

# **Discrimination in the Workplace**

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## **Authenticity and the Genuine Occupational Qualification Exception**

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours)  
University of Otago  
2014

## **Acknowledgments**

To my supervisor Associate Professor Selene Mize: thank you for your calming influence,  
patience, ideas and guidance throughout the year;

To my family for their ongoing love and support in every new venture I undertake;

And to my friends, who have looked out for me and made this year so special.

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## Introduction

Are women more effective waitresses and men better at selling electronics? Does age affect a pilot's ability to fly? When is it acceptable to restrict the performance of certain jobs to members of a specific group?

Discrimination in employment is addressed under two statutes in New Zealand, the Human Rights Act 1993 (HRA) and the Employment Relations Act 2000. The focus of this dissertation is on the HRA and policies in employment that discriminate on the grounds of sex and age. The aim is to explore the contours and boundaries of the Genuine Occupational Qualification (GOQ) exception to discrimination in employment, and how the Human Rights Review Tribunal (HRRT) should interpret it.

New Zealand is perceived as a progressive, liberal and multi-cultural nation; a paragon of non-discrimination. New Zealand is often at the forefront of change and development, leading the world in allowing women to vote in 1893, legalising abortion in 1977 and enabling same-sex marriage in 2013. However, inequality in employment is still a serious concern for many minorities.<sup>1</sup> Underlying prejudices can be entrenched by time and accepted practice, especially in the context of employment.

“Equality is achieved by changing assumptions and structures that lead to discrimination.”<sup>2</sup> This is fundamentally difficult because traditionally equality is measured by comparing what women have against a male standard. This is what society calls sex equality.<sup>3</sup> There is a tension between the concept of equality which “presupposes sameness” and the concept of sex which “presupposes difference. Sex equality thus becomes a contradiction in terms.”<sup>4</sup> Age also poses a challenge to the concept of equality, because it is a changing state, which affects every person – therefore it is difficult to establish a comparator group to say when age equality is achieved.

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<sup>1</sup> *New Zealand National Universal Periodic Review Report* No. 2 (2014) at 10.

<sup>2</sup> Tamar Witelson “From Here to Equality: *Meiorin*, *TD Bank*, and the Problems with Human Rights Law” (1999) 25 *Queen’s LJ* 347 at 378.

<sup>3</sup> Catharine MacKinnon *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, 1987) at 33. Consider the example of anatomy models in medical school: the male body is the human body. The female body is only studied in gynaecology or obstetrics.

<sup>4</sup> At 33.

Classifications are necessary for the legislation to work, but categorising people conflicts with a fundamental aspect of human rights law, that each individual ought to be assessed on their own merits. Clearly this creates difficulties for the law, especially in the certainty of interpreting exceptions to discrimination. Sometimes it is necessary to impose probability judgments for efficiency. For example, the relationship between age and capacity: statistically, an elderly driver is prone to more accidents than a middle aged driver but this is not universal. So when is it okay to lump all 88 year olds into the same category? Does risk incorporate statistical probability or other demonstrated factors such as cultural expectations, standards and stereotypes?

Providing total equality is a challenge because discrimination is ingrained in our culture; this needs to be appreciated in order to craft an effective solution. Stereotyping and biased perceptions start early. Parents spend more time talking to and comforting their daughters, while allowing boys to play alone.<sup>5</sup> Parents also underestimate their daughter's ability to crawl, and overestimate their son's ability.<sup>6</sup> Cultural stereotyping continues throughout childhood and into the workforce, to the detriment of women who "pay the price in lost job opportunities... Once again, '(t)he pedestal upon which women have been placed has..., upon closer inspection, been revealed as a cage.'" <sup>7</sup> This paper examines the HRA and the extent to which these ingrained stereotypes are tolerated in the employment context.

Section 21 of the HRA contains a list of prohibited grounds of discrimination. These are: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation. Discrimination on a prohibited ground is only unlawful if it occurs in a specified area, such as employment or the provision of goods and services. For example, it is unlawful for an employer to discriminate by reason of any of the prohibited grounds when hiring, firing or offering terms of employment.<sup>8</sup> Discrimination can be direct or indirect. Indirect discrimination prohibits behaviour which on its face may be neutral, but "nonetheless has a discriminatory effect on people or groups because of a prohibited ground."<sup>9</sup> The focus is on the *effect* of the conduct and "whether that effect results

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<sup>5</sup> Melissa W. Clearfield and Naree M. Nelson "Sex Differences in Mother's Speech and Play Behaviour with 6, 9, and 14-Month-Old Infants," (2006) 54(1-2) *Sex Roles* 127-137.

<sup>6</sup> Emily R. Mondschein, Karen E. Adolph, and Catherine S. Tamis-Le Monda, "Gender Bias in Mothers' Expectations About Infant Crawling" (2000) 77(4) *Journal of Experimental Child Psychology* 304-16.

<sup>7</sup> *Dothard v Rawlinson* 433 US 321, 97 SC 2720 [1977] at 345.

<sup>8</sup> HRA 1993, s 22.

<sup>9</sup> *Claymore Management Ltd v Anderson* 2 NZLR 537 [2003] at [97].

in a person or group being treated differently.”<sup>10</sup> For example imposing minimum height restrictions tends to rule out more women or Asians, thus subjecting them to detriment.<sup>11</sup>

The onus of proving an exception to discrimination is on the employer.<sup>12</sup> Indirect discrimination can be defended by the employer demonstrating that “good reason”<sup>13</sup> for the practice or requirement exists, thus there is no need to rely on a GOQ. For direct discrimination, there are numerous exceptions, both general and specific. Specific exceptions indicate that other societal values or interests may sometimes prevail. For example, s 28 allows for discrimination on the ground of sex in order to comply with religious doctrines or customs, such as male-only Catholic priests. General exceptions are more flexible in scope, but are exercised at the discretion of the court or tribunal.

There are two reasons for allowing exceptions to anti-discrimination legislation: first, the person is incapable of performing the job and is therefore unqualified; second, the person can do the job, but there is something inherently bad about the way they do it. For example an epileptic bus driver may be a capable driver, but may blackout, making him unfit for the job. This second category is where the law is not completely clear; the issue is when will it be appropriate to allow employers to discriminate on a prohibited ground and what is a legitimate reason for doing so? Section 22 requires that a person be “qualified for work”. While being *unqualified* is not an exception, it implicitly could cover the same content that is usually considered in the second category. An employer could refuse to hire a male wet-nurse because they are unqualified, or because being a female is a GOQ for the job, for reasons of authenticity. This complicates the exception’s interpretation.

A GOQ has yet to be invoked by an employer as a defence (in a published decision) and thus there is no guidance as to when a particular rule or requirement discriminating on the grounds of sex or age is a GOQ. The purpose of this dissertation is to demonstrate for employers when and how a GOQ can be invoked and to expose issues surrounding the exception’s interpretation. It

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<sup>10</sup> At [97].

<sup>11</sup> *The Human Rights Act 1993 Guidelines for Government Policy Advisors: Indirect Discrimination* (prepared for the Ministry of Justice 2000).

<sup>12</sup> HRA 1993, s 92F(2); *Claymore Management Ltd v Anderson*, above n 9, at [100].

<sup>13</sup> HRA 1993, s 65: Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of Part Two has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

is recommended that legislative amendment clarify the standard that must be met. Guidelines outlining an interpretative approach to a GOQ will also be recommended. The HRC's role in educating the public about discriminatory practices is very important, in order to uproot deep seated prejudices against minorities. The desired effect of the proposed changes is to delineate as much as possible the scope of the exception in order to uphold the certainty of the law while achieving flexible and fair results.

This paper will consider two hypothetical examples throughout the analysis where Jack and Lucy apply for two jobs: as wait-staff at Juggs, a restaurant closely resembling Hooters;<sup>14</sup> and as a sales assistant at Carlson, a womens' clothing boutique. Lucy is offered both jobs, despite Jack having greater experience in hospitality and retail. Assuming that Jack was discriminated against on the grounds of his gender, can Juggs and Carlson rely on an exception that being a female is a GOQ for the job?

Human rights legislation is widely acknowledged as fundamental law<sup>15</sup> and thus should be given a "fair, large and liberal interpretation"<sup>16</sup> in order to achieve policy objectives. While Dworkin would term the rights set down in the HRA as strong rights,<sup>17</sup> the HRA does not have any special legislative status and will not automatically trump other legislation. Exceptions such as a GOQ will only be recognised in limited circumstances. It would be anomalous with the "special status"<sup>18</sup> of human rights legislation to interpret the exception in a liberal manner that "would, in effect, permit the exception to swallow the rule."<sup>19</sup>

New Zealand's international obligations also confine the interpretation of these exceptions.<sup>20</sup> The common law presumption of consistency requires that we read legislation narrowly as we presume Parliament did not intend to abridge fundamental human rights. The stance taken overseas appears to reflect the idea that under no circumstances should a defence be an excuse to perpetuate, in particular, sexist and potentially demeaning stereotyped characterisations.

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<sup>14</sup> Juggs is a real restaurant that opened in Hamilton in July, 2013. Its business model is very closely related to the Hooters franchise in America, with a branding focus on attractive young women in skimpy clothing.

<sup>15</sup> *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at [30].

<sup>16</sup> *Coburn & Others v Human Rights Commission* [1994] 3 NZLR 323 at 333.

<sup>17</sup> Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1978) at 198.

<sup>18</sup> *Director of Human Rights Proceedings v New Zealand Thoroughbred Racing Inc* [2002] 3 NZLR 333, (2002) 6 HRNZ 713 (CA) at [22].

<sup>19</sup> *Diaz v Pan American World Airways Inc* 442 F 2d 385 (5<sup>th</sup> Cir 1971) at 387.

<sup>20</sup> New Zealand's ratification of the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Discrimination against Women* and *International Labour Organisation Conventions 100 and 111* all require legislative and administrative steps to be taken to ensure equal treatment and the modification of social and cultural patterns of discriminatory conduct.

## I. Chapter One

This chapter considers the GOQ exception, other related provisions of the HRA and the relevant case law.

### A. Examining s 27(1) and s 97

Section 27(1) provides that an employer can discriminate on the prohibited grounds of sex and age,<sup>21</sup> if “for reasons of authenticity, being of a particular sex or age is a genuine occupational qualification”<sup>22</sup> for the job.

Section 97 also limits the scope of the protection provided by s 22 (discrimination in employment). Section 97 is a general exception that gives the HRRT the power to declare that a practice or requirement which would otherwise be unlawful under s 22 is not unlawful because it constitutes a GOQ or a genuine justification.<sup>23</sup> This provision has broader application than s 27 as it is not limited to any particular prohibited grounds of discrimination. It is a catchall provision, allowing the HRRT to exercise discretion to provide a “general defence”<sup>24</sup> for any reason; a safety net for Parliament which drafted the provision not knowing what circumstances would arise.

So while both s 27(1) and s 97 allow for a GOQ exception, s 97 encompasses the potential for a GOQ to be declared on grounds other than sex and age. Therefore the interpretation of each provision may differ as the ambit of s 97 is significantly wider. Given its broad nature, the HRRT’s power should only be used in “exceptional cases”<sup>25</sup> indicating that a successful application under s 97 will be rare and may be subject to a higher standard of proof than s 27(1).

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<sup>21</sup> HRA 1993, s 21(1)(a) and (i).

<sup>22</sup> Section 27(1).

<sup>23</sup> A genuine justification exists in the context of s 44 of the Act which relates to the provision of goods and services.

<sup>24</sup> Janet McLean “Equality and Anti-Discrimination Law” in Grant Huscroft and Paul Rishworth *Rights and Freedoms: the NZBORA 1990* (Brooker’s, Wellington, 1995) at 272.

<sup>25</sup> *Avis Rent A Car Ltd v The Proceedings Commissioner* (1998) 5 HRNZ 501, at 5.

### 1. *Comparing a GOQ and a genuine justification*

In the Canadian Supreme Court case of *Zurich Insurance Company v Ontario*<sup>26</sup> L’Heureux-Dubé J stated that the two phrases, bona fide occupational requirement<sup>27</sup> and bona fide justification<sup>28</sup> convey the same meaning, despite the former being applicable to employment situations, and the latter being used in other contexts. L’Heureux-Dubé J regarded the choice of wording as a matter of “style rather than of substance”.<sup>29</sup> In New Zealand there is a clear legal distinction because a GOQ “defence excuses what the law would otherwise categorise as discrimination, whereas a [genuine] justification suggests that, so far as the law is concerned, there has been no discrimination at all.”<sup>30</sup> However this distinction tells us little about the linguistic interpretation of the exception.

### B. *Domestic employment*

Section 27(2) allows for discrimination “based on sex, religious or ethical belief, disability, age, political opinion, or sexual orientation where the position is one of domestic employment in a private household.”<sup>31</sup> This omits the grounds of marital status, colour, race, ethnic or national origin, employment status and family status.<sup>32</sup> If the exception, for policy reasons, is based on a distinction between public and private zones, allowing for autonomy in private households, then it is unclear why discrimination is not exempt on every prohibited ground within the domestic sphere.

Allowing discrimination based on sex or age in the private sphere has the same *effect* as allowing a GOQ exception on the same grounds in the public sphere, as it perpetuates deeply held and intrinsic values, preventing society from shifting towards an accepting and diverse mind-set. It is

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<sup>26</sup> *Zurich Insurance Company v Ontario Human Rights Commission* [1992] 2 SCR 321 at [80] with support from the Court of Appeal in *Rosin v Canada (Canadian Forces)* [1991] 1 FC 391 at 408.

<sup>27</sup> Canadian Human Rights Act 1985, s 15(a). The term “bona fide” is used as an alternative to the HRA’s “genuine”.

<sup>28</sup> Section 15(g).

<sup>29</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26 at [80].

<sup>30</sup> Nicholas Banforth “Setting the Limits of Anti-Discrimination Law: Some Legal and Social Concepts” in Janet Dine and Bob Watt *Discrimination Law: Concepts, Limitations, & Justifications* (Addison Wesley Longman Ltd, Essex, 1996) at 50 (Chapter Five), referencing the position taken by Evelyn Ellis at Chapter Two.

<sup>31</sup> HRA 1993, s 27(2).

<sup>32</sup> Comparing s 27(2) with the prohibited grounds of discrimination in s 21.

the “*effect* on its victims with which [antidiscrimination] law is truly concerned”.<sup>33</sup> However there are many laws, particularly criminal, which permit certain conduct in the private sphere.<sup>34</sup>

Because the focus of this paper is on non-domestic employment, s 27(2) is not relevant here.

### *C. Age Discrimination, s 30*

Despite inclusion in s 27(1), age also has a GOQ exception in s 30 which has much broader application, “for reasons of safety or for any other reason”. Overseas jurisdictions have held that sex can also establish an exception for reasons of safety to third parties.<sup>35</sup> The validity of this proposition is assessed in Chapter Six.

### *D. Case law on exceptions to discrimination in New Zealand*

There are no published judgments on a s 27(1) GOQ exception. The following case law considers related provisions and can provide an indication of how the courts and HRRT are interpreting exceptions to discrimination.

*McAlister v Air New Zealand*<sup>36</sup> considered the s 30 exception where a pilot-in-command was demoted at the age of 60 in order for Air New Zealand to comply with age prohibitions imposed by the United States Federal Aviation Administration. The Supreme Court found a s 30 GOQ existed.<sup>37</sup> The prohibitions imposed on the employer fell within the statutory words “for any other reason” as:<sup>38</sup>

[T]he language in s 30 is broad enough to cover situations where age, although not part of the formal qualifications for the activity at issue, is important to the employer’s operations as a consequence of legal obligations which the employer has no alternative to accept.

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<sup>33</sup> Evelyn Ellis “Gender Discrimination in the European Community” in Janet Dine and Bob Watt *Discrimination Law: Concepts, Limitations, & Justifications* (Addison Wesley Longman Ltd, Essex, 1996) at 15.

<sup>34</sup> For example: Crimes Act 1961, s 124 distribution or exhibition of indecent matter.

<sup>35</sup> *Dothard v Rawlinson*, above n 7.

<sup>36</sup> *McAlister v Air New Zealand Ltd* [2010] NZSC 76. This case was brought under s 104 of the Employment Relations Act 2000 but s 30 of the HRA 1993 was also considered.

<sup>37</sup> This finding was subject to the employer meeting the reasonable accommodation requirements in s 35 of the HRA. This provision is discussed in Chapter Five.

<sup>38</sup> *Air New Zealand Ltd v McAlister* [2008] NZCA 264, 3 NZLR 794 at [110].

The Employment Court stated that to establish age as a GOQ, an employer needs to establish that:<sup>39</sup>

- a) The policy relied on was genuinely imposed in good faith and in the belief that it was necessary for the performance of the position;
- b) Objectively viewed, the age limit is a necessary qualification for the position; and
- c) Any age qualification is for safety or any other reason and the reason must be genuine and related to the occupation.

*Avis Rent A Car Ltd v The Proceedings Commissioner* is the only successful application for a declaration under s 97 so far in New Zealand. Avis' rental policy of declining to rent to customers under the age of twenty-five, whilst otherwise in breach of s 44, was not unlawful because a genuine justification existed. Given the lack of precedent, the HRRT developed a set of principles relevant to determining what constitutes a genuine justification:<sup>40</sup>

- The "special nature of human rights" requires that any exception be construed in a restrictive manner;
- "[C]ommercial expediency does not justify the compromising of human rights, however anti-discrimination laws should not make 'business impossible or genuinely unworkable'";
- The onus of proof lies with the party asserting that an exception exists;
- A discriminatory practice will not be declared lawful if there is another means of achieving the same objective;
- The policy must be imposed "honestly and in good faith" and in the "sincerely held belief that discrimination is demonstrably justified in the particular circumstances"; and
- There must be no ulterior motive "aimed at defeating the purposes of the Act."

The HRRT stated that this was the "kind of exceptional case for which s 97 was designed"<sup>41</sup> as it balanced two sets of rights: those of drivers under the age of twenty-five and those of the general community. This is dubious reasoning as it is highly unlikely that Avis imposed the age restriction out of concern for the rights of other road-users and the wider social good. Perhaps the reason the case was exceptional was because Avis provided substantial statistical evidence (such as the high powered nature of their vehicles) to demonstrate the risk to the safety of the community, which carried weight with the HRRT as it demonstrated a "sound objective basis for

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<sup>39</sup> *McAlister v Air New Zealand Ltd* EC Auckland AC65/06, ARC 37/05, 24 November 2006 at [116].

<sup>40</sup> *Avis Rent A Car Ltd v The Proceedings Commissioner*, above n 25, at 5.

<sup>41</sup> At 6.

the discriminatory policy.”<sup>42</sup> However Avis’ policy clearly had a commercial intention – the risk of renting to under twenty-five’s clearly outweighed the return. As identified by the defendant, Avis’ “legitimate commercial needs can be met by a suitable system of differential pricing”<sup>43</sup> which other rental operators employ. So in fact *Avis* is a case balancing a right (of under twenty-five drivers) against an interest (making a profit and minimising insurance claims.)

This case has limited application to the interpretation of s 27(1). First, it is in relation to the provision of goods and services and concerns whether a practice is genuinely justified as opposed to what constitutes a GOQ; secondly, it falls within the broad jurisdiction of s 97 which may require a higher standard of proof; and thirdly the decision was grounded in safety, which is irrelevant to the reason of authenticity in s 27(1). However the principles pertaining to the nature of human rights and the intentions of the party seeking the exception are relevant.

In order to best evaluate how the HRRT will assess whether sex or age establishes a GOQ it is necessary to analyse the individual components of the exception. The Canadian and American approach to similar exceptions will be critiqued to inform the likely interpretation under the HRA.

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<sup>42</sup> At 3.

<sup>43</sup> At 4.

## II. Chapter Two

This chapter considers the term *qualification*. Establishing what constitutes a qualification is imperative for two reasons: first, returning to the hypothetical example in Chapter One, Jack must be qualified for the job per s 22 to establish discrimination; secondly, understanding the ambit of a qualification is necessary to assess the scope of a *genuine occupational* qualification and whether this applies to a Juggs waitress or a women's clothing assistant. Factors that may indicate a legitimate qualification such as the exercise of an employer's discretion, customer and co-worker preference, and desirable versus essential characteristics will be considered.

Regulations pertaining to the Saskatchewan Human Rights Code<sup>44</sup> exhaustively state that a "reasonable occupational qualification" means a qualification that:

- a. Renders it necessary to discriminate on the grounds of sex or age in order that the essence of the business is not undermined; or
- b. Is a legitimate business purpose; or
- c. Renders it necessary to discriminate in order for the job to be performed safely.

But does not include a qualification:

- d. Based on assumptions or stereotyped characterisations of a group;
- e. Based on customer, co-worker or employer preference;
- f. That operates in a disguised form to discriminate against one sex.

The list clarifies when a qualification will legitimately form an exception without unnecessarily limiting the circumstances when it may apply. It would be highly beneficial for the HRC to use the Saskatchewan Regulations to inform the drafting of guidelines to clarify what will constitute a qualification for the purposes of a GOQ under the HRA.<sup>45</sup>

A qualification is broadly defined as a quality or accomplishment that makes someone suitable for a particular job or activity.<sup>46</sup> In case law, the discussion turns on whether a particular qualification is sufficiently related to the job: a qualification is occupational only if it concerns "job-related skills and aptitudes" and "affects an employee's ability to do the job."<sup>47</sup> For example

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<sup>44</sup> Saskatchewan Regulation 216/79 in reference to the Saskatchewan Human Rights Code 1979.

<sup>45</sup> The drafting of guidelines, per HRA 1993, s 5 is discussed in Chapter Seven.

<sup>46</sup> Concise Oxford Dictionary (7<sup>th</sup> ed, 1985).

<sup>47</sup> *International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls, Inc.* 499 US 187, 111 SC 1196 [1991] at 201.

a job as a freezer hand in *Canterbury Frozen Meat*<sup>48</sup> required an “A” health rating, imposed by the employer. The Complaints Review Tribunal held that the health rating was not a qualification because there was an insufficient link between the required rating and effectively doing the job; a worker need only have the ability to carry out the basic job requirements.

The Supreme Court of Canada (SCC) in the leading case *Ontario v Etobicoke*<sup>49</sup> considered whether age was a bona fide occupational requirement (BFOR).<sup>50</sup> The Borough imposed a mandatory retirement age of sixty for its firefighters. Finding that no BFOR existed, the Court stated that a qualification must be “objectively related to the employment concerned”.<sup>51</sup> The court sought evidence of the “duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties.”

The SCC has subsequently recognised the difficulty of defining *qualification* with any degree of precision: the qualification must be “rationally connected to the employment concerned”<sup>52</sup> and must be related to “professional and technical competence.”<sup>53</sup> However the Board of Inquiry (the first stage in an anti-discrimination claim in Canada) noted that amendment of the legislation from “occupational” to “because of the nature of employment”<sup>54</sup> directed “attention to a wider range of factors [than] those which are occupationally related to the qualification.”<sup>55</sup> No direction was given as to what that wider range of factors may be.

The United States Supreme Court (SCOTUS) has noted that the term *qualification* alone accommodates an employer’s idiosyncratic requirements, but modifying “qualification” with

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<sup>48</sup> *Proceedings Commissioner v Canterbury Frozen Meat* (1999) 5 NZELC 98, 538.

<sup>49</sup> *Ontario (Human Rights Commission) v Etobicoke (Borough)* [1982] 1 SCR 202.

<sup>50</sup> The case was brought under the Ontario Human Rights Code 1970, s 24(1)(b) which allows for discrimination by reason of age, sex, record of offences or marital status if based on a *reasonable and bona fide qualification* because of the nature of employment. This exception has slightly different terminology and fewer grounds than the exception set out in s 15(1) of the Canadian Human Rights Act 1985: “It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide occupational requirement*.” This provision has broad application to all of the prohibited grounds of discrimination in s 3(1) which include race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

<sup>51</sup> *Ontario (Human Rights Commission) v Etobicoke (Borough)*, above n 49, at 202.

<sup>52</sup> *Brossard (Ville) v Québec (Commission des droits de la personne)* [1988] 2 SCR 279 at [69].

<sup>53</sup> At [57].

<sup>54</sup> Ontario Human Rights Code (OHRC) 1990, s 24(1)(b), above n 50.

<sup>55</sup> *Ontario Human Rights Commission v London Monenco Consultants Ltd* (1992) 9 OR (3d) 509 (ONCA) at [22].

“occupational” limits qualifications to those that affect an employee’s ability to do the job.<sup>56</sup> This is a much better formulation than the Canadian Board of Inquiry, as it limits the scope of the exception to circumstances that genuinely involve job related skills; however what affects the ability to do the job will be contentious at the margins. The clearest example of a male-only job qualification is a sperm donor.

### 1. *Employer Discretion*

Employing a female secretary because they are better able to charm clients, will not amount to sex being a job qualification. American courts consistently find the exercise of employer discretion as insufficient to establish sex as a bona fide occupational qualification (BFOQ). In *Wilson v Southwest Airlines*,<sup>57</sup> the airline attempted to justify a policy of hiring only females in order to attract male clients. The court held that the discretion to exploit female sexuality as a marketing tool did not constitute sex as a BFOQ.

An employer is still able to exercise discretion to employ the most qualified person for the job, even if a GOQ does not exist. However the employer cannot reject an entire group of people, for example on the basis of their sex, without considering their applications. Most legitimate qualifications, such as a secretary’s ability to type 150 words per minute, can be tested in advance with aptitude tests, job trials or simulations in order to establish suitability for a position.

Herein lies a practical issue with the Act: because of bias against older people, an employer may hire a twenty-five year old counsellor over a more experienced and better qualified fifty-five year old and often the discrimination goes unnoticed and therefore unchallenged. However there is no rule that says the most qualified person must get the job. It might be valid to employ the younger counsellor to give them experience to develop their potential or in order to pay them a lower wage. It is difficult to determine when discrimination is occurring and when an employer is simply exercising their discretion based on various interests. It would only be in situations such as *Avis*, where the rental car company openly refused to hire to drivers under twenty-five, that the discrimination is evident and likely to be challenged.

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<sup>56</sup> *UAW v Johnson Controls Inc*, above n 47, at 201. This is in reference to Title VII of the American Civil Rights Act 1964 which states that “it shall not be an unlawful employment practice for an employer to hire and employ employees... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification reasonably necessary* to the normal operation of that particular business or enterprise...”

<sup>57</sup> *Wilson v Southwest Airlines Co.* 517 F Supp 292 (1981).

## 2. Personality

Personality can constitute a qualification. In *DHRP v Goodrum*,<sup>58</sup> a female alleged indirect discrimination after she was denied a position as an auctioneer because she lacked the *X factor* that her male counterparts possessed. The case does not precisely define this term, but suggested that it included height, booming voice and being a team player. The HRRT held that *qualified* is not limited to educational qualifications; *qualified* means possessing qualities or qualifications *fitting or necessary* for a certain office, function or purpose.<sup>59</sup> The HRRT held that personality (e.g. being disruptive or temperamental) is a qualification and can disqualify an applicant. The *X factor* was considered just as important as education and experience.

The HRRT found no indirect discrimination; therefore the employer did not need to establish good reason for the requirement. This decision is troubling. A personality trait ought to disqualify a candidate for a job if it can be sufficiently linked to job performance. For example a cold and calculating psychiatrist is unlikely to be effective at building a trusting relationship with a patient. But here the traits in evidence were clearly desirable characteristics that could be remedied with a podium and loudspeaker; it was not a fundamental personality trait such as being timid or selfish that made Goodrum unfit for the job. The HRRT must exercise caution when allowing employers' discretion to discriminate by reason of an applicant's personality as it could easily be used as a means of disguising true discriminatory reasons for not hiring an applicant, like the fact that Goodrum was a woman.

## 3. Stereotypes

Stereotypes as to the physical capabilities of individual men, women or certain age groups will not satisfy a GOQ. Under New Zealand law, there is no presumption that only men have the necessary physical strength and stamina to do a particular job.<sup>60</sup> Federal policy in America requires that the capabilities of any one person be assessed on an individual basis, not on the basis of stereotypical characteristics. However this is not always practical or efficient and places an onerous burden on employers. It is recommended that this burden be limited by a standard of reasonableness, addressed in Chapter Five.

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<sup>58</sup> *Director of Human Rights Proceedings v Goodrum* 7 NZELC 96,934 (2003).

<sup>59</sup> At 96,945.

<sup>60</sup> *Proceedings Commissioner v Armourguard Security Ltd* (1991) 4 NZELC 98,127.

#### 4. *Desired but not essential characteristics*

Even with judicial comment, it is difficult to distinguish a qualification from a desirable characteristic. If an employer wanted to employ a female counsellor because women are considered to be more empathetic, sex will not be a GOQ. The hiring practice is based on stereotypical characteristics and is therefore only a desirable factor. Alternatively, if an employer wanted to hire a twenty-five year old counsellor as they are better able to relate to troubled teenagers (a typecast in itself), but a fifty-five year old being the only applicant is hired, the original statement is rendered a wish list and not an essential requirement.

One commentator argues that when employers are compelled to provide equal opportunities, “difficulties often turn out to be not insuperable at all.”<sup>61</sup> Pitt gives the example of university departments which have trouble recruiting students with *A* levels in the right subjects. These departments have not “closed down for lack of suitably qualified candidates; rather, they have discovered that it is possible to take people without these erstwhile ‘essentials’ and bring them to the requisite level.”<sup>62</sup> When most of the required elements of the job are just desirable factors, what constitutes a GOQ will be appropriately narrow.

Incorporating a standard such as whether a policy is “reasonably necessary”<sup>63</sup> draws attention to characteristics that are objectively related to the job while avoiding purely desirable and often stereotypical traits. The problem is not that stereotypes can be inaccurate (sometimes there will be empirical evidence to support the stereotype), but rather they overlook individual differences by grouping people together based on generalisations. If sex or age is only a desirable factor and not a qualification, then the employer will be unsuccessful in establishing a GOQ.

#### Hypothetical examples

In order to establish sex as a GOQ, Juggs will need to establish that along with normal qualifications for the job such as the ability to take orders, wait tables and operate the till, Juggs wait-staff must entertain and titillate the customers while looking attractive/sexy. Juggs must prove that only females are qualified for this. Establishing sex as a valid GOQ rests on whether the entertainment function is essential to the job. Based on *Wilson* and *Diaz*, it will be very hard to demonstrate that the restaurant function is subordinate to the entertainment function. Juggs

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<sup>61</sup> Gwyneth Pitt “Madam Butterfly and Miss Saigon: Reflections on Genuine Occupational Qualifications” in Janet Dine and Bob Watt *Discrimination Law: Concepts, Limitations, & Justifications* (Addison Wesley Longman Ltd, Essex, 1996) at 205.

<sup>62</sup> At 205.

<sup>63</sup> The standard in Title VII of the Civil Rights Act 1964, above n 56.

will also have a hard time arguing that sexy girls in hot-pants are essential as opposed to merely desirable.

Similarly, Carlson must establish that embodying the brand by wearing the clothes and being made-up is a qualification for the job, which Jack cannot do. The policy of wearing the clothes must be a necessary function of a shop assistant to establish a GOQ. While this practice might sell more clothing, it will be difficult to prove that it is essential to performing the job in totality. Jack may be very knowledgeable and just as effective at selling clothes without wearing them.

Both companies must prove that the alleged qualifications are objectively related to the job and are linked to professional and technical competence.

### 5. *Customer Preference*

Generally, customer preference will not justify a job qualification based on sex. In *Diaz v Pan American World Airways* the American Court of Appeal held that being female was not a BFOQ for a flight attendant, as catering to customers' psychological needs was only "tangential"<sup>64</sup> to the essential function of the business, which was the safe transfer of passengers from one place to another. If the essential service requires that just one gender is able to fulfil the duties, then a BFOQ exists in favour of that sex.<sup>65</sup> Customer preference<sup>66</sup> and gender stereotypes<sup>67</sup> are non-essential characteristics. The Court of Appeal considered the nature of the work, the expected results and the associated risks of the job as relevant. It held that passenger preference for female stewardesses should not influence the determination of whether sex discrimination was valid,<sup>68</sup> because the Equal Employment Opportunity Commission (EEOC) guidelines do not allow a BFOQ exception on the basis of "the refusal to hire an individual because of the preferences of co-workers, the employer, clients, or customers."<sup>69</sup>

This precedent is a strong example of the exception's limited application. If societal preference could drive BFOQ's then human rights would be subject to societal norms, thus contradicting the purpose of human rights. Only in rare circumstances will the overriding purpose of the Act, to provide equal employment opportunities, be defeated by job qualifications based on sex.

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<sup>64</sup> *Diaz v Pan American World Airways Inc*, above n 19, at 388.

<sup>65</sup> At 388.

<sup>66</sup> At 389.

<sup>67</sup> *Dothard v Rawlinson*, above n 7, at 333.

<sup>68</sup> *Diaz v Pan American World Airways Inc* above n 19, at 389.

<sup>69</sup> At 389.

Subsequent cases have altered the *Diaz* test to focus on the essence of the particular job in question, as opposed to the entire business operation.<sup>70</sup> For example, the employer is entitled to consider what is needed in a nurse rather than what is the essential function of a nursing home in totality.<sup>71</sup> While lowering the requisite standard, the exception is still narrowly construed by the courts. This approach is more practical as it narrows the court's focus to the particular job in question. It would be too onerous for the employer to show that the essential nature of the entire business is undermined, especially if the business is multi-faceted or has different divisions.

Customer reactions do not provide a good basis for a legitimate employer concern because whatever negative view a customer has (often held by the majority against the minority), is essentially the kind of prejudice that anti-discrimination legislation is trying to break down. In *Fernandez v Wynn Oil*,<sup>72</sup> a female was not promoted to Director of International Operations because the company believed that clients in countries where women did not work would refuse to conduct business with a woman. The court held that accommodating other country's discriminatory policies could not be a basis for a BFOQ. There was no factual basis linking sex with job performance in the sense that the tasks of the Director were not sex-specific and thus being a male was not a BFOQ; nor would being a female undermine the essence of the business or cause serious safety issues.

Take for instance a car manufacturer who wishes to employ models to be photographed lying on car bonnets. The employer may be correct in assuming that female models will sell more cars than males, but this should not satisfy the exception. The American precedent that exploitation of female sexuality will not generally establish a BFOQ<sup>73</sup> ought to be persuasive in New Zealand, because using sex as a marketing tool undermines the legislation by prioritising customer preference and sustaining a culture of sexualisation. "There is a thin, but important, line between sex as a GOQ where the essential nature of the job requires a woman, and the case where the job can more effectively be performed by a woman because of customer reaction."<sup>74</sup> The reality is that sex sells. Anti-discrimination legislation is not going to stop employers using sex as a

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<sup>70</sup> Sex Discrimination: Title VII and the Bona Fide Occupational Qualification [1977] 55 TXLR 1025 at 1044.

<sup>71</sup> EEOC Decision No. 71-2410, 1973 EEOC Dec 4499 (1971).

<sup>72</sup> *Fernandez v Wynn Oil Co.* 653 F 2d 1273 (1981).

<sup>73</sup> *Wilson v Southwest Airlines Co.* above n 57.

<sup>74</sup> David Pannick "When is Sex a Genuine Occupational Qualification" (1984) 4(2) Oxford Journal of Legal Studies 198 at 209.

marketing tool to generate more profit. But when sex discrimination is challenged, the case law makes it clear that the employer will be unable to rely on a GOQ exception.

The New Zealand Labour Court has held that co-worker preference is not relevant to qualifications.<sup>75</sup> This should by analogy extend to customers because the effect of preference is the same: it generally strengthens the majority's standing, at the expense of a minority group. New Zealand ought to align with America, where the general rule is that customer preference will not constitute a valid basis for establishing sex as a BFOQ, "at least in the absence of concrete evidence that failure to honor customer preference would mean the employer could not provide the primary service it offers."<sup>76</sup> Human rights are supposed to keep a check on society; the majority's actions should not constitute or define human rights.

The exception to this rule in New Zealand, America and Canada, is where preference is justified to preserve reasonable standards of privacy.<sup>77</sup> For example preference for the same gender in intimate care situations such as showering patients in hospital.

### Hypothetical examples

Juggs' policy, implemented predominantly to attract male clients will not satisfy the exception (*Diaz*). The entire brand is designed around customer preference and exploiting female sexuality. The *Wilson ratio* condemning the use of female sexuality as a marketing tool severely weakens Juggs' argument.

On the basis of *Diaz*, a customer's desire for a "women's opinion" will be unlikely to establish the exception unless *Diaz* can be distinguished on the basis that helping customers to decide what to buy is causally related to the essential function of selling clothes. Carlson could also invoke the privacy exception to exclude Jack because staff often see customers in a state of undress when assisting them in the changing room.<sup>78</sup> Nonetheless customer preference for a female assistant will not satisfy a s 27(1) exception.

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<sup>75</sup> *Mulder v Ocean Beach Freezing Works* [1987] NZILR 84.

<sup>76</sup> "Permissible sex discrimination in employment based on Bona Fide Occupational Qualifications (BFOQ) under § 703(e)(1) of Title VII of Civil Rights Act of 1964" 110 ALR Fed 28 (1992); *Hyland v Xerox Corp.*, 380 F Supp 2d 705 (2005).

<sup>77</sup> HRA 1993, s 27(3). In America: *Fesel v Masonic Home of Delaware, Inc.*, 447 F Supp 1346 (1978).

<sup>78</sup> However this is subject to the s 35 general qualification to exceptions. See discussion in Chapter Five.

## 6. Appearance

Appearance may constitute a qualification in some professions. Further, appearance is not a prohibited ground of discrimination under the Act.<sup>79</sup> Therefore discriminating against a person with tattoos when hiring a bank teller, or a person with facial piercings when hiring a checkout operator, will not be impermissible direct discrimination under the Act.<sup>80</sup> The question of whether it might be *indirect* discrimination, if the approach ends up screening out disproportionately large numbers of groups on a prohibited ground (e.g. race, disability) is a more complicated question and beyond the scope of this paper.

## 7. Business necessity or business convenience

Whether a qualification needs to be a business necessity or just a business convenience is unclear from the case law. If convenience is enough then the standard that an employer must meet to establish a GOQ is lowered. In America, the concept of indirect discrimination and the concomitant business necessity test originated in *Griggs v Duke Power*. A successful class action was brought against the employer who required high school education or the passing of an intelligence test as a condition of employment. Both standards had a disparate impact on black employees. SCOTUS held that with a case of indirect discrimination, “[t]he touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”<sup>81</sup>

For a period of time, American courts retreated from this onerous standard, stating that “there is no requirement that the challenged practice be ‘essential’ or ‘indispensable’ to the employer’s business to pass muster.”<sup>82</sup> This was out of concern for employers who would be left with no other option but to employ based on a subjective quota system which Title VII rejects;<sup>83</sup> however the 1991 Civil Rights Act restored the test to business necessity. To establish the

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<sup>79</sup> HRA 1993, s 21: Grounds of Discrimination do not include attractiveness; therefore employers can discriminate on the basis of appearance.

<sup>80</sup> In *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20, a Maori woman was told to cover her forearm Moko while waitressing. The HRRT held that this was not direct discrimination on the grounds of race as the “tattoo free” policy was reasonable, and the employer would have treated a non-Maori with a forearm tattoo in the same manner.

<sup>81</sup> *Griggs v Duke Power Company* 401 US 424, 91 SC 849 [1971] at [4].

<sup>82</sup> *Wards Cove Packing Co v Atonio* 490 US 642, 109 SC 2115 (1989) at 659.

<sup>83</sup> *Watson v Fort Worth Bank and Trust* 487 US 977, 108 SC 2777 (1988) at 2787-2788: citing 42 USC § 2000e-2(j) of the Civil Rights Act that nothing in Title VII requires an employer to grant preferential treatment in order to meet quotas. The NZ Equal Opportunities Tribunal has also held that gender balance is not relevant to qualifications: *Parr v BCNZ* (1987) 1 NZELC 95,560 where a female applicant was denied employment because a female anchor had already been hired.

defence, the employer must prove a lack of less discriminatory alternatives,<sup>84</sup> the cost of which may be a factor in deciding whether the alternative is viable.<sup>85</sup>

#### (a) Application to New Zealand

New Zealand has faced a similar conflict in determining the standard required to establish *good reason*. It has been argued that because the “HRA's direct discrimination defences operate primarily on a standard of reasonableness, not absolute necessity”<sup>86</sup> that lesser standard should also apply to indirect discrimination. This reflects Parliament’s intention, using the standard of *reasonableness* throughout the Act, not necessity. The word *necessary* does not feature in s 65, the indirect discrimination provision, and yet the HRRT often applies this more stringent test.<sup>87</sup> Business necessity is an impossible standard that could only be met by jobs such as sperm donors or surrogacy clinics. Such a high standard defeats the purpose of having exceptions. The defence is “‘good reason’, not ‘great reason’”.<sup>88</sup> It is inconsistent to require a higher standard for “neutral provisions, raising the possibility of indirect discrimination... than the statutory exceptions for intentional, direct discrimination.”<sup>89</sup>

New Zealand should consistently apply a standard of reasonableness. While this could be perceived as giving employers too much leeway to discriminate, it in fact reflects the plain meaning of *good reason* which should, based on business efficacy, allow an employer to implement a policy where there is a sound business reason for doing so.

In summary, *genuine occupational* limits a qualification to something that is objectively related to the job concerned. Desirable and non-essential characteristics or stereotypes will not constitute a qualification. Nor will customer, co-worker or employer preference for a particular sex or age. A GOQ will be established where a qualification is essential to performance of the job, appropriately limiting the scope of the exception.

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<sup>84</sup> *Robinson v Lorillard Corp* 444 F 2d 791, 798 (1971).

<sup>85</sup> *Wards Cove Packing Co v Atonio*, above n 82, at 661.

<sup>86</sup> Selene Mize “Indirect Discrimination Reconsidered” 1 NZ Law Review 27 (2007) at 53.

<sup>87</sup> *Proceedings Commissioner v Air New Zealand Ltd* (1988) 7 NZAR 462 at 472-473: the standard is business necessity not business convenience; *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 at 242-243: the emphasis is on necessity; “good reason” should not be confused with a reasonableness test.

<sup>88</sup> “Indirect Discrimination Reconsidered”, above n 86, at 53.

<sup>89</sup> At 51. Note that a s 27(1) GOQ only applies to employment and is confined to a specific reason (authenticity) and specific grounds of discrimination (sex and age); whereas *good reason* has unlimited application to all areas of discrimination and is not limited to any prohibited grounds.

### III. Chapter Three

This chapter discusses the meaning of authenticity, the interpretive issues that arise in the context of a GOQ and whether authenticity has any ongoing relevance in this technological and diverse world.

#### A. The concept of Authenticity

An employer may discriminate on the grounds of sex or age, where, for reasons of authenticity, being of a particular sex or age is a GOQ for the job. Authenticity is not specifically defined in the Act, but a dictionary definition of *authentic* is “real, actual, genuine”<sup>90</sup> which substantially narrows the ambit of the exception.

The predecessor to s 27(1)<sup>91</sup> contained a non-exhaustive list of when sex might be reasonably necessary to ensure authenticity, including theatrical performances, posing for artists and modelling clothing. There is no indication in *Hansard* why such a list was not included in the current Act, although perhaps it was so the ambit of the section was flexible enough to change in response to future social trends.

Authenticity will exclude from consideration attributed characteristics like strength, stamina and dexterity. New Zealand’s position is similar to America that it is no longer possible to rely on the assumption that some jobs are only able to be carried out by one sex because of presumed attributes of that sex.<sup>92</sup> This is an appropriate stance as it means an exception can only be relied on when it is truly necessary for reasons of authenticity to discriminate on the grounds of sex or age.

Both *Wilson* and *Diaz* demonstrate that where the physique of the employee is essential to the primary function of the business, then the employee’s sex will establish a GOQ. In assessing the validity of a GOQ, the HRRT should consider the protection of rights against the burden on the employer and the value of commercial efficiency. Ultimately, “[i]t comes back to the question of

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<sup>90</sup> Shorter Oxford English Dictionary (6<sup>th</sup> ed, 2007).

<sup>91</sup> Human Rights Commission Act 1977, s 15(3)(a) .

<sup>92</sup> *Proceedings Commissioner v Armourguard Security Ltd*, above n 60. In America, “it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterisations of the sexes...” *Dothard v Rawlinson*, above n 7, at 333.

how far employers can be expected to put themselves out to give equal opportunities.”<sup>93</sup> It is best to operate from the position that employers must provide equal opportunities, and work backwards to allow employers to renege from this standard when the burden is too onerous (e.g. compulsory retirement ages) or authenticity allows it.

Few cases have relied on authenticity to claim a GOQ. A female undercover agent investigating “purse snatching and unlawful abortion” in America was successful;<sup>94</sup> as was a chat line in England where one can talk to “live girls 24 hours”, despite no physical element.<sup>95</sup> However, a female posing as a servant at a historic site was not necessary for authenticity, as a man posing as a male servant or doctor was an appropriate alternative.<sup>96</sup> These examples demonstrate the narrow confines of authenticity and the interaction with the reasonably necessary standard. It may have been authentic to employ a female actress to pose as a servant, but it was not reasonably necessary.

Even when authenticity is relied on, courts have been unwilling to prescribe a judicial formula. “There are very few jobs the essential nature of which only one sex can perform”<sup>97</sup> therefore the authenticity exception will usually be limited to biological or physiological job requirements. Stereotypes and sociological differences are “hard to reconcile with the fundamental premise of the... Act that one should consider persons as individuals irrespective of the qualities commonly possessed by or associated with their sex.”<sup>98</sup>

Many of the tests developed by the American courts would not view authenticity as a reason to establish a BFOQ, as they all place a strong emphasis on safety. However, authenticity may be reasonably necessary to establish a BFOQ under the sexual characteristics test which originated from *Rosenfeld v Southern Pacific Co.* Despite this case being about strength and safety, it has greatest application to s 27(1) of the HRA. Southern Pacific attempted to justify refusing to hire females for strenuous labour on the basis of state laws imposing female weight-lifting limits.

The court stated that a BFOQ is established on the basis of an intrinsic feature of one sex which justifies the exclusion of that sex from a particular job. The emphasis is on physiological features

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<sup>93</sup> “Madam Butterfly and Miss Saigon”, above n 61, at 205.

<sup>94</sup> *Button v Rockefeller* 351 NYS 2d 488 (1973) at 492.

<sup>95</sup> *Mr M Cropper v UK Express Limited* [1992] IT, unreported.

<sup>96</sup> *Oliver v Canada (Parks Canada)* 11 CHRR D/456 (1989).

<sup>97</sup> “When is Sex a Genuine Occupational Qualification”, above n 74, at 205.

<sup>98</sup> At 206.

rather than stereotypical traits. Thus the court refused to declare sex a BFOQ based on stereotyped characterisations of women as the “weaker sex”.<sup>99</sup> This decision results in a catch-22 for the employer: breaching the state laws, or discriminating against women. Hiring women while still complying with the state laws, places an onerous burden on the employer because more employees will be required to fulfil the lifting tasks. The standard imposed here is very high. The example of an actor is given as justifying the exception for reasons of authenticity.<sup>100</sup>

### *B. The relevance of the authenticity exception*

The *Wilson* judgment noted in *obiter*, that the position of an actress would satisfy the authenticity exception because the essential function of the job is to “fulfil the audience’s expectation and desire for a particular role, characterised by particular physical or emotional traits”<sup>101</sup> which a male could not authentically embrace. This statement is misleading in at least one respect. While correct that an actress will likely satisfy the exception,<sup>102</sup> emotional traits and typecast characteristics (like strength) will not establish the need for authenticity.

The authenticity exception was largely developed for the theatrical sphere;<sup>103</sup> however the ongoing relevance of the authenticity exception is questioned by some commentators. Modern technology (in film, editing and makeup) has diminished the significance of the authenticity exception in the dramatic arts, where the audience is constantly required to “suspend their disbelief”.<sup>104</sup> While uncommon, females do successfully play male characters – in 1982 Julie Andrews won a Golden Globe for her role in *Victor, Victoria* and in 2007 Cate Blanchett was nominated for an Academy Award for her role as a male in *I’m Not There*. Pitt argues that actors’ abilities to overcome “physical unsuitability and be completely convincing”<sup>105</sup> renders the theatrical example “a very inconsistent one.”<sup>106</sup> Difficulties arise with Pitt’s rights based approach: it is impractical as it ignores the burden imposed on the employer and the reasonableness standard implicit in the legislation. The HRA would not have foreseen burdening employers to audition 100 males for a female role; this would simply be unreasonable.

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<sup>99</sup> *Rosenfeld v Southern Pacific Co.*, 444 F 2d 1219 (1971) at 1224.

<sup>100</sup> At 1224.

<sup>101</sup> *Wilson v Southwest Airlines*, above n 57, at 301.

<sup>102</sup> One of the examples given in the Human Rights Commission Act 1977.

<sup>103</sup> For example Sex Discrimination Act 1975 (United Kingdom) s 7: “...in dramatic performances or other entertainment, for reasons of authenticity.”

<sup>104</sup> “*Madame Butterfly* and *Miss Saigon*”, above n 61, at 203.

<sup>105</sup> At 203, citing *The Times*, (1990) 4 September.

<sup>106</sup> At 200.

Pitt states that there could “be difficult and ultimately absurd arguments over how far authenticity should go: should only Jewish actors play Shylock, an actor with the appropriate physical disability play Richard III, heterosexual actors for Romeo and Juliet?”<sup>107</sup> A valid argument; however the answer is that authenticity ought to be assessed against a standard of reasonableness.

If females can authentically play males,<sup>108</sup> the authenticity exception ought to be irrelevant to models too. Andreja Pejčić was born a male but has modelled in both men’s and women’s shows for top designers. Subsequently, Pejčić underwent sex reassignment surgery and now identifies as a woman. This example defies the need for an authenticity exception, because prior to 2014 Pejčić was completely convincing as a female.<sup>109</sup> However this is a rare and artificial example. Androgyny will not always be the desired effect. It would not be feasible for every producer to audition people of both sexes for a specific gender role. This can be distinguished from an elite film where an established actress like Julie Andrews plays both a female and male, which may be part of the film’s appeal. The authenticity exception will still have application where biological characteristics are essential to performance of the job (e.g. lingerie models).

### Hypothetical examples

Juggs could rely on the success of Hooters<sup>110</sup> in America to demonstrate that the essential function of the business is to provide vicarious sexual entertainment to patrons. Juggs must prove that the entertainment tasks are of such a specific nature that they can only be authentically performed by women. For example, straight male customers will only be aroused

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<sup>107</sup> At 200.

<sup>108</sup> Note there is no Hollywood film where a male authentically plays a female, which makes the entire argument specious, because a male *is* required to play a man for reasons of authenticity. Excluding films where actors play the opposite sex for comedic effect (e.g. Robin Williams in *Mrs Doubtfire*).

<sup>109</sup> The entire authenticity argument for sex hinges on a binary definition of gender. While the definition of sex in s 21(1)(a) does not include gender identity, a Crown Law opinion has stated that gender identity discrimination will be covered under the HRA (Solicitor-General, Human Rights (Gender Identity) Amendment Bill, 2 August 2006 at 7). This interpretation aligns New Zealand with UK, Canadian and European decisions. It has since been submitted by Louisa Hall for Labour (Manurewa) in Supplementary Order Paper 432 (2014), with agreement from the Human Rights Commission, that s 21(1)(a) should be amended to read “sex, which includes gender identity, pregnancy and childbirth.” Thus transsexuals are protected from discrimination, but a GOQ may exist to deny a transsexual employment if it can be shown that being a particular sex is a GOQ for a position.

<sup>110</sup> In 1991 the EEOC launched an investigation into Hooters female only hiring policy for “Hooters Girls”. The EEOC dropped the investigation in 1995 after Hooters launched a \$1m publicity campaign defending its hiring policy stating that a BFOQ existed. Hooters Girls also staunchly defended the company, asserting their allegiance to “their” brand of femininity.

by female wait-staff. However in demonstrating this element of the job, Juggs is relying on stereotypical assumptions, which will not establish a GOQ for reasons of authenticity.

Provided the HRRT considers Carlson's policy of employees wearing the brand's clothing as essential to the job, Carlson will have more success establishing that being a female is a GOQ. Carlson could argue that clothes being worn look quite different to clothes on hangers. Thus modelling the clothes is an important part of selling clothes. Carlson has a basis in fact for discriminating against Jack on the grounds of sex because Jack cannot authentically wear the clothing and therefore cannot fulfil an essential function of the job.

#### IV. Chapter Four

The focus of this chapter is the employer's intention to act in good faith and whether this is required to establish sex or age as a GOQ.

##### A. A comparison of the terms *genuine* and *bona fide*

The latin term *bonā fidē*, meaning “with good faith”<sup>111</sup> was replaced with the current *genuine* occupational qualification in the HRA.<sup>112</sup> *Bona fide* might suggest that the exception depends on the state of mind of the employer, whereas *genuine*<sup>113</sup> suggests an assessment of the objective nature of the particular job. While the reason for the change is unclear, a Ministry of Justice paper indicates that the reason for the new wording (aligning New Zealand with the United Kingdom) was to move away from the state of mind of the employer, and focus on the “requirements of the actual position.”<sup>114</sup> However, as noted above, this was already the case as *occupational* confines the scope of *qualification* to purely job related requirements.

During the second reading of the Human Rights Bill, members of Parliament referred to the exception as the BFOQ. In 1998, the HRRT in *Avis* also referred to the “bona fides of the application”<sup>115</sup> demonstrating the interchangeable nature of the two phrases. Perhaps *genuine* was chosen as it better encapsulates the aim of the exception, to allow for discrimination for reasons of *authenticity*; or perhaps the phrase is simply more widely understood. However regardless of the term used, *Avis* provides authority that the exception requires consideration of both subjective and objective elements. It has been posited that there is no substantive difference between the English GOQ and the American BFOQ,<sup>116</sup> therefore the differences in terminology will not influence interpretation of a GOQ in New Zealand.

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<sup>111</sup> The Shorter Oxford English Dictionary (6<sup>th</sup> ed, 2007). *Bona fide* defined as: acting or done in good faith; sincere, genuine.

<sup>112</sup> Human Rights Commission Act 1977, s 15(3) used the phrase *bona fide*. This has since been replaced by the term *genuine* in the Human Rights Act 1993, s 27(1).

<sup>113</sup> The Shorter Oxford English Dictionary (6<sup>th</sup> ed, 2007). *Genuine* defined as having the character claimed for it; real, true, not counterfeit; authentic.

<sup>114</sup> *Human Rights Commission Act 1977 and Race Relations Act 1971: Review* (prepared for the Ministry of Justice 1989).

<sup>115</sup> *Avis Rent A Car Ltd*, above n 25, at 5.

<sup>116</sup> “When is Sex a Genuine Occupational Qualification”, above n 74, at 201.

### *B. A mixed subjective objective test*

The HRA is silent on whether a GOQ is assessed based on subjective or objective intention. The employer's state of mind, whether they intended to discriminate or not, is no defence.<sup>117</sup> However interpretation of the word *genuine* suggests that intent is relevant to establishing an exception. While it could be argued that *genuine* replaced *bona fide* in the 1993 Act to focus on the objective nature of the policy rather than the employer's intent, the *Aris* principles make it clear that intent is relevant to whether a genuine justification is established (and by analogy, a GOQ too).<sup>118</sup>

*Etobicoke* is the Canadian authority on the BFOQ test. McIntyre J set out a two pronged test. First, a subjective requirement that the policy:<sup>119</sup>

Must be imposed honestly, in good faith, and in the sincerely held belief that [it] was imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for the ulterior or extraneous reasons.

Secondly, that the qualification is:

Related in an objective sense to the performance of the employment concerned, in that it is *reasonably necessary* to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

In formulating the *Etobicoke* test, the SCC adopted the American "reasonably necessary" test despite the word *reasonable* not being included in the OHRC at the time.<sup>120</sup> While *Etobicoke* requires consideration of the state of mind of the employer, the American approach only requires an objective element - whether the policy is "reasonably necessary"<sup>121</sup> based on a factual enquiry.

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<sup>117</sup> HRA 1993, s 92I states that it is no defence that a Part Two breach was unintentional or without negligence. However the employer's state of mind may be relevant to the remedy.

<sup>118</sup> The Tribunal stated that the policy must be imposed "honestly and in good faith" and in the "sincerely held belief that discrimination is demonstrably justified in the particular circumstances" and that the employer had no ulterior motive "aimed at defeating the purposes of the Act", above n 25, at 5.

<sup>119</sup> *Ontario (Human Rights Commission) v Etobicoke (Borough)* [1982], above n 49, at 208. The case was brought under the Ontario Human Rights Code (OHRC) 1970.

<sup>120</sup> Now, s 24(1)(b) of the Code states that discrimination on the grounds of age, sex, record of offences or marital status is a "reasonable and bona fide qualification because of the nature of the employment."

<sup>121</sup> As stated in Title VII of the Civil Rights Act 1964, above n 56.

The position in New Zealand more closely follows the *Etobicoke* approach, rather than the purely objective American method. This is appropriate as it restricts the availability of an exception to those employers who were not trying to circumvent the Act and better fits with the purpose of anti-discrimination legislation, as a device for the “relief of disadvantage”<sup>122</sup>. The burden is not too great, because the employer has the chance to prove their honest belief in conjunction with the policy being objectively necessary. If the law is “going to have the remedial effect intended for it, it must not allow employers the chance of exonerating their practices too easily.”<sup>123</sup>

Hypothetical examples:

Given other prevalent examples of female only hiring in New Zealand, such as Red Bull promo girls and the norm of female assistants in women’s clothing stores, it will not be difficult for Juggs and Carlson to demonstrate an honestly held belief that the policy was imposed for the effective performance of the job. Objective necessity will impose more of a challenge, especially for Juggs.

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<sup>122</sup> “Gender Discrimination in the European Community”, above n 33, at 15.

<sup>123</sup> At 24.

## V. Chapter Five

This chapter addresses the s 35 qualification on exceptions as well as the standard of proof and evidentiary requirements required to establish a GOQ.

### A. Reasonable Accommodation and Alternatives

Section 35 bars an employer from relying on any Part Two exception (including *good reason*) if with “some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.”<sup>124</sup> This provision is the closest New Zealand comes to requiring employers to reasonably accommodate employees.<sup>125</sup> Section 35 requires consideration of reasonable alternatives to a policy rather than imposing a strict duty to accommodate, which reflects the standard of reasonableness throughout the Act. The HRRT will balance commercial expediency with upholding fundamental rights when assessing an alternative.

The Employment Tribunal took this practical approach in *Long Bay College*<sup>126</sup> holding that the refusal to hire a male physical education teacher in an all-girls school was not substantiated, because the changing room supervision task (which the school argued the male teacher was unqualified for) could be overseen by someone else. This prevented the school from relying on the privacy exception.<sup>127</sup>

While Canada requires a duty to accommodate, the standard is not particularly burdensome. In *Meiorin*,<sup>128</sup> the government failed to establish sex as a BFOR for reasons of safety where aerobic standards for firefighters indirectly discriminated against women. The SCC stated that accommodation ought to be “innovative yet practical”<sup>129</sup> in the circumstances. In *Zurich Insurance*

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<sup>124</sup> HRA 1993, s 35. The Supreme Court in *McAlister* remitted the case back to the Employment Court to decide whether Air New Zealand could reasonably have adjusted Mr McAlister’s activities so that other pilots could carry out the pilot-in-command duties for long haul flights.

<sup>125</sup> Excepting s 28(3): where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer’s activities required to accommodate the practice does not unreasonably disrupt the employer’s activities.

<sup>126</sup> *NZPPTA v Long Bay College Board of Trustees* AT16/93, AET456/92, 29 January 1993.

<sup>127</sup> HRA 1993, s 27(3)(a) Nothing in section 22 shall prevent different treatment based on sex where the position needs to be held by one sex to preserve reasonable standards of privacy.

<sup>128</sup> *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees’ Union* 3 SCR 3 [1999] [*Meiorin*].

<sup>129</sup> “From Here to Equality: *Meiorin*, *TD Bank*, and the Problems with Human Rights Law”, above n 2, at 385.

*Company* where a policy discriminated against young, unmarried males in vehicle insurance, the SCC stated that the question of whether the very essence of the business would be undermined if the policy could not be relied on was too high a standard, and one which the OHRC did not require. An “alternative may be impractical even though its adoption would not undermine the very essence of a business.”<sup>130</sup> This indicates that Canada will apply a lesser standard of reasonableness to the duty, as incorporated in the OHRC.<sup>131</sup> Interestingly, Title VII engages the standard “reasonably necessary”<sup>132</sup> and yet the American courts have preferred to develop alternate tests.<sup>133</sup>

As aforementioned, the s 35 proviso to a GOQ should be based on a standard of reasonableness. It should not be expected that the employer consider every possible alternative and make adjustments to accommodate every employee’s idiosyncratic requirements. The s 35 qualification acts as a final hurdle on the reasonableness of the policy and whether it has been imposed in good faith.

#### Hypothetical examples:

Juggs must demonstrate that alternatives such as hiring male wait-staff were dismissed as impractical because men could not authentically fulfil the entertainment function of the job. This argument is inadequate, because even if the entertainment function is essential to the job, Juggs could employ men to wait tables while women performed the “entertaining” tasks. This would be a reasonable alteration of the tasks to avoid discriminating, that does not undermine the Jugg’s brand.

Carlson will have a stronger case arguing that there is no reasonable alternative to discriminating against Jack on the basis that he cannot wear the clothing. This will depend on whether wearing the clothing is an essential function of the job. With regards to helping women change in the dressing rooms, *Long Bay College* is authority for reasonably altering duties so that another employee can carry out this task. The reasonableness of this alternative will depend on whether there is another assistant working at the same time. If Carlson was in a department store, altering the duties would be perfectly reasonable.

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<sup>130</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26, at [37].

<sup>131</sup> Ontario Human Rights Code 1990, s 24(1)(b) “...reasonable and bona fide qualification because of the nature of the employment.”

<sup>132</sup> Title VII American Civil Rights Act 1991, above n 56.

<sup>133</sup> These are the essence test, business necessity test, “all or substantially all” test, third party risk test and the sexual characteristics test.

## *B. Onus of Proof*

The onus of proving a Part 2 exception is on the employer.<sup>134</sup> However, the HRA is silent on when the burden is considered to have been discharged. *Etobicoke* clarifies that the complainant must first establish discrimination; the burden then shifts to the employer to establish an exception based on a BFOR.<sup>135</sup> This is because the employer is in “possession of the relevant information to justify its actions.”<sup>136</sup>

## *C. Standard of Proof*

Based on the *Etobicoke* formulation, it is imperative under s 27(1) that the qualification, being of a particular sex or age, is reasonably necessary to ensure authenticity. While the HRA gives no indication of the standard required to establish this, s 92I(3) is indicative: the HRRT may grant a remedy, if satisfied on the balance of probabilities that the defendant has breached Part 2. For consistency, the same civil standard ought to apply to establishing an exception.

In *Avis* the Tribunal found that the policy of refusing to hire cars to under twenty-five's was justified based on “crucial evidence” from two witnesses<sup>137</sup> who provided extensive road accident statistics based on age; while in *Thoroughbred Racing* a s 97 genuine justification for a rule denying the spouse of a convicted person from racing a horse was denied on the basis that there had been a “plethora of assertions of fact”<sup>138</sup> without any evidence such as statistics to endorse them. The Tribunal made it clear that in order to qualify as an exceptional case, the “existence of facts, as distinct from the assertion of facts” is the “vital prerequisite”<sup>139</sup> for consideration under s 97; *Talleys Fisheries*<sup>140</sup> reflects this standard. The High Court found sex discrimination to exist in the allocation of females to positions as trimmers and males to the higher paying position of filleters. *Talleys* was criticised for not providing hard evidence about their employment practices.

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<sup>134</sup> HRA 1993, s 92F(2).

<sup>135</sup> *Ontario (Human Rights Commission) v Etobicoke (Borough)*, above n 49, at 208.

<sup>136</sup> *Ontario Human Rights Commission v Simpson-Sears Ltd* [1985] 2 SCR 536 at [28].

<sup>137</sup> The policy manager of the Land Transport Safety Authority and the Executive Officer of the New Zealand Vehicle Rental and Leasing Association Inc.

<sup>138</sup> *Proceedings Commissioner v Thoroughbred Racing New Zealand Inc* CRT Decision No 31/99, 27 October 1999 at 10. The case was appealed from the Complaints Review Tribunal on other grounds but failed.

<sup>139</sup> At 10.

<sup>140</sup> *Talleys Fisheries Ltd v Lewis & Edwards* 8 HRNZ 413 (2007). A case brought under s 22(1)(b) of the HRA.

The New Zealand case law indicates that opinions and generalisations are insufficient to establish an exception. Clearly more concrete evidence will be required. The “real issue is whether there [is] sufficient in the evidence adduced to satisfy us [the HRRT] that there is a sound objective basis for the policy.”<sup>141</sup> A legitimate GOQ should be evident from the facts, the standard of proof being circumstantial.

#### Hypothetical examples:

Juggs must provide evidence, such as a job description,<sup>142</sup> that being a female is reasonably necessary to fulfil the entertainment function of the job. It is unlikely, however that this employer-created evidence will satisfy the HRRT that a sound, objective basis for the policy exists.

It is more evident from the facts of Carlson that Jack is unqualified because he is unable to wear the clothing. Evidence such as higher sales and profit margins as a result of employees wearing the clothing would strengthen Carlson’s case.

#### *D. The value of empirical evidence: statistical data versus industry standards*

There are many conflicting opinions on the kind of evidence required to establish the need for authenticity. While statistical evidence can be beneficial in effectively assessing risk for a safety exception, its relevance to a GOQ is questionable. Likewise, industry standards can reflect ingrained stereotypes such as ‘old boy’ professions like Law where hiring is based on a *people like up* policy. Relying on such standards perpetuates discriminatory practices and has little value as empirical evidence.

When considering sex or age as a GOQ, case law states that the court must “examine the particular circumstances of the individual employer, and not simply rely on generalisations about an industry or a group of employers.”<sup>143</sup> Statistics demonstrating correlations “between the aging process and the safe, efficient performance of those duties” will help to establish whether age is a qualification objectively related to the job, with “statistical and medical evidence being of more

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<sup>141</sup> *Avis Rent A Car Ltd v The Proceedings Commissioner*, above n 25, at 7.

<sup>142</sup> Hooters relied on the extensive job description which listed numerous ‘entertainment’ duties in addition to the waitressing duties, to prove that only females could perform the role of being a “Hooters Girl.”

<sup>143</sup> *Everson v Michigan Dept of Corrections* 391 F 3d 737 (2004) at 760.

weight than the impressions”<sup>144</sup> of industry experts. In contrast, commentary on Title VII notes that the “court’s appraisals need not be based on objective, empirical evidence, and common sense and deference to experts in the field may be used.”<sup>145</sup>

Ultimately, there must be a “basis in fact”<sup>146</sup> for the existence of a GOQ, because statistics alone, “without an indication of a connection between the statistics, ‘the practices of the employer, and the employee’s case”<sup>147</sup> will be inadequate to prove that a GOQ is reasonably necessary. Any statistical evidence must be provided in “a context that would lend them probative value.”<sup>148</sup>

In *Zurich*, a Canadian court majority found that the policy of discriminating against young, unmarried males in vehicle insurance was based on “credible actuarial evidence” with “overwhelming statistical” data to show that “young drivers are involved in proportionately more accidents, and more severe accidents, than other drivers.”<sup>149</sup> Notwithstanding this finding, the court noted that statistical analysis was not enough to satisfy the reasonableness test<sup>150</sup> as to “allow ‘statistically supportable’ discrimination would undermine the intent of human rights legislation which attempts to protect individuals from collective fault.”<sup>151</sup> An additional requirement of the policy being “in the interests of sound and accepted business practice”<sup>152</sup> was imposed, and the second limb of the *Etobicoke* test (that of being reasonably necessary) was reformulated as consideration of practical alternatives.<sup>153</sup>

L’Heureaux-Dubé J in dissent held that “more than a statistical correlation”<sup>154</sup> is necessary to prove an exception. “[S]trong statistical proof is required to demonstrate a rational connection between a discriminatory classification and high risk.”<sup>155</sup> A policy must be a “reasonable means

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<sup>144</sup> *Ontario (Human Rights Commission) v Etobicoke (Borough)*, above n 49, at 203.

<sup>145</sup> *Civil Rights Act of 1964*, § 703(e), 42 USCA § 2000e-2(e).

<sup>146</sup> *Dothard v Rawlinson*, above n 7, at 335.

<sup>147</sup> *Ryan* at 133 quoting *Gadstone v Concord Hospital* 966 F 2d 32 (1992) at [2].

<sup>148</sup> *Ryan v Greater Lawrence Technical School* 896 F Supp 2d 117 (2012) at 133.

<sup>149</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26, at [35]. A goods and services case under the OHRC, with facts similar to *Arvis*—a young male was discriminated against on the grounds of age, sex and marital status in paying more for vehicle insurance than other classes such as married females.

<sup>150</sup> Section 21, now 22 of the OHRC: in the insurance context, a differentiation, “distinction, exclusion or preference on reasonable and bona fide grounds” establishes a BFOQ.

<sup>151</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26, at [36].

<sup>152</sup> At [24].

<sup>153</sup> After finding that no such alternative existed, the court declared that a BFOQ existed on the grounds of age, sex and marital status. Note that this was in the insurance context, where the Court held that individually assessing each insured would be “wholly impracticable” at [17]. The HRA 1993, s 48 sets out exceptions to discrimination in insurance on the grounds of sex, disability and age.

<sup>154</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26, at [83].

<sup>155</sup> At [90].

of identifying and classifying similar risks” and thus the court must consider “the availability of alternative means of ascertaining the risk”.<sup>156</sup> There was no statistical basis for choosing twenty-five as the *magic age*. L’Heureaux-Dubé J agreed with the original finding of the Board of Inquiry that there was a reasonable alternative, which “relies solely on non-discriminatory, causally connected factors such as driving record, driving experience and vehicle use to establish rate differentials”<sup>157</sup> to insure drivers under the age of twenty-five. This is a far more credible argument, given the contradictory reasoning of the majority. This demonstrates the benefit of the s 35 proviso, to act as a check on the reasonableness of a policy.

In *Avis* the HRRT gave significant weight to the statistical evidence provided to support Avis’ submission that the policy was in place for the safety of road users. The HRRT noted that had the risk been simply economic, their “task would have been a relatively straight forward one”, but instead held that safety was a “social policy issue.”<sup>158</sup> The policy was clearly of commercial advantage to Avis; it was problematic to grant the exception on the basis that Avis had implemented the policy for society’s benefit. As the plaintiff argued, reasonable alternatives such as differential pricing could have achieved the same outcome.

Relying on industry standards such as refusing to hire to under twenty-five’s can prolong institutionalised discrimination. In employment, masculine ethos established through office culture or politics marginalises women and maintains occupational segregation, undervaluing women’s labour: men in positions of seniority “has the effect of crystallising, or amplifying, existing patterns of employment and, therefore, of discrimination.”<sup>159</sup> On the other hand, too great an emphasis on statistical data categorises individuals into groups and often results in overgeneralisation and stereotyping.

In America, *Ambat v San Francisco*<sup>160</sup> considered a policy of employing only females to supervise all female prison units. Despite significant statistical evidence proving that female inmates were at risk of sexual misconduct by male staff, the court held that statistics were not enough to satisfy the test that “all or substantially all” male staff would engage in this behaviour. To suggest as much would amount to the “kind of unproven and invidious stereotype that Congress sought

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<sup>156</sup> At [83].

<sup>157</sup> At [108] citing the Board of Inquiry decision at 2966.

<sup>158</sup> *Avis Rent A Car Ltd v The Proceedings Commissioner*, above n 25, at 6.

<sup>159</sup> Nicholas Bernard “What are the Purposes of EC Discrimination Law?” in Janet Dine and Bob Watt *Discrimination Law: Concepts, Limitations, & Justifications* (Addison Wesley Longman Ltd, Essex, 1996) at 84.

<sup>160</sup> *Ambat v City and County of San Francisco* 757 F 3d 1017 (2014).

to eliminate from employment decisions when it enacted 'Title VII.'<sup>161</sup> This recent decision is refreshing. By refusing to acknowledge stereotypes and statistics, the court focuses on the individual circumstances and the importance of equal employment opportunities.

A common sense and practical approach should be taken to evidential requirements; exemplified by an older American case, *City of Philadelphia v Pennsylvania Human Relations Commission*.<sup>162</sup> The court, in finding that sex was a BFOQ for a supervisor at a youth centre, stated that the City should not be expected to “produce cold, empirical facts to show that girls and boys at this age relate better to supervisors of the same sex. It is common sense”<sup>163</sup> that youths will seek out someone of the same sex to discuss emotional issues. It is “clearly a situation in which the sexual characteristics of the employee are crucial to the successful performance of the job.” If assessed under the HRA today, this scenario may not qualify for an exception on the basis of customer preference. However the HRRT is able to take a common sense approach to make a distinction between legitimate customer preferences i.e. identifying with a same-sex counsellor, and a preference which is based on bias and negative attitudes towards a group. Provision should be made in s 27(1) to accommodate this scenario.<sup>164</sup>

Statistical evidence in relation to safety and risk is quantifiable. The same data does not necessarily exist to demonstrate the need for a GOQ by reason of authenticity. If the exception is reasonably necessary, it should be evident from the facts e.g. a lingerie model. A directive, such as the comments in *Thoroughbred Racing*<sup>165</sup> or L'Heureaux-Dubé J's rational connection between the policy and prohibited ground, will help guide the HRRT in assessing the validity of a GOQ. Statistical data and industry standards can be helpful, but ultimately the “veracity of the evidence and the inferences to be drawn therefrom are judgments left to the discretion”<sup>166</sup> of the court.

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<sup>161</sup> At 1029, quoting *Breiner v Nevada Department of Corrections* 610 F 3d 1202 (2010) at 1211. The “all or substantially all” test will be analysed in more detail in the next section.

<sup>162</sup> *City of Philadelphia v Pennsylvania Human Relations Commission* 300 A 2d 97 (1973).

<sup>163</sup> At 103.

<sup>164</sup> A possible GOQ regarding this scenario is assessed in Chapter Seven. This case might also have qualified under the privacy exception in New Zealand, per s 27(3)(1).

<sup>165</sup> *Proceedings Commissioner v Thoroughbred Racing New Zealand Inc*, above n 138, at 10.

<sup>166</sup> *Beaver v Montana Dept of Natural Resources and Conservation* 318 Mont 35, 78 P 3d 857 (2003) at 54.

### *E. Individual assessment and the objective of human rights law*

The evidential burden on the employer discussed above, has the potential to conflict with the “underlying philosophy of human rights legislation ... that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics.”<sup>167</sup> Too heavy a reliance on statistical data to prove the validity of a GOQ creates a fundamental tension with this philosophy.

In America, “[r]egardless of the difficulty of measuring individual characteristics, Title VII prohibits the use of popular stereotypes or even statistical data”<sup>168</sup> to typecast individuals because it denies individuality. A BFOQ “cannot be implemented by a blanket exclusion of all females.”<sup>169</sup> If the qualification is bona fide, then the only valid test is for the employer to measure the qualification directly.<sup>170</sup> This is consistent with Title VII because it would “measure the person for the job and not the person in the abstract.”<sup>171</sup>

However in reality, the exception “seeks to achieve a balance between the right of the individual to be dealt with on his or her own merits and the needs of the employer to operate his or her business safely, efficiently and economically.”<sup>172</sup> The HRRT will not impose unreasonable requirements on an employer that are unworkable or defeat commercial purposes.

It would be feasible in New Zealand (given the population size in comparison with the Americas) to impose the requirement for individual testing on employers to verify the legitimacy of a GOQ. For many occupations, individual assessment already occurs as a result of the application process. Policy-wise, the burden is unlikely to cripple the commercial sector.

In *Zurich*, a distinction was made between a BFOQ in the insurance context as opposed to in employment. The court accepted classification by “degree of risk on the basis of groups who

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<sup>167</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26, at [17]. Nonetheless the Court held that in the insurance context, it would be “wholly impracticable” to assess each insured individually, based on the premise that “insurance rates are set based on statistics relating to the degree of risk associated with a class or group of persons.”

<sup>168</sup> *Mitchell v Mid-Continent Spring Co of Kentucky* 583 F 2d 275 (1978) at 281.

<sup>169</sup> “Permissible sex discrimination in employment based on Bona Fide Occupational Qualifications”, above n 76, at s 11.

<sup>170</sup> *Dothard v Rawlinson*, above n 7, at 332: “If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly.”

<sup>171</sup> *Griggs v Duke Power Co*, above n 81, at 856.

<sup>172</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26, at [20].

share characteristics which are material to the risk”<sup>173</sup> given that (in the majority’s view) individual testing was not possible. Ryan J dissented that classification by mileage is a more desirable scheme because it “moves closer to this goal [of individual treatment] through its emphasis of *individual* driving characteristics instead of group stereotypes.”<sup>174</sup> Subsequent Canadian cases have preferred Ryan J’s reasoning, an approach New Zealand should adopt.

McLachlin J stated that we “must not confuse the absence of evidence about alternatives with the absence of alternatives.”<sup>175</sup> The burden is on the employer, who is best placed to bear it, to demonstrate that no reasonable alternatives exist. Some commentators think it is too burdensome a standard to require the employer to identify and consider every conceivable alternative. But again, with emphasis on pragmatism, appropriate alternatives should be construed against a standard of reasonableness.

McLachlin J’s statement highlights the importance of not relying on entrenched industry standards and traditions. As society continues to seek true equality of opportunity, we must consider every policy from a fresh perspective to ensure that it is consistent with anti-discrimination legislation. The insurance industry exemplifies this. Traditionally, premiums have been based on the risk associated with one’s classification, such as *married female over thirty-five*. Now, insurance companies are employing new technology to focus on individual qualities to more accurately assess an individual’s risk.<sup>176</sup> The result in *Avis* should be seriously questioned in light of these developments.

### 1. *Group categorisations*

In *Weeks v Southern Bell Telephone*, the employer only employed male switchman because of a State law preventing women from lifting more than 30 pounds, which was occasionally required in the role. The Court held that:<sup>177</sup>

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<sup>173</sup> At [22].

<sup>174</sup> At [110].

<sup>175</sup> At [118].

<sup>176</sup> For example, Tower Insurance in 2014 released an Smartphone Application which rates the safety of drivers over 250km and can result in a premium discount between 5-20%. This demonstrates that non-discriminatory classification systems exist to achieve the same purpose of ascertaining risk.

<sup>177</sup> *Weeks v Southern Bell Telephone* 408 F 2d 228 (5<sup>th</sup> Cir 1969) at 235.

[T]o rely on the BFOQ exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

Southern Bell failed to satisfy that burden.<sup>178</sup> The “all or substantially all” test, first proposed in *Weeks*, allows employers to “avoid an assessment of an individual applicant’s qualifications”<sup>179</sup> to impose a policy based on stereotypical generalisations, accurate or otherwise.

Subsequent courts have limited the test’s application, due to its conflict with the underlying philosophy of the American and Canadian legislation “that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics.”<sup>180</sup> Few cases have successfully employed it. In *Usery v Tamiami Trail Tours*<sup>181</sup> an age BFOQ was established for bus drivers, on the basis that individual testing was impractical. This case has been subject to criticism.<sup>182</sup> Practicality is not a good excuse unless individual testing would be unreasonable in the circumstances. It is highly doubtful that the tour company was unable to test drivers’ skills before employing them. This test has very limited application to a GOQ in New Zealand because it profoundly conflicts with the purpose of the HRA which is to protect against blanket exclusion on a prohibited ground.

#### Hypothetical examples:

Juggs has a similar business model to Hooters, where job qualifications like being charismatic, having glamorous styled hair and camera-ready makeup, along with responsibilities like entertaining guests in a fun way and making special occasions memorable<sup>183</sup> can only be met by women. Provided the entertainment function reasonably requires that only females are qualified for the job, these qualifications satisfy the “all or substantially all” test and sexual characteristics test, so that in effect, individual testing is not required. This is a spurious argument that twists customer preference and the exploitation of female sexuality into the essential function of the job in order to justify the discriminatory policy. Hooters may have successfully warded off the

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<sup>178</sup> The Court did not need to decide on the constitutionality of the 30 pound law as it was repealed prior to the Fifth Circuit appeal.

<sup>179</sup> “Sex Discrimination: Title VII and the Bona Fide Occupational Qualification”, above n 70, at 1043.

<sup>180</sup> *Zurich Insurance Company v Ontario Human Rights Commission*, above n 26, at [17].

<sup>181</sup> *Usery v. Tamiami Trail Tours, Inc.*, 531 F 2d 224 (1976).

<sup>182</sup> *Tuohy v Ford Motor Company* 490 F Supp 258 (1980) criticised the *Tamiami* court’s application of the essence test and “all or substantially test” on the basis that safety was only considered in the first stage essence test and not the second stage “all or substantially all” test, despite its fundamental importance to the BFOQ in question.

<sup>183</sup> Job description of a Hooters Girl <[www.hooters.com/careers](http://www.hooters.com/careers)>.

EEOC with its vast financial resources and “all-American” support, but in New Zealand, a policy that so directly undermines the purpose of the HRA would not be successful. It is unlikely that Juggs can rely on an exception that being a female is a GOQ for the job.

Carlson could argue that individually testing male applicants is unnecessary because their biological characteristics render them unable to wear the clothing, which is designed for women. This argument will likely meet the sexual characteristics test as it is based on legitimate grounds and is truly for reasons of authenticity (provided that wearing the clothes – to demonstrate how they can be worn/put together and accessorised - is an essential function of the job.) Carlson has a greater chance of establishing a GOQ exception.

## VI. Chapter Six

This chapter discusses safety and the American third party risk test, and whether there is scope for s 27(1) to cover safety on the grounds of sex.

### A. Third Party Risk

An alternative reason to authenticity or privacy that justifies a BFOQ in America is where employing a particular class presents a substantial risk to third parties. It would be impracticable to eliminate this risk by individual testing. Discrimination on the grounds of age and disability are commonly assessed using this test. Section 27(1) does not currently extend to third party risk, however it could be relevant to s 30 or s 97.

The test developed from *Dotbard v Rawlinson*<sup>184</sup> where SCOTUS held that male sex was a BFOQ for a correctional counsellor in a maximum security, all-male penitentiary because of the risk a female correctional counsellor would pose to prisoners.<sup>185</sup> The court stated that usually, the “argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.”<sup>186</sup> However the court held that this was not a usual case; there was more at stake than the claimant’s safety - being a woman would “directly undermine her capacity to provide the security that is the essence”<sup>187</sup> of the position, therefore putting inmates at risk. Thus, while the majority was careful to limit their decision to the facts before them, the claimant’s right to “weigh and accept the risks of employment”<sup>188</sup> was overruled by third party risk.

Marshall J disagreed with the majority’s application of the BFOQ exception: other States had allowed women to take up these positions, with great success, confirming that “absolute disqualification of women is not, in the words of Title VII, ‘reasonably necessary to the normal operation’ of a maximum security prison.”<sup>189</sup> Marshall J noted that while the “Court recognizes

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<sup>184</sup> *Dotbard v Rawlinson*, above n 7.

<sup>185</sup> The Supreme Court has subsequently retreated from this decision. The court stated that *Dotbard* was limited to the specific facts of the case: that the Alabama, male only, maximum security penitentiary was particularly violent, with a large proportion of sex offenders (20%), justifying the BFOQ for contact positions.

<sup>186</sup> *Dotbard v Rawlinson*, above n 7, at 334.

<sup>187</sup> At 336.

<sup>188</sup> At 335.

<sup>189</sup> At 341.

that possible harm to women guards is an unacceptable reason for disqualifying women, it relies instead on an equally speculative threat to prison discipline supposedly generated by the sexuality of female guards.”<sup>190</sup>

The majority correctly stated the law, but then failed spectacularly in applying it, resulting in fundamentally flawed reasoning that perpetuates a generalised bias against women, by denying them equal employment opportunities because of their biological makeup. SCOTUS’s reasoning undermines every effort toward equality that Title VII represents. The effect of this decision “is to punish women because their very presence might provoke sexual assaults.”<sup>191</sup> *Dotbard* is the ultimate example of “sex stereotyping [and] unnecessary...paternalism.”<sup>192</sup>

The Court of Appeal in *Ambat*<sup>193</sup> overturned the District Court’s finding that being a female was a BFOQ for supervising female inmates. The court refused to base a BFOQ on a typecast trait that males are sexual predators, thus would not suppose that all male supervisors posed a sexual risk to female inmates. This reasoning is much better aligned with the purpose of Title VII as it focuses the attention on the claimant and their right not to be discriminated against on the basis of their sex, despite a strong evidential basis for the policy.

The jail’s policy was adopted for four reasons:<sup>194</sup> to “protect the safety of female inmates from sexual misconduct perpetrated by male deputies”; to “maintain the security of the jail in the face of female inmates’ ability to manipulate male deputies and of the deputies’ fear of false allegations of sexual misconduct by the inmates”; to protect the inmates’ privacy;<sup>195</sup> and to promote rehabilitation due to concern that surveillance by male staff might traumatise inmates who had been sexually abused. There had been several allegations of sexual misconduct by male staff before the policy’s implementation.

The court combined multiple tests: first requiring a “high correlation between sex and the ability to perform job functions”<sup>196</sup> in considering whether the job qualification was reasonably necessary; and secondly whether sex was a “legitimate proxy” for the qualification because either

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<sup>190</sup> At 342.

<sup>191</sup> At 345.

<sup>192</sup> “When is Sex a Genuine Occupational Qualification”, above n 74, at 224.

<sup>193</sup> *Ambat v City and County of San Francisco*, above n 160.

<sup>194</sup> At 1022.

<sup>195</sup> The evidence demonstrating the inmates’ reasonable right to privacy would likely establish an exception under s 27(3)(a) if this were to be considered in New Zealand.

<sup>196</sup> *Ambat v City and County of San Francisco*, above n 160, at 1025 quoting *Johnson Controls*, above n 47, at 202.

there was a “substantial basis for believing that all or nearly all [men] lack the qualification, or ... it is impossible or highly impractical”<sup>197</sup> to conduct individual testing. The analysis combined elements of the essence test, the “all or substantially all” test and the third party risk test in assessing whether the Title VII reasonably necessary standard was met.

The first part of the test was satisfied on the facts, based on the reasons for adopting the policy. The second limb was not satisfied, despite strong statistical evidence of sexual misconduct by male staff against female inmates.<sup>198</sup> The court concluded that there were reasonable alternatives such as requiring employee background checks or psychological examinations, which are required for other supervisory positions.

Given the strong evidentiary basis for the policy, at first glance it appears as though the court has swung too far in favour of the individual claimant’s rights for fear of following the erroneous SCOTUS precedent.<sup>199</sup> The court justified their reasoning on the basis that the jail was reasonably able to individually test applicants. This is a sensible outcome because it protects the rights to equal job opportunities and avoids sex discrimination – the reasoning would equally apply to female guards supervising males. It does not ignore the safety risk to female inmates, rather recognises that this factor does not justify denying men the right to equal job opportunities when there are other alternatives to mitigate the risk. If this were decided in New Zealand, the operation of s 35 would ideally arrive at the same conclusion.

The application of the third party risk test has been highly contentious. The decision in *Ambat* exemplifies the extremely narrow scope of the exception. Currently it has no place under the HRA because safety is not a reason to justify a GOQ under s 27(1). The possible extension to this ground is addressed in the following section.

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<sup>197</sup> At 1025 quoting *EEOC v Boeing Co.*, 843 F 2d 1213 (1988).

<sup>198</sup> This implicates the *Aviz* decision, where statistical evidence was given significant weight.

<sup>199</sup> Nonetheless *Dothard* was distinguishable as SCOTUS clearly limited their decision to the specific facts.

### *B. The extension of a GOQ to public safety*

One reason for the exclusion of safety as justifying a GOQ under s 27(1) is that it has no impact on *authenticity* in relation to sex and age.<sup>200</sup> This is most likely because safety can justify an exception in other parts of the Act – such as s 30 for age and s 97.

Take the example of sex discrimination against women because exposure to chemicals in the workplace has a direct causal link with infertility.<sup>201</sup> The common stance in antidiscrimination law is that it is the individual who takes responsibility to assess this risk.<sup>202</sup> In *UAW v Johnson Controls*,<sup>203</sup> a policy barred all women from working in a battery factory despite evidence that lead exposure also had a debilitating effect on male fertility. SCOTUS held that fetuses were not third parties; nonetheless moral and ethical concerns about the welfare of the next generation did not suffice to establish a BFOQ.<sup>204</sup> The exception is “not so broad that it transforms this deep social concern into an essential aspect of battery making.”<sup>205</sup> The female employees were best placed to decide whether to expose themselves to the risk of foetal damage.

*Johnson Controls* clarifies that the safety exception is “limited to instances in which sex or pregnancy actually interferes with the employee’s ability to perform,”<sup>206</sup> based on the essence of the business; such as laying off pregnant flight attendants when they become incapable of performing the essential function of ensuring passenger safety.<sup>207</sup> The focus is on the safety of the public and not on the employee. This reflects the value of democratic autonomy and the purpose of anti-discriminatory legislation. The only other situation where being female results in harm to third parties is in situations like *Dothard*; but as Marshall J identifies, that punishes women for being female and is precisely the type of stereotypical discrimination that anti-discrimination legislation is aimed at preventing.

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<sup>200</sup> Hansard parliamentary debate on both the Human Rights Commission Act 1977 and the HRA give no indication of Parliament’s intent with regards to safety and sex discrimination.

<sup>201</sup> HRA 1993, s 21: Sex includes pregnancy and childbirth.

<sup>202</sup> *Dothard v Rawlinson*, above n 7, at 335: “In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.”

<sup>203</sup> *UAW v. Johnson Controls, Inc.*, above n 47.

<sup>204</sup> At 188.

<sup>205</sup> At 204.

<sup>206</sup> At 188.

<sup>207</sup> *Harris v Pan American World Airways, Inc.*, 649 F 2d 670 (1980).

*Ambat* makes it clear that individual testing is required unless it is impossible or highly impractical. Section 27(1) reflects this attitude given that safety will not justify a GOQ on the basis of sex. Therein lies a reason why safety, which was central to the finding of a genuine justification based on age in *Avis*,<sup>208</sup> is not extended to sex and therefore not included in s 27(1). Safety can theoretically be invoked on any ground under s 97, however *Ambat* demonstrates that safety will rarely justify sex as establishing a GOQ (even if privacy is a factor, as it was in that case).

Arguably safety could be an implicit factor in whether an individual was *qualified* for the job, per s 22. However, the circumstances when this would arise are limited. Risk of harm is explicit in the s 29 disability exception, and the specific s 30 age GOQ – Parliament has clearly enabled the legislation to override an individual’s autonomy in these two exceptional instances where the individual will put themselves or others at risk.<sup>209</sup> It can be inferred from the fact that s 30 includes safety and s 27(1) does not, that Parliament intended to exclude safety from applying to sex. Therefore there is currently no justification to extend the scope of s 27(1) beyond authenticity.

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<sup>208</sup> *Avis* in the American context, could have been decided using the third party risk test or the “all or substantially all” test.

<sup>209</sup> Note that age and disability are the two grounds that most often apply the third party risk test.

### *Summary: The impact of international exceptions on a GOQ in New Zealand*

Despite slight differences in terminology, the Canadian and American exceptions provide significant guidance on the constituent elements of a GOQ. The American courts have developed five tests<sup>210</sup> used to determine the validity of a BFOQ. While theoretically meeting just one test is sufficient to meet the reasonably necessary standard and establish a BFOQ, many cases combined multiple tests in their assessment. This layering of standards creates unnecessary complexity for an already intricate and technical exception.

The simplicity of the *Etoibicoke* test is appealing, especially given that many of the elements of the test have been incorporated into New Zealand decisions (*McAlister* and *Avis*). From a practical perspective, a simpler approach will enable the HRRT to more easily establish whether a practice qualifies as a GOQ. The more straightforward the test, the more consistent the application is likely to be. A single test enables application to a variety of circumstances, whereas the American tests are limited to their specific categories.

In summary, to establish a s 27(1) GOQ the burden of proof is on the employer to demonstrate that a qualification is rationally connected to the job. The scope of authenticity has been diminished by the development of technology; therefore the need for authenticity ought to be evident from the facts and whether it is reasonably necessary to discriminate in the circumstances. The test requires a mixed subjective/objective analysis, based on the *Etoibicoke* formulation. Industry standards and even statistical evidence, while indicative, will not be enough to satisfy the exception. The evidence required to establish a GOQ for reasons of authenticity will differ on a case by case basis which fits well with the requirement for individual assessment and the consideration of reasonable alternatives per s 35.

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<sup>210</sup> These are the essence test, business necessity test, “all or substantially all” test, third party risk test and the sexual characteristics test.

## VII. Chapter Seven

This chapter outlines two recommendations: first, the publication of guidelines by the HRC giving guidance to the interpretation of a GOQ; and secondly, possible legislative amendment.

### A. Publication of guidelines

The HRRT process is much less formal than the court system. The exercise of judgment rather than “mechanical application of set criteria to facts” results in fewer procedural requirements and less strict rules of evidence.<sup>211</sup> A less formulaic approach permits the HRRT to effectively assess inequities and balance competing rights or interests. But informality comes at the cost of certainty. Because there is no precedent defining the scope of a GOQ, it is recommended that the HRC issue guidelines, per its s 5(2)(e) function, outlining factors the HRRT will consider in assessing the validity of a GOQ for reasons of authenticity.<sup>212</sup>

The issuance of guidelines would help employers and employees identify when employers’ competing rights and interests might legitimately outweigh the infringement of another right; it may also provide the impetus for legislative change. McLean suggests that “legislative amendment which addresses specific applications of the Act in particular settings is necessary”.<sup>213</sup> Amending the Act could unnecessarily restrict the GOQ’s application. A better approach would be for the HRC to include a non-exhaustive list of practical examples in the guidelines to give the exception some substantive meaning. This would enable s 27(1) to remain example free, thereby preserving its flexibility without unnecessarily limiting the circumstances in which a GOQ could arise.

In Canada and America, the BFOQ exception has been refined through judicial interpretation.<sup>214</sup> The same deliberation has yet to be applied to a GOQ in New Zealand. This lack is unfortunate,

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<sup>211</sup> Law Commission Issues Paper 6, *Tribunals in New Zealand* 2008 at 38.

<sup>212</sup> One of the HRC’s primary functions is “to advocate and promote respect for, and an understanding of, human rights in New Zealand society” per HRA 1993, s 5(1). In order to do so, the HRC may prepare and publish, as appropriate, “guidelines and voluntary codes of practice for the avoidance of acts or practices that may be inconsistent with, or contrary to, this Act” per s 5(2)(e).

<sup>213</sup> “Equality and Anti-Discrimination Law”, above n 24, at 264.

<sup>214</sup> The Supreme Court of Canada considered a BFOQ in *Ontario (Human Rights Commission) v Etobicoke (Borough)*, above n 49; The American Supreme Court considered a BFOQ in *Johnson Controls*, above n 47. These are just two examples of many.

as it is important to have transparent processes, justified methods and clear reasoning, because an exception limits the fundamental right to freedom from discrimination.

The factors that the HRRT may consider when deciding whether a GOQ exists for reasons of authenticity include:

1. Whether the qualification is objectively related to the job in that it involves genuinely job related skills;
2. Whether the qualification is an essential characteristic for the job or merely desirable;
3. Whether the policy is imposed honestly, in good faith and not for ulterior reasons;
4. Whether the policy is reasonably necessary to achieve the essential objectives of the job, not merely because it is preferable;
5. Whether the job requires the biological characteristics or functions of one sex;
6. Whether for reasons of authenticity a member of one age group or sex is required, excluding from consideration typecast or attributed characteristics such as strength;
7. Whether the employment is in relation to a dramatic or artistic performance, entertainment, photographic or modelling work, in a role that, for reasons of authenticity, aesthetics or tradition, requires the role to be performed by a person of the relevant sex or age;
8. The degree of burden on the employer, balancing commercial expediency with upholding fundamental human rights;
9. Whether individual assessment is reasonable;
10. Whether a policy is employed to establish/maintain a balance or quota of employees of a particular sex or age;
11. Whether there is a basis in fact for the policy;
12. Whether, per s 35, reasonable adjustments can be made to avoid discriminating in the circumstances.

Ultimately, the HRRT will employ discretion and common sense to establish the validity of a GOQ. The guidelines will be useful but not determinative as each case will be assessed on the facts.

A non-exhaustive list of occupations which may allow discrimination on the grounds of sex or age to establish a GOQ for reasons of *authenticity* include:

- An actor or actress;
- A clothes model;
- An artist's model (nude drawing/painting);
- Work in the sex entertainment industry e.g. social escort;
- Where the job is for the provision of services concerning the welfare of a patient e.g. work in a youth centre, where therapeutic or welfare concerns regarding a patient require a member of the same sex or a particular age.

Case support for the last category, includes *Healey v Southwood Psychiatric Hospital*:<sup>215</sup> a hospital with emotionally disturbed and sexually abused children established that its policy of staffing at least one member of each sex on every shift was a BFOQ for therapeutic and privacy concerns. The American Court of Appeal held that the essence of the hospital's business would be undermined if it could not consider sex when making its shift assignments.

In New Zealand, even if privacy is not an issue, it ought to be legitimate to discriminate when concerned for the patient's welfare. There are multiple ways to allow this: by extending the scope of s 27(1); by broadening privacy in s 27(3)(1); by declaring an exception under s 97; or by drafting a new exception. Perhaps the employer's best approach would be to dismiss the applicant at first instance as being unqualified for the job. For example, a qualification for a job helping domestic violence victims recover at a Women's Refuge is to be non-threatening, and a man would be unqualified.

### *B. Interpreting a Genuine Occupational Qualification*

Given that the same issues can establish a GOQ in both ss 27(1) and 97, the specific exception is rendered superfluous. However Parliament must have had a reason to include both, supporting the argument that they have different processes. Therefore it is necessary to test the extent of a s 27(1) GOQ to give the provision substantive value because currently, there is no way for an employer to know for sure, in advance of a complaint, whether a legitimate GOQ exists. Uncertainty undermines the rule of law. While uncertainty may have the desirable effect of

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<sup>215</sup> *Healey v Southwood Psychiatric Hospital* 78 F 3d 128 (1996).

discouraging employers from engaging with the section, it does not discourage discriminatory practices.

Ultimately, the strongest approach for New Zealand would be to adopt the twelve factors outlined, in conjunction with legislative amendment recommended below which incorporates the reasonably necessary standard directly into s 27(1). The result is less complicated than the American multiple test approach because it is grounded in a single statutory test which applies to a range of circumstances, informed by the twelve factors. This rids s 27(1) of uncertainty and enables the HRRT to substantively assess each case in context. A single, carefully formulated test must be simple enough to be easily understood, while having wide application to a variety of circumstances.

### *C. Legislative Amendment*

“The challenge of the legislation is to develop open, justifiable, and consistent methodologies by which to determine the content”<sup>216</sup> of a GOQ exception. Ultimately, legislative amendment is necessary to achieve the desired certainty.<sup>217</sup>

A simple extension of s 27(1) to include a reasonably necessary test would strengthen the standard required. An employer would need to demonstrate a lack of practical alternatives (implicit in reasonably necessary) in addition to meeting the s 35 reasonable adjustment proviso. Qualifying *necessary* with *reasonable* makes the section workable and does not place too great a burden on the employer. An employer would not be required to demonstrate they thought of every possible alternative; they would be required to demonstrate that alternatives were considered, and dismissed as impractical. *McAlister* incorporated the reasonably necessary standard into a s 30 GOQ.<sup>218</sup>

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<sup>216</sup> “Equality and Anti-Discrimination Law”, above n 24, at 271.

<sup>217</sup> A lesson can be learnt from the Sex Discrimination Act 1975 in the United Kingdom which explicitly spelt out extensive circumstances when a GOQ would apply. The result: the provision was so widely drafted that it seemed to better further “the objectives of those who opposed the 1975 Act than the objectives of those who supported the legislation.” “When is Sex a Genuine Occupational Qualification”, above n 74 at 234. Social standards changed so much that it was necessary to reduce the circumstances in which sex was recognised as a GOQ. The provision now more closely resembles s 27.

<sup>218</sup> *McAlister v Air New Zealand*, above n 36.

A revised s 27(1) might read:

Nothing in section 22 shall prevent different treatment based on sex or age where, for reasons of authenticity, being of a particular sex or age is a genuine occupational qualification for the position or employment where –

- (a) the essential nature of the job calls for a particular biological characteristic or function; or
- (b) the essential nature of the job would be materially different if carried out by a particular sex or age group; and
- (c) it is reasonably necessary to the performance of the job in the circumstances.

The phrase “biological characteristic or function” accurately captures Parliament’s intent to allow the exception in circumstances where particular physical features are required, to include jobs such as an escort or swimwear model, as well as encompassing other situations like the patient welfare example<sup>219</sup> or the phone sex case.<sup>220</sup> It also avoids assumptions regarding stereotypical traits (e.g. strength) of each sex or age group that terms like *physique* imply.<sup>221</sup>

A GOQ under the United Kingdom and New South Wales provisions is available when the “essential nature of the job”<sup>222</sup> calls for a particular “physiognomy or physique”<sup>223</sup>. The term *physiognomy*<sup>224</sup> was not included in this recommendation because it seems to directly encompass characteristics judged from a person’s form, such as typecast assumptions that young people are more mentally acute or women have a more empathetic nature, which is exactly what s 27(1) aims to avoid.

It may be envisaged that safety to third parties could fit within s 27(1)(b) if an appropriate circumstance were to arise. Section 97 would still operate as a catch-all provision for a special circumstance that falls outside the scope of s 27(1).

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<sup>219</sup> America makes provision for this in the EEOC Compliance Manual, s 625.1: *Bona Fide Occupational Qualifications*.

<sup>220</sup> *Mr M Cropper v UK Express Limited*, above n 95.

<sup>221</sup> Defined in the Shorter Oxford English Dictionary (6th ed, 2007) as the physical or bodily structure, organisation and development; the characteristic appearance or physical powers (of an individual or a race).

<sup>222</sup> Sex Discrimination Act 1975, s 7 (United Kingdom).

<sup>223</sup> Anti-Discrimination Act 1981, s 31 (New South Wales).

<sup>224</sup> Defined in the Shorter Oxford English Dictionary (6th ed, 2007) as the art of judging character from the features of the face or the form of the body generally; a person’s face or expression, esp. viewed as indicative of the mind and character.

#### *D. Conclusion*

These recommendations are designed to clarify when sex or age will establish a GOQ for reasons of authenticity for both employers and employees. There is a fine line between certainty and rigidity. The legislative amendment is designed to illustrate the required standard which, in conjunction with the guidelines should set out the circumstances in which a GOQ will be established, without restricting the exception from developing in response to changing future needs. The aim is to strike a balance between the employee's right to be assessed on individual merit, and the employer's need to operate their business efficiently and economically. The requirements imposed on the employer will be reasonable so as not to defeat commercial purposes.

In order to achieve equality in the workforce, perceptions and attitudes must be altered. "The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied"<sup>225</sup> this opportunity. The employer must demonstrate that it is reasonably necessary to discriminate for reasons of authenticity, by demonstrating that the essential nature of the job calls for a particular sex or age. The narrow confines of the exception should alert employers that discriminatory practices will only be tolerated in rare and justified circumstances.

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<sup>225</sup> *Rosenfeld v Southern Pacific Co.*, above n 99, at 1225.