

BEGINNERS' GUIDE TO THE HUMAN RIGHTS ACT 1993

Te Aka Matua o te Ture | Law Commission is carrying out a review of the protections in the Human Rights Act 1993 for people who are transgender, people who are non-binary and people with innate variations of sex characteristics.

This page explains some features of the Human Rights Act that might help readers to understand key issues for the Commission's review. This page is intended to be a simple summary so some details have been left out and we don't always use the exact language of the Human Rights Act. We have provided some links for further information at the end.

This guide is not legal advice. If you want advice about how the Human Rights Act might apply to your situation, we encourage you to contact [Te Kāhui Tika Tangata | Human Rights Commission](#) or a lawyer.

I. An Anti-Discrimination Law

The Human Rights Act does not protect all types of human rights. In Aotearoa New Zealand, human rights are protected in many different laws. For example, New Zealand has a law called the New Zealand Bill of Rights

Act 1990 which protects a range of rights such as fair trial rights and the freedoms of opinion and belief, expression, religion and association. Human rights are also protected by international treaties.

The Human Rights Act is mainly about discrimination. Discrimination is when someone treats you differently and worse than others based on a prohibited reason. Examples are refusing you a job, to rent you a flat, or access to a public facility because of your sex or race or religion. The Human Rights Act states when it's unlawful in Aotearoa New Zealand for someone to discriminate.

It's not always unlawful to treat people differently. Sometimes it can be fair to treat people differently from others. The Human Rights Act has some ways to distinguish between fair and unfair differences in treatment. This allows for competing rights and interests to be weighed.

As we will explain, the Human Rights Act does not generally cover the way people behave in private.

II. The Prohibited Grounds of Discrimination

One way the Human Rights Act identifies unfair differences in treatment is by singling out some "prohibited grounds of discrimination". Currently, these are: sex; marital status; religious belief; ethical belief (which is defined in the Act as the lack of a religious belief); colour; race; ethnic or national origins; disability; age (but only if you're 16 or over); political opinion; employment status; family status; and sexual orientation.

You can't complain about discrimination under the Human Rights Act unless the difference in treatment was linked to one or more of these prohibited grounds.¹

This can be:

- Through **direct discrimination**. This is when the difference in treatment was *because of* a prohibited ground.
- Through **indirect discrimination**. This is when the difference in treatment was not because of a prohibited ground but its *effect* was to disadvantage people on the basis of a prohibited ground. An example is a job advert that requires New Zealand qualifications when that isn't really necessary to perform the role. This would discriminate indirectly on grounds of national origin.

The prohibited grounds of discrimination apply to someone's present, past or even assumed circumstances. For example, it's unlawful to discriminate against someone because they vote for a particular political party, because they once voted for that party or because you incorrectly assume they vote for that party. It's also unlawful to discriminate against someone because their friend or relative votes for that party.

The list of prohibited grounds in the Human Rights Act doesn't expressly refer to people who are transgender, non-binary and/or have variations of sex characteristics. The list of prohibited grounds doesn't contain the term "gender", nor related terms such as "gender identity" or "gender expression". It doesn't contain the term "intersex".

Discrimination on these bases may already be prohibited by one or more of the current grounds listed in the Human Rights Act although this has not yet been considered by a New Zealand court or tribunal. For example, the Government considers that the existing ground of “sex” covers discrimination against people who are transgender, non-binary and/or have innate variations of sex characteristics (although it considers the law could be clearer). Te Kāhui Tika Tangata | Human Rights Commission is also happy to accept complaints of discrimination on this basis. In some overseas jurisdictions, the ground of disability has been successfully relied on.

III. Rules that Apply to the Government (Part 1A of the Human Rights Act)

Even if someone treats you differently and worse based on one of the prohibited grounds, it doesn't automatically mean the treatment is unlawful. The Human Rights Act contains two sets of rules to determine when treatment is lawful and when it's not.

The first set of rules applies to government agencies and others carrying out government functions. A government act, policy or practice is unlawful discrimination if it:²

- treats someone differently than others based on a prohibited ground; and
- leaves them worse off than others; and
- the government has not shown the difference in treatment was reasonable.

The third requirement recognises there can be good reasons for governments to single out groups for special treatment. An example is an old age pension, which treats people differently based on their age. Even though a government policy or practice treats two groups of people differently, it might be reasonable (and therefore lawful) if it's well designed and meets an important need.

Differences in treatment are also lawful if they're done in good faith to help people who are disadvantaged because of discrimination. An example might be providing support to help disabled people to obtain employment.

IV. Rules that Apply to Other People (Part 2 of the Human Rights Act)

A second set of rules applies to private people and organisations. These rules are more detailed (which helps people know their rights and obligations). But these rules apply in a more limited way than the rules about government.

A. Private people and organisations are only bound when they engage in aspects of public life

Mostly, the anti-discrimination rules in the Human Rights Act only apply to private people and organisations when they take part in certain public-facing activities that are listed in the Act.³ For example, people are covered by the Human Rights Act when they are:

- making employment decisions, or decisions about who gets to belong to a business partnership;

- deciding about membership of an industrial or professional association;
- denying someone access to a public place or vehicle;
- refusing someone goods, services or facilities that are available to other members of the public;
- refusing to sell or rent someone a house, or ending a lease, or deciding how much to charge their tenants;
- deciding who gets to go to a school or university, or to take part in vocational training.

If you're carrying out one of the listed activities, it's usually unlawful for you to treat someone differently and worse than others because of a prohibited ground of discrimination. An example is that it's usually unlawful to refuse to hire someone because you don't like their race or sex or political opinion.

Outside of these listed activities, the Human Rights Act doesn't usually cover private (non-government) conduct. For example, the Human Right Act doesn't stop people from discriminating in who they choose to spend time with and live with. It even allows discriminatory membership rules for private clubs.

B. Other circumstances in which it is lawful to discriminate

Even if they fall within one of the listed activities, a person's actions won't be unlawful if they're covered by one of the exceptions in the Human Rights Act. These exceptions are one of the ways the Human Rights Act distinguishes between fair and unfair differences in treatment. An example is you can discriminate because of

someone's political opinion if you're hiring them to work for a political party.

Some of these exceptions in the Human Rights Act allow for discrimination on the ground of "sex". Here are some examples (but there are others):

- when hiring someone for a domestic job in a private household;
- when employing someone as a counsellor on very personal things like sexual matters;
- when providing separate public facilities for public decency or public safety;
- in competitive sports for people who are 12 or over if the strength, stamina or build of competitors is relevant.

Some exceptions in the Human Rights Act allow discrimination for specific activities and on particular grounds. Some exceptions apply more widely. For example, differences in treatment are always lawful if they're done in good faith to help a person who belongs to a group that's included in the list of prohibited grounds of discrimination, and if it's reasonable to think the group needs help to achieve equality.

C. "Other forms of discrimination"

The Human Rights Act also describes a handful of "other forms of discrimination" that it says are unlawful. These provisions operate slightly differently from the rest of the

Human Rights Act but apply to conduct that's similar to discrimination.

These other types of discrimination include: inciting racial disharmony; sexual and racial harassment; treating someone unfairly in an employment decision because they're a person affected by family violence; conversion practices; unfair treatment of a whistleblower or of a person who has made a complaint under the Human Rights Act; and advertising to do something that breaches the Human Rights Act.

V. Other Provisions in the Human Rights Act

The Human Rights Act contains many other parts. For example, it establishes ways for discrimination complaints to be made and decided.

If you want to read more about the Human Rights Act, Te Kāhui Tika Tangata | Human Rights Commission has some helpful information on its website:

- [What are human rights? \(tikatangata.org.nz\)](https://www.tikatangata.org.nz/what-are-human-rights)
- [Human rights in legislation \(tikatangata.org.nz\)](https://www.tikatangata.org.nz/human-rights-in-legislation)
- [Equality and Freedom from Discrimination \(tikatangata.org.nz\)](https://www.tikatangata.org.nz/equality-and-freedom-from-discrimination)

Te Kāhui Tika Tangata | Human Rights Commission also has an information and support line, which you can contact on 0800 496 877 or infoline@hrc.co.nz.

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- ¹ There are some limited exceptions contained in the “other forms of discrimination” discussed below.
 - ² Unlawful discrimination by the Government breaches both the Human Rights Act and the New Zealand Bill of Rights Act 1990.
 - ³ The “other forms of discrimination” contain some narrow exceptions to this.