial claims.[18] For example the Commission suggested that gender, which was undefined in the Bill should be defined as including males and females and "having a combination of the physical or chromosomal characteristics of both sexes, or having the physical characteristics of one sex and the gender identity of another, or being a transvestite."[19]

The Justice and Law Reform Select Committee heard several hundred submissions and gave the Commission the chance to respond to these as well as to questions put forward by the Select Committee itself. Of the 700 or so submissions received most supported the Bill. The Committee noted in their report that only 142 submissions were opposed to the protection of homosexuals and people with AIDs or HIV.[20] Staunchly against any protection for gays, or people with AIDs were the Coalition of Concerned Citizens and the Police Commissioner, John Jamieson. Both felt that the employment of openly gay people would jeopardise public

support for the police.[21] Other significant submissions to which the Commission responded included those from the Legislation Advisory Committee, New Zealand Police, New Zealand Fire Service, Office of the Race Relations Conciliator, Women's Electoral Lobby, several church groups, and the New Zealand Police Association.

The Commission's supplementary submission addressed many concerns of these groups. In particular the Commission stressed the value of the broad mandate given to it by the Act, stating that it had attracted wide international respect. The Commission agreed that the list of exemptions in the Act was getting unmanageable and emphasised that it preferred a general 'bona fide occupational qualification' defence to be included instead.[22] The Supplementary Submission again pushed the case for the repeal of the "subordination" clause. This time, however, the Commission suggested that it could afford to undertake a review of all legislation prior to the repeal of the clause if this was considered necessary.[23] This formed the basis of a future project - Consistency 2000.

The Report of The Select Committee

On 22 July 1993 the Justice and Law Reform Committee reported back to Parliament on the Human Rights Bill. In justifying their suggestion that sexual orientation be included as a ground of unlawful discrimination, the Committee listed several other countries and states which had successful legislation covering that type of discrimination.[24] Other changes made to the Human Rights Bill by the Select Committee included the extension of the Commission's functions to include a review of legislative compliance with the Act, prior to the repeal of the 'subordinate' clause. The inclusion of pregnancy and childbirth in the definition of sex discrimination, and the removal of several exemptions including the religious discrimination exemption which arose out of the Eric Sides case in 1981 were also sought. The Committee also introduced

the concept of "reasonable accommodation", whereby an employer or service provider had to accommodate an employee's or client's special needs within reason.[25] This would prove to have significant impact in a later complaint against Stagecoach, a Wellington bus company.

In the final reading of the Human Rights Bill, sexual orientation remained the primary issue. John Banks claimed that

> The Chief Human Rights Commissioner also uses creative accounting in claiming that opinion polls favour non-discrimination. ... She would do better to restrict herself to administering the law, rather than joining the lobby to change it.[26]

This comment by Banks failed to take account of the Commission's function of reporting to the Prime Minister on any legislation it believed to need repeal or amendment. After the final debate the Bill was extended to provide protection from discrimination for voluntary workers, protection from discrimination on the grounds of sexual orientation and protection from discrimination for people with AIDs and HIV.[27] The Bill received its third reading on 27 July 1993 and won the majority vote. It received royal assent on 10 August 1993 and was set to come into force on 1 February 1994.

The difference between the 1977 Human Rights Commission Act and the 1993 Human Rights Act

The 1993 Human Rights Act was much more than an extension of its predecessor, the 1977 Human Rights Commission Act, and Chief Commissioner Mulgan stated her belief that "it is the most progressive piece of legislation in the world."[28] It was an advance on the old Act in a number of ways. The first point to note is that the functions of the Commission were greatly increased. For example, from 1 February 1994 the Commission could publish non-binding guidelines on aspects of the

Act, make public statements to any groups arriving in New Zealand who were at risk of discrimination, and publish any kind of report relating to the Act.[29]

The 1993 Human Rights Act also increased the grounds of unlawful discrimination. The Act now prohibits discrimination on thirteen grounds as opposed to six in the 1977 Act.[30] Prohibited grounds of discrimination are: sex (including pregnancy and childbirth), marital status (specifically including de facto couples), religious belief, ethical belief, colour, race, ethnic or national origins (including citizenship), disability, age, political opinion, employment status (including being a beneficiary), family status, and sexual orientation (which included heterosexuals, homosexuals, lesbians, and bisexuals).[31] Although all private citizens were required to comply with the new grounds, Government provided itself with an exemption until 31 December 1999 in relation to the Consistency 2000 project.

The Act was certainly progressive in its protection of people with disabilities. The Act defines disability as physical impairment or illness, psychiatric illness, intellectual or psychological, physiological or anatomical abnormalities, reliance on wheelchairs, guide dogs or other remedial means, and finally "the presence in the body of organisms capable of causing illness".[32] The definition of disability was based on the Queensland Anti-discrimination Act 1991, which has gained a positive reputation for its definition of disability.

Another change which has had a profound effect on many people was the introduction of provisions against age discrimination. Age, which was introduced by an amendment to the 1977 HRC Act in 1992, is defined in more specific terms in the 1993 Human Rights Act. The definition of age in the 1992 Amendment Act limited protection to those from school-

leaving age until the point of entitlement to national superannuation. This did not apply at all to superannuation schemes except to make it unlawful to specify a minimum age for membership to a scheme.[33] By comparison the 1993 Act removed the upper age limit from 1 February 1999.[34] In regards to superannuation schemes the 1993 Act disallows discrimination on the basis of age for people joining schemes after 1 January 1995[35] (amended in 1994 to 1 January 1996).[36]

The Act also set in place structural changes. Although the number of Commission members remained at seven, the Ombudsman was no longer a member of the Commission, but instead the newly created Privacy Commissioner would become a member. The other six members remained the Chief Commissioner, Race Relations Conciliator, Proceedings Commissioner, and three other Human Rights Commissioners. Alternates for any Commissioner could also be appointed in their absence.[37]

The name of the Equal Opportunities Tribunal was changed to the Complaints Review Tribunal. This change reflected its widened mandate of handling human rights, race and privacy complaints.[38] The Act also created a Complaints Division which consisted of the Race Relations Conciliator and no more than three other Commissioners.[39] The Complaints Division was made responsible for receiving, investigating and conciliating complaints. The Complaints Division could also investigate and conciliate any issue it felt was unlawful discrimination. Finally, particularly complicated complaints could be referred to the full Commission for consideration.[40] Other important provisions in the 1993 Act provided for both sexual harassment and racial harassment complaints to be investigated and conciliated separately from sex or race discrimination.[41] Commission approval of affirmative action

programmes or 'measures to ensure equality', which had previously been mandatory, was also made unnecessary.[42]

Although the 1993 Act amalgamated the Office of the Race Relations Conciliator and the Human Rights Commission there were few visible changes. The Race Relations Office and the Commission kept as separate as previously. Correspondence between the offices was frequent and all Commission publications which dealt with racial discrimination were sent to the Race Relations Office for comment.[43]

Consistency 2000

Possibly the most critical provision in the 1993 Act was the 'Consistency 2000' project. This project was the culmination of three functions given to the Commission in the 1993 Act. The first was to examine all Acts, Regulations, policies, and administrative practices of the New Zealand Government prior to 31 December 1998.[44] The second function was to determine, from that examination, all conflicts with the anti-discrimination provisions of the 1993 Human Rights Act.[45] And the third function was to report all results to the Minister of Justice before 31 December 1998.[46] This project was designed to prepare the Government for section 152 of the Human Rights Act. Section 152 repealed the subordinate nature of the Act and also repealed the Government's exemption from the new grounds on 31 December 1999.[47] Consistency 2000, therefore, was intended to find and remove all legislative inconsistencies with the Human Rights Act 1993.

By far the greatest controversies in this period derived from this project. The relevant portions from the Act should be quoted in full:

> **5. Functions and powers of Commission** -- (1) The functions of the Commission shall be -- ...
>
> (i) To examine, before the 31st day of December 1998, the Acts and regulations that are in force in New Zealand, and any policy or administrative practice of the Government of New Zealand:
>
> (j) To determine, before the 31st day of December 1998, whether any of the Acts, regulations, policies, and practices examined under paragraph (i) of this subsection conflict with the provisions of Part II of this Act[48] or infringe the spirit or intention of this Act:
>
> (k) To report to the Minister, before the close of the 31st day of December 1998, the results of the examination carried out under paragraph (i) of this subsection and the details of any determination made under paragraph (j) of this subsection:[49]

When read in conjunction with the following two sections of the Act the purpose of Consistency 2000 becomes clear.

> **151. Other enactments and actions not affected --**
>
> (1) Except as expressly provided in this Act, nothing in this Act shall limit or affect the provisions of any other Act or regulation which is in force in New Zealand.
>
> (2) Except as expressly provided in this Act, nothing in this Act relating to grounds of prohibited discrimination other than those described in paragraphs (a) to (g) of section 21(1)[50] of this Act shall affect anything done by or on behalf of the Government of New Zealand.
>
> **152. Expiry of section 151** -- Section 151 of this Act shall expire with the close of the 31st day of December 1999, and on the close of that day shall be deemed to be repealed.[51]

Although nothing in the Consistency 2000 report would be binding on the Government, legal author Paul Rishworth noted that 'the moral power of a report from the country's main authority on human rights is likely to be enormous.'[52]

Methodology

Before commencing the bulk of the project in 1995 several questions of methodology needed to be answered. It was unclear whether the repeal of section 151 would give the Act primacy over other Acts - it undoubtedly removed its subordinate nature, yet the Act would then be devoid of any information regarding its standing in relation to other Acts. Rishworth was of the opinion, based on similar Canadian experiences, that the Act *could* be held primary over other Acts.[53] The Commission noted also that difficulties arose in that overseas jurisdictions have tended to do things the other way around - with Government being bound first, then citizens.[54]

Perhaps the most difficult task for the Consistency 2000 team was the establishment of a methodology. There were few legal precedents to go on anywhere in the world, and it was the largest project of its type anywhere.[55] Work began late in 1994 and the team set the following boundaries:

> The project is to examine, to determine and to report. When the Government is in possession of the report and all the facts it is the function of the Government to decide which identified conflicts have outlived their usefulness and which matters, for what it considers are sound social policy reasons, should be retained. These are matters for the Government to decide whatever may be the view of the Human Rights Commission.[56]

Next came the task of defining terms. One of the most difficult terms to define was ' ... nothing in this Act relating to grounds of prohibited discrimination ... shall affect anything done by or on behalf of the Government of New Zealand'.[57] The difficulty lay in deciding what exactly was by or on behalf of the Government. For example, it was unclear whether Crown Health Enterprises (CHEs) and Regional Health Authorities (RHAs) should be included in the Commission's legislative

analysis. The Commission obtained several legal opinions on these and other interpretive issues.[58] The legal opinions obtained stated that the work of CHEs was not 'by or on behalf of Governments'[59] but that the RHAs were to be included in the Consistency 2000 analysis.[60] The Commission also had to decide what was meant by the 'Acts, regulations, policies, and practices ... [which] infringe the spirit or intention of the Act'.[61] The Commission had to determine how wide their interpretations could be.[62] In order to work through these issues further legal opinions were sought[63] and the Commission staff published their own views in prominent journals such as *Human Rights Law and Practice* in order to receive scholarly feedback.[64]

The Commission decided on a three-phase methodology. Phase one was training for each Government department and organisation on completing their own self-audit of the Acts and regulations relevant to them. Such training commenced in February 1996. During this phase contact people were identified at both the Commission and within each Government department. Phase two was the completion of self-audits. Phase three was the Commission's external audit of the information provided from the self-audits and the preparation of the final report.

Pilot Studies

Before the full-scale analysis began the Commission implemented a pilot study with the Department of Labour. The purpose was to assess the suitability of the project methodology and determine the level of support each Government department would require in its self-audit. The pilot study which began in November 1995, showed that the project was going to be a lot slower than originally anticipated, due to the sheer volume of work.[65]

A second pilot study was run with the Department of Social Welfare. This arose from a Cabinet directive to the Department, requesting their assessment and report of human rights inconsistencies on 31 December 1996, 2 years earlier than the Consistency 2000 report. This was a clear indicator that the Government was aware that there would be significant changes required to social welfare legislation.

The Department of Social Welfare's report was quite different from the rest of the Consistency 2000 audit. The Department looked to find immediate policy remedies to many of the legislative conflicts uncovered. Such an approach was not wholly endorsed by the Commission whose role was not to find solutions. The Commission's report notes that many key Department of Social Welfare staff did not attend the Human Rights Commission training seminars.[66] As the Commission had not examined the conflicts which the Department had identified, they did not input anything to the Department's report to Cabinet. The Commission's final Consistency 2000 report is condemnatory of the approach taken by both Cabinet and the Department in their exclusion of the Human Rights Commission:

> The Human Rights Commission, which felt it had little influence over the approach in Social Welfare focused on identifying conflicts with and infringements of the Human Rights Act ... and was not concerned with policy solutions which were to be addressed by the Government after receipt of the Commission's report. The result appears to have been that ministers were advised prematurely by officials not expert in human rights matters, about risks to social welfare programmes that may not have been real, and had options proposed to them that were not well-founded in human rights terms.[67]

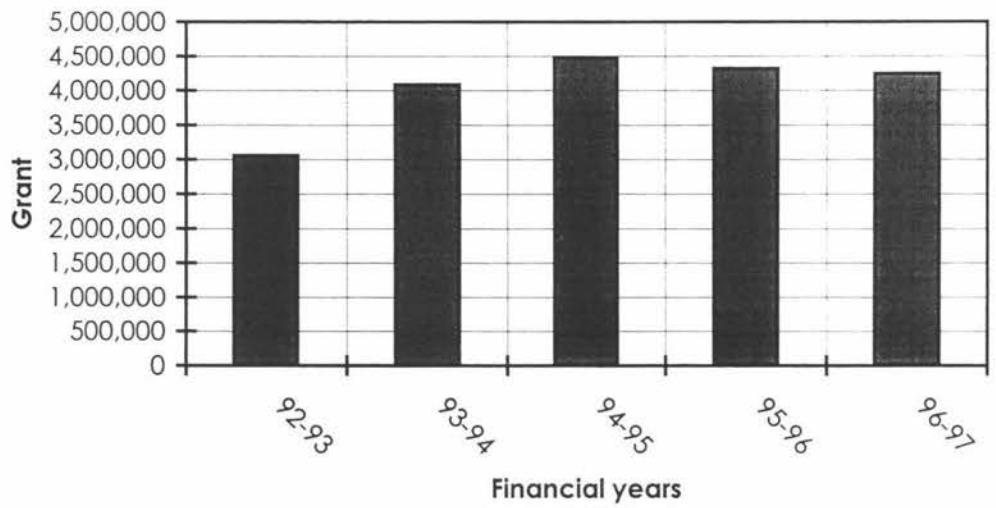
Self-audits

In August 1995 Cabinet established an Officials Committee to work with the Commission on developing an overall framework and timetable for Consistency 2000. The initial timetable set in 1995 envisaged the completion of the self-audits by March 1997, and the completion of the external audits by March 1998.[68] The completion of a self-audit was not the full extent of each Government department's role in Consistency 2000. After the Commission's audit of a department's legislation a report was to be issued outlining the areas of conflict which had been established. In this way they could set in motion any legislative changes if so desired. Interim reports were also made to the Minister of Justice for the same reason.[69] By early 1997 it was clear that the project was going to occupy about 20% of the Commissioners' time until the end of 1998.[70]

Funding

Many of the difficulties in this period arose from under-funding. A pertinent example was the Consistency 2000 project which was never given any specific or extra funding. Although Government grants over this period significantly increased in comparison to the previous period, this was due to the increased workload of the 1993 Act.[71] The graph below shows a $1,000,000 increase in 1993-1994 funding in anticipation of the 1993 Act. Since 1994 funding has steadily decreased despite the increase in costs associated with the Consistency 2000 project.

Figure 9 Government Grants 1992 – 1997
(adjusted for inflation to 1997 dollars)



Initially the funds for Consistency 2000 were taken from the Commission's annual Government grant, but the Commission decided to reassess that situation at the end of the pilot study, as it foresaw the curtailing of other Commission activities if this were to continue.[72] By the middle of 1996 the Commission was beginning to question the value of the project considering the scarce resources.[73] A folder prepared in 1996 on human rights for Members of Parliament notes that a letter from the Ministry of Justice in July 1996 recognised the need for additional funding in order for Consistency 2000 to be completed.[74] In January 1997, after receiving the Commission's request for extra funding, the Secretary for Justice wrote to the Commission to inform them that it would not be successful. The reason was that "Treasury's preliminary view is that initiatives which fall outside the coalition agreement have a low probability of being provided with additional appropriation."[75] The

Commission was also told that it would have to exhaust its reserves before additional funding would be considered. This was done by mid 1997. The final estimated cost of the project was $1.28 million.[76]

Ending the Consistency 2000 Project

Remembering that the Commission had set a target date of March 1997 for receiving all self audits, it is highly significant that by June 1997 only 25% of the projected data had been received from Government departments and agencies. This was due to the preparation of the Government budget, and policy changes required by the Coalition Government.[77] Of those inconsistencies which had been identified the Commission noted that most of the conflicts related to traditional definitions of 'family' which assumed both two parents and heterosexual couples.[78]

The first sign that Consistency 2000 was under threat was the lack of funding. In response to this the Commission boldly chose not to do any further work on the project until more funding was received, stating that

> The opportunity costs of the diversion of resources away from public relations, public education, complaints processing and other projects are serious for the credibility of the Commission and the people whose rights the Commission is bound to protect and promote, but the Commissioners have no alternative. [79]

In this statement the Commission was also responding to an announcement made in June 1997 following a Cabinet decision. Cabinet announced that it was planning to permanently exempt itself from the Human Rights Act other than in areas where it acted in the same manner as the private sector. These included issues such as employment and access to buildings.[80] In the words of the Chief Commissioner, Pamela

Jefferies, such a move 'would represent a significant step backwards in the observance of human rights law in New Zealand.'[81]

A press release from Doug Graham in May 1998 confirmed the plan to wind up Consistency 2000 early.[82] Graham stated that Cabinet had decided in October 1997 to end the project and make Government comply with the Act except for specific exemptions. Each Government department and agency was asked which exemptions it wanted and these would be considered by Parliament. The Human Rights Act was to remain subordinate to other legislation, but Government was to become compliant with the Act. Graham foresaw the amending legislation being passed before the end of 1998, in order that the Commission would not be required to report to Government.[83]

The Human Rights Amendment Bill 1998

The Human Rights Amendment Bill 1998 was announced in May 1998. Its main purposes were to end Consistency 2000 and to remove Government's temporary exemption from the Human Rights Act. Rather than the exhaustive audit which Consistency 2000 was completing, the Government chose to examine inconsistencies with the Human Rights Act as each piece of legislation came up for review. Inconsistencies which were known already would either require a specific exemption from the Human Rights Act or would have to be corrected. The human rights implications of new legislation became the responsibility of department Chief Executives, who had to provide Cabinet with a report detailing these. Other significant changes included the addition of a clause expressly stating that the Human Rights Act would not override any other legislation.[84] A Women's Commissioner was also introduced in the Human Rights Amendment Bill, in fulfilment of a 1996 Coalition Government agreement between National and New Zealand First.[85] The

Women's Commissioner was to be appointed from among the existing Commissioners.

The specific exemptions provided in the 1998 Human Rights Amendment Bill covered many areas. There were fitness and marital status exemptions for the defence force, health and disability exemptions for providers of health and disability services, and age exemptions for employees with age-linked retirement benefits prior to December 1998. The largest number of exemptions were not surprisingly in the area of social welfare legislation. Exemptions were sought allowing the Department of Social Welfare to discriminate in the provision of monetary and non-monetary assistance on the grounds of marital status, disability, age, family status and employment status. The exemptions also allowed the Department to target particular groups of individuals for investigation.[86]

The Labour Party response to these changes was loud. In August 1997 Labour spokesperson on human rights, Tim Barnett, launched a petition to gain support for Consistency 2000,[87] and Chris Trotter, a well-known left-wing writer, called the actions 'potentially the most serious threat to New Zealanders' civil liberties since Rob Muldoon's SIS Amendment Act of 1977.'[88] Yet very few people had heard of the changes or the Amendment Bill - it received minimal media coverage. It was then perhaps with great foresight that in 1997 Rishworth noted that 'the more 'low key' the exercise is kept, the easier it may be for the Government to ignore the final report when it is delivered.'[89]

On 19 August 1998 the Human Rights Amendment Bill was tabled. The reasons listed in the Ministry of Justice briefing material which accompanied the Bill included the fact that it was committing too many resources for the minor inconsistencies found. Considering that only 25-

30% of all self-audit material had even been received, any analysis of the inconsistencies found lessens in significance. In the Commission's own report it is stated that "This report covers only a relatively moderate proportion of the total Acts and regulations in the New Zealand statute book, and Government policies and administrative practices."[90]

Although the Amendment Bill removed the requirement of the Commission to report on 31 December 1998, it had not been passed by that date. Subsequently the Commission presented its report to the Minister of Justice as it was legislatively required to do. It begins: "This is the report that Government did not want."[91]

Internal Restructuring

The Commission faced major restructuring in this period from 1993 - 1997. From late 1993 when the Human Rights Act was being finalised, it was evident that the Commission had inadequate staffing numbers to administer such an enlarged piece of legislation. Between August 1993 and April 1994 all three teams - legal/research, education, and complaints - complained of understaffing.[92] The Commissioners' response was to employ 20 new staff, lifting staff levels from 30 to 50, and to revise their own roles.[93] The review of Commissioner roles freed them to develop policy while management issues would be left to team convenors, henceforth known as managers.[94] In addition, from January 1995 the Commission split its bi-monthly meetings into two - one to deal with complaints, publications, and Consistency 2000, the other an Executive Commission meeting to handle administrative issues, strategic plans and finance.[95]

The Commission was reorganised again between February and June 1996. New managers were appointed including a General Manager, and the teams and duties changed.[96] Two of the teams, education and

research/legal, became one called Information and Promotion. This new team covered the duties of the previous two apart from litigation, which was delegated to a small team under the Proceedings Commissioner.[97]

The new Act prompted many changes to the Commission's relationship with Government. An example is the 'Memo of Understanding' signed by the Commission and the Ministry of Justice in 1996.[98] The memo contained provisions for the two organisations to report to each other and dispute settlement procedures. It also required the Commission to submit quarterly reports to the Ministry on 'service performance variances', proposed corrections, and any other changes to workloads or financial performance.[99] It does not require much in return. Questions were raised as to its necessity and its possible compromise of the Commission's independence.[100] Regardless of these concerns and the opinion of a Queens Counsel that the memo should not be signed,[101] the memo was signed by the new Chief Commissioner, Pamela Jefferies and the Minister of Justice, Doug Graham.

Another internal development over this period has been the institution of formal strategic plans and 'service performance evaluations'. There is ample evidence to demonstrate the effectiveness of these 'tools', especially in addition to the renewed focus of the Commissioners on policy. For example, consistency in approach to inquiries, media, policy initiatives, research, publication standards and even Commission meetings has improved noticeably.[102] The strategic plans form the basis of the service performance evaluations in each annual report since 1991. The first strategic plan covered 1992 - 1995 and introduced the service performance evaluations as well as identifying several holes in the Commission, such as the lack of any media liaison person.[103] Subsequent strategic plans have relied heavily on international principles of human

rights as a guideline for Commission goals.[104] Other common themes include pro-active media management and increased positive publicity.

During this period the Commission also paid more attention to Maori issues. In the past Maori issues had generally been mainstreamed in other Commission activities, apart from two smaller initiatives. Since 1988 an internal committee made up of tauiwi and Maori staff and called Te Runanga had existed to provide support and encouragement for Maori staff, and to act as a 'sounding board' for ideas from other teams. Staff were members of Te Runanga by virtue of race. In 1990 a system entitled Kaupapa Maori was implemented by the Complaints Division as a way of handling Maori complaints in a culturally sensitive manner.

From 1993 the Commission resolved to create a special unit, Te Tari Kaupapa Maori, to affirm the status of Maori as tangata whenua.[105] The unit would be responsible for policy and education, aimed at Maori, and had the support of Te Runanga.[106] Te Tari Kaupapa Maori was launched in November 1994 with the promotion concept of the Commission as a "double-hulled waka".[107] The unit appears to have been successful, meeting all its performance goals and coming in under budget every year. The Commission's 1996 Annual Report noted that demand for the unit's seminars was increasing. However, from 1996 Te Tari Kaupapa Maori suffered cutbacks due to the Consistency 2000 project.[108]

Complaints

Two themes are evident in the complaints function for this period. The first is the rising number of complaints, the second internal reorganisation. The reorganisation of the complaints process means that some statistics and comparisons which were made in previous chapters are not available.

The rising number of complaints over this period was generally due to the addition of grounds in the 1993 Act. The following graph depicts the rise from under 200 complaints received per year to around 250 per year. This in addition to the soaring numbers of inquiries the Commission received (again due to the new grounds and publicity profile) increased the workload significantly.

Figure 10 Total Complaints Received 1993 - 1997

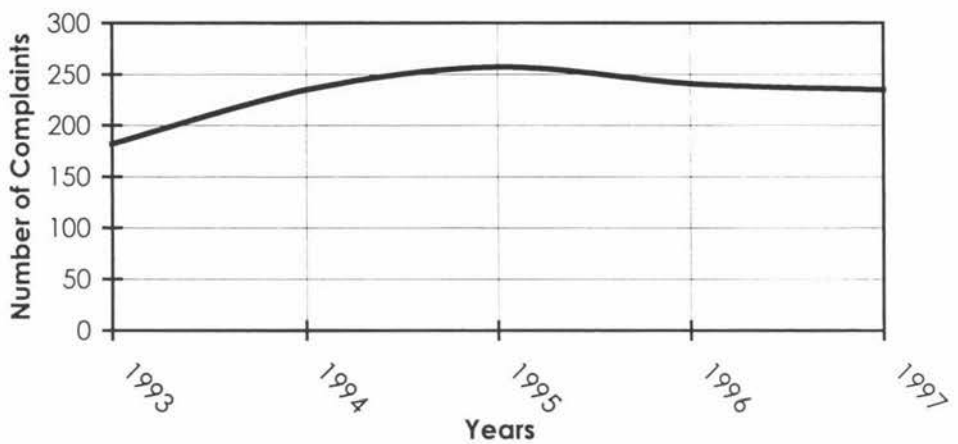
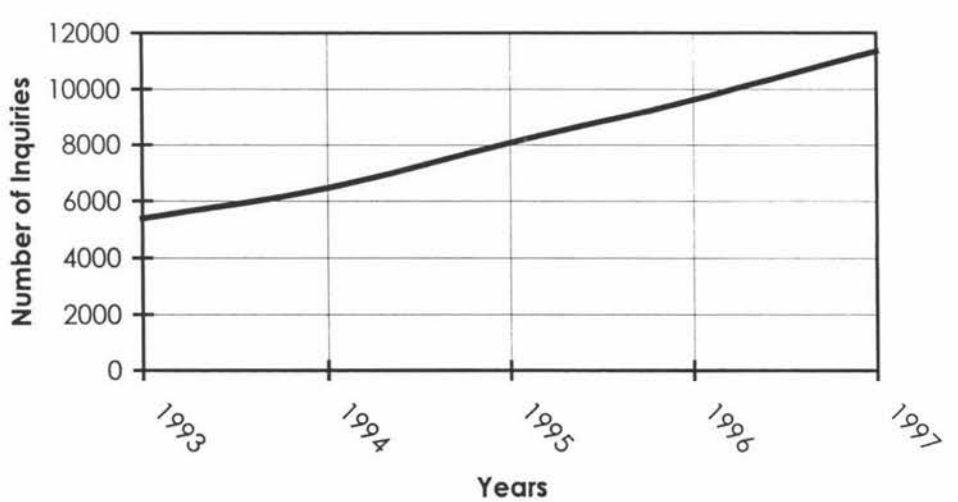
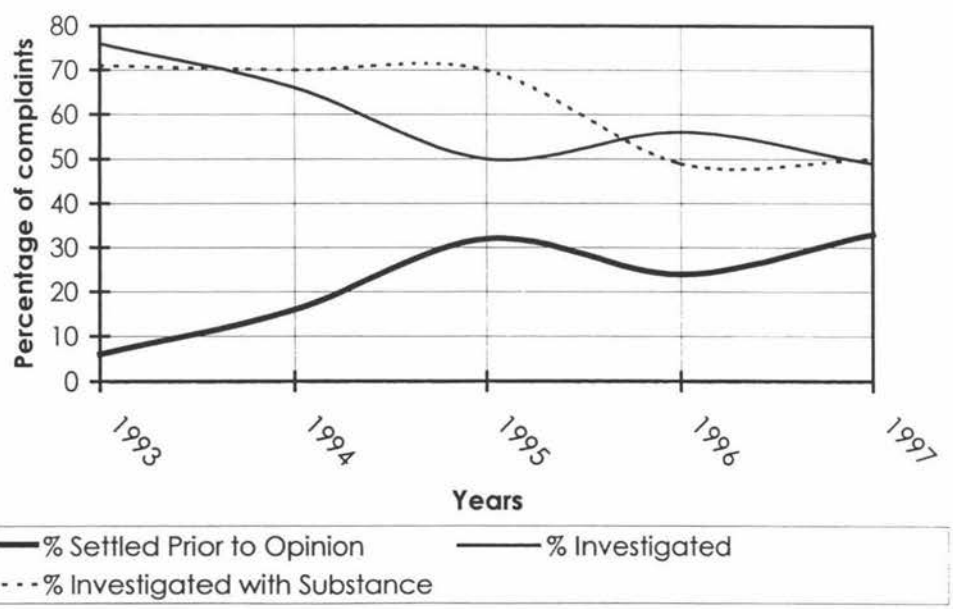


Figure 11 Total Inquiries Received 1993 - 1997



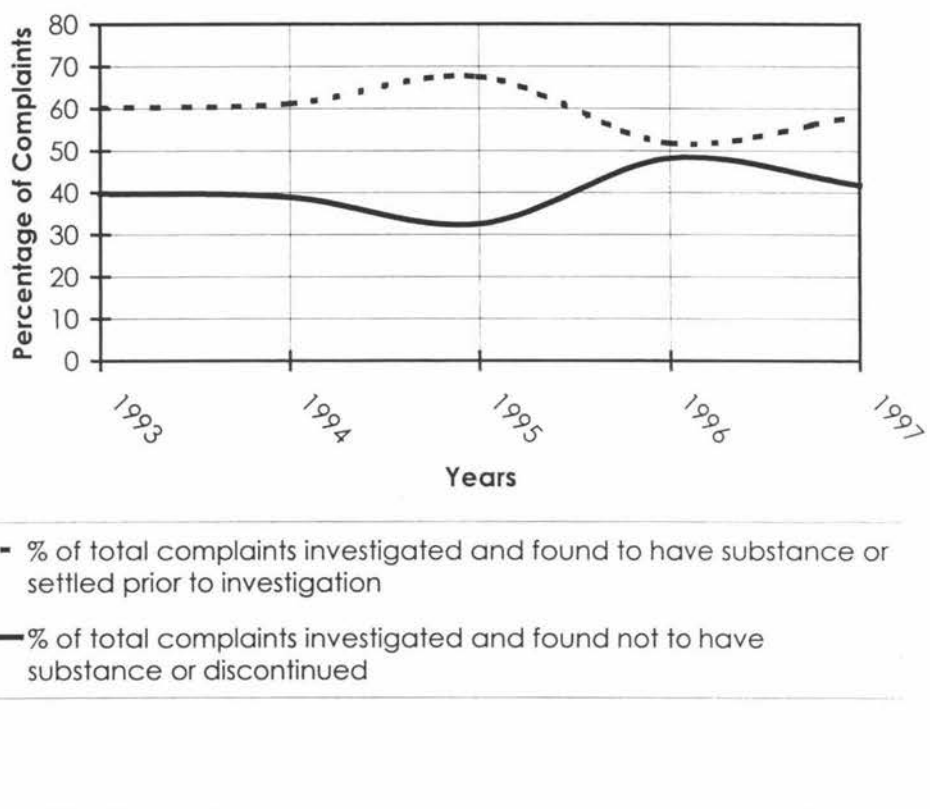
The 1993 Act changed the way the Commission handled complaints. Straightforward complaints went directly to the Proceedings Commissioner for an opinion rather than being investigated first. More complex complaints went to the Complaints Division, and very complicated complaints went to a full Commission meeting for decision.[109] In 1994 the process was again changed to put the emphasis on mediation, rather than investigation. An attempt would first be made to mediate complaints without necessarily establishing all the facts. If then the complaint could not be settled, it would go for investigation by the Complaints Division.[110] This system was declared successful the following year.[111] Due to this change in focus, the number of complaints settled prior to a Commission investigation rose dramatically from under 10% in 1993 to over 30% in 1997. The number of complaints investigated therefore dropped as the following graph demonstrates.

Figure 12 Comparison of Complaints 1993 - 1997



A more useful indication of the percentage of complaints considered to have substance can therefore be gleaned from the addition of all complaints which were settled prior to investigation and all complaints investigated and found to have substance, as demonstrated below.

Figure 13 Comparison of Complaints Considered



This shows a rise to almost 70% in "successful complaints" in 1995 which drops significantly in 1996 to just above 50%. The reason for this is unclear but could have been due to the rising number of complaints under new grounds. As in the early years of the Commission, the lack of awareness about what the Commission could cover could explain several complaints being lodged which were unsuccessful.

Due to the addition of the new grounds several significant settlements and investigations were effected during this period. For example, the first decision on political opinion in employment was passed by the Commission in 1994 and saw the inclusion of trade union activities in the definition of political opinion.[112]

One of the largest and most significant complaints was the 'Stagecoach complaint'. In 1994 a complaint was considered which held that a Wellington bus company was directly discriminating against people in wheelchairs in that they could not access the buses. The company responded that they were exempt from providing access under a clause in the Act which held that compliance was not necessary if undue financial hardship would be suffered by the company. However, as the company were about to purchase new buses the Commission considered that the extra cost for the new buses to be made accessible was not unfair. The company disagreed with the finding and the case went to the Complaints Review Tribunal. The Tribunal ordered the bus company to halt the purchase of new buses unless they had 'super-low floors' (ie. were wheelchair accessible).[113] The company agreed to a trial of the new buses in 1996 and the legal proceedings against the company only ended in 1998.[114] The complaint was particularly significant in that it served as an example to other transport operators and now several companies have accessible buses. Despite the significance of this complaint and the outcome, one of the complainants felt unhappy with the degree to which he felt the rights of disabled people were made negotiable.[115]

The complaints process during this later period was really only hindered by the inefficient operations of the Complaints Review Tribunal. Concerns over delays in Tribunal decisions and hearings began to be noted as early as February 1993,[116] and continued to 1996. For example, the Commission noted in its 1995 Annual Report that during the year

only six cases had been heard and 14 more were waiting, one for over a year.[117] The delays were not only on the Tribunal's side. In the following year, the Complaints Division informed the Commission that several cases were being struck out due to the length of time between Commission decisions and proceedings being filed at the Tribunal.[118] A change in Proceedings Commissioner in 1996 and the appointment of a new Complaints Review Tribunal chairperson before the expiry of the original chairperson's term led to the clearing of many complaints. The previous delays experienced are now no longer an issue.[119]

Education

The careful planning of education activities has been necessitated by the financial constraints imposed by the Consistency 2000 project. Since 1995 many education activities were downscaled due to a lack of funding.[120] Such activities included the production of publications and resources. Had the education team continued to downscale all its projects none would have been effective, so in 1997 an Education Strategy was developed. The strategy developed was based on a study of 'key informants' and their reactions to the HRC. Several important issues were highlighted which then served to focus the education team.

From 1995 the education team began to focus on disabilities, as complaints in this area had begun to rise.[121] Others were quick to pick up on this change in focus. One writer felt that 'The Human Rights Act is a blunt instrument for handling problems of discrimination in the delivery of health and disability services, and has the potential to significantly impede the delivery of effective health care.'[122] Health care providers were worried that certain anti-discrimination provisions were impossible to keep, such as a physician discriminating on the basis of physical illness especially in the provision of scarce resources such as dialysis and transplants.[123] Many of the issues relating to disability discrimination

and health care are still being worked through. Meanwhile the education team has chosen to focus on empowering people with disabilities through training workshops and seminars, designed to promote use of the Act to improve disabled access to services and facilities.[124] The Commission continued to publish booklets and pamphlets relating to disabilities.

Sexual harassment also received a significant amount of attention. Sexual harassment training seminars had been held by the education team for several years but they had been on request in each instance - usually as part of a settlement agreement or discussed along with other issues. The increased demand for seminars led to the employment of a Sexual Harassment Training Coordinator in 1992.[125] Between July 1993 and June 1994, 115 sexual harassment training programmes were run.[126] The Sexual Harassment Training Coordinator was intended to be a self-funded position with costs being recovered through fees,[127] but the 1996 Annual Report shows that only 27% of the consultant's costs were being recovered. Requests for sexual harassment training continued and in 1996 the Commission began work on a special initiative for schools. The resultant kit was a collaboration between the Commission, the Ministry of Education, the PPTA and the New Zealand School Trustees Association. Aimed at Principals and Boards of Trustees, it contains a full explanation on how to establish sexual harassment procedures and the investigation of complaints.[128]

Other publications by the Commission covered topics such as sexual orientation, refugees, children's rights and mental health - most of these publications emanate from representations received from the public.[129] A significant paper authored by the Commission addressing special needs education *invited* complaints of indirect discrimination by explaining how substance will be found in them:

> It may be difficult to establish on a *direct discrimination* test that students with disabilities were treated *less favourably* than others when they receive no less funding than able bodied students. However, it could be argued that the teaching resources used by mainstream schools are inaccessible to students with disabilities who consequently are denied education and, therefore, are being treated less favourably than students without disabilities.[130]

With this pro-active approach to education, the Commission may be beginning to take on a new role.

A significant finding from the 'key informant' study related to the international focus of the Commission. The education strategy notes that 'Education work to date has not been informed by agreements made by the Commission at International Workshops.'[131] It was decided that the work of the education team should better reflect such documents as the Paris Principles and other international work of the HRC. The study identified several groups which also required stronger targeting: 'interest groups, the media, overseas human rights commissions, other rights groups and NGOs.'[132]

A companion document to the education strategy development plan was the Tangata Whenua Statement. This statement contained issues such as sensitivity to cultural differences (for example the issue of transsexuals in Maori culture) and the need to better target Maori, as most are not comfortable approaching the Commission.[133]

Publicity

The new media approach began early. A communications officer was hired to handle all media relations, and this provided the opportunity for a more pro-active media strategy, and also ensured consistency across all media releases.[134] In February 1993 the Commission began planning for a publicity campaign to advance debate on the issue of human rights -

knowing that it would be coming up soon.[135] The campaign became a priority in August as the Act received its royal assent, and involved new logos, toll-free numbers, stickers and t-shirts.[136] From this point on the Commission appeared to be more aware of the media and its value. For example the promotional media strategies are an important aspect of every new publication.[137] More recently the Commission has taken to 'creating' newsworthy stories for the media from actual complaints.[138] This is a far cry from the early period when the Commission tried desperately to attract as little media attention as possible.

Public opinion of the Commission also seems to have improved. In June 1997 an NBR/Consultus Poll showed that 77% of women and 71% of men felt the Commission was necessary. The poll however indicated areas of the Commission's image which needed work, for example its relationship to the poor, and more advertising of the Commission's functions.[139]

Research and Legal Team

In 1994, at the launch of the Human Rights Act Mulgan stated that:

> While the Commission has always had wide powers to receive representations, make public statements, scrutinise legislation and report to the Prime Minister on 'any matter affecting human rights', neither its resources nor its own, or the public's perception of its role have allowed it to take real advantage of the opportunities those powers offered. But now we hope to be able to do just that.[140]

The team charged with the tasks at hand was the Research/Legal team, a unit which Mulgan was proud to have established.[141] Its main tasks were the preparation of guidelines, submissions and reports to various ministers.

The bulk of the Research/Legal team's work was in the area of submissions to Select Committees. Between 1993 and 1997 34 submissions were made. Most of the submissions related to existing and proposed legislation that did not meet the new requirements of the Act. For example, many legislative definitions of 'family' did not include same-sex partners (although Government was not obliged to meet that requirement of the Act until 2000, it was assumed that they would wherever possible). In most of these submissions the suggestion was made that if the piece of legislation in question was not altered then it would be picked up in the Consistency 2000 project and would have to be altered later. For example, from the *Submission to the Social Services Committee on the Youth Income Support Bill*:

> if the Youth Income Support Bill is passed it is a matter which would need to be reported to the Minister of Justice by the Commission pursuant to section 5 (1)(k).
>
> It is the Commission's position that legislation being either introduced or amended should be made consistent with the Human Rights Act, as far as is possible. This would be in keeping with the legislative scheme whereby all Acts and Regulations should be either consistent with, or specifically exempted from, the Act by 31 December 1999.[142]

A dominant theme through the submissions from 1994 on is the reference to international instruments and standards, which supports the idea of an emerging legal culture acutely aware of the power of international human rights instruments and bodies. Examples abound but it can be seen clearly in the submission on the Mental Health (Compulsory Assessment and Treatment) Amendment Bill in 1994. In the Mental Health Amendment Bill the Commission claimed that any compulsory treatment would be a direct violation of the right to dignified treatment as stated in the International Covenant on Civil and Political Rights. The submission also refers to the UN Declaration of the Rights of Disabled

Persons and UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.[143] Other submissions refer to the International Convention on Economic, Social and Cultural Rights and World Health Organisation standards for housing.[144]

The Commission's submissions have not always been well received. For example, in its submission on the income and asset testing of elderly people requiring hospitalisation, the Commission suffered criticism from members of Parliament. The Commission argued that "rights recognised under the International Covenant on Economic, Social and Cultural Rights ... appear to be seriously restricted, if not breached."[145] Asset testing, the Commission believed, amounted to discrimination on the basis of age, disability, marital, and family status. A leaked submission from the Ministry of Foreign Affairs stated that the Commission's claims of breaches of international instruments was wrong, "poorly drafted and legally simplistic".[146]

The Research/Legal team was responsible for preparing reports to Government on legislation. Examples of such reports include the aforementioned *Report on Income and Asset Testing of Elderly People,* and the *Report to the Minister of Justice on the Elimination of Discrimination in Superannuation Schemes.* This latter type of report was an update of trends in superannuation.[147] More recently Wyatt Creech, Minister of Education, requested the Commission report on the tertiary education green paper.[148]

The preparation of guidelines was a new function for the Commission and proved popular. The Commission could publish non-binding guidelines on aspects of the Act and how to comply with the Act. By 1997 the Research team had produced five sets of guidelines. The first

were the *Advertising Guidelines* and the *Pre-employment Guidelines*. The *Advertising Guidelines* set out the legal requirements of advertising in a non-discriminatory way, including the many exceptions to the Act, and an explanation of a 'bona fide occupational qualification' which allows for discriminatory advertising in limited circumstances.[149] The *Pre-employment Guidelines* followed this up with examples of unlawful questions to ask in interviews and on job application forms.[150] Next came the *Superannuation Guidelines* in 1995. These were very complicated as they involved an explanation of the changes to the age limits for superannuation in 1996 and then in 1999.[151] In 1997 a set of guidelines were published for the insurance industry, which were well received and were perhaps a little more in-depth than previous guidelines. The *Insurance Guidelines* covered specific grounds and exemptions in the Act but also delved into likely areas of contention or confusion such as age, genetic testing, and disability.[152] In the same year a joint set of guidelines on the Human Rights Act and Equal Employment Opportunities were published by the HRC and the New Zealand Employers' Federation. This was a simpler booklet outlining the way the Act operated, the complaints process and how the Act affected employers and employees.[153]

The Commission's Growing Involvement in International Human Rights Work

Since 1993 the HRC has been more involved in international conferences and events than previously. A long-time staff member of the Commission, Frances Joychild recently noted that Mulgan's close attention to international human rights issues was "a very important development" for the Commission and one which had been extended by Jefferies.[154] A possible explanation for why the Commission has, only in the last eight years, paid particular attention to international affairs is difficult to provide. It may be that a legal culture is emerging in New

Zealand which is providing stronger support for international instruments. This has been related to the influence that the United Nations Human Rights Committee (UNHRC) has had on New Zealand courts since New Zealand's signing of the first optional protocol (OP) to the International Covenant on Civil and Political Rights on 26 May 1989.[155] The OP allows New Zealanders whose covenant rights have been violated, and who have exhausted all domestic remedies without success, to make an application to the UNHRC.

Since the early 1990s the HRC has become involved with an organisation of 'National Institutions for the Promotion and Protection of Human Rights' which has met regularly. An important task undertaken at one of these meetings was the creation of guidelines for the establishment and functioning of national human rights institutions - these have become known as the 'Paris Principles'. The two most important aspects of the Paris Principles as seen by Mulgan were 'representativeness of the society' and 'independence from Government.'[156] Both issues were of significance to the New Zealand Commission.

From these international meetings came the establishment in July 1996 of the Asia Pacific Forum of National Human Rights Institutions.[157] As one of the four inaugural members the New Zealand Human Rights Commission has played a significant role, and in 1998 the Forum was coordinated by Chief Commissioner Pamela Jefferies.[158] As one of the oldest Human Rights Commissions the New Zealand Commission's most helpful role is in the area of training and advice to other Commissions and Governments. For example, in 1996 the New Zealand HRC advised both Hong Kong and Mongolia on the establishment of Human Rights Commissions. Other training has occurred in the form of frequent staff exchanges, particularly with the Australian Commission.

The Commission's involvement in the international human rights forum corresponds with both the UN's own increased focus on human rights,[159] and New Zealand's term on the United Nations Security Council (1992-1995).[160] The Commission has been particularly involved in the preparation of New Zealand's reports under the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights on the country's human rights situation.

While the responsibility for writing and submitting a State's periodic reports under the ICCPR and the ICESCR lies with Government, the Commission has been involved in the process of background data gathering. The Commission has also been available to answer the oral questions of the UN Committees examining the reports. Certain problems arose however when the Government response was notably different to that which the Commission would give. This situation has led to the Commission submitting its own reports to UN Committees. In a 1995 report the Commission stated that "In appearing reluctant to lead by example the Government does not assist the Commission in the promotion and protection of these rights within the private sector...".[161] The Commission did not hesitate to identify rights which it felt had been unduly limited, for example the right to work and the Employment Contracts Act, and equality of pay between the sexes.[162]

Although the HRC and the Ministry of Foreign Affairs and Trade often work together there have been tense occasions. One such occasion was at the UN Centre for Human Rights' conference on/for 'National Institutions for the Promotion and Protection of Human Rights' in February 1995. On her return Jefferies described the Ministry's speech on the Draft Declaration of Indigenous Peoples as "over cautious and full of weasel words."[163]

Conclusion

In 1996 Martha Roche, a Commission staff member, wrote that

> In addition to identifying the benefits of the success of Consistency 2000, the Commission has also had to consider the risks associated with failure. These included a loss of credibility with Government and with the public and a decreased likelihood that human rights factors will become essential policy considerations.[164]

In 1998 that possibility was upon the Commission. Staff member Frances Joychild recalled in her farewell speech that 'The Human Rights Commission is now at its rockiest time since the late 1970s. In many respects the experience over the Consistency 2000 project reminds me of the Commission in the early 1980s.'[165] Although the Commission submitted its objections to the 1998 Human Rights Amendment Bill, it also began to develop Public Policy Guidelines to aid in the application of the Act by Government Department Chief Executives.[166] The main objections the Commission had to the Amendment Bill relate to it remaining subordinate, and the exemptions sought by the Department of Social Welfare. The Commission was concerned that without completion of Consistency 2000 any discriminatory practice will remain until that legislation happens to be reviewed.[167] Other concerns centred around the independence, or lack thereof, which the New Zealand HRC has from Government.

Further to issues of domestic credibility, Rodney Harrison, QC, has pointed out that the cessation of Consistency 2000 'would demonstrate both nationally and internationally a fundamental lack of commitment to basic human rights.'[168] The international focus of the New Zealand Human Rights Commission means that many countries and the United Nations will be watching to see what happens to Consistency 2000. It does not set a good precedent for the first project of its type in the world

to be discarded as too difficult. If a small country under one unified legal jurisdiction can not carry off a review of the human rights compliance of its legislation then what message does that give other countries?

In 1995 New Zealand submitted its third report to the United Nations under the ICCPR. The UN Committee examining the report questioned the compatibility with the Covenant of the 1 January 2000 Government compliance date. The Government's response was that it was intended to allow the Government enough time to bring everything into line with the Act[169] - what it will answer next time remains to be seen. In the eyes of the Chief Commissioner, Pamela Jefferies, 'The inherent promise to reduce unlawful discrimination in legislation to only that essential for sound policy reasons has not been realised. The preeminence of human rights law has proved a mirage.'[170]

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[1] *Human Rights Bill*, as introduced by Doug Graham in 1992.

[2] *NZPD*, 15 December 1992, v.532, p.13202.

[3] ibid., p.13204.

[4] ibid., p.13206.

[5] ibid., pp.13207-13209.

[6] ibid., p.13211.

[7] ibid., 22 July 1993, v.536, p.16741.

[8] Human Rights Commission, *Minutes and Supporting Papers*, 13 May 1993.

[9] Human Rights Commission file, *Human Rights Bill 1992*, no. 681.

[10] Human Rights Commission, *Human Rights Bill: Submission of the Human Rights Commission* (1993), p.1.

[11] ibid., pp.2-4.

[12] ibid., p.9.

[13] ibid., p.15.

[14] ibid., p.23.

[15] ibid., p.1.

[16] ibid., pp.16-17.

[17] ibid., p.22.

[18] ibid., p.6.

[19] ibid., p.6.

[20] *NZPD,* 22 July 1993, v.536, pp.16741-16742.

[21] *Submissions to the Justice and Law Reform Committee regarding the 1992/3 Human Rights Bill.*

[22] Human Rights Commission, *Human Rights Bill: Supplementary Submission of the Human Rights Commission to the Justice and Law Reform Select Committee,* 1993, pp.1-2.

[23] ibid., p.10.

[24] *NZPD,* 22 July 1993, v.536, p.16742.

[25] *Human Rights Bill* as reported back from Justice and Law Reform Committee, 22 July 1993.

[26] *NZPD,* 27 July 1993, v.537, p.16917.

[27] ibid., pp.16907-16953.

[28] Jane Phare, 'Rights to sort out the wrong', *New Zealand Herald,* 5 February 1994, s.2, p.5.

[29] *Human Rights Act 1993,* no.82, s.1(5).

[30] ibid., s.21. The 1977 Act covered sex, religious or ethical belief, marital status, race*, colour*, national or ethnic origins* (*administered by the Race Relations Office).

[31] There is no mention in 'sexual orientation' or 'sex' of trans-gender people, ie. transsexuals and transvestites.

[32] *Human Rights Act 1993,* s.21(h)(i)-(vii).

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[35] ibid., s.70.

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Conclusion: The New Zealand Human Rights Commission at 20

In September 1998 the New Zealand Human Rights Commission celebrated its twentieth anniversary. Paul Hunt, senior law lecturer at Waikato University, spoke at the celebrations. He summarised the position of the HRC, saying "The Commission is one of the oldest and most respected national human rights institutions in the world. It is held in high regard because of its statutory framework, which gives it a broad mandate and compelling list of prohibited grounds of discrimination."[1]

The path which brought the HRC to such a position was not straight and smooth but wavering and full of pot holes. The Commission was established with the implementation of the 1977 Human Rights Commission Act in September 1978. The Act was the product of several international human rights developments such as the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. The timing of the Act also derived in part from New Zealand's preparedness for a strong piece of human rights legislation. New Zealand had already achieved legislation on race relations, equal pay, and establishing the Ombudsman prior to 1977. Coupled with the Select Committee examination into the Role of Women in New Zealand, the introduction of the 1977 Human Rights Commission Act was a logical progression.

Beginning its operations with a less than full complement of Commissioners, the Human Rights Commission immediately fell out of favour with both the media and Government and by 1984 faced the possibility of extinction.

Following the introduction of the Labour Government in 1984 the Commission entered a much more stable period. Funding was increased and the Commission did not confront the undermining which it had previously. In fact, the Government openly invited the Commission to examine the Human Rights Commission Act and suggest changes and improvements. This stable environment allowed the Commission to make progress on policy issues and to establish precedents. This was reflected also in the updating of the Commission's structure which developed to match the different demands of the period.

In 1993 the Human Rights Act was passed replacing the 1977 Human Rights Commission Act and incorporating many of the Commission's earlier suggestions. The new Act created a more powerful Commission which could act on an increased number of grounds of discrimination. The Consistency 2000 project, however, diverted many of the Commission's resources from these new grounds of discrimination, as the project never received proper funding.

It is clear then that the New Zealand Human Rights Commission has followed a bumpy path to arrive at its current position. Despite this, the Commission has consolidated its role as a protector and promoter of human rights in New Zealand. The Commission's involvement in international human rights issues has increased and it is now a role model amongst national human rights institutions. The refinement of the Commission's internal structure has shifted the focus more towards mediation. Through this process the complaints which are formally taken through to their conclusion are more substantial and successful.

The Commission's ability to report on the human rights implications of legislation has been increasingly exercised but still to less than desired effect. The Consistency 2000 project was the logical culmination of this

function. However, its premature ending and the disregard of the Commission's suggestions does not bode well for future legislative reports.

The expanding role of the Human Rights Commission in international affairs means that an examination of its successes and failures can be of value to similar institutions at a developmental stage. This could be particularly useful for developed countries. The human rights situations of developed countries are easily overlooked in favour of examining the often disturbing situations in still developing countries such as China, India, Africa and South America.

This study of the Human Rights Commission is well placed to act as a springboard for further studies. While there is already a substantial collection of legal examinations of human rights issues both domestically and internationally, there are several gaps in the social examination of human rights in New Zealand.

One area which is beginning to attract academic attention is New Zealand's role in international human rights movements, including through the Human Rights Commission, non-governmental organisations and Government.

Another valuable examination would be a comparison of several Human Rights Commissions - perhaps a comparison of the more developed institutions such as New Zealand, Canadian or Australian Commissions. This is especially pertinent to New Zealand as many of our anti-discrimination laws and definitions have been based on laws from these countries.

An examination will also need to be done on the effects of the premature ending of Consistency 2000. Pamela Jefferies said of Consistency 2000 "It is regrettable that the Government had a change of heart midway through the Consistency 2000 review. It has now got a report that is much less detailed and comprehensive than it could have been. ... This has been a missed opportunity."[2] The effect on the status of the New Zealand Human Rights Commission both nationally and internationally will need analysis. Such an examination could easily fit into a wider examination of the role of the HRC in the future.

When the Human Rights Commission celebrated its twentieth anniversary, Mary Robinson, the United Nations High Commissioner for Human Rights sent it this message.

> The New Zealand Human Rights Commission has made a very important contribution to human rights ... as an example to other peoples and countries...
>
> Your continued success is important to our strategy to provide examples worthy of emulation to countries which do not yet have such mechanisms. Your work in a number of areas, including equality for women and protection for indigenous peoples and minorities has, I believe, been an important example that others can build on.[3]

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Appendix 1 Glossary

CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
HRA	Human Rights Act
HRC	Human Rights Commission
HRCA	Human Rights Commission Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

Appendix 2 Government Grants 1979 -1997

Table 1 Government Grants to the Commission 1979 - 1997

Adjusted for Inflation

Base Year = 1997

CPI taken from New Zealand Yearbook 1998.

Financial Year (April-March)	Actual Govt grant	CPI Index	Conversion factor	Adjusted Govt grant ($1997)
79-80	$583,583	324	3.339506	1,948,879
80-81	$643,000	374	2.893048	1,860,230
81-82	$740,181	433	2.498845	1,849,598
82-83	$782,000	488	2.217213	1,733,861
83-84	$532,000	505	2.142574	1,139,850
84-85	$681,270	572	1.891608	1,288,696
85-86	$882,046	647	1.672334	1,475,075
86-87	$973,973	765	1.414379	1,377,567
87-88	$1,377,580	834	1.297362	1,787,220
88-89	$1,895,953	867	1.247982	2,366,114
89-90	$2,248,889	928	1.165948	2,622,088
90-91	$2,116,444	970	1.115464	2,360,817
91-92	$2,311,111	978	1.106339	2,556,873
92-93	$2,790,223	987	1.096251	3,058,785
93-94	$3,776,000	1000	1.082	4,085,632
94-95	$4,306,667	1040	1.040385	4,480,590
95-96	$4,240,889	1063	1.017874	4,316,690
96-97	$4,240,888	1082	1	4,240,888

Appendix 3 Timeline of Commissioners

Chief Commissioner

Patrick J. Downey	Sep 1978 - Feb 1984	
Justice John H. Wallace	Feb 1984 - Jun 1989	
Margaret Mulgan	Jun 1989 - Aug 1994	later Margaret *Bedggood*
Pamela Jefferies	Aug 1994 -	

Proceedings Commissioner

(new position as of 1984)

K. Graeme MacCormick	Feb 1984 - Jan 1989	Alternate Chairman: Mar 1985 - Mar 1986 Jan 1988 - Jan 1989
Peter E.G. Hosking	Jan 1989 - Jun 1996	Alternate Proceedings Commissioner: Jun 1988 - Jan 1989
Chris Lawrence	Jun 1996 -	

Human Rights Commissioners

Ria M. McBride	Sep 1978 - Mar 1980	not replaced until 1984
Margaret M. Hutchison	Sep 1978 - June 1984	part-time
Margaret Clark	Feb 1984 - Jan 1988	
Diana Shand	Feb 1984 - Jan 1987	Special Responsibility for Women's Affairs and South Island
	Jun 1987 - Jan 1989	Part-time Special Responsibility for the South Island
Sheila Peacocke	Jun 1984 - May 1987	
Rae Julian	Feb 1987 - Feb 1992	Special Responsibility for Women's Rights

Erihapeti Murchie	Feb 1988 - Jun 1996	
Areta Koopu	Jun 1996 -	
Carolynn Bull	Nov 1989 - Mar 1995	Part-time: Nov 1989 - Nov 1990 Special Responsibility for the South Island
Ross Brereton	Mar 1995 -	Special Responsibility for the South Island

Race Relations Conciliator

Harry D.B. Dansey	- Nov 1979	
E Te R. Tauroa	Jan 1980 - Mar 1986	
Walter Hirsch	Mar 1986 - Aug 1989	
Christopher Laidlaw	Aug 1989 - Oct 1992	
John Clark	Nov 1992 - Mar 1996	
Rajen Prasad	Mar 1996 -	

Ombudsman

Graeme R. Laking	- Oct 1984	
Lester J. Castle	Nov 1984 - Nov 1986	
John F. Robertson	Dec 1986 -	Ceased to be a member of the Human Rights Commission Feb 1994

Privacy Commissioner

Bruce Slane	Apr 1992 -	Membership of Human Rights Commission began in Apr 1992

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