

The Diversity Matrix

Updating What Diversity Means for Discrimination
Laws in the 21st Century

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Other publications of the Superdiversity Centre include:

Superdiversity Stocktake: Implications for Business, Government and New Zealand, published on the Centre's website.

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Contents

| | |
|-----------|--|
| 4 | Introduction |
| 5 | Overview |
| 6 | What is intersectional discrimination? |
| 9 | Development of an intersectional approach |
| 9 | Issues with the single axis / grounds-based approach |
| 10 | Increasing superdiversity |
| 12 | Overview of research on 'double disadvantage' |
| 18 | New Zealand |
| 19 | Overview |
| 19 | Test for determining breach of s 19(1) |
| 20 | Case law on intersectional discrimination |
| 22 | Could s 19(1) of the NZBORA accommodate an intersectional discrimination claim? |
| 23 | An intersectional discrimination claim under the Treaty of Waitangi |
| 23 | Case studies: What might an intersectional discrimination case look like? |
| 25 | Need for increased awareness of intersectional discrimination |
| 27 | Overseas Jurisprudence |
| 28 | United Kingdom |
| 30 | Canada |
| 34 | Australia |
| 35 | United States |
| 37 | Europe |
| 42 | International human rights instruments |
| 46 | Key issues arising in intersectional discrimination cases |
| 47 | Selection of appropriate comparator |
| 53 | Causation / Issues of proof |
| 54 | Remedies in intersectional discrimination cases: Quantifying the compounded disadvantage |
| 57 | Conclusion |
| 60 | Table of Cases (New Zealand and Overseas) |
| 63 | Index |
| 67 | Endnotes |

Introduction

Overview

1. One of the implications of New Zealand's growing ethnic and cultural diversity, which I wrote about in the *Superdiversity Stocktake*,¹ is the need to broaden the definition of diversity so that it takes into account multiple aspects of a person's diverse characteristics where these converge and intersect. This means not just considering (for example) gender diversity in isolation, but considering gender in combination with race, sexuality, religion (or lack of religious belief) and (dis)ability.
2. Complaints made to the Human Rights Commission ('HRC') involving more than one pleaded ground of discrimination (for example, sex and race, sex and disability, and age and sex) have increased in the past five years, and will likely increase with New Zealand's ongoing demographic transition to superdiversity. Growing numbers of New Zealanders are identifying with different cultures and ethnicities, due to migration and increased rates of intermarriage. Greater cultural and ethnic diversity has led to greater religious and linguistic diversity.
3. The *Diversity Matrix* discusses the need for a 'matrix' or 'intersectional' approach to diversity in the context of our anti-discrimination laws, and examines the implications of undertaking such an approach. I use the terms "matrix", "intersectional" and "multiple ground" approach throughout to refer to taking more than one aspect of a person's identity into account when examining that person's experiences, and the implications of the combined characteristics of that person's identity.
4. The *Diversity Matrix* takes into account issues experienced by overseas courts in undertaking an intersectional approach to discrimination, as well as research on the compounded disadvantage experienced by certain groups. There is an extensive body of New Zealand and overseas research evidencing that some groups, such as ethnic women, are typically subject to a "double" or even "triple" disadvantage in a variety of different settings, including employment, housing, criminal justice and health.
5. However, the current approach to discrimination undertaken by the New Zealand Courts and Tribunals tends to view claimants through a single lens, focusing solely on one characteristic – such as sex, race or age – despite there being nothing in our anti-discrimination legislation preventing more than one characteristic from being considered at one time or together with other protected characteristics.
6. The difficulty with such an approach is that "[e]ach individual is distinct and unique. Their personal characteristics are of infinite variety and diversity",² and intersect in a multitude of indivisible combinations. The current approach to discrimination risks not taking into account the real lived experience of individuals who may be subject to a compounded disadvantage when they are discriminated against on the basis of multiple protected characteristics. Therefore, a refreshed definition and view of diversity is essential for everyone in New Zealand's ever-diversifying population, not just a limited few.
7. As acknowledged by Australia's former Race and Disability Commissioner, Graeme Innes, in a speech to the Culturally and Linguistically Diverse Communities Conference:³

Just as identities are based on multiple intersections of race, culture, religion, gender, sex, language and country of origin, we need interventions that are complex and sophisticated enough to redress this intersectionality... We cannot be effective and achieve respect for human rights without understanding the complexities of the multiple aspects of identity that shape individuals and communities. The basic principles enshrined in human rights and multiculturalism frameworks have much to offer each other in making this an achievable reality.

What is intersectional discrimination?

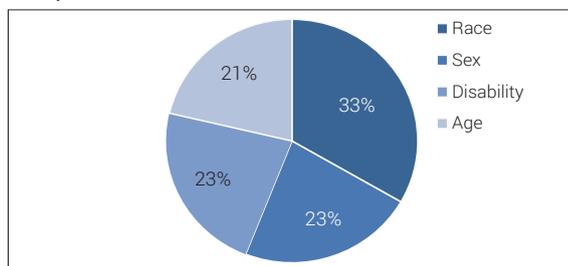
8. The Courts have emphasised that the “essence of discrimination lies in treating persons in comparable circumstances differently”.⁴ Anti-discrimination legislation aims to ensure equality between individuals in comparable circumstances by prohibiting differential treatment on the basis of prohibited grounds of discrimination.
9. The concept of “discrimination” has been defined as encompassing both direct and indirect discrimination. In *Taylor v Attorney-General*, Fogarty J explained the distinction between “direct” and “indirect” discrimination as follows:⁵
 - (a) Direct discrimination occurs when a law, rule or practice on its face discriminates on a prohibited ground. In other words, it uses the prohibited ground as the very basis upon which to differentiate between two groups or two people. An example is prohibiting black people from voting.
 - (b) Indirect discrimination occurs when a law, rule or practice is neutral on its face but has a disproportionate impact on a group because of a particular characteristic of that group. A historical example is the minimum literacy requirement for enrolling to vote in the United States which excluded many black people from voting.
10. However, discrimination claims are becoming increasingly complex, and may involve not only claims of direct and/or indirect discrimination, but also multiple discrimination, that is discrimination on more than one prohibited ground, for example, race and sex, or age and disability. Between October 2015 and October 2016, 15.4 per cent of complaints submitted to the HRC relied on more than one prohibited ground, compared to 9.19 per cent of complaints between October 2011 and October 2012.⁶

Number of HRC complaints alleging multiple grounds between 2011 and 2016⁷

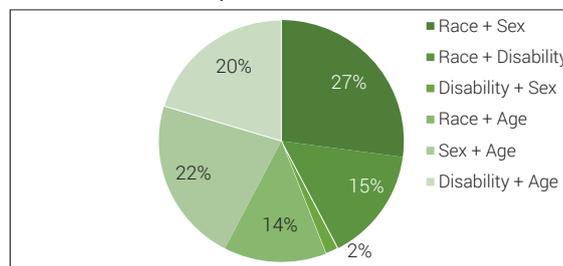
| | 2011/12 | 2012/13 | 2013/14 | 2014/15 | 2015/16 | Total |
|--|---------|---------|---------|---------|---------|--------|
| Claims on multiple grounds | 120 | 159 | 150 | 158 | 198 | 785 |
| Total complaints | 1,306 | 1,282 | 1,225 | 1,168 | 1,286 | 6,267 |
| % of multiple ground claims comprising total complaints ⁸ | 9.19% | 12.40% | 12.24% | 13.53% | 15.40% | 12.54% |

11. The majority of these multiple discrimination claims involved a combination of race and sex, followed by disability and age, sex and age, race⁹ and age, and race and disability.
12. The number of complaints involving multiple grounds may in fact be underreported, due to the current lack of visibility around the issue of intersectional discrimination in New Zealand. Such complaints are likely to increase with the growing diversity of New Zealanders, thus giving greater visibility to the double disadvantage experienced by complainants in such cases.

Grounds relied on in multiple discrimination complaints to HRC in 2011 to 2016



Combination of grounds relied on in multiple discrimination complaints to HRC in 2011 to 2016



13. Multiple discrimination can either be “additive” or “intersectional” in nature. Additive discrimination is where an individual or group is discriminated against on the basis of more than one protected characteristic. For example, in the English case of *Al Jumard v Clywd Leisure Ltd*,¹⁰ the claimant, a British National who was Iraqi by birth, was a duty manager at a leisure centre. He was also physically disabled as a result of a hip operation. The Employment Tribunal found that the claimant had been discriminated against because of his race and, in relation to separate incidents, discriminated against because of his disability.

14. On the other hand, intersectional discrimination is where the multiple discrimination experienced by the complainant “cannot usefully or effectively be broken down into its component parts. It is where the sum of the parts is something more than the constituent elements”.¹¹ In other words, it is where a person is discriminated against because of the combination of different characteristics, which produces “something unique and distinct from any one form of discrimination standing alone”.¹² For example, the explanatory notes to the Equality Act 2010 (UK) gave the following examples of intersectional discrimination:¹³

A black woman has been passed over for promotion to work on reception because her employer thinks black women do not perform well in customer service roles. Because the employer can point to a white woman of equivalent qualifications and experience who has been appointed to the role in question, as well as a black man of equivalent qualifications and experience in a similar role, the woman may need to be able to compare her treatment because of race and sex combined to demonstrate that she has been subjected to less favourable treatment because of her employer’s prejudice against black women.

A bus driver does not allow a Muslim man onto her bus, claiming that he could be a “terrorist”. While it might not be possible for the man to demonstrate less favourable treatment because of either protected characteristic if considered separately, a dual discrimination claim will succeed if the reason for his treatment was the specific combination of sex and religion or belief, which resulted in him being stereotyped as a potential terrorist.

15. Other examples which have been raised in case law and academic commentary include an Asian woman, whose discrimination “cannot properly be analysed under the rubric of either gender or racial discrimination”,¹⁴ a Muslim women banned from wearing religious garments (such as burqas and hijabs),¹⁵ a single mother rendered ineligible for a benefit due to her marital status,¹⁶ and a homosexual man whose de-facto partner was denied access to a pension scheme.¹⁷

Examples of multiple ground discrimination cases before the HRC

The HRC has also mediated a number of claims involving multiple ground discrimination in recent years, though these have not progressed to the Human Rights Review Tribunal (‘HRRT’) or the Courts, as is discussed further below.¹⁸

Examples of such claims are provided below, and demonstrate the multitude of ways different protected characteristics may intersect in different contexts:¹⁹

- (a) Religious belief, race, ethnic and national origins discrimination in employment: A man resigned after nearly five years of employment due to the accumulation of discussions, requirements and behaviour by his employer which put down his religious beliefs and culture. The message he received was that he needed to change his belief systems. The complainant’s health and his relationship with his wife were adversely affected by his employer’s conduct. The complaint was resolved by compensation for loss of dignity and injury to feelings.
- (b) Family status and sex discrimination in provision of goods and services: A woman booked a one-day refresher course. She was told by the course provider that she would not be allowed to bring her breast-fed baby. The complainant needed to do the refresher course within a tight timeframe in order to keep her certificate valid. The complaint was resolved by the complainant’s inclusion in a course and by the respondent making changes to frontline booking so that people were informed about options available to enable parents, including breast-feeding mothers, to attend its courses.
- (c) Disability and sex discrimination in provision of goods and services: The female complainant was looking for accommodation and went to a real estate agent. The complainant had a neurological disorder, which slowed her down and meant that looking through properties took some time. She alleged that the real estate agency told her that she was wasting their time and a “man would not require more than one viewing”. The parties agreed that the complainant would continue to engage the respondent agency’s services, and that she would provide criteria of what she was looking for in accommodation.
- (d) Race and sexual orientation discrimination in employment: A Thai worker was subjected to comments about his race and suggestions that he was homosexual because he had lunch with the other Thai workers. He was distressed by these comments so he resigned, but did not tell

his employer until the last day of work. The employer was shocked and asked him to stay. The complaint was resolved through apology and compensation.

- (e) National origin and religious belief discrimination in employment: A migrant couple were employed as managers of a store. They left the store after a year, as they felt they had no choice, alleging a number of employment issues as well as discrimination issues based on national origin and religious belief. The employer tried teaching the couple English in front of customers and would not allow them time off each Friday to attend a mosque. Mediation led to resolution of all the issues with compensation.
- (f) Family and marital status discrimination pre-employment: A woman applied for a job and was asked on the application form for her date of birth, marital status (including the number of dependants she had), country of birth and whether she had any disabilities. Her complaint to the HRC resulted in the company agreeing to remove the questions that appeared discriminatory, or indicated an intention to discriminate against certain candidates, from the application form.
- (g) Sex and marital status discrimination pre-employment: A woman applied for a position and was asked whether she was married, whether she wanted to have children, what her partner did and whether they were going to get married. The prospective employer explained that the questions were asked to “assess stability”. Discussion with the company’s human resources manager, and provision of the HRC’s pre-employment guidelines for employers, resolved the matter.
- (h) Sex and family status discrimination pre-employment: A female job applicant was asked about whether she intended to have children, and about her husband’s job and childcare arrangements. At the second interview, she was informed that it would be difficult for her to fulfil job requirements with a family. She was told that she had missed out on the job and that it was “important to have the right balance of males and females”. The final settlement included an apology, compensation, acknowledgment and training for the company about the anti-discrimination provisions in the Human Rights Act 1993 and the Employment Relations Act 2000.
- (i) Age and race discrimination in government activity: The complainant alleged that a Government-run programme for ACC-funded Tai Chi classes, which were free for people over 65, or those over 55 who were Māori or Pacific, discriminated on the basis of age and race. The Government was of the view that any discrimination was justified based on statistics relevant to the preventative programme. The programme was free for people over 65 because older people tend to have falls, and was free for Māori and Pacific peoples over 55 because these groups tended to have shorter life expectancies than other ethnic groups. ACC also had discretion to fill ten per cent of places regardless of age, based on need.
- (j) Sex and national origins discrimination in employment: The complainant alleged that she was not given the same time or opportunity to study as her male colleagues and so she had not applied for a particular programme of study. Eventually she did the study in her own time. Her pay increased, but the time delay meant that her salary was well below that of her male counterparts. The complainant’s allegations of structural discrimination were not accepted and the complaint was not resolved. The respondent employer wanted statistical evidence about structural discrimination against female workers, which the complainant could not produce. The complainant’s explanations of “how things were done” did not suffice, and further evidence was needed of what was required for employees to advance up a pay scale.
- (k) Age and sex discrimination in employment: The female complainant alleged age and sex discrimination following her employer’s offers of early retirement to older female staff. At mediation, differences in female employees’ pay, seniority and workloads compared to male colleagues were raised. The complaint was not resolved.
- (l) Age and sex discrimination in employment: The complainant applied for a retail job in a casual relief position but was not interviewed despite having relevant experience. He asked for reasons but was given no explanation. He felt that the majority of salespeople and customers in the industry were female and this was why he was not interviewed. The company disputed this and stated that the company appointed solely based on the merits of applications. The company did not want to meet in mediation.

Development of an intersectional approach

16. The concept of intersectionality was first devised by American academic Kimberlé Crenshaw in 1989.²⁰ Crenshaw argued that the “single-axis framework” of discrimination distorted the experience of black women in the United States and effectively erased them in racism and sexism discourse by shifting the focus to the comparatively privileged members of the target groups (white women and black men). As a consequence, black women were further marginalised and their claims of discrimination “obscured” when they could not be understood according to this single-axis analysis:²¹

This focus on the most privileged group members marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon.

17. Crenshaw found that the challenges faced by black women in bringing cases alleging discrimination before the courts reflected the way in which society viewed discrimination:²²

Underlying this conception of discrimination is a view that the wrong which antidiscrimination law addresses is the use of race or gender factors to interfere with decisions that would otherwise be fair or neutral. This process-based definition is not grounded in a bottom-up commitment to improve the substantive conditions for those who are victimized by the interplay of numerous factors. Instead, the dominant message of antidiscrimination law is that it will regulate only the limited extent to which race or sex interferes with the process of determining outcomes. This narrow objective is facilitated by the top-down strategy of using a singular “but for” analysis to ascertain the effects of race or sex. Because the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics. Put differently, the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks. Notions of what constitutes race and sex discrimination are, as a result, narrowly tailored to embrace only a small set of circumstances, none of which include discrimination against Black women.

18. Thus, as long as discrimination is interpreted as being “necessarily based on certain...‘categories’... those who are unable to ‘fit’ themselves into the ‘fixed categories’ will fall through the cracks” of anti-discrimination laws.²³
19. Similar arguments have been made in the New Zealand context. Academics, such as Ani Mikaere, have written extensively about the double disadvantage experienced by Māori women in various contexts, including health care, employment, housing, and representation in public and political life, as discussed further below.²⁴

Issues with the single axis / grounds-based approach

20. As has been recognised in various overseas jurisdictions, there are a number of dangers inherent in considering specific grounds alleging discrimination in isolation from each other. In particular, applying a siloed,²⁵ “single axis” approach to multiple discrimination cases risks misunderstanding the nature of the discrimination at issue,²⁶ and failing to assess the “real lived experience of claimants”,²⁷ who are often subject to a “double” or “compounded” disadvantage. As observed by Sarah Hannett:²⁸

Anti-discrimination law conceives of claimants as possessing a singular set of social characteristics: for example, inclusion in the category ‘black’ or inclusion in the category ‘woman’. Further, the sealed nature of the grounds protected ensures that such social attributes are ‘defined as if they have fixed, unchanging essences’. As a result, any differences between the individuals of a particular sex or racial group are rendered invisible’.

21. As noted by Smith:²⁹

Perhaps the greatest of the problems of the single-axis model is the way that it tends to essentialise the experiences of identity groups... the law assumes individuals can be

characterised by one dominant ground, leaving those with complex identities outside the scope of protection... This...makes it more difficult for individuals claiming discrimination to get an effective remedy, as they must prove that two or more discrete discriminations have occurred. Evidence of discrete discrimination may simply not exist where intersectional discrimination has occurred.

22. Because the “very nature of identities is... both complex and also fluid...the protection of individuals’ identities demands an equally elaborate and adaptable anti-discrimination legal framework because if one is ‘to assume that groups are rigidly delineated by race, gender, disability, sexual orientation or other status, [then one] is to render invisible those that are found in the intersection between those groups.”³⁰ A claimant suffering from intersectional discrimination “cannot merely *choose* which attribute will disadvantage them; ‘they all have to manage together’”.³¹

23. The adoption of the single-axis approach is partly attributable to the structure of anti-discrimination statutes, which typically prohibit discrimination on the basis of a list of prohibited grounds. For example, s 21(1) of the Human Rights Act 1993 lists various characteristics as prohibited grounds of discrimination, including sex, family and marital status, religious or ethical belief, political opinion, colour, race and ethnic or national origins (including nationality or citizenship), disability, age, employment status and sexual orientation. Dianne Pothier has contended that the “atomised” structure of the grounds in anti-discrimination law acts to specify: ³²

...particular grounds to the exclusion of others. Such sharp distinctions between those social attributes that gain protection, and those that do not, are premised upon ‘an assumption that groups are mutually exclusive, defined according to objective characteristics and operating in opposition to one another’.

24. In reality, however, **every** individual is made up of:³³

...an indivisible combination of two or more social characteristics...The concept of multiplicity is not unique to marginalized groups in society. Every individual has a sex, race, religion, sexual orientation which to varying degrees influences his or her life.

25. Solanke argues that the problems caused by treating individual grounds as “silos”:³⁴

...prompt the question of whether it is time to think about changing the way in which discrimination law is designed to see. Whilst the silos do have some value, if only to remind us that forms of discrimination are not completely analogous with one another, there is need to be concerned with their ability to open up to each other to remedy intersectional discrimination.

26. Rather, resolving cases of intersectional discrimination requires applying “a matrix framework”³⁵ that recognises “identities not as fixed, stable, unitary and coherent, but as fluid, contingent, multiple and intersecting”³⁶.

27. As is addressed below, intersectional discrimination cases have also given rise to legal issues in practice around the selection of the appropriate comparator, causation and proof, and identification of the appropriate remedy, which have caused difficulties for overseas courts.³⁷

28. Unlike overseas jurisdictions, the New Zealand Courts have not had to address intersectional discrimination, as it has not yet been expressly pleaded by claimants, though (as noted above) the HRRT has upheld multiple discrimination claims and considered the double disadvantage experienced by some claimants. However, as is addressed below, the increasing superdiversity of the New Zealand population will likely result in more cases of multiple ground discrimination, some of which will involve the intersection of one or more grounds, as supported by the increased numbers of HRC complaints of that nature. Therefore, it is critical that urgent consideration be given to the particular issues that may arise in intersectional discrimination cases; otherwise, “we risk undertaking an analysis that is distanced and desensitized from real people’s real experiences”. ³⁸

Increasing superdiversity

29. The New Zealand population is becoming more superdiverse, with a substantial increase in the diversity of ethnic, minority and immigrant groups “arising from shifts in global mobility” in recent years, particularly in

Auckland.³⁹ In 2001, 76.83 per cent of the population identified as European, while 30.5 per cent identified as Māori, Pacific Peoples, Asian or Middle Eastern, Latin American or African ('MELAA').

New Zealand population in 2001 by ethnicity and sex⁴⁰ (percentage according to total population)

| Ethnicity | Male | Female | Total |
|-------------------------------|---------------------------|---------------------------|--------|
| European | 1,395,900 (37.35%) | 1,475,535 (39.48%) | 76.83% |
| Māori | 257,484 (6.89%) | 268,800 (7.19%) | 14.08% |
| Pacific Peoples | 115,153 (3.08%) | 117,645 (3.15%) | 6.23% |
| Asian | 113,070 (3.03%) | 244,662 (6.55%) | 9.58% |
| MELAA | 12,675 (0.34%) | 11,406 (0.31%) | 0.65% |
| Other ethnicity ⁴¹ | 414 (0.01%) | 390 (0.01%) | 0.02% |
| Total population | 1,823,002 (48.78%) | 1,914,273 (51.22%) | - |

30. By 2013, those identifying as European had reduced by six per cent to 69.99 per cent of the population, with one third identifying as Māori, Pacific Peoples, Asian or MELAA.

New Zealand population in 2013 by ethnicity and sex⁴² (percentage according to total population)

| Ethnicity | Male | Female | Total |
|-------------------------------|---------------------------|---------------------------|--------|
| European | 1,433,601 (33.79%) | 1,535,793 (36.20%) | 69.99% |
| Māori | 288,636 (6.80%) | 309,966 (7.31%) | 14.11% |
| Pacific Peoples | 145,236 (3.42%) | 150,708 (3.55%) | 6.97% |
| Asian | 227,046 (5.35%) | 244,662 (5.77%) | 11.12% |
| MELAA | 23,898 (0.56%) | 23,055 (0.54%) | 1.1% |
| Other ethnicity ⁴³ | 38,997 (0.92%) | 28,755 (0.68%) | 1.6% |
| Total population | 2,064,015 (48.66%) | 2,178,033 (51.34%) | - |

31. The demographic shift was most apparent in Auckland, where approximately 47.33 per cent of the population identified as Māori, Pacific Peoples, Asian or MELAA in the 2013 Census. Therefore, a quarter of the Auckland population was comprised of women from ethnic minorities. The direct and indirect discrimination (subconscious bias) issues these women experience differ from those of Anglo-Saxon women and men from ethnic minorities. Women from ethnic minorities often suffer from a "double disadvantage" (as discussed further below).⁴⁴

Auckland region population in 2013 by ethnicity and sex (percentage according to total Auckland region population)⁴⁵

| Ethnicity | Male | Female | Total |
|---|-------------------------|-------------------------|--------|
| European | 381,882 (26.98%) | 407,424 (28.78%) | 55.76% |
| Māori | 68,097 (4.81%) | 74,673 (5.28%) | 10.09% |
| Pacific Peoples | 94,248 (6.66%) | 100,710 (7.11%) | 13.77% |
| Asian | 148,293 (10.48%) | 158,937 (11.23%) | 21.71% |
| MELAA | 12,609 (0.89%) | 12,336 (0.87%) | 1.76% |
| Other ethnicity ⁴⁶ | 8,979 (0.63%) | 6,663 (0.47%) | 1.1% |
| Total Auckland region population | 687,495 (48.67%) | 728,055 (51.43%) | - |

32. A significant proportion of New Zealand's Asian, Pacific and MELAA populations are also born overseas. It is well-established that female migrants from ethnic minorities can suffer a "triple disadvantage" particularly in the employment context.⁴⁷ In 2013, approximately 78 per cent of people identifying as Asian were born overseas, while 22 per cent were born in New Zealand.⁴⁸ Similarly, 76.9 per cent of people identifying as Middle Eastern and 82.6 per cent of those identifying as Latin American were born overseas, while 23.1 per cent and 17.4 per cent were born in New Zealand. Approximately 37.7 per cent of people identifying with at least one Pacific ethnicity were born overseas, compared with 62.3 per cent born in New Zealand. In contrast, 89.9 per cent of people identifying as New Zealand European were born in New Zealand and 10.1 per cent were born overseas.

33. As I wrote in the *Superdiversity Stocktake*, immigration "will continue to be determinative of New Zealand's demographic makeup, particularly the Asian population".⁴⁹ Statistics New Zealand has projected that an increasing proportion of New Zealanders are likely to identify with Māori, Asian and Pacific ethnicities, with about 51 per cent of New Zealanders likely to identify as Asian, Māori and Pacific peoples by 2038.⁵⁰

Higher rates of intermarriage between people from different ethnic groups will also increase the ethnic diversity of the population.⁵¹ In its seventh report to the Committee on the Elimination of Discrimination against Women (**'CEDAW Committee'**) in 2010, the New Zealand Government acknowledged that some groups of women, such as Māori and Pacific women, face greater discrimination than others and "policy approaches are increasingly focusing on this diversity, as significant changes are projected in the ethnic composition of the New Zealand population over the next two decades".⁵²

34. With superdiversity comes increasing religious diversity. Although the 2013 Census figures reveal that New Zealand is becoming increasingly secular as the number of people reporting no religion increases, New Zealand is simultaneously becoming more religiously diverse as traditionally minority religions continue to grow.⁵³
35. Ethnicity also has a bearing on health and disability outcomes. In 2013, 24 percent of the New Zealand population identified as disabled,⁵⁴ up from 20 per cent in 2001.⁵⁵ Māori and Pacific people had higher-than-average disability rates (32 per cent and 26 per cent respectively), after adjusting for differences in ethnic population age profiles, compared to 24 per cent of the European population. Māori and Pacific Peoples had a higher-than-average disability rate, despite having a younger population age profiles than that of the total population. The median ages of Māori and Pacific Peoples identifying as disabled were 40 years and 39 years respectively, compared to 57 years for Europeans.
36. In addition, some health conditions are more prevalent among specific ethnic groups. For example, diabetes is most common among Māori and Pacific Islanders, who are three times as likely to have diabetes compared to other New Zealanders. South Asian people are more likely to develop diabetes compared to other New Zealanders,⁵⁶ and have high rates of cardiovascular disease and low birth weight.⁵⁷ There is also a high risk of stroke amongst Chinese people.⁵⁸
37. Growing numbers of New Zealanders will therefore be misrepresented by discrimination conceived along a single axis line. This requires a broader definition and enforcement of discrimination, taking into account cases where multiple grounds of discrimination converge and intersect.

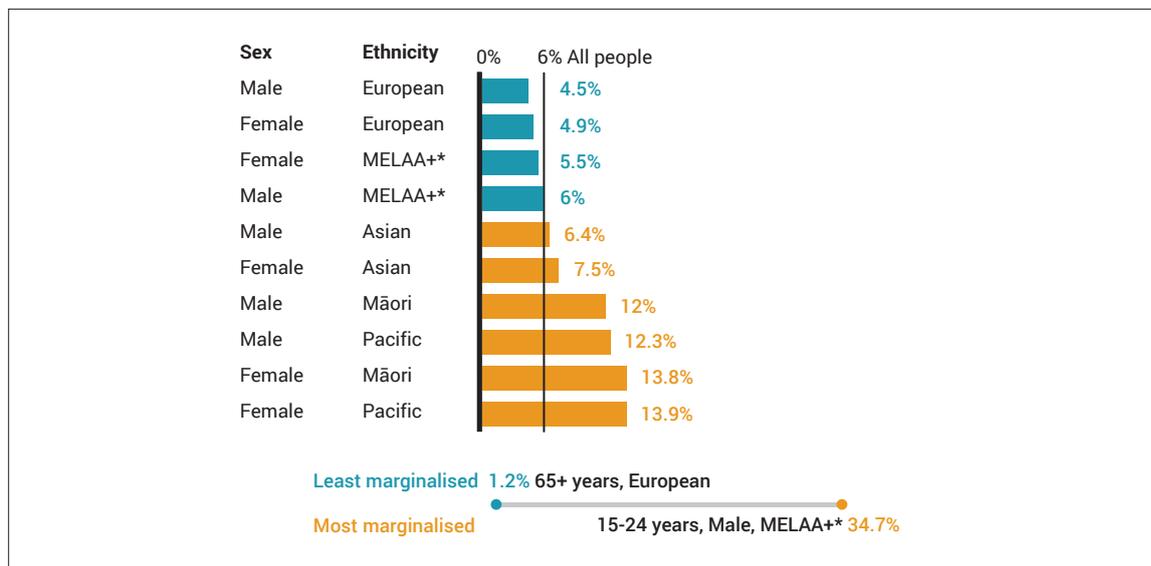
Overview of research on 'double disadvantage'

38. Although there has been little consideration in New Zealand of the double disadvantage experienced by certain groups in the legal context, there is a growing body of research and literature in other fields regarding the intersection of multiple factors.

Employment

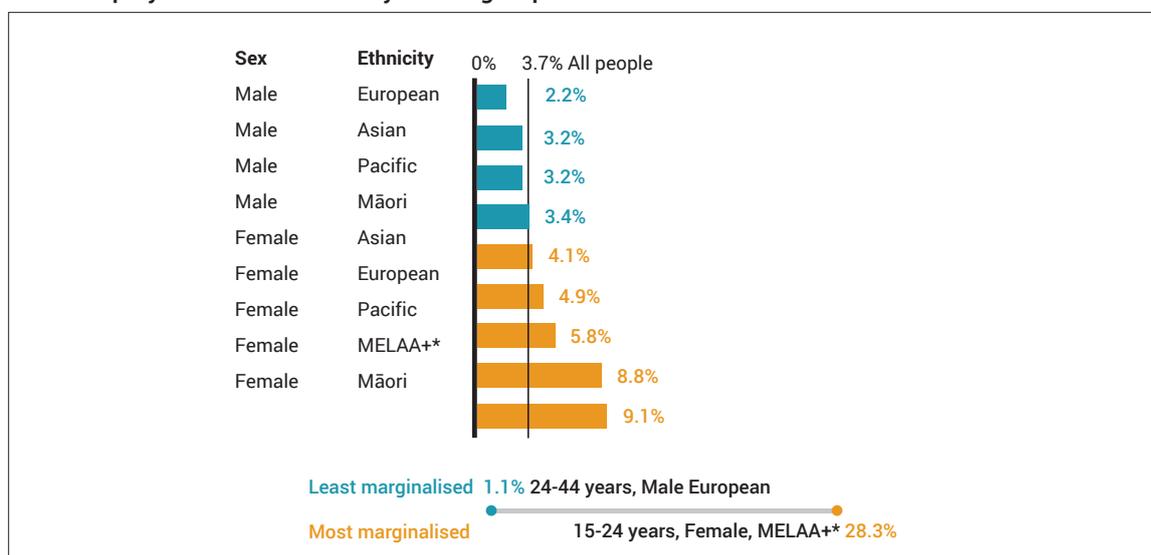
39. Much of the research undertaken on the "double disadvantage" to date, both in New Zealand and overseas, has focused on the experience of ethnic women, particularly migrants, in the employment context.
40. For example, a 2013 survey of New Zealanders found that migrants from the South-East Asia region were most likely to report workplace discrimination (14.6 per cent), followed by those originating from the Middle East, Latin America or Africa (12.8 per cent). Only 4.4 per cent of New Zealand-born Europeans reported experiencing workplace discrimination.⁵⁹ Women were more likely to experience discrimination than men, whether foreign-born or New Zealand-born, indicating that migrant women are subject to a "double disadvantage". The study concluded, however, that the situation did generally improve for migrants the longer they lived in New Zealand, probably due to greater English fluency. Similarly, a 2014 Office of Ethnic Communities report found that employment rates and the earning capacity of migrants correlate with their English language ability. Migrants from North Asia (particularly from China) were more likely to encounter employment barriers because of their English language ability than migrants from other regions.⁶⁰

Unemployment rate in 2015 by ethnic group and sex⁶¹



41. Māori, Pacific and MELAA women are also more likely to be underemployed (that is, part-time workers available and wanting more hours) than both European men and men from ethnic minorities.

Underemployment rate in 2015 by ethnic group and sex⁶²



42. In addition to ethnicity, disability and age also have implications for female labour force participation. According to the HRC Tracking Equality at Work tool, women and young people have higher rates of unemployment, underemployment and lower rates of labour force participation than men. Young Māori and Pacific women are particularly marginalised, as are disabled people. Young Māori women under 25 years have an unemployment rate of 23.6 per cent, and young Pacific women under 25 have an unemployment rate of 31.4 per cent.⁶³ Disabled women are more marginalised than disabled men, with only 46 per cent of disabled women participating in the labour force, compared with 54 per cent of disabled men.⁶⁴

Pay data for ethnic women

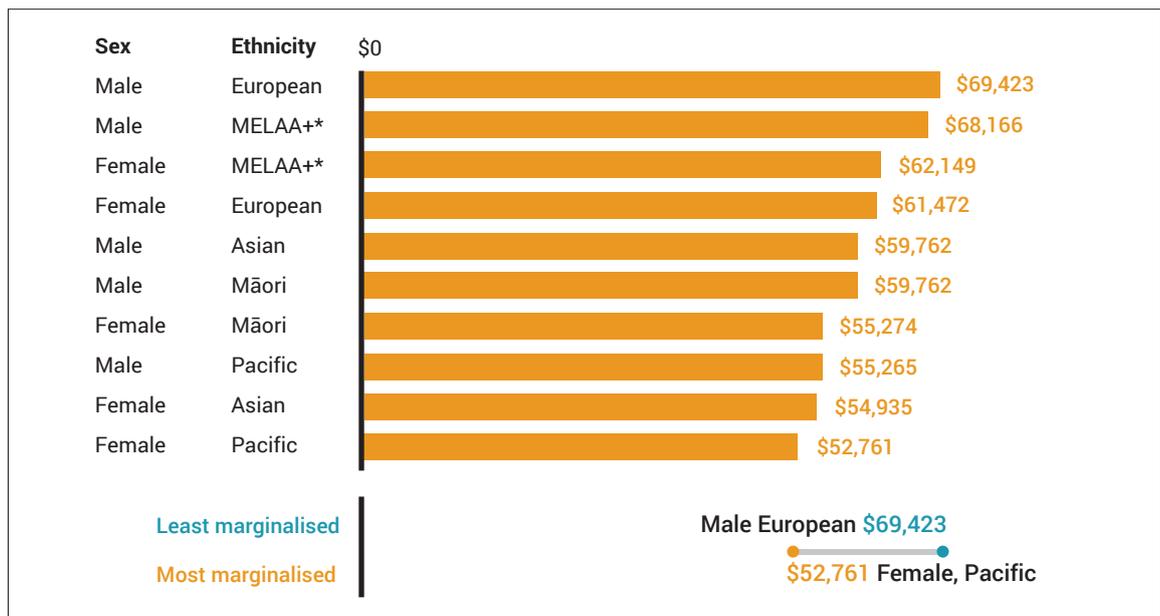
43. The pay data also shows that ethnic women often earn the least, and that the double disadvantage can create unique challenges in terms of conscious and unconscious bias and stereotyping. The gender pay gap rose to 12 per cent in 2016, up from 9.9 per cent in 2014.⁶⁵ Men are persistently paid more than women overall and within ethnic groups.⁶⁶
44. These trends have persisted over time, with a drop in the median pay rate of Asian and MELAA women aged between 25 and 44 since 2014.⁶⁷

Average Weekly Income By Ethnicity and Gender in 2015 data

| Ethnicity | Men's average weekly income | Women's average weekly income | Pay gap (cf. European men) |
|------------------------|-----------------------------|-------------------------------|----------------------------|
| European | \$1277 | \$846 | 33.8% |
| Māori | \$1012 | \$756 | 40.79% |
| Asian | \$1006 | \$798 | 37.51% |
| Pacific Peoples | \$916 | \$723 | 43.4% |
| MELAA | \$1001 | \$760 | 40.5% |
| All ethnicities | \$1207 | \$829 | - |

45. Similar trends are evident for pay rates in the public service, the “most marginalised group” being female Pacific public servants, with male European public servants being the “least marginalised group”, earning \$16,662 more per annum on average.⁶⁸

Public servant pay rate in 2015 by ethnic group and sex



46. According to the HRC Tracking Equality tool, “compounding indicators” such as ethnicity and sex result in a wider pay gap for certain groups:⁶⁹

These patterns have persisted over time. Both gender and ethnic pay gaps have shown little improvement in the last five years. In 2015 the gap between European and Māori workers widened.

47. Further, as at 2013, 71.3 per cent of all women with disabilities earned \$30,000 per annum or less compared to 55.1 per cent of men with disabilities, 53.7 per cent of women with no disabilities, and 35.4 per cent of men with no disabilities.⁷⁰

48. In response to New Zealand’s sixth periodic report on its compliance with its obligations under the International Covenant on Civil and Political Rights,⁷¹ the UN Human Rights Committee (‘UNHRC’) noted its concerns about “the persistent inequalities between women and men”, particularly Māori and Pacific women, women with disabilities and migrants (particularly those of Asian origin, who were disproportionately affected by the gender wage gap, unemployment rates, and access to employment and vocational training).⁷² The CEDAW Committee has also noted “a number of challenges that continue to impede the full implementation of the Convention” by New Zealand, such as “the status of vulnerable groups of women, including women with disabilities and minority women”.⁷³ The CEDAW Committee also expressed concern about the position of women subject to multiple forms of discrimination and disadvantage.⁷⁴

The Committee is concerned about the situation of disadvantaged groups of women, including women with disabilities, women of ethnic and minority communities, rural women and migrant women, who may be more vulnerable to multiple forms of discrimination with respect to education, health, social and political participation and employment. As noted in the report

of the State party, disabled women are disproportionately represented among those who lack qualifications, those who do not work, and those on low incomes. The Committee is concerned that the new social security legislation will likely predominantly affect Māori women and reduce their social benefits. The Committee is further concerned that there are few education and employment programmes targeted at women and girls with disabilities. The Committee notes with concern the impact of the Christchurch earthquake on women, particularly rural women and older women, including their reported higher degrees of stress, anxiety and depression as well as their resulting higher numbers of displacement and unemployment.

49. The CEDAW Committee's recommendations to the New Zealand Government included improving the collection and publication of data relating to the above issues, disaggregated by sex, age, ethnicity and other relevant factors, to enable proper understanding of the barriers faced by these groups of women.⁷⁵

50. In its follow-up report in response to this recommendation, the New Zealand Government stated that New Zealand:⁷⁶

...has a full range of disaggregated population data available. Sufficient data currently exist to identify the position of women, including by ethnicity, disability, location and age, especially regarding access to education, employment and health-care services. Important sources include the New Zealand Census of Population and Dwellings, the New Zealand Health Survey, the New Zealand Income Survey, the Disability Survey, the New Zealand Crime and Safety Survey, the Time Use Survey, Te Kupenga (a survey of Māori wellbeing) and education and health administrative data.

The Ministry of Women's Affairs is also undertaking a stocktake of gendered information and where these are disaggregated by age, sex, ethnicity, disability and location. Initial analysis against the United Nations minimum set of gender indicators shows that the majority of the 52 indicators are collected in New Zealand. Data are not currently collected on a few indicators, including women's ownership of land and businesses. Further work will be undertaken over the next few months to finalise this analysis, determine whether missing indicators have relevance for New Zealand and what action may be needed.

...Agencies, including Statistics New Zealand, are working together to ensure gender analysis is undertaken of the new data emerging from integrating these data sets, including, where possible, by ethnicity, age and disability.

51. In its 2016 report to the CEDAW Committee, the New Zealand Government also indicated that:⁷⁷

Changes are being made to better use the wide array of administrative data collected by government agencies. This involves integrating administrative data collected by different agencies with data collected in official surveys. For example, the Disability Data and Evidence Working Group, co-facilitated by the Office for Disability Issues and Statistics New Zealand, will consider high-priority areas to improve data and evidence to ensure informed decision-making on policy and services that impact on disabled women.

Other incidences of "double disadvantage"

52. The double disadvantage experienced by certain population groups has also been identified in contexts other than employment, such as housing, the criminal justice system, education, and the health and disability sector.

Housing

53. In the housing context, a Mental Health Foundation issues paper released in 2001 on discrimination in housing referred to multiple discrimination in the context of mental illness and ethnicity, and noted that Māori and Pacific individuals suffering from mental illness, particularly young people, could be subject to "dual" or "triple" discrimination in the housing market (on the basis of ethnicity, disability and age), limiting their access to suitable housing options.⁷⁸

54. The Healthy Housing Project, a long-running study run by University of Otago examining the health impacts on people moving from the Housing New Zealand ('HNZ') waiting list to HNZ tenancies, has found

that HNZ applicants are a vulnerable group with high rates of hospitalisation and deteriorating health status leading up to the period when they apply for a house.⁷⁹ The vulnerability of the HNZ population was attributable to a convergence of factors, such as the age and sex of the applicants and tenants, who were predominately female applicants, with a median age of 20 years and a median age of 15 years for the HNZ tenant population, as well as being on very low incomes. HNZ tenants were also more likely to be Māori and Pacific Peoples, more likely to be living in single-parent households, and more likely to suffer from chronic physical illnesses and mental illness. The study identified the potential to improve the health of this group through improved access to health services and through housing improvements.

Criminal justice

55. In the criminal justice system, a recent report into neurodisability in New Zealand's youth justice system noted that "neurodisabilities do not discriminate – they cross over socio-economic, ethnic, and cultural boundaries".⁸⁰ It is estimated that communication disorders alone could affect 60 to 90 per cent of youth offenders.⁸¹ The report found that:⁸²

People with neurodisabilities are vulnerable when they come into contact with the justice system. This is evidenced by the significant over-representation of individuals with neurodisabilities in both the adult and youth justice systems.... Individuals with neurodisabilities are vulnerable in the justice system due to a number of factors. These can include different degrees of comprehension and social (dis)comfort due to low reading age, limited literacy skills, slower cognitive processing speeds and comprehension, impaired or heightened auditory and visual perception, poor short-term memory and variable concentration, reduced ability to understand procedures and follow instructions, inability to comprehend cause and effect and/or consequences. As well as behavioural propensities that can be mistakenly interpreted as hostility, acting out or evidence of guilt.

56. Thus, for children and young people, who are already vulnerable when exposed to the criminal justice process (and particularly in custodial settings) due to their age,⁸³ having a neurodisability can compound the disadvantage.⁸⁴ For example:⁸⁵

...young people with neurodisabilities are highly prone to false or exaggerated confessions due to propensity to say 'yes' in order to bring an uncomfortable situation to an end. Lack of eye contact and sensory issues are also common characteristics of neurodisabilities. While this is indicative of anxiety or nervousness in the individual, it can be misinterpreted as guilt, disinterest or belligerence.

57. The overrepresentation of Māori in both the youth and adult justice systems also adds another dimension to the issue.⁸⁶

58. In a New Zealand Law Commission study on the challenges that women face in accessing legal services, Māori and Pacific women reported that lawyers needed greater knowledge of those women's everyday lives and needed to communicate legal information in an understanding and understandable manner.⁸⁷

For these communication-based reasons, many women said that, if they could, they would choose a lawyer with whom they could identify because of their culture, sex or sexuality or who could be relied upon to have some knowledge of the women's circumstances. In that regard, women often said they found it difficult to believe that a young man or woman who had recently embarked on a legal career could understand the human dynamics involved in family-related problems, particularly disputes over children and situations involving family violence.

59. Many women from minority ethnic groups reported that the criminal justice system was unresponsive not only to issues of culture, but also to gender.⁸⁸

Women from a range of minority ethnic groups repeatedly identified barriers of language and cultural values between them and the justice system, and particularly between them and legal service providers. It was plain that for most women from those groups, the clash between their own cultural heritage and the predominantly British heritage of the justice system presented the largest of all the barriers they encountered in their attempts to utilise the system.

...

Whatever their ethnic background, women were generally critical of what was referred to as the “male culture” of the justice system, especially of the legal profession and judiciary. They saw this as affecting the quality of services they received from the justice system. Women knew that lawyers and, especially, senior lawyers and judges are mainly men. The message they took from this was that attitudes and practices within the legal profession are not conducive to women lawyers’ advancement. This served to reinforce the view that women clients would be disadvantaged in their dealing with lawyers and the justice system in which lawyers play such an important role.

60. These issues are not isolated to the legal system, and are important for all professions and businesses in servicing clients. They also have implications for government and policy-making in various contexts, as addressed in the *Superdiversity Stocktake*.
61. The UNHRC has echoed these concerns, noting in response to New Zealand’s sixth periodic report, that there were “persistent inequalities between women and men”, particularly Māori and Pacific women, women with disabilities and migrants, who were disproportionately affected by domestic and gender-based violence, and overrepresented at all stages of the criminal justice process.⁸⁹ A Ministry of Social Development study on homicide within New Zealand families between 2002 and 2006 found that Māori and Pacific women were more likely to be the victims of homicide perpetrated by a family member of the victim, an intimate partner or an ex-partner, and that more Māori children were victims of homicide than any other ethnic group.⁹⁰ The UNHRC recommended that the New Zealand Government review law enforcement policies with a view to reducing the overrepresentation of Māori and Pacific peoples in the justice system, in particular women and young people, and strengthen efforts to combat domestic and gender-based violence, particularly in relation to women and girls with disabilities or of Māori or Pacific ethnicity.
62. In the health system, Asian people are significantly more likely to report unfair treatment from health professionals, particularly recent migrants.⁹¹ South Asian women in particular have “limitations on how they have been socialised, including a lack of knowledge on health risks, language barriers and economic dependency” and “experience an imbalance of power and control”.⁹² New Zealand’s current provision of aged care services has also been criticised by Indian community groups, who have raised the issue that lack of home care provision for people from different ethnicities is leaving some feeling isolated and affecting their health.⁹³
63. The Committee on the Rights of the Child has recommended that New Zealand strengthen non-discrimination measures concerning “children in vulnerable situations”, such as Māori and Pacific children, refugee children, migrant children, children with disabilities and LGBT children.⁹⁴ New Zealand’s subsequent report to the Committee acknowledged the “disparity in educational outcomes for Māori students”.⁹⁵ The CEDAW Committee has also acknowledged the low participation rates of disabled women in employment and education, as well as the challenges that Māori and Pacific women face in the areas of health and education.⁹⁶ New Zealand’s first report to the Committee on the Rights of Persons with Disabilities (**the CRPD Committee**) noted that 18 per cent of women aged 15 or over report having a disability and “by virtue of their gender and their disability, they are doubly disadvantaged”.⁹⁷ The CRPD Committee recommended that further measures be undertaken to assist women with disabilities in obtaining education, and also recommended that the government address the health inequalities facing Māori and Pacific people with disabilities.⁹⁸ In its eighth report, in 2016, New Zealand reported that it is revising its Disability Strategy with a particular focus on disabled women, and this will be released in December 2016.⁹⁹

New Zealand

Overview

64. In summary, there is nothing in New Zealand's current anti-discrimination laws preventing the HRC, the HRRT or the Courts from adopting an intersectional discrimination approach in appropriate cases. The relevant anti-discrimination provisions do not state that discrimination may only be alleged on one prohibited ground or that, when discrimination is pleaded on more than one ground, each pleaded ground must be considered separately. Although the HRC has mediated cases involving multiple ground discrimination, the HRRT and the Courts have not yet addressed the issue of intersectional discrimination, as claimants do not appear to have expressly pleaded the issue. This indicates that legal practitioners also need training on identifying and bringing such claims, as the HRC complaints statistics make it clear that multiple ground discrimination is an increasing occurrence in New Zealand. The HRRT has, however, upheld discrimination claims based on more than one ground, and considered the double disadvantage experienced by some claimants, even though intersectional discrimination has not been pleaded.
65. The current legislative framework protecting against discrimination is comprised of the Human Rights Act 1993 ('HRA'), the Employment Relations Act 2000 ('ERA'), and the New Zealand Bill of Rights Act 1990 ('NZBORA'). The focus of this paper is on the operation of the NZBORA and the HRA, in particular s 19(1) of the NZBORA.
66. Part 1A of the HRA applies to acts or omissions by the legislature, judiciary or the executive, or any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.¹⁰⁰ Part 2 applies to acts or omissions by private entities¹⁰¹ and prohibits discrimination on prohibited grounds in various circumstances, including, in particular, employment.¹⁰² The HRA also protects against specific forms of discrimination, including inciting racial disharmony,¹⁰³ racial and sexual harassment,¹⁰⁴ publication and display of discriminatory advertisements,¹⁰⁵ and victimisation.¹⁰⁶
67. Affirming the strength of the legislative protection against discrimination provided by the HRA, s 19(1) of the NZBORA provides that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the HRA. Sections 20I and 20L of the HRA provide that an act or omission that is inconsistent with the right to freedom from discrimination affirmed by s 19(1) of the NZBORA is also in breach of Part 1A of the HRA if the act or omission is encompassed by s 3 of the NZBORA. However, unlike the HRA, the NZBORA only applies to acts done by the legislative, executive or judicial branches of government, or by any person or body in the performance of a public function, power or duty.¹⁰⁷
68. Affirmative action measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination are protected by s 19(2), which affirms that such measures do not constitute unlawful discrimination for the purposes of the NZBORA.

Test for determining breach of s 19(1)

69. The Court of Appeal has recently affirmed in *B v Waitemata District Health Board* that, in determining whether there has been a breach of s 19(1) of the NZBORA, "[t]here is no dispute as to the correct test",¹⁰⁸ that being the approach adopted by the Court of Appeal in *Atkinson v Ministry of Health* ('Atkinson')¹⁰⁹ and affirmed in *Child Poverty Action Group v Attorney-General* ('Child Poverty').¹¹⁰
70. The Court of Appeal in *Atkinson* described the approach to s 19(1) as a two-step process:¹¹¹

[T]he first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact. ...we consider that differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against.
71. If the plaintiff proves on the balance of probabilities that there is prima facie breach of s 19(1), the Court must then go on to assess whether the discrimination is nevertheless justified under s 5 of the NZBORA.¹¹²
72. As is addressed below, selecting an appropriate comparator, the first step in the *Atkinson* test, can be particularly problematic in cases where indirect discrimination is alleged on multiple prohibited grounds, as the existence of the other possible causes for a discriminatory outcome can be considered reason to

deny comparability with the claimant group's chosen comparator.¹¹³ In *Taylor v Attorney-General*, Fogarty J noted that:¹¹⁴

Selection of the comparator in cases of indirect discrimination is more complex than that in direct discrimination cases. Because equal treatment will amount to indirect discrimination where that treatment has a material disproportionate exclusionary impact on a group sharing a protected characteristic, it follows that the focus is different. Indirect discrimination is concerned with **differential impact**, rather than differential treatment. **The choice of comparator must reflect this focus and be group-based...**

Case law on intersectional discrimination

73. Although claimants have alleged multiple grounds of discrimination in a number of cases before the HRRT, additional grounds have either been dropped by the claimant before the hearing, the claims have been struck out due to evidential issues, or the intersectional nature of the claim has not been expressly addressed by the HRRT.

Cases involving multiple ground discrimination

74. In *Idea Services Ltd v Attorney-General*, the Ministry of Health's senior management team ('SMT') decided to remove funding for users of disability services once they reached the age of 65.¹¹⁵ The applicant, Idea Services, argued that this discriminated against disability service users who were over the age of 65, on the ground of age. The HRRT accepted the applicant's claim, finding that the policy did have a discriminatory effect and this was not a justified limitation under s 5 of the NZBORA. The HRRT's decision was upheld on appeal.¹¹⁶
75. Although the applicant only relied on age as a basis for its claim, the HRRT noted that disability was also relevant to the experience of the group that had been subjected to discrimination, implicitly acknowledging the double disadvantage that can arise in intersectional discrimination cases, despite not being expressly pleaded:¹¹⁷

...even if one accepts that age is not a particularly invidious ground of discrimination **there are other factors at work in the context here. Not the least of these is that the affected group under consideration comprises people with intellectual disability**, to the extent that they require accommodation in a group home, contract board or independent supported living situation. In any view they form part of a very **vulnerable sector of society. This may not be a case about discrimination on the grounds of disability, but the fact that the affected group is made up of people with disabilities is part of the context that matters when considering this issue of impact.**

...

Leaving intellectually disabled people at home without any meaningful interaction with their community is exactly what the philosophy behind the MoH's provision of funding for disability support services aimed to avoid. **Denying access to funding for day services can only have had the effect of further marginalising the affected group.**

We agree with Mr Butler that the SMT decision stigmatises the affected group by conveying a message that after reaching 65 they are no longer worthy of the opportunities...that come with day services...**In our view, the SMT decision embodies (and in its execution perpetuates) prejudice and stereotyping of senior members of the intellectually disabled community as being people in respect of whom it is no longer necessary to invest the cost of providing day services, and from whom day services can be taken without consequence.** In this context the fact that age is the ground of discrimination at issue cannot possibly save the SMT decision.

76. The HRRT made a declaration that the Ministry's decision to remove funding was inconsistent with s 19(1) of the NZBORA and was not within any justified limitation prescribed by law under s 5 of the NZBORA.¹¹⁸ It also awarded costs to the applicant in the sum of \$165,000, which was reduced on appeal.¹¹⁹
77. In another case, *Adoption Action Inc v Attorney-General*, the applicant, Adoption Action Inc, alleged that New Zealand's adoption laws were discriminatory on the grounds of sex, marital status, sexual orientation,

disability, age and race.¹²⁰ The applicant also alleged that people could suffer multiple grounds of discrimination under certain laws, namely:

- (a) Sex and marital status: A birth father who is not married to the birth mother is not required to consent to the adoption of a child, whereas a birth mother cannot have her consent dispensed with except for in extreme circumstances.¹²¹
- (b) Marital status and sexual orientation: A couple in a same-sex de facto civil union or relationship cannot adopt a child as they are not included within the definition of “spouses” for the purposes of the Adoption Act 1955.¹²² Further, for sole applications for adoption, the consent of an unmarried opposite-sex or same-sex partner is not required where the couple are living together, despite the fact that the consent of the spouse of a married applicant is always required.¹²³

78. The HRRT found that in both of the circumstances described above, the relevant laws were discriminatory and not justifiable under s 5 of the NZBORA, and granted declarations accordingly.¹²⁴ Although the HRRT did not discuss the implications of the intersectional aspects of the claim, in finding for the applicant, the HRRT demonstrated a willingness to uphold claims based on multiple grounds of discrimination.

Cases where additional grounds not pursued

79. In several cases before the HRRT, claimants have alleged multiple grounds of discrimination in their initial complaint to the HRC but these additional grounds have either not been pursued at hearing, or the HRRT has focused on only one ground in determining the claim, normally due to procedural or evidential issues.
80. For example, in *Bullock v Department of Corrections*, a female Māori probation officer attended a graduation ceremony for offenders and was treated differently to her male colleagues by being made to sit in the back and not being given an opportunity to speak.¹²⁵ While she claimed that she had been discriminated against on a number of grounds (including ethical belief, race and/or political opinion), the HRRT chose only to consider her claim of sex discrimination because the other alleged discriminatory treatment pleaded by the claimant did not relate to the graduation ceremony:¹²⁶

... the plaintiff's claim referred to a number of the prohibited grounds of discrimination apart from sex. Again, it may be that in some respects those parts of the claim were intended to relate to other issues raised by the plaintiff, and which are not directly concerned with the graduation. We think it is enough to say that the overwhelming focus of the evidence and argument we heard concerned the possibility of unlawful conduct on the grounds of the plaintiff's sex. We do not therefore consider it to be necessary to deal with any independent issues of discrimination on the grounds of ethical belief, race and/or political opinion in relation to what happened at, and as a result of, the graduation (**beyond saying again that, even if those issues were fully analysed, we do not think the end result would be materially different**).

81. In *CBA v LKJ Ltd*, the plaintiff, a single, 45-year-old woman, was denied in vitro fertilisation (“IVF”) on the basis that the risk of harm from the procedure outweighed the chance of IVF leading to a successful pregnancy.¹²⁷ She alleged that she had been discriminated against on the basis of her marital status as a single woman, her age and disability, as her mental health was taken into consideration by the IVF team. The plaintiff abandoned the first two grounds at the hearing (for reasons unknown), with the case being argued as one of discrimination on the basis of disability.
82. In *Eaglesome v Chief Executive of the Department of Corrections*, the complainant prisoner alleged discrimination on the grounds of sexual orientation and religion.¹²⁸ However, the complainant, again for reasons unknown, chose to abandon the sexual orientation claim pre-hearing, and the HRRT ultimately referred the matter back to the HRC.

Cases where claim struck out

83. Finally, in several other cases involving multiple grounds of discrimination, the plaintiff's claim has either been struck out by the HRRT due to evidential issues, or referred back to the HRC.¹²⁹
84. For example, in *Mackrell v Universal College of Learning*, the plaintiff claimed that she had been discriminated against when enrolled with the defendant as a student nurse on the grounds of marital status, religious belief and disability, as well as victimisation and harassment on the grounds of colour and race.¹³⁰ Her

claim was struck out for various reasons, including procedural issues, lack of evidence and a general lack of clarity around her allegations.

85. Similarly, in *Orlov v Ministry of Justice*, the plaintiff's claims of discrimination on the grounds of ethical belief, ethnic or national origin and/or political opinion were struck out as they were too "vague" to constitute "tenable" claims of discrimination.¹³¹ The plaintiff claimed that the judge in *habeas corpus* proceedings, where the plaintiff was a lawyer for one of the parties, discriminated against him by refusing to hear his arguments and told him repeatedly to "sit down and shut up". The judge subsequently complained about the plaintiff's conduct to the Law Society. The plaintiff's claim did not adduce any evidence demonstrating that the judge's alleged conduct was on the basis of the relevant grounds of discrimination pleaded.
86. In another case, *Sioneplu v Downer NZ Ltd*, a pregnant Pasifika woman was hit by a truck operated by a Downer employee.¹³² Downer subsequently denied involvement, with the implication that the plaintiff had caused the damage to her own vehicle. The plaintiff claimed that she had been discriminated against by Downer on the basis of sex and ethnicity. In particular, she claimed that Downer was a 'man's company' and believed that she, as a woman, should just 'get over it'. She also claimed that Downer had assumed they could get away with the incident because she was a Pacific Islander. The claim was ultimately struck out for lack of evidence, as Downer had not been aware of her sex or ethnicity until after the relevant events.
87. Finally, in *Morrison v Housing New Zealand Corporation*, the plaintiff brought a claim of discrimination on the grounds of disability, family status, employment status, race and ethnic or national origins.¹³³ The claim was struck out for failing to provide a clear connection between the prohibited grounds of discrimination and any conduct by the defendant, though the HRRT said that this did not preclude the plaintiff from making a new claim based on Part 1A of the HRA.

Could s 19(1) of the NZBORA accommodate an intersectional discrimination claim?

88. Although an intersectional discrimination claim has not yet been expressly pleaded, there is nothing in s 19(1) of the NZBORA to suggest that a claimant would be prevented from bringing a discrimination claim based on more than one prohibited ground. Section 19(1) provides that: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". Nor does the HRA (or for that matter, the ERA) limit claimants to relying on one prohibited ground in discrimination cases.
89. In determining whether there has been an unjustified breach of s 19(1), the Courts have emphasised that the Courts should adopt a "purposive and untechnical approach".¹³⁴ As Tipping J said in *Quilter v Attorney-General*:¹³⁵

The spirit of the Bill of Rights and the Human Rights Act suggests a broad and purposive approach to these problems. Such an approach leads to the proposition that it is preferable to focus more on impact than on strict analysis... New Zealand's human rights legislation... is to be afforded a liberal and purposive interpretation, rather than an interpretation of a technical kind...

90. Further, in *Atkinson*, the Court of Appeal emphasised that:¹³⁶

...the word "discrimination" in s 19(1) is not qualified in any way. While plainly the word means more than differentiation, a comparison can be made with other rights in the Bill of Rights which include a qualification in the statement of the rights themselves. For example, s 21 of the Bill of Rights protects the right to be free from "unreasonable" search and seizure. The right to freedom from discrimination is not qualified in this way.

91. Accordingly, if faced with a claim where intersectional discrimination is expressly pleaded, the Courts could conclude that s 19(1) is broad enough to encompass such claims. Therefore, law reform is unlikely to be needed to clarify the scope of s 19(1).
92. There may, however, be benefit in clarifying that s 19(1) is broad enough to encompass intersectional discrimination, as has occurred in Canada.¹³⁷ As addressed below, s 3(1) was inserted into the Canadian Human Rights Act to clarify that the Act encompasses both additive and intersectional discrimination claims. Section 21 of the HRA could be amended by inserting a new subsection, such as the following:

“For the avoidance of doubt, discrimination may be based on one or more of the prohibited grounds listed in subsection (1), and on a combination of prohibited grounds.”¹³⁸ Such an amendment would provide much-needed visibility and awareness of intersectional discrimination.

An intersectional discrimination claim under the Treaty of Waitangi

93. In light of the double disadvantage often experienced by Māori women (as discussed above), it is also worth briefly considering whether Article Three of the Treaty of Waitangi (**‘the Treaty’**), which affirms the principle of equality and non-discrimination between all New Zealanders, might encompass a claim of intersectional discrimination based on race and sex.¹³⁹
94. In contrast to the HRA and the NZBORA, the Treaty does not list the grounds on which discrimination is prohibited, so it theoretically could extend to encompass multiple discrimination claims against the Crown (based on contemporary breaches).¹⁴⁰ Indeed, a discrimination claim on the basis of multiple protected grounds has been submitted to the Waitangi Tribunal relying on Articles Two and Three of the Treaty, though it has yet to be heard by the Tribunal.¹⁴¹ In 1993, a group of Māori women submitted an urgent claim to the Waitangi Tribunal (WAI 381, known as the Mana Wahine claim) alleging that the Crown’s actions and policies since 1840 have systematically discriminated against Māori women and deprived them of their spiritual, cultural, social and economic well-being and rangatiratanga, as protected by the Treaty.
95. After more than 20 years, the Mana Wahine claim is still yet to be heard by the Waitangi Tribunal due to the backlog of historical claims, though it is listed as fourth on the Tribunal’s agenda for the next ten years (as at 2015).¹⁴²

Case studies: What might an intersectional discrimination case look like?

Salisbury School: Age, sex and disability status

96. The Minister of Education’s proposed closure of Salisbury School, a single-sex residential (boarding) school in Nelson for intellectually disabled female students in in years 3 to 10 of schooling, provides a useful example of what a case of intersectional discrimination might look like in the New Zealand context (if expressly pleaded as such) under s 19(1) of the NZBORA. It also bears some similarities to the Canadian case of *Auton*, discussed below, which also concerned special education.¹⁴³ In that case, the Court’s chosen comparator group failed to take into account the relevance of the claimants’ age, which was ultimately fatal to the claim.
97. The Minister sought to close Salisbury School in 2012 and transfer its students to a co-educational school, Halswell. However, this decision was successfully challenged via judicial review.¹⁴⁴ The High Court concluded that the Minister had failed to consider the mandatory relevant consideration that the safety of students included the established and enhanced vulnerability of intellectually impaired girls (compared to intellectually impaired boys) upon being transferred to a co-educational setting:¹⁴⁵

As a matter of common sense, the risk of sexual abuse for girls with impaired intellect is likely to increase, the more they are in the company of potential abusers. Intellectually impaired boys are potential abusers...No great leap in logic is required to recognise the validity of concerns over having boys and girls together for the educational aspects of residential special needs education, even if completely effective separation of the residential aspects of schooling in a co-educational setting is achieved. Those changes introduce a risk that would not be present in the single sex environment at Salisbury School...the protection of girls from physical and sexual abuse if placed in a co-educational special school setting... was a mandatory relevant consideration in assessing the sufficiency of that solution as an alternative to providing for girls at Salisbury School. The Minister’s decision failed to have regard to available warning signals raised by and on behalf of the Trustees about greater levels of risk of abuse in a co-educational setting.

98. In June 2016, the Minister commenced consultation on her renewed proposal to close Salisbury School by the end of 2016.¹⁴⁶ The Minister stated that the successful implementation of the Intensive Wraparound Service (**‘IWS’**) – a support system for students with highly complex and challenging behaviour, with the aim of keeping students at their local schools – had reduced the demand for residential schooling. Since 2011 Salisbury School’s roll has fallen from 72 to nine, pushing the per student cost of educating girls at

Salisbury up to \$214,909. The Minister also commenced consultation on the proposal to make Halswell co-educational.

99. The Minister's proposal to close Salisbury has received criticism from Salisbury's Board of Trustees, Opposition MPs and the public.¹⁴⁷ One of the main objections has been that the application of the IWS, has led to the "managing down" of Salisbury's enrolments since 2012.¹⁴⁸ The IWS appears to prioritise applications from intellectually impaired students with conduct disorders, meaning that intellectually impaired students without conduct disorders are left to "fall through the gaps".¹⁴⁹ Students must be approved for IWS funding in order to be eligible for enrolment at residential special schools, such as Salisbury.¹⁵⁰ Further, the proposal to close Salisbury and transfer students to a co-educational setting at Halswell raises potential risks for Salisbury's female students, who are particularly vulnerable to abuse compared to other students (including intellectually disabled boys), as was discussed in the 2012 judicial review decision. Halswell also only caters to students in years 6 to 10 of schooling, meaning that female students between years 3 to 5 of schooling who are eligible for enrolment at a special school will be rendered incapable of being enrolled at a special school in the event of Salisbury's closure.
100. If Salisbury was closed, and the school legally challenged the Minister's decision in Court, it is arguable that an intersectional discrimination claim could be brought on behalf of Salisbury's current and prospective students on the basis of age and sex. The claimant group would consist of current and future students who will not receive an education that adequately provides for their special educational needs as a result of the Ministry's closure of Salisbury. Disability is also relevant to the claimant group's experience, as they are already a vulnerable group by virtue of their disability status, with this vulnerability being compounded for female students in a co-educational setting.
101. Salisbury is the only single-sex school for girls providing residential special education in New Zealand. If it is closed, girls requiring residential special education will be directed to attend Halswell, which could become co-educational. If Salisbury is closed, this decision would prima facie limit the rights of girls requiring special education under s 19(1) of the NZBORA on the basis of sex. Because intellectually impaired female students are at greater risk of abuse than boys in a co-educational residential school setting, even if completely separated from male students, female students are materially disadvantaged compared to male students in such a setting. For female students in years 3 to 5, they will no longer have any options for residential schooling appropriate to their needs, which appears to discriminate on the basis of sex and age contrary to s 19(1).
102. In the end, any approach that the Court may take in such a case, to issues such as whether *Atkinson* should apply, whether a comparative approach should be adopted and the appropriate remedy, remains to be seen. As is addressed below, overseas courts have encountered a number of issues when seeking to apply an intersectional discrimination approach in practice, though these issues have been overcome.
103. Ultimately, the Courts, when considering whether the claimant group in such a case has been materially disadvantaged, should take into account the compounded disadvantage the claimant group will likely have experienced due to the intersectional nature of the discrimination. In the case of Salisbury, that would arguably include the claimant group's disability status, not just their sex and/or age, which renders them particularly vulnerable in education settings. Otherwise, the Courts risk failing to take into account the true nature and extent of the discrimination alleged, and risk undertaking an artificial analysis of the claim.

Mana wahine claim: Participation of Māori women in political and public life

104. The Mana Wahine claim provides another example of what an intersectional discrimination claim might look like.
105. The genesis for the claim was the removal of a respected Māori woman elder from the shortlist of appointees to the Māori Fisheries Commission¹⁵¹ and the control of the fisheries settlement process almost exclusively by the Crown and Māori men.¹⁵² The claim seeks to "remedy exclusionary practices of the Crown which inhibited and prevented participation by Māori women in decision making".¹⁵³
106. Although the claim arose from a specific event, it concerns the Crown's actions and policies since 1840, and alleges that the Crown has systematically discriminated against Māori women and deprived them of their spiritual, cultural, social and economic well-being and rangatiratanga. As discussed above, Māori women are subject to a double disadvantage in many contexts, including access to the legal system,

employment and health. Therefore, the Waitangi Tribunal's findings will likely have broad implications for Māori women generally.

107. Although submitted under the Treaty, the claimants would also be entitled to bring a claim against the Crown alleging breach of s 19(1) of the NZBORA on the basis of both ethnicity/race and sex. The exclusion of Māori women from the settlement process prima facie limits the right of these women to freedom from discrimination on the basis of their ethnicity/race (particularly as indigenous peoples)¹⁵⁴ and gender.
108. One aspect of the claim that requires careful consideration (and which likely makes the Waitangi Tribunal a more appropriate forum for the claim's determination) is the contention by some that the alleged discriminatory practices are sourced in tikanga Māori, and are not attributable to the Crown.¹⁵⁵

Employment of Muslim women

109. Intersectional discrimination cases that have arisen overseas have often involved allegations of discrimination in the employment context.¹⁵⁶
110. There have been several New Zealand media stories in recent years involving Muslim women who have been denied employment or been abused in public for wearing a hijab. For example, in July 2016, a 25-year-old Muslim girl was told by a manager at a jewellery store that applying for a job was a "waste of time" unless she removed her hijab.¹⁵⁷ The incident, which was the second such incident within nine months at one of the jewellery chain's stores, led to the chain's head office issuing a stern warning to staff that discrimination, on any grounds, will not be tolerated.¹⁵⁸
111. In these cases, a complaint could have been submitted to the HRC or a claim could have been filed with the High Court alleging breach of the HRA and/or the NZBORA for discrimination on the basis of both sex and religious belief (and possibly ethnicity). In the absence of any health and safety issues, it is difficult to see how there would be any justification for breach of the right to freedom from discrimination in these circumstances.¹⁵⁹

Need for increased awareness of intersectional discrimination

112. One of the key problems appearing to prevent cases of intersectional discrimination from being properly recognised and addressed in law is a "lack of awareness of intersectional discrimination" by "those who may be suffering it", and such discrimination "can be misidentified, misunderstood or simply not recognised".¹⁶⁰
113. Given that there will likely be more cases of multiple discrimination due to New Zealand's increasing superdiversity, there needs to be increased awareness of intersectional discrimination by complainants, their lawyers, and by courts and tribunals, so that such cases are determined in a manner that takes into account the real and lived experience of complainants.
114. The HRC has already dealt with multiple ground discrimination cases in mediation (as discussed above). Further, under s 5 of the HRA, one of the primary functions of the HRC is to "advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society".¹⁶¹ It would therefore be consistent with the statutory role of the HRC to undertake an active role in promoting awareness of intersectional discrimination, generally and in the HRC complaints process. This could include, pursuant to its statutory functions, promoting respect for and observance of human rights through education and publicity,¹⁶² publishing guidance promoting an understanding of the HRA and the NZBORA (which could include, for example, information on the scope of s 19(1) of the NZBORA),¹⁶³ and appearing as an intervenor in court and tribunal proceedings to be an advocate for human rights.¹⁶⁴ By way of example, the Ontario Human Rights Commission and the Canadian Human Rights Tribunal have raised intersectional discrimination in relevant cases as an intervenor,¹⁶⁵ and the former has endorsed the increasingly "contextualised" approach to discrimination in Canada and the move towards an "intersectional" approach in various publications.¹⁶⁶
115. In order to fully understand the nature and extent of intersectional discrimination, data needs to be collected on discrimination in various contexts on an ongoing basis, and disaggregated in accordance with multiple factors, for example, age, sex, ethnicity and disability. Otherwise intersectional discrimination

will remain largely “invisible”,¹⁶⁷ and the law will fail to properly address experiences of intersectional discrimination, which are only likely to increase with New Zealand’s growing diversity.¹⁶⁸

116. The HRC’s Tracking Equality at Work tool, established in 2015, is a good start.¹⁶⁹ This tool allows discrimination in the employment context to be assessed against multiple indicators. For example, pay rates in the labour market can be examined through three dimensions at once – age, sex and ethnicity – so, for example, one can compare the experience of Asian women between 45 to 64 years of age to European men between 15-24 years of age.¹⁷⁰ However, data is still being collected for the database. The regular collection and disaggregation of data is consistent with the recommendations of various UN Committees (as is discussed below), as well as the practice of overseas bodies such as the Danish Institute for Human Rights. The Danish Institute has recently released a reference paper on data gathered for the purposes of the 2030 Agenda for Sustainable Development.¹⁷¹ Target 17.28 of the Agenda explicitly aims to significantly increase the availability of disaggregated data consistent with the prohibited grounds of discrimination under international law by 2020:¹⁷²

These categories for disaggregation...reflect the cross-cutting human rights principles of non-discrimination and equality. The adequate implementation of target 17.18 is key to enabling a systemic monitoring of the equality and non-discrimination dimensions of the entire 2013 Agenda, and to realising the commitment to ‘leave no one behind’...

117. The paper emphasises that a “key role” of national human rights bodies is “to monitor and analyse the human rights situation at a national level against international human rights standards”, including designing “methodologies for exposing inequalities through disaggregation of statistical data”.¹⁷³

Overseas Jurisprudence

118. In contrast to the New Zealand Courts, the issue of intersectional discrimination has been subject to extensive judicial consideration in most overseas jurisdictions. This section summarises the leading overseas case law on intersectional discrimination, as well as discussing the key issues overseas courts have encountered in determining such claims.

United Kingdom

119. Intersectional discrimination has been considered by the English Courts on a number of occasions, although tension has arisen over two key issues, being:
- (a) Does discrimination need to be made out under each individual ground?
 - (b) Does the claimant need to identify a comparator?
120. The English Courts have, to date, demonstrated a narrow approach to intersectional discrimination cases, tending to require the selection of a comparator and proof of discrimination in relation to each separate alleged ground of discrimination, though lower courts have attempted to soften this approach.

Bahl v Law Society

121. The defining case in this area is *Bahl v Law Society*, which was heard in the Employment Tribunal,¹⁷⁴ the Employment Appeal Tribunal¹⁷⁵ and ultimately in the English Court of Appeal.¹⁷⁶ In *Bahl*, the claimant was a “black Asian” female solicitor who alleged that she had been discriminated against on the basis of race and sex during her dismissal by her employer.
122. In the first instance, the Employment Tribunal found that the actions of the claimant’s employers may have been caused unconsciously by her race or gender, and that she had been treated less favourably than a white person or man in similar circumstances.¹⁷⁷ However, the Employment Tribunal did not expressly explain the characteristics of the hypothetical comparator with whom the claimant was being compared, and did not distinguish between the issues of race and sex in finding that the claimant had been discriminated against.¹⁷⁸

We do not distinguish between the race or sex of the Applicant in reaching this conclusion. Our reason for that is simple. The claim was advanced on the basis that Kamlesh Bahl was treated in the way she was because she is a black woman. Kamlesh Bahl was the first office holder that the Law Society had ever had who was not both white and male. There was no basis in the evidence for comparing her treatment with that of a white female, or a black male, office holder. We can only draw inferences. We do not know what was in the minds of Robert Sayer and Jane Betts at any particular point. It is sufficient for our purposes to find, where appropriate, that in each case they would not have treated a white person or a man less favourably. If we need to refine our approach for the purposes of dealing with remedy the parties may address this issue at that stage.

123. The Employment Appeal Tribunal found that the Employment Tribunal’s failure to distinguish between race and sex discrimination was an error of law, and that it should have considered whether the claimant had proved that discrimination had occurred in respect of either ground.¹⁷⁹ The Employment Appeal Tribunal also held that the Employment Tribunal’s failure to construct a hypothetical comparator was not an error of law in itself, but noted that it would have been prudent to do so.¹⁸⁰
124. The English Court of Appeal agreed with the Employment Appeal Tribunal and criticised the Employment Tribunal for not identifying evidence to support separate claims of race and sex discrimination, finding this to be an error of law.¹⁸¹ Although the Court did not expressly address whether an intersectional discrimination claim was permitted by the relevant legislation,¹⁸² it noted that it was “necessary” for the Employment Tribunal to find “the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference which it did”.¹⁸³
125. The difficulty with this approach is that, by separating the two grounds and requiring the plaintiff to provide evidence in support of both, the Court was effectively treating the pleaded grounds in isolation from each other, which failed to take into account whether the discriminatory treatment alleged by the claimant was intersectional, that is, “specifically connected with her identity as a black woman”.¹⁸⁴ In other

words, the evidential test stated by the Court negated the opportunity for any intersectional analysis. As noted by McColgan:¹⁸⁵

Not only does the decision in *Bahl* protect intersectional discrimination from challenge under domestic discrimination law, it renders proof of discrimination virtually impossible for someone who differs from the 'unstated norm' in more than one respect, unless she avoids drawing attention to more than one of her deviations from this norm.

126. Further, the Court's approach failed to take into account that the two grounds compounded to result in a greater harm than the separate constituent elements, and that two protected characteristics may not be capable of being separated.

Subsequent legislative and case law developments

127. Following the decision in *Bahl*, the United Kingdom Parliament attempted to expressly protect against multiple discrimination on two (though not more) prohibited grounds by enacting the Equality Act 2010 (UK). Section 14 of the Equality Act sought to introduce a new category of "combined discrimination" based on "dual characteristics" including age, disability, gender reassignment, race, religion or belief, sex and sexual orientation. Section 14 provided that:¹⁸⁶

A person (A) discriminates against another (B) if, because of **a combination of two relevant protected characteristics**, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.

...

For the purposes of establishing a contravention of this Act by virtue of subsection (1), **B need not show that A's treatment of B is direct discrimination because of each of the characteristics in the combination (taken separately).**

But B cannot establish a contravention of this Act by virtue of subsection (1) if, in reliance on another provision of this Act or any other enactment, A shows that A's treatment of B is not direct discrimination because of either or both of the characteristics in the combination.

128. Section 14 was initially delayed from coming into force, and was later removed entirely to reduce the cost of regulation to business, approximately £3 million each year according to the British Home Office.¹⁸⁷
129. The approach adopted in *Bahl*, and the effect of the proposed s 14, were both discussed in *O'Reilly v BBC*.¹⁸⁸ In that case, the claimant made complaints of direct age discrimination, age victimisation, direct sex discrimination and sex victimisation against her former employer, the first respondent. Counsel for the first respondent relied on the decision in *Bahl* and contended that, in the absence of s 14 having come into force, multiple discrimination was "not currently unlawful".¹⁸⁹ However, the Employment Tribunal disagreed with the first respondent's interpretation of *Bahl*, and held that discrimination in employment could occur as the result of a combination of multiple protected characteristics:¹⁹⁰

It would be extremely surprising should [a claim] fail because the discrimination is combined. The position is more difficult when dealing with claims in which it is necessary to determine the reason why treatment was afforded which was not based on the application of criteria that were expressly, or inherently, discriminatory. This raises real difficulties in the analysis of evidence, that we consider, on a proper analysis, was where the...Court of Appeal considered that the tribunal fell into error in *Bahl*. **The error was not as to the possibility of there being combined discrimination, which was not expressly considered in the case; but of analysis of the evidence which requires a conclusion that age and/or sex were significant factors in the decision that was made before liability can be established.** It is not sufficient to conclude that the evidence does not support a finding of either sex or age discrimination, **but that it must be one or the other, or both...We have to decide whether age or sex is a factor in the decision singly, whether both are factors, or whether they are factors in combination. We need to have that in mind to analyse the primary facts and draw inferences from them.**

130. The Employment Tribunal ultimately upheld the claims based on age discrimination, but not those based on sex discrimination. This decision was not appealed, and has not been addressed in subsequent cases.

131. In another case, *Ministry of Defence v DeBique*, the claimant was a Foreign and Commonwealth soldier serving in the British Army, as well as a single mother with a young daughter.¹⁹¹ The claimant contended that the Army's policy that it is the responsibility of parents, married or single, to ensure they have the required childcare so that soldiers could be available 24/7 (**24/7 PCP**), indirectly discriminated against her on the basis of sex. This was because women were more likely than men to be single parents with primary childcare responsibility, and the 24/7 PCP caused particular difficulty for single parents because of the need for special childcare arrangements. The claimant also contended that she was at a particular disadvantage because she was ineligible for adult relative childcare cover due to her status as a Foreign and Commonwealth Soldier (**the immigration PCP**), and claimed she had been subjected to indirect race discrimination. On appeal, the Ministry of Defence argued that the Tribunal erred in considering the combined effect of the two PCPs. The Employment Appeal Tribunal rejected this argument on the basis that discrimination "**cannot always be sensibly compartmentalised into discrete categories**" and that claimants can experience a "double disadvantage" caused by their particular circumstances:¹⁹²

Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience. The Claimant in this case considered that the particular disadvantage to which she was subject arose both because she was a 24/7 female soldier with a child and because she was a woman of Vincentian national origin, for whom childcare assistance from a live-in Vincentian relative was not permitted. The Tribunal recognised that this double disadvantage reflected the factual reality of her situation.

Canada

132. Section 15 of the Canadian Charter of Rights and Freedoms (**'the Charter'**) provides:
- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
133. The Canadian Human Rights Act 1977 (CAN) also protects against discrimination on the grounds listed in s 15(1), and also expressly protects against discrimination on the basis of family status, sexual orientation and marital status.
134. Intersectional discrimination is now well-entrenched in Canadian human rights law, following several Charter cases that established a new approach to discrimination based on the 'matrix' of factors that make up an individual's unique experience.
135. Notably, s 3(1) of the Canadian Human Rights Act, which primarily deals with discrimination in employment, was inserted in 1998 to clarify that the Canadian Human Rights Act also protects against multiple discrimination:¹⁹³
- For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.
136. Although there has been no substantive consideration of this provision by the Canadian Courts since its implementation,¹⁹⁴ Canadian human rights tribunals have upheld multiple claims of intersectional discrimination in recent years, though there has been limited consideration of such cases by higher level courts since the mid-1990s.
137. In contrast to the UK Courts, the Canadian Courts have not tended to adopt a comparator analysis to identify whether intersectional discrimination has occurred, instead focussing on the compounding disadvantage to the claimant in such cases.

138. In *Canada v Mossop*, the claimant was denied bereavement leave to attend his partner's father's funeral because his partner was also male.¹⁹⁵ The Supreme Court of Canada held that he had not been discriminated against on the basis of family status. However, L'Heureux-Dube J, in her dissenting opinion, concluded that the claim should be upheld:¹⁹⁶

It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex... **Categorizing such discrimination as primarily racially oriented, or primarily gender oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.**

However, though multiple levels of discrimination may exist, multiple levels of protection may not. There are situations where a person suffers discrimination on more than one ground, but where only one form of discrimination is a prohibited ground. When faced with such situations, one should be cautious not to characterize the discrimination so as to deprive the person of any protection... One should not lightly allow a characterization which excludes those from the scope of the Act who should legitimately be included. **A narrow and exclusionary approach, in my view, is inconsistent with a broad and purposive interpretation of human rights legislation.**

139. Justice L'Heureux-Dube reiterated this view in her dissenting judgment in the subsequent case of *Egan v Canada*.¹⁹⁷ In that case, the appellants were denied a spousal allowance under ss 2 and 19(1) of the Old Age Security Act RSC 1985 (CAN) because the Act did not recognise homosexual relationships. They challenged the constitutionality of these provisions on the basis that they discriminated on the ground of sexual orientation, which they argued was an analogous ground to those listed in s 15(1) of the Charter, and should therefore be afforded protection under the Charter. The majority of the Supreme Court of Canada took a "grounds-based" approach to discrimination, focusing on whether the alleged discrimination was based on one of the enumerated or analogous grounds in the Charter.¹⁹⁸ However, L'Heureux-Dube J argued that applying a strict grounds-based approach was incorrect:¹⁹⁹

The enumerated or analogous nature of a given ground should not be a necessary precondition to a finding of discrimination. If anything, a finding of discrimination is a precondition to the recognition of an analogous ground. The effect of the "enumerated or analogous grounds" approach may be to narrow the ambit of s. 15, and to encourage too much analysis at the wrong level...

Courts must treat these considerations as a matrix rather than as a single equation, and as the microscope rather than as the object being studied.

140. The Canadian Supreme Court affirmed the grounds-based approach in *Law v Canada*, but held that such an approach did not preclude a Multiple ground discrimination claim.²⁰⁰ That case concerned the constitutionality of the ss 44(1)(d) and 58 of the Canada Pension Plan RSC 1985 (CAN), which drew distinctions on the basis of age with regard to entitlement to survivor's pensions. The claimant contended that the entitlements were dependent upon the interplay of age, disability, and parental status. The Court concluded that:²⁰¹

...this interplay would not preclude the appellant from establishing that a distinction had been drawn on one or more of the grounds in s. 15(1) of the Charter...it is open to a claimant to articulate a discrimination claim under more than one of the enumerated and analogous grounds.

141. It also affirmed that it was the Court's task to consider whether the alleged grounds were analogous to those enumerated in the Charter, considering "the nature and situation of the individual or group at issue, and the social, political and legal history of Canadian society's treatment of the group". Accordingly, there was "no reason in principle... why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or a synthesis of, the grounds listed in s 15(1)".²⁰²

Comeau and Morrison

142. Intersectional discrimination claims were upheld in *Comeau v Cote*²⁰³ and *Morrison v Motsewetshe*.²⁰⁴
143. In *Comeau*, a 63 year-old construction worker with a heart condition was laid off by his employer and subsequently claimed discrimination on the grounds of age and disability. The British Columbia Human Rights Tribunal (**British Columbia HRT**) held that his termination was, in part, based on the combined and compounded effect of his disability (as perceived by the claimant's employer) and age:²⁰⁵
- Whether or not Mr Comeau's age, or health, in isolation, would have affected his employment, I am persuaded that in Mr Cote's assessment, Mr Comeau's heart condition or perceived disability was amplified by the fact that he was a 63-year old man at the time.
144. The British Columbia HRT ultimately awarded the claimant \$13,860 for lost wages and \$3,500 for the injury to his dignity, feelings and self-respect.
145. In *Morrison*, the Ontario Human Rights Tribunal (**Ontario HRT**) held that two African female complainants had been subjected to 'intersectional discrimination' by the respondent during a recruitment process on the grounds of sex and ethnicity. The Ontario HRT awarded one of the respondents \$5,000 and the other respondent \$8,000 in compensation for their humiliation and loss of dignity resulting from the infringement of their rights to be free from intersectional discrimination based on her sex and ethnic origin, sexual solicitation and harassment.
146. However, neither Tribunal discussed the principles applicable to intersectional discrimination cases, preferring to focus on an evidential analysis of whether discrimination had occurred. Nor did the Tribunals adopt a comparative analysis.

Baylis-Flannery test

147. The principles regarding intersectional discrimination were first articulated by the Ontario HRT in the 2003 case of *Baylis-Flannery v DeWilde*.²⁰⁶ The complainant alleged that the respondent, her employer, had discriminated against her as a black woman by "making various unwanted sexual advances to her as a Black woman, by assaulting her, by describing the body parts of other Black women and other African or Black persons generally to her, by making racist and sexist jokes, by ignoring her efforts to rebuff him, and by committing acts of reprisal against her".²⁰⁷
148. The Ontario HRT, citing *Comeau and Morrison*, concluded that "an intersectional analysis of discrimination is a **fact-driven exercise** that assesses the disparate relevancy and impact of the possibility of compound discrimination".²⁰⁸ As with the Tribunals in *Comeau and Morrison*, the Ontario HRT did not adopt a comparative analysis, likely because there was direct evidence of discrimination in each of these cases.
149. While the Ontario HRT acknowledged that the complainant could likely succeed under the separate grounds of race or sex, it found that there was a "danger in adopting a single ground approach" as this would negate the importance of the particular sexual discrimination that she had suffered as a black woman:²⁰⁹
- ...reliance on a single axis analysis where multiple grounds of discrimination are found, tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds, rather than recognize the possibility of the compound discrimination that may have occurred.
150. The Ontario HRT awarded the complainant \$35,000 as compensation for her humiliation and loss of dignity resulting from the infringement of her rights to be free from racial and sexual discrimination, sexual solicitation and harassment, racial harassment, retaliatory treatment for the rejection of such solicitation, and as compensation for the loss of the right to be free from reprisals. She was also awarded \$10,000 as compensation for her mental anguish caused by the infringement of her rights.

Subsequent cases

151. Since the decisions in *Comeau*, *Morrison* and *Baylis-Flannery*, the Ontario and British Columbia HRTs have upheld a number of cases of intersectional discrimination, usually in the context of employment.²¹⁰

152. In *Flamand v DGN Investments*, the Ontario HRT found that a native Canadian single mother had been discriminated against on the intersecting grounds of ancestry and family status, and affirmed its position in *Baylis-Flannery* that “the reliance on a single axis analysis where multiple grounds of discrimination are found tends to minimize the impact of the other ground of discrimination”.²¹¹
153. In *Hogan v Ontario*, the Ontario HRT involved a transsexual claimant who alleged that the delisting of sex re-assignment surgery (**SRS**) from the Schedule of Benefits, resulting in SRS not being covered by the claimant’s health insurance, constituted discrimination on the basis of sex and disability.²¹² The majority held that the claims of sex and disability discrimination had to be considered separately, as there was no intersectional impact.²¹³ The Vice-Chair disagreed, finding that sex and disability discrimination were “inherently intersectional”:²¹⁴

...transsexuals are a distinct and insular minority, whose disability and sex, in the broadest sense of both terms, are often misunderstood. They routinely suffer from prejudice and negative stereotyping, including “transphobia,” and “transbashing,” a targeted form of physical assault. I find that the promulgation of Regulation 528/98 was a form of systemic **discrimination against all transsexuals with profound GID [gender identity disorder] who require sex reassignment surgery.**

154. In another case, *Radek v Henderson Development Ltd*, the British Columbia HRT upheld a claim by a disabled Aboriginal woman who was denied entry to a shopping mall by a security officer, and alleged discrimination on the grounds of race, colour, ancestry and physical disability.²¹⁵ The British Columbia HRT referred to the concept of intersectionality as discussed in *Comeau, Morrison* and *Baylis-Flannery*, and concluded that the effect of the discrimination may have been “especially severe” due to the number of intersecting grounds:²¹⁶

People who were both Aboriginal and disabled, such as Ms. Radek...were particularly liable to be viewed as suspicious and undesirable, and thus subject to adverse treatment. For example, stereotypes about “drunken Indians” made it likely for Aboriginal people with mobility-related disabilities to be perceived as intoxicated or stoned. To be singled out for treatment of the kind described in this decision, because of one’s race or disability or a combination of those factors, constitutes a clear violation of the human dignity of all those so affected. The opportunity to walk into a shopping mall and buy a cup of coffee, go for an inexpensive meal, use a bank machine, or simply pass through on the way to public transportation, is one which the majority of Canadians take for granted. The practices of the respondents had the effect of systematically denying the Aboriginal and disabled people of the Downtown Eastside that opportunity. It made them strangers in their own community.... This denial of equal opportunity on the basis of stereotypes about Aboriginal and disabled people constitutes the antithesis of respect for human dignity.

155. There has, however, been limited consideration of intersectional discrimination by higher level courts. In *Turner v Canada*, the Federal Court of Appeal criticised the Canadian Human Rights Tribunal for failing to consider perceived disability on the basis of the claimant’s weight as an additional ground to a claim of discrimination based primarily on race, national or ethnic origin and age.²¹⁷ The appellant claimed that his failure to pass an interview for a job promotion was due to his being “unfairly stereotyped” within his company “as a big lazy black man”.²¹⁸ The Court of Appeal considered that the intersectional nature of the appellant’s discrimination claim was “sufficiently significant that the Tribunal was under a duty to deal with it or to explain why it did not”:²¹⁹

... the concept of intersecting grounds of discrimination...holds that when multiple grounds of discrimination are present, **their combined effect may be more than the sum of their individual effects.** The concept of intersecting grounds also holds that **analytically separating these multiple grounds minimizes what is, in fact, compound discrimination.** When analyzed separately, each ground may not justify individually a finding of discrimination, but when the grounds are considered together, another picture may emerge...though the primary focus of a complaint of discrimination may be race, **the analysis of that primary ground must not ignore the other grounds of complaint,** such as disability, and the possibility that compound discrimination may have occurred as a result of the intersection of these grounds. Moreover, section 3.1 of the Canadian Human Rights Act specifically provides that a discriminatory practice includes a practice based on the effect of a combination of prohibited grounds.

156. The Court allowed the appeal and referred the matter back to the Tribunal, which ultimately concluded that the appellant had been the object of stereotypical assumptions about older, obese, black males.²²⁰ However, the second Tribunal decision was subsequently subject to a successful judicial review on the grounds that the Tribunal's assessment of the evidence and its conclusion that the appellant had made out a case of intersectional discrimination were unreasonable.²²¹

Australia

157. As in New Zealand, there has been limited consideration of intersectional discrimination in Australia to date, despite Australia's increasing diversity. Sydney, in particular, has a disproportionately large concentration of many of Australia's migrant communities. The Lebanese, Fijian, Korean and Nepalese communities have been called "large population groups". Well over half of Australia's 25,000-strong Nepalese community, for example, is concentrated in Sydney, and seven out of every ten Lebanese migrants in Australia live in Sydney. Similarly, Melbourne has the second largest Asian population in Australia, which includes the largest Indian and Sri Lankan communities in the country. Melbourne exceeds the national average in terms of proportion of residents born overseas: 34.8 per cent compared to a national average of 23.1 per cent.
158. The UN, through its various human rights committees, has recommended that Australia undertake further action to address the discrimination and disadvantage faced by its most vulnerable communities, particularly the Aboriginal community. The CEDAW Committee, in its most recent concluding observations on Australia's compliance with the CEDAW, noted that there had been "slow progress" in ensuring the equal participation of vulnerable groups of women, such as indigenous women, women with disabilities, migrant women and women from culturally and linguistically diverse backgrounds, in public and political life, as well as their equal access to education, employment and health.²²² The Committee further commented that data "does not always allow for a full understanding of ways in which multiple forms of discrimination impact outcomes for specific groups such as indigenous women and girls".²²³ Australia's Multicultural Policy, introduced in 2014, states that the Australian Multicultural Council will work with state and territory governments under the Council of Australian Governments to ensure that data collected by government agencies on client services can be disaggregated by markers of cultural diversity, such as country-of-birth, ancestry, languages spoken at home and level of English proficiency.²²⁴
159. The UN has consistently expressed concern about the position of indigenous women and children, who are "particularly disadvantaged".²²⁵ In 2010, the Special Rapporteur on the situation of indigenous people reported that indigenous people in Australia suffer disadvantage "across the range of socio-economic factors" and indigenous Aboriginal women and children experience "distressingly high rates of violence and poor living conditions" compared to non-indigenous women and children.²²⁶ Similar concerns have been raised by the Special Rapporteur on adequate housing, who commented that indigenous women and children face issues regarding access to adequate housing, and suffer health problems as a consequence.²²⁷
160. The Australian Human Rights Commission ('AHRC') has also acknowledged the disadvantage and discrimination suffered by indigenous women and children in Australia. In a progress report to the UNHRC in 2014, the AHRC (on behalf of the Australian Council of Human Rights Authorities) noted that Aboriginal and Torres Strait Islander women are significantly more likely to be victims of domestic and family violence or to be hospitalised as a result of assault.²²⁸ Further, Aboriginal and Torres Strait women and young people are disproportionately represented in the criminal justice system.²²⁹
161. The Australian Courts have not expressly recognised the concept of intersectional discrimination, despite being faced with such claims. For example, in *Dao & Anor v Australian Postal Commission*, two Vietnamese women made a complaint of discrimination to the New South Wales Equal Opportunity Commission after being denied employment with Australia Post for failing to meet minimum body weight requirements.²³⁰ They alleged discrimination on the grounds of race and sex; the women's body weight was "too low" because they were Asian women. Although the High Court dismissed the claim on procedural grounds, the fact situation illustrates that the experience of women from ethnic minorities is qualitatively different from a European woman or an Asian man, and that such claimants may not be able to say that their experience of discrimination is because of race as distinct from sex or vice versa.²³¹
162. Despite the apparent need for a more intersectional approach to human rights protection in Australia,²³² the anti-discrimination legislative framework that exists is inherently single-ground in nature. Australia has multiple anti-discrimination statutes, being the Australian Human Rights Commission Act 1986, the

Racial Discrimination Act 1975, the Sex Discrimination Act 1984, the Disability Discrimination Act 1992 and the Age Discrimination Act 2004. In a 2001 issues paper on sex and race intersectionality, the AHRC criticised this legislation as creating “artificial divisions between race and gender, so that those who experience disadvantage on both grounds may not have their experiences recognised”.²³³ In its response to a report by the UN Secretary-General on the rights of older people, in 2011, the AHRC described Australia’s anti-discrimination legal framework as follows:²³⁴

The federal anti-discrimination laws, the Commission’s procedures and those of the courts allow for complaints to be made on multiple grounds. The Commission notes that state/territory-based anti-discrimination legislation which includes the ground of age co-exist with the federal legislation. However, arguably there is limited provision within the Acts to address intersectional discrimination.

163. At an AHRC forum on “Equal Dialogues” in 2010, participants (made up of government, NGO, and community organisation representatives) called for a multicultural policy that “addresses intersecting discrimination faced by vulnerable people within culturally and linguistically diverse groups”.²³⁵ However, Australia’s Multicultural Policy does not recognise intersectional discrimination.

United States

164. In the United States, claims based on multiple grounds of discrimination have been successful under Title VII of the Civil Rights Act 1965, which provides that it is unlawful for an employer to discriminate against an individual “because of such individual’s race, color, religion, sex, or national origin”.
165. The issue of intersectional discrimination arose as early as 1976 in the case of *DeGraffenreid v General Motors*.²³⁶ In that case, a group of black women alleged that their former employer’s ‘last hired-first fired’ policy for layoffs perpetuated the effect of the employer’s past race and sex discrimination in hiring practices. The claimants brought their claim as *black women* and alleged discrimination on the combined grounds of race and sex, rather than race and sex discrimination separately. The Missouri District Court rejected such an approach to discrimination, and found that the issues of race and sex discrimination needed to be addressed separately.²³⁷

The initial issue in this lawsuit is whether or not the plaintiffs are seeking relief from racial discrimination, or sex-based discrimination. The plaintiffs allege that they are suing on behalf of black women, and that therefore this lawsuit attempts to combine two causes of action into a new special sub-category, namely, a combination of racial and sex-based discrimination. The Court notes that the plaintiffs have failed to cite any decisions which have stated that black women are a special class to be protected from discrimination. The Court’s own research has failed to disclose such a decision. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new ‘super-remedy’ which would give them relief beyond what the drafters of the relevant statutes intended. **Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.**

166. The Missouri Court of Appeals upheld the District Court’s decision and did not expressly address the issue of combined discrimination.²³⁸
167. Four years later, the United States Court of Appeals (fifth circuit) reached a different conclusion in the pivotal case of *Jefferies v Harris County Community Action Association*.²³⁹ The plaintiff, Jefferies, was a black woman who had applied for a promotion at her employer, Harris County Community Action Association (‘HCCAA’). Previous holders of the position included a white female and a black male. On the day that the plaintiff submitted her application she discovered that a black male had already been hired to the position. Jefferies argued that HCCAA had discriminated against her, in failing to promote her, on the grounds of sex and race. In support of this, she provided evidence that every position she had ever applied for had been filled by males or non-black females and that her qualification for these positions had never been called into question. The trial court considered the grounds of sex and race discrimination separately and found no discrimination under either ground.
168. On appeal, the plaintiff argued that the trial court had erred by treating the grounds of sex and race as separate. Instead of considering evidence of the number of white female and black males employed

by HCCAA, she submitted that the Court should only have considered statistics about the number of black females hired or promoted. The Court of Appeals accepted this argument, acknowledging that “discrimination against black females can exist even in the absence of discrimination against black men or white women”.²⁴⁰ The Court further noted that Title VII of the Civil Rights Act provided a remedy against employment discrimination on the basis of “race, color, religion, sex, or national origin” and held that “the use of the word ‘or’ evidences Congress’ intent to prohibit employment discrimination based on any or all of the listed characteristics”.²⁴¹ As a consequence, the Court held that black women were intended to be a protected class under Title VII:²⁴²

...in the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy. If both black men and white women are considered to be within the same protected class as black females... no remedy will exist for discrimination which is directed only toward black females.

169. The matter was remanded back to the trial court under the direction that it consider the plaintiff’s claim according to the above principles.
170. Following the decision in *Jefferies*, subsequent courts accepted that Title VII protected black women from discrimination on the dual grounds of race and sex, and that proof of favourable treatment of white females or black males was not fatal to a discrimination claim of this nature.²⁴³ For example, in *Hicks v Gates Rubber Co*, in considering whether the sexual harassment suffered by the plaintiff amounted to a hostile work environment, the US Court of Appeal (10th circuit) directed the lower court to aggregate evidence of racial hostility with evidence of sexual hostility in order to determine the “pervasiveness” of the harassment.²⁴⁴
171. In *Lam v University of Hawaii*, the intersectional approach established in *Jefferies* was extended to encompass Asian women.²⁴⁵ The plaintiff, a woman of Vietnamese descent, claimed that her employer had discriminated against her on the basis of her race, sex and national origin in its decisions to cancel the recruitment process rather than hire her when she applied for advertised positions, on two occasions. The plaintiff’s claim failed in the Hawaiian District Court, which cited the employer’s favourable consideration of Asian male and white female candidates as evidence against discriminatory practices. The United States Court of Appeals (ninth circuit) criticised the District Court’s treatment of racism and sexism as “separate and distinct elements amenable to almost mathematical treatment” and held that Asian men and white women could not be used as the “model victims” for establishing discrimination.²⁴⁶

At least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components... Rather than aiding the decisional process, **the attempt to bisect a person’s identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences**... Like other subclasses under Title VII, Asian women are subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women. In consequence, they may be targeted for discrimination “even in the absence of discrimination against [Asian] men or white women.”... Accordingly, we agree with the *Jefferies* court that, when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.

172. *Jefferies* continues to be followed by the United States Courts faced with Title VII claims of sex and race discrimination,²⁴⁷ and has also been applied in intersectional discrimination cases based on other grounds.²⁴⁸
173. For example, *Hafford v Seidner* involved a claim by an African-American Muslim man that his employer had created a hostile work environment by engaging in racial and/or religious harassment.²⁴⁹ The United States Court of Appeals (sixth circuit), on appeal, noted that the harassment experienced by the appellant may have been based on hostility towards him as a “black Muslim”.²⁵⁰

The theory of a hostile-environment claim is that the cumulative effect of ongoing harassment is abusive. It would not be right to require a judgment against Hafford if the sum of all of the harassment he experienced was abusive, but the incidents could be separated into several

categories, with no one category containing enough incidents to amount to “pervasive” harassment.

174. The Court ultimately referred the case back to the District Court to determine the claim on the basis of both pleaded grounds of discrimination, noting that:²⁵¹

Although there is enough evidence of racial harassment for that claim to stand on its own, the district court should allow at trial for consideration of the possibility that the racial animus of Hafford’s co-workers was augmented by their bias against his religion.

175. In another case, *Gorzynski v JetBlue Airways Corp*, the plaintiff alleged discrimination on the grounds of age and sex, though she did not rely on Title VII.²⁵² The United States Court of Appeals (second circuit) cited *Jefferies* and *Lam* as authority for the fact that discrimination could occur on intersecting grounds. On the facts of this case, the plaintiff had produced sufficient evidence of age discrimination and therefore it was unnecessary for her to bring an age-plus-sex claim.²⁵³ But the intersecting nature of the discrimination arguably would have been relevant to any damages award sought by the plaintiff.

Europe

176. The European Courts have not yet adopted an intersectional approach to discrimination claims, though they have recently begun to express support for such an approach. Most of the cases involving intersectional discrimination to date have either been analysed through a single-axis lens or have focused on alleged violations of claimants’ substantive rights, such as the right to religious freedom, rather than discrimination. Both approaches have arguably prevented the Courts from engaging fully with the realities of the discrimination before them.

Banning of religious garment cases

177. In recent years, the European courts have determined a number of cases focusing on the particular experience of Muslim women following the imposition of bans on the wearing of religious garments in public, such as burqas and hijabs.²⁵⁴ As noted by Eva Brems:²⁵⁵

European societies’ recent struggle with the integration of their Muslim minorities has resulted in many challenging legal debates, particularly with regard to the accommodation of religion in the workplace and in educational settings. Recently, such debates have extended to the proper role of religious expression in the public space. The most widespread example of this new phenomenon is the criminalization of the wearing of the niqab, or Islamic face veil, in public. One of the most remarkable aspects pertaining to the European bans on face coverings and the surrounding debates is that they proceed on the basis of assumptions about women wearing face veils without any factual support. At the time the bans in Belgium and France were adopted, there was no empirical research available that documented the experiences and motives of the women who wore face veils. Nor was there any effort undertaken to consult those women in the process leading up to the ban.

178. However, cases seeking to challenge these bans have tended to focus on claimants’ rights to freedom of religion, as affirmed by art 9 of the European Convention on Human Rights (**‘the Convention’**), rather than their right to freedom from discrimination on the basis of sex, religious belief or a combination of both.²⁵⁶ Schiek has argued that the equality directives implemented by the European Union:²⁵⁷

...require acknowledging the reality of intersectional discrimination. Accordingly, women of ethnic minority origin would form a protected category and would thus be able to establish that a ban on headscarves disproportionately disadvantages them...Above all, testing headscarf bans against a prohibition of intersectional discrimination would allow the law to integrate all the diverging issues captured by a piece of cloth.

179. In Schiek’s view, this could allow the Courts to arrive at “more convincing solutions” than those reached to date under art 9 of the Convention.²⁵⁸ The European Court on Human Rights (**‘ECHR’**) has afforded States a wide margin of appreciation to limit the rights and freedoms of individuals to religious freedom under art 9 of the Convention to pursue the aim of secularism, as secularism is compatible with the role of the State as the “neutral and impartial organiser”.²⁵⁹

180. For example, in *Dahlab v Switzerland*, the applicant was appointed as a primary-school teacher by the Geneva cantonal government.²⁶⁰ The applicant converted to Islam and began wearing an Islamic headscarf in class. After a school inspection, the Director General of Primary Education requested that the applicant stop wearing the headscarf while carrying out her professional duties, as such conduct was incompatible with s 6 of the Public Education Act 1940 (CH), which required teachers to demonstrate “denominational neutrality”. The applicant submitted that the measure prohibiting her from wearing a headscarf in the performance of her teaching duties infringed her freedom to manifest her religion, as guaranteed by art 9 of the Convention. The ECHR, in concluding that the prohibition was not unreasonable, observed that:²⁶¹

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant’s pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which...is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

Accordingly, weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable.

181. The claimant also alleged the prohibition imposed by the Swiss authorities amounted to discrimination on the ground of sex within the meaning of art 14 of the Convention, in that a man belonging to the Muslim faith could teach at a State school without being subject to any form of prohibition. However, the Court rejected this claim, concluding that:²⁶²

...the measure by which the applicant was prohibited, purely in the context of her professional duties, from wearing an Islamic headscarf was not directed at her as a member of the female sex but pursued the legitimate aim of ensuring the neutrality of the State primary-education system. Such a measure could also be applied to a man who, in similar circumstances, wore clothing that clearly identified him as a member of a different faith.

182. In the 2005 case of *Leyla Şahin v Turkey*, the applicant alleged that her rights and freedoms, including her right to freedom of religion, had been violated by regulations prohibiting the wearing of the Islamic headscarf in Turkish higher education institutions.²⁶³ The applicant’s former university took various disciplinary measures, including suspension, against the applicant as a result of her continuing to wear a headscarf during lectures. The ECHR agreed with the lower courts that the regulations: ²⁶⁴

...were based in particular on the two principles of secularism and equality. The principle of secularism prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience. It also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements...that freedom to manifest one’s religion could be restricted in order to defend those values and principles... upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention...

183. The ECHR concluded that the regulations pursued a legitimate aim, and it was not appropriate for the Court to substitute its view for that of the university authorities as to the proportionality of the university’s “internal rules...By reason of their direct and continuous contact with the education community, the university authorities are in principle better placed than an international court to evaluate local needs and conditions or the requirements of a particular course”.²⁶⁵

184. The same conclusion was reached in *Dogru v France*, where the applicant, an 11-year-old Muslim student, refused to take off her headscarf during physical education classes.²⁶⁶ The school sought to expel the student. The ECHR, citing its decision in *Leyla Şahin*, noted that “in a democratic society, in which several religions coexist within one and the same population, it may be necessary to place restrictions on... freedom [of religion] in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected”.²⁶⁷ It reiterated that a State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety, and that the school had a wide “margin of appreciation” regarding the appropriate disciplinary measure in the circumstances.²⁶⁸

185. However, the ECHR set out the limits of this justification for the restriction of art 9 in the case of *Ahmet Arslan and others v Turkey*.²⁶⁹ The applicants must be State officials or the case must concern the regulation of religious symbols in public institutions, such as schools.²⁷⁰ Accordingly, the restriction on the right to religious manifestation must be intended to maintain the neutrality of State institutions if it is to be accepted as a legitimate aim by the ECHR. Indeed, France has only employed secularism as a justification for the limitation of art 9 in cases concerning State institutions or State employees, and did not seek to do so in justifying its burqa ban in *SAS v France*.²⁷¹ In that case, the applicant, a Muslim woman challenged a ban imposed by the French Government on wearing a burqa or niqab in public. She submitted that she was a devout Muslim and wore the burqa and niqab in accordance with her religious faith, culture and personal convictions. She emphasised that neither her husband nor any member of her family put pressure on her to dress in such a manner. In addition to art 9, the applicant also claimed that the ban violated art 14 of the Convention, which prohibits discrimination on the basis of “any ground”, including sex and religion.

186. One of the intervenors, Amnesty International, noted that there was a risk of “intersecting discrimination” due to the intersection of sex with grounds such as religion: ²⁷²

In the intervener’s view, in addition to constituting a disproportionate interference with freedom of religion, the ban generated indirect and intersectional discrimination on grounds of religion and sex, endorsed stereotypes and disregarded the fact that veiled women made up a vulnerable minority group which required particular attention...women might experience a distinct form of discrimination due to the intersection of sex with other factors such as religion, and such discrimination might express itself, in particular, in the form of stereotyping of subgroups of women... restrictions on the wearing of headscarves or veils might impair the right to work, the right to education and the right to equal protection of the law, and might contribute to acts of harassment and violence. In the third party’s submission, it is an expression of gender-based and religion-based stereotyping to assume that women who wear certain forms of dress do so only under coercion; ending discrimination would require a far more nuanced approach...

The intervener further observed that, as noted by the Special Rapporteur on freedom of religion or belief in his interim 2011 report, **the prohibition on sex-based discrimination was often invoked in favour of banning the full-face veil, whereas such prohibitions might lead to intersectional discrimination against Muslim women. In the intervener’s view, this could be counterproductive as it might lead to the confinement of the women concerned in the home and to their exclusion from public life and marginalisation, and might expose Muslim women to physical violence and verbal attacks.**

187. However, the ECHR ultimately upheld the legality of the ban on the basis that it pursued two legitimate aims, public safety and “respect for the minimum set of values of an open and democratic society”. In rejecting the claim of indirect discrimination, the ECHR concluded that: ²⁷³

...as a Muslim woman who for religious reasons wishes to wear the full-face veil in public, she belongs to a category of individuals who are particularly exposed to the ban in question and to the sanctions for which it provides. The Court reiterates that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even where it is not specifically aimed at that group and there is no discriminatory intent... This is only the case, however, if such policy or measure has no “objective and reasonable” justification, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be realised. In the present case, while it may be considered that the ban imposed...has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-

face veil in public, this measure has an objective and reasonable justification for the reasons indicated previously.

188. Notably, the Council of State, the highest administrative court in France, has recently granted urgent applications seeking to suspend a decision by the mayor of Villeneuve-Loubet (Alpes-Maritimes) banning clothes demonstrating an obvious religious affiliation worn by swimmers on public beaches, including burkinis, a type of swimsuit for women covering the whole body except the face, the hands and the feet, and intended to accord with Islamic traditions of modest dress.²⁷⁴ The ban was aimed at preventing public disorder following the Nice terrorist attack in July 2016. However, the Court concluded the mayor's order had seriously infringed, in a manner that was clearly illegal, fundamental liberties such as freedom of movement, religious freedom and individual freedom, as imposing the ban was unnecessary to the maintenance of peace and good order. There was no evidence that risks of breaches against peace and good order existed on the beaches of Villeneuve-Loubet in relation with the clothes worn by some people, and the concern and worries resulting from recent terrorist attacks were not sufficient to justify the mayor's order. Given the proliferation of anti-burkini bans in the last few years, it is likely that this matter will soon come before the ECHR for determination.
189. The difficulty with the Courts' approach in such cases is that, by restricting their substantive analysis to individual violations of substantive rights suffered by the claimants, such as the right to religious freedom, the Courts fail to "address the structural inequalities that create and legitimise intersectional discrimination" and "cannot remedy the systemic inequality which creates the conditions for these violations".²⁷⁵ Further, the failure to recognise the intersectional discrimination at issue in such cases means that the Courts are not responding to the "full depth of discrimination as it is experienced" by the claimants.²⁷⁶
190. The European Court of Justice ('ECJ') took a different approach in *Bouagnaoui and ADDH v Micropole SA*, an employment case, where the plaintiff refused to comply with an instruction from her employer not to wear a veil or headscarf when in contact with customers and was dismissed.²⁷⁷ She claimed that the dismissal was unlawful because she had been discriminated against on the basis of her religious beliefs. Although the plaintiff's claim only alleged discrimination on the basis of a single ground (religious belief), Advocate-General Sharpston's preliminary opinion on behalf of the ECJ referred to the gender dimension of the plaintiff's claim, observing that:²⁷⁸

Some perceive wearing the headscarf as a feminist statement, as it represents a woman's right to assert her choice and her religious freedom to be a Muslim who wishes to manifest her faith in that way. Others see the headscarf as a symbol of oppression of women. Either view may no doubt find support in individual cases and particular contexts. Thus, the particular context of the present case is that of an educated woman seeking to participate in the labour market of an EU Member State. Against that background, it would be patronising to assume that her wearing of the hijab merely serves to perpetuate existing inequalities and role perceptions... What the Court should not do, in my view, is to adopt the view that, because there may be some occasions where the wearing of the headscarf should or could be deemed oppressive, that is so in every instance. Rather...the matter is best understood as an expression of cultural and religious freedom.

191. Advocate-General Sharpston concluded that any workplace rule prohibiting employees from wearing religious signs or apparel when in contact with customers of the business will involve direct discrimination on grounds of religion or belief. In addition, where a rule results in indirect discrimination on grounds of religion or belief, the interests of the employer's business will constitute a legitimate aim in assessing whether the discrimination is justified, although the rule must be proportionate to that aim. Further:²⁷⁹

...in the vast majority of cases it will be possible, on the basis of a sensible discussion between the employer and the employee, to reach an accommodation that reconciles adequately the competing rights of the employee to manifest his or her religion and the employer to conduct his business. Occasionally, however, that may not be possible. In the last resort, the business interest in generating maximum profit should then in my view give way to the right of the individual employee to manifest his religious convictions. Here, I draw attention to the insidiousness of the argument, 'but we need to do X because otherwise our customers won't like it'. Where the customer's attitude may itself be indicative of prejudice based on one of the 'prohibited factors', such as religion, it seems to me particularly dangerous to excuse the

employer from compliance with an equal treatment requirement in order to pander to that prejudice...

Other intersectional discrimination cases

192. The European Courts have engaged in little consideration of the concept of intersectional discrimination in cases where claimants have relied on more than one prohibited ground of discrimination. For example, in the case of *Pensionsversicherungsanstalt v Kleist*, where Austrian national rules setting the age conferring entitlement to a retirement pension at 60 years for women and 65 years for men, the ECJ did not consider the possibility that the female claimant had been subject to intersectional discrimination, not just discrimination on the grounds of sex.²⁸⁰ Similarly, in the cases of *Odar v Baxter Deutschland GmbH* (combination of age and disability),²⁸¹ and *Z v A Government Department* (combination of sex and possible disability),²⁸² the ECJ considered the pleaded grounds of discrimination separately, rather than undertaking an intersectional analysis.

193. In 2013, a third party intervenor claimed that intersectional discrimination had occurred on the grounds of sex and military status in the ECHR decision in *Markin v Russia*.²⁸³ In that case, a Russian serviceman was denied parental leave that would have ordinarily been granted to a servicewoman. The intervenor contended that:²⁸⁴

If discrimination on the basis of sex and discrimination on the basis of military status were analysed separately, the stereotypes concerning military servicewomen would recede to the background. If one set of comparisons concerned men and women in general, and the other set of comparisons concerned soldiers and civilians, then nowhere in that equation could the concerns of military servicemen, and even less so of servicewomen, be recognised directly.

194. The majority of the ECHR held that the plaintiff had been discriminated against on the basis of sex, but did not substantively consider the military status aspect of the claim. However, Judge de Albuquerque (partly dissenting) concluded that the denial of parental leave to the applicant was based on a combination military status and sex:²⁸⁵

The impugned discrimination has a two-fold legal nature: there is not only sex discrimination between servicemen and servicewomen, since servicewomen are better treated than servicemen, but also discrimination based on professional status, since civilian men are better treated than servicemen.

195. In *International Planned Parenthood Federation v Italy*, the applicant organisation alleged that the high number of Italian medical practitioners conscientiously objecting to performing abortions breached the right of women to health under art 11 of the EU Charter of Human Rights.²⁸⁶ The applicant organisation also alleged that the right to health of women wishing to terminate their pregnancy was not secured without discrimination, and that this also constituted a violation of the Charter:²⁸⁷

...in terms of equality and access to care, the search of an available abortion service determines a "territorial and economic discrimination"...the requests of women to access abortion procedures are treated in different ways, "depending on the luck of the patient": if the woman concerned is lucky enough to live in an area close to a health facility providing abortion services, she will have no difficulty in terminating her pregnancy; on the contrary, should she live in an area with a high rate of objecting health personnel, she will be forced to move in search of an operational structure, and this at her own expenses.

196. The nature of the discrimination was twofold: (1) discrimination on the grounds of territorial and/or socio-economic status between women who had relatively unimpeded access to lawful abortion facilities and those who did not; and (2) discrimination on the grounds of gender and/or health status between women seeking access to lawful termination procedures and men and women seeking access to other lawful forms of medical procedures which are not provided on a similar restricted basis.²⁸⁸ The European Committee of Social Rights, in concluding that art 11 of the Charter had been violated, observed that:²⁸⁹

...these different alleged grounds of discrimination are closely linked together and constitute a claim of "overlapping", "intersectional" or "multiple" discrimination, whereby certain categories of women in Italy are allegedly subject to less favourable treatment in the form of impeded

access to lawful abortion facilities as a result of the combined effect of their gender, health status, territorial location and socio-economic status.

197. In a recent preliminary opinion delivered in June 2016, the ECJ indicated that it was willing to adopt an intersectional approach to discrimination.²⁹⁰ In the *Parris* case, the claimant, a former lecturer at Trinity College in Dublin, belonged to an occupational pension scheme. The claimant's same-sex partner was denied the right to a survivor's pension under the scheme. The claimant alleged that the scheme was discriminatory on the basis of age and sexual orientation. It was legally impossible for the claimant and his partner to enter into a civil partnership or marriage before the claimant reached the age limit for the scheme due to the (then) prohibition on same-sex marriage in Ireland. Advocate-General Kokott, on behalf of the Court, observed that:²⁹¹

...particular attention will have to be given to the fact that any discrimination perpetrated against the person concerned is attributable to a combination of two factors, age and sexual orientation. The Court's judgment will reflect real life only if it duly analyses the combination of those two factors, rather than considering each of the factors of age and sexual orientation in isolation.

The issue under consideration here...concerns the combination of two or more factors neither of which, in and of itself, gives rise to discrimination against the persons concerned...

198. He further noted that, although it had undoubtedly "in the past already been presented with cases in which several such factors have featured in the background, no case has yet – to my knowledge – required the Court to give a ruling on this issue." After referring to various legislative resolutions of the European Parliament on discrimination and equal treatment and academic commentary on the issue, Advocate-General Kokott concluded that:²⁹²

The combination of two or more different grounds for a difference of treatment is a feature which lends a new dimension to a case such as this and must be taken duly into account in its assessment under EU law. **After all, it would be inconsistent with the meaning of the prohibition on discrimination enshrined in Article 1 in conjunction with Article 2 of Directive 2000/78 for a situation such as that at issue here to be split and assessed exclusively from the point of view of one or other of the grounds for a difference of treatment in isolation.** Consequently, the fundamental rule of the Directive, to the effect that there must be no discrimination based on any of the grounds for a difference of treatment to which it refers (Article 2(1) in conjunction with Article 1 of the Directive) must also apply to cases involving possible discrimination based on a combination of more than one of those grounds.

If discrimination cannot be established solely on the basis of one of the grounds for a difference of treatment... the situation must... be examined from the point of view of indirect discrimination...it must therefore be examined...whether the measure in question puts the persons concerned at a particular disadvantage specifically on account of a combination of two or more grounds for a difference of treatment... **After all, the scope of the prohibition on discrimination... being of a fundamental nature, must not be defined restrictively.**

199. In other words, failing to adopt an intersectional approach to discrimination would be contrary to the spirit and purpose of the EU anti-discrimination framework. The New Zealand Courts have likewise emphasised the importance of not restrictively defining discrimination (as discussed above), which supports the view that an intersectional approach is consistent with the spirit and purpose of New Zealand's anti-discrimination laws.²⁹³

International human rights instruments

200. New Zealand has ratified a number of international human rights instruments, which subsequently formed the "genesis" of New Zealand's anti-discrimination laws, in particular the NZBORA and the HRA.²⁹⁴ As a result, the New Zealand Courts have taken into account international developments in interpreting domestic legislation, which "paint a backdrop against which New Zealand's obligations and compliance can be placed".²⁹⁵ Tipping J, for the majority in *Quilter*, concluded that the international materials provided relevant context for interpreting the NZBORA.²⁹⁶ In addition, as observed by Thomas J in the same case, although not binding on the New Zealand Courts, "the international material assists to indicate the underlying nature or essence of discrimination. The covenants and conventions express the basic values

which, in ordering its affairs, the community is to observe".²⁹⁷ In *Huang v Minister of Immigration*, the Court of Appeal went so far as to conclude that statutes should "as far as possible...be read in a way which is consistent with New Zealand's international law obligations".²⁹⁸ This extends to the jurisprudence of the various UN committees in interpreting these conventions and covenants.

201. Although the concept of intersectional discrimination is not explicitly referred to in international human rights instruments, which have "traditionally relied on a 'single axis' approach to enforce legal provisions prohibiting discrimination",²⁹⁹ it has increasingly received recognition by the various UN Committees in their General Comments and recommendations to State parties. Therefore, New Zealand's international obligations, which underpin our anti-discrimination laws, support an intersectional approach to discrimination.

ICCPR

202. Article 2 of the International Covenant on Civil and Political Rights ('**ICCPR**') affirms the commitment of state parties to respecting and ensuring the rights of all individuals within their respective jurisdictions, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".³⁰⁰

203. Article 26, which s 19 of the NZBORA is based on, further provides that all persons are entitled to freedom from discrimination on the same grounds:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

204. The UNHRC has observed that, while the various UN conventions deal only with discrimination on specific grounds, the term "discrimination" as used in the ICCPR should be interpreted as:³⁰¹

...any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

205. In the context of gender discrimination, the UNHRC has recognised that:³⁰²

Discrimination against women is often **intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status**. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.

206. This recognition of intersectional discrimination is particularly important in the New Zealand context given that the long title of the NZBORA expressly affirms New Zealand's commitment to the ICCPR, which it ratified in 1978.

ICESCR

207. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**') provides a similar prohibition on discrimination to art 26 of the ICCPR:³⁰³

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

208. The Committee on Economic, Social and Cultural Rights ('**CESCR**') has acknowledged that the prohibited grounds of discrimination listed in art 2 are "not exhaustive", as reflected in the prohibition

of discrimination of any kind as to “other status”.³⁰⁴ The CESCR has recognised that some individuals will face discrimination on more than one prohibited ground and this may have a “unique and specific impact” that “merits particular consideration and remedying”.³⁰⁵ The CESCR has also drawn attention to the intersectional discrimination that women may face, noting that:³⁰⁶

Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.

209. In particular, the CESCR has expressed concern that women with disabilities can be treated as “genderless”, with the effect that “the double discrimination suffered by women with disabilities is often neglected”.³⁰⁷ Female workers can also suffer the effects of intersectional discrimination and “accumulated disadvantages” in respect of conditions of work, such as pay.³⁰⁸

CEDAW

210. Article 2 of the Convention on the Elimination of Discrimination Against Women (**‘CEDAW’**) affirms the commitment of parties to condemning “discrimination against women in all its forms”.³⁰⁹ Accordingly, CEDAW provides protection for women in the areas of political and public life,³¹⁰ education,³¹¹ employment,³¹² health care,³¹³ and economic and social life.³¹⁴
211. The CEDAW Committee has consistently recommended that state parties, in implementing CEDAW, must address the intersectional discrimination suffered by women. In the CEDAW Committee’s view, intersectionality is central to understanding the discrimination faced by women:³¹⁵

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.

212. In particular, the CEDAW Committee has expressed concern about the intersectional discrimination faced by disabled women, refugee women, migrant women and older women, as well as women who are subject to gender-based violence (including female genital mutilation and honour killings) or denied access to justice.³¹⁶ For example, in its concluding observations of the CEDAW Committee on the UK, the Committee called upon:³¹⁷

...the State party to conduct regular and comprehensive studies on intersectional discrimination against ethnic minority women... The Committee is concerned at the situation of immigrant women and women asylum-seekers, who may be subject to multiple forms of discrimination with respect to education, health, employment and social and political participation.

CERD

213. Under art 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (**‘CERD’**), state parties agree to condemn, not engage in and take measures to prevent racial discrimination, without delay.³¹⁸
214. The Committee on the Elimination of Racial Discrimination (**‘the CERD Committee’**), like the CEDAW Committee, has adopted an intersectional approach to discrimination in interpreting CERD. The CERD Committee has noted that vulnerable groups such as women and children may experience “multiple discrimination” as a result of their race, sex and age.³¹⁹ For women in particular, the CERD Committee has emphasised the importance of considering the compounding impact of sex discrimination on race discrimination:³²⁰

The Committee notes that racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or

primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.

215. Further, certain forms of racial discrimination may be directed:³²¹

...specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilization of indigenous women; abuse of women workers in the informal sector or domestic workers employed abroad by their employers. Racial discrimination may have consequences that affect primarily or only women, such as pregnancy resulting from racial bias-motivated rape; in some societies women victims of such rape may also be ostracized. Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.

216. The CERD Committee has consequently recommended that state parties gather data on factors “affecting and difficulties experienced in ensuring the equal enjoyment by women, free from racial discrimination, of rights under the Convention”.³²² Further, state parties should disaggregate this data by gender within those racial and ethnic groups, thereby allowing state parties and the CERD Committee to “identify, compare and take steps to remedy forms of racial discrimination against women that may otherwise go unnoticed and unaddressed.”³²³

CRPD

217. Article 6 of the Convention on the Rights of Persons with Disabilities (**CRPD**) explicitly recognises that “women and girls with disabilities are subject to multiple discrimination”.³²⁴ Article 7 of the CRPD also extends protection to children with disabilities.
218. The Committee on the Rights of Persons with Disabilities has affirmed that disabled women “may be subject to multiple and intersectional forms of discrimination based on gender and disability”.³²⁵

CRC

219. Article 2 of the Convention on the Rights of the Child (**CRC**) provides that:³²⁶

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

220. The Committee on the Rights of the Child appears to have acknowledged the multiple grounds of discrimination that children may face, exacerbating their vulnerability, by addressing the application of CRC in the context of indigenous children, disabled children and children belonging to ethnic or religious minorities.³²⁷

Key issues arising in intersectional discrimination cases

221. This section focuses on the key issues that have arisen in intersectional discrimination cases overseas, which will likely be relevant to the New Zealand context. In sum, overseas courts and academics have identified the following issues in cases involving intersecting grounds of discrimination, each of which is discussed in turn below:
- (a) Selecting an appropriate comparator, if any;
 - (b) Issues relating to proof and causation; and
 - (c) Relevance of intersectional discrimination to remedy.
222. In determining the appropriate approach to intersectional discrimination cases, the New Zealand Courts, the HRC and the HRRT will likely consider how comparable overseas jurisdictions have dealt with the above issues in resolving intersectional discrimination claims. Even though not binding in New Zealand, the New Zealand Courts may find the English jurisprudence persuasive. The approach to discrimination undertaken by the English Courts bears the most resemblance to the current New Zealand approach, at least in terms of cases involving one protected ground of discrimination.
223. The Canadian jurisprudence may also be persuasive, though it is worth noting that in previous NZBORA cases, such as *Atkinson*, the New Zealand Courts have declined to adopt the Canadian approach to discrimination under the Charter, including taking into account subjective factors such as dignity and stereotyping (which perpetuate historical disadvantage or have severe negative effects) as non-exhaustive criteria that form part of the discrimination analysis.³²⁸ Although the Court of Appeal in *Atkinson* concluded that the relevant differential treatment should be viewed “in context”,³²⁹ it did not consider that claimants should be *required* to demonstrate historical disadvantage or stereotyping, preferring to focus on whether differential treatment/effects gave rise to a material disadvantage.³³⁰ This may reduce the persuasive value of the Canadian jurisprudence.

Selection of appropriate comparator

Importance of comparator

224. The New Zealand Courts have held that determining whether a person has been discriminated against requires the Court to make a comparison, by finding a comparator: that is, another person or group who is in similar circumstances to the plaintiff but is being treated differently. In *Atkinson*,³³¹ the Court of Appeal endorsed the statement of Tipping J in *Quilter* that “the essence of discrimination lies in treating persons in comparable circumstances differently”.³³² Comparators are relevant to the analysis because “they help expose that ‘likes’ have been treated in an ‘unlike’ fashion and give rise to the inference that discrimination is the reason for that differentiation”.³³³ This position was applied in *Idea Services*, where the High Court held that the use of a comparator was a “logical and natural...starting point in the analysis of whether there is discrimination”.³³⁴ The Court of Appeal in *Child Poverty* indicated that the reason for the comparator exercise is:³³⁵

...because legislation and policy decisions all involve to a greater or lesser extent differential treatment or the making of distinctions of some sort. What the Court is trying to do by reference to the comparator is to sort out those distinctions which are made on the basis of a prohibited ground. The Court is looking at the reality of the situation not, as Iacobucci J said in *Law v Canada* (Minister for Employment and Immigration), “in the abstract”. It is necessary also to be comparing apples with apples and hence the inquiry focuses on analogous or comparable situations. The comparator exercise...is simply a tool in that analysis.

225. As a result, the first step of the *Atkinson* test requires determining the relevant characteristics of the claimant group,³³⁶ and then identifying whether there is a group or groups in a comparable or analogous situation to the claimant group. The “comparator group selected should be one that enables a determination of whether this difference is on the basis of age or on some other (non-discriminatory) basis”.³³⁷ In *McAlister*, Elias CJ (for the majority) described the role of a court in formulating a comparator as follows:³³⁸

The task of a court is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination which is in issue, taking full account of all facets of the scheme, including particularly any defences made available to the person against whom

discrimination is alleged. A comparator which is appropriate in one setting may produce a completely inapt result in another. It will certainly do so if it effectively deprives part of the statutory scheme of its operation.

226. Where the circumstances of the case are simple, adopting a mirror comparator, that is a person or group with exactly the same relevant characteristics as the plaintiff minus the ground of prohibited discrimination, has the advantage of clearly revealing the alleged differential treatment and placing the prohibited ground at the “centre of the enquiry”.³³⁹ The comparator does not have to be a real person or group in s 19(1) NZBORA cases, but can instead be based on a hypothetical person or group.³⁴⁰
227. However, in *Atkinson*, the Court of Appeal (noting that the Canadian Supreme Court in *Withler v Canada (Attorney-General)* had retreated from the “mirror test”) affirmed that, for the purposes of determining whether there has been a breach of s 19(1), the person or group simply has to be in a “comparable or analogous situation” to the plaintiff.³⁴¹ The Court of Appeal in *Child Poverty*, citing *Withler*, affirmed this position, stating that the search for a mirror comparator may mean that “the definition of the comparator group determines the analysis and the outcome” and becomes “a search for sameness, rather than a search for disadvantage”, which can occlude the real issue.³⁴² As the Canadian Supreme Court observed in *Withler*, “[r]ational people may differ on what characteristics are relevant”.³⁴³ In particular, the adoption of a mirror comparator “overlooks that a plaintiff may be impacted by many interwoven grounds of discrimination, and may “fail to account for more nuanced experiences of discrimination”, for example, in cases involving allegations of intersectional discrimination.³⁴⁴
228. Where a mirror comparator is unavailable, the Courts have sometimes struggled to identify an appropriate comparator in the absence of any established methodology on how to ascertain the comparator, particularly in cases of indirect discrimination.³⁴⁵ In the recent High Court decision in *Taylor v Attorney-General*, Fogarty J, in concluding that more than one comparator group was available, observed that: ³⁴⁶

Selection of the comparator in cases of indirect discrimination is more complex than that in direct discrimination cases. Because equal treatment will amount to indirect discrimination where that treatment has a material disproportionate exclusionary impact on a group sharing a protected characteristic, it follows that the focus is different. Indirect discrimination is concerned with differential impact, rather than differential treatment. The choice of comparator must reflect this focus and be group-based...I do not read the authorities as requiring the selection of only one comparator. One of the key requirements of analysis is not to allow definitions of comparators to drive outcomes. They are an aid to analysis. They must not dictate the analysis.

Difficulties with adopting a comparator in intersectional discrimination cases

229. Although comparators are meant to be an “aid” or “tool” to analysis, the New Zealand Courts have always adopted a comparative approach to date.³⁴⁷ This may pose difficulties once a claimant expressly pleads intersectional discrimination before the Courts. Unlike additive discrimination cases, where the claimant’s relevant characteristics can be considered and analysed discretely, thereby allowing “a correspondingly clear comparator to be selected”,³⁴⁸ discrete analysis is not always feasible in intersectional discrimination cases, which involve an indivisible combination of two or more protected characteristics.
230. Overseas courts have struggled with identifying the appropriate comparator in cases involving intersectional discrimination, sometimes dispensing with a comparative analysis altogether, or failing to investigate or explicitly identify an appropriate comparator, though case law is still unsettled in this area.³⁴⁹ The Canadian Supreme Court’s decision in *Moore v British Columbia (Education)* provides a useful example of the difficulties with adopting a comparative analysis.³⁵⁰ In *Moore*, a complaint was brought on behalf of a dyslexic child, J, for discrimination in education. At issue was whether J should be compared to the general population, to other students with disabilities or whether the comparator group analysis was “both unnecessary and inappropriate”, as had been held by the Canadian Court of Appeal.³⁵¹ The Supreme Court reasoned that comparing J to the general student population was inappropriate on the grounds that he needed special intensive remediation programmes to learn to read, whereas the majority of other students did not.³⁵² The Court also concluded that comparing a dyslexic student to other special needs students would allow the province to discriminate equally against all students with disabilities and still be immune from discrimination complaints: ³⁵³

It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential dangers of comparator groups identified in *Withler v. Canada*...If J is compared only to other special needs students, full consideration cannot be given to whether he had genuine access to the education that all students in British Columbia are entitled to. This... 'risks perpetuating the very disadvantage and exclusion from mainstream society the Code is intended to remedy'...

231. As a result, the Court ultimately decided against using a comparator group analysis, concluding that J only needed to show that he had a characteristic protected from discrimination, that he had experienced an adverse impact with respect to a service customarily available to the public, and that the protected characteristic was a factor in the adverse impact.

232. In another case, *Secretary of State for Defence v Macdonald*, the claimant, an air force officer who was forced to resign because of his employer's policy against homosexuality, was compared to a lesbian, who the Scottish Court of Session held would have been treated the same as the claimant under the policy.³⁵⁴ The Court, in concluding that the claimant had not been discriminated against, in my view, wrongly conflated the issue of sexual orientation with sex when examining the relevant circumstances of the claimant.³⁵⁵ If, however, the claimant had been compared to a heterosexual woman, who also chose a male partner, the differential impact of the policy on the claimant would have been clear, illustrating the importance of selecting an appropriate comparator. Failure to do so can be fatal to a complainant's claim, as was the case in *Macdonald*.

233. As noted by Hannett, generally it is up to the claimant to select the appropriate comparator, and:³⁵⁶

Often the ubiquitous white male will remain the predominant, and unproblematic, point of reference. The white man frequently represents the most privileged individual with whom to undertake a comparison. Thus, a black woman might select a white male comparator when alleging sex and race discrimination, as this provides a contrast for treatment on the basis of both sex and race.

234. However, as observed by Smith and Starl, locating a basis for comparison is not a simple matter, and even considering hypothetical comparators may not produce a suitable candidate in intersectional discrimination cases, particularly those involving intersectional discrimination.³⁵⁷ As a result, they suggest that intersectional discrimination "may be better addressed by taking the approach of disadvantage rather than difference",³⁵⁸ as "there may be situations...in which identical treatment may only perpetuate inequality".³⁵⁹

235. The Canadian cases of *Auton v British Columbia*³⁶⁰ and *Falkiner v Ontario*³⁶¹ provide a useful illustration of the difficulties encountered when attempting to identify a comparator in intersectional discrimination cases.

Auton v British Columbia

236. In *Auton v British Columbia*,³⁶² the Canadian Supreme Court's attempted use of a mirror comparator was fatal to the plaintiffs' claims of discrimination.

237. The plaintiffs were pre-school aged autistic children and their parents, who were refused funding by the British Columbia Government for a particular kind of recently developed applied behavioural therapy. The plaintiffs argued that the denial of funding discriminated against them on the basis of disability. The plaintiffs proposed that they be compared to non-disabled children and their parents, as well as adult persons with mental illness.

238. Chief Justice McLachlin noted that there were four principles regarding the choice of comparator:³⁶³

- (a) Choosing a correct comparator is "crucial" as "the comparison between the claimants and this group permeates every stage of the analysis";
- (b) While the claimant's chosen comparator will be the "starting point", the court may substitute a more appropriate comparator if necessary;
- (c) The comparator group should mirror the characteristics of the claimant in every respect except for the

characteristic forming the basis for discrimination;

- (d) A claimant relying on a personal characteristic related to the ground of disability may invite comparisons between people with different types of disabilities, or differing levels of severity.

239. Applying the above criteria, McLachlin CJ rejected the claimants' proposed comparators and held that the appropriate comparator was:³⁶⁴

...a nondisabled person or a person suffering a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.

240. The Court considered this comparator group to be more appropriate because it was 'like' the plaintiffs in all ways, save for the characteristics forming the discrimination claim. People receiving well-established non-core therapies were not in the same position as those claiming newer, non-core benefits, and the two groups could be treated differently for reasons entirely unrelated to the alleged grounds of discrimination.³⁶⁵ Accordingly, the claimants' comparators were "deficient" as they failed to recognise the "recent and emergent nature" of the relevant treatment for which funding had been denied.³⁶⁶

241. The Canadian Supreme Court ultimately concluded that differential treatment had not been established between the plaintiffs and the comparator, as there was no evidence that the British Columbia Government responded any differently to requests for new therapies by non-disabled persons or persons with a different type of disability.

242. However, the comparator adopted by McLachlin CJ failed to take into account the relevance of the claimants' age, with the effect that no consideration was given to the British Columbia Government's treatment of children.³⁶⁷ Further, the comparison with disabilities "other than a mental disability" compared autistic children to people without mental disabilities, without considering any distinctions in the treatment of children with other kinds of mental disabilities.³⁶⁸

243. As Gibson and Sewrattan explain, the use of a narrow comparator had the corresponding effect of narrowing the issue before the Court:³⁶⁹

The issue was not whether autistic children should have general access to treatments specific to their condition, thereby equalizing their access to healthcare with that of a 'typical' member of Canadian society; instead, the claim was whether their lack of access to this specific, new and emergent, non-core treatment was discriminatory... This focus allows wider systemic issues and harms of **discrimination to avoid scrutiny**.

Falkiner v Ontario

244. In *Falkiner v Ontario*, the Ontario Court of Appeal considered a claim involving intersecting grounds of discrimination (sex and marital status),³⁷⁰ though an intersectional approach was not expressly adopted by the Court.³⁷¹

245. The case involved two appeals regarding the interpretation and constitutional validity of the definition of "spouse" in Ontario's Family Benefits Act. The Act had been amended to define spouses as persons of the opposite sex living in the same place, who had a "mutual agreement or arrangement regarding their financial affairs" and a relationship that amounted to "cohabitation". The consequence of this definition was that, once persons of the opposite sex began living together, they were presumed to be spouses unless they provided evidence to the contrary.

246. The claimants were unmarried woman with dependent children who were in "try on" relationships with men with whom they had lived for less than a year. When the new definition was inserted, the claimants were no longer eligible for benefits as "sole support parents", despite the fact that their partners did not necessary provide the same level of financial support as husbands or other long-term, committed partners. They argued that the new definition made two crucial distinctions: between social assistance recipients and all other persons, and between women and single mothers on social assistance and others on social assistance. Consequently, these distinctions were said to discriminate against the claimants on

the basis of sex and the analogous grounds of marital status, receipt of social assistance, single mothers and single mothers on social assistance.

247. The Ontario Court of Appeal noted that defining the correct comparator groups was “central” to the determination of whether discrimination had occurred, though this was “not an easy task”.³⁷² The Court ultimately considered each of the claimants’ relevant personal characteristics in isolation, and conducted a comparator analysis in respect of each.³⁷³

Because the respondents assert that they have been discriminated against on the basis of more than one personal characteristic, no single comparator group will capture all of the differential treatment complained of in this case. Instead, the respondents urge us to undertake a set of comparisons, each one bringing into focus a separate form of differential treatment. The respondents claim three forms of differential treatment and thus use three comparator groups. First, they compare themselves with persons who are not on social assistance. Second, they contrast the effect of the definition on women on social assistance and its effect on male social assistance recipients. Finally, they offer a variation on this latter comparison by contrasting the effect of the definition on single mothers on social assistance and its effect on other social assistance recipients.

248. The Court concluded that the use of multiple comparators was necessary “to bring into focus the multiple forms of differential treatment alleged”, this treatment being based on “an interlocking set of personal characteristics”.³⁷⁴ However, by dealing with the characteristics as “severable and unrelated” and undertaking a “non-intersectional analysis of an intersectional claim”, the Court arguably failed to address the true nature of the discrimination at issue, which the Court itself had described as “interlocking”.³⁷⁵ As contended by Gilbert and Majury, in the context of intersectional discrimination cases, it is only when one:³⁷⁶

...amalgamates the grounds and the comparisons does the analysis gain depth and substance; only when the grounds are treated as intersectional and interactive does the full nature of the claim and its impact come into focus. A single, narrow, consecutive comparator group approach is at best an unnecessary step and at worst an impediment to understanding...multi-grounded intersectional discrimination...

249. In the end, although the adoption of a comparative analysis was not fatal to the claim in *Falkiner*, in contrast to *Auton*, there remains a risk that other claimants might “fall through the cracks”, and as noted by Gilbert and Majury, “regardless of outcome, the process of dissection is, in and of itself, an insult to the claimants’ dignity”.³⁷⁷ Accordingly, this suggests that the New Zealand Courts may need to adopt a different approach to intersectional discrimination claims.

Departure from comparators?

250. Although a full examination of whether comparators should be departed from in intersectional discrimination cases is beyond the scope of this paper, the difficulties involved in selecting a comparator in such cases suggests that “the centrality of the comparator... must be challenged”, or at least questioned, “given the difficulties with identifying persons whose ‘relevant circumstances’ are the same or materially similar to those of claimants who complain of intersectional discrimination”.³⁷⁸
251. In recognition of these difficulties, overseas courts have begun to display flexibility to adopting a comparator in cases of alleged discrimination, even in cases involving only one protected ground. In the case of *Webb v EMO Air Cargo (UK) Ltd*, for example, the House of Lords concluded that less favourable treatment due to pregnancy typically will amount to sex discrimination, with no need to for the claimant to be compared to a male comparator in analogous circumstances, “comparison with a man who was in like position being impossible”.³⁷⁹ Likewise, in the context of racial and sexual harassment, “highly racially or sexually specific conduct may trigger prima facie discrimination with no need for a comparator”.³⁸⁰ For example, in the Canadian cases of *Morrison*³⁸¹ and *Baylis-Flannery*³⁸² and the US case of *Hafford*³⁸³ (discussed above), there was sufficient evidence of highly racialised and/or sexualised conduct, for example evidence of racist and sexist remarks and comments, to amount to prima facie discrimination.³⁸⁴

252. Academic commentators have also sought to develop new frameworks for analysing intersectional discrimination. These frameworks are consistent with the approach undertaken by the Canadian Courts and Tribunals, and are helpful in clarifying the reasons behind adopting a different approach in intersectional discrimination cases.

253. For example, Smith and Starl contend that multi-level analysis created by sociologists Gabriele Winker and Nina Degele could be adapted to fit a legal context, in particular to multiple discrimination cases.³⁸⁵ Smith and Starl propose the following legal test in such cases, the key difference being the need to focus on the alleged disadvantage before difference:³⁸⁶

- (i) The specific situation of the complainant will be described in order to specify what similar situation it could be compared to.
- (ii) The particular harm caused to the complainant by the treatment or rule is clarified (including clarifying the complainant's social position and the type of discrimination) without attempting to define the cause of the conduct or rule at issue (i.e. on which "ground").
- (iii) Description of the treatment of other persons, which involves identifying their relevant characteristics and collection of data. Smith and Starl caution that it is "important not to compare the persons' treatment by categories, otherwise intersectionalities might be left unrevealed".³⁸⁷
- (iv) Then, one analyses the differences between the complainant's treatment and the other persons' treatment, the aim being to identify which categories and intersections are relevant in the case and what the comparator or group for comparison looks like. This "answers the question whether a comparator is needed at all, or whether a hypothetical comparator makes sense".³⁸⁸
- (v) The complaint is supplemented with data where this is needed for corroboration.
- (vi) The results of the analytical steps and their conclusions are then compiled.

254. Wilkie and Gary suggest a "contextualised comparative analysis", taking into account groups who have been subject to historic marginalisation:³⁸⁹

...the court's legal analysis should be focused more on substantive equality, rather than a formalistic application of the comparator...One way the courts may do so is by using contextualized comparative analyses... If the analysis of positive rights focuses on [the claimant's] contextual needs... substantive outcomes are more likely to be realized...a contextual approach may be particularly relevant for those seeking disability-related supports as the need of people with disabilities for certain supports may be heightened by their membership in other disadvantaged groups, such as older adults or women. In assessing the social context of an impugned distinction, it should be relevant to courts that, for example, the sub-group of older people with disabilities has been historically marginalized in our society.

255. Similarly, Solanke contends that the concept of "stigma" is more conducive to an intersectional analysis:³⁹⁰

Although a nebulous concept, most people would have a strong idea of what a stigma is – it is an attribute which is denigrated and 'deeply discrediting' to an extent that it irrevocably 'tarnishes' the whole identity of an individual...Stigmatisation is a social practice – it is the collective imposition of a negative relationship to an individual attribute which permits a collective and public 'doubting of the person's worthiness' ... Stigma can rectify the vision of anti-discrimination by addressing the blind spot – it facilitates synergy because stigmas can occur alone or in groups. It would allow for individuals to be seen as holistic beings...discrimination law would still focus on stigmas that have certain consequences. This could be determined by a set of questions: is the stigma arbitrary or is there a reason for it that is non-discriminatory?... Secondly, is the public response to this stigma always punitive rather than just negative? For example, smokers may now have to huddle in doorways to indulge in their habit, but their job prospects remain unharmed. Thirdly, does the stigma make a 'significant' difference in relation

to access to and acquisition of resources in key areas, such as health, housing, education, training and employment? Is there a historical dimension to it? Is it structurally maintained? Is it difficult to escape?

256. Solanke argues that, rather than a comparative analysis, the focus should be on identifying certain groups, such as black women, as distinct protected subgroups for the purposes of determining whether there is a prima facie case of discrimination. Thus, “[t]he respondent would have to demonstrate non-discrimination by reference to the same stigmatised group, in this case, black women”, and if there are no other people in the stigmatised group, “then as has become the norm in cases of discrimination, a hypothetical comparator could be used”.³⁹¹

Causation / Issues of proof

257. In order to establish prima facie discrimination, the claimant needs to establish causation between the differential treatment and the prohibited ground or grounds.
258. In the New Zealand context, the Court of Appeal in *Child Poverty*, citing the United Kingdom Supreme Court’s decision in *Patmalniece v Secretary of State for Work and Pensions*,³⁹² found that the prohibited ground needs to be a “material ingredient” in the differential treatment and/or effects”, not a “substantial and operative factor”.³⁹³ The Court concluded that:³⁹⁴

The point that emerges from this discussion is that the existence of another criterion which may render the person ineligible for assistance does not of itself mean there may not be discrimination on a prohibited ground... Whether described as a “material ingredient” or as an operative factor, in this case, the reality is that no matter what a beneficiary’s eligibility is under any of the other criteria, that person will never be able to qualify under the “off-benefit” rule so long as he or she exhibits the characteristic on which basis discrimination is prohibited. The criterion operates to exclude people on the basis of a prohibited ground.

259. Issues relating to causation and proof have featured in intersectional discrimination cases, such as the decision in *Bahl*, discussed above, where the Court required the plaintiff to establish evidence in relation to each type of discrimination against each alleged discriminator, rather than dealing with the grounds together.³⁹⁵
260. McColgan has referred to this as “the dilemma of unidimensionality”:³⁹⁶

Those who fail to conform to the dominant social identity along more than one axis can hope, at best, that their multiple non-conformity is overlooked in the context of a claim based on a single axis. And claimants who are discriminated against for more than one reason, or for a reason specific to their combination of factors by which they are differentiated from the “unstated norm”, will struggle to establish, as they are required to do by the “unidimensional” approach, that the treatment of which they complain can be attributed to any one of these factors.

261. In other words, as a complainant:³⁹⁷
- ...departs from the norm in an increasing number of directions, it is less and less likely that the conduct complained of will be held to constitute discrimination in law. If the complainant straddles too many categories...it is no longer discrimination, it is “just her”.
262. Similarly, Smith and Starl have observed that claimants in intersectional discrimination cases, by virtue of their unique situation, may struggle to find statistical evidence to corroborate a claim of discrimination, “and so are denied this potentially powerful tool for demonstrating discrimination”,³⁹⁸ particularly when alleging systemic discrimination.³⁹⁹ This may pressure claimants to simplify their claims by picking “only one ground of discrimination and to act as though that ground is totally disconnected from other aspects of identity”.⁴⁰⁰ Further, even if intersectional discrimination can be presented in terms of single grounds, proof must be found and presented for each ground separately, increasing the burden of proof on the claimant.⁴⁰¹ This not only fails to take into account the combined effect of the grounds, as occurred in *Bahl*, but can also present additional difficulties when it is clear that there is discrimination on at least one prohibited ground, yet it is unclear on which one or ones.⁴⁰² Pothier refers to the following situation:⁴⁰³

I am referring to the scenario where the non-discriminatory explanation seems implausible, but the precise discriminatory explanation is unclear – for example, a less-qualified white able bodied male is hired instead of a better-qualified Aboriginal woman with a disability. Not being required to pinpoint a particular ground of discrimination would not be helpful if the competing explanation were unrelated to any prohibited ground – for example, the able-bodied white male was clearly substantially better qualified than the Aboriginal women with a disability.

263. The Courts should be prepared to be flexible in their approach to issues of causation and proof in intersectional discrimination cases. As concluded by the Court of Appeal in *Atkinson*, and the Supreme Court in *McAlister*, adopting a legalistic, technical approach would frustrate the purpose and undermine the spirit of human rights legislation.⁴⁰⁴ In several cases, overseas courts have indicated a willingness to adopt a flexible approach to proof in intersectional discrimination cases.
264. For example, in *Ministry of Defence v DeBique* (discussed above),⁴⁰⁵ the UK Employment Appeal Tribunal rejected the appellant's argument that the Employment Tribunal had erred in its selection of the members of the claimant "pool" who had been disadvantaged by the Army's policies around childcare.⁴⁰⁶ The appellant contended that the Employment Tribunal had to be satisfied on the evidence that the Army's policies put people of the claimant's national origin at the same disadvantage as the claimant. However, there was "no such evidence in this case since the Claimant was in a category of one".⁴⁰⁷ The Employment Appeal Tribunal considered the conclusion reached by the Employment Tribunal, namely that the numbers of people affected by the policies were likely to be small and would not invalidate the comparison within the pool, to be "unimpeachable", and dismissed this ground of appeal.⁴⁰⁸
265. Similarly, in the US case of *Hicks v Gates Rubber Co* (also discussed above),⁴⁰⁹ the plaintiff, a black woman, accused her employer of both racial discrimination and sexual harassment.⁴¹⁰ Although the US Court of Appeals (10th circuit) found that the use of racial slurs by the plaintiff's co-workers were occasional and incidental enough that they could not support a racial discrimination claim, and the unwelcome sexual advances the plaintiff described were not enough to show sexual harassment, the evidence of both racial and sexual hostility could be "aggregated" to corroborate a hostile work environment claim under Title VII.

Remedies in intersectional discrimination cases: Quantifying the compounded disadvantage

266. Overseas courts, particularly in Canada, have recognised that intersectionality can be an aggravating factor in a discrimination claim, and that victims of intersectional discrimination will, in many instances, be members of historically marginalised groups.⁴¹¹ As observed by L'Heureux-Dube J (dissenting) in *Egan v Canada*, the impact of discrimination may depend on the nature of the group affected.⁴¹²

No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable.

267. Consequently, awarding an increased remedy may be necessary and appropriate to reflect this. However, according to the Ontario HRT:⁴¹³

Although courts and tribunals have acknowledged the reality of discrimination on more than one ground, there are no clear directions on dealing with remedies in these types of claims. There is very little evidence to show that remedies awarded in human rights complaints consider multiple or intersecting grounds of discrimination.

268. Where two (or more) grounds of discrimination have an additive effect, it will usually be easy to determine that a higher remedy is needed, as the discriminatory conduct can be assessed separately according to each ground. However, where the pleaded grounds intersect to create a unique experience, the question becomes, how does one quantify the harm? According to the Ontario HRT:⁴¹⁴

While in some cases, a more significant award may not be warranted, there may be some situations in which the particular vulnerability of the person, as a result of the intersectionality of grounds, should be acknowledged in the damages for injured dignity, mental anguish and so forth. It could be another factor to be considered in determining the extent of the complainant's injury as a result of the discrimination or harassment.

269. The issue of remedies in intersectional discrimination cases was addressed by the British Columbia HRT in *Comeau v Cote*.⁴¹⁵ *Comeau* involved the dismissal of a 63-year-old man with a heart condition from his employment, an action that he contended, and the British Columbia HRT accepted, constituted unlawful discrimination on the combined grounds of age and disability. In determining the appropriate remedy, the British Columbia HRT found that the combination of age and disability discrimination had a more serious effect on the claimant than if discrimination had occurred on one ground alone, and accordingly ordered a higher remedy of \$3,500 to compensate for injury to his dignity, feelings and self-respect (in addition to lost wages).⁴¹⁶

...I find that that the impact of the discrimination on the basis of both age and disability or perceived disability to be more hurtful to Mr. Comeau, than if it were only on one grounds. As the impugned conduct was tied to both Mr. Comeau's age and his health, it was an attack on two aspects of his dignity, feelings and self respect. The Respondents' conduct branded Mr. Comeau as old and physically incapable. The experience gained with his age was reduced in significance, as he was also perceived as physically incapable as a result of his health... Although it is difficult to assess how much of the hurt and humiliation was attributed to the perceived disability and how much to the perception that his age hampered his performance, I am satisfied that this intersectionality of prohibited grounds had a greater impact on Mr. Comeau's dignity, feelings and self respect than would discrimination on either ground in isolation.

270. In *Baylis-Flannery v DeWilde*,⁴¹⁷ the Ontario HRT reached the following conclusion in respect of a black woman subject to intersectional discrimination as a result of her race and sex:⁴¹⁸

The Tribunal finds that using a pragmatic and functional approach, Ms Baylis-Flannery can and should be given restitution for all of the enumerated grounds of discrimination that she suffered by adding them together within the restitution she receives for general damages. However, the Tribunal finds that the "non-trivial discriminatory scar" aspect of this case falls within the separate category of mental anguish, and it is greater than it otherwise would have been if the matter were based on a single ground, because the impact of the intersectional discrimination, i.e. having her employer repeatedly diminish her based on his racist assumptions of the sexual promiscuity of Black women, pierces her human dignity.

271. The Ontario HRT took the intersectional nature of the claim into consideration when calculating the appropriate damages, awarding \$10,000 for loss of dignity and injury to feelings:⁴¹⁹

The Tribunal has considered the following in making this award: the loss of dignity and worth suffered by the complainant; the seriousness, frequency, intersectionality and duration of these repeated infringements; the loss of dignity that she suffered from being in a work environment that was poisoned; the gravity of his actions as evidenced by his criminal conviction; and the impact of the two separate acts of reprisal on her...

272. In the New Zealand context, the NZBORA does not expressly provide any remedies for breaches of the rights and freedoms it protects, although the Courts have held that they have the ability to grant remedies for such breaches, including damages in certain circumstances.⁴²⁰ The HRA, by contrast, details the remedies available for a breach of its provisions. The remedies available to a plaintiff depend on the conduct forming the basis of the discrimination claim.⁴²¹ Where a plaintiff brings a claim of discrimination on the basis of any other act or omission, for example, a private employer, the plaintiff may seek a variety of remedies, including a declaration that the defendant has committed a breach of the HRA, an order restraining the defendant from continuing or repeating the breach, or an award of damages.⁴²² In awarding damages, the HRRT may consider pecuniary loss, the loss of a benefit or humiliation, loss of dignity and injury to the feelings of the plaintiff.⁴²³

273. Although the appropriate remedy will necessarily be determined on a case-by-case basis, the experience of the overseas courts suggests that future cases involving intersectional discrimination may attract higher damages awards in New Zealand as well.

274. Academics Schiek and Chege have argued that intersectional discrimination may warrant increased remedies due to the tendency of intersectional cases to "remain invisible".⁴²⁴

The primary focus of law and policy should hence be to make visible those at the intersections. Also, when the social context of discrimination is examined, the structural background of those at the intersections could reveal a more vulnerable situation cases by an interplay of ground related aspects of discrimination, and prevailing economic, historical, social factors. In that respect therefore, injuries suffered by the persons at the intersections could be higher.

275. Similarly, Reynoso notes that “women faced with multiple forms of discrimination are often left with remedies that do not fully take into account the injury”.⁴²⁵ Accordingly, while it is important that the Courts recognise the occurrence of multiple discrimination, Reynoso argues that they must also “take the further step of developing appropriate remedies to address these claims”.⁴²⁶

As the aim of remedies is, in part, to restore the person to the position she would have been in had the discrimination not occurred, evaluating the damage inflicted on a person as a result of discrimination is crucial to establishing an appropriate remedy. Thus, there may be circumstances in which an individual’s vulnerabilities – based on multiple forms of discrimination – warrant acknowledgement in the damages phase for harms such as injured dignity or mental anguish.

The principles of affirmative action provide some further guidance in remedying and preventing systemic discrimination. By acknowledging that existing social and legal arrangements have benefited certain groups and disadvantaged others, affirmative action programs attempt to restore balance by targeting disadvantaged persons-namely, those who experienced compounded or intersectional discrimination.

Conclusion

276. New Zealand needs to adopt a new approach to diversity and discrimination to ensure our anti-discrimination laws take into account the matrix of factors that comprise each person's identity, and are properly enforced. Otherwise, "we risk undertaking an analysis that is distanced and desensitized from real people's real experiences".⁴²⁷ Our anti-discrimination laws will not only fail to properly recognise the nature of the barriers experienced by those who are subject to multiple ground discrimination, but will also fail to properly remedy the harm suffered.
277. There is nothing in New Zealand's current anti-discrimination laws preventing the HRC, the HRRT or the Courts from adopting an intersectional discrimination approach in appropriate cases. Indeed, the Courts have emphasised that, when interpreting anti-discrimination provisions, a "purposive", "liberal" and "untechnical" approach should be applied so as not to frustrate the purpose of human rights legislation.⁴²⁸ Although the HRC has mediated cases involving multiple ground discrimination, the HRRT and the Courts have not addressed the issue, as it has not yet been pleaded by claimants. The HRRT has, however, upheld discrimination claims based on more than one ground, and considered the double disadvantage experienced by some claimants, even though intersectional discrimination has not been pleaded.
278. The New Zealand approach is in contrast to the position in overseas jurisdictions, where the issue of intersectional discrimination has received extensive consideration by Courts, human rights bodies and academics (with the exception of Australia, and the European Courts, the latter having only recently given attention to the issue). Overseas courts have adopted a range of approaches to multiple discrimination claims. In the United Kingdom, the Courts have tended to adopt a narrow approach to intersectional discrimination cases, requiring selection of a comparator group and proof of discrimination on each separate ground alleged, rather than considering a combination of evidence relating to two or more grounds. Although lower courts have attempted to soften this approach, the issue has yet to be settled by the higher courts. The Canadian Courts, in contrast, have not tended to adopt a comparator analysis to identify whether intersectional discrimination has occurred, instead focussing on the compounding disadvantage to the claimant in such cases – though the majority of these cases have involved evidence of direct discrimination, obviating the need for a comparator. In the United States, the Courts have held that claimants belonging to groups subject to unique types of stereotyping, such as black and Asian women, are members of protected classes who may allege discrimination on the basis of two or more intersecting grounds.
279. Finally, the various United Nations human rights committees, in interpreting international human rights conventions to which New Zealand is a party, have recognised that intersectionality is central to understanding the scope of State parties' obligations under these conventions, and recommended that State parties recognise the compounding negative effect of intersectional discrimination on specific vulnerable groups.
280. Ultimately, the overseas jurisprudence, though not binding on the New Zealand Courts, will be instructive to the New Zealand Courts once intersectional discrimination is expressly pleaded before the Courts. The overseas cases show that overseas courts have expressed support for, and increasingly applied, an intersectional approach to discrimination. They also illustrate the issues that overseas courts have encountered in analysing intersectional discrimination cases, but also show that such issues are not insurmountable and can be resolved. Ultimately, the need for the New Zealand Courts to adopt an intersectional approach to discrimination will become increasingly important as New Zealand's diversity increases.
281. It would be consistent with the statutory role of the HRC to promote awareness of intersectional discrimination, generally and as part of its complaints resolution process, so as to bring greater visibility to this issue affecting the human rights of increasing numbers of New Zealanders. Although law reform may not be needed for the Courts to recognise intersectional discrimination, clarifying that the NZBORA and the HRA encompass intersectional and multiple ground discrimination, as has occurred in Canada with the insertion of s 3(1) of the Canadian Human Rights Act, would ensure greater certainty and improve awareness of intersectional discrimination.
282. A matrix approach to diversity more generally is also needed, not just in the context of our anti-discrimination laws. Properly defining diversity is critical to business, customers and employees, and will also affect how local and central government should tailor their approach to policy-making and citizen engagement. Otherwise growing numbers of New Zealanders will be excluded from critical public discourse, for example about the need for more women on boards, which often only refer to Pākehā women, or more Māori representation, which often refers to Māori men. In the absence of a 21st century

definition of diversity, we will not properly define the issues and the barriers that superdiverse people face, and we risk failing to devise effective solutions as a result.

Table of Cases (New Zealand and Overseas)

| Case | Paragraph |
|--|--------------------------------------|
| A | |
| <i>Adoption Action Inc v Attorney-General</i> [2016] NZHRRT 9 | 77 |
| <i>Ahmet Arslan and others v Turkey</i> (41135/98) Section II, ECHR, 23 February 2010 | 185 |
| <i>Air New Zealand v McAlister</i> [2009] NZSC 78, [2010] 1 NZLR 153 | 9, 89, 90, 225, 226, 258, 263 |
| <i>Al Jumard v Clwyd Leisure Ltd</i> [2008] IRLR 345 (UK Employment Appeal Tribunal) | 13 |
| <i>Andrews v British Columbia</i> [1989] 1 SCR 143 (SCC) | 229 |
| <i>Attorney-General v IDEA Services Ltd (in Stat Man)</i> [2012] NZHC 3229, [2013] 2 NZLR 512 | 224 |
| <i>Attorney-General v IDEA Services Ltd</i> [2013] 2 NZLR 512 (HC) | 74 |
| <i>Auton (Guardian ad litem of) v British Columbia (Attorney General)</i> 2004 SCC 78 | 96, 235, 236–243, 249 |
| <i>Auton v British Columbia</i> [2004] 3 SCR 657 (SCC) | 230 |
| B | |
| <i>B v R</i> 1436/042 FCC 2d, 24 September 2003 (German Federal Constitutional Court) | 177 |
| <i>B v Waitemata District Health Board</i> [2016] NZCA 184 | 69, 225 |
| <i>Bahl v Law Society</i> [2004] EWCA Civ 1070 (UKCA) | 121–126, 127, 129, 259 |
| <i>Baylis-Flannery v DeWilde</i> 2003 HRTO 28 (Ontario Human Rights Tribunal) | 147–150, 151, 152, 154, 251, 270–271 |
| <i>Baylis-Flannery v DeWilde</i> 2003 HRTO 28, 2003 CarswellOnt 8050 | 114 |
| <i>Board of Trustees of Salisbury Residential School v Attorney-General</i> [2013] NZAR 228, [2012] NZHC 3348 | 97 |
| <i>Bogan v MTD Consumer Group Inc</i> WL 3671696 (District Court ND Mississippi, 2016) | 172 |
| <i>Bullock v Department of Corrections</i> HRRT 33/06, 19 March 2008 | 80 |
| C | |
| <i>Canada (Attorney General) v Turner</i> 2015 FC 1209 (Federal Court of Canada) | 156 |
| <i>Canada (Attorney-General) v Mossop</i> [1993] 1 SCR 554 (SCC) | 138 |
| Case C-152/11 <i>Odar v Baxter Deutschland GmbH</i> (ECJ, Opinion of Advocate-General Sharpston, 12 July 2012) | 192 |
| Case C188/15 <i>Boughnaoui and ADDH v Micropole SA</i> (ECJ, Opinion of Advocate-General Sharpston, 13 July 2016) | 190–191 |
| Case C-356/09 <i>Pensionsversicherungsanstalt v Kleist</i> (ECJ, Second Chamber, 18 November 2010) | 192 |
| Case C-363/12 <i>Z v A Government Department</i> (ECJ, Grand Chamber, 18 March 2014) | 192 |
| Case C-443/15 <i>Parris</i> (ECJ, Opinion of Advocate-General Kokott, 30 June 2016) | 197–198 |
| Case C-443/15 <i>Parris v Trinity College Dublin and Others</i> Opinion of Advocate General Kokott, 30 June 2016 | 15 |
| <i>CBA v LKJ Ltd</i> [2014] NZHRRT 13 | 81 |
| <i>Chambers v Omaha Girls Club</i> 629 F Supp 925 (1986) | 170 |
| <i>Chambers v Omaha Girls Club</i> 834 F 2d 697 (8th Cir, 1987) | 170 |
| <i>Child Poverty Action Group Inc v Attorney-General</i> [2013] NZCA 402, [2013] 3 NZLR 729 | 69, 224, 225, 258 |
| <i>Comeau v Cote</i> 2003 BCHRT 32 (British Columbia Human Rights Tribunal) | 142–144, 148, 151, 154, 269 |
| <i>Corbiere v Canada (Minister of Indian and Northern Affairs)</i> [1999] 2 SCR 203 (SCC) | 139 |
| D | |
| <i>Dahlab v Switzerland</i> (42393/98) Second Section, ECHR, 15 January 2001 | 15 |
| <i>Dahlab v Switzerland</i> (42393/98) Section II, ECHR, 15 January 2001 | 180–181, 182 |
| <i>Dao & Anor v Australian Postal Commission</i> (1987) 162 CLR 317 (Australian HC) | 161 |
| <i>DeGraffenreid v General Motors</i> 413 F Supp 142 (District Court ED Missouri, 1976) | 165 |
| <i>DeGraffenreid v General Motors</i> 558 F 2d 480 (8th Cir, 1977) | 166 |
| <i>Djokic v Sinclair & Anor</i> (1994) EOC 92-643 (Australian Human Rights and Equal Opportunities Commission) | 262 |

| | |
|---|---|
| <i>Dogru v France</i> (27058/05) Section V, ECHR, 4 December 2008 | 179, 184 |
| <i>Drew v Attorney-General</i> [2002] 1 NZLR 58 (CA) | 272 |
| E, F | |
| <i>Eaglesome v Chief Executive of the Department of Corrections</i> [2015] NZHRRT 26 | 82 |
| Egan v Canada [1995] 2 SCR 513 (SCC) | |
| | 28, 139–141, 266, 276 |
| <i>Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services)</i> 2002 CarswellOnt 1558 (Ontario CA) | 235, 244–249 |
| <i>Falkiner v Ontario</i> 2002 CarswellOnt 1558 (Ontario Court of Appeal) | 15 |
| <i>Flamand v DGN Investments</i> 2005 HRTO 10 (Ontario Human Rights Tribunal) | 152 |
| <i>Forrest v Chief Executive of the Department of Corrections</i> [2014] NZHRRT 41 | 83 |
| G, H | |
| <i>Gorzynski v JetBlue Airways Corp</i> 596 F 3d 93 (2nd Cir, 2010) | 175 |
| <i>Gosal v Canada (Attorney General)</i> 2011 FC 570 (Canadian FC) | 136 |
| <i>Graham v Bendix Corporation</i> 585 F Supp 1036 (ND Ind, 1984) | 170 |
| <i>Grundy v British Airways Plc</i> [2008] IRLR 74 (UKCA) | 228 |
| <i>Hafford v Seidner</i> 183 F 3d 506 (6th Cir, 2005) | 173–174, 251 |
| <i>Hicks v Gates Rubber Co</i> 833 F 2d 1406 (10th Cir, 1987) | 170, 265 |
| <i>Hodge v Canada (Minister of Human Resources Development)</i> 2004 SCC 65, [2004] 3 SCR 357 | 238 |
| <i>Hogan v Ontario</i> 2006 HRTO 32 (Ontario Human Rights Tribunal) | 153 |
| <i>Huang v Minister of Immigration</i> [2009] 2 NZLR 700 (CA) | 200 |
| I, J, K | |
| <i>Idea Services Ltd v Attorney-General (No. 2)</i> [2011] NZHRRT 17 | 76 |
| <i>Idea Services Ltd v Attorney-General (No. 3)</i> [2011] NZHRRT 21 | 76 |
| <i>Idea Services Ltd v Attorney-General</i> [2011] NZHRRT 11 | 74 |
| <i>International Planned Parenthood Federation – European Network (IPPF EN) v Italy</i> (2014) 58 EHRR SE17 (ECHR) | 195–196 |
| <i>Jefferies v Harris County Community Action Association</i> 615 F 2d 1025 (5th Cir, 1980) | 167–168, 170, 171, 172, 175 |
| <i>Karaduman v Turkey</i> (16278/90) (1993) DR 74 (EComHR) | 182 |
| <i>Keith v Canada (Correctional Service)</i> 2012 FCA 117 (Canadian FCA) | 136 |
| <i>Kingston & Richmond AHA v Kaur</i> [1981] ICR 631 (UK Employment Appeal Tribunal) | 121 |
| L | |
| <i>Lam v University of Hawaii</i> 40 F 3d 1551 (9th Cir, 1994) | 171 |
| <i>Law v Canada (Minister of Employment and Immigration)</i> [1999] 1 SCR 497 (SCC) | 140–141, 224 |
| <i>League of Human Rights v Villeneuve-Loubet</i> (402742) State Council ORD, 26 August 2016 (Conseil d'État) | 188 |
| <i>Leyla Şahin v Turkey</i> (44774/98) Grand Chamber, ECHR, 10 November 2005 | 177, 182–183, 184 |
| <i>Lincoln v Bay Ferries Ltd</i> 2004 FCA 204 (Canadian FCA) | 136 |
| <i>Lord v Canada</i> 2001 FCT 397 (Canadian FC) | 136 |
| M | |
| <i>Mackrell v Universal College of Learning</i> HRRT 31/04, 30 March 2005 | 84 |
| <i>Malik v Bertram Personnel Group</i> (1991) 7 EOR 5 (UK Employment Appeal Tribunal) | 121 |
| <i>Mandla v Dowell</i> [1983] 2 AC 548 (UKHL) | 177 |
| <i>Markin v Russia</i> (30078/06) (2013) 56 EHRR 8 (ECHR) | 193–194 |
| <i>Mihaka v Housing New Zealand Corporation</i> [2016] NZHRRT | 83 |
| <i>Minister of Defence v DeBique</i> [2010] IRLR 471 (UK Employment Appeal Tribunal) | 131, 228, 264 |
| <i>Ministry of Health v Atkinson</i> [2012] NZCA 184, [2012] 3 NZLR 456 | 8, 69, 70–72, 89, 90, 102, 200, 223–225, 227, 263, 277 |

| | |
|--|------------------------------|
| <i>Ministry of Transport v Noort</i> [1992] 3 NZLR 260 (CA) at 268 | 90 |
| <i>Mist v R</i> [2005] NZSC 77, [2006] 3 NZLR 145 | 90 |
| <i>Moore v British Columbia (Education)</i> 2012 SCC 61, [2012] 3 SCR 360 (SCC) | 230 |
| <i>Morrison v Housing New Zealand Corporation</i> HRRT 14/06, 8 December 2006 | 87 |
| <hr/> | |
| <i>Morrison v Motsewetscho</i> 2003 HRTO 21 (Ontario Human Rights Tribunal) | 142, 145, 148, 151, 154, 251 |
| <hr/> | |
| N, O, P, Q | |
| <i>N (P) v R (F)</i> 2015 BCHRT 60 (British Columbia Human Rights Tribunal) | 154 |
| <i>NB v Slovakia</i> (29518/10) Former Section IV, ECHR, 12 June 2012 | 178 |
| <i>Norsah c Commission des droits de la personne et des droits de la jeunesse</i> 2016 QCCA 700 (Quebec Court of Appeal) | 151 |
| <i>Northern Regional Health Authority v Human Rights Commission</i> (1997) 4 HRNZ 37 (HC) | 200 |
| <i>O'Reilly v BBC</i> ET Case 2200423/2010, 10 January 2011 (UK Employment Tribunal) | 129 |
| <i>Orlov v Ministry of Justice</i> HRRT 09/09, 1 July 2009 | 85 |
| <i>Patmalniece v Secretary of State for Work and Pensions</i> [2011] UKSC 11, [2011] 1 WLR 783 | 258 |
| <i>Patterson v Canada Revenue Agency</i> , 2011 FC 1398 (Canadian FC) | 136 |
| <i>Quilter v Attorney-General</i> [1998] 1 NZLR 523 (CA) | 6, 89, 200, 224, 277 |
| <hr/> | |
| R | |
| <i>R (on the application of Begum) v Headteacher and Governors of Denbigh High School</i> [2006] UKHL 15 | 177 |
| <i>R v Hansen</i> [2007] NZSC 7, [2007] 3 NZLR 1 | 71 |
| <i>R v Law</i> [1999] 1 SCR 497 (SCC) | 223 |
| <i>Radek v Henderson Development (Canada) Ltd</i> 2005 BCHRT 302 (British Columbia Human Rights Tribunal) | 154 |
| <i>Redford v KTBS, LLC</i> WL 552960 (District Court WD Louisiana, 2016) | 172 |
| <hr/> | |
| S | |
| <i>Salem v Heritage Square Inc</i> WL 2555513 (US District Court ND California, 2007) | 172 |
| SAS v France (2015) 60 EHRR 11 (ECHR, Grand Chamber) | 185–187 |
| <i>Secretary of State for Defence v Macdonald</i> [2001] IRLR 431 (Scottish Court of Session) | 232 |
| <i>Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd</i> (2013) 11 NZELR 78 (EC) | 229 |
| <i>Simpson v Attorney-General [Baigent's case]</i> [1994] 3 NZLR 667 (CA) | 272 |
| <i>Sionepulu v Downer NZ Ltd</i> [2012] NZHRRT 16 | 86 |
| <i>Suggs v Central Oil of Baton Rouge, LLC</i> WL 3037213 (US District Court MD Louisiana, 2014) | 172 |
| <hr/> | |
| T | |
| <i>Taylor v Attorney-General</i> [2016] NZHC 355, [2016] 3 NZLR 111 | 9, 72, 228 |
| <i>Taylor v Attorney-General of New Zealand</i> [2014] NZHC 1630, [2014] BCL 346 | 272 |
| <i>Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc</i> [2015] 2 NZLR 437 (CA) | 226 |
| <i>The Law Society v Kamlesh Bahl</i> EAT 1057/01, 31 July 2003 (UK Employment Appeal Tribunal) | 121 |
| <i>Turner v Canada (Attorney-General)</i> 2012 FCA 159 (Federal Court of Appeal) | 114, 155 |
| Turner v Canada Border Services Agency 2014 CHRT 10 (Canadian Human Rights Tribunal) | 156 |
| <hr/> | |
| V, W | |
| <i>VC v Slovakia</i> (18968/07) Former Section IV, ECHR, 8 November 2011 | 178 |
| <i>Webb v EMO Air Cargo (UK) Ltd (No 1)</i> [1992] UKHL 15 | 251 |
| <i>Withler v Canada (Attorney General)</i> 2011 SCC 12, [2011] 1 SCR 396 (SCC) | 223, 227, 230 |

Index

| Heading | Sub-heading | Sub-Sub-Heading | Paragraph |
|---------------------|---|-----------------|--|
| Affirmative Action | | | 68, 275 |
| Asian peoples | | | 15, 29–33, 36, 44, 48, 62, 116, 121–126, 157, 161, 171, 278 |
| Australia | | | 7, 157–163, 262, 278 |
| | Australian Human Rights Commission (AHRC) | | 160, 162–163 |
| | Ethnic breakdown | | 157 |
| Canada | | | 92, 114, 132–156, 224, 227, 230, 266, 281 |
| | British Columbia Human Rights Tribunal (HRT) | | 143–144, 151, 154, 269 |
| | Canadian Charter of Rights and Freedoms (the Charter) | | 132, 134, 139, 140, 141, 223 |
| | Canadian Human Rights Act 1977 | | 92, 133, 135, 155, 281 |
| | Ontario Human Rights Tribunal | | 145, 147–150, 152–153, 267, 268, 270–271 |
| | Supreme Court of Canada/Canadian Supreme Court | | 138–140, 227, 229, 230, 236, 241 |
| Causation and proof | | | 27, 221, 257–265 |
| Comparator | | | 27, 72, 96, 119–120, 122–123, 137, 221, 224–228, 229–235, 236–243, 247–249, 250–256, 278 |
| | Departure from | | 229–235, 250–256 |
| Compounded | | | 100 |
| | Disadvantage | | 4, 6, 20, 56, 103, 137, 208, 278 |
| | Discrimination | | 148, 149, 155, 275 |
| | Effect | | 143, 211, 279 |
| | Grounds | | 126 |
| | Indicators | | 46 |
| Crenshaw, Kimberlé | | | 16–17 |
| Criminal Justice | | | 4, 52, 55–63, 160 |
| Discrimination | | | |
| | Additive | | 13, 92, 229, 268, |
| | Direct | | 9, 10, 31, 72, 127, 191, 228, 278 |
| | Indirect | | 9, 10, 31, 72, 187, 191, 198, 228 |
| | Multiple | | 10, 11, 12, 13, 14, 20, 28, 42, 53, 94, 113, 121, 127, 129, 135, 162, 214, 217, 253, 266, 275, 278 |
| | | Additive | 13, 72, 92, 229, 268 |
| | | Single-axis | 16, 21, 23, 176 |

| Prohibited Grounds | | |
|----------------------------|---|--|
| | Age | 2, 5, 10, 15, 35, 42, 50, 54, 74–75, 77, 81, 83, 100–101, 116, 129–130, 132, 138–140, 143, 162, 172, 175, 180, 192, 197, 225, 269 |
| | Disability | 2, 10–11, 13, 15, 22–23, 35, 42, 50–52, 53, 55–56, 63, 74, 75, 77, 81, 84, 87, 100, 103, 115, 127, 132, 139, 140, 143, 153–155, 162, 172, 192, 208, 218–219, 237–242, 254, 262, 269 |
| | Family and marital status | 15, 23, 58, 77, 81, 84, 87, 133, 136, 138, 152, 154, 162, 208, 244, 246 |
| | Race, racial | 1–2, 5, 7, 10–11, 13–14, 15, 16–17, 20, 22–24, 61, 66, 77, 80, 83, 84, 87, 93, 107, 121–124, 127, 131, 132, 138, 139, 149, 150, 151, 154–155, 161–162, 164–174, 177, 202–208, 211, 214–216, 219, 233, 251, 262, 265, 270 |
| | Religion, religious | 1, 7, 14, 15, 23–24, 34, 82–84, 111, 127, 132, 139, 164, 168, 172, 173–174, 176, 177, 178, 180, 182, 184–186, 191, 202–208, 211, 219, 220 |
| | Sex | 2, 11, 14, 15, 16, 17, 20, 31, 41, 45–46, 54, 58, 77, 80, 86, 96–97, 101, 103, 111, 116, 121–124, 127, 129–130, 145, 153, 161–162, 165, 167–168, 171–172, 175, 181, 185–186, 192–194, 208, 211, 214, 232–233, 244–246, 251 |
| | Sexual orientation | 15, 22, 23, 24, 77, 82, 83, 127, 133, 139, 151, 162, 197, 211, 232 |
| Diversity | | 1–3, 6, 12, 29, 33, 34, 115, 157, 158, 163, 276, 280–282 |
| | Cultural | 1–2, 158, 163 |
| | Ethnic | 2, 29, 33 |
| | Linguistic | 2, 158, 163 |
| | Religious | 2, 34 |
| Double Disadvantage | | 12, 19, 28, 31, 38–63, 40, 64, 75, 93, 106, 131, 277 |
| Employment | | 4, 13, 15, 19, 23, 32, 39–42, 48, 50, 52, 63, 66, 87, 106, 109–111, 116, 121–124, 129–131, 135, 143, 151, 158, 161, 168, 190, 210, 212, 224, 244, 255, 264, 269, 272 |
| Education | | 48, 50, 52, 63, 66, 96–103, 114, 158, 177, 180–184, 186, 210, 212, 230 |
| Europe | | |
| | EU Charter of Human Rights | 195–196 |
| | European Committee of Social Rights | 196 |
| | European Convention on Human Rights (the Convention) | 178–182, 185 |
| | European Court of Human Rights (ECHR) | 177, 178–188, 193–194 |
| | European Court of Justice (ECJ) | 190, 192, 197 |

| | |
|--|---|
| Health Care | 19, 210 |
| Housing | 4, 19, 52, 53–54, 66, 159, 255 |
| Human Rights Act 1993 | 15, 23, 65–67, 87, 88–89, 92, 94, 111, 114, 139, 200, 244, 272, 281 |
| Human Rights Commission | 2, 10, 11, 15, 28, 42, 46, 64, 79, 82, 83, 111, 114, 116, 222, 277, 281 |
| Human Rights Review Tribunal | 15, 28, 64, 73–82, 83, 87, 222, 272, 277 |
| Income | 43–51 |
| International Law | |
| Committee on Economic, Social and Cultural Rights (CESCR) | 208–209 |
| Committee on the Elimination of Discrimination against Women (CEDAW Committee) | 33, 48–51, 63, 158, 211–214 |
| Committee on the Elimination of Racial Discrimination (the CERD Committee) | 214, 216 |
| Committee on the Rights of Persons with Disabilities (CRPD Committee) | 63, 218 |
| Committee on the Rights of the Child | 63, 220 |
| Convention on the Elimination of Discrimination against Women (CEDAW) | 158, 210–212 |
| Convention on the Rights of Persons with Disabilities (CRPD) | 217 |
| Convention on the Rights of the Child (CRC) | 219–220 |
| International Convention on the Elimination of All Forms of Racial Discrimination (CERD) | 213–216 |
| International Covenant on Civil and Political Rights (ICCPR) | 48, 202–206 |
| International Covenant on Economic, Social and Cultural Rights (ICESCR) | 207–209 |
| UN Human Rights Committee (UNHRC) | 48, 61, 160, 204–205 |
| Mana Wahine claim | 94–95, 104–108 |

| | |
|-------------------------------------|--|
| Māori and Pacific peoples | 15, 19, 29–33, 35–36, 41, 42, 44, 46–50, 53–54, 57–58, 61, 63, 80, 93–95, 104–108, 282. |
| New Zealand Bill of Rights Act 1990 | 65, 67–68, 69, 71, 74, 76, 78, 88, 89, 90, 94, 96, 101, 107, 111, 114, 200, 203, 206, 223, 226, 272, 281 |
| Religious garments | 15, 177–199 |
| Remedies | 27, 102, 165, 221, 266–275 |
| Superdiversity | 2, 28, 34, 113 |
| Stocktake | 1, 33, 60 |
| Treaty of Waitangi | 93–95, 105, 107 |
| United Kingdom | 42, 119–131, 137, 177, 212, 251, 258, 264, 278 |
| United States of America | 9, 16, 164–175, 278 |
| Waitangi Tribunal | 94–95, 106, 108 |

Endnotes

- 1 M Chen *Superdiversity Stocktake: Implications for Business, Government and New Zealand* (Superdiversity Centre for Law Policy and Business, 2015). Academics have defined superdiverse cities and countries as those where more than 25 per cent of the resident population is comprised of migrants or those where more than 100 nationalities are represented.
- 2 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 532.
- 3 Graeme Innes, Australian Race and Disability Commissioner "An inclusive (not integrated) Australia" (Culturally and Linguistically Diverse Communities Conference, Australian Human Rights Commission, Melbourne, 12 May 2011).
- 4 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [44].
- 5 *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [134], citing A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2016). See also *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [112], where McGrath J observed, in discussing the difference between direct and indirect discrimination, that: "The concept of indirect discrimination...prohibits conduct that is not apparently in contravention, but which on examination has the effect of excluding or imposing a disadvantage on a person or group on prohibited grounds. Indirect discrimination is directed to ensuring substantive as opposed to formal inequality".
- 6 The HRC's analysis was focused on the grounds of age, race and gender.
- 7 Data is for each year from October to October.
- 8 Percentage rounded to two decimal points.
- 9 The ground of "race" is consolidated to include discrimination claims made on the basis of race, ethnic or national origin and colour.
- 10 *Al Jumard v Clwyd Leisure Ltd* [2008] IRLR 345 (UK Employment Appeal Tribunal). Although the Employment Appeal Tribunal said that losses flowing from the two forms of discrimination, where they did not arise out of the same facts, should have been separately considered by the Employment Tribunal, it did not disagree with the Employment Tribunal that there were two types of discrimination at issue.
- 11 M Sargeant *Age Discrimination in Employment* (Gower Publishing, England, 2012) at 160.
- 12 M Eaton "Patently Confused: Complex Inequality and *Canada v Mossop*" (1994) 1 Rev Cons Stud 203 at 229.
- 13 UK Parliament "Equality Bill: Explanatory Note" (2009) <www.publications.parliament.uk>.
- 14 See A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2016) at [17.17].
- 15 See for example *Dahlab v Switzerland* (42393/98) Second Section, ECHR, 15 January 2001.
- 16 *Falkiner v Ontario* 2002 CarswellOnt 1558 (Ontario Court of Appeal).
- 17 Case C-443/15 *Parris v Trinity College Dublin and Others* Opinion of Advocate General Kokott, 30 June 2016.
- 18 See discussion below from [64] onwards.
- 19 Anonymised examples were provided to the author by the Human Rights Commission.
- 20 K Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1 University of Chicago Legal Forum 139.
- 21 K Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1 University of Chicago Legal Forum 139 at 139–140.
- 22 K Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1 University of Chicago Legal Forum 139 at 151.
- 23 D Kropp "Categorical Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) 23 Queen's LJ 201 at 229–230. See also M Campbell *CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination* (Oxford University Working Paper, Vol 2, No 3, 2016) at 8–9; S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65; N Iyer "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's Law Journal 179.
- 24 See A Mikaere "Māori Women: Caught in the Contradictions of a Colonized Reality" (1994) 2 WLR 149. See also F Cram and LT Smith "Māori women talk about accessing health care" (2003) 7(2) He Pukenga Korero: A Journal of Māori Studies 1; CTK Hoskings "Reclamation of cultural identity for Māori women" (1997) 13(2) Women's Studies Journal 25; LT Smith "Māori women: Discourses, projects and mana wahine" in S Middleton and A Jones (eds) *Women and education in Aotearoa Vol 2* (1992, Bridget Williams Books, Wellington) 33; A Mikaere (ed) *Yearbook of New Zealand Jurisprudence* (2005) 8(2). These arguments arose during the Mana Wahine movement from the 1970s onwards. To put it simply, mana wahine, typically referred to as Māori feminist discourse, is a "theoretical and methodological approach that explicitly examines the intersection of being Māori and female". N Simmonds "Mana wahine: Decolonising politics" (2011) 25(2) Women's Studies Journal 11 at 11. See also A Mikaere "Māori Women: Caught in the Contradictions of a Colonized Reality" (1994) 2 WLR 149; P Johnston and H Waitere "Echoed silences: In absentia: Mana Wahine in institutional contexts" (2009) 23(2) Women's Studies Journal 14. For example, as observed by N Simmonds in "Mana wahine: Decolonising politics" (2011) 25(2) Women's Studies Journal 11 at 11: "Difference has always been intricately woven into the fabric of my life. Similarly, a number of Māori women have reflected on how the intersection of being Māori and being a woman posits us in complex and tricky spaces that require careful negotiation... Its central strand lies in the intersection of being both Māori and female, and thus Māori women are often intimately entangled in multiple oppressions - those arising from sexism, racism, and colonisation, but others too, such as homophobia".
- 25 I Solanke "Infusing the silos in the Equality Act 2010 with synergy" (2011) 40(4) Industrial Law Journal 336. See also I Solanke "Putting Race and Gender Together: A New Approach To Intersectionality" (2009) 72 Modern Law Review 723.
- 26 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 4–5. Available online at <antidiscrimination.etc-graz.at>.
- 27 See generally D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 39.
- 28 Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 66.
- 29 B Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" (2016) 16 Equal Rights Review 73.
- 30 A Masselot and J Bullock "Stuck at the Cross-Road: Intersectional Aspirations in the EU Anti-Discrimination Legal Framework" 2013(1) ANJES 3 at 4, citing S Fredman "Positive Rights and Positive Duties; Addressing Intersectionality" in D Schiek and V Chege (eds) *European Union Non Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Abingdon, Routledge-Cavendish, 2008) at 73. See also M Campbell *CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination* (Oxford University Working Paper, Vol 2, No 3, 2016) at 9.
- 31 B Burton "Neoliberalism and the Equality Act 2010: a missed opportunity for gender justice?" (2014) 43(2) ILJ 122 at 132.
- 32 See D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37.
- 33 S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 68.
- 34 I Solanke "Infusing the silos in the Equality Act 2010 with synergy" (2011) 40(4) Industrial Law Journal 336 at 342–343.
- 35 I Truscan and J Bourke-Martignoni "International Human Rights Law and Intersectional Discrimination" (2016) 16 Equal Rights Review 103 at 195.
- 36 D Kropp "Categorical Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) 23 Queen's LJ 201 at 229–230. See also S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65.
- 37 See discussion below at [221]–[272].
- 38 *Egan v Canada* [1995] 2 SCR 513 (SCC) at [53], per L'Heureux-Dubé J (dissenting).
- 39 M Chen *Superdiversity Stocktake: Implications for Law, Policy and Business* (2015) at [1.1], citing P Spoonley *Superdiversity, Social Cohesion, and Economic Benefits* (IZA World of Labour, May 2014) at 1.
- 40 Statistics New Zealand "2001 Census data – Table Builder" <nzdotstat.stats.govt.nz>.
- 41 "Other ethnicity" includes respondents who did not state their ethnicity.
- 42 Statistics New Zealand "2013 Census data – Table Builder" <nzdotstat.stats.govt.nz>.
- 43 "Other ethnicity" includes respondents who did not state their ethnicity.
- 44 See discussion below at [38]–[63].
- 45 Statistics New Zealand "2013 Census data – Table Builder" <nzdotstat.stats.govt.nz>.
- 46 Statistics New Zealand "2013 Census QuickStats about culture and identity" (15 April 2014).
- 47 See discussion below at [38] onwards.
- 48 Statistics New Zealand "2013 Census QuickStats about culture and identity" (15 April 2014).
- 49 M Chen *Superdiversity Stocktake: Implications for Law, Policy and Business* (2015) at [1.25].
- 50 Statistics New Zealand "National Ethnic Population Projections: 2013 (base) – 2038" (press release, 21 May 2015).
- 51 M Chen *Superdiversity Stocktake: Implications for Law, Policy and Business* (2015) at [1.25] and [1.38]–[1.41].
- 52 New Zealand Government *New Zealand's seventh report on its implementation of the United Nations Convention on the Elimination of All Forms of Discrimination against Women CEDAW/C/NZL/7* (2010) at iv.
- 53 M Chen *Superdiversity Stocktake: Implications for Law, Policy and Business* (2015) at [1.73], citing Statistics New Zealand "2013 Census QuickStats about culture and identity" (15 April 2014).
- 54 For the 2013 Disability Survey, disability was defined as an impairment which has a long-term limiting effect on a person's ability to carry out day-to-day activities. Long-term means six months or longer and limiting effect means a restriction or lack of ability to perform.

- 55 Statistics New Zealand "Disability Survey: 2013" (17 June 2014) <www.stats.govt.nz>.
- 56 Ministry of Health "Diabetes" <www.health.govt.nz>.
- 57 A Wong *Challenges for Asian health and Asian health promotion in New Zealand* (Health Promotion Forum, 2015) at 5.
- 58 A Wong *Challenges for Asian health and Asian health promotion in New Zealand* (Health Promotion Forum, 2015) at 5.
- 59 B Daldy, J Poot and M Roskrug "Perception of workplace discrimination among immigrants and native born New Zealanders (2013) 16(1) Australian Journal of Labour Economics 137 at 151. There is considerable academic literature documenting the "double disadvantage" migrant women face in a variety of contexts, although experience varies depending on country. For example, see Ascend Pan-Asian Leaders *Hidden in Plain Sight: Asian American Leaders in Silicon Valley* (May 2015); Vanderbilt University "The new 'double disadvantage': Where you're born doesn't matter as much as whether you're married and a woman" ScienceDaily (online ed, 9 October 2014); R Rajiman "Gender, ethnicity and immigration: Double-disadvantage and triple disadvantage among recent immigrant women in the Israeli labor market" (1997) 11(1) Gender & Society 108; I Browne and J Misra "The Intersection of Gender and Race in the Labor Market" (2003) 29 Annual Review of Sociology 487; T Liebig and S Widmaier *Children of Immigrants in the Labour Markets of EU and OECD Countries: An Overview* (OECD, Social, Employment and Migration Working Papers, 2009); AT Le and P Miller "Glass ceiling and double disadvantage effects: women in the US labour market" (2010) 42(5) Applied Economics 603; C Ravnobøl *Intersectional Discrimination against Children: Discrimination against Romani Children and Anti-Discrimination Measures to Address Child Trafficking* (Innocenti Working Paper, IWP-2009-11, 2009); M Boyd "At a Disadvantage: The Occupational Attainments of Foreign Born Women in Canada" (1984) 18(4) International Migration Review 1091; K Donato, B Piya and A Jacobs "The Double Disadvantage Reconsidered: Gender, Immigration, Marital Status, and Global Labor Force Participation in the 21st Century" (2014) 48 International Migration Review 335; S Moore "Age as a factor defining older women's experience of labour market participation in the UK" (2007) 36(3) ILJ 383; Directorate-General for Internal Policies *Discrimination Generated by the Intersection of Gender and Disability* (European Parliament, 2016); S Dutta "Discrimination Generated By the Intersection of Gender and Disability" (2015) 14(6) Journal of Dental and Medical Sciences 33. An ongoing qualitative study by Global City Leaders is also examining whether young leaders perceive an intersection between their age, experience, gender, ethnicity, and nationality and their leadership work, and how young leaders conceive of their personal and professional identity. See <www.globalcityleaders.org>.
- 60 Office of Ethnic Affairs *Language and Integration in New Zealand* (2014).
- 61 Human Rights Commission "Tracking Equality at Work: Unemployment rate" <tracking-equality.hrc.co.nz>.
- 62 Human Rights Commission "Tracking Equality at Work: Underemployment rate" <tracking-equality.hrc.co.nz>.
- 63 In the United Kingdom, a study on the experience of older women in the labour market found that age discrimination was "bound up" with other forms of discrimination and women might experience multiple discrimination as a result. See S Moore "Age as a factor defining older women's experience of labour market participation in the UK" (2007) 36(3) ILJ 383 at 384.
- 64 Human Rights Commission "Tracking Equality at Work: Employment" <tracking-equality.hrc.co.nz>.
- 65 Ministry for Women "Gender pay gap" <women.govt.nz>. See also Statistics New Zealand "Measuring the gender pay gap" (19 January 2016) <www.stats.govt.nz>. Similar trends have been observed overseas. See for example M Boyd "At a Disadvantage: The Occupational Attainments of Foreign Born Women in Canada" (1984) 18(4) International Migration Review 1091; K Donato, B Piya and A Jacobs "The Double Disadvantage Reconsidered: Gender, Immigration, Marital Status, and Global Labor Force Participation in the 21st Century" (2014) 48 International Migration Review 335.
- 66 Statistics New Zealand "Measuring the gender pay gap" (19 January 2016) <www.stats.govt.nz>. See also M Chen *Superdiversity Stocktake: Implications for Law, Policy and Business* (2015) at [2.148].
- 67 Human Rights Commission "Tracking Equality at Work: Pay rates labour market" <tracking-equality.hrc.co.nz>. Data based on the 2015 Statistics New Zealand Income Survey 2015.
- 68 Human Rights Commission "Tracking Equality at Work: Pay rates public service" <tracking-equality.hrc.co.nz>. Data based on the 2015 State Services Commission's Human Resource Capability Survey.
- 69 Human Rights Commission "Tracking Equality at Work: Pay rates public service" <tracking-equality.hrc.co.nz>. Data based on the 2015 State Services Commission's Human Resource Capability Survey.
- 70 Human Rights Commission "Tracking Equality at Work: Income for people with disabilities by annual income" <tracking-equality.hrc.co.nz>. Information is based on the 2013 Census data.
- 71 New Zealand Government *Sixth periodic report on International Covenant of Civil and Political Rights* CCPR/C/NZL/6 (2015).
- 72 UN Human Rights Committee *Concluding observations on the sixth periodic report of New Zealand* CCPR/C/NZL/CO/6 (2016) at [17] and [21].
- 73 UN Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/NZL/CO/7 (2012) at [9].
- 74 UN Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/NZL/CO/7 (2012) at [36].
- 75 UN Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: New Zealand* CEDAW/C/NZL/CO/7 (2012) at [24], [25] and [37].
- 76 New Zealand Government *Concluding observations on the seventh periodic report of New Zealand* Addendum: Information provided by New Zealand in follow-up to the concluding observations CEDAW/C/NZL/CO/7/Add1 (2014) at [5]–[9].
- 77 New Zealand Government *Women in New Zealand: Eighth Periodic Report by the Government of New Zealand under the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (2016) at 70.
- 78 L Pere, H Gilbert and D Peterson *Issues Paper 2: Discrimination in Housing* (Mental Health Foundation, 2003).
- 79 M Baker, J Zhang and P Howden-Chapman *Health Impacts of Social Housing: Hospitalisations in Housing New Zealand Applicants and Tenants, 2003-2008* (University of Otago, 2010).
- 80 N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (2016 Neurodisabilities Forum, 30 May 2016) at 4.
- 81 N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (2016 Neurodisabilities Forum, 30 May 2016) at 7, citing N Hughes, N, H Williams, P Chitsabeau, R Davies and L Mounce Nobody made the connection: The prevalence of neurodisability in young people who offend (UK Office of the Children's Commissioner, 2012).
- 82 N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (2016 Neurodisabilities Forum, 30 May 2016) at 4.
- 83 See N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (2016 Neurodisabilities Forum, 30 May 2016) at 15; S Berelowitz and P Hibbert "I think I must have been born bad": Emotional wellbeing and mental health of children and young people in the youth justice system (UK Office of the Children's Commissioner, 2011).
- 84 N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (2016 Neurodisabilities Forum, 30 May 2016) at 5.
- 85 N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (2016 Neurodisabilities Forum, 30 May 2016) at 5.
- 86 N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (2016 Neurodisabilities Forum, 30 May 2016) at 15.
- 87 New Zealand Law Commission *Women's Access to Legal Services* (NZLC SP2, 1999) at [144].
- 88 New Zealand Law Commission *Women's Access to Legal Services* (NZLC SP2, 1999) at [161] and [165].
- 89 UN Human Rights Committee *Concluding observations on the sixth periodic report of New Zealand* CCPR/C/NZL/CO/6 (2016) at [17] and [21]. See also A Kohli "Forced and Underage Marriages in New Zealand: Some Reflections on Public and Private Patriarchy and Intersectionality" (2015) 1 International Journal for Intersectional Feminist Studies 58, where the author argues that, in the context of forced marriage cases, New Zealand has a pattern of ignoring the multicultural fabric of the society by "ignoring the multiple forms of oppression that women from diaspora communities face because of their ethnicity and race".
- 90 J Martin and R Pritchard *Learning from Tragedy: Homicide within Families in New Zealand 2002-2006* (Ministry of Social Development, 2010).
- 91 A Wong *Challenges for Asian health and Asian health promotion in New Zealand* (Health Promotion Forum, 2015) at 5.
- 92 A Wong *Challenges for Asian health and Asian health promotion in New Zealand* (Health Promotion Forum, 2015) at 7.
- 93 L Baker "Age care 'isolating' for ethnic groups" Radio New Zealand (online ed, 1 October 2014, New Zealand).
- 94 UN Committee on the Rights of the Child *Concluding observations on third and fourth periodic report of New Zealand* CRC/C/NZL/CO/3-4 (2011) at [24].
- 95 New Zealand Government *Fifth Periodic Report on the United Nations Convention on the Rights of the Child* CRC/C/NZL/5 (2015) at [57].
- 96 UN Committee on the Elimination of All Forms of Discrimination against Women *Concluding observations of the Committee on Elimination of Discrimination against Women on the seventh periodic report of New Zealand* CEDAW/C/NZL/CO/7 (2012) at [12]–[13], [52], [55] and [101]. For further discussion of the double disadvantage for women with disabilities, see also Directorate-General for Internal Policies *Discrimination Generated by the Intersection of Gender and Disability* (European Parliament, 2016); S Dutta "Discrimination Generated By the Intersection of Gender and Disability" (2015) 14(6) Journal of Dental and Medical Sciences 33.
- 97 New Zealand Government *First New Zealand report on implementing the UN Convention on the Rights of Persons with Disabilities* CRPD/C/NZL/1 (2011) at [238].
- 98 UN Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of New Zealand* CRPD/C/NZL/CO/1 (2014) at [16] and [53]–[56].
- 99 New Zealand Government *United Nations Convention on the Elimination of All Forms of Discrimination against Women: Eighth Periodic Report by the Government of New Zealand* CEDAW/C/NZL/8 (2016) at [11].
- 100 Human Rights Act 1993, s 20J.

- 101 Human Rights Act 1993, s 21A.
- 102 Human Rights Act 1993, ss 22–35. Other specific forms of discrimination include discrimination in partnerships (s 36), discrimination by industrial and professional associations, qualifying bodies, and vocational training bodies (ss 37–41), discrimination in access to places, vehicles and facilities (ss 42–43), discrimination in the provision of goods and services (ss 44–52), discrimination in the provision of land, housing, and other accommodation (ss 53–56) and discrimination in access to educational establishments (ss 57–60).
- 103 Human Rights Act 1993, s 61.
- 104 Human Rights Act 1993, ss 62 and 63. See also Human Rights Act 1993, s 69.
- 105 Human Rights Act 1993, s 67.
- 106 Human Rights Act 1993, s 66.
- 107 New Zealand Bill of Rights Act 1990, s 3.
- 108 *B v Waitemata District Health Board* [2016] NZCA 184 at [84].
- 109 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
- 110 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.
- 111 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].
- 112 Section 5 of the NZBORA provides that “Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, for discussion of the balancing test involved in the s 5 stage of the analysis.
- 113 This poses difficulties for plaintiffs in additive and intersectional discrimination cases, given that the “choice of the comparator cannot only determine the outcome of a discrimination claim but equally importantly it signals an unequal treatment due to a particular characteristic”. See A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2016) at [17.10.26].
- 114 *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [140] and [148]. Emphasis added.
- 115 *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11.
- 116 *Attorney-General v IDEA Services Ltd* [2013] 2 NZLR 512 (HC).
- 117 *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11 at [149], [154] and [155]. Emphasis added.
- 118 *Idea Services Ltd v Attorney-General* (No. 2) [2011] NZHRRT 17.
- 119 *Idea Services Ltd v Attorney-General* (No. 3) [2011] NZHRRT 21.
- 120 *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9.
- 121 Adoption Act 1955, ss 7–9.
- 122 Adoption Act 1955, s 3.
- 123 Adoption Act 1955, s 7.
- 124 A declaration of inconsistency is the only remedy available for enactments which are held to be discriminatory in breach of Part 1A. See Human Rights Act 1993, s 92J.
- 125 *Bullock v Department of Corrections* HRRT 33/06, 19 March 2008.
- 126 *Bullock v Department of Corrections* HRRT 33/06, 19 March 2008 at [74]. Emphasis added.
- 127 *CBA v LKJ Ltd* [2014] NZHRRT 13.
- 128 *Eaglesome v Chief Executive of the Department of Corrections* [2015] NZHRRT 26.
- 129 See *Forrest v Chief Executive of the Department of Corrections* [2014] NZHRRT 41, where a prisoner alleged discrimination on the grounds of sexual orientation and religion. See also *Mihaka v Housing New Zealand Corporation* [2016] NZHRRT, which involved a claim of discrimination on the grounds of age and race.
- 130 *Mackrell v Universal College of Learning* HRRT 31/04, 30 March 2005.
- 131 *Orlov v Ministry of Justice* HRRT 09/09, 1 July 2009.
- 132 *Sionepulu v Downer NZ Ltd* [2012] NZHRRT 16.
- 133 *Morrison v Housing New Zealand Corporation* HRRT 14/06, 8 December 2006.
- 134 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [104], citing *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) and *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [51].
- 135 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 575–577.
- 136 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [113]. Emphasis added. See also *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145 at [45] and *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [35] per Elias CJ; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268.
- 137 See discussion below from [118].
- 138 A similar subsection could be inserted into s 105 of the Employment Relations Act 2000. Section 19(1) of the New Zealand Bill of Rights Act 1990 simply refers to the grounds of discrimination listed in the Human Rights Act, so would not need to be amended.
- 139 The full text of Article Three in the English version of the Treaty states: “In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.”
- 140 The Treaty of Waitangi Amendment Act 2006 established a cut-off date of 1 September 2008 for the lodging of historical (pre-1992) claims. Contemporary claims – those relating to breaches of the Treaty after 1 September 1992 – can still be lodged with the Waitangi Tribunal.
- 141 Article Two of the Treaty states: “Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.”
- 142 See Waitangi Tribunal Unit (Ministry of Justice) *Te Manutukutuku: Issue 68* (2015).
- 143 See discussion below at [236]–[243].
- 144 *Board of Trustees of Salisbury Residential School v Attorney-General* [2013] NZAR 228, [2012] NZHC 3348.
- 145 At [81] and [83].
- 146 Ministry of Education “Consultation initiated over future of Salisbury” (press release, 16 June 2016).
- 147 See for example C Sivignon “Richmond’s Salisbury School may close in January” *Stuff.co.nz* (16 June 2016, New Zealand); B Spencer “Outcry over Salisbury School closure” *NelsonLive.co.nz* (17 June 2016, New Zealand); Public Service Association “Salisbury School closure a bitter blow for families” (press release, 17 June 2016); P Dougan “Salisbury School facing closure: ‘My daughter has nowhere to go’” *New Zealand Herald* (online ed, 18 June 2016, New Zealand); B Spencer “Petition to save Salisbury School” *NelsonLive.co.nz* (22 July 2016, New Zealand); L Macdonald “Salisbury School supporters fight closure” *Newshub* (7 August 2016, New Zealand); “Nelson school battles ‘penny pinching’ closure” *Radio New Zealand* (online ed, 7 August 2016, New Zealand); “Closure of Nelson’s Salisbury School ‘hypocritical’, says Labour” *Newstalk ZB* (8 August 2016, New Zealand); C Sivignon “Hekia Parata delays Salisbury School closure decision” *Stuff.co.nz* (6 September 2016, New Zealand).
- 148 C Sivignon “Richmond’s Salisbury School may close in January” *Stuff.co.nz* (16 June 2016, New Zealand).
- 149 C Sivignon “Richmond’s Salisbury School may close in January” *Stuff.co.nz* (16 June 2016, New Zealand).
- 150 The Secretary of Education, through the Ministry, has a broad discretion over the enrolment of a person in a special school under s 9 of the Education Act 1989, not the school. As a section 9 agreement is the only means by which a person may be enrolled in a special school under the Act, provided the discretion under s 9 is exercised consistently with the Act, the Ministry determines the enrolment process for special schools. The Ministry has determined that enrolment at Salisbury is conditional on a student’s eligibility for IWS, which is determined by the IWS Eligibility Panel.
- 151 The Commission was established following the Māori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 as a result of successful proceedings brought against the Crown by Māori in the Waitangi Tribunal and the Courts. For discussion of the settlement process, see R Boast “Maori Fisheries 1986-1998: A Reflection” (1999) 30(1) *VUWLR* 111.
- 152 See K Johnston “Discrimination, the State and Māori women: An analysis of International Human Rights Law and the Convention on the Elimination of All Forms of Discrimination Against Women” (2005) 8(2) *New Zealand Yearbook of New Zealand Jurisprudence* 31.
- 153 N Simmonds “Mana wahine: Decolonising politics” (2011) 25(2) *Women’s Studies Journal* 11.
- 154 As noted by Johnston, some academics have recognised that international human rights law does not adequately explain or reflect indigenous women’s unique experiences of racism and colonialism. See K Johnston “Discrimination, the State and Māori women: An analysis of International Human Rights Law and the Convention on the Elimination of All Forms of Discrimination Against Women” (2005) 8(2) *New Zealand Yearbook of New Zealand Jurisprudence* 31 at 63.
- 155 K Johnston “Discrimination, the State and Māori women: An analysis of International Human Rights Law and the Convention on the Elimination of All Forms of Discrimination Against Women” (2005) 8(2) *New Zealand Yearbook of New Zealand Jurisprudence* 31 at 33.
- 156 See discussion below from [118] onwards.
- 157 “New Zealand: Muslim woman told to remove hijab for job application” *The Indian Express* (online ed, 24 July 2016, Melbourne). See also A Fisher and B Torrie “Women fear hijab bias could limit jobs” *Dominion Post* (online ed, 6 July 2011, Wellington); L Tan “Life beneath the veil in NZ” *New Zealand Herald* (online ed, 23 January 2014, New Zealand).
- 158 C Miller “No scarf, job seeker told, but jeweller says it was an error” *The New Zealand Herald* (online ed, 19 July 2016, New Zealand).
- 159 See s 5 of the New Zealand Bill of Rights Act 1990 and s 65 of the Human Rights Act 1993.
- 160 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 4–5. Available online at <antidiscrimination.etc-graz.at>.

- 161 Human Rights Act 1993, s 5(1)(a).
- 162 Human Rights Act 1993, s 5(2)(a).
- 163 Human Rights Act 1993, s 5(2)(e).
- 164 Human Rights Act 1993, s 5(2)(j).
- 165 See for example *Baylis-Flannery v DeWilde* 2003 HRT0 28, 2003 CarswellOnt 8050; *Turner v Canada (Attorney-General)* 2012 FCA 159 (Federal Court of Appeal).
- 166 Ontario Human Rights Commission *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (2001).
- 167 See P Uccellini "Multiple Discrimination: How Law can Reflect Reality" (2008) 1 The Equal Rights Review 24 at 41.
- 168 B Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" (2016) 16 The Equal Rights Review 73 at 101.
- 169 See Human Rights Commission "Tracking Equality at Work" <tracking-equality.hrc.co.nz>.
- 170 Human Rights Commission "Tracking Equality at Work: Pay" <tracking-equality.hrc.co.nz>.
- 171 Danish Institute of Human Rights *SDG Data, Indicators & Mechanisms: A Human Rights Reference Paper* (2015).
- 172 Danish Institute of Human Rights *SDG Data, Indicators & Mechanisms: A Human Rights Reference Paper* (2015) at 11. "Cross-cutting" refers to the fact that principles such as non-discrimination and equality appear in multiple international human rights conventions.
- 173 Danish Institute of Human Rights *SDG Data, Indicators & Mechanisms: A Human Rights Reference Paper* (2015) at 13–14.
- 174 See in contrast *Kingston & Richmond AHA v Kaur* [1981] ICR 631 (UK Employment Appeal Tribunal). The claimant, a Sikh woman, argued that the respondent's dress code was indirectly racially discriminatory as it prevented her wearing trousers, without which she would feel improper. She did not allege sex discrimination but could have done so if she had alleged indirect multiple discrimination. See also *Malik v Bertram Personnel Group* (1991) 7 EOR 5 (UK Employment Appeal Tribunal). In that case, the complainant, a Muslim woman, was refused employment because she wished to wear trousers at work. The UK Employment Appeal Tribunal found that the complainant had been unlawfully discriminated against on the basis of her race. Again, the complainant did not plead indirect sex discrimination but could have done so.
- 175 *The Law Society v Kamlesh Bahl* EAT 1057/01, 31 July 2003 (UK Employment Appeal Tribunal).
- 176 *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA).
- 177 See *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA) at [59] and [66].
- 178 *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA) at [72].
- 179 *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA) at [137].
- 180 *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA) at [74].
- 181 *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA) at [135].
- 182 The claim was brought under s 1(1) of the Sex Discrimination Act 1975 (UK) and ss 1(1) and 3(4) of the Race Relations Act 1976 (UK).
- 183 *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA) at [137].
- 184 See A McColgan "Reconfiguring discrimination law" (2007) PL Spr 74 at 79.
- 185 See A McColgan "Reconfiguring discrimination law" (2007) PL Spr 74 at 79.
- 186 Emphasis added.
- 187 See M Robinson "Dual discrimination: the significance of delaying Section 14" (Institute of Employment Rights Conference Series, NUT Hamilton House, London, 5 December 2012).
- 188 Employment Tribunal.
- 189 *O'Reilly v BBC* ET Case 2200423/2010, 10 January 2011 (UK *O'Reilly v BBC* ET Case 2200423/2010, 10 January 2011 (UK Employment Tribunal) at [239].
- 190 *O'Reilly v BBC* ET Case 2200423/2010, 10 January 2011 (UK Employment Tribunal) at [247]–[249]. Emphasis added.
- 191 *Minister of Defence v DeBique* [2010] IRLR 471 (UK Employment Appeal Tribunal).
- 192 *Minister of Defence v DeBique* [2010] IRLR 471 (UK Employment Appeal Tribunal) at [165]. Emphasis added.
- 193 The South African Constitution (s 9) also expressly states that discrimination is prohibited on one or more grounds, though it does not refer to a combination of grounds.
- 194 The Canadian Courts have, however, made reference to this provision. In *Patterson v Canada Revenue Agency*, 2011 FC 1398 (Canadian FC), the plaintiff alleged that her employer's decision not to take into account her maternity leave in calculating her experience (which was required to apply for two job promotions) discriminated against her on the basis of family status and sex. The Canadian Federal Court held that, because the policy was discriminatory on the basis of family status, it did not need to consider the alternate ground of discrimination on the basis of sex. In *Lincoln v Bay Ferries Ltd* 2004 FCA 204 (Canadian FCA), *Lord v Canada* 2001 FCT 397 (Canadian FC) and *Gosal v Canada (Attorney General)* 2011 FC 570 (Canadian FC), the Courts dismissed the complainants' intersectional discrimination claims on the basis that there was no evidence to support their claims. Similarly, in *Keith v Canada (Correctional Service)* 2012 FCA 117 (Canadian FCA), the Canadian Federal Court of Appeal held that the complainant had failed to submit any evidence to show that the Royal College Fellowship certification process discriminated against candidates on the basis of national origin and/or age.
- 195 *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 (SCC).
- 196 *Canada (Attorney-General) v Mossop* [1993] 1 SCR 554 (SCC) at [153]–[154]. Emphasis added.
- 197 *Egan v Canada* [1995] 2 SCR 513 (SCC). For academic commentary critiquing the grounds-based approach in *Mossop and Egan*, see D Kropp "Categorical" Failure: Canada's Equality Jurisprudence – Changing Notions of Identity and the Legal Subject" (1997) 23 Queen's LJ 201.
- 198 The distinction between 'enumerated' and 'analogous' grounds is a unique feature of Canadian jurisprudence. Section 15(1) of the Canadian Charter of Rights and Freedoms states that: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". These grounds are more limited than those contained in s 21(1) of New Zealand's HRA 1993. However, the Canadian Courts have interpreted the use of the words "in particular" to indicate that additional grounds may be pleaded if they are 'analogous' to the 'enumerated' grounds listed in s 15. A ground will be analogous if it is "based on characteristics that cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law". See *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 (SCC) at 219.
- 199 *Egan v Canada* [1995] 2 SCR 513 (SCC) at [52] and [67]. Emphasis added.
- 200 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC).
- 201 *Egan v Canada* [1995] 2 SCR 513 (SCC) at [52].
- 202 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (SCC) at [93]–[94].
- 203 *Comeau v Cote* 2003 BCHRT 32 (British Columbia Human Rights Tribunal).
- 204 *Morrison v Motsewetshe* 2003 HRT0 21 (Ontario Human Rights Tribunal).
- 205 *Comeau v Cote* 2003 BCHRT 32 (British Columbia Human Rights Tribunal) at [88].
- 206 *Baylis-Flannery v DeWilde* 2003 HRT0 28 (Ontario Human Rights Tribunal).
- 207 *Baylis-Flannery v DeWilde* 2003 HRT0 28 (Ontario Human Rights Tribunal) at [3].
- 208 *Baylis-Flannery v DeWilde* 2003 HRT0 28 (Ontario Human Rights Tribunal) at [143]. Emphasis added.
- 209 *Baylis-Flannery v DeWilde* 2003 HRT0 28 (Ontario Human Rights Tribunal) at [143]–[145] and [148].
- 210 See also *Norsah c Commission des droits de la personne et des droits de la jeunesse* 2016 QCCA 700 (Quebec Court of Appeal), where the complainant sought to bring a claim of intersectional discrimination based on race and sexual orientation. The claim was dismissed in the first instance by the Quebec Human Rights and Youth Rights Commission in 2014. The complainant successfully applied for judicial review of the decision to dismiss the claim, and the case is now on appeal.
- 211 *Flamand v DGN Investments* 2005 HRT0 10 (Ontario Human Rights Tribunal) at [138] and [140].
- 212 *Hogan v Ontario* 2006 HRT0 32 (Ontario Human Rights Tribunal).
- 213 *Hogan v Ontario* 2006 HRT0 32 (Ontario Human Rights Tribunal) at [209].
- 214 *Hogan v Ontario* 2006 HRT0 32 (Ontario Human Rights Tribunal) at [249] and [263].
- 215 *Radek v Henderson Development (Canada) Ltd* 2005 BCHRT 302 (British Columbia Human Rights Tribunal). See also *N (P) v R (F)* 2015 BCHRT 60 (British Columbia Human Rights Tribunal), where the British Columbia HRT, citing *Radek*, considered the alleged grounds of discrimination (sex, family status, age, race, ancestry, colour and place of origin) together, rather than separately. The claimant was a Filipino mother, hired through an agency to work in the respondents' home in Hong Kong as a housekeeper and caregiver to the respondents' two children. The British HRT held at [90] that the "complainant is an integrated person, with a number of characteristics, some of them protected under the Code, all of which are alleged to have been factors in how she was treated."
- 216 *Radek v Henderson Development (Canada) Ltd* 2005 BCHRT 302 (British Columbia Human Rights Tribunal) at [604]–[606] and [644], citing *Comeau* at [131] and *Baylis-Flannery* at [145]–[146].
- 217 *Turner v Canada (Attorney-General)* 2012 FCA 159 (Federal Court of Appeal).
- 218 *Turner v Canada (Attorney-General)* 2012 FCA 159 (Federal Court of Appeal) at [11].
- 219 *Turner v Canada (Attorney-General)* 2012 FCA 159 (Federal Court of Appeal) at [48]–[50]. Emphasis added.
- 220 *Turner v Canada Border Services Agency* 2014 CHRT 10 (Canadian Human Rights Tribunal).
- 221 *Canada (Attorney General) v Turner* 2015 FC 1209 (Federal Court of Canada).
- 222 UN Committee on the Elimination of Discrimination against Women *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia* CEDAW/C/AUS/CO/7 (2010) at [26], commenting on Australian Government *Australia's combined 6th and 7th report to the United Nations on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women* CEDAW/C/AUL/7 (2009) at [26].
- 223 At [36].

- 224 Australian Government *The People of Australia: Australia's Multicultural Policy* (2014).
- 225 At [40].
- 226 UN Human Rights Council *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Situation of indigenous peoples in Australia A/HRC/15/37/Add 4* (2010) at [45] and [53].
- 227 UN Human Rights Council *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari: Mission to Australia A/HRC/4/18/Add 2* (2007) at [87].
- 228 Australian Human Rights Commission *Australia's Universal Periodic Review: Progress report prepared by the Australian Human Rights Commission on behalf of the Australian Council of Human Rights Authorities* (2014) at [41].
- 229 At [42].
- 230 *Dao & Anor v Australian Postal Commission* (1987) 162 CLR 317 (Australian HC).
- 231 See Australian Human Rights and Equal Opportunity Commission *Issues Paper: Gender and Race Intersectionality* (2001).
- 232 The AHRC reports on the number of complaints of discrimination that it receives each year, in its annual reports. The extent to which the AHRC receives complaints of multiple ground discrimination is not clear from the information available. The annual reports group complaints under each Act, which means that it is not possible to ascertain whether, and how often, individuals bring claims under multiple acts (and therefore allege discrimination on multiple grounds). However, the AHRC does state that a complainant may raise multiple grounds of discrimination under each Act. Under the Sex Discrimination Act, for example, a complainant may allege that discrimination has occurred on the separate grounds of sex, marital status or sexual orientation. Further, the AHRC notes that the total number of complaints received under the Sex Discrimination Act, in 2014-2015, doubles if these complaints are counted by ground rather than complainant. The data therefore suggests that multiple discrimination claims may come before the AHRC and it is possible that some claims may be intersectional in nature – for example, a lesbian might claim sex and sexual orientation discrimination, or a single mother might claim sex and marital status discrimination.
- 233 Australian Human Rights and Equal Opportunity Commission *Issues Paper: Gender and Race Intersectionality* (2001).
- 234 Australian Human Rights Commission *UN Questionnaire on the Rights of Older People: Australian Human Rights Commission Response to the UN Secretary General Report* (2011) at [11].
- 235 Australian Human Rights Commission "Equal Dialogues: A forum on Human Rights and Cultural Diversity (2010)" <www.humanrights.gov.au>.
- 236 *DeGraffenreid v General Motors* 413 F Supp 142 (District Court ED Missouri, 1976).
- 237 *DeGraffenreid v General Motors* 413 F Supp 142 (District Court ED Missouri, 1976) at 143. Emphasis added.
- 238 *DeGraffenreid v General Motors* 558 F 2d 480 (8th Cir, 1977).
- 239 *Jefferies v Harris County Community Action Association* 615 F 2d 1025 (5th Cir, 1980).
- 240 *Jefferies v Harris County Community Action Association* 615 F 2d 1025 (5th Cir, 1980) at 1032.
- 241 *Jefferies v Harris County Community Action Association* 615 F 2d 1025 (5th Cir, 1980) at 1032.
- 242 *Jefferies v Harris County Community Action Association* 615 F 2d 1025 (5th Cir, 1980) at 1032.
- 243 *Graham v Bendix Corporation* 585 F Supp 1036 (ND Ind, 1984); *Chambers v Omaha Girls Club* 629 F Supp 925 (1986); *Chambers v Omaha Girls Club* 834 F 2d 697 (8th Cir, 1987).
- 244 *Hicks v Gates Rubber Co* 833 F 2d 1406 (10th Cir, 1987) at 1416 and 1420.
- 245 *Lam v University of Hawaii* 40 F 3d 1551 (9th Cir, 1994).
- 246 *Lam v University of Hawaii* 40 F 3d 1551 (9th Cir, 1994) at 1561–1562. Emphasis added.
- 247 See for example *Bogan v MTD Consumer Group Inc* WL 3671696 (District Court ND Mississippi, 2016) and *Redford v KTBS, LLC* WL 552960 (District Court WD Louisiana, 2016).
- 248 See for example *Suggs v Central Oil of Baton Rouge, LLC* WL 3037213 (US District Court MD Louisiana, 2014), where an intersectional claim of discrimination on the grounds of age and disability survived the defendant's motion for summary judgment due to the plaintiff producing sufficient evidence of both age and disability discrimination. See also *Salem v Heritage Square Inc* WL 2555513 (US District Court ND California, 2007), where the California District Court declined to award the plaintiff summary judgment on a claim of gender, ethnic and religious discrimination, but rejected the defendant's argument that the grounds had to be considered separately.
- 249 *Hafford v Seidner* 183 F 3d 506 (6th Cir, 2005).
- 250 *Hafford v Seidner* 183 F 3d 506 (6th Cir, 2005) at 514–515.
- 251 *Hafford v Seidner* 183 F 3d 506 (6th Cir, 2005) at 515.
- 252 *Gorzynski v JetBlue Airways Corp* 596 F 3d 93 (2nd Cir, 2010).
- 253 *Gorzynski v JetBlue Airways Corp* 596 F 3d 93 (2nd Cir, 2010) at 109–110.
- 254 Courts from different jurisdictions have reached different conclusions regarding the legality of such bans. The decision of Leyla Şahin v Turkey (44774/98) Grand Chamber, ECHR, 10 November 2005 contains a helpful summary of the position in various countries. In Austria, Germany, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom, the State education authorities permit Muslim pupils and students to wear the Islamic headscarf in the absence of any express statutory ban (see for example *B v R* 1436/042 FCC 2d, 24 September 2003 (German Federal Constitutional Court)). In the United Kingdom, a tolerant attitude is shown to pupils who wear religious signs. Difficulties with respect to the Islamic headscarf are rare, but see *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, where the House of Lords held that in this particular case there were justifiable grounds for interference with the claimant's right to manifest her religious belief by wearing a jilbāb, one of the grounds being to protect the rights of other female students at the school who would not wish to be pressured into adopting a more extreme form of dress. The issue has also been debated in the context of the elimination of racial discrimination in schools in order to preserve their multicultural character (see, in particular, *Mandla v Dowell* [1983] 2 AC 548 (UKHL)). In Finland and Sweden the veil can be worn at school. However, a distinction is made between the burqa and the niqab. In Sweden, mandatory directives were issued in 2003 by the National Education Agency allowing schools to prohibit the burqa and niqab, provided they do so in a spirit of dialogue on the common values of equality of the sexes and respect for the democratic principle on which the education system is based. In the Netherlands, where the question of the Islamic headscarf is considered from the standpoint of discrimination rather than of freedom of religion, it is generally tolerated. In 2003, a non-binding directive was issued. Schools may require pupils to wear a uniform provided that the rules are not discriminatory and are included in the school prospectus and that the punishment for transgressions is not disproportionate. A ban on the burqa is regarded as justified by the need to be able to identify and communicate with pupils. In a number of other countries (Russia, Romania, Hungary, Greece, the Czech Republic, Slovakia and Poland), the issue of the Islamic headscarf does not yet appear to have given rise to any detailed legal debate.
- 255 See E Brems "Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings" (2014) 22 JL & Poly 517.
- 256 A similar approach has been adopted in the cases of *NB v Slovakia* (29518/10) Former Section IV, ECHR, 12 June 2012 and *VC v Slovakia* (18968/07) Former Section IV, ECHR, 8 November 2011. Both cases involved the sterilisation of underage Roma women without their informed consent. Although the ECHR did not go on to address the applicants' art 14 discrimination claims, dealing with them under art 8 (right to private life) instead, it recognised the particular disadvantage experienced by the applicants as Roma women, noting that the "practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups...particularly...members of the Roma community", and that the applicants had been "marked out" as patients to be sterilised because of their origin (*NB v Slovakia*, at [162], *VC Slovakia*, at [4], per Judge Mijovic dissenting).
- 257 D Schiek "Just a piece of cloth? German courts and employees with headscarves" (2004) 33(1) ILJ 68 at 73.
- 258 D Schiek "Just a piece of cloth? German courts and employees with headscarves" (2004) 33(1) ILJ 68 at 73.
- 259 *Dogru v France* (27058/05) Section V, ECHR, 4 December 2008 at [62].
- 260 *Dahlab v Switzerland* (42393/98) Section II, ECHR, 15 January 2001.
- 261 *Dahlab v Switzerland* (42393/98) Section II, ECHR, 15 January 2001 at 13.
- 262 *Dahlab v Switzerland* (42393/98) Section II, ECHR, 15 January 2001 at [14].
- 263 *Leyla Şahin v Turkey* (44774/98) Grand Chamber, ECHR, 10 November 2005.
- 264 *Leyla Şahin v Turkey* (44774/98) Grand Chamber, ECHR, 10 November 2005 at [113]–[114]. See also the decisions in *Karaduman v Turkey* (16278/90) (1993) DR 74 (EComHR) and *Dahlab v Switzerland* (42393/98) Section II, ECHR, 15 January 2001, where it was concluded that, in a democratic society, the State was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and public safety. In *Karaduman*, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who did not practise their religion or who belonged to another religion were not considered to constitute interference for the purposes of Article 9 of the Convention.
- 265 *Leyla Şahin v Turkey* (44774/98) Grand Chamber, ECHR, 10 November 2005 at [121].
- 266 *Dogru v France* (27058/05) Section V, ECHR, 4 December 2008.
- 267 *Dogru v France* (27058/05) Section V, ECHR, 4 December 2008 at [62].
- 268 *Dogru v France* (27058/05) Section V, ECHR, 4 December 2008 at [75]–[76].
- 269 *Ahmet Arslan and others v Turkey* (41135/98) Section II, ECHR, 23 February 2010.
- 270 *Ahmet Arslan and others v Turkey* (41135/98) Section II, ECHR, 23 February 2010 at [48]–[49].
- 271 *SAS v France* (2015) 60 EHRR 11 (ECHR, Grand Chamber). See also S Berry "The 'Burkini Ban' – A Red Line even for the European Court of Human Rights?" (7 September 2016) Oxford Human Rights Hub <ohrh.law.ox.ac.uk>.
- 272 *SAS v France* (2015) 60 EHRR 11 (ECHR, Grand Chamber) at [132]–[133]. Emphasis added.
- 273 *SAS v France* (2015) 60 EHRR 11 (ECHR, Grand Chamber) at [160]–[162]. Citations omitted.
- 274 *League of Human Rights v Villeneuve-Loubet* (402742) State Council ORD, 26 August 2016 (Conseil d'État). The interim orders suspending the ban are available at: <www.revuegeneraledudroit.eu>. See also Conseil d'État "The Council of State

- orders a decision banning clothes demonstrating an obvious religious affiliation to be suspended" (press release, 26 August 2016).
- 275 B Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" (2016) 16 *The Equal Rights Review* 73 at 96. See also K Yoshida "Towards Intersectionality in the European Court of Human Rights: The Case of *B.S. v Spain*" (2003) 21 *Feminist Legal Studies* 202.
- 276 B Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" (2016) 16 *The Equal Rights Review* 73 at 96.
- 277 Case C-188/15 *Bougnauou and ADDH v Micropole SA* (ECJ, Opinion of Advocate-General Sharpston, 13 July 2016).
- 278 Case C-188/15 *Bougnauou and ADDH v Micropole SA* (ECJ, Opinion of Advocate-General Sharpston, 13 July 2016) at [75]–[76].
- 279 Case C-188/15 *Bougnauou and ADDH v Micropole SA* (ECJ, Opinion of Advocate-General Sharpston, 13 July 2016) at [133].
- 280 Case C-356/09 *Pensionsversicherungsanstalt v Kleist* (ECJ, Second Chamber, 18 November 2010).
- 281 Case C-152/11 *Odar v Baxter Deutschland GmbH* (ECJ, Opinion of Advocate-General Sharpston, 12 July 2012).
- 282 Case C-363/12 *Z v A Government Department* (ECJ, Grand Chamber, 18 March 2014).
- 283 *Markin v Russia* (30078/06) (2013) 56 EHRR 8 (ECHR).
- 284 *Markin v Russia* (30078/06) (2013) 56 EHRR 8 (ECHR) at [122].
- 285 *Markin v Russia* (30078/06) (2013) 56 EHRR 8 (ECHR) at [01-17], per Judge de Albuquerque (partly dissenting).
- 286 *International Planned Parenthood Federation – European Network (IPPF EN) v Italy* (2014) 58 EHRR SE17 (ECHR).
- 287 *International Planned Parenthood Federation – European Network (IPPF EN) v Italy* (2014) 58 EHRR SE17 (ECHR) at [30].
- 288 *International Planned Parenthood Federation – European Network (IPPF EN) v Italy* (2014) 58 EHRR SE17 (ECHR) at [190].
- 289 *International Planned Parenthood Federation – European Network (IPPF EN) v Italy* (2014) 58 EHRR SE17 (ECHR) at [190].
- 290 Case C-443/15 *Parris* (ECJ, Opinion of Advocate-General Kokott, 30 June 2016).
- 291 Case C-443/15 *Parris* (ECJ, Opinion of Advocate-General Kokott, 30 June 2016) at [4] and [149].
- 292 Case C-443/15 *Parris* (ECJ, Opinion of Advocate-General Kokott, 30 June 2016) at [153]–[155]. Emphasis added.
- 293 See discussion at [89]–[90].
- 294 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 531, citing *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37 (HC) at 56–59.
- 295 *Northern Regional Health Authority v Human Rights Commission* (1997) 4 HRNZ 37 (HC) at 58. See for example *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA); *Ministry of Health v Atkinson* [2012] NZCA 84, [2012] 3 NZLR 456 at [39]–[42].
- 296 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).
- 297 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 530 per Thomas J.
- 298 *Huang v Minister of Immigration* [2009] 2 NZLR 700 (CA) at [34]. See also K Keith "Roles of the Courts in New Zealand in Giving Effect to International Human Rights – with some history" (1999) 29 VUWLR 27; A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2016) at [4.5]–[4.6].
- 299 I Truscian and J Bourke-Martignoni "International Human Rights Law and Intersectional Discrimination" (2016) 16 *Equal Rights Review* 103.
- 300 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
- 301 UN Human Rights Committee *General comment No 18* HRI/GEN/1/Rev6 (1989) at [7]. Emphasis added.
- 302 UN Human Rights Committee *General Comment No 28* CCPR/C/21/Rev1/Add10 (2000) at [38]. Emphasis added.
- 303 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).
- 304 UN Committee on Economic, Social and Cultural Rights *General Comment No 20* E/C12/GC/20 (2009) at [15] and [27].
- 305 UN Committee on Economic, Social and Cultural Rights *General Comment No 20* E/C12/GC/20 (2009) at [17].
- 306 UN Committee on Economic, Social and Cultural Rights *General Comment No 16* E/C12/2005/4 (2005) at [5].
- 307 UN Committee on Economic, Social and Cultural Rights *General Comment No 5* E/1995/22 (1994) at [19].
- 308 UN Committee on Economic, Social and Cultural Rights *General Comment No 23* E/C12/GC/23 (2016) at [47].
- 309 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 1 March 1980, entered into force 3 September 1981).
- 310 Article 7.
- 311 Article 10.
- 312 Article 11.
- 313 Article 12.
- 314 Article 13.
- 315 UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 28* CEDAW/C/GC/28 (2010) at [18]. For further discussion on the CEDAW and intersectional discrimination, see M Campbell "CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination" Oxford University Working Paper Vol 2 No 3, February 2016; L Hodson "Women's rights and the periphery: CEDAW's optional protocol" (2014) 25(2) *EJIL* 561.
- 316 UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 18* A/46/38 (1991); UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 19* CEDAW/C/GC/19 (1992) at [11]; UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 26* CEDAW/C/2009/WP1/R (2008) at [14]; UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 27* CEDAW/C/GC/27 (2010) at [13]; UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 32* CEDAW/C/GC/32 (2014) at [16]; UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 33* CEDAW/C/GC/33 (2015) at [8].
- 317 UN Committee on the Elimination of Discrimination Against Women *Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland* (2008) 47 EHRR SE20 at [46]–[47].
- 318 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 7 March 1966, entered into force 4 January 1969).
- 319 UN Committee on the Elimination of Racial Discrimination *General Recommendation No 31* A/60/18 (2005).
- 320 UN Committee on the Elimination of Racial Discrimination *General Recommendation No 25* A/55/18 (2000) at [1].
- 321 UN Committee on the Elimination of Racial Discrimination *General Recommendation No 25* A/55/18 (2000) at [2].
- 322 UN Committee on the Elimination of Racial Discrimination *General Recommendation No 25* A/55/18 (2000) at [3].
- 323 UN Committee on the Elimination of Racial Discrimination *General Recommendation No 25* A/55/18 (2000) at [6].
- 324 Convention on the Rights of Persons with Disabilities (adopted by resolution of the UN General Assembly, 24 January 2007, A/RES/61/106).
- 325 UN Committee on the Rights of Persons with Disabilities *General Comment No 1* CRPD/C/GC/1 (2014) at [35].
- 326 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).
- 327 UN Committee on the Rights of the Child *General Comment No 9* CRC/C/GC/9 (2007); UN Committee on the Rights of the Child *General Comment No 10* CRC/C/GC/10 (2007); UN Committee on the Rights of the Child *General Comment No 11* CRC/C/GC/11 (2009).
- 328 See for example *R v Law* [1999] 1 SCR 497 (SCC) and *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396 (SCC).
- 329 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].
- 330 At [135] and [136].
- 331 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
- 332 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [101] and [109].
- 333 SB Goldberg *Discrimination by Comparison* (Columbia Public Law & Legal Theory Working Papers, Paper 9185, 2010) at 16.
- 334 *Attorney-General v IDEA Services Ltd (in Stat Man)* [2012] NZHC 3229, [2013] 2 NZLR 512 at fn 82.
- 335 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51].
- 336 *B v Waitemata District Health Board* [2016] NZCA 184 at [86].
- 337 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [139].
- 338 *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [34].
- 339 See A Emanuel "To whom will ye liken me, and make me equal?: Reformulating the role of the comparator in the identification of discrimination" (2014) 45(1) *VUWLR* 1 at 9.
- 340 See for example *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2015] 2 NZLR 437 (CA) at [99]; *Air New Zealand Ltd v McAlister* [2010] 1 NZLR 153 (SC).
- 341 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].
- 342 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [49]. Emphasis added.

- 343 *Withler v Canada* (Attorney General) 2011 SCC 12, [2011] 1 SCR 396 (SCC) at [59].
- 344 *Withler v Canada* (Attorney General) 2011 SCC 12, [2011] 1 SCR 396 (SCC) at [58] and [59].
- 345 See the discussion in A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2016) at [17.10.1]–[17.10.24]. See also *Minister of Defence v DeBique* [2010] IRLR 471 (UK Employment Appeal Tribunal) at [145], citing *Grundy v British Airways Plc* [2008] IRLR 74 (UKCA) at [27], where the UK Employment Appeal Tribunal noted that pool selection in cases of indirect discrimination "has troubled the Courts and Tribunals for years... no universal principle of law dictates what the pool should be in any particular case... three decades of litigation have failed to produce any universal formula for locating the correct pool, driving Tribunals and Courts alike to the conclusion that there is none".
- 346 *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 at [140] and [148].
- 347 A similar approach to the use of comparators is evident overseas. For example in *Andrews v British Columbia* [1989] 1 SCR 143 (SCC) at 164, the Canadian Supreme Court commented that "equality is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises". See further S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65. But, see *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* (2013) 11 NZLR 78 (EC), where the Employment Court observed (at [37]) that a comparator is simply a "means to an end".
- 348 See S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 81.
- 349 S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 84.
- 350 *Moore v British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360 (SCC). But see *Auton v British Columbia* [2004] 3 SCR 657 (SCC), which also involved government funding for dyslexic students, where the Canadian Supreme Court applied a comparative analysis.
- 351 *Moore v British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360 (SCC) at [25].
- 352 *Moore v British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360 (SCC) at [32].
- 353 *Moore v British Columbia (Education)* 2012 SCC 61, [2012] 3 SCR 360 (SCC) at [30]–[32].
- 354 *Secretary of State for Defence v Macdonald* [2001] IRLR 431 (Scottish Court of Session).
- 355 See S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 82–83.
- 356 S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 69.
- 357 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 4–5. Available online at <antidiscrimination.etc-graz.at>. See also D Gilbert and D Majury "Critical Comparisons: The Supreme Court of Canada Doms Section 15" (2006) 24 Windsor YB Access Just 111.
- 358 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 4–5. Available online at <antidiscrimination.etc-graz.at>.
- 359 S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 84.
- 360 *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78.
- 361 *Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* 2002 CarswellOnt 1558 (Ontario CA).
- 362 *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78.
- 363 *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78 at [51]–[54], citing *Hodge v Canada (Minister of Human Resources Development)* 2004 SCC 65, [2004] 3 SCR 357 at [18]–[32].
- 364 At [55].
- 365 At [55].
- 366 At [56].
- 367 D Gilbert and D Majury "Critical Comparisons: The Supreme Court of Canada Doms Section 15" (2006) 24 Windsor YB Access Just 111 at 131–132.
- 368 D Gilbert and D Majury "Critical Comparisons: The Supreme Court of Canada Doms Section 15" (2006) 24 Windsor YB Access Just 111 at 131–132.
- 369 S Gibson and C Sewrattan "Gender Roles, Charter Holes and Societal Goals: Mentally Ill Female Prisoners in Canada" (2012) 32 Windsor Review of Legal and Social Issues 25 at 47–48.
- 370 In New Zealand, the claimant would arguably have been entitled to claim discrimination on the basis of employment status (which includes the status of being on a benefit), and family status, both of which are protected grounds under s 21(1) of the HRA. Accordingly, the claimants could have claimed discrimination on the basis of four intersecting protected characteristics.
- 371 *Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* 2002 CarswellOnt 1558 (Ontario CA).
- 372 *Falkiner v Ontario (Director of Income Maintenance, Ministry of Community & Social Services)* 2002 CarswellOnt 1558 (Ontario CA) at [67].
- 373 At [71].
- 374 At [72].
- 375 D Gilbert and D Majury "Critical Comparisons: The Supreme Court of Canada Doms Section 15" (2006) 24 Windsor YB Access Just 111 at 137.
- 376 D Gilbert and D Majury "Critical Comparisons: The Supreme Court of Canada Doms Section 15" (2006) 24 Windsor YB Access Just 111 at 134–137.
- 377 At 135.
- 378 A McColgan "Reconfiguring discrimination law" (2007) PL Spr 74 at 92.
- 379 *Webb v EMO Air Cargo (UK) Ltd (No 1)* [1992] UKHL 15.
- 380 S Hannett "Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination" (2003) Oxford Journal of Legal Studies 65 at 84.
- 381 *Morrison v Motsewetshe* 2003 HRTO 21 (Ontario Human Rights Tribunal).
- 382 *Baylis-Flannery v DeWilde* 2003 HRTO 28 (Ontario Human Rights Tribunal).
- 383 *Hafford v Seidner* 183 F 3d 506 (6th Cir, 2005).
- 384 See discussion above at [145], [147]–[150], and [173]–[174] respectively.
- 385 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 3. Available online at <antidiscrimination.etc-graz.at>.
- 386 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 15. Available online at <antidiscrimination.etc-graz.at>.
- 387 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 15. Available online at <antidiscrimination.etc-graz.at>.
- 388 At 15.
- 389 C Wilkie and M Gary "Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality" (2011) 30 Windsor Review of Legal and Social Issues 37 at 57–58.
- 390 I Solanke "Infusing the silos in the Equality Act 2010 with synergy" (2011) 40(4) Industrial Law Journal 336 at 344. Citations omitted.
- 391 I Solanke "Infusing the silos in the Equality Act 2010 with synergy" (2011) 40(4) Industrial Law Journal 336 at 354.
- 392 *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783.
- 393 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [53]–[64]. See also *Air New Zealand v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [48]–[49].
- 394 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [64].
- 395 *Bahl v Law Society* [2004] EWCA Civ 1070 (UKCA). See discussion above at [121]–[125].
- 396 A McColgan "Reconfiguring discrimination law" (2007) PL Spr 74 at 79.
- 397 N Iyer "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 CJWL 25 at 42 and 44.
- 398 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 4–5. Available online at <antidiscrimination.etc-graz.at>. See also D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37.
- 399 D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 63.
- 400 See also D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 59.
- 401 S Smith and K Starl *Locating Intersectional Discrimination* (European Training and Research Centre, 2011) at 4–5. Available online at <antidiscrimination.etc-graz.at>. See also P Uccelli "Multiple Discrimination: How Law can Reflect Reality" (2008) 1 The Equal Rights Review 24 at 36.
- 402 D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 63.
- 403 D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at fn 94. See also the Australian case of *Djokic v Sinclair & Anor* (1994) EOC 92-643 (Australian Human Rights and Equal Opportunities Commission). This case illustrates the potential difficulties in intersectional discrimination cases in recognising harm in where it has clearly occurred but is based on individual and (supposedly) separate grounds of discrimination. A Greek female worker in a meatpacker complained to Australian Human Rights and Equal Opportunities Commission after she was harassed and inappropriately touched by her supervisor, called a "stupid wog bitch" by her co-workers for reporting unauthorised work breaks, subjected to rumours that she was sleeping with male co-workers and eventually dismissed. She alleged discrimination on the basis of race and sex, which included allegations of sexual harassment. Although the Commission upheld the complainant's discrimination claims, it had difficulties with finding that the burden of proof was satisfied with respect to sexual harassment, and dismissed these allegations.
- 404 See discussion above at [89]–[90]. See also D Pothier "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 63.
- 405 See discussion above at [131].
- 406 *Minister of Defence v DeBique* [2010] IRLR 471 (UK Employment Appeal Tribunal)

- at [152].
- 407 At [154].
- 408 At [161].
- 409 See discussion above at [170].
- 410 *Hicks v Gates Rubber Co* 833 F 2d 1406 (10th Cir, 1987).
- 411 The Austrian Federal Disability and Equality Act 2006 provides that multiple discrimination may be taken into account in awarding damages. Similarly, the Romanian Equal Treatment Act 2006 states that discrimination on two or more grounds qualifies as an "aggravating circumstance."
- 412 *Egan v Canada* [1995] 2 SCR 513 (SCC) at [58].
- 413 Ontario Human Rights Commission *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (2001) at 22–23.
- 414 Ontario Human Rights Commission *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (2001) at 24.
- 415 *Comeau v Cote* 2003 BCHRT 32 (British Columbia Human Rights Tribunal).
- 416 *Comeau v Cote* 2003 BCHRT 32 (British Columbia Human Rights Tribunal) at [131].
- 417 *Baylis-Flannery v DeWilde* 2003 HRTO 28 (Ontario Human Rights Tribunal).
- 418 *Baylis-Flannery v DeWilde* 2003 HRTO 28 (Ontario Human Rights Tribunal) at [149].
- 419 *Baylis-Flannery v DeWilde* 2003 HRTO 28 (Ontario Human Rights Tribunal) at [170].
- 420 See for example *Simpson v Attorney-General [Baigent's case]* [1994] 3 NZLR 667 (CA). Where legislation is inconsistent with the NZBORA, the Court may only issue a declaration that the legislation is inconsistent with the NZBORA (consistent with s 4 of the NZBORA). See for example *Taylor v Attorney-General of New Zealand* [2014] NZHC 1630, [2014] BCL 346. Where the impugned legislation is delegated legislation (such as a regulation or bylaw) the Courts may strike the legislation down as *ultra vires*. See for example *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).
- 421 In respect of a Government enactment with a discriminatory effect, a plaintiff may only seek a declaration that the relevant enactment is inconsistent with the right to freedom from discrimination in s 19(1) of the NZBORA: s 92J.
- 422 Human Rights Act 1993, s 92I.
- 423 Human Rights Act 1993, s 92M. Similarly, where discrimination has occurred in the context of an employment relationship, the Employment Relations Act 2000 states that an employee may choose either to bring a personal grievance before the Employment Relations Authority or to make a complaint under the HRA. If an employee elects to use one of these procedures, they may not exercise any rights in respect of the other claim. See Human Rights Act, s 79A; Employment Relations Act 2000, s 112.
- 424 D Schiek and V Chege (eds) *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge, 2009) at [1.3.4]. See also N Duclos "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 Canadian Journal of Women and Law 25.
- 425 J Reynoso "Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins" (2004) 7 Harv Latino L Rev 63 at 66.
- 426 J Reynoso "Perspectives on Intersections of Race, Ethnicity, Gender, and Other Grounds: Latinas at the Margins" (2004) 7 Harv Latino L Rev 63 at 72.
- 427 *Egan v Canada* [1995] 2 SCR 513 (SCC) at [53], per L'Heureux-Dubé J (dissenting).
- 428 See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 575–577; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [113].

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