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# AUCKLAND DISTRICT LAW SOCIETY

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## PUBLIC ISSUES COMMITTEE

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If a precis or abstract of this paper is published, or reference made to its content, please advise your readers that the full text of the paper issued by this Committee will be available at the Auckland District Law Society's Internet website,

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## GOVERNMENT NEEDS TO ACT TO PROTECT HUMAN RIGHTS

1. At the end of this year section 151 of the Human Rights Act 1993 expires. The effect of the expiry of that section will be to leave the status of the Human Rights Act, and thus the important rights it protects, in an uncertain legal state.
2. The attached paper of the Public Issues Committee of the Auckland District Law Society entitled "Primacy of Human Rights Legislation" addresses the constitutional issue of the status of the Human Rights Act 1993 following the expiry of section 151. The paper recommends that the Government take action to replace section 151 with a provision that provides for the Human Rights Act to prevail over other legislation, except where Parliament expressly provides otherwise. The Committee believes that a failure to take action will result in a lost opportunity to promote human rights. The Government is under an obligation at international law to adopt legislative or other measures necessary to give effect to international human rights.
3. The Public Issues paper also comments on a document recently released by the Ministry of Justice entitled "Re-Evaluation of Human Rights Protections in New Zealand". One of the important constitutional issues that paper addresses is the status of the Human Rights Act. That issue is referred to in the Ministry of Justice's document as the "Primacy Issue".

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## PRIMACY OF HUMAN RIGHTS LEGISLATION - WHAT WILL BE THE POSITION IN 2002?

1. The Ministry of Justice has recently released a discussion paper entitled "Re-Evaluation of Human Rights Protections in New Zealand". The paper reviews domestic human rights arrangements and recommends general strategic directions for human rights. An important constitutional issue that paper addresses is the status of the Human Rights Act 1993 in relation to other statutes – will the Human Rights Act 1993 assume primacy over other legislation following the repeal of section 151 as from 31 December 2001? This paper deals with that primacy issue.
  
2. Under New Zealand's constitutional arrangements the Courts do not generally have the power to strike down or challenge the validity of legislation. This fundamental principle is reflected in the New Zealand Bill of Rights Act 1990. That Act is New Zealand's principal rights protecting instrument. In contrast with jurisdictions with constitutionally entrenched Bills of Rights, New Zealand Courts cannot invalidate laws passed by Parliament on the grounds that they are inconsistent with the New Zealand Bill of Rights Act. This lack of higher constitutional status has been the subject of criticism by the UN Human Rights Committee. Having said that, the Bill of Rights Act has to some extent allowed the Courts to insist on a rights-based approach to public decision-making.
  
3. The key focus of the Bill of Rights Act is on ensuring that the government in each of its forms i.e. executive, legislative and judicial, provides and

maintains specified fundamental civil and political human rights. The areas it covers are generally those where citizens interact with the powers of the State such as democratic and civil rights, rights to life, rights when being held/charged with criminal offences. Of importance and in a separate category, it also guarantees the right to freedom from discrimination on the grounds specified under the Human Rights Act 1993.

4. In contrast the Human Rights Act's focus is both broader and more specific. Under Part I a human rights institution is established whose purpose is to provide better protection of human rights in New Zealand in the broadest sense possible, meaning all rights recognised in United Nations Covenants and Conventions on Human Rights. These include economic, social and cultural rights and rights of children.
5. Under Part II the human rights institution established under the Act and courts are given specific powers to enforce one particular human right – the right to be free from discrimination. The areas where discrimination is proscribed are the areas of public life, otherwise called the "marketplace". They include employment, education, accommodation, access to public places and provision of goods and services. Any one person or any one organisation, whether government sector or private, which operates in the areas specified must comply with the prohibitions against discrimination. This prohibition has been in force for 24 years. The instances of a conflict with other laws have arisen from time to time and the government has either amended the other laws so as to comply (e.g. Defence Act) or enacted specific exemptions (eg Social Security Act).

6. These two enactments, the Bill of Rights Act and Human Rights Act are essentially different in nature and have different functions and purposes. They overlap in two areas. In a general sense each of them makes specific contributions to the protection of human rights for persons in New Zealand. In a specific sense the Bill of Rights Act affirms and guarantees freedom from discrimination which Part II of the Human Rights Act proscribes. It is unnecessary and unhelpful to see them in terms of a hierarchy of Human Rights protections, one of which must be said to be higher than the other. They perform different functions and are better described as a grouping of domestic human rights enactments along with the Health and Disability Act, Privacy Act and Ombudsman Act.
7. The constitutional status of the Human Rights Act 1993 was addressed by Parliament at the time of its enactment, but in an incomplete way. Section 151 of the Act provides that the Human Rights Act itself should not limit or affect the provisions of any other Act or Regulation that is in force in New Zealand. That provision, namely section 151, is, however, due to expire on 31 December 2001 leaving open the question of whether, after that date, the Human Rights Act will remain subordinate legislation or be read by the Courts to prevail over inconsistent statutes. This is an important issue for the enforcement of human rights in New Zealand.
8. Unless Parliament were expressly to determine the relationship between the Human Rights Act and other statutes by, say, an amendment to the existing

Human Rights Act itself, the question of its constitutional status will be left to the Courts to work out over time.

9. It is not possible to determine in a generalised or definitive way what the approach of the Courts might be, should Parliament fail to take corrective legislative action. Recent decisions of the Court of Appeal suggest that there may be a divergence of judicial opinion on the approach the Court should take when faced with a direct conflict between the Human Rights Act and another statute or regulation. This is evidenced from the recent *Pora* decision involving the Susan Burdett murder of 1992, where some of the Judges, in reliance on Canadian authority, determined that a statutory provision containing a prohibition against the retrospective imposition of penalties should take primacy over a conflicting provision which provided for the retrospective imposition of an increased minimum parole period. This finding was reached on the basis that human rights legislation, namely the New Zealand Bill of Rights Act, is of a special nature requiring a particular approach to statutory interpretation. A number of other Judges, however, disagreed with that approach.
10. Other decisions of the Court of Appeal tend to suggest a greater degree of support for an approach which would allow the Court to declare that a statutory provision is inconsistent with the Human Rights Act albeit that the provision would have to be enforced according to its proper meaning. In a recent censorship decision, the Court of Appeal suggested that the Court has both a power and, on occasions, a duty to indicate whether a statutory

provision is inconsistent with the New Zealand Bill of Rights Act 1990. That approach might also be adopted with respect to the Human Rights Act 1993.

11. In working out the issue of primacy, the Courts, assuming there is no legislative correction, will be aware of the need to ensure consistency with the New Zealand Bill of Rights Act which Parliament has expressly determined not to enjoy primacy over other legislation. The position in the Ministry of Justice discussion paper is that it would be incongruous if the Human Rights Act had greater status than the New Zealand Bill of Rights Act, the statute that is New Zealand's principal rights protection instrument. The paper also notes the potential for incongruity that arises from the fact that the right to freedom from discrimination in the Bill of Rights Act makes express reference to the grounds of discrimination in the Human Rights Act.
  
12. The Public Issues Committee does not accept an undesirable incongruity will be created if the Human Rights Act, in so far as it outlaws discrimination in the marketplace, will override marketplace discrimination which may be provided for in other legislation. Freedom from discrimination is one of the fundamental freedoms provided for in every United Nations International Human Rights Covenant. The government in ratifying these covenants has guaranteed it will provide such protection to persons living in New Zealand. It should have no fear of creating a law which requires that all laws comply with the prohibitions against marketplace discrimination, except if they are specifically exempted.

13. The legal effect of a simple repeal of section 151 without corrective legislative action will leave the status of the Human Rights Act and the issue of whether it will enjoy primacy over other legislation in a state of uncertainty. This is a matter of constitutional importance. It is undesirable that the status of human rights legislation, particularly a statute which has application to private sector interests, should remain in such an uncertain state. It is also undesirable that the status of the Human Rights Act should be left to the Courts when the status of the more significant rights instrument, namely the New Zealand Bill of Rights Act, has been clarified by legislation. The Committee recommends that Parliament act to state clearly what the relationship between the Human Rights Act and the rest of the statute book is, as from 1 January 2002.

14. In order to cure the problem of uncertainty identified at paragraph 13 above, the Public Issues Committee recommends that section 151 not be extended but be replaced with a provision which reads:

"Except as provided for in any other Act or regulation this Act shall apply to all other Acts and regulations."

15. The Committee considered the option of recommending that section 151 should not be extended but be replaced with provisions equivalent to sections 4, 5 and 6 of the New Zealand Bill of Rights Act 1990. These provisions provide that while legislation cannot be held by the Court to be invalid or ineffective as a result of inconsistency with the New Zealand Bill of Rights Act itself, nevertheless all other enactments are to be interpreted as far as possible consistently with the Bill of Rights legislation. However, the

Committee preferred the recommendation adopted at paragraph 14 above on the basis that it is the better way for the Government to meet its international obligations of adopting legislative or other measures necessary to give effect to human rights.

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