EQUALITY AND AFFIRMATIVE ACTION: A HUMAN RIGHTS PERSPECTIVE ON TERTIARY EDUCATION IN NEW ZEALAND THROUGH THE LENS OF AFFIRMATIVE ACTION

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JOHN SADLER*

ABSTRACT: Affirmative action, an almost exclusively American concept, has more latterly achieved prominence, perhaps controversy, in New Zealand. The public’s interest in this concept seems particularly acute in the field of tertiary education. This paper explores human rights issues in tertiary education through the lens of affirmative action at the Auckland University Law School and Medical School. The paper asks if the practice of affirmative action is justifiable from a strictly legal perspective in the first part, and then addresses the broader more normative question, whether it is morally so justified in the second part. I have endeavoured to provide answers to both questions. The key question to be addressed in this paper is whether New Zealand desires or needs a practice that is essentially separatist as it advances into the 21st century?

Introduction

There is a plethora of academic books and articles on the subject of affirmative action, principally in the context of civil rights in the United States.¹ By way of contrast, from the perspective of affirmative action programmes affecting tertiary education in New Zealand, there is an apparent dearth of academic literature on the topic.²

The purpose of this research paper is to carry out an in-depth analysis of affirmative action programmes as they currently apply at the University of Auckland Schools of Law and Medicine. Both institutions have in place restrictive entry to courses and within these barriers is applied a further restriction through affirmative action quota for entry of Maori and Pacific Islanders. The methodology of this paper is to divide the topic into two parts: the first will be a descriptive account of the programmes that are currently in place at the Law and Medical Schools. The question will be posed from the standpoint of New Zealand’s statutory regime, whether the current law justifies the practice of programmes which grant quota to Maori and Pacific

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² Di Maio, Antonia, “One Pakeha New Zealander’s justification for affirmative action in law schools targeting Maori.”. Thesis Bachelor of Laws with Honours University of Waikato, 2002. This academic paper however appears as the only New Zealand view on the subject to date.
Islanders under: the Human Rights Act 1993, the Education Act 1989, The New Zealand Bill of Rights Act 1990, and the Treaty of Waitangi in respect to Maori at the University of Auckland. The second part of the paper will concentrate on affirmative action from a normative and more theoretical perspective in an attempt to determine whether the practice is ultimately a good for that minority quota group. This issue will also be reviewed in the wider sense as to whether it is a good for society itself.

The overall objective is to seek an answer to the question whether there is a sound doctrinal basis for the practice of affirmative action at the University of Auckland. The outcome, however, maybe an acceptance that it is devoid of any sound principle to justify the continuation of the policy, and that the reasons for its inclusion in tertiary education lie elsewhere.

Notwithstanding the apparent flood of material written on the topic of affirmative action from outside New Zealand, I suggest that it is still worthy of research, due in no small measure to the highly contentious and sensitive nature of the issue. At the time of writing, this subject is once again at the forefront of the political consciousness of the nation, especially so in terms of preferential quota for entry of Maori. In recent months the subject has been in part responsible for a significant shift in the political fortunes of the National Party Opposition following its leader Don Brash’s speech at the Orewa Rotary Club on 27th January 2004. In his speech, Brash called for affirmative action quotas for tertiary education to be ended and identified a “dangerous drift towards racial separatism in New Zealand”. This would be a negative outcome in today’s world, and one that seemed to capture the attention of a significant sector of the population.

In more recent times the Minister of Education, Trevor Mallard, has announced that the government will abandon teaching scholarships for Maori and Pacific Islanders currently set at $10,000 per person per annum, of which 400 such scholarships were issued last year. The implication is that the Government is treating the continuation of affirmative action policies as a political imperative and starting a process that may see a steady retreat from assistance generally determined on the basis of race.

It is fair to say that affirmative action programmes engender an intense emotional response on both sides of the argument. The reasons are diverse and complex. However, it is because the subject matter is of such a highly contentious nature, both socially and politically, and also in the process of evolution, that it is still worthy of independent and original research. I am of the view that the consideration of the subject of affirmative action in tertiary education in the New Zealand context

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is far from exhausted and much has been left to be said as to the reasons why it continues and the legal justification for the practice.

Part I

The Affirmative Action Programmes at the Medical School and the Law School.

Equality in the abstract is a concept central to democratic forms of government. Perhaps the most recognised expression of this notion is enshrined in the Constitution of the United States as its Fourteenth Amendment: “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.”

I suggest that the ideal of equality as between different ethnic and racial groups is one which most people in New Zealand would accept as having a clear and precise meaning, and one which would be closely linked to the notion of equal treatment for all under the law. It is the idea that all things are the same, and racial differences cannot be called in aid to advance one race over another. The fact that its true meaning, in terms of equality between Pakeha, Maori and Pacific Islanders, is deeply immersed in the fabric of the nation’s historic, social, economic, and political life is not so readily appreciated nor comprehended. Equality, in the sense that all are treated alike in reference to some commonly accepted legal criteria, so that all may be judged on the same footing as regards access to the restrictive courses taught in both Schools, is sharply at odds with the concept of equality enshrined in the Constitution of the United States. For, it is in this area that affirmative action programmes lay down policies granting one race an advantage over another.

Consideration will first be given to the affirmative action policy utilised by the Law School. By way-of-a-snapshot in 2004 the Law School restricted the number of Bachelor of Law (LLB) Part I course students to 500. A quota for Maori of up to 58, and up to 24 for Pacific Island applicants was allowed for the Part I course. In the same year the number of enrolments to be accepted in Part II was limited to 270 with a Maori quota of 32 and a Pacific Islanders quota of 13. The quotas for both ethnic groups have remained unchanged since 1988 when the legal system course was removed from the LLB Law Examinations and consigned to the intermediate or entry level arts/science papers in the first year. From its inception, and up until 1991, the number determined for each quota group was calculated by the proportion the ethnic group bore to the general population taken northward of a line approximately east-west across the central North Island and then that proportion translated to the student population in the Law School.

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5 The United States Constitution, Amendments to the Constitution, 1868 Equality Amendment Article XIV.
7 Interview with Stephen Penk, Senior Tutor, Auckland University Law School.
Initially this proportionate method worked fairly in representing the quota numbers at the Law School in the same proportion they were represented in the general population. That is, that the Part I and Part II student body quotas roughly equated to the distribution of those discrete groups in the wider population north of the east-west border. But with the opening of the Waikato Law School on the 21st April 1991 the population proportion changed, with the result that the Pacific Islander’s quota should have approximately doubled in size and the Maori quota should, on the same proportionate calculation, have been halved, as the Pacific Islanders in the Auckland area significantly exceed in number that of Maori.\(^8\) The changes in population demographics have not been reflected in proportionate changes to the quota because of political considerations advanced by groups supporting the Maori sector. This is a point I will return to later.

The Medical School adopts a similar approach but amalgamates both Maori and Pacific Islanders under “Special Entry Quotas”, as MAPAS.\(^9\) The aggregated total for both groups is 30 students. The Medical School predicates its restriction in domestic student enrolments on limitations imposed by the government. The government restriction applies due to the exceptionally high cost of teaching medical students. The size of the special entry quota is directly related to the amount of money granted to the medical school for funding its teaching in any one year. Students seeking admission in the first year must pass a UMAT\(^10\) exam which is designed to test a broad range of skills other than those traditionally regarded as strictly academic.\(^11\)

In both the Law and Medical Schools those seeking entry under the quota are required to submit to a panel interview where their ethnicity and minimum academic standards are assessed. Whereas, the Medical School does not have a set minimum grade entry level in respect of the MAPAS, the Law School entry grade requirement for both quota groups is a C+. For the remainder of the student population in the Law School the highest grade determines entry.

The Law School, in setting limits on the student population, relies on s 224(5) of the Education Act 1989. This provision empowers the University Council to inquire and satisfy itself that there is insufficient accommodation, equipment or teaching staff to place restrictions on the number of students granted entry. The Medical School in its policy document setting out the entry criteria does not overtly rely on this provision but instead seeks to invoke government funding as the sole arbiter for entry. Notwithstanding the Medical School’s seeming reluctance to publicly express the correct statutory basis for its policy, it is nonetheless bound by the same

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\(^8\) The Auckland Area Census 2001 data records the proportions of Pacific peoples at 14.9% and Maori at 11.5% of the larger Auckland population. (https://www.stats.govt.nz).

\(^9\) Maori and Pacific Admission Scheme, Auckland University Medical School.

\(^10\) Undergraduate Medicine and Health Sciences Admission Test*, included are tests for non-verbal reasoning by distinguishing different spatial configurations and interaction skill test such as how to manage an 89 year old widow who has broken her hip.

\(^11\) Interview with Kate Snow, Student Services Manager, Auckland University Medical School.
provision as the Law School and would have to satisfy the same criteria. Both institutions are entitled, under s 224(6) to “give preference to eligible persons who are included in a class of persons that is under-represented among the students undertaking the course”.

The statutory regime for the practice of Affirmative Action in New Zealand.

What role does the Human Rights Act 1993 and the Bill of Rights Act 1990 have to play in sanctioning the practice of affirmative action? How does it stand alongside the anti-discrimination principle in s 19(1) of the Bill of Rights which holds that; “Everyone has a right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.” This provision lays down a principle that freedom from discrimination is of general application, provided it is discrimination as it is defined in terms of the Human Rights Act 1993, which includes, inter alia, under s21(f), “race”, as a prohibited ground of discrimination.

The first problem to be encountered in pursuit of a doctrinal basis for the practice of affirmative action is the not entirely happy state of the statutory provisions bearing on the issue. If s 19(2) is considered together with s 19(1) the point becomes apparent:

s 19(2) Measures taken in good faith for the purposes of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

The perplexing feature is that subs (1) prohibits, as unlawful, discrimination on the grounds of race while by way of contrast and apparent contradiction subs (2) allows discrimination on the basis of racial groups, provided it is for the purpose of advancement of a previously disadvantaged group that became disadvantaged by virtue of discrimination. In terms of logic such a proposition may appear on its face to be circular. Consider this: firstly, it is unlawful to discriminate against a people or a group; secondly, it is not unlawful to discriminate against a group provided the group was discriminated against in the past; but finally it is still unlawful to discriminate. Confronted with this apparent illogical sequence, the question becomes one of the proper constructions of s 19 as a whole.

Some helpful guidance can be obtained from the recent Supreme Court of Canada decision in Lovelace v Ontario. This was an unusual case involving a dispute between ethnic peoples in North America. The point in issue concerned one group of non-Indian ethnic people’s claim to be involved in the management and revenues from a Casino developed with assistance of the Ontario Government under the heading of “bands”, a term meaning a body of Indians identified under the Indian Act, 10, 1996. The bands were a group identified as “First Nations” and beneficiaries of the First Nation’s fund. The Court applied the Canadian Charter of Rights and Freedoms and considered s15 which is framed in terms not dissimilar to New

Zealand’s subs(s) 19(1) and 19(2)\textsuperscript{13} and appears to have application in like effect. Subsection(s) 15(1) and 15(2) of the Canadian Charter of Rights and Freedoms provides:

1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, ....

(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, ....

The Court stressed the point that subs (1) should not be read separate and apart from subs (2) but should be read together as supporting and guaranteeing the principle of equality enshrined in subs (1). The Court adopting with approval the dicta of the Court of Appeal in the same case said: “We view s 15(2) of the Charter as furthering the guarantee of equality in s 15(1), not as an exception to it. This view is grounded in our concept of equality and in the Supreme Court of Canada’s equality jurisprudence.”\textsuperscript{14} The Supreme Court took the view that, properly understood, s 15(2) required the Court to be satisfied that the group was disadvantaged and the purpose of the program was to ameliorate those conditions. It is only by this means that the enquiry could properly be directed towards establishing whether a claim of discrimination was made out. The goal, being equality, required the government to undertake positive programmes which would reduce the imbalance in the historically and socially disadvantaged groups. The court had long recognised s 15(1) included both prevention of discrimination and relief from disadvantage. The Court was at pains to point out that all Aboriginal peoples in North America had been victims of stereotyping and prejudice and had traditionally suffered high rates of poverty and unemployment, as well as a serious lack of facilities in health, education and housing.\textsuperscript{15}

If the Supreme Court’s interpretation of the Canadian Charter provisions is adopted and translated into s 19 it becomes tolerably clear how that section should be read, and understood. Essentially it is both a positive and a negative provision all-in-one. It is positive in the sense that it provides for a general guarantee of equality and sameness for all, being the reverse side of freedom from discrimination. It is negative in the sense that it departs from that general guarantee for the special reasons relating to past discrimination and linked to the list in the Human Rights Act. In this way it looks backwards into the past and justifies present day inequality and discriminatory practices on the basis of identifiable historic disadvantage. Thus it is capable of delving into the full spectrum of social ills afflicting the nation in its last 150 years.

\textsuperscript{13} New Zealand Bill of Rights Act 1990.
\textsuperscript{14} Ibid above n 12, 160.
\textsuperscript{15} Above n 12, 160.
Therefore the feature that serves to underpin the s 19(2) right to depart from the freedom from discrimination standard and render such departure only partially discriminatory is prior social and political disadvantage. A group, asserting the right to benefit from an affirmative action programme, must seek refuge in s 19(2), in order to render lawful its overtly discriminatory practice.

There is an unfortunate lack of judicial authority in New Zealand on the meaning and degree of historical disadvantage sufficient for inclusion in s 19. The only real assistance in the area of primary evidence is the New Zealand Department of Statistics. It is a statistical fact that both Maori and Pacific Islanders share a disproportionately high ranking in all those depressingly familiar negative population figures that feature in the country’s prisons and hospitals, and in poverty stricken and welfare dependant regions. There are also the chronic failure rates in New Zealand’s secondary schools. It was primarily for these reasons that the Labour government in the late 1990s embarked on a programme of “Bridging the Gaps” in an effort to claw back these poor performance statistics.

There is the added difficulty of attempting to reconcile the intent of s 19(2) with s 73 of the Human Rights Act 1993 which in its tone and apparent effect is significantly different to s 19. In its terms s 73 provides:

(1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of this Act shall not constitute a breach if—
(a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of this Act; and
(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

Section 73 appears prima facie to be a positive provision in the sense that the goal of the discriminatory practice is to advance the group towards equality and to lose its status as in need of assistance or advancement. It is as Mclean points out: “Equality of outcomes is the concern of … Sections 65 and 73.” If this initial interpretation is correct there is therefore no need to justify the affirmative action programme under s 73 on the basis of historic disadvantage. All that is required is an objective test of a supposed need to achieve equality, from known facts, to be determined on the ordinary civil standard of proof: a preponderance of the probabilities.

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16 A Prison population census on 20th November 1997 showed that of a total of 4,935 inmates 42% were Maori. From the 1996 Census of Population and Dwelling 31.5% of Maori workers reported very low incomes of less than $20,000 and over 40% of Maori had no school qualifications, <http://www.stats.govt.nz/domino> 23rd September 2004. See also “Pacific Progress: A Report on the Economic Status of Pacific Peoples” Statistics Department 2004, <http://www.stats.govt.nz/domino>, reports that the over-representation of Pacific peoples in the unemployed, lower-skilled workers and low income earners has been accentuated by the restructuring of the late 1980s and 1990s who were employed in industries worst affected, and thus bore a disproportionate burden.

There is lacking in New Zealand a developed body of case law to touch on the issue of affirmative action other than the case of the *Amaltal Fishing Company Ltd v Nelson Polytechnic*.\(^{18}\) This was a frustrating case which had the potential to delve deeper into the meaning and effect of s 73, and perhaps that section’s juxtaposition with its statutory counter-part in s 19, but failed to achieve those heights. In the *Amaltal* case the Nelson Polytechnic had as part of its 1994 course program a Fishing Cadet course. In terms of its agreement with the Education and Training Support Agency it set aside four of the 14 available places for the first six months course to Maori and all 14 to them in the second six months. The Race Relations Conciliator received a complaint from the plaintiff but refused to act on it on the grounds of lack of jurisdiction, in that the Polytechnic operated under the Education Act 1989 and was not covered by the Human Rights Act 1993. The matter eventually came before the Human Rights Tribunal which determined that it had jurisdiction to hear the case. The Polytechnic took no part, other than to file a fatuous written statement which did nothing to elucidate the purport of s 73. In the Tribunal’s decision, it expressed regret that the Polytechnic had offered no evidence to establish the third essential element of the defence: that the group may reasonably be supposed to need assistance or advancement. The Tribunal was not satisfied that on a balance of probabilities the defence had been made out.

What, on its true construction, is the purpose of s 73? The first and maybe most obvious feature of s 73 is that is applies only to Part 2 of the Human Rights Act 1993, which part seeks to define all the categories of possible discrimination by listing in s 21 prohibited grounds of discrimination. But all that is referred to is a list of individual characteristics or a particular status - race, sex, marital status, and so on. There is no reference at all to “persons or groups” as if they were an identifiable cultural, racial or ethnic group. In point of fact, groups of any sort are decidedly absent, as McLean cogently explains: “The provision is obscured by the fact that Part II does not prohibit discrimination against groups at all, it simply prohibits certain neutrally described characteristics ….\(^{19}\)

The overt purpose of s 73 is to promote equality as an outcome among peoples in a community by allowing affirmative action with a view to lifting a group from a low status up to a position of equality with other members of the community. The relevant grounds are largely economic, and I suggest can only be measured in terms of the following factors: income, housing, educational achievement, and employment. These grounds translate into the accepted indices of a population’s overall wellbeing such as literacy, numeracy, and low rates of criminal offending. But is s 73 infected with the same negative feature so apparent in s 19, so that it is always looking backwards over its metaphorical shoulder, analysing the past in an introspective search for a proper evidential basis so as to establish a defence to an otherwise unlawful practice?


\(^{19}\) Above n 17, 266.
The harm sought to be addressed and the concern implicit in s 73 is, broadly speaking, social injustice. To defeat this ill, s 73 attempts to create a situation that will bring forth positive outcomes by amelioration of the social stagnation that results in the poor performance statistics referred to above. But is this positive purpose somehow attenuated by the awkward coupling of s 21 and s 73? As McLean has commented the effect is to widen the scope of s 73 and require the party seeking the protection of the section to justify it on the basis of “New Zealand’s particular historical context.”

The proviso in subs (1)(b) requires an objective test in relation to persons or groups who “may reasonably be supposed to need assistance.” This does not justify discrimination solely on the basis of race, but only on the basis of persons or groups who may reasonably be supposed to need advancement. Therefore the justification under s 73 for affirmative action on the basis of race alone seems slight. For, if it had been intended that s 21 prohibited discrimination on grounds that included indigenous, ethnic, or racial groups such as Maori, Samoan, Tongan or Chinese as a people or group it would have been an easy enough matter for s 73 to be expressed in such terms. The fact that such discrete groupings are conspicuous by their absence is due, I suggest, to the fact that it is politically and morally unjustifiable to explicitly promote one group or class of people over another within the context of the legislative framework.

This flaw in s 73 places the provision under pressure and weakens its effect in the already strained connection between s 19 and s 73. The failure to include groups that could reasonably be presumed to be affected in these statutory provisions significantly erodes the underlying principles on which the practice of affirmative action is justified at law. It also has potential to become part of the political debate as to whether there exists a sufficient mandate for affirmative action. In their current form s 21 and s 73 of the Human Rights Act and s 19 of the Bill of Rights Act are lacking in certainty as to which sector of the community is to benefit from positive discrimination and what evidential requirements must be satisfied in order to justify a departure from the principle of freedom from discrimination.

A case that has cast some light on the meaning and application of s 73 is Coburn v Human Rights Commission. Although a case not directly on point with affirmative action, it none the less raises a problematic issue which will create some difficulty in the application of s 73, as a positive defence to an allegation of discrimination. In Coburn, Thorp J, when dealing with a superannuation scheme and attempts to bring it into conformity with the Human Rights Act, expressed the view that s 73 operated as an exemption from the provisions of the Human Rights

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22 Above n 17, 267.
21 Ibid n 17, 266.
20 Section 73(1) (b) Bill of Rights Act 1993.
Act so as to encourage positive discrimination, but could not be applied to justify or cure unlawful discrimination. There may well be a very fine line to be drawn between lawful and unlawful discrimination. The problem is essentially this: that if the correct evidential standard cannot be established by way of the grounds for the need for assistance or advancement then the defence will not be made out. This leads onto the next related point: that although s 73 appears on one view to be goal-orientated towards positive outcomes for groups, its rationale is not based on race at all as it has no application under s 21 to discrete racial groups, whoever they may be.

In the form in which it is currently drafted s73 is, in terms of the rhetoric of the political sector, a needs-based provision and cannot be relied upon to justify the practice of affirmative action across an entire ethnic group or race of people. Justification can only be achieved if it can be demonstrated that the people are reasonably supposed to be in need of achieving equality as a race. But this is but one factor in a wider more problematic picture. If there is not a present “need”, in a temporal sense, in the group or individual that can be proven to the correct standard in the sense that the “need” is current so that the defence will be available, then there is no justification for the practice of affirmative action. Therefore, it must fall on the negative side of the discrimination line and accordingly be unlawful. Also, it is only the “need” that will bring the group into equal place with other members of the community and not any other class of need. But, which members? How many? A simple majority or 75% perhaps? The use of such vague words as “persons” and “groups of persons” and the lack of any clear guidelines may have the effect of rendering the provision almost inoperative. But this much is clear: that if s 73 is not complied with discrimination which would otherwise be positive discrimination or in other words affirmative action will be in breach of the Human Rights Act s 19 and accordingly unlawful.

There is a further difficulty with s 73. This provision can not be read in the same way as s 19 under the dicta in Lovelace v Ontario. If the Court in Coburn is correct in determining that subs (b) operates as an exception, it is in direct conflict with the Supreme Court of Canada in Lovelace. In terms of civil rights jurisprudence, as it has developed in Canada, s 15(2) is not an exception to s 15(1) but is in the words of the Supreme Court a provision that: “enhances this concept of equality by recognizing that achieving equality may require positive action by government to improve conditions of historically and socially disadvantaged groups in Canadian Society.”

If the decision in Coburn, although in conflict with the Supreme Court of Canada, is correct it has the effect of lessening the overall impact and weight of affirmative action as a separate stand-alone doctrine. If affirmative action’s true status is only

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24 Above n 12.
25 Above n 23.
26 Above n 12.
27 Above n 12, 160 para 42.
that of an exception, and defence to a claim of unlawful discrimination, then it
cannot achieve the special status of a doctrine in its own right. As Thorp J stated
when speaking of s.73:\footnote{28}

In my view, the main purpose of S 73 is to allow, and indeed encourage, the formulation of
programmes to alleviate particular inequalities until these have been rectified by the
operation of the Acts’ general and broader policies.

His Honour clearly envisaged an implicit sunset provision in the application of subs
1(b). It would only justify a discriminatory practice otherwise unlawful to the
extent that the inequality was rectified, thus rendering the provision necessarily of
short term application and not firm doctrine under a Bill of Rights regime. It can
therefore be nothing more than a temporary measure if it is to be effective and
achieve its intended outcome. However, that should not be seen as a problem as it
would be a good thing in the development of a society for affirmative action to be
only a temporary measure.

At this juncture I will return, by way of a short summary, to s 19 of the Bill of
Rights Act. It is accepted that Bills of Rights universally “apply broad and general
phrases to denote fundamental moral and political principles ....”\footnote{29} and that an
interpretation of the provisions should be generous avoiding the usual strictures
that constrain other legislation.\footnote{30} The rather unsubtle corruption that permeates s 19
is that although its purpose is a laudable one of establishing a personal right to be
free from discrimination it is not carried through to execution because of the less
than clear connection with the promotion of discrimination in its positive form
under affirmative action in the Human Rights Act.

As I have already indicated, the unlawful discriminatory status identified by
individual characteristics in the Human Rights Act s 21 are not linked with, nor do
they directly refer back to the persons or groups in either s 19 Bill of Rights Act or s
73 Human Rights Act. The s 21 categories are purely denoting prohibition;
discrimination on account of age, sex, or race is unlawful. But there is nothing in the
Human Rights Act to make unlawful discrimination against groups per se, therefore,
it can be mooted such discrimination is not unlawful. But this only creates a
quandary: if the Bill of Right Act promotes freedom from discrimination, which in
turn is not discrimination if applied to groups, because discrimination against
groups is not unlawful then it must follow that there is no justification under New
Zealand law for affirmative action programmes, because these groups cannot be
discriminated against. But, I must doubt the conclusiveness of this attempt at a
logical progression as there still remains the positive right to separate treatment
under s 73.

\footnote{28} Above n 23.
\footnote{29} Rishworth Paul, Huscroft Grant, Optican Scott, Mahoney Richard,\textit{The New Zealand Bill of
Rights},(Oxford University Press, Melbourne, 2003) 43.
\footnote{30} Ibid 43.
In order to touch on all the relevant provisions in this area I must necessarily refer to s 65 Human Rights Act which attempts a-catch-all-mechanism by including within the general definition of discrimination in s 19 an indirect form of it. Its effect is to include as unlawful discrimination, otherwise disparate provisions or policies with discriminatory outcomes, which were not directly intended and for which no good reason exists. But the impact of s 65 may not necessarily be to make a practice discriminatory which would otherwise be lawful equal treatment, provided the disparate nature of the practice has a sufficiently good reason to support it. As McLean articulates:

In addition to allowing affirmative action programmes, the Act introduces a kind of disparate impact test in s 65. That section provides that apparent compliance with the Act which “has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination” is unlawful unless there is a “good reason” for it. The effect of apparently “equal treatment” may therefore be given the meaning “discrimination” under the Act…

I have thus far endeavoured to illustrate that s19 and s 73 are a strained paring. The problems of application and effect of these sections can only be compounded by overlaying them with the indirect species of discrimination found in s 65. This only serves to further muddy an already murky pool.

As this research paper concerns affirmative action in the context of the New Zealand tertiary education system perhaps the most directly relevant provision should be found in the Education Act 1989. The current practice of the University of Auckland, as I have already alluded to, is to shelter behind the bricks and mortar restrictions in s 224 in order to justify the limitation quota numbers set aside for Maori and Pacific Islanders. While the provisions in the Bill of Rights Act and the Human Rights Act attempt to embrace the broader principles of civil rights law, s 181 of the Education Act 1989 specifically empowers the University of Auckland Council to make discriminatory decisions. The maxim of statutory interpretation, *generalia specialibus non derogant*, would seem to have found fertile ground in the apparent contradictions between these three Acts. Section 181 has, to the extent that there are any discrepancies between the interpretation and effects of s 19, s 73 and s 65, dominance. Section 181 should be applied first where there is any conflict in the University of Auckland Council decision making process relating to affirmative action programmes. This view of the primacy of s 181 over the general provision in s 19 of the Bill of Rights Act is supported by the fact that both s 4 and s 5 of that Act relegate the Bill of Rights to a secondary status compared with any other statutes so that any right under the Bill of Rights would be limited by s.5 to the extent that a certain practice is prescribed by law.

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31 Above n 17, 388.
32 Ibid n 17, 267.
33 Bryan A. Garner (ed) Black’s Law Dictionary (eight ed) (Thomson West, St Paul, MN, United States of America, 2004) 705: “General things do not derogate from specific things”. This is the doctrine that holds that the general words in a later statute do not repeal an earlier statutory provision dealing with a special subject.
The impact of the Treaty of Waitangi on tertiary education

There are three main interrelated principles within s 181:\n
(a) Firstly, a positive duty on Councils of tertiary education providers to ensure that the members of communities who are under-represented among the student population are encouraged to participate to achieve their educational potential.

(b) Secondly, the Council must not discriminate unfairly in the process, and by corollary as long as the discrimination is fair (perhaps a contradiction in itself) it is not unlawful.

(c) And, finally, the Council has a duty to acknowledge the principles of the Treaty of Waitangi, but no duty is laid down in the section to apply such principles.

The standard in s 19 and s 73 is “good faith” for policies, practices or conduct that would otherwise be unlawful discrimination provided the remaining conditions of the provision can be met. Good faith is a standard apart from the concept of fairness. It is entirely possible for an individual to undertake some activity in good faith but at the same time be totally unfair by an objective measure.

Section 181(c) is the principal provision which bestows duties on the University Council in the management of the student body with particular regard to members of the community who were under-represented among them. This duty is to be undertaken with the aim of increasing the overall educational potential of the entire community. Although s 181 does not deal with equality per se, that by necessary implication must be the logical outcome of subs (c). For, within that provision there lies the underlying notion that the encouragement of the under-represented communities is being carried out for the sole purpose of them achieving academic

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34 s 181 Education Act 1989:
It is the duty of the Council of an institution, in performance of its functions and the exercise of its powers,-

(a) To strive to ensure that the institution attains the highest standards of excellence in education, training, and research:
(b) To acknowledge the principles of the Treaty of Waitangi:
(c) To encourage the greatest possible participation by the communities served by the institution so as to maximize the educational potential of all members of those communities with particular emphasis on those communities that are under-represented among the students of the institution:
(d) To ensure that the institution does not discriminate unfairly against any person:
(e) To ensure that the institution operates in a financially responsible manner that ensures the efficient use of resources and maintains the institution’s long-term viability:
(f) To ensure that proper standards of integrity, conduct and concern for-
(i) The public interest; and
(ii) The wellbeing of students attending the institution are maintained.
equality. The current evidence of the economic disparity across the full spectrum of socio-economic statistics would justify at law the practice of affirmative action in respect of Maori and Pacific Islanders, but not to the extent of the exact ratios that presently apply. Section 181 expressly authorises discrimination, so long as it is not unfair. This must be read together with subs (c) so that the emphasis on under-represented communities must not be unfair to all the communities served by the University.

The arrangement under s 181 allows for discrimination in respect of persons or groups of persons as these categories are understood in both s(s) 19 and 73. But the Council has the onerous duty of balancing the educational interests of the particular community to achieve its potential against the prohibition not to be unfair in that process to those communities. These are the interests of the entire population less the under-represented community within the university population catchment. The exercise of weighing these interests, at the same time endeavouring to be fair to both groups, is further complicated by the provision in subs (b) where the Council has a duty to acknowledge the principles of the treaty of Waitangi. As Hammond J in Assn of University Staff v Waikato University35 said when speaking of s 181:

More fundamentally again, the University is obliged to respect the principles of the Treaty of Waitangi. What those principles are have been enlarged on by the Waitangi Tribunal, the Royal Commission on Social Policy in 1988, and the Court of Appeal in the New Zealand Maori Council v Attorney –General [1987]1 NZLR 641.... Fundamentally, the Treaty requires a partnership; and it gives rise to a duty to act reasonably, and in good faith. Fundamental guarantees are given of the protection of Maori fishing grounds, forests, lands and culture.

The overwhelming difficulty cast upon the Council in this respect is that there is no clear defined expression of what those principles are in an everyday practical way. The issue of the principles of the Treaty has occupied the courts since this formulation of words was introduced into statute law from the mid 1980s and now can be found in fourteen different Acts of Parliament.37 The question of the meaning of this phrase came before the Court again recently in Carter Holt v Te Runanga o Tuwharetoa Ki Kawerau.38 In that case Heath J lamented the fact that:39

There is no comprehensive or authoritative list of the principles of the Treaty of Waitangi available for decision makers to consider. That point is also made in Laws NZ, Treaty of Waitangi, para 75. A list of (so called ) “central principles”, which have been extracted from decisions of the Waitangi Tribunal, are set out in the Laws NZ, Treaty of Waitangi, para 12.

36 Ibid 834.
37 Some of the more important examples of cases are: Tainui Maori Trust Board v Attorney-General [1989] 2 NZLR 513 and Te Runanga o Te Ika Whenuo Inc Soc v Attorney-General [1994] 2 NZLR 20.
38 [2003] 2 NZLR 349.
39 Ibid 359.
His Honour then proceeded to list the eight central principles.\textsuperscript{42} It should be noted, although to some a trite point, that the principles extracted from the decisions of the Waitangi Tribunal do not have the force of law, they have the status merely of recommendations to Parliament which it may choose to accept or reject.

Heath J made reference to the latest Law Commission Study Paper, “\textit{Maori Custom and Values in New Zealand}”\textsuperscript{41}, and the Privy Council decision in \textit{New Zealand Maori Council v Attorney-General},\textsuperscript{42} and the speech of Lord Woolf in that case when referring to the principles of the Treaty. In that case his Lordship said: \textsuperscript{43}

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\text{[T]he “principles” are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances which now applies, it is not surprising that the Acts do not refer to the terms of the Treaty.) With the passage of time, the “principles” which underlie the Treaty have become more important than its precise terms.}
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His Lordship went on to identify the Crown’s obligation to protect and preserve Maori property, which embraced the Maori language as part of Taonga. This was part of the quid pro quo of the Crown being recognised as the legitimate Government of the entire nation by Maori. His Lordship did however provide a caveat that this obligation in the English text of the Treaty was not, “absolute and unqualified” \textsuperscript{44}, which approach was consistent with, “the Crowns other responsibilities as the Government of New Zealand and the relationship between Maori and the Crown ….”\textsuperscript{45} The relationship the Treaty envisaged was “founded on reasonableness, mutual cooperation, and trust ….” \textsuperscript{46}

How then does this relate to s 181? I suggest that the provision in subs (b) of that section is otiose, because it adds nothing to what is already provided for by s 181. It is not aided by the absence of a clear, authoritative expression of principles to be applied; other than broad concepts of good faith, reasonableness, and fairness which are already at the most express words of s 181, or at the least, implied concepts. It is this subsection that the Council is duty bound to apply, setting the limits on

\begin{itemize}
\item[(a)] The Crown has an obligation to protect actively Maori interests.
\item[(b)] The Crown and Maori have mutual obligations to act reasonably and in good faith.
\item[(c)] The Treaty provides a basis for a changing relationship and should always be progressively adapted.
\item[(d)] There is a principle of mutual benefit that should be applied.
\item[(e)] The Treaty has the basic object of two peoples living together in one country, and this concept lays the foundation for the principle of partnership.
\item[(f)] The Crown has guaranteed rangatiratanga to all iwi, which includes an implicit guarantee that the Crown would not allow one iwi an unfair advantage over another.
\item[(g)] The Crown has an obligation to recognise rangatiratanga: Ibid 359.
\end{itemize}

\textsuperscript{41} NZLCSP 9, (March 2001).
\textsuperscript{42} [1994] 1 NZLR 513.
\textsuperscript{43} Ibid 517.
\textsuperscript{44} Above n 42 517.
\textsuperscript{45} Above n 42 517.
\textsuperscript{46} Ibid.
student admissions and the quota applied within those limits. It is in this way that the obligation falls on the Council not to be unfair in discriminating between one group and another. That is where, without the aid of a clear set of principles to work with, unfair or even idiosyncratic outcomes may occur.

It is against the background of this complex and often confusing statutory regime underpinning the practice of affirmative action at the University of Auckland that I now pose this question: does the Treaty of Waitangi guarantee to Maori a juristic right to quota for admission to University to the exclusion of other persons or groups otherwise entitled on merit to a place? The answer is an emphatic no, for the reasons I am about to give.

This question involves an understanding of the status of the Treaty of Waitangi in New Zealand’s legal system. It is recognised as the founding document. It almost goes without saying that the question of its status is perhaps the most closely-held and hotly-debated topic in New Zealand at present. To speculate briefly it may even have the potential, if not managed with sensitivity and care, to polarise the nation.

From the standpoint of legal analysis the question becomes somewhat mired by the myopic decision taken in 1840 to create two versions of the Treaty; one in English, and the other in Maori. What was missed in the translation was, essentially, the thing that was being granted, or in another sense being traded between the parties. What was it? In the preamble to the English version the tenor of the document becomes plain: “[to] appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty’s sovereign authority over the whole or any part of those islands ....”

But in the Maori translation that phrase had taken on a different meaning appearing as: “te Kawanatanga o te Kuini …,” or “for the government of the Queen …” Again, in the First Article, the Chiefs in the English version would “cede to her Majesty… absolutely and without reservation all the rights and powers of sovereignty ….” But in the Maori copy of the Treaty, that appears again as “te Kawanatanga …” or government. So the result was that the English text stood for sovereignty or power over the people in return for protection of the Sovereign; whereas the Maori text stood for government, a much lesser constitutional status than sovereignty. This I suggest is the reason why the Treaty is so often spoken of as a living document; simply because there is left open under its imprecise terms a political dimension. As Rishworth explains:

The precise effect of the Treaty is contested, and the issues are further complicated by the fact that the Treaty is in both Maori and English; that they are not exact translations of each other; and that the Maori version is the one actually signed by most Maori in 1840. This results in a rich ambiguity that is probably one of the Treaty’s virtues: it can be made to

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47 Treaty of Waitangi, English text, Preamble.
48 Ibid.
49 Translation of Maori Text by I. H. Kawharu.
50 Above n 47, First Article.
51 Treaty of Waitangi, Maori text, First Article.
52 Above n 29, 16.
It is small wonder, against this unclear and misunderstood document, that the Maori wars followed shortly thereafter. It also becomes apparent why, with such a significant human rights factor in the matrix of the Treaty, later governments would seek to include it as part of a comprehensive Bill of Rights. The fact that this did not happen, and that the Treaty remained as a document without force of law, is due to Maori opposition to the proposal in a white paper promulgated in the mid 1980s. It seemed that giving the treaty the status of a juristic right was not at all palatable to Maori. I suggest that the reason has more to do with Maori reluctance to have the Treaty as part of the general law, because the Treaty would then become a creature of Parliament and subject to its supremacy and leave out-in-the-cold for good any debate on Maori Sovereignty. There was the prospect too that the Treaty may become subject to restrictive judicial ruling if issues relation to it had to be tried in the Courts.

I have already touched on, in a slightly different context, the Governments action in the mid 1980s to include the Treaty clause in Acts of Parliament and expressed my view on the lack of clarity of the definition of the principles of the Treaty. I suggest that it is unsound practice for a Government and indeed irresponsible to set up a statutory provision based on supposed principles, without providing any indication what they might be and then ask private litigants and the tax-payer to expend vast sums of money in an endeavour to discover what they are.

However, matters have moved on since the mid 1980s with the enactment of the 2001 Amendment to the Human Rights Act; a new s 5(2) (d) introduced an expanded role for the Human Rights Commission. Subsection 5(2) (d) included, inter alia, the following:

[T]o promote by research, education, and discussion a better understanding of the human rights dimensions of the treaty of Waitangi and their relationship with domestic and international human rights law ....

As Rishworth has noted; “[T]his is the inaugural mention of the Treaty of Waitangi in the Human Rights Act and, as readers will know, the Treaty does not feature in the Bill of Rights.” It is postulated that by this new provision the Treaty now has its own discrete and discernable dimension within the Human Rights Act for treaty obligations. Thus it follows, Rishworth suggests:

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53 The New Zealand Maori Wars were fought between 1843-1872. The range varies a little depending on which historian is consulted <http://www.newzealandwars.co.nz>.
54 Above n 29, 16.
55 Above n 29, 16.
56 Section 5 (2) (d) Human Rights Act 1993.
58 Ibid.
59 Ibid.
But to say Treaty obligations are consistent with human rights is not quite the point. The assumption of the new section in the Act is that the Treaty has a human rights “dimension”. This presumably means that fulfilment of Treaty obligations in not just consistent with human rights, but that there is a right to have those obligations fulfilled.

This, though, is the recurring theme: what in the current unclear state of the meaning of principles of the Treaty is the obligation of the Council under the Treaty in respect of the restricted entry practices at the Schools of Law and Medicine? Is it an obligation on the University to allow entry to Maori in the restricted entry classes to the exclusion of other members or groups who are required to enter the Schools on a merit based criteria? Is the particular obligation at issue here to be found in the 1840 Treaty-inspired partnership principle, so often referred to in the cases on point, and in the media? For if the obligation to provide a place stems from partnership principles under the Treaty the right to a quota-secured place in the course can not be founded on such principles. The reason is clear enough: mutuality and equality are fundamental to the notion of partnership under the Treaty. That does not mean equality in terms of numbers, for that would be plainly illegal under s 181(d) Education Act 1989: as an equal partner to the Treaty, under a partnership model Maori would by necessary implication be entitled to 50% of all places in restrictive courses regardless of any other restrictive criteria (It is a moot point, however, that outside of the political context, partnerships are seldom 50-50). Such an outcome as this would result in the Council acting unfairly by discriminating against groups in the community who on a proportionate population ratio would represent a larger number than Maori. The wider community would be required to compete for the places based on the highest grades obtained to secure a place as well as their future. If a partnership is the correct model, and in order to bring that model into conformity with s 181(d) it would have to apply at the point of entry to the course. It would be equality under the criteria for entry based on the highest grade pass and not based on a quota. By this means the Treaty obligation would not conflict with s 181(d) as the partnership Treaty principle would not conflict with the duty of the Council to act fairly, notwithstanding the 2001 Amendment to the Human Rights Act.

I take the view, for the reasons discussed above that the Treaty alone does not support or authorise the practice of a quota secured entry for Maori. For to apply the Treaty obligation underpinned by the full weight of the principle of equality under a partnership paradigm would cause the Council to act unlawfully in failing to encourage the greatest possible participation of the community it serves and thereby cause the University of Auckland to discriminate unfairly.
Part II

Is Affirmative Action a beneficent concept?

I will now consider affirmative action from the wider perspective, as indicated under Part II of my introduction. Does the concept and practice produce a result that is good for the beneficiary group or community in receipt of it? I suggest that there is a strong feeling of outrage in minority groups who view help to them as an insult: that the benefactor, usually cast in the role as the white middle class male, has the temerity to proclaim that he has the bests interests of the group at heart and has the superior knowledge and is therefore better informed to make decisions as to what is good for the minority. One only needs to take a cursory look around and almost walk straight into such an emotional response, for this wounded sentiment is easy enough to find. Recently, Tariana Turia, the fledging Maori Party political co-leader, whose party aspires to take all the Maori seats at the next general election, when speaking at a public meeting at Whangarei’s Te Regana Paraoa Marae said:62

I’m sick and tired of hearing how mad, bad and sad we [Maori] are. We’re actually doing all right, thank you … We have huge potential, huge untapped potential. … We have everything to celebrate.

The report went on to state that she believed that it was time for Maori to start making decisions for themselves.

A similar sentiment is one of the themes to be found in Stephen L. Carter’s book Reflections of an Affirmative Action Baby.61 In his book,62 Carter describes an incident at the time of his application to law schools in the USA. He had applied to several. He had been accepted for entry to Yale when a belated response came to him from Harvard rejecting his application. Shortly thereafter he received calls from two officials of Harvard Law School who apologised profusely for the error. When pressed by Carter as to what the error was one of their officials responded in a more honest than politically correct manner when he revealed the error was that they had believed they were dealing with a white person on the application and had only subsequently discovered he was black. The official felt that this should have been taken into account as “additional information” and his application granted on the basis of his race as black-skinned. The inference to be drawn was that the application to Harvard had been so well drawn that it could only have been the work of a white not a black. Naturally enough, this implicit insult somewhat benignly conveyed by the official has stayed with Carter ever since. The application, being too good for a black applicant, could not support the supposed white applicant because of restrictions on places and the Law School Affirmative Action programme. The point being made is that the University official naturally assumed a lesser standard for

60 NZPA reported in the New Zealand Herald 1 October 2004 at page A7.
62 Ibid 15-16.
blacks and did not see Carter’s application for what it was, due no doubt to a very deep, almost subconscious, prejudicial attitude in that regard.

The feeling on the part of minority racial groups of deeply held indignation is no new thing. Much earlier than Carter’s reflections, in fact almost 140 years before, the same sentiment was forcefully expressed by Frederick Douglass in a speech to slavery abolitionists, which was quoted with approval in the opinions of Justice Thomas and Justice Scalia in the United States Supreme Court decision in *Grutter v Bollinger*, the most important decision on affirmative action in the USA in over twenty years. Douglass, to that gathering, said:

"[I]n regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply justice. The American people have always been anxious to know what they shall do with us... I have had but one answer from the beginning. Do nothing with us! Your doing has already played the mischief with us Do nothing with us! If the apples will not remain on the tree of their own strength, if the apples are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! ...And if the negro cannot stand on his own legs, let him fall also All I ask is, give him a chance to stand on his own legs! Let him alone...[Y]our interference is doing him positive injury."

The same strength of feeling was expressed in the dissenting opinion of Justice Thomas in *Grutter*, himself the only black American on the US Supreme Court Bench, where he said:

"Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators. Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School (Law School). The Constitution does not, however, tolerate institutional devotion to the status quo in admission polices when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of “strict scrutiny.”"

So there is a live issue of what affirmative action brings to the recipient in terms of self worth and personal dignity. Is the bestowing of a benefit, like the guarantee of a place in a professional School such as Law or Medicine, ahead of others not within that racial or ethnic group, and whose places are determined on merit not race, in fact a benefit to Maori or Pacific Island people in the long term? Does it leave that racial or ethnic group with the feeling of having been cheated? Of having lost an important opportunity to show without favour an ability as person of equal standing or better with those not in that discrete racial group? In my view the risk is palpable. There is a high probability that from the perspective of personal dignity or self worth the outcome of an affirmative action programme would be negative. It is

65 Above reproduced n 64, 346.
66 Ibid n 64, 346.
reasonable to assume therefore that under this head, affirmative action is not beneficent. It is simply a detriment.

The next aspect to be considered under this broader view of affirmative action is the concept of diversity. The word is almost a term of art in United States Constitutional Law. It is in a way the quota when you’re not having a quota. By this I mean that the use of explicit quota under the US Constitution has been outlawed since 1978. The practice of quota on the other hand, by allowing a limited number of a racial or ethnic group into an institution, but by not assigning a number to it, is merely creates diversity in another guise and is Constitutional. The concept of diversity embodies some of the positive and negative elements that are present in the New Zealand practice of affirmative action. It arose out of the 1978 Supreme Court case of Regents of the University of California v Bakke.

Justice Powell’s opinion was for 25 years the touchstone of the constitutional analysis of race conscious admission policies. In essence Justice Powell’s decision held that government decisions that touched on a person’s race or ethnic identity could only be justified on one limited ground: the decision had to serve a compelling interest. Historic disadvantage was rejected as an unlawful factor in balancing the interests of different races: the link to the past being too tenuous and uncertain. Justice Powell held that the most important objective was the attainment of a diverse student body and he regarded race as a “plus factor”. However, a condition was imposed that the constitutional protections accorded to individuals through their individual rights were not to be disregarded in the institution seeking diversity. The object was to achieve a heterogeneous student body. This concept of diversity was affirmed by the majority of the Supreme Court in the 5/4 decision in Grutter and at the same time sending Justice Thomas, one of the dissenting minority in that case, into a state of near apoplexy.

What the majority of the Court settled on, drawing from the precedent of Justice Powell in Bakke, as being within constitutional limits, was the creation of a diverse institution where race was taken into account as a plus factor. What was regarded as strictly unconstitutional and exemplified by the subsequent companion case to Grutter, that of Gratz v Bollinger, was any form of numerical analysis or determination based on race. But diversity, which to the cynic maybe no more than an aesthetic good look, was correct. Justice O’Connor, who delivered the opinion of the majority in Grutter, adopted with approval the dicta in the District Court:

> As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enrol a ‘critical mass’ of minority students.”...The Law School’s interest is not simply “to assure within its student body some

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68 Ibid.
69 Above n 67, 311.
70 Ibid.
71 539 US, 156 L ed 2d 257, 223 S Ct.
72 Above n 64, 333.
specified percentage of the particular group merely because of its race or ethnic origin."...That would be outright racial balancing, which is patently unconstitutional. ... Rather the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding", helps break down racial stereotypes, and "enables [students] to better understand persons of different races".... These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

The Supreme Court observed that:73

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas, and views points.

The minority in stark contrast, exemplified by Justice Thomas, virtually condemned as racial discrimination the majority's decision:74

The proffered interest that the majority vindicates today, then, is not simply "diversity". Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution.

And further:75

Justice Powell's opinion in Bakke and the Court's decision today rests on the fundamentally flawed proposition that racial discrimination can be contextualised so that a goal, such as classroom aesthetics, can be compelling in one context but not in another.

The minority considered that the Law School should make a choice between entry either based on totally aesthetic criteria, and one based on its elitist exclusionary admission system. So in Justice Thomas's view, "race as a plus factor" quickly degenerates into a shallow and undignified "good look" so as to achieve a racially balanced and pleasing to the eye arrangement of students in a classroom. Is this the keystone of diversity? Is it just a colourful play thing for university administrators to meddle with? Is a diverse polymorphous group reducible to a mere aesthetic balance in order to produce harmony, but not produce a positive educational outcome: the aim of diversity? Before attempting an answer to these questions it maybe helpful to reflect on Justice Thomas's view in the case where his Honour said:76

[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test (LSAT). Nevertheless, law schools continue to

73 Ibid n 64, 333.
74 Ibid n 64, 350.
75 Ibid. n 64, 350.
76 Above in n 64, 358.
use the test and then attempt to “correct” for black underperformance by using racial discrimination in admissions so as to obtain their aesthetic student body. The Law School’s continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court ….

If one accepts this hard headed, dare say, angry view, of the only black United States Supreme Court Justice, diversity, as a principle to underpin affirmative action is, without even addressing whether it is constitutional or not, morally indefensible.

Now, to put these ideas from Grutter in context: can the practice at the Schools of Law and Medicine be justified on the principle of diversity using race as a plus factor? If the only rational is the Justice Powell aesthetic, then the answer must be a compelling “no” for such a motivation as aesthetic composition for composition sake would breach the anti-discrimination principle in the Bill of Rights Act. Aesthetics cannot be a proper basis for affirmative action. If the alternative justification for diversity is driven by the need for skills “in today’s increasingly global market place [which] can only be developed through exposure to widely diverse people, culture, ideas and viewpoints” it is arguably within the justifications for discriminatory practices in s 73, which has as its goal advancement and equality, and also the promotion of the under-represented in s 181 and s 224(6) of the Education Act 1989. But all this may not be asking the right question. Perhaps the more accurate enquiry is to ask whether there is any educational benefit for the University and the students who are part of the quota group, so as to reflect on whether there is a good in all of this. The process of education surely can only have value for the student if the student benefits by an increase in skill, ability and the total sum of his or her knowledge. An overall increase in scholarship, research and learning is surely the goal of the university. But if affirmative action, under the guise of diversity, or not, is merely a policy of social readjustment that benefits neither the student nor the university, then it is unjustifiable. The process must therefore produce a positive outcome for both student and institution. In short, students who enter the quota affirmative action programme must pass with good grades and the university position as a centre for excellence in scholarship and research must be enhanced. If affirmative action is not directed towards and also produces these outcomes it cannot be justified on a moral basis as it does not produce a positive outcome: a good.

Conclusion

I have endeavoured to approach the issue of human rights in tertiary education in New Zealand on two broad fronts under the general heading of affirmative action. My first enquiry was to look at the subject from a strictly legal perspective and to pose questions through the lens of affirmative action in terms of the interconnecting statutory provisions and the Treaty, which all have a bearing on this practice. The second was more in the realm of the normative: an attempt to reach a deeper level of

77 Ibid n 64, 334.
appreciation and understanding and to pose fundamental questions about the good it may serve from both a societal and a personal perspective. I make no claim to a definitive answer to either enquiry. I am perhaps the first to acknowledge that this area of the law is not capable of strict quadratic analysis. This topic lends itself more towards a search for broad concepts and of balancing competing rights, than it does to clearly defined results.

Notwithstanding these reservations there are tentative conclusions that I am entitled to draw about affirmative action, its practice and its theoretical basis. To stand back and look for a moment at the overlapping, complex and confusing tangle that are the various relevant provisions and rights in the Bill of Rights Act, the Human Rights Act, the Education Act, and the Treaty, you may begin to appreciate that the present state of racial disharmony in New Zealand has more to do with the unfortunate state of these four major pillars of the affirmative action framework, than with much else.

I have suggested that s 19 of the Bill of Right Act lacks words of sufficient clarity and definition to adequately grapple with the advancement of one racial group over another, which in my view is the object of the section. This apparent failure comes about because of the discriminatory factor: race, in the connecting statute, the Human Rights Act which does not identify groups as such. The reason for the suggested short-coming is the sensitivity of the legislature to the identification of the target group. A quick check of the relevant statistics would leave little doubt as to which group in society was in need of advancement.

The student pass rates at the Law School give an insight into the efficacy of the affirmative action programme which has now been in place for over a decade. The figures show that in the second year of the degree course between 2000-2003, which is the year after the legal system, arts and science papers have been completed, the percentage pass rate for Maori was 66%, and for Pacific Island students 69%. The figures pick up in the third year to 89.1% and 86% respectively. This significant increase in the pass rate in the third year may be largely due to the fact that it is only those in the third year who comprised the competent students in the second year and had managed to pass and survive the course. The important point to take from these figures is that roundly one third of the Maori and Pacific Island students who are part of the quota affirmative action programme or not fail in the second year. Is affirmative action in the New Zealand tertiary system knocking on the wrong door? Is the programme in reality only one that sets out to take people who are educationally ill-prepared to cope, as a failure rate of one in three in the second year?

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78 Under fundamental algebraic theory the quadratic equation guarantees two solutions, see <http://mathworld.wolfram.com>.

79 Above n 16.

80 University of Auckland, Table F SPR by Teaching Faculty, Department, Course level and Ethnicity, Faculty of Law, Students Pass Rate 2003. At the time of research into the issue of failure rates at the Law School it was not possible to obtain statistics on failure rates of Maori or Pacific Islanders at the Medical School.
would tend to indicate? With laudable motives does the programme place a quota student in the Law School only to set that student up to fail? Although it is beyond the scope of this research paper the development work to prepare a student to cope surely needs to be undertaken at a far more basic level in the education system and not at the Himalayan heights of professional medical or legal study.

The circular nature of the coupling between subs(s) 19 (1) and (2) of the Bill of Rights Act 1990 makes the interpretation of s 19 a challenge. The time directional shifts between s 19 and s 73 I have highlighted. With one, s 19 looking forever into the past, while the other, s 73 always takes the more positive perspective towards the future, to find, in time equality for all society’s group: ethnic, racial, or otherwise. I have raised the possibility that the scope of s 73 may also include a historical perspective. But on balance its primary objective is the pursuit of equality with present day disadvantage the appropriate standard. There is the possibility of a lacuna in s 19 as it does not in its present form provide justification for unlawful discrimination against groups.\(^{81}\)

From these general provisions I have moved onto the particular sections in the Education Act. There is the rather unnecessary use by the University of Auckland of the brick and mortar provision in s 224(5) when the more appropriate sections of the Act are s 181 and s 224(6). The issue of whether the Treaty provides a right to Maori for quota entry has been considered. It does not. To do so, would probably breach s181.\(^{82}\)

A crucial is sue for the Council is that there is no rational or principled basis on which a decision as to the division of quota between Maori and Pacific peoples is taken. The numbers assigned to these discrete groups do not reflect the proportionate distribution throughout the population in the greater Auckland area. It does not appear that the Council is on a firm legal footing in complying with s 181 on the representative numbers that make up the present quota groups at both the Law and the Medical Schools. The duty of the Council under s 181 includes a positive duty to maximise the educational potential of those underrepresented among the students at the institution, as well as being fair to all students. It will often be a fine line between unfairness and maximisation of potential. The task will and ought to be a difficult one for the Council in striking the right balance. That the Council may be failing in its duty is not entirely clear, especially in the case of the Medical School. That institution does not distinguish between the racial groups under the 30 MAPAS students it admits. The fact that it does not may indicate a failure to carry out the duty to maximise potential if the distribution of racial types in the group of 30 does not fairly reflect its proportion of the general population in the greater Auckland area. This degree of uncertainty is due to the fact that the numbers in the division between the two ethnic groups is not presently known. But by contrast the position at the Law School is clearer. It is arguably unfair to award

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\(^{81}\) See discussion of this analysis on pages 15 & 16.  
\(^{82}\) See discussion of this topic on pages 20 to 23.
Maori a greater number in the quantum of the quota places than the Pacific Island peoples. Such a practice is unconscionable. There are far more Pacific peoples in Auckland than Maori. It is conceivable that on this ground a Pacific Island student excluded under the bricks and mortar restriction could demand and be granted one of the quota places set aside for Maori.

I am of the view that the Council would be duty bound to consider the risk of it breaching its duty under s 181 if it did not give due weight to maximising the potential of this group against maximising the potential of Maori. I alluded earlier in this paper to the decision taken in the early 1990s not to amend the ratios between Maori and Pacific Islanders in the quota. That decision I suggest was due to considerations relating to the Treaty. The popular view was that Maori had a right to educational places that were indirectly discriminatory to Pacific Islanders and that right stemmed from the Treaty. However the Treaty does not possess the force of statute law, its status as statute law was stopped squarely in its tracks by Maori themselves. This is so notwithstanding the Treaty dimension included in the Human Rights Act. The Treaty is a political document in today’s world, not a legal one. If it embodies principles, the most compelling are surely partnership principles and if an equal partner in the nation it would be capable of producing patently unfair outcomes. The division of all resources by 50% across the board is neither politically feasible nor morally right.

The normative moral aspects of this research paper raise issues that are deep within the character and personal make up of all people. Without reservation my preference is for the clear, concise, accurate and forceful statements of Justice Thomas in Grutter. The Carter view of the subliminal but implicit ‘put down’ in white America’s attitude when dealing with black intellectuals or professionals has its source in affirmative action. There are many factors at play with the concept of affirmative action and its use that bears directly on personal makeup and much of it is not positive as I have pointed out.

Perhaps the most important feature to emerge from this paper is the fact that affirmative action harbours the seeds of its own demise: if it works and is justified on the basis that it produces equality, there is no longer a need for it, if it does not develop equality for disadvantaged groups, it fails, and a different form of advancement will have to take its place. I conclude this paper with the observations of Justice Thomas in Grutter on affirmative action in education which encapsulates an appropriate sentiment on which to finish:\footnote{Above n 64, 360.}

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.