**A picture containing text, outdoor, sign

Description automatically generated![A blue sign with white text

Description automatically generated with low confidence]()**

**THE ROLE OF THE INTERVENER IN**

**HUMAN RIGHTS CASES**

Sylvia Bell

**ABSTRACT**

Although interveners are often considered to have the potential to undermine the traditional adversarial system by favouring one of the parties, their involvement can also contribute to clarifying the law, benefiting a greater number of people than simply the parties to the litigation. This is particularly likely to be the case in the area of human rights where the courts are increasingly required to deal with complex new concepts.

The purpose of this project was to examine the role that interveners have played in human rights cases in New Zealand and whether the quality of decision making could be said to have improved as a result. Human rights law was selected as a case study as a result of the amendments to the Human Rights Act in 2001 that were designed to encourage the Human Rights Commission to take a more proactive role in the development of human rights jurisprudence where there was a need to settle important questions of law. We were also interested in whether, if there was demonstrable evidence of increasing third party involvement, there could be better guidance on how to intervene in order to facilitate public interest litigation and increase understanding of human rights and the rule of law generally*.*

**ACKNOWLEDGEMENTS**

This research on the role of the intervener in human rights cases was undertaken by Sylvia Bell while she was based in the New Zealand Centre for Human Rights Law, Policy and Practice at the Auckland University Law School. Sylvia pioneered interventions by the Human Rights Commission during the 2000s. She brought that rare combination of academic excellence and practical experience to the research.

Sylvia was assisted by students undertaking the Part IV LawGenrl Community Internship and Project papers under the auspieces of the Human Rights Centre. Special thanks to Professor Janet McLean who advocated for the project and provided valuable advice and encouragement.

The research would not have been possible without the financial assistance of the Law School and the generous support of the New Zealand Law Foundation. We are grateful for the funding and for the patience and understanding of the Executive Director Lynda Hagen and the Grants Manager Dianne Gallagher.

Rosslyn Noonan

Former Director

New Zealand Centre for Human Rights Law, Policy & Practice.

**THE ROLE OF THE INTERVENER IN**

**HUMAN RIGHTS CASES**

Sylvia Bell

*Although interveners are often considered to have the potential to undermine the traditional adversarial system by favouring one of the parties,*[[1]](#footnote-1) *their involvement can also contribute to clarifying the law, benefiting a greater number of people than simply the parties to the litigation.*[[2]](#footnote-2) *This is particularly likely to be the case in the area of human rights where the courts are increasingly required to deal with complex new concepts.*

*The purpose of this project was to examine the role that interveners have played in human rights cases in New Zealand and whether the quality of decision making could be said to have improved as a result. Human rights law was selected as a case study as a result of the amendments to the Human Rights Act in 2001 that were designed to encourage the Human Rights Commission to take a more proactive role in the development of human rights jurisprudence where there was a need to settle important questions of law.*[[3]](#footnote-3) *We were also interested in whether, if there was demonstrable evidence of increasing third party involvement, there could be better guidance on how to intervene in order to facilitate public interest litigation and increase understanding of human rights and the rule of law generally.*

Published by the New Zealand Centre for Human Rights Law, Policy & Practice

ISBN:

STRUCTURE OF THE PAPER

[I. INTRODUCTION 4](#_Toc58492408)

[II. RELEVANT HUMAN RIGHTS LEGISLATION 4](#_Toc58492409)

[A. Human Rights Act 1993 (HRA) 4](#_Toc58492410)

[B. New Zealand Bill of Rights Act 1990 5](#_Toc58492411)

[C. The Concept of Discrimination 6](#_Toc58492412)

[III. THE CONTEXT 7](#_Toc58492413)

[D. Third Party Involvement 7](#_Toc58492414)

[E. Standing 9](#_Toc58492415)

[F. The Public Interest 11](#_Toc58492416)

[G. The Crown As An Intervener 12](#_Toc58492417)

[H. Balancing Individual Rights & The Public Interest 14](#_Toc58492418)

[I. Factors That Can Influence A Decision To Intervene 15](#_Toc58492419)

[J. Costs 16](#_Toc58492420)

[IV. METHODOLOGY 18](#_Toc58492421)

[K. Identification Of Trends Resulting In Intervention 18](#_Toc58492422)

[L. Rates Of Intervention 18](#_Toc58492423)

[M. Application Of A Human Rights Approach 20](#_Toc58492424)

[*1. Standards In The International Human Rights Treaties 20*](#_Toc58492425)

[*2. Participation 22*](#_Toc58492426)

[*3. Non–Discrimination 23*](#_Toc58492427)

[*4. Accountability 25*](#_Toc58492428)

[*5. Transparency 26*](#_Toc58492429)

[*6. Vulnerability 27*](#_Toc58492430)

[V. CONCLUSION 29](#_Toc58492431)

[N. Recommendation 30](#_Toc58492432)

[VI. APPENDIX 1: HRC TEMPLATE 32](#_Toc58492433)

[VII. APPENDIX 2: INTERVENTION IN OTHER JURISDICTIONS 34](#_Toc58492434)

[VIII. APPENDIX 3: PRACTICE NOTES 41](#_Toc58492459)

# INTRODUCTION

In New Zealand a court’s authority to allow a party to intervene derives from the right to manage its own procedure. There are no rules governing when a third party can intervene and at times it has been difficult to persuade a court that intervention is justified.[[4]](#footnote-4) There is, however, a long standing tradition of public interest intervention in the United States[[5]](#footnote-5) and Canada.[[6]](#footnote-6) In the United Kingdom, where intervention has increased significantly since the introduction of the Human Rights Act 1998, the Supreme Court has said that it finds submissions by third parties valuable as it can be assisted by hearing different perspectives on an issue, particularly if what is being argued is of constitutional importance and has implications beyond the interests of the parties.[[7]](#footnote-7)As Sedley LJ has observed, a third party intervention can avoid “the polar positions adopted, as tends to happen in litigation, by the parties and instead reasons by degrees”.[[8]](#footnote-8) Intervention also has its critics who consider that the introduction of third parties in civil litigation can undermine the legitimacy of the courts and has the potential to unduly politicise the legal process.[[9]](#footnote-9)

# RELEVANT HUMAN RIGHTS LEGISLATION

## HUMAN RIGHTS ACT 1993 (HRA)

The first statutory recognition of New Zealand’s international human rights commitments was the Race Relations Act 1971 (RRA) which translated the obligations in the International Convention on the Elimination of Racial Discrimination into domestic law. The Human Rights Commission Act which led to the establishment of the Human Rights Commission followed in 1977. The same year New Zealand ratified the two major human rights covenants.

The legislation has been amended a number of times. The first major change was in 1993 when the RRA was subsumed by the Human Rights Act 1993 (HRA) and the grounds of unlawful discrimination in the original Act were extended. Contentiously, the public sector was exempted on the so-called “new” grounds pending a review of existing legislation and policy to identify any that was discriminatory and allow change if necessary.[[10]](#footnote-10) It was not until a further amendment in 2001 that the actors in section 3 of the New Zealand Bill of Rights Act (NZBORA) – the Executive, legislature and judiciary – were made accountable for discriminatory activity on all the grounds in the Act.

At the same time changes were made to ensure the Act applied to human rights more generally rather than simply discrimination. The statutory mandate for the HRC to intervene is found in sections 5 (2)(a) and (j) of the Human Rights Act 1993. Section 5(2)(a) provides that the HRC can:

… advocate for human rights and to promote and protect, by education and publicity, respect for, and observance of, human rights.

Section 5(2)(j) allows the HRC to:

… apply to a court or tribunal, under rules of court or regulations specifying the tribunal’s procedure, to be appointed as intervener or as counsel assisting the court or tribunal, or to take part in proceedings before the court or tribunal in another way permitted by those rules or regulations, if, in the Commission’s opinion, taking part in the proceedings in that way will facilitate the performance of its functions stated in paragraph (a).

Section 5(2)(j) embodies the idea that the Commission could play a useful role by contributing to legal proceedings involving human rights given its expertise in the area and independence from the merits of specific proceedings. The potential for this has not gone unnoticed by the Courts. In *Seales,* a case which attracted considerable publicity and a significant number of applications to intervene, Collins J granted the Commission leave to intervene noting that it was in a different position to other interveners as it could assist the Court by providing submissions on the international and domestic human rights dimensions of the proceedings.[[11]](#footnote-11) The Judge said that he “believed that he would be assisted by … neutral submissions from the Human Rights Commission on the topics in respect of which it wishes to address me.”[[12]](#footnote-12)

Since the changes to the Act in 2001 the Commission has increased its intervention function to the point where it now routinely appears in cases before the higher courts in which human rights are implicated[[13]](#footnote-13) and is recognised as having an expertise and understanding of human rights issues and the application of the HRA.[[14]](#footnote-14) For example, in *S*pencer v Attorney-General (sued in respect of the Ministry of Health), the then Chief High Court Judge observed that:[[15]](#footnote-15)

The Commission sought leave to intervene in both the judicial review and declaratory judgment proceedings on the grounds that the issues in the proceedings are of wide public interest and considerable importance … I was satisfied that the Commission’s intervention would be of assistance in determining the issues in the proceedings. As the national advocate for human rights, the Commission could assist me with the issues in the proceedings, and also with the architecture of the human rights legislation, the procedures under it and how they apply in these circumstances. I observe that the Commission was of considerable assistance during the course of the proceedings.

## NEW ZEALAND BILL OF RIGHTS ACT 1990

The NZBORA affirms human rights and fundamental freedoms and New Zealand’s commitment to the ICCPR (although as it protects a more limited range of rights it is not an exact replica of the ICCPR). It is aimed at the legislature, the Executive and judicial branches of government and people or bodies carrying out a public function or duty, or exercising a power, conferred on them by law. A number of provisions guide the application of the Act, including section 4 which provides that other legislation is not repealed if it is inconsistent with the NZBORA; section 5 which incorporates what is effectively a proportionality test allowing limitation of the rights in the Act if the restriction can be justified in a free and democratic society; and section 6 which requires that legislation that potentially infringes a right should, where possible, be interpreted consistently with the rights and freedoms in the NZBORA.

When the HRA was amended in 2001 the standard in the NZBORA was considered more appropriate for dealing with government compliance than the more prescriptive provisions of Part 2 of the HRA (which applies mainly to the private sector) since it allowed a wider range of factors to be taken into account - which should theoretically result in more robust social policy. The test was incorporated into Part 1A of the HRA in relation to s.19 (the right to be free from discrimination) only.

Part 1A applies to public sector activity with the exception of employment matters, racial and sexual harassment and victimisation, which are subject to the same legal obligations as the private sector. A public sector activity will breach the HRA if it is inconsistent with the right to freedom from discrimination under s. 19 of the NZBORA and cannot be justified as a reasonable limitation under s.5. The result is that while the procedures in the HRA apply, interpretation of the right to be free from discrimination is decided by reference to the NZBORA.

## THE CONCEPT OF DISCRIMINATION

Under Part 2 of the HRA it is unlawful to treat people less favourably in certain areas by reason of any of the grounds in s.21 subject to exceptions applying to specific grounds. By contrast, the NZBORA, which applies to Part 1A of the HRA, guarantees the right to freedom from discrimination on the same grounds as the HRA subject to the reasonable justification test in s.5. Although the concept of discrimination is central to both Acts - and a non-derogable right under the international human rights treaties - neither Act defines discrimination.

While it was clearly important for discrimination to be defined more precisely, this did not happen until *Ministry of Health v Atkinson*[[16]](#footnote-16) and *CPAG v Attorney-General*[[17]](#footnote-17) were decided in 2012. Until then the leading case on discrimination had been *Quilter v Attorney-General*,[[18]](#footnote-18)but as each Judge approached the analysis of discrimination differently, no clear test for discrimination emerged, although there was some agreement that not all differences on the prohibited grounds amounted to discrimination, that social and historical factors could be relevant and it is more difficult to justify discrimination on some grounds than others.

The Court of Appeal in *Atkinson* and *CPAG* established that discrimination for the purposes of Part 1A is made up of two parts:

1. different treatment on one of the prohibited grounds resulting in material disadvantage to a person or group in comparable circumstances;
2. that cannot be justified.

To amount to discrimination for the purposes of the HRA and NZBORA, the treatment must result in disadvantage. Disadvantage is usually established by comparing the alleged treatment with benefit derived by someone else. That is, a notional person in similar circumstances. The difficulty lies in identifying the appropriate comparator as identifying an exact comparator can result in considerable injustice by eliminating discrimination too early in the process. There must also be a link between what is complained of and a prohibited ground, although the ground does not need to be the principle reason for the treatment. It needs only to be a material factor. As the Court of Appeal put it in the *CPAG* case,

… where there is more than one causative factor it is necessary to consider the criteria as a whole as the point of the exercise is to consider the impact on the claimant group in context.

# THE CONTEXT

## THIRD PARTY INVOLVEMENT

The definition of an **intervener** differs from jurisdiction to jurisdiction. For present purposes, when we refer to an intervener we mean a third party who is permitted to join litigation even though they are not a party to the proceedings.

The right to intervene is at the discretion of the court, irrespective of the views of the principal parties. Interveners can be joined in the public or private interest.[[19]](#footnote-19) Intervention may also be permitted in criminal proceedings although this is more complicated as it may be seen as politicising the administration of the criminal law.[[20]](#footnote-20) While it is recognised that interveners can add value to a case by providing argument on germane legal points, it is not acceptable for interveners to simply repeat arguments made by the parties. An intervener is there to assist the court reach a just result - not assist one of the parties.[[21]](#footnote-21) Doing so can attract the opprobrium of the court and result in an award of damages against the intervener.

There are also other ways of providing a court with information if, for various reasons, it is not likely to be forthcoming from the parties themselves. An **amicus curiae** is an appointment made by a court to provide legal argument that the court would not otherwise hear to ensure a just outcome. While other types of third party intervention have developed more recently with the increasing interest in collective action and rights orientation of the courts, the role of amicus has been recognised since the 17th century.[[22]](#footnote-22) As the role is intended to help the court it is arguably the least intrusive type of third party involvement and least disruptive of the adversarial system.[[23]](#footnote-23) It is also more circumscribed.[[24]](#footnote-24) An amicus will either help the court by expounding the law impartially or, if one of the parties is unrepresented, advance legal arguments on their behalf.[[25]](#footnote-25)

A **contradictor** is appointed by the court to take the role of a party no longer involved in the litigation to challenge legal arguments and ensure a full argument is made. A contradictor can be seen as a specialised type of amicus that allows the court to proceed with a hearing to decide a particular issue. A good example of this can be seen in *RIDCA Central v VM*.[[26]](#footnote-26) In that case VM was no longer subject to a compulsory care order under the Intellectual (Compulsory Care and Rehabilitation) Act but the court needed to resolve the conditions under which an order could be extended. The lawyer who had acted for VM in the substantive matter was appointed as contradictor. The Human Rights Commission was granted leave to intervene.

Even within the legal profession the distinction between an intervener and an amicus is not always well understood. For example, the Human Rights Review Tribunal has had to deal with an application to join proceedings that conflated the role of amicus and intervener. In *Director of Human Rights Proceedings v Sensible Sentencing Group Trust*,[[27]](#footnote-27) two victims of the aggrieved person at the centre of a privacy case sought orders permitting them to intervene in the proceedings andfortheir solicitor to be appointed as amicus curiae to represent their interests. The Chairperson pointed out that an amicus is not an advocate for a party, citing the *Beneficial Owners of Whangaruru Whakaturia (No. 4) v Warin*[[28]](#footnote-28)inwhich the Court of Appeal was required to address the question of whether an amicus could file an appeal. In holding that an amicus had no standing to appeal, the court made the following observations:

An amicus is not a party to an action but a person appointed by the court to help the court by expounding law impartially, or if one of the parties is unrepresented, by advancing legal arguments on his or her behalf... He or she is appointed at the discretion of the court and the extent to which he or she may file documents and present legal argument is at the discretion of that court. Unlike orders for joinder as a plaintiff or a defendant, appointments of amici curiae do not require the consent of the parties. Reference can also be made to *Taylor v Manager of Auckland Prison*[[29]](#footnote-29)where Duffy J observed that the appointment of an amicus is not done to assist a party or to ensure that he or she has legal representation. It is done to assist the court so that the judge who hears the substantive matter has his or her attention directed to all relevant arguments that can be made, and can maintain appropriate judicial distance from the inquiry that needs to be made.

There is a substantial difference between expounding law impartially and advancing legal arguments on a party’s behalf. The latter involves partisan advocacy, while the former does not; the latter involves engaged confrontation with opposing counsel, but the former involves giving assistance to the court in a neutral and comprehensive way, particularly to ensure that all aspects of a dispute are teased out and addressed.

The Chairperson distinguished the role of intervener which he described as a non-party who has been given leave to participate in civil proceedings. While an amicus is appointed at the behest of the court, an intervener enters a proceeding voluntarily because they have an interest in the case or responsibilities for the issue in their own right. Although an intervener is not a party and cannot exercise appeal rights any more than an amicus can, appointment of an intervener will be appropriate in cases where the issues that the intervening party will address require, or will substantially compel, partial legal argument: *Beneficial Owners of Whangaruru Whakaturia (No. 4)*.[[30]](#footnote-30)

A **McKenzie friend** is a non-lawyer who provides assistance to a self-represented litigant and seeks to appear as an advocate on the person’s behalf. The concept originated in the 1970s in the UK when the husband in a divorce case was not granted legal aid and his solicitor sought to redress the resulting imbalance by sending a law clerk to support him in court. The role has become more refined since then. The Law Commission, for example, noted that while the courts will usually allow unrepresented parties to have a support person with them, they can refuse if it would obstruct the efficient administration of justice. A McKenzie Friend may sit with the litigant, take notes, and offer suggestions and advice but it is unclear what, if anything, they can do beyond this.[[31]](#footnote-31) In the UK the role has assumed a semi-professional status although in a recent Court of Appeal judgment a leading judge expressed concern about the use of McKenzie friends, after she heard a number of unsuccessful criminal appeal cases.[[32]](#footnote-32) She noted that those who had acted in the role had “raised the hopes of applicants, taken up a very considerable amount of time and resources of the court, and put the applicants at risk of a loss of time order” with what she described as unmeritorious applications.

Finally a **litigation guardian** is a person appointed ‘in the interests of justice’ to represent someone in legal proceedings because of the subject’s age or because they are mentally incapacitated. While it may seem that a young person (that is someone under 18) will always need a litigation guardian,[[33]](#footnote-33) the presumption may be displaced if the minor applies to conduct proceedings in their own name and is considered capable of doing so.[[34]](#footnote-34) An incapacitated person – that is a person who because of physical, intellectual, or mental impairment, whether temporary or permanent, is incapable of understanding the issues on which his or her decision would be required as a litigant conducting proceedings or unable to give sufficient instructions to issue, defend, or compromise proceedings[[35]](#footnote-35)– must have a litigation guardian to represent them in legal proceedings unless the court directs otherwise.[[36]](#footnote-36)

## STANDING

*Standing, like a duty of care in tort, is in truth not an element of the cause of action but its rejection is a shorthand expression of a conclusion that there are no merits.*[[37]](#footnote-37)

Standing is determined by whether a prospective plaintiff has some personal interest in a matter since theoretically only those personally affected by an issue should be involved in litigation. It is not enough that a person is interested simply in the resolution of a dispute - they should have a stake in the outcome[[38]](#footnote-38). At its most basic, standing is the right to take part in court proceedings because the party has a personal interest in the case. There are reasons for this. As Baragwanath J explained in *Jeffries v Attorney-General*:[[39]](#footnote-39)

Litigation imposes burdens on the parties and public resources alike. Restriction of standing to sue is a means used by the courts to restrain litigation where the plaintiff has no personal interest at stake, and where there is not sufficient public interest to justify the allocation of public resources to a hearing and to trouble the defendant with it. It can serve as a valuable curb on unnecessary or improper claims, stopping the proceeding at the outset. But a party who lacks a personal interest in a proceeding may be permitted to pursue it if able to satisfy the ultimate test of whether such leave is warranted by the public interest in the administration of justice and the vindication of the rule of law.

The principle is applied relatively stringently in private law proceedings but not as much where the actions of a public entity are under scrutiny. In such cases a court may allow a person to be part of proceedings if they can establish their involvement is justified in the public interest and to uphold the rule of law[[40]](#footnote-40). In Northern Ireland the Court of Appeal identified the following issues as relevant in deciding whether to grant standing:

* as a relative concept it is deployed according to the potency of the public interest content of the case;
* the greater the public importance involved in the issue before the court, the more ready the court should be to hold that the applicant has the necessary standing;
* the focus of the courts is more on the existence of a default or abuse on the part of a public authority than the involvement of a personal right or interest on the part of the applicant;
* absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined.[[41]](#footnote-41)

In 2013, Baroness Hale, Deputy President of the UK Supreme Court, described the court’s approach to granting standing to third parties in public law proceedings in the following way:[[42]](#footnote-42)

The approach we adopt towards the standing required for people and organisations to bring claims for judicial review or other public law remedies is crucial to the constitutional purpose which they serve. The same is true of the approach we adopt to governmental and non-governmental bodies who want to intervene in the proceedings to draw to our attention arguments or material which for whatever reason the parties may not have put before us … [T]oo close a concentration on a particular interest which the claimant may be pursuing risks losing sight of what this is all about … [F]undamentally the issue is not about individual rights but about public wrongs. There are better ways of nipping unmeritorious claims in the bud than too restrictive an approach to standing.

As the courts in New Zealand have become more liberal in allowing third party intervention the question of standing has been invoked less stringently - although as Palmer J has observed, while the requirement of standing has been significantly relaxed “…it was not so relaxed that it become horizontal … the requirement reflects the general attitude of the New Zealand legal system that a judicial decision on the application of the law is made in the context of particular facts.”[[43]](#footnote-43)

A statute may prescribe its own rules for standing or have no rules at all. It is useful to compare the Human Rights Act and the Bill of Rights (NZBORA) in this respect.[[44]](#footnote-44) Although standing is not explicitly referred to in the Act, it has rarely been an issue in NZBORA litigation[[45]](#footnote-45) possibly because of section 27(2) of the NZBORA which states that “every person whose rights or interests are recognised by law and have been affected by a determination of … a tribunal or public authority has the right to apply for judicial review of that decision.”[[46]](#footnote-46) Where the case involves a challenge to the lawfulness of an administrative policy and an applicant can demonstrate sufficient interest in the proceedings then standing will be accepted.[[47]](#footnote-47) The Courts are more likely to scrutinise an application where there is some monetary or personal benefit for a plaintiff.

The Human Rights Act does not have a formal standing requirement but taking a case to the Tribunal is contingent on a complaint first having been made to the Human Rights Commission[[48]](#footnote-48). The Commission itself has the right to appear and be heard in proceedings before the Human Rights Review Tribunal (the Tribunal) and any cases on the Human Rights Act before the higher Courts even if it has not been involved in earlier proceedings. In order to intervene in cases that may involve human rights but do not directly engage with the Act, the Commission must establish its credentials in the same way as other applicants - as was the case in *RIDCA Central (Regional Intellectual Disability Care Agency) v VM*.[[49]](#footnote-49)

Although detriment is an important aspect of standing, a person does not have to have suffered personally to bring proceedings. In *Attorney-General v Human Rights Review Tribunal [Judicial Review]*,[[50]](#footnote-50)theChild Poverty Action Group (CPAG) sought a declaration that legislation conferring dependent child tax credits was discriminatory because it was not available to people on a benefit. The Attorney-General contested CPAG’s involvement in the case arguing that it lacked standing to bring proceedings because it was not a complainant or ‘victim’ under the HRA and not personally affected. In an interlocutory decision, the Tribunal held that CPAG did have standing. The High Court upheld the Tribunal’s decision in subsequent judicial review proceedings, stating that while it was undeniable that third parties may waste public resources by bringing badly framed claims, nonetheless the fear of abstract claims was overstated and challenging standing an unsatisfactory way of addressing this.[[51]](#footnote-51)

## THE PUBLIC INTEREST

Whether a court permits an applicant to intervene will depend to a large extent on whether the case involves an issue which can be said to be in the public interest, although it will be vigilant to ensure that, as Justice McGrath put it, “the litigant is not lost by allowing the public interest to take over*.*” The question is often what amounts to the public interest and when it can – or should – be distinguished from what are essentially policy issues. In 1995 Sir Ivor Richardson observed that: [[52]](#footnote-52)

Public interest litigation is an inevitable feature of modern democracies but it continues to give rise to questions as to the proper role of the courts in determining public policy issues.

Public interest defies precise definition.[[53]](#footnote-53) When faced with the question in the United Kingdom, the UK Law Commission, for example, decided that rather than producing guidelines on the meaning ofy the public interest it was more appropriate to rely on judicial discretion on a case by case basis. However, the increase of cases brought in the public interest has been criticised by academics who claim that such interventions impugn the “traditional legal qualities of independence, rationality and finality” of the adversarial system.[[54]](#footnote-54) Sir Ivor Richardson had raised similar concerns in New Zealand, observing that if it was possible for everyone to raise issues of public interest, litigation would become an alternative to the orthodox political process “taking courts beyond their core function of adjudicating on individuals’ rights and duties.”[[55]](#footnote-55) He concluded that there would be increasing difficulties in the years to come in ensuring fair access to the courts and a real likelihood that they could become swamped with “enthusiastic busybodies” advancing unmeritorious claims.[[56]](#footnote-56) Despite such reservations, the courts seem likely to continue to allow third parties with no ties to the immediate issue to become involved in litigation if the decision has significant implications for others − although, as Lord Woolf noted in *R (Re Northern Ireland Human Rights Commission) v Greater Belfast Coroner*,[[57]](#footnote-57)a court will need to balance the benefits to be derived from the intervention against the inconvenience and delay to the other parties. The real question is whether the intervener can provide a perspective that is not otherwise available to the court.[[58]](#footnote-58)

In New Zealand in *Seales v Attorney-General*[[59]](#footnote-59)(where the plaintiff opposed a number of applications to intervene) Collins J described the power to grant leave to intervene as a discretion[[60]](#footnote-60)which should be exercised with restraint to avoid expanding the issues, elongating the hearing and increasing the costs of litigation. He further qualified the position by stating that:

* Where issues of general and wide public importance are involved, the Court must be satisfied it would be assisted by the intervener’s involvement;[[61]](#footnote-61)
* It may be appropriate to grant leave where the proceeding is likely to involve development of the law;[[62]](#footnote-62)
* Leave should not be granted when the proceeding is essentially one that involves statutory interpretation and is unlikely to involve broad questions of policy.[[63]](#footnote-63)

The Court of Appeal in *Ngāti Whātua Ōrākei Trust v Attorney-General* subsequently reinforced these criteria adding that a Court will also take into account the relevant expertise or the unique position of an intended intervener as well as the impact of the intervention on appeal but noting also that the fact that a case raises issues of principle which transcend particular facts is not enough, in itself, to extend rights of hearing beyond the parties.[[64]](#footnote-64)

## THE CROWN AS AN INTERVENER

In New Zealand the Attorney-General has responsibility under the Crown Proceedings Act to represent the public interest on behalf of the wider community and to intervene in proceedings to which he or she is not already a party, if government policy is involved[[65]](#footnote-65). But while the Crown can intervene through the Attorney-General to represent the public interest – and has a long history of doing so[[66]](#footnote-66) – it is not necessarily the case that the human rights dimensions of an issue have been appropriately addressed fully addressed.

The Crown’s role in protecting the public interest differs conceptually from situations where an independent third party intervenes to promote a particular position. As one academic observed:

The public interest role of the Attorney General was developed over a century ago with a monolithic, majoritarian concept of the public interest. The Attorney-General was seen as representative of the interest of the whole of society, not the divergent views of the social groups within such a society.[[67]](#footnote-67)

The public interest and that of the Government are not always synonymous. Various Attorney-Generals have, for example, avoided becoming directly involved in criminal prosecutions because of their responsibility to ensure the proper administration of justice.[[68]](#footnote-68) It can also mean that at times there may be disagreement over who is best placed to represent the public interest. In relation to the Human Rights Commission, for example, the Attorney-General has claimed that the Commission can be too partisan in how it approaches an issue leading to an unfair or unbalanced outcome. This occurred in *RIDCA Central v VM*,[[69]](#footnote-69)itself a good example of the role that an intervener can play in presenting the human rights aspects of a case.

The casealsoillustrates how the views of the Crown and third party interveners may be widely divergent. The facts were as follows. VM was intellectually disabled. In 2005 she was charged with possessing a knife in a public place. The offence carried a maximum sentence of 3 months or a fine not exceeding $2000. She was found unfit to stand trial under the Criminal Procedure (Mentally Impaired Persons) Act (CP (MIP) Act) and a care order was made under the Intellectual Disability (Compulsory Care and Rehabilitation) Act (IDCCR Act). As a result she was subject to a compulsory care regime under a care and rehabilitation plan which required her to comply with directions given by a care co-ordinator and live in a particular facility. The original order was for two years but it had been extended for a further year. When the second order expired the care co-ordinator sought a further extension. The extension was granted by the Family Court. By then VM had been subject to an order for three years and three months even though the index offence which led to her detention only carried a maximum sentence of three months. She appealed the extension and the High Court quashed the order. RIDCA Central, the agency which was responsible for VM’s care, appealed the decision although it did not challenge the order itself. The point on appeal related to the conditions under which an order could be extended.

Although the facts by then were moot as VM was no longer subject to an order, the Court of Appeal was sufficiently concerned about the High Court’s approach to grant RIDCA leave to appeal in the public interest and VM’s counsel to appear as the contradictor. While the period to which VM could have been sentenced had long passed, the level of risk which she posed at the time the initial order was made had not reduced significantly when the extension was requested. The prognosis was that rehabilitative efforts were unlikely to lead to further diminution of the risk she presented.[[70]](#footnote-70) Logically, it followed that if the test for extending an order was identical to that for making the original order then a care recipient who had been made subject to an order because of a minor criminal offence could be subject to repeated renewals (along with the accompanying restrictions) for a substantial period of time.[[71]](#footnote-71) The question hinged almost entirely on the risk posed to the community by the care recipient.

Both the Attorney-General and the Human Rights Commission were granted leave to intervene.[[72]](#footnote-72) The Crown supported RIDCA’s position arguing that the issue was simply whether the care recipient posed an undue risk. It followed that the criteria for extension should be the level of risk posed by the applicant and whether it remained the same as when the initial order was made. The Commission and the contradictor argued that granting renewal of an order involved a wider range of factors than just risk and needed to take into account issues such as the proportionality of the period of compulsory care to the initial offending and steps taken to rehabilitate the patient.[[73]](#footnote-73) The Court agreed, finding undue risk was an inappropriate test and a nuanced evaluation of all the information available was required so that the Judge could balance community protection against the liberty interest of the care recipient.[[74]](#footnote-74) Given that the relevant legislation allowed no further appeal, the decision now determines the conditions under which a compulsory care order may be extended.

The Crown’s intervention can highlight problems such as disparity in the quality of representation because of funding issues. On the other hand, it can also raise the profile of proceedings and stimulate the interest of potential interveners, particularly since at present there is no list of scheduled hearings or their subject matter publicly available.[[75]](#footnote-75)

## BALANCING INDIVIDUAL RIGHTS & THE PUBLIC INTEREST

Whether a third party should be able to intervene requires the courts to balance individual rights and the public interest. Apart from obvious issues such as ensuring that one of the parties is not favoured over another, the context will also be relevant since the legislature and the Executive may in some cases be presumed to have a better understanding of what the public interest involves than the intervener.

In New Zealand this can be complicated if a case involves the HRA since most policy issues fall under Part 1A of the Act. As outlined earlier, Part 1A HRA applies to the public actors in s 3 of the NZBORA introducing the NZBORA standard for evaluating discrimination in that context and the test in s 5 which allows a right to be limited if the restriction can be demonstrably justified in a fair and democratic society.

The s 5 test can be significant where the allocation of public money is involved - as was illustrated by the Child Poverty Action Group (CPAG) proceedings.[[76]](#footnote-76) In 2004 the then Labour Government introduced a package of reforms known as Working for Families which included an in-work tax credit designed to supplement the income of working families with three or more children. It excluded those on income tested benefits. CPAG challenged the scheme arguing that it amounted to discrimination on the ground of employment status.[[77]](#footnote-77) The Tribunal found that while the eligibility rules were discriminatory they amounted to a reasonable justification under s 5. CPAG appealed to the High Court which found that the off-benefit rule was prima facie discriminatory but only in respect of a very small number of beneficiaries and, in any event, it could be justified. Although the High Court refused leave to appeal its decision, the Court of Appeal granted leave on whether the High Court had correctly stated and applied the test for discrimination. It, too, found that the rules were discriminatory but that they could be justified under s 5. In doing so the court focused on the latitude that should be given to a decision maker about the choice of measure adopted,[[78]](#footnote-78) noting that in matters involving social security and allocation of public spending, a greater degree of leeway should be afforded to the decision maker’s choice.

The case illustrates the difficulties in separating policy and legal issues, the Court itself observing that … “the function of measuring compliance with human rights norms is not one that the courts have sought for themselves but it is a function that has been “thrust” on them by the Human Rights Act and the Bill of Rights”[[79]](#footnote-79)andgoing on tonote that, “while the courts cannot shirk that task, it is a question of recognising the respective role of the courts and the decision maker”.[[80]](#footnote-80)

## FACTORS THAT CAN INFLUENCE A DECISION TO INTERVENE

The financial implications of becoming involved in court proceedings can play a significant role in whether pressure groups or NGOs apply to intervene. While many groups consider their involvement is necessary in order to promote a particular perspective or support a certain issue,[[81]](#footnote-81) the possibility of prohibitive costs orders, in particular, can affect their decision to intervene. This differs in the case of organisations such as the Human Rights Commission which has an explicit power to intervene to promote a human rights perspective and can be presumed to be funded to carry out the role.[[82]](#footnote-82)

The following factors may influence a party in whether to intervene:

* The number of people likely to be affected. A case which involves a significant number of people can indicate that an important issue of public interest is involved. See, for example, *Attorney General v Human Rights Review Tribunal*;[[83]](#footnote-83) *Drew v* *Attorney-General*.[[84]](#footnote-84)
* Whether the decision will effect a vulnerable group that might otherwise not be heard. The *RIDCA* case is a good example of this. The people most impacted by the decision were people with intellectual disability who had fallen foul of the criminal justice system but were unable to understand - and thus engage with - the trial process;
* Whether the case involves an important point of law or is likely to set an important precedent. For example *Atkinson v Ministry of Health*[[85]](#footnote-85) which dealt with the definition of discrimination and *Trevethick v Ministry of Health*[[86]](#footnote-86)which addressed the rationale for the difference between the funding of disability services & ACC;
* Whether a serious or controversial issue of significance is raised. For example, whether family members should be paid to care for adult disabled children as in *Atkinson.*
* Ensuring international human rights standards are observed: *Attorney General v Zaoui*.[[87]](#footnote-87)

Other factors can include the promotion of responsible governance in holding the government accountable for administrative action as a way of improved decision making.[[88]](#footnote-88)

A paper from the UK on intervention also included criteria such as the value that an organisation can add over and above what is already available; whether the decision could impact significantly on an area of law relevant to the organisation; and the ability to deal with the risks of an adverse outcome.[[89]](#footnote-89)

## COSTS

Although as a general principle in civil cases costs follow the event, costs have been reduced when an unsuccessful plaintiff’s claim involves a matter of public interest.[[90]](#footnote-90) In *Earthquake Commission v Insurance Council of New Zealand*[[91]](#footnote-91)the interveners sought costs against the Earthquake Commission, relying on s 99A of the Judicature Act.[[92]](#footnote-92) Although they were unsuccessful, in the course of the judgment the Court identified a number of cases where interveners had been awarded costs because of the contribution they had made to the proceedings. See for example, *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel*[[93]](#footnote-93) where an award of costs was made in favour of the intervener because it had provided significant assistance to the Court at all stages of the proceedings. In reaching its decision in the case of the Earthquake Commission, however, the Court stated that:

Although the case undoubtedly involved a matter of considerable public importance and the interveners represented the interests of others, they participated in the hearing primarily to promote their private property – related interests… It [was] also relevant that the interveners were granted protection against an adverse costs award at the time they were joined. Those who pursue their own interests in litigation do not normally receive such protection. Having been insulated from the risk of having to pay costs, one would not normally expect such persons would be entitled to receive an award of costs.[[94]](#footnote-94)

It can be crippling for small agencies who have intervened if an award of costs is made against them. One way of avoiding this is by extracting an agreement from the parties in advance that they will not seek an order against an intervener in return for the intervener not seeking costs against them or obtaining an order on the same terms.[[95]](#footnote-95) Even so, such an agreement will not necessarily insulate an intervener against an award of costs. In the UK in *R (E) v Governing Body of JFS*,[[96]](#footnote-96)for example, an order was made in favour of certain interveners when they were granted leave to intervene at the first instance but the Court of Appeal subsequently made an order against some of those interveners for a proportion of the claimant’s costs. The Supreme Court upheld the order on the ground that the intervention was *transformed when the case reached the Court of Appeal* with the intervener effectively leading the argument for the Appellant. Subsequently the Supreme Court limited the order to costs in the Court of Appeal, effectively respecting the protection granted at first instance.

A similar situation occurred domestically, albeit at a lower level. In *Claymore Management Ltd v Anderson*[[97]](#footnote-97)the plaintiff was employed by a law firm in a part time capacity. When she became pregnant, the firm terminated her employment saying that they required someone to work fulltime. She alleged that she was discriminated against, both directly and indirectly, by reason of family status - at the time a relatively new ground. She was successful at the Tribunal. The case was appealed to the High Court which overturned the Tribunal’s decision finding there was no nexus between the defendant’s decision to dis-establish the plaintiff’s position and the fact of her pregnancy. Although the court admitted it found the intervener’s submissions helpful and not “overly partisan” it was nonetheless supportive of the respondent’s position. The court therefore held that the appellants were entitled to a costs award as the respondent’s conduct had added unnecessarily to the costs and the intervener had to accept some responsibility for this.[[98]](#footnote-98)

The question of costs differs in the Human Rights Review Tribunal as the Tribunal has a broad discretion whether to award or withhold costs under s 92L. The Chairperson has noted:[[99]](#footnote-99)

… the jurisdiction of the Tribunal under Part 1A and Part 2 of the Human Rights Act cannot, without substantial qualification, be compared to the civil jurisdiction of the District Court or of the High Court. This is because the subject matter is entirely different, as is the process of adjudication. Successive Chairpersons have said that the discretion should not be exercised in a way which may discourage individuals (often self-represented) from bringing claims before the Tribunal, being claims under the Human Rights Act, the Privacy Act 1993 and the Health and Disability Commissioner Act 1994 otherwise human rights protection in New Zealand might be weakened. One of the overarching purposes of human rights is to protect the powerless and the vulnerable. They should not, by the prospect of monetary penalty, be discouraged from bringing proceedings to access that protection.

In deciding how to award costs, the Tribunal will take a number of matters into account including whether parties have acted in good faith in participating in the Commission’s mediation process or have obstructed the process. In *Andrews v Commissioner of Police*[[100]](#footnote-100)the Tribunal revisited the way in which it had previously approached the apportionment of costs, reiterating that costs should advance rather than hinder the purposes of the HRA and noting that introducing considerations derived from public law or constitutional issues was deeply problematic.[[101]](#footnote-101) More recently, the Tribunal, referring to the potential chilling effect of an award of costs in accessing justice, declined to award costs against a plaintiff as she had not acted unreasonably (as the defendants alleged) and the issue was of significant public importance.[[102]](#footnote-102)

# METHODOLOGY

## IDENTIFICATION OF TRENDS RESULTING IN INTERVENTION

We were interested in whether there had been increased intervention in cases involving human rights issues since the introduction of the 2001 amendment to the HRA and, if so, whether this had led to decisions that were more human rights compliant.

To identify cases where the courts had permitted third parties to intervene since 2000 we relied on the NZLII database, using the search word “intervener” qualified by the descriptor “human rights”. While we accept that this did not identify all relevant third party intervention (for example, early cases were not picked up in the original search as interveners were often described as “interested parties”) the process was sufficiently robust to allow the identification of general trends. We used the data to identify the number of interveners in individual cases and compared the number of interventions in human rights cases with those in other areas.

The initial analysis suggested that there has been a significant increase in the number of interventions over the past two decades. Overall, the courts appear to have been particularly open to third party intervention where significant public issues such as the *Zaoui* case, matters arising out of the Christchurch earthquakes and the Equal Pay cases, have been litigated.

## RATES OF INTERVENTION

**Table 1:** Third party interventions since 2000

**Table 2:** Number of interventions in human rights cases since 2000.

**Table 3:** Comparison of human rights-related cases and “other” (non-human rights related) interventions since 2000

While it is possible to identify where there has been an intervention, the actual impact of the intervention can be difficult to determine if there is no specific reference to it in the judgment. This is the case more often than not and is probably attributable to courts not wishing to appear too partisan and to favour one or other of the parties. As Justice McGrath has observed, “interveners should not be allowed to capture the case.”

In order to identify whether recent judgments of the higher courts reflect a greater understanding of human rights, we selected a number of cases that had been decided since the introduction of the 2001 amendment and ran them through a lens based on a human rights approach.[[103]](#footnote-103) We spoke to members of the judiciary; lawyers who had intervened, and counsel who had acted for a party in cases where intervention had been allowed. The New Zealand Human Rights Commission, other agencies and NGOs who had appeared as third parties were asked for their views. We also wanted to know whether the process could be improved and, if so, how.

## APPLICATION OF A HUMAN RIGHTS APPROACH

A human rights approach is a conceptual framework based on international standards developed by the United Nations to promote and protect human rights. Perhaps predictably, support for the approach tends to come mostly from those concerned with changing the world rather than interpreting it[[104]](#footnote-104)- a distinction that will resonate with those who support the concept of intervention as a way of influencing policy. While the human rights approach has been used principally in the development of policy and has been criticised as conceptually vague and difficult to enforce, it is a useful way of identifying jurisprudence that is human rights compliant.[[105]](#footnote-105)

As adapted for New Zealand by the Human Rights Commission in 2004,[[106]](#footnote-106) the approach involves:

* Expressly applying the principles and standards in the international human rights instruments;
* Participation & empowerment of individuals and groups, allowing them to use rights as leverage for action and to legitimise their voice in decision-making;
* Non-discrimination;
* Accountability for actions and decisions allowing individuals and groups to complain about decisions that affect them adversely;
* Transparency;
* Vulnerability – balancing rights to maximise respect for all right-holders and where there is conflict, favouring the most vulnerable.

### Standards In The International Human Rights Treaties

When a country ratifies an international treaty it makes a commitment to give effect to the standards in the treaty. It follows that it may be argued that the courts should take into account the principles in the treaties New Zealand has ratified as a matter of international law, despite the fact that they are often not reflected in domestic law, which has meant - on one view at least - that they are not directly enforceable by local courts.[[107]](#footnote-107)

The use of the international treaties by the New Zealand courts as interpretative aids has changed since the days of *Ashby v Minister of Immigration*[[108]](#footnote-108)when Richardson J observed that “if the terms of domestic legislation are clear and unambiguous they must be given effect in our Courts whether or not they carry out New Zealand’s international obligations”. Courts are increasingly referring to the international treaty framework even if they are not specifically incorporated in domestic legislation and it is now accepted practice for the judiciary to strive to interpret legislation consistently with New Zealand’s treaty obligations where possible.[[109]](#footnote-109) As the Court of Appeal put it in *Tavita v Minister of Immigration*,[[110]](#footnote-110)relying on the fact that an international treaty ratified by New Zealand was not part of domestic law to rebut a rights based argument was “... unattractive … apparently implying that New Zealand’s adherence to the international instruments has been at least partly window dressing.”[[111]](#footnote-111)More recently it has been suggested that referring to treaty law for interpretative purposes is no longer optional, but required, unless the domestic statute is unambiguously incompatible with the treaty obligation.[[112]](#footnote-112)

Over the past decade, the courts’ willingness to accept that international treaty law can be used to supplement the interpretation of domestic statutes has been particularly evident in relation to human rights treaties - possibly because they are considered to have a special status because of the rights they protect. This approach is further strengthened when the long title of a statute such as the Human Rights Act provides that human rights in New Zealand are to be protected “in general accordance with the United Nations Covenants or Conventions on Human Rights” or the NZBORA refers to the legislation affirming New Zealand’s commitment to the International Convention on Civil and Political Rights.

*Hosking v Runting*[[113]](#footnote-113)is a good example of the role that the international treaties can play in influencing a decision. Mr Hosking was a well-known television personality. Mr Runting, a photographer, was commissioned by Pacific Magazines to take photographs of Hosking’s young children. He took photographs of them in a pushchair in the street. Neither Mr Hosking nor his wife were aware the photographs were being taken and subsequently advised the magazine that they had not consented to the taking of the photographs and applied for an injunction restraining publication, claiming intentional infliction of emotional distress and invasion of their right to privacy. The application was dismissed and the Hoskings appealed to the Court of Appeal, relying on alternative claims for misappropriation of image, trespass to the person and negligent infliction of emotional harm upon their children. Although the Hoskings were again unsuccessful, one of the interveners - the Children’s Commissioner - directed the Court to certain articles in CRC relating to preservation of identity and freedom from exploitation, in an attempt to prevent publication of the photographs. While the Court took note of the international obligations, it held that when read in context, “the provisions deal[t] with “serious physical and mental abuse of children” - situations with which the present case was not concerned.”[[114]](#footnote-114) Despite rejecting the Commissioner’s arguments, the Court was clearly amenable to input by interveners where human rights or international law were an issue, citing New Zealand’s obligations under the international covenant and the CRC as a reason for whether the tort of privacy was made out.[[115]](#footnote-115)

The reasoning in *Zaoui v Attorney-General*[[116]](#footnote-116)is another example, the High Court concluding that the material before it, which included the international instruments, pointed towards granting Zaoui the relief he sought. At [172] the Judge observed that while it was for the Inspector-General to determine the value that he gave to the international human rights instruments and jurisprudence, it was not a correct statement of the position (as counsel representing the Inspector-General had attempted to argue) that the “general issues of international jurisprudence were beside the point.” And in *Wall v Fairfax New Zealand Ltd*[[117]](#footnote-117)the Tribunal drew significantly on international jurisprudence and the impact of relevant international human rights law to identify the balance between exciting racial disharmony and the right to freedom of expression.

Theoutcome in *Smith v Air New Zealand Ltd*[[118]](#footnote-118)was less encouraging. The original complaint was made by a woman with a respiratory condition which meant she required extra oxygen when she travelled by air. She had to organise and pay for her oxygen on domestic flights and for extra oxygen on overseas flights when she travelled for work purposes. She argued this discriminated against her by reason of her disability and that the airline was obliged, as a result of the HRA, to accommodate her needs when she flew.

The HRA does not impose a general obligation to accommodate but creates a defence in certain areas allowing a provider to avoid accommodating a person with a disability if it is “not reasonable” to require them to do so. In support of her argument Ms Smith cited the UN Convention on the Rights of Persons with Disability which promotes undue hardship as the threshold test in deciding whether reasonable accommodation is necessary. The Court of Appeal found that the test was one of reasonableness not undue hardship. Although recognising the importance of the Convention the Court considered that there were dangers in relying on it too much. The failure to reasonably accommodate a person’s disability - no matter how important it was for them - will not always amount to a breach of the HRA.

Overall, it is fair to say that there has been a significant change in the way that the courts are referring to, and using, the international instruments. Whether this reflects a sea change in the approach to the international treaty framework generally or is the result of specific interventions, is a moot point but there does seem to be a correlation between the number of interventions and reference to the international treaties.

Most of the cases involving human rights since 2000 where there had been interveners have referenced the international standards.

### Participation

Participation reflects the idea that those affected by a decision should be able to have a say in the outcome. It is essential to a human rights approach as it can draw attention to issues of class - particularly the existence of conflicting interests among social groups - and allows poor and marginalized groups to be involved in deciding policies that affect their communities.[[119]](#footnote-119) As one commentator has put it, participation allows people an opportunity to tell their side of the story before a decision is made. This has a positive effect on their experience with the legal system – irrespective of the outcome – if they feel an authority has considered their point of view before reaching a decision.[[120]](#footnote-120)

In New Zealand Professor Smillie recognised the importance of participation as early as 1978 when he observed that:[[121]](#footnote-121)

Providing citizens with an increased sense of involvement in the administrative process tends to allay suspicion that decisions of governmental regulatory bodies tend to unduly favour the organised entrenched interests of regulated enterprises at the expense of more diffuse and less organised interests such as those of consumers, environmentalist and recreational groups.

Participation is a significant aspect of third party litigation as the intervention is often predicated on public interest and those most affected by the outcome may not be parties to the proceedings. It assumes greater importance when access to the courts is limited because of cost or inability to access legal aid. It also contributes to the increasing involvement of NGOs and NHRIs as third parties in strategic litigation. The trend of the courts in allowing intervention and the increasing number of applications to intervene is consistent with the concept of participation conceived of in the human rights approach.

As noted already, in recent years New Zealand courts have taken a reasonably positive approach to third party intervention adopting a liberal attitude to granting leave to individuals or organisations that can establish an interest in particular proceedings.[[122]](#footnote-122) In Attorney-General v *Human Rights* Review *Tribunal*[[123]](#footnote-123)CPAG was a party not an intervener but the case illustrates when a court will allow a party who not personally affected by an issue to become involved in proceedings.

CPAG claimed to act on behalf of 250,000 children living in poverty whose parents were ineligible for tax relief because they were recipients of a benefit. The Crown sought to have the proceedings struck out, on the grounds that CPAG did not have standing as it had not suffered any personal detriment. The Tribunal did not accept the argument and the High Court upheld the Tribunal’s decision. While acknowledging that there was always the possibility of unmeritorious claims advanced in the abstract failing for lack of a factual context and increasing the cost of proceedings, the court considered that CPAG had an interest greater than that of the public generally and should remain a party. It also recognised the social and political implications of the claim.[[124]](#footnote-124)

### Non–Discrimination

The way that discrimination and equality are addressed in human rights law has changed over the past decade. The narrow legalistic approach that prevailed for many years has been displaced by recognition of the socio-cultural and political-legal institutions which contribute to, and sustain, the structures of discrimination[[125]](#footnote-125)reinforcing the idea that discrimination is not just about treating everybody the same but treating them differently where necessary to ensure equal outcomes. The UN Convention on the Rights of Persons with Disability, which promotes a social model of disability based on the theory that the difficulties disabled people face lie more with their interaction with the social environment than their physical condition, is a good example of this. The context in which the discrimination occurs is relevant and will often be broader than the factual situation before the courts.

In order to decide whether interpretation of the concept of discrimination has evolved as a result of intervention we compared some of the cases which had dealt with discrimination without the benefit of third party involvement and cases where there had been. One example of how things can go awry without taking adequate account of the context was *Daniels v Attorney General*[[126]](#footnote-126)which involved the lawfulness of government policy in relation to the education of children with special needs. The parents of many of these children were opposed to the policy of mainstreaming – that is, educating their children in general classrooms rather than special schools or units within regular schools – arguing that the policy was discriminatory. In the High Court, Judge Baragwanath upheld aspects of the parents’ claim but found that discrimination amounted to failure to treat the same rather than to treat differently. This had significant implications for the work of the Human Rights Commission which promoted the need for different treatment to ensure equal outcomes. The Commission applied - and was granted - the right to intervene in the proceedings when the case reached the Court of Appeal.[[127]](#footnote-127) Time constraints, however, meant that the court did not address the concept of discrimination and scrutinised the right to education without properly considering the meaning of discrimination as it was later endorsed in the UN Convention.

The reasoning of the court in *Quilter*[[128]](#footnote-128)and in *Atkinson* and *CPAG* are a good illustration of how the concept of discrimination has developed. *Quilter* involved three lesbian couples who argued that they should be able to marry even though the Marriage Act 1955 did not define marriage. They argued that the absence of a definition meant there was no bar to same sex marriage and denying them the right to marry discriminated against them by reason of their sex and sexual orientation. A majority of the Court of Appeal found that it was not discriminatory to limit marriage to opposite sex couples. Their reasoning has been criticised as “betray[ing] a profound lack of understanding of the fundamentals of discrimination law and an unwillingness to engage with the heart of the particular alleged discrimination in issue”.[[129]](#footnote-129)

The *Atkinson* case involved the Ministry of Health’s policy of not paying family members who provided disability support services for their adult disabled children but paying people who were not family members to provide the same services. The families claimed they were discriminated against on the basis of their family status.[[130]](#footnote-130) Both the Tribunal and the High Court found that the policy was discriminatory and could not be justified under s 5 of the NZBORA. The Ministry appealed, arguing that the High Court had not correctly stated and applied the test of the right to be free from discrimination. The Court of Appeal found that the High Court had been correct and the policy was prima facie discriminatory on the ground of family status, agreeing with the approach taken by the respondent and the Commission.[[131]](#footnote-131) The Court of Appeal’s decision was followed by the *Spencer* cases which involved similar facts to *Atkinson*. Mrs Spencer was a caregiver for her adult son who had Down Syndrome. He was seriously disabled and had lived with his mother all his life because he was unable to live independently. Following the Court of Appeal’s decision in *Atkinson* Mrs Spencer successfully challenged the Ministry claiming payment as her son’s caregiver. The *Spencer* cases confirmed the value of intervention from a judicial point of view, particularly the Commission’s evidence in contextualising the argument advanced by the Ministry, and demonstrating that the class of people likely to claim as a result of the declaration sought would be relatively small.[[132]](#footnote-132)

As indicated earlier the *CPAG* case dealt with a claim that an aspect of the Working for Families tax credit discriminated against people on benefits and consequently the children in those families. In deciding whether the High Court had correctly applied the test for discrimination, the Court of Appeal agreed with CPAG and the Commission (which had intervened) about the link between the treatment and the prohibited ground, finding the High Court had been premature to defer the question of causation to the second limb of the test. However, the Court also considered that the off-benefit rule amounted to a justified limitation on the right to freedom from discrimination on the ground of employment status. While this was not the position advocated by the Commission, the Commission’s submission had clearly contributed to the Court’s approach to the test for discrimination.

Comparing the approach to discrimination in *Quilter* and *Daniels* with that in *Atkinson* and *CPAG* suggests that in the latter cases the courts found the more wide ranging argument useful in identifying discrimination. Although it would be presumptuous to claim that the outcome was directly attributable to the intervention, it is likely that the third party submissions helped to contextualise the issue, providing guidance on an appropriate approach to defining discrimination. For example, in the *Atkinson* case the court agreed with the approach to defining discrimination advanced by the parents and the Commission, noting that it had the advantage of simplicity and was “the approach adopted in the field.”[[133]](#footnote-133) While accepting that the approach only provided guidance, nonetheless it was workable and sufficiently flexible to allow what is seen as discrimination to evolve over time, the court going on to note that “distinctions that have been drawn in the past which would now be universally regarded with some horror.”

### Accountability

Accountability (particularly of public sector actors) is central to a human rights approach. The need to justify government action under s 5 NZBORA is a crucial aspect of accountability. Limitation of a right in the NZBORA is only permissible if it can be justified in a “free and democratic society”. This carries with it the implicit assumption that the government will not only take responsibility for its actions if a policy or law has the effect of infringing a right but can justify doing so. This “culture of justification” contributes to good governance by ensuring that citizens are entitled to seek, and receive, answers for why their rights are infringed.[[134]](#footnote-134) As Justice Tipping put it in *R v Hansen*[[135]](#footnote-135)by enacting s 5 of the NZBORA, Parliament gave the New Zealand courts a significant review role since a limitation must be able to be *demonstrably* justified:

… Parliament must be taken to have disclaimed any kind of presumptive justification simply because it has enacted the limit. The onus is on those who claim the limit is reasonable and justified to satisfy the court that this is demonstrably so.[[136]](#footnote-136)

The courts play an important role in deciding whether this standard is met. A recent example of the courts holding the state sector accountable can be found in *Quake Outcasts v Minister for Canterbury Earthquake Recovery*.[[137]](#footnote-137)The case involved the residents of the red zone in Christchurch who were uninsured at the time of the earthquakes in 2010 and, as a result, unable to recover the cost of their properties from the Canterbury Earthquake Recovery Authority. The Supreme Court (although not unanimously) found that the CERA had acted unlawfully in acting as it had, noting:[[138]](#footnote-138)

The whole scheme of the Canterbury Earthquake Recovery Act, its purposes and its legislative history support the view that decisions of the magnitude of those made in June 2011 on recovery measures should have been made under the Act and in particular through the Recovery Plan processes. They were not. That the June 2011 decisions were made outside of the Act undermined the safeguards, community participation and reviews mandated by the Act.

Since the introduction of the NZBORA in 1990 the s 5 test has evolved to the point where the defining features are now generally accepted as those set out by Justice Tipping in *Hansen*. Namely, did the limiting measure serve a purpose that is sufficiently important to justify curtailing the right? Is it rationally connected with its purpose? Does it impair the right no more than is reasonably necessary to achieve its purpose? And is the limit proportional to the importance of the objective? Clearly such an exercise will cover a wide spectrum of issues ranging from political, social and economic decisions to those with substantive legal content.[[139]](#footnote-139) At times they will intersect, particularly when policy decisions about the allocation of scarce resources are involved, requiring a measure of deference to the responsible decision maker, something that is further complicated by the fact that there have been considerable changes in the judicial approach to the justiciability of social and economic rights over the period that we are dealing with. To deal with the difficulties that can arise, Tipping postulated a spectrum extending from matters involving major political, social or economic decisions at one end to matters with substantial legal content at the other.[[140]](#footnote-140) While this may appear to suggest that the Courts will defer to a greater extent to government decisions involving the allocation of resources, it does not negate their responsibility to scrutinise the human rights implications of discriminatory social and economic policies. A good example of this is the Court of Appeal in *CPAG* which described evidence of the policy process leading to the tax exemption as “extensive” and the adoption of the incentive itself as “reflecting a careful analysis of a range of possible alternatives with differing social and economic impacts”.[[141]](#footnote-141) While describing the decision as “difficult”, the Court nevertheless found that the off-benefit rule could be justified making it clear that the extensive policy process, particularly the examination of viable alternatives, contributed significantly to its decision.

### Transparency

Transparency is central to a human rights approach as it reflects the presumption that the ethical claims underlying human rights should be able to survive open and informed scrutiny.[[142]](#footnote-142) It captures the idea that decision makers need to be able to give reasons for decisions with the potential to discriminate. This is particularly so in relation to public sector agencies that should be able to justify discriminatory policies. As Justice Whylie observed:[[143]](#footnote-143)

The giving of reasons encourages transparency of thought, which of itself is a vital protection against a precious or arbitrary decision. The very process of giving reasons is likely to mean that the decision is better thought out. When reasons are given, it can be more readily seen that the decision-maker has considered relevant matters and refused to consider irrelevant matters… The person affected may well be more inclined to accept the decision if it is reasoned.

If policy makers are not transparent about their motives, a defence is likely to be struck out. In this respect it is salutary to compare the *CPAG* case with that of *Atkinson*. In *Atkinson* the High Court, and subsequently Court of Appeal, were required to consider whether the Ministry of Health’s policy of not paying family members to care for their adult disabled children amounted to discrimination on the ground of family status. The Ministry claimed that its policy was not discriminatory and that families implicitly accepted that they had a duty to care for disabled family members as part of the “social contract”. However, the policy could be described as inchoate at best. It had been subject to review after review (one version having been dismissed as having too great a human rights orientation) leading the High Court to conclude that there was no clearly articulated policy. The position was compounded by the fact that there had been a number of exceptions made for some family members but, again, these appeared to have been decided in an ad hoc manner and when the Court asked the Ministry to provide it with evidence of the criteria used to make the decisions, it was referred to a statement on the Ministry’s webpage which described the policy in very general terms. The main driver behind the decision not to pay family members seemed to be the assumption that if family members had the right to be paid for caring for their disabled relatives, the policy would become fiscally unsustainable as they would opt to do so as a means of earning an income.

The High Court found that the practice of not paying family members was discriminatory and could not be justified in terms of section 5. The Court of Appeal agreed, albeit with the proviso that the Ministry should be afforded some latitude because of deference to government agencies to allow them space to make legitimate choices but recognising that this did not displace the Court’s responsibility under s 5. The uncertainty of the policy in *Atkinson* lessened the need for deference, the Court of Appeal finding that the policy was discriminatory. By contrast, in the case of *CPAG* the evidence tendered to justify the discrimination was described as “extensive, reflecting a careful analysis of a range of possible options each with differing social and economic impacts”. The presentation of a carefully thought out process implicitly endorsing the importance of transparent decision-making, was a significant aspect in deciding whether the limitation in section 5 was satisfied.

### Vulnerability

Vulnerability is also integral to a human rights approach. Although it will not always be the determinative factor it is one of a ‘constellation of factors’ that a Court should take into account in addressing human rights issues.[[144]](#footnote-144) But while the concept may appear to be comparatively straightforward, it is vague and difficult to define with any precision. In the human rights discourse, it is increasingly being used to indicate a heightened susceptibility of certain individuals or groups to being harmed or wronged by others or by the State.[[145]](#footnote-145) It is a particularly important consideration in situations where popular sentiment runs against recognition of the rights of groups such as prisoners.[[146]](#footnote-146) In such cases, it can be a way of imposing obligations on the State to ameliorate the harm of certain policies by tailoring the policies to meet the specific needs and concerns of vulnerable groups. While the development of the concept of vulnerability by the courts is a positive development, critics consider that it can create difficulties by encouraging stereotyping, stigmatization and paternalism.[[147]](#footnote-147) To avoid such negative connotations, it is best understood as a “universal, inevitable, enduring aspect of the human condition” and the role of the State is to be responsive to this.[[148]](#footnote-148)

In this context vulnerability differs from the more common understanding of an individual who is vulnerable as a consequence of a particular situation.[[149]](#footnote-149) It is better described as ‘relational’ because it reflects the idea that some people are more at risk of human rights violations as a result of their membership of a particular group or a shared demographic profile. Recognition of group vulnerability also allows society to understand how it reinforces inequalities resulting from broader societal and institutional circumstances allowing it to address them accordingly. For example, in *Quilter*, Justice Thomas said: [[150]](#footnote-150)

… socially vulnerable and marginalised members of the community have been the most oppressed by discrimination. It is simply because the basic civil and political rights of those disadvantaged and, at times, reviled people have not been accorded the concern, respect and consideration human dignity demands that the human rights movement has flourished. The international community and its participating states have sought to agree to all persons their fundamental rights.

An indication of judicial interpretation of the term can be found in *RIDCA v VM* in relation to the situation of people with intellectual disability who have committed a crime but, by nature of their condition, are unable to understand and participate in the criminal justice process. The facts of this case were outlined earlier. To briefly recap, VM, who had an intellectual disability, was charged with possession of a knife in a public place an offence which, had it gone through the normal criminal justice process, could have resulted in her being imprisoned for 3 months. As she was deemed unfit to stand trial she was made subject to a compulsory care order under the ID (CC&R) Act which lasted for two years and was renewed for another year. She was eventually discharged following a further application as it could otherwise have meant that intellectually disabled care recipients subject to an order because of the commission of a minor criminal offence could be detained for a substantial period of time by repeated renewal of the original order. The High Court found that extension of an order required ongoing and increasing justification because of the importance of the liberty interest of the subject. The decision was appealed, RIDCA arguing that the level of risk should be the relevant factor in renewing the order, not concern for the subject’s rights. While the Court of Appeal granted leave to appeal, as the legislation allowed no right to appeal to the Supreme Court[[151]](#footnote-151) Justice Baragwanath (dissenting) suggested that a better option would have been for the appellant to file declaratory judgment proceedings in the High Court then seek leave to move the proceedings to the Court of Appeal for determination allowing an appeal to the Supreme Court in the case of an adverse decision. He justified this approach because of the “outstanding importance” of the issues raised and the court’s role of safe guarding the interests of those who cannot look after themselves.

The *Terranova* case[[152]](#footnote-152) which involved the payment of female workers in the care giving industry is another example. The work is almost exclusively performed by women and notoriously poorly paid. The case was brought under the Equal Pay Act, the women claiming that they would not have been so badly paid if they had been men. The plaintiffs’ situation had all the hallmarks of vulnerability. It was *relational* as it resulted from a particular societal environment; *particular*, in that the vulnerability was shaped by specific group-based experience; and resulted in *harm*. In the course of the judgment, Judge Inglis referred to the “unquantifiable cost (including societal cost) of adopting an approach which may have the effect of perpetuating discrimination against a significant and vulnerable group in the community simply because they are women, doing what has been described as undervalued women’s work”.[[153]](#footnote-153)

An overview of recent decisions suggests that the courts are increasingly likely to apply the concept of vulnerable groups as a way of demanding State action or accountability for policy decisions, particularly in the area of economic and social rights. While this is most evident in a case such as *Terranova –* which did result in law change - it can also be seen in cases such as *CPAG*, *Atkinson*, *Daniels* and *Quilter* where the negative, often hidden, experiences of a particular group have become the focus of a move to ensure a better, more just outcome for its members.

# CONCLUSION

Our study indicates there has been a significant increase in third party intervention in cases involving human rights since the 2001 amendment to the HRA[[154]](#footnote-154) and the resulting decisions have become more consistent with a human rights approach. What is also evident, however, is that the relative newness of many of the concepts and the lack of domestic human rights jurisprudence mean that an intervener needs to have a sound knowledge and understanding of the area. While the Human Rights Commission has established a record of intervening, other agencies are also becoming more involved in cases which have a human rights dimension.[[155]](#footnote-155)The quality of representation is important as a sound argument by an intervener can have a significant impact on the eventual outcome of a case, contextualising the issue and enhancing its credibility*.* The role and quality of an intervention is likely to become even more important if the right to make a declaration of inconsistency is formally added to the Courts’ repertoire.

While it is difficult to say that intervention *of itself* has led to decisions that are more human rights compliant, the change in judicial decision making since intervention has become more common is more consistent with a human rights approach than previously. The shift by the courts to permitting third party involvement where issues of principle are involved rather than excluding applicants for traditional reasons, such as lack of standing, is a significant part of this. As Lord Neuberger put it in relation to the development of human rights jurisprudence in the United Kingdom following the enactment of the Human Rights Act 1998, “judges are approaching human rights issues in a different way from that in which they approached them fourteen years ago.” He attributed this in part to the introduction of ideas in the ECHR which made judges “more questioning about … accepted ideas and assumptions”.[[156]](#footnote-156)

This also appears to be the case in New Zealand. While this may reflect the influence of the NZBORA[[157]](#footnote-157) - particularly in relation to accountability and transparency in the public sector - it is not just the NZBORA that has changed the way judges are approaching their task. Greater acceptance by the courts of international human rights standards has played a part, as has the recognition that courts can be involved in what are effectively policy issues without infringing the roles of the Executive and the legislature.[[158]](#footnote-158) While intervention has been criticised as politicising the judicial process, there is a growing recognition that allowing the involvement of third parties can better contextualise social issues, enriching the final result. Better understanding of the impact of administrative decision making on vulnerable groups has also been crucial given the perspective that those groups can bring to proceedings.

Funding will always be an issue in whether third parties become involved in a case. Although legal aid is not available for third party intervention, some lawyers we spoke to considered it should be, particularly if an issue is in the public interest and affects more people than just the immediate parties. In contrast, those opposed to the concept of public funding for interveners argue that it raises the possibility of involvement by over-zealous parties who may be ill equipped to address the issues. The quality of representation is important. As one lawyer put it, “it would be a shame if the value of intervening was sacrificed on the altar of indifferent counsel.”However, significant changes would be required to make legal aid available to interveners. A more appropriate option would be a separate fund set up for the purpose.

The issue of costs is possibly more contentious. As a general principle an intervener bears their own costs but they can be liable for costs and costs have been awarded to an intervener where they have made a significant and unique contribution to a case.[[159]](#footnote-159) Whether this should be clarified in legislation was considered by the Law Commission but it concluded that rules rather than legislation allowed greater flexibility for dealing with interveners generally. It did, however, recommend the replication of section 99A of the Judicature Act 1908 in section 178 of the Senior Courts Act 2016 giving a court the discretion to make orders for payment by any party to the proceedings of costs in a number of instances.[[160]](#footnote-160) Given the newness of the Senior Courts Act, it would be premature to recommend a change at this point although the possibility of negotiating a compromise position on costs between the parties to the proceedings should not be lightly dismissed.

## RECOMMENDATION

If it is accepted that the role of the intervener has led to improved decision-making from a human rights perspective it then becomes a question of whether - and if so how - it could be complemented or improved.

Many jurisdictions recognise the value that third party intervention (not just in human rights cases) can bring to litigation. We looked at the position in comparable jurisdictions along with some of the templates that have been developed to assist individuals and groups seeking to intervene.[[161]](#footnote-161) This has led us to conclude that it could be appropriate to develop guidance domestically to help ensure that third parties seeking to intervene can usefully assist the courts. Detailed guidance through, for example, a Practice Direction could reassure those considering whether to intervene about the likelihood of risks (for example, an order of costs[[162]](#footnote-162)) that could result from intervention and how the court would best be helped.[[163]](#footnote-163)

More general guidance such as that developed by Liberty in the UK may also be a possibility. In the UK it was suggested that basic information should be made available at the stage of applying, while the more detailed process to be followed should only be available after a court has granted permission to intervene. Overall guidance of this type would create a framework against which reasonable and responsible behaviour could be evaluated and allow for better information to be made available about the cases that are making their way through the higher courts.

The New Zealand Law Commission in its *Review of the Judicature Act 1908* noted:[[164]](#footnote-164)

The rising scope for intervention could be seen as increasing the need to spell out in legislation such matters as when interveners should be allowed, and what their rights are. The Commission’s view is that any legislative provisions should enable the court to have sufficient discretion to tailor the extent of the role of the intervener to the particular proceedings, allowing the court to maximise efficiency and balance the concerns of both the parties and the intervener. It could be useful to have a provision stating the court’s power to grant a third party leave to act as an intervener, but also that details regarding the process for intervention and role of an intervener are more suited to being set out in rules than in the consolidated courts statute that was being considered.

The Law Commission identified the following matters that could be clarified in this way:

* the costs that an intervener may be liable for;
* the process for making an application to intervene, and what material the prospective intervener must provide to the court;
* the time for filing an application;
* criteria for determining whether leave to appear will be granted;
* when an intervener may give both written and oral submissions;
* any restrictions on the parameters of matters that interveners can discuss; and
* whether new evidence can be introduced by an intervener at an appeal stage.

# APPENDIX 1: HRC TEMPLATE

**HRC TEMPLATE ON FACTORS INFLUENCING WHETHER TO INTERVENE**

**MEMO: CONFIDENTIAL AND SUBJECT TO LEGAL PRIVILEGE**

**To: [Commissioners]**

**From: [Legal staff responsible]**

**cc. [Relevant HRC management/staff]**

**Re: [name of proceeding]**

**Date: [ ]**

**Introduction**



**Background to the proceedings**



**Suitability Assessment**

1. The suitability criteria set out in the table below below are based on the Scope of Delivery criteria set out in the *Terms of Reference: Legal Interventions* document.

|  |  |
| --- | --- |
| **Suitability Criteria set out in HRC Terms of Reference: Legal Interventions** | **Assessment** |
| **Can the HRC assist the Court and add value by raising matters/adopting an approach that may not be raised by other parties?** |  |
| **Does the case have the potential to have a major impact on human rights?** |  |
| **Does the case involve an important point of law? e.g. key concepts, scope of the law, addresses significant gaps?** |  |
| **Could the proceedings have a significant impact on a particular sector or is likely to affect a large number of people?** |  |
| **Is intervention in the proceedings the most effective use of HRC resources?** |  |
| **Does the case involve broader strategic issues relating to the role, functions or reputation of the Commission?** |  |
| **Is there an absence of other legal support, taking into account the particular circumstances of the individual and the above criteria?** |  |

1. In summary, the human rights issues arising from the proceedings are aligned/not aligned with the Scope of Delivery criteria and the Commissions’ broader strategic objectives.

**Assessment against the Terms of Reference criteria**

1. The following table assesses the implications of intervening in the case against the Terms of Reference criteria set out in the Commission’s *Terms of Reference: legal interventions* document.

|  |  |
| --- | --- |
| **Relevant HRC Terms of Reference criteria** | **Assessment** |
| **Consistency with the HRC’s values and strategic priorities** |  |
| **A clearly defined outcome** |  |
| **Who will benefit from the proceedings** | . |
| **The social, human rights and political context** |  |
| **Possible publicity** |  |
| **The effectiveness of the proposed intervention** |  |
| **HRC capacity to carry out the work involved** |  |

**Relevant Treaty obligations and legislative provisions**

1. The following table provides an overview of the UN Treaty provisions, legislative provisions and government policies that are most relevant to the proceedings.

|  |  |
| --- | --- |
| **Instrument** | **Relevant provisions** |
| **UN Treaty obligations** |  |
| **Human Rights Act 1993** |  |
| **New Zealand Bill of Rights Act 1990** |  |
| **Other legislative and policy settings** |  |

**Conclusion/Recommended action**

# APPENDIX 2: INTERVENTION IN OTHER JURISDICTIONS

## EUROPEAN UNION

### European Court of Justice

There is a limited right to intervene before the CJEU[[165]](#footnote-165). Actions before the CJEU may involve:

* Preliminary references: that is, requests from domestic courts on interpretation of EU law.[[166]](#footnote-166)
* Direct actions: involving disputes between individuals, institutions or other private entities about breaches of EU law.[[167]](#footnote-167)

Third parties can only intervene in preliminary references if they are parties to the main proceeding. Even if permission to intervene has been granted by a domestic court this does not guarantee that the intervener will be allowed to appear before the CJEU*.*[[168]](#footnote-168) In relation to cases involving direct action, parties may only intervene if they can establish a direct, existing interest in the case.[[169]](#footnote-169)For example if the intervener is directly affected by the issue involved.

There are two types of procedure:

**Written Procedure**

The written procedure is initiated by the Court of Appeal making a reference to the CJEU. This is also the point where the Advocate General and the judge-rapporteur, who is managing the particular case, are allocated. Written observations are filed and the judge-rapporteur sets out the points raised by the interveners and other parties and draws up a preliminary report which is served on all parties.

Once the report has been circulated, the parties can inform the Registrar of any errors or omissions. At a meeting of the Advocate General and the Judges, depending on the issues raised in the case, the composition of the court is decided and a formal Report for the Hearing circulated to all parties. Relevant documents and reports are translated into the relevant languages and served on all parties by the Registry of the CJEU, a process that can take several weeks.

**Oral Procedure**

The oral procedure is more straightforward. The Opinion of the Advocate General is delivered following a hearing. The judgment is then issued but will only be published once it is translated. Even though such opinions are not binding, in 60 -70% of the cases the opinion is followed.[[170]](#footnote-170)

### European Court of Human Rights

The European Court of Human Rights has a relatively liberal approach to granting leave to third party interveners. Although the right is rarely exercised, States have the right to intervene in cases brought by one of their nationals against another contracting State under Article 36(1) of the European Convention. Article 36, rule 44 also allows any person (which can include a State, individual or organisation) to intervene if it is considered to be in the interest of the proper administration of justice. Under Article 36(2), rule 44(3) a third party may be given permission by the Court to submit written comments or, in exceptional cases, to take part in hearings. A recent trend is for certain governments and for national human rights institutions to intervene when issues of public international law are involved.

Rule 44 imposes a duty to cooperate with the Court [44A]. If a party fails to cooperate the President may take any steps that he considers appropriate [44B]. The court may decide to discontinue an application if a party fails to participate effectively or makes inappropriate submissions. If an applicant fails to pursue an application, the court may strike the application off its list under Rule 43.

## UNITED KINGDOM

There are several ways of intervening in UK. Explicit rules are set out by the Appellate Committee of the House of Lords (Rule 37), UK Supreme Court Rules (15, 26, 40 & 41), High Court Civil Procedure Rules (19.2(2) & 54.17) and Privy Council Rules (Rule 27). The rules are largely the same, enabling interveners (with varying degrees of interest in the case) to apply for permission to appeal. The judicial body concerned then considers whether to permit intervention. There is no guidance on the criteria on which a decision shall be made. Most notably, the Court of Appeal has no express rules governing intervention even though interventions are permitted at the Appeal Court stage as part of the inherent jurisdiction of the court.

### Administrative Courts

In the administrative courts, “any person” may apply in judicial review proceedings to either file evidence or make representations (Rule 54.17(1)). The only express guideline for the application is that it should be made promptly (54.17(2)). The Practice Note on Rule 54.17 bolsters the court’s interest in receiving and determining applications to intervene so as not to delay the hearing (Paragraph 13.5). Applicants are expected to have first consulted with the parties before submitting their application to intervene[[171]](#footnote-171). There are no fees for applications made under Rule 54.

Applications to intervene are determined informally based on whether the intervention would provide the court with information, expertise or perspective over and above that which can be provided by the parties[[172]](#footnote-172). If the intervener merely intends to restate what one of the parties is submitting, it is unlikely that leave will be granted.

### Court of Appeal

The Court of Appeal has no formal provisions governing interveners. Applications to intervene may either be made formally under a Part 23 Application notice (Form N244), or informally by letter to the Civil Appeals Office. An application under Part 23 costs £200, which can be a significant barrier for some. The form itself may also be an obstacle as it is designed for parties rather than interveners[[173]](#footnote-173). If an intervener applies by letter, there is no fee or requirement to fill out a form.

Applications by either method must set out the reasons why the applicant wishes to intervene, and brief details of the intervention. The proposed intervener must have sought the views of the parties before submitting their application.[[174]](#footnote-174)

### House of Lords

The House of Lords has specific rules governing third party interveners[[175]](#footnote-175). Third parties intending to intervene may do so upon petitioning the House for leave and paying the applicable fee (£570) (Rule 37.1, 37.2). This must be done at least six weeks before the date of the hearing of the appeal (Rule 37.4), reaffirming the interest in expediency and not delaying cases that are already before the courts. The application must be certified with the consent of both parties, or – if the parties do not consent – a brief note as to the reasons why (Rule 37.2).

With all these processes there is no substantive direction as to how applications are determined. The only insight is that found in *Re Northern Ireland Human Rights Commission (Northern Ireland)* when Lord Woolf said:[[176]](#footnote-176)

The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court’s judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties.

Interveners may apply to make either written or oral submissions, or both. Usually applications are for written submissions and acceptance of these has come to be defined as “commonplace”. Leave to make oral submissions is sought less often, and the Court will decide the time each intervener has for their submissions.[[177]](#footnote-177)

### Supreme Court

The Supreme Court Rules 2009 set out who may apply as an intervener (Rule 15). Intervener applications may be allowed for either written or written and oral submissions (Rule 26(1)). Applications are made on the SC002 form which is tailored to interveners, unlike the forms that apply in the Court of Appeal.

In 2009, the fees for applications were set at £200 for devolution cases and £800 for civil cases.[[178]](#footnote-178) However, fees may be reduced or remitted when an application to intervene is filed by a charitable or non-profit organisation making submissions in the public interest (Schedule 2, para 9).

### Privy Council

The Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (SI 2009/224), Rule 27(1) sets out the rules for third party intervener applications. The application is considered on paper, and intervention is permitted by written submission or written and oral submissions (Rule 27(2)). The fee for an application is £100 (Practice Direction 7, Schedule 2).

### Attorney General

The Attorney General has a public interest role as an independent officer of the Crown and the power to bring or intervene in certain family law and charity proceedings and other legal proceedings that are in the public interest. In exercising such functions the Attorney General acts independently of Government, and may consult Ministerial colleagues but does not act at their direction. The Crown can intervene as of right in constitutional litigation.

## SCOTLAND

Interventions in the public interest are rare in the Scottish Courts. It was not until 2000 that express provision was made in the Rules of the Court of Session for third party intervention.[[179]](#footnote-179) The Scottish Human Rights Commission has its own rules of court.[[180]](#footnote-180)

**Application Procedure**

An intervener can apply by filing a minute pursuant to Form 58.18.[[181]](#footnote-181) This minute must include:[[182]](#footnote-182)

* The name and description of the intervener
* The issues to be addressed and the reasons for why the issues raise a matter of public interest
* The propositions that the intervener wishes to put forward, and explanations of why these propositions are relevant to the court and how they will assist the court.

The court will then decide if the intervention can proceed. Issues that will be considered include whether:[[183]](#footnote-183)

* The issue concerns the public interest
* The propositions are likely to help the court
* The intervention will not unduly delay the proceedings or in any way prejudice the other parties. This includes the possibility of liability for costs.[[184]](#footnote-184)

## CANADA[[185]](#footnote-185)

### Supreme Court

Intervention in the Supreme Court is governed by Part 11 (Rules 55-59) of the Rules of the Supreme Court of Canada. Rule 55 establishes that any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge. Rule 56 covers the limitation periods for making a motion for intervention, and rule 57 covers the contents of the application.

Rule 59(1) provides additional considerations for the judge, such as any disbursements, the imposition of any terms and conditions and the grant of any rights and privileges determined by the judge. Rule 59(2) gives the judge discretion to authorise the intervener to present an oral argument at the hearing, but under r 59(3), an intervener is not permitted to raise new issues unless otherwise ordered by the judge.

The Rules of the Supreme Court do not specify the grounds on which a motion for leave to intervene would be allowed. However, the Supreme Court in *Reference re Workers’ Compensation Act, 1983 (Nfld) (Application to Intervene)* held that the applicant must demonstrate:[[186]](#footnote-186)

1. An interest; and
2. Submissions will be useful and different from those of the other parties.

In terms of the interest test, it has been said that “any interest is sufficient, subject always to the exercise of discretion”.[[187]](#footnote-187) As for the “useful and different” requirement, this will be satisfied where “the intervener will provide the Court with fresh information or a fresh perspective on an important or public issue”. [[188]](#footnote-188) It follows that materials in support of a motion to intervene must be *relevant* and *not duplicate* material provided by other parties. Generally, once the Court grants leave the intervener is limited to a brief factum and an appearance at the hearing of the appeal. Under this process, the Court typically grants more than 90 percent of the requests to intervene.[[189]](#footnote-189)

The Court’s decisions vary from case to case and interveners cannot automatically assume they will be granted leave. For example, in *R v N.S.*, the Supreme Court dealt with the question of whether requiring a witness to remove her niqab while testifying would interfere with her religious freedom. Several public interest groups sought leave to intervene and were granted intervener status. The same groups were declined intervener status in a later case, *R v Ishaq*[[190]](#footnote-190)which involved similar facts. Overall judicial reception of interveners has mostly been positive, several SCC Justices acknowledging their importance. For example:[[191]](#footnote-191)

* Wilson J acknowledged that interveners were “invaluable in most cases”;
* Major J noted that “interveners have made valuable contributions to the work of the court”; and
* Iacobucci J added quite recently that interveners have played a “highly significant role” in litigation at the SCC level.

A study by Professor Koshan on the question of the influence of public interest interventions has concluded that, after reviewing eight decisions of the SCC in the fields of family, labour and equality rights law, interveners have been useful to the Court in presenting materials and arguments that assisted the Court.[[192]](#footnote-192)

### Federal level

Most provinces have their own Rules of Civil Procedure that make the test more restrictive or emphasise the need to avoid prejudice to immediate parties by granting intervener status.[[193]](#footnote-193) Other tests at federal level do not differ substantively from the Rules of the Supreme Court of Canada.[[194]](#footnote-194) The prejudice factor leaves scope for the direct parties to dispute the granting of intervener status on the grounds that it will cause them prejudice and injustice.[[195]](#footnote-195)

Overall, courts tend to be more lenient in permitting interveners in constitutional as opposed to private law legislation, principally because of the costs and complexity that interveners can bring to private legislation.[[196]](#footnote-196) Some courts have since added an additional consideration as to whether the issues are essentially private in nature or if they involve a public interest component. In the case of the former, “the standard to be met by the proposed intervener is more onerous or more stringently applied”. In the case of the latter, the threshold may be relaxed when public policy issues arise or matters of public interest are involved. However, litigation involving constitutional issues is not necessarily an open door to intervention either.

### The Attorney-General

Under Rule 32, the Attorney-General can intervene on constitutional matters without obtaining leave. On non-constitutional matters, the Attorney-General must apply for leave.

## UNITED STATES

### Supreme Court

The [Supreme Court](https://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States)  has special rules for *amicus curiae* briefs sought to be filed in cases pending before it. Supreme Court Rule 37 states, in part, such a brief should cover "relevant matter" not dealt with by the parties which "may be of considerable help”. The cover of an *amicus* brief must identify which party the brief is supporting, or if the brief supports only affirmance or reversal. The Court also requires that, *inter alia*, all non-governmental amici identify those providing a monetary contribution to the preparation or submission of the brief. There is a strong tendency to allow all who apply to intervene in this way which has had the effect of unduly politicising the process.

### Federal courts

Intervention is governed by [Rule 24](http://www.law.cornell.edu/uscode/html/uscode28a/usc_sec_28a_02000024----000-.html) of the [Federal Rules of Civil Procedure](https://en.wikipedia.org/wiki/Federal_Rules_of_Civil_Procedure). Rule 24(a) governs intervention as of right. An applicant has the right to intervene in a case when a federal statute explicitly confers upon the applicant an unconditional right to intervene or when the applicant claims an interest relating to the property or transaction which is the subject of the [lawsuit](https://en.wikipedia.org/wiki/Lawsuit). In order to be admitted as an intervenor, the applicant must show that its ability to protect its interest would be impeded by disposition of the case and that its interest is not adequately represented by the current parties to the case. Rule 24(b) provides for intervention at the discretion of the judge hearing the case. An applicant may be permitted by the court to intervene when a federal statute confers upon the applicant a conditional right to intervene or when the applicant's claim involves a question of law or fact in common with the main action. In both cases the applicant cannot sit on its rights and must intervene as soon as it has reason to know that its interest may be adversely affected by the outcome of the litigation.

Agents of the federal or [state](https://en.wikipedia.org/wiki/U.S._state) government may be permitted by the court to intervene when a party to a case relies on a federal or state statute or [executive order](https://en.wikipedia.org/wiki/Executive_order_%28United_States%29), or any [regulation](https://en.wikipedia.org/wiki/Regulation) promulgated thereunder, for its claim or defence.

### The Attorney General

Intervention by United States or a State under 28 U.S. Code § 2403 on a constitutional question as of right.

## AUSTRALIA

In Australia the position is similar to that in New Zealand. The courts have the inherent jurisdiction to regulate their own procedure, although different court rules also regulate non-party joinder. However, traditionally the Australian courts have been reluctant to permit third party intervention unless the applicant is directly affected by a decision in the proceedings[[197]](#footnote-197). The different courts have different rules for joinder.

### High Court

High Court Rules 2004 (Cth) Ch 2. Pt 21 allows two or more persons to be joined as plaintiffs or as defendants in any proceeding: where the Court or a Justice, before or after the joinder, gives leave to do so; or  where (i)  if separate proceedings were brought by or against each of them, some common question of law or fact would arise in all of the proceedings; or  (ii)  all rights to relief in the proceeding (whether joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions. There is also a Practice Direction No.1 of 2000 – *Written Submissions and Authorities: All Full Court Matters Except Removal Applications or Leave or Special Leave Applications* – which provides procedural guidance relating to the filing of material by interveners and amicus curiae in the High Court.

### Supreme Court

Although for the most part this relies on the inherent jurisdiction of the Court, states have different procedural rules dictating joinder. For example, Supreme Court (General Civil Procedure) Rules 2015 (Vic); or Supreme Court Rules 2006 (S Aust)

### Federal Court

The Federal Court Rules 2011 (SLI NO 134 OF 2011) - RULE 9.12 specifically addresses the role of interveners rather than the joinder of parties generally and provide detailed guidance on how the court should exercise its discretion.

### The Attorney-General

The Attorney-General can intervene where a right has been granted through statute, such as in constitutional cases under s.78A (1) of the Judiciary Act 1903 (Cth) or in civil litigation that may affect the prerogatives of the Crown. Apart from this there is no accepted practice allowing the Attorney-General to intervene as of right in non-constitutional matters as a matter of public policy.[[198]](#footnote-198)

# APPENDIX 3: PRACTICE NOTES

## SUPREME COURT OF UK[[199]](#footnote-199)

**Intervention**

8.8.1 A person who is not a party to an application for permission to appeal may apply for permission to intervene in accordance with rule 15. See paragraph 3.3.17 of [Practice Direction 3](https://www.supremecourt.uk/procedures/practice-direction-03.html). A person who is not a party to an appeal may apply for permission to intervene in accordance with rule 26. See paragraph 6.9 of [Practice Direction 6](https://www.supremecourt.uk/procedures/practice-direction-06.html). (See below)

8.8.2 Attention is drawn to paragraphs 2 and 3 of Lord Hoffmann's opinion in *E v The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66, [2009] 1 AC 536, where he said this.

“It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help”.

3. An intervention is of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way."

6.9.1 A person who is not a party to an appeal may apply in accordance with rule 26 for permission to intervene in the appeal. An intervener under rule 15 who wishes to intervene in the appeal must make a formal application under rule 26.

6.9.2 An application should be made in the general form of application, Form 2, (see paragraph 7.1 of [Practice Direction 7](https://www.supremecourt.uk/procedures/practice-direction-07.html) for applications) and should state whether permission is sought for both oral and written interventions or for written intervention only. The application should be filed with the prescribed fee and confirmation of the consent of the appellants and respondents in the appeal. If their consent is refused, the application must be endorsed with a certificate of service on them, with a brief explanation of the reasons for the refusal.

6.9.3 Applications for permission to intervene should be filed at least 6 weeks before the date of hearing of the appeal. Failure to meet this deadline may increase the burden on the parties in preparing their cases and the core volumes, and may delay the hearing of the appeal.

6.9.4 If permission is given, written submissions must be filed and also given to the appellants and respondents for incorporation into the core volumes at least 4 weeks before the hearing. They should avoid repeating material that is in the parties' written cases. They should concentrate on the particular points that the intervener wishes to raise and should normally not exceed 20 pages of A4 size.

6.9.5 All counsel instructed on behalf of an intervener with permission to address the Court should attend the hearing unless specifically excused.

6.9.6 Subject to the discretion of the Court, interveners bear their own costs and any additional costs to the appellants and respondents resulting from an intervention are costs in the appeal. Orders for costs "will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent)": rule 46(3).

## SUPREME COURT OF CANADA

### **General Procedure: Rule 18**

1. **Application for leave to intervene**  
   The general rules for interventions in the Supreme Court of Canada are found in Rule 18. This rule provides that a person interested in an appeal or reference can intervene by leave of a judge. As noted above, there is no longer an automatic right to intervene for those parties who had intervener status at the lower level court.
2. **Procedures for filing an application for leave to intervene**  
   Pursuant to Rule 18(2), an application for leave to intervene must be made within 60 days after the filing of a notice of appeal or reference. This is done by filing and serving a notice of motion in Form B.2 together with a supporting affidavit.
3. **Contents of an application for leave to intervene**  
   Rule 18(3) outlines the required contents of an application for leave to intervene. The criteria listed in 18(3) are all factors which will be considered by the court in deciding whether an application for leave to intervene will be allowed. These criteria will be discussed in more detail below.
4. **Order granting leave to intervene**  
   Under Rule 18(6), where leave to intervene is granted, the court order specifies the date by which the intervener's factum must be filed. Furthermore, the court order may make provision for the additional disbursements incurred by the parties to the appeal as a result of the intervention.
5. **Rights and privileges of an intervener**  
   Pursuant to Rule 18(1), the judge has the discretion to determine the terms and conditions on which an application for leave to intervene will be granted as well as the rights and privileges of an intervener. Subject to Rule 18(1), 18(4) and (5) outline the basic rights and limitations of an intervener. Under Rule 18(4), an intervener has the right to file a factum and Rule 18(5) provides that:

18(5) Unless otherwise ordered by a judge, an intervener

* 1. shall not file a factum that exceeds 20 pages;
  2. shall be bound by the case on appeal and may nor add to it; and
  3. shall not present an oral argument.

In other words, if one wishes to file a factum in excess of 20 pages, not be bound by the case of appeal, or present an oral argument, one has to specifically apply for same.

### **Attorneys-General as Interveners**

1. **Rule 18: Intervention by application** On issues other than constitutional questions, the Attorneys-General of Canada and of the provinces as well as the Ministers of Justice of the two territories must apply for leave to intervene just like any other party. Because of the circularity between Rules 18(8) and 32(7), there is some ambiguity as to whether an Attorney-General or Minister of Justice is limited by Rule 18(5)(a) and (c). Therefore the safest approach when applying for leave under Rule 18 on a non-constitutional issue is to apply for leave to file a factum that exceeds 20 pages or to present an oral argument.
2. **Rule 32: Intervention as of right** Under Rule 32, the Attorneys-General and the Territorial Ministers of Justice are entitled to intervene without leave on constitutional questions.
   1. Raising a constitutional question: Where a party raises a question as to the constitutional validity, applicability or inoperability of a statute, a constitutional validity, applicability or inoperability of a statute, a constitutional question may be stated by a judge on a motion brought by one of the parties pursuant to Rule 32(1). The motion must be brought within 60 days from the filing of the notice of appeal unless the Chief Justice or judge allows for an extension of this time under Rule 32(3).

It should also be noted that, under Rule 32(7), an Attorney-General who has been granted intervener status under Rule 18 can bring a motion to state a constitutional question within 15 days after leave to intervene has been granted.

The Supreme Court's decision in Tetrault-Gadoury v. Canada (Employment & Immigration Commission) provides some useful insight into the court's decisions whether or not to state a constitutional question. The court in Tetrault-Gadoury outlined five circumstances in which, as a matter of policy, a constitutional question would not be stated. The court refused to state such questions when:

* + 1. the question proposed did not comprehend the degree of generality which would justify the application of Rule 32,
    2. the issue raised was essentially one of evidence,
    3. the question arose from the facts of the case,
    4. there was no attack on the validity of a law, but when the court was being asked to construe a law in light of a section of the Charter, or
    5. that the alleged infringement or denial of guaranteed rights arose from particular facts as opposed to a law or regulation.
  1. Notice of constitutional question and of Attorney-General's right to intervene: Pursuant to Rule 32(4), all of the Attorneys-General and the Territorial Ministers or Justice are to be served with any constitutional questions stated by the court. Notice of the question is to be served together with a notice that any Attorney-General or Minister of Justice who wishes to intervene shall file a notice of intervention in Form C and serve same on the parties. By virtue of Rule 18(7), an Attorney-General or Territorial Minister of Justice intervening under Rule 32(4) has a number of advantages which others seeking to intervene do not. The Attorneys-General and Territorial Ministers of Justice:
     1. need not apply for leave to intervene;
     2. need not describe their interest in the appeal or reference;
     3. need not state the position they will take in the appeal or reference;
     4. need not persuade the Court of the relevance, usefulness or difference of their submission;
     5. are not limited by the 20 page maximum for a factum;
     6. are not subject to the prohibition on oral argument.

### **Internal Process**

**(1) Rule 18**

An application for leave to intervene is treated as a normal motion before the court, such that one files a notice of motion and affidavit [Rule 18(2)]. The notice of motion and affidavit in support, together with opposing affidavits if any, are referred to the judge handling interlocutory motions that particular week for determination, with or without counsel and with or without reasons.

**(2) Rule 32**

For a Rule 32 application, one also commences with a notice of motion and affidavit specifically stating the constitutional question with the particular alleged constitutional infringement being a separate question from the s. 1 justification. This is, of course, served on all parties and then filed with proof of service. Then the local agent is informed by the court of the date that the Chief Justice will hear the motion, if the Chief Justice is not prepared to sign as is.

Upon the order being granted (generally in writing on the notice of motion itself), the constitutional question(s) is translated by professional legal translators in the court and upon receipt of same, the local Ottawa agent prepares a notice of constitutional question and order, arranges for the Registrar to sign the latter, and then arranges for all Attorneys-General and Territorial Ministries of Justice to be served. As a courtesy, one should also serve the parties. As a further (and now almost uniform) courtesy, a copy of the reasons for judgment of the Court of Appeal below is also served on all Attorneys-General and Territorial Ministries of Justice. Of course, proof of service is then filed with the court.

1. *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 at [32] per Lord Woolf; domestically see *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 (HC) where costs were eventually awarded against the Proceedings Commissioner (intervening on behalf of the Commission) because the “submission buttressed the respondent’s case…”. [↑](#footnote-ref-1)
2. But see *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 183, [2017] NZAR 627 in which the Court of Appeal declined to grant intervenor status to the applicants because their applications were so general that it risked the Court engaging in a form of judicial inquiry rather than adjudicating on a specific dispute - an approach which the Court had cautioned against in *Drew v Attorney-General* [2001] 2 NZLR 428 (CA) at [16]. [↑](#footnote-ref-2)
3. Peter Cooper, Paul Hunt, Janet McLean and Bill Mansfield *Re-evaluation of the Human Rights Protections in New Zealand: Report for the Associate Minister of Justice* (Ministry of Justice, October 2000) at 68. The nature of the HRA and the dichotomy between the public and private sectors makes the situation in New Zealand unique because it involves different standards and can conflate the personal and public interest. See more generally Margaret Wilson “An Account of the Making of the Human Rights Amendment Act 2001” (2011) 19 Wai L Rev 1. [↑](#footnote-ref-3)
4. Law Commission *Review of the Judicature Act: Towards a Consolidated Courts Act* (NZLC R126, 2012), but see r 48(1) of the Court of Appeal (Civil) Rules 2005, which confers powers on the Court to deal with its own procedures and serve notices on parties not party to the proceedings [↑](#footnote-ref-4)
5. PM Collins *Friends of the Supreme Court: Interest Groups and Judicial Decision making* (Oxford University Press, New York, 2008). [↑](#footnote-ref-5)
6. P Bryden “Public Interest Intervention in the Courts” (1987) 66 Can Bar Rev 490. [↑](#footnote-ref-6)
7. An empirical study into the role of third party interventions in the House of Lords over the ten years following the introduction of the Human Rights Act 1998 found significant changes in judicial decision making had resulted from those interventions: S Shah, T Poole, M Blackwell “Rights, Interveners and the Law Lords” (2014) 34 OJLS 295; see also Alec Samuels “The intervener is here to stay” (6 October 2017) New Law Journal <www.newlawjournal.co.uk>. [↑](#footnote-ref-7)
8. “Justice Intervening” (26 October 2009) UK Supreme Court Blog <http://ukscblog.com>. The origin of the quote is *R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39. [↑](#footnote-ref-8)
9. Carol Harlow “Public Law and Popular Justice” (2002) 65 MLR 1. [↑](#footnote-ref-9)
10. The new grounds were disability, political opinion, employment status, family status and sexual orientation. Most of the criticism came from the disability community and related to the omission to require the public sector to comply with their needs. [↑](#footnote-ref-10)
11. *Seales v Attorney-General* [2015] NZHC 828. [↑](#footnote-ref-11)
12. At [62] – [65]. [↑](#footnote-ref-12)
13. Since 2002 it has been involved in at least eighteen cases. [↑](#footnote-ref-13)
14. In *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245 the Supreme Court granted the Commission leave to intervene noting that “[the]Court is satisfied that the grounds for intervention advanced by the Commission provide a proper basis for leave to intervene to be granted in light of the issues raised in the appeal, the Commission’s statutory functions under s 5 of the Human Rights Act 1993 and the Commission’s experience and expertise.” See also *Attorney-General v Taylor* [2017] NZSC 131 where the Commission was granted leave to intervene on the general merits of the appeal because of its human rights expertise. [↑](#footnote-ref-14)
15. *S*pencer v Attorney-General [2013] NZHC 2580, [2014] 2 NZLR 780 at [15]. [↑](#footnote-ref-15)
16. *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456. [↑](#footnote-ref-16)
17. *CPAG v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729. [↑](#footnote-ref-17)
18. *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA). [↑](#footnote-ref-18)
19. Intervention in the private interest is relatively uncommon as the person is likely to be a party or apply to join themselves as an interested party. For more on the distinction see the decision of Palmer J in *Kamel Mohamed v Guardians of New Zealand Superannuation* [2020] NZHC 1324, particularly at [14]:

    … the threshold for intervention does not differ …on whether a case involves issues of private or public law. Public and private law, though convenient labels, are moreof a continuum than a distinction. But if the distinction is used, I consider intervention is more likely in a public law case only because it is more likely an intervener will assist the Court in a public law case than a private law case. [↑](#footnote-ref-19)
20. For example in the UK, see *R v Smith (Lance Percival)* [2003] EWCA Crim 283, [2003] 1 WLR 2229 and in New Zealand *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710. The Privacy Commissioner intervened in *Alsford,* the Supreme Court acknowledging (at [15]) the considerable assistance that he provided. For a fuller description of the situation in the UK and Canada see A Loux “Hearing a Different Voice: Third Party Intervention in Criminal Appeals” (2000) 53 CLP 459. The author recognises that intervention could lead to unfairness to the accused but by the same token the operation of the justice system implicates significant societal or “public” interests that may demand representation when the powers of the state in relation to its citizens are being determined. [↑](#footnote-ref-20)
21. See *Borrowdale v Director-General of Health* [2020] NZHC 1379 at [41]. [↑](#footnote-ref-21)
22. In the US the role of amicus is the established term for a third party intervener and likely to be more partisan than in New Zealand. [↑](#footnote-ref-22)
23. Shah and Poole ““Rights, Interveners and the Law Lords,” above n 7, at 297. [↑](#footnote-ref-23)
24. Hon Michael Kirby “Deconstructing the Law’s Hostility to Public Interest Litigation” (2011) 127 LQR 537 at 549. [↑](#footnote-ref-24)
25. *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 266 per Salmon LJ. [↑](#footnote-ref-25)
26. *RIDCA Central v VM* [2011] NZCA 659, [2012] 1 NZLR 641. The case is interesting as the point of public importance raised by the proposed appeal was considered sufficiently important to justify granting leave, notwithstanding that the appeal itself was moot. [↑](#footnote-ref-26)
27. *Director of Human Rights Proceedings v Sensible Sentencing Group Trust* [2013] NZHRRT 26 (19 August 2013). [↑](#footnote-ref-27)
28. *Beneficial Owners of Whangaruru Whakaturia (No. 4) v Warin* [2009] NZCA 60, [2009] NZAR 523. [↑](#footnote-ref-28)
29. *Taylor v Manager of Auckland Prison* [2012] NZHC 1241 (5 June 2012) at [86]. [↑](#footnote-ref-29)
30. *Beneficial Owners of Whangaruru Whakaturia (No. 4) v Warin,* above n 30, at [27]. [↑](#footnote-ref-30)
31. Law Commission *Review of the Judicature Act: Towards a Consolidated Courts Act*, above n4, at [15]. For a more recent example of the constraints that can be placed on a McKenzie Friend see Craig v Slater [2017] NZHC 874. [↑](#footnote-ref-31)
32. *R v Conaghan* [2017] EWC Crim 597. [↑](#footnote-ref-32)
33. High Court Rule 4.31. [↑](#footnote-ref-33)
34. High Court Rule 4.32. [↑](#footnote-ref-34)
35. High Court Rule 4.29. An earlier rule required a person to be mentally disordered. [↑](#footnote-ref-35)
36. High Court Rule 4.30. [↑](#footnote-ref-36)
37. *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486 [*Sunset Terraces*]. [↑](#footnote-ref-37)
38. “Standing” Legal Dictionary by The Free Dictionary <https://legal-dictionary.thefreedictionary.com>. [↑](#footnote-ref-38)
39. *Jeffries v Attorney-General* [2010] NZCA 38. See also *Drew v Attorney-General* [2001] 2 NZLR 428 at [11] and *Moxon v Casino Control Authority* (HC Hamilton M324/999 24 May 2000). [↑](#footnote-ref-39)
40. See, for example, J Karastelev “On the outside seeking in: must interveners demonstrate standing to join a lawsuit?” [2002] 52 Duke LJ 455; M Gelowitz “*P.S v Ontario*: Ontario Court of Appeal Clarifies When Intervention Should be granted in Constitutional Cases” (2014) accessible at [www.conductofanappeal.com](http://www.conductofanappeal.com). See also Sir Ivor Richardson, “Public Interest Litigation” (1995) 3 Wai L Rev 1. [↑](#footnote-ref-40)
41. *Re D’s Application* [2003] NICA 14. See also Australian Law Reform Commission *Standing in Public Interest Litigation* (Report 27, 1985; modified 2015) which described the law of standing in Australia as confused and restrictive since different tests of standing apply depending on the type of remedy the plaintiff was seeking. The report concluded that though the rules of standing should be broadened, standing should be denied to a party if their interest in the action is deliberately meddlesome or the interest too minimal. Despite this the law has not been changed to accommodate the ALRC’s proposals. [↑](#footnote-ref-41)
42. Baroness Hale “Judicial Review Trends and Forecasts”(Judicial Review Conference 2013). [↑](#footnote-ref-42)
43. *Smith v Attorney-General* [2017] NZHC 1647, [2017] NZAR 1094. The decision contains a useful discussion on the history of the evolution of the concept in judicial review proceedings at [18] – [31]. [↑](#footnote-ref-43)
44. Part 1A of the HRA introduced the Bill of Rights standard for discrimination in relation to the public sector when the Act was amended in 2001. [↑](#footnote-ref-44)
45. Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* **(**2nd ed, Lexis Nexis, Wellington, 2015) at [34.5.3]. The original draft of the NZBORA included a provision limiting the right of action to those whose rights had been breached. As this was not carried forward into the final version, it suggests that the ‘victim’ requirement was not considered that relevant. [↑](#footnote-ref-45)
46. See in this respect the decision of Winkelman J in *Spencer v Attorney-General* [2013] NZHC 2580 at [164]. [↑](#footnote-ref-46)
47. *IRC v National Federation of Self-Employed & Small Businesses Ltd* [1988] AC 617 (HL) cited in Butler and Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 48. [↑](#footnote-ref-47)
48. *New Zealand Private Prosecution Service limited v Key* [2015] NZHRRT 48 at [35]. [↑](#footnote-ref-48)
49. *RIDCA v VM* [2011] NZCA 659, [2012] 1 NZLR 641. [↑](#footnote-ref-49)
50. *Attorney-General v Human Rights Review Tribunal* (2006) 18 PRNZ 295. Contrast the situation in the UK where it seems that litigants in cases under the HRA must satisfy the ‘victim’ test. [↑](#footnote-ref-50)
51. At [61]. See also *Attorney-General v Adoption Action* [2016] NZHRRT 9. [↑](#footnote-ref-51)
52. Sir Ivor Richardson “Public Interest Litigation” (1995) 3 Wai L Rev 1. But see the disagreement on this point between Sedley J and Sumption J beginning with Sedley’s article “Judicial Politics” (2012) 34(4) *London Review Of Books*. [↑](#footnote-ref-52)
53. For overviews of the debates about its meaning and content see Barry Bozeman *Public Values and Public Interest* (Georgetown University Press, Washington DC, 2007) at chapter 1; R Box “Redescribing the Public Interest” (2007) 44 *Social Science Journal* 585; Mike Feintuck *The Public Interest in Regulation* (Oxford University Press, 2004) at chapter 1. [↑](#footnote-ref-53)
54. Carol Harlow “Public Law & Popular Justice,” above n 9, at 6. [↑](#footnote-ref-54)
55. Citing David Feldman “Public Interest Litigation & Constitutional Theory in Comparative Perspective” (1992) 55 MLR 44 at 48. [↑](#footnote-ref-55)
56. The terminology was used by the Attorney-General in relation to Child Poverty Action Group in *Atorney-General v Human Rights Review Tribunal*, above n 53 at 27, but it has its origins in the comments of Lord Denning in *Attorney-General of the Gambia v N’jie* [1961] 2 All ER 502 at 511. [↑](#footnote-ref-56)
57. *R (Re Northern Ireland Human Rights Commission) v Greater Belfast Coroner* [2002] UKHL 25. [↑](#footnote-ref-57)
58. Butler and Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 48 at [34.6.1], and see *Borrowdale v Director-General of Health* [2020] NZHC 1379 at [20]. [↑](#footnote-ref-58)
59. *Seales v Attorney-General* [2015] NZHC 828. [↑](#footnote-ref-59)
60. *Drew v Attorney-General* [2001] 2 NZLR 428 (CA) at [11]. [↑](#footnote-ref-60)
61. *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 436 (CA). [↑](#footnote-ref-61)
62. *X v X* HC Auckland CIV-2006-404-903, 4 July 2006 at [25]. [↑](#footnote-ref-62)
63. *D v C [Intervention]* (2001) 15 PRNZ 474 (CA) at [7] but see in Australia *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 189 CLR 579 where the High Court granted leave to eleven people to appear as amici because the case involved an issue of statutory interpretation. [↑](#footnote-ref-63)
64. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 183 at [11]. [↑](#footnote-ref-64)
65. Crown Proceedings Act 1950, s. 35(2)(h) and High Court Rules rr 4.27,7.4 and sch. 5(2). The position in the UK is broadly similar. See P Havers and C Mellor “Third Party Interventions by the Government” [2004] JR 130. [↑](#footnote-ref-65)
66. Although this role has become less prominent in cases involving human rights as the HRC has become involved in intervention. Of the 109 cases since 2000 where intervention has been in the area of human rights, only fourteen were by the Attorney-General. [↑](#footnote-ref-66)
67. E Clarke “The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand” [2005] VUWLR 3 at 7 [↑](#footnote-ref-67)
68. Michael Cullen, Attorney-General “Role and Functions of the Attorney-General*”* (Canterbury Law Facility, 2006). Prosecutions must be carried out independently from the exercise of executive power as the public interest requires the interests of society to be upheld in a principled way. [↑](#footnote-ref-68)
69. *RIDCA Central v VM* [2011] NZCA 659; [2012] 1 NZLR 641. [↑](#footnote-ref-69)
70. At [12]. [↑](#footnote-ref-70)
71. At [13]. [↑](#footnote-ref-71)
72. The Commission’s involvement was in part the result of its observations in the role of coordinator of the National Preventive Mechanisms under the Convention against Torture which includes monitoring institutions such as care agencies. [↑](#footnote-ref-72)
73. At [16]. [↑](#footnote-ref-73)
74. At [93]. [↑](#footnote-ref-74)
75. One lawyer we spoke to suggested that there should be an obligation in the High Court rules to inform the Commission of any cases involving human rights. [↑](#footnote-ref-75)
76. *Child Poverty Action Group Inc. v Attorney-General* [2013] NZCA 402; *Child Poverty Action Group Inc. v Attorney-General* HC Wellington CIV-2009-404-273 (25 October 2011); *Child Poverty Action Group Inc. v Attorney-General* NZHRRT decision 31/08 (16 December 2008). [↑](#footnote-ref-76)
77. Employment status is defined as being unemployed or in receipt of a benefit. [↑](#footnote-ref-77)
78. *Child Poverty Action Group Inc. v Attorney-General* [2013] NZCA 402 at [78]. [↑](#footnote-ref-78)
79. At [92] quoting Lord Scott in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [145]. [↑](#footnote-ref-79)
80. At [29]. Lord Bingham in *A*, above, referred to the “demarcation of functions” and questions of “relative institutional competence” [↑](#footnote-ref-80)
81. See for example, *New Zealand Maori Council v Attorney-General* [2008] NZSC 34. [↑](#footnote-ref-81)
82. Or an implicit role because of the nature of its functions, as the power to intervene was described in *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 at [32] per Lord Woolf. For an example of a party seeking to prevent the Commission exercising this statutory function see *Wall v Fairfax Media* HRRT 017/713 (11 March 2014) in which the plaintiff attempted to have the Commission excluded from the proceedings as it considered it was inappropriate for a first instance decision maker to intervene in proceedings in which its own decision was being challenged. The Chairperson allowed the Commission to intervene stating that it was beyond dispute that it had the right to appear and be heard. The question was, rather, what weight the tribunal would give to its submissions. [↑](#footnote-ref-82)
83. *Attorney General v Human Rights Review Tribunal* [2006] NZHC 1661, (2006) 18 PRNZ 295. [↑](#footnote-ref-83)
84. *Drew v* *Attorney General* [2001] 2 NZLR 428, (2001) 18 CRNZ 460, (2001) 15 PRNZ 1. [↑](#footnote-ref-84)
85. *Atkinson v Ministry of Health* [2012] NZCA 20, [2011] 2 NZLR 171. [↑](#footnote-ref-85)
86. [*Trevethick v Ministry of Health* [2008] NZCA 397, (2008) 9 HRNZ 252, [2009] NZAR 18.](http://www.nzlii.org/cgi-bin/disp.pl/nz/cases/NZCA/2008/397.html?stem=0&synonyms=0&query=trevethick)  [↑](#footnote-ref-86)
87. *Attorney General v Zaoui* [2005] NZSC 38, [2006] 1 NZLR 289, (2005) 7 HRNZ 860. [↑](#footnote-ref-87)
88. Such factors are likely to be particularly decisive in relation to the HRA given that Part 1A is designed to ensure that public sector agencies act in a non-discriminatory manner. The criteria that the New Zealand Human Rights Commission takes into account in deciding whether to intervene are found in Appendix 1. [↑](#footnote-ref-88)
89. JUSTICE, *To Assist the Court: Third Party Interventions in the Public Interest* (2016). JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK branch of the International Commission of Jurists. [↑](#footnote-ref-89)
90. High Court r 14.7. Rule 14.7(e) recognises that it may be appropriate for the Court to refuse to make an award of costs against a party which has acted reasonably in the conduct of a proceeding concerning a matter of public interest. More recently in *Ngati Te Ata v Minister for Treaty of Waitangi Negotiations* [2018] NZCA 471, the Court of Appeal noted that in a case which involves a public interest benefit security for costs may be waived on the basis that no costs order will be made against an appellant, even if unsuccessful. Proceedings relating to the vindication of rights under the Bill of Rights can fall into this category: at [5]. See also Butler & Butler, above n 48, at [33.4]. [↑](#footnote-ref-90)
91. *Earthquake Commission v Insurance Council of New Zealand* [2015] NZHC 457. [↑](#footnote-ref-91)
92. Now s 178 Senior Courts Act 2016. [↑](#footnote-ref-92)
93. *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2018] NZHC 926, per Paul Davison J. See also *Diagnostic Med Ltd v Auckland District Health Board (No 2)* HC Auckland CIV-2006-404-4724, (23 October 2009). [↑](#footnote-ref-93)
94. At [23] – [24]. [↑](#footnote-ref-94)
95. The Human Rights Commission and Crown Law reached such an agreement when the 2001 amendment binding the public sector became law in relation to Part 1A matters as it was considered important to clarify the law. [↑](#footnote-ref-95)
96. *R (E) v Governing Body of JFS* [2009] UKSC 15. A new costs regime designed to target abuses of process and unreasonable behaviour by interveners not properly able to assist the court or further the public interest came into effect in 2015 [↑](#footnote-ref-96)
97. *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537, (2003) 7 NZELC 98,739 (HC). [↑](#footnote-ref-97)
98. *Claymore Management Ltd v Anderson* HC Auckland CIV-2002-404-95. [↑](#footnote-ref-98)
99. *H*eather v IDEA Services Ltd [2012] NZHRRT 11 (23 May 2012) at [14]. See by analogy *Attorney-General v Udompun* [2005] 3 NZLR 205 (CA) at [186]. [↑](#footnote-ref-99)
100. *Andrews v Commissioner of Police* [2014] NZHRRT 31. For confirmation of the Tribunal’s approach see *Commissioner of Police v Andrews* [2015] 3 NZLR 515, [2015] NZHC 745. [↑](#footnote-ref-100)
101. *Andrews*, above, at [7.3]. [↑](#footnote-ref-101)
102. *Wall v Fairfax New Zealand Ltd (Costs)* [2017] NZHRRT 28. [↑](#footnote-ref-102)
103. There are relatively few cases before then given the HRA did not bind the public sector on the so-called “new” grounds. Most of the significant human rights cases therefore involved the NZBORA. [↑](#footnote-ref-103)
104. Amartya Sen “Elements of a Theory of Human Rights” 32(4) *Philosophy & Public Affairs* 315, quoting a classic distinction made famous by Karl Marx. [↑](#footnote-ref-104)
105. Although we were unaware of it at the time, a similar approach to evaluate judicial decision making in the human rights area was being employed elsewhere. Over the past few years the European Research Council (ERC) has funded a project designed to make decisions of the European Court of Human Rights more human rights consistent premised on a human rights approach in relation to the European Convention. See ERC “Strengthening the European Court of Human Rights: More Accountability through Better Legal Reasoning” Human Rights Centre <https://hrc.ugent.be>. [↑](#footnote-ref-105)
106. Human Rights Commission *Human Rights in New Zealand Today* (August 2004) at 25. [↑](#footnote-ref-106)
107. This situation reflects the distinction between the theory of dualist and monist approaches although in our view this is far from indicative in how the judiciary has responded to international treaties. See the comments by Sir Geoffrey Palmer in “Human Rights and the New Zealand Government’s treaty obligations” (1999) 29 VUWLR 57 at 60, [1981] 1 NZLR 222, 229 and Melissa A Waters, “Creeping Monism: The Judicial Trend towards Interpretive Incorporation of Human Rights Treaties” (Colum L Rev, Washington & Lee Legal Studies Paper No. 2006-12, April 2007). Available at SSRN: <http://ssrn.com/abstract=934108>. [↑](#footnote-ref-107)
108. *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA). [↑](#footnote-ref-108)
109. This is consistent with the New Zealand Law Commission’s prediction in *A New Zealand Guide to International Law and its Sources*(NZLC R34, 1996) at [71] that in the future Courts may be willing to have regard to a treaty in interpreting legislation, even if the treaty has not been incorporated into national law or the treaty did not exist when the statute was enacted. For a discussion on this latter point see *Smith v Air New Zealand Ltd* [2011] NZCA 20, [2011] 2 NZLR 171 at [25] where the Court was asked to construe the reasonable accommodation provisions in the Human Rights Act in accordance with the recently ratified Convention on the Rights of Persons with Disability. [↑](#footnote-ref-109)
110. *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). [↑](#footnote-ref-110)
111. At 266. [↑](#footnote-ref-111)
112. Andrew Butler and Petra Butler “The Judicial Use of International Human Rights Law in New Zealand” [1999] 29(1) VUWLR 173. See also Sir Ken Keith “Roles of the Courts in New Zealand in Giving Effect to International Human Rights - with Some History” [1999] 29 VUWLR 27. [↑](#footnote-ref-112)
113. Hosking v Runting [2005] 1 NZLR 1 (CA). [↑](#footnote-ref-113)
114. At [146]. [↑](#footnote-ref-114)
115. At [148]. [↑](#footnote-ref-115)
116. *Zaoui v Attorney-General* [2004] 2 NZLR 339. [↑](#footnote-ref-116)
117. *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 1. [↑](#footnote-ref-117)
118. *Smith v Air New Zealand Ltd* [2011] 2 NZLR 171. [↑](#footnote-ref-118)
119. Pol De Vos, Wim De Ceukelaire, Geraldine Malaise, Dennis Pérez, Pierre Lefèvre, and Patrick Van der Stuyft “Health through people’s empowerment: a rights-based approach to participation” (2009) 11 *Health and Human Rights* 23 at 25. [↑](#footnote-ref-119)
120. T Tyler “Procedural Justice and the Courts” (2007-2008) 44 Ct.Rev. 26 at 30, cited in E Brems and L Layrysen “Procedural Justice in Human Rights Adjudication: the European Court of Human Rights” (2013) 35 *Human Rights Quarterly* 176at 176. [↑](#footnote-ref-120)
121. JA Smillie “Locus Standi – the Report of the Public and Administrative Law Reform Committee” (1978) 4 Otago Law Review 141. Participation is particularly relevant in the context of the HRA given that Part 1A is specifically designed to make public sector agencies accountable for discrimination. [↑](#footnote-ref-121)
122. See for example, Palmer J in *Kamel Mohammed v Guardians of New Zealand Superannuation* [2020] NZHC 1324 at [16]. [↑](#footnote-ref-122)
123. Attorney-General v *Human Rights* Review *Tribunal* (2006) 18 PRNZ 295 (Miller J). [↑](#footnote-ref-123)
124. At [64]. [↑](#footnote-ref-124)
125. Office of the High Commissioner for Human Rights “Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies” (2006). [↑](#footnote-ref-125)
126. *Daniels v Attorney-General* HC AK M1516/SW99; *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA). [↑](#footnote-ref-126)
127. *Attorney-General v Daniels* CA84/02. [↑](#footnote-ref-127)
128. *Quilter* *v Attorney-General* [1998] 1 NZLR 523, (1997) 4 HRNZ 170 (CA). [↑](#footnote-ref-128)
129. Butler and Butler, above n 48, at [17.9.4]. [↑](#footnote-ref-129)
130. The HRA defines family status as (inter alia):

     “(i) having responsibility for the part-time or fulltime care of children or other dependents ...

     (iv) being the relative of a particular person…” [↑](#footnote-ref-130)
131. *Atkinson v Ministry of Health* [2012] NZCA 20, [2011] 2 NZLR 171 at [135]. [↑](#footnote-ref-131)
132. *Spencer v Attorney-General* [2013] NZHC 2580, [2014] 2 NZLR 780; *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449; *Spencer v Ministry of Health* [2016] NZHC 1650, [2016] 3 NZLR 513. Mrs Spencer was unable to join the *Atkinson* plaintiffs because she was out of time in making her complaint. Counsel acting for the Human Rights Commission was required to spend some time in explaining the intricacies of the HRA process which led to this outcome to the Court – something recognised by the Judge in her decision. [↑](#footnote-ref-132)
133. *Atkinson v Ministry of Health* [2012] NZCA 20, [2011] 2 NZLR 171 at [113]. [↑](#footnote-ref-133)
134. Butler and Butler, above n 48, at [6.8]. [↑](#footnote-ref-134)
135. *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1. [↑](#footnote-ref-135)
136. At [108] . [↑](#footnote-ref-136)
137. *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1. See the outcome of the Supreme Court’s decision in Quake Outcasts v Minister of Canterbury Earthquake Recovery [2017] NZCA 332. [↑](#footnote-ref-137)
138. At [114]. [↑](#footnote-ref-138)
139. *CPAG v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [80]. [↑](#footnote-ref-139)
140. At [116] [↑](#footnote-ref-140)
141. At [120] [↑](#footnote-ref-141)
142. Sen, above n 109, at 321. [↑](#footnote-ref-142)
143. *Smith v Attorney-General* [2017] NZHC 463, citing *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [91]. [↑](#footnote-ref-143)
144. L Peroni and A Timmer “Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention law” (2013) 11 I.CON 1056 at 1076. [↑](#footnote-ref-144)
145. Roberto Andorno, “Is Vulnerability the Foundation of Human Rights?” in Aniceto Masferrer and Emilio Garcia-Sanchez *Human Dignity of the Vulnerable in the Age of Rights* (Springer, 2016) 257. [↑](#footnote-ref-145)
146. See Sir Geoffrey Palmer “What the New Zealand Bill of Rights aimed to do, why it did not succeed and how can it be repaired” (2016) 14 NZJPIL 169. At 179 he notes that “the rights of unpopular people are just as real as those who live in society’s mainstream. These situations are the very ones where rights are most needed.” [↑](#footnote-ref-146)
147. L Peroni and A Timmer, above n 149, at 1056. [↑](#footnote-ref-147)
148. At 1060, citing M Fineman “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20 Yale J L & Feminism 1. [↑](#footnote-ref-148)
149. By highlighting the obligation of the State to ameliorate the situation, it overcomes the problems of a matter being dealt with as a private rather than public issue: see C Furusho “Uncovering the human rights of the vulnerable subject and correlated State duties under liberalism” (2016) 5 UCL JL and J 175. [↑](#footnote-ref-149)
150. *Quilter* *v Attorney-General* [1998] 1 NZLR 523, (1997) 4 HRNZ 170 (CA) at 34. [↑](#footnote-ref-150)
151. Section 134(3), Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. [↑](#footnote-ref-151)
152. *Service & Foodworkers Union Nga Ringa Tota Inc. v Terranova Homes and Care Ltd* [2013] NZEmpC 157, (2013) 11 NZELR 80. [↑](#footnote-ref-152)
153. At [109]. [↑](#footnote-ref-153)
154. While we have limited our study to human rights cases, traditionally there is a history of unions intervening in employment cases and NGOs such as Forest & Bird in environmental cases. There has also been a significant number of interventions in cases involving the Treaty of Waitangi. [↑](#footnote-ref-154)
155. See, for example, *Seales v Attorney-General* [2015] NZHC 828 and *Service & Foodworkers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157, (2013) 11 NZELR 80. [↑](#footnote-ref-155)
156. Lord Neuberger, “The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience” (Melbourne, 8 August 2014). Text available online at <https://www.supremecourt.uk/docs/speech-140808.pdf>. [↑](#footnote-ref-156)
157. See Sir Kenneth Keith in “The New Zealand Bill of Rights Experience: Lessons for Australia” (2002 Bill of Rights Conference, 21 June 2002), cited in Justice Susan Glazebrook “The New Zealand Bill of Rights Act 1990: Its operation and effectiveness,” a paper delivered to the South Australian State Legal Convention 2004. [↑](#footnote-ref-157)
158. See, for example, comments by Elias CJ in *Ngāti Whātua Ōrākei*  *Trust v Attorney-General* [2018] NZSC 84 at [194] onwards or, for a more recent example, *Borrowdale v Director-General of Health* [2020] NZHC 2090. [↑](#footnote-ref-158)
159. *Diagnostic Medlab Ltd v Auckland District Health Board (No.2 )* HC Auck CIV-2006-404-4724. [↑](#footnote-ref-159)
160. Incurred by the Attorney-General or the Solicitor-General; payment by any party to the proceedings or out of public funds of the costs incurred by any other person or payment by the Attorney-General or the Solicitor-General of costs incurred by any of the parties. For a list of factors applicable to the determination of costs see *Earthquake Commission v Insurance Council of New Zealand* [2015] NZHC 457, (2015) 22 PRNZ 427 at [6] [↑](#footnote-ref-160)
161. Appendix 2 contains examples of guidance available in Canada and the UK at Supreme Court level [↑](#footnote-ref-161)
162. This could also include a court waiving fees if the intervener is meeting their own fees and intervention is genuinely in the public interest: JUSTICE, *To Assist the Court: Third Party Interventions in the Public Interest* (2016) at 80. [↑](#footnote-ref-162)
163. We understand that there is a Senior Courts bench book of useful tips for Judges on intervention that is not available to the public. By contrast a Practice Note guides what a court does and has greater status. It is also a public document and therefore useful to counsel who can draw it to the Court’s attention. [↑](#footnote-ref-163)
164. Law Commision *Review of the Judicature Act 1908* (NZLC IP 29, 2012) at [15.62]. [↑](#footnote-ref-164)
165. Statute of the Court of Justice of the European Union, Art 40(2). [↑](#footnote-ref-165)
166. Treaty on the Functioning of the European Union (TFEU), Art 267. [↑](#footnote-ref-166)
167. TFEU Arts 258, 263 and 265. [↑](#footnote-ref-167)
168. *R (British American Tobacco UK Ltd) v Secretary of State for Health* [2014] EWHC 3515. [↑](#footnote-ref-168)
169. Statute of the Court of Justice of the European Union, Art 50(2). [↑](#footnote-ref-169)
170. JUSTICE, *To Assist the Court: Third Party Interventions in the Public Interest* (2016). [↑](#footnote-ref-170)
171. Public Law Project, *Third Party Interventions: A Practical Guide* (2008) at 408. [↑](#footnote-ref-171)
172. JUSTICE, *To Assist the Court: Third Party Interventions in the Public Interest* (2016). [↑](#footnote-ref-172)
173. Public Law Project, above n 177, at 13. [↑](#footnote-ref-173)
174. As above. [↑](#footnote-ref-174)
175. Practice Directions and Standing Orders applicable to civil appeals (approved 8 October 2007), Rule 37. [↑](#footnote-ref-175)
176. *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 per Lord Woolf at [32]. [↑](#footnote-ref-176)
177. JUSTICE, *To Assist the Court: Third Party Interventions in the Public Interest* (2016) at 19. [↑](#footnote-ref-177)
178. Supreme Court Fees Order 2009, SI 2009/2131. [↑](#footnote-ref-178)
179. Rules of the Court of Ssession, r 58.8A. However, an opportunity was given to a third party to appear in the case of *Lord Blantyre v Lord Advocate* (1876) 13 SLR 213. [↑](#footnote-ref-179)
180. Section 11, Human Rights Commission Act 2006 (Scotland). [↑](#footnote-ref-180)
181. Rules of the Court of Session, r 58.18. [↑](#footnote-ref-181)
182. As above. [↑](#footnote-ref-182)
183. As above, at r 58.19(4). [↑](#footnote-ref-183)
184. Normally interveners are liable for their own costs, as it is unlikely that these fees will be subject to a waiver. If a potential intervener does not have the financial means for an intervention, it could consider offering help to whichever party in the proceedings is most similar to their interests. [↑](#footnote-ref-184)
185. Canada has a special history relating to intervention as a result of the Intervenor Funding Project Act 1988 (IFPA) which provided funding in advance of a hearing for those who could not otherwise be able to afford to participate. Among the IFPA’s public policy objectives was ensuring public access to hearings was not unfairly restricted solely on ability to pay, by providing a mechanism in advance of hearings to permit participation by individuals and groups who represent legitimate interests and who otherwise lack resources to participate in hearings.

     The IFPA contained a sunset clause that originally caused it to expire in March 1992, but was subsequently renewed and extended for another four years. It eventually expired in March 1996. This year the Trudeau government restored the program. [↑](#footnote-ref-185)
186. *Reference re Workers’ Compensation Act, 1983 (Nfld) (Application to Intervene)* [1989] 2 SCR 335. [↑](#footnote-ref-186)
187. At 340. [↑](#footnote-ref-187)
188. *Reference re Workers’ Compensation Act, 1983 (Nfld) (Application to Intervene)* [1989] 2 SCR 335 at 340 [↑](#footnote-ref-188)
189. Benjamin Alarie and Andrew Green, “Interventions at the Supreme Court of Canada: Accuracy, Affiliation and Acceptance” (2010) 82 *Osgood Law Jnl* 381 at 383. [↑](#footnote-ref-189)
190. Ishaq*v Canada* *(Minister of* *Citizenship and Immigration)* [2015] FC 156. [↑](#footnote-ref-190)
191. Michelle Campbell “Re-inventing Intervention in the Public Interest: Breaking Down Barriers to Access” (2014) 15 J Env L & Prac 187 at 193. [↑](#footnote-ref-191)
192. Jennifer Koshan “Dialogue or Conversation? The Impact of Public Interest Interveners on Judicial Decision Making” (Paper presented to the Canadian Institute for the Administration of Justice Annual Conference, October 2003) [unpublished]). [↑](#footnote-ref-192)
193. Brent Kettles, “Intervention: The first step is admitting your client has a problem” The Advocates’ Journal at 29. [↑](#footnote-ref-193)
194. See, for example, the Ontario *Rules of Civil Procedure*. These cover intervention at Rules 13.01, 13.02 and 13.03. The Ontario Rules do not differ substantively from the Rules of the Supreme Court of Canada as it sets out similar grounds. [↑](#footnote-ref-194)
195. Brent Kettles, above n 200, at 28. [↑](#footnote-ref-195)
196. *Authorson v Attorney General of Canada* (2001) 147 OAC 355 at [8] – [9]. [↑](#footnote-ref-196)
197. Susan Kenny, “Interveners and Amici Curiae in the High Court” (1998) 20 Adel LR 159. See also *Levy v State of Victoria & Ors* (1997) 189 CLR 579; George Williams, “The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis “ (2000) 28 Federal Law Review 365; Michael Kirby, “Deconstructing the law’s hostility to public interest litigation” (2011) 127 LQR 537. [↑](#footnote-ref-197)
198. *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391. [↑](#footnote-ref-198)
199. See also The Public Law Project, *Third Party Interventions: A Practical Guide* (2008), which is designed to assist anyone considering whether to intervene before the Administrative Court or Court of Appeal and the Project’s paper *Third Party Interventions in Judicial Review: An Action Research Study* (2001). [↑](#footnote-ref-199)