IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA108/2023
[2025] NZCA 644

BETWEEN	RUSSELL THOMAS HOBAN Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	9 April 2024 (further information received 1 October 2025)
Court:	Cooper P, Courtney and Katz JJ
Counsel:	R A Kirkness, M D N Harris and M P Handford for Appellant D J Perkins and O Kiel for Respondent A S Butler KC, T W M Pilkington and E C Vermunt for the Human Rights Commission | Te Kāhui Tika Tangata as Intervener
Judgment:	8 December 2025 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by Cooper P)

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Introduction

[1] This appeal concerns the "hate speech" provisions contained in the Human Rights Act 1993 (HRA). Mr Hoban says the provisions are inconsistent with the right to be free from discrimination because they only prohibit hate speech based on colour, race, or ethnic or national origin, and not hate speech based on sexual orientation. The Attorney-General says there is no discrimination because people with different sexual orientations are all treated in the same way under the hate speech provisions in the HRA, as are those subject to other forms of unlawful discrimination.

[2] Mr Hoban sought a declaration from the Human Rights Review Tribunal (the Tribunal) pursuant to s 92J of the HRA that s 61 of the HRA is inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of

Rights Act 1990 (the Bill of Rights Act). The Tribunal dismissed his claim.[1] Mr Hoban appealed to the High Court under s 123 of the HRA and that Court dismissed his appeal.[2]

[3] The High Court granted Mr Hoban leave to appeal to this Court pursuant to s 124 of the HRA.[3] For the reasons set out below, we dismiss the appeal.

Background

Legislative framework and history

[4] New Zealand has made certain international commitments to end all forms of racial discrimination, including ratifying the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). These respectively record commitments to condemn and eliminate racial discrimination in all its forms and prohibit the advocacy of racial hatred that constitutes incitement to discrimination.[4]

[5] To give effect to these international commitments, in 1993 New Zealand amended and consolidated domestic human rights law into one statute, the HRA. The HRA applies to the legislative, executive and judicial branches of government, and any person performing a public function, power or duty.[5] Both acts and omissions of the legislature are subject to the anti-discrimination provisions in the HRA.[6]

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1 *Hoban v Attorney-General* [2022] NZHRRT 16, (2022) 13 HRNZ 615 [*Hoban* (HRRT)].
2 *Hoban v Attorney-General* [2022] NZHC 3235, (2022) 13 HRNZ 846 [judgment under appeal].
3 *Hoban v Attorney-General* [2023] NZHC 222 [*Hoban* (leave)].
4 See International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) [ICERD], arts 2(1) and 4; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR], art 20(2). The obligations arising under those instruments were considered at length by the High Court in *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471. See also *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 17, (2017) 11 HRNZ 165.
5 Human Rights Act 1993 [HRA], s 20J.
6 Section 20L.

[6] The HRA contains two provisions which address what is colloquially known as "hate speech". Both are limited to speech concerning colour, race, or ethnic or national origin. The first, s 61, provides as follows:[7]

> **61 Racial disharmony**
>
> (1) It shall be unlawful for any person—
>
> (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
>
> (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
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> (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—
>
> being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
>
> …

[7] If persons are subject to the kind of speech referred to in s 61, they are entitled to complain to the Human Rights Commission (the Commission) and, if the matter is not resolved, to bring civil proceedings before the Tribunal.[8]

[8] The second provision, s 131, provides for a separate criminal offence of inciting racial disharmony:[9]

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7 This section was preceded by s 9A of the Race Relations Act 1971, inserted in 1977, which proscribed the publication, distribution or use of statements "which [are] threatening, abusive, or insulting, … being matter or words likely to excite hostility or ill will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons".

8 HRA, ss 76(2)(a) and 92B.

9 This was preceded by s 25 of the Race Relations Act, as enacted in 1971, which contained criminal penalties for hate speech.

> **131 Inciting racial disharmony**
>
> (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—
>
> (a) publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or
>
> (b) uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—
>
> being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
>
> …

[9] Section 132 provides that a prosecution under s 131 cannot be commenced without the consent of the Attorney-General.

[10] The Bill of Rights Act sets out and affirms fundamental freedoms and rights in New Zealand. Section 19 of the Bill of Rights Act is the "non-discrimination" provision. It provides:[10]

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
>
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

[11] The prohibited grounds of discrimination are set out in s 21 of the HRA, which provides as follows:

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[10] A similar provision was found in s 9 of the Race Relations Act and is currently in s 73 of the HRA.

21 Prohibited grounds of discrimination

(1) For the purposes of this Act, the **prohibited grounds of discrimination** are—

(a) sex, which includes pregnancy and childbirth:

(b) marital status, which means being—

(i) single; or

(ii) married, in a civil union, or in a de facto relationship; or

(iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or

(iv) separated from a spouse or civil union partner; or

(v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended:

(c) religious belief:

(d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:

(e) colour:

(f) race:

(g) ethnic or national origins, which includes nationality or citizenship:

(h) disability, which means—

(i) physical disability or impairment:

(ii) physical illness:

(iii) psychiatric illness:

(iv) intellectual or psychological disability or impairment:

(v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:

(vi) reliance on a disability assist dog, wheelchair, or other remedial means:

(vii) the presence in the body of organisms capable of causing illness:

(i) age, which means,—

…

(j) political opinion, which includes the lack of a particular political opinion or any political opinion:

(k) employment status, which means—

…

(l) family status, which means—

(i) having the responsibility for part-time care or full-time care of children or other dependants; or

(ii) having no responsibility for the care of children or other dependants; or

(iii) being married to, or being in a civil union or de facto relationship with, a particular person; or

(iv) being a relative of a particular person:…

(m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

…

[12] The HRA does not contain provisions equivalent to ss 61 and 131 with respect to speech concerning sexual orientation, or any of the prohibited grounds of discrimination other than colour, race, or ethnic or national origin.

[13] Section 5 of the Bill of Rights Act states that the rights and freedoms in the Bill of Rights Act "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Mr Hoban's claim

[14] On 27 July 2017, a video was posted of a "sermon" given at the Westcity Bible Baptist Church, in which it is agreed the pastor said:

> My view on homo marriage is that the Bible never mentions it so I'm not against them getting married … As long as a bullet goes through their head the moment they kiss … Because that's what it talks about — not homo marriage but homo death.

[15] These remarks received widespread attention online and in the mainstream media. On 18 August 2017, the police confirmed to *Newshub* they were "not in a

position to pursue the matter any further, as no criminal offence ha[d] been committed".[11] The Commission also did not take any action.

[16] Mr Hoban is a homosexual man.[12] He was "horrified" at the remarks, which he described as "threatening, abusive and insulting" and "[inciting] hostility to a group that [he is] a part of". Mr Hoban said he felt "unprotected, bewildered, threatened, confused, undermined, and unsafe" on learning of the lack of legal recourse in relation to the remarks, in particular, the lack of specific protection in the HRA. He said feeling protected by human rights laws is important to him because, as a homosexual man, he has "experienced years of feeling hounded, discriminated against, and silenced". To Mr Hoban, "silence and inaction [seemed like] tacit approval" of the pastor's remarks. Mr Hoban decided to consider what avenues for legal action were available to him.

The Tribunal

[17] On 2 July 2020, Mr Hoban applied to the Tribunal for a declaration of inconsistency under s 92J of the HRA on the basis that s 61 was inconsistent with the right to freedom from discrimination as affirmed by s 19 of the Bill of Rights Act. The Tribunal found against Mr Hoban.[13]

[18] The Tribunal considered that there was only one reasonable interpretation of s 61.[14] The appropriate test for assessing any inconsistency was therefore the one set out in *Ministry of Health v Atkinson*, namely:[15]

> [55] It is agreed that the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact. …
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> …

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11 Matt Burrows "'No criminal offence' committed by anti-gay Auckland pastor – police" (18 August 2017) Newshub <www.newshub.co.nz.>.

12 This is the term used by Mr Hoban to describe himself in evidence before the Tribunal. We note this term may not be how all members of the rainbow community refer to themselves.

13 *Hoban* (HRRT), above n 1, at [68]. The Commission had a right to appear and gave submissions to assist the Tribunal pursuant to s 92H of the HRA.

14 At [22]. The Tribunal declined to apply the six-step framework of *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, saying that approach was more suited to cases concerning two possible meanings of a provision.

15 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 (footnotes omitted).

> [56] The requirement for differential treatment as between those in comparable situations raises an issue about who is the appropriate comparator group. …

[19] The Tribunal emphasised that the comparator must fit the statutory scheme in relation to the particular ground of discrimination;[16] is not appropriate if it artificially rules out discrimination at an early stage of the inquiry;[17] and must have work to do to prevent the comparison exercise from miscarrying.[18]

[20] Mr Hoban said the appropriate comparator was people who could access the protection of s 61, namely members of a group discriminated against on the grounds of their colour, race, or ethnic or national origins. The Attorney-General said the differential treatment in this case required a difference between people of different sexual orientations; that is Mr Hoban had to show homosexual persons were treated differently to those of heterosexual, lesbian or bisexual orientation.[19]

[21] The Tribunal said:

> [32] In our view it is plain from the face of the HRA, s 61 that while three of the prohibited grounds of discrimination (colour, race, ethnic or national origins) are within the scope of s 61 the other ten grounds are not. Those in the first group have access to the remedy in s 61. Those in the second group do not and are in this respect materially disadvantaged. In our view it is those in the first group who are the appropriate comparator.
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> [33] The formulation advanced by the Attorney-General artificially compares the four categories of sexual orientation in s 21(1)(m) with each other rather than simply using "sexual orientation" as the ground. Section 21 makes it clear that sexual orientation "means" a heterosexual, homosexual, lesbian, or bisexual orientation. By artificially drawing both the group and the comparator group from a single definition the resulting comparator artificially rules out discrimination at an early stage of the inquiry and does not best fit the statutory scheme. It also frames the comparator group in terms which result in the comparator having no work to do. The intention of the [HRA] is to take a "purposive and untechnical" approach to whether there is prima facie discrimination and so it is important to avoid artificially ruling out discrimination at the first stage of the inquiry. …

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16 *Hoban* (HRRT), above n 1, at [25.1], citing *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [34] per Elias CJ, Blanchard and Wilson JJ.

17 *Hoban* (HRRT), above n 1, at [25.2] citing *Air New Zealand v McAlister*, above n 16, at [51] per Tipping J.

18 *Hoban* (HRRT), above n 1, at [25.3] citing *Ministry of Health v Atkinson*, above n 15, at [67].

19 *Hoban* (HRRT), above n 1, at [26]–[28].

[22] Turning to the second step, the Tribunal considered that "only an affirmative answer is possible" to the question of whether the differential treatment had a discriminatory impact.[20] Section 61 was therefore discriminatory within the meaning of s 19(1) of the Bill of Rights Act.

[23] The Tribunal then considered s 19(2) of the Bill of Rights Act. The Tribunal explained that "measures" under s 19(2) must satisfy two criteria: (1) they must be taken in good faith, and (2) their purpose must be to assist or advance persons or groups of persons who have been disadvantaged because of unlawful discrimination.[21] The Tribunal considered that because s 61 implements New Zealand's treaty obligations under the ICERD, it met the criteria under s 19(2) and did not unlawfully discriminate against Mr Hoban.[22]

[24] In case this conclusion was wrong, the Tribunal considered the question of justification under s 5 of the Bill of Rights Act. The Tribunal said first the approach set out by the Supreme Court in *R v Hansen* was not necessarily of assistance in the case of legislative omissions. Rather, the Tribunal considered it was necessary to return to the text of the Bill of Rights Act to assess whether s 61 is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.[23]

[25] The Tribunal accepted that the Attorney-General had discharged the burden of establishing justification for the legislature not including sexual orientation in s 61 because:[24]

(a) Both hate speech provisions (ss 61 and 131) were enacted to implement New Zealand's international law obligations, whereas "New Zealand has no treaty obligations which require the enactment of legislation prohibiting the advocacy or incitement of hatred or discrimination based on sexual orientation".[25]

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20 At [35].
21 At [40].
22 At [42] and [44].
23 At [50], referring to *R v Hansen*, above n 14.
24 *Hoban* (HRRT), above n 1, at [57].
25 At [52]–[53].

(b) Parliament is the appropriate venue for debate about the appropriate ambit of hate speech laws.[26] The Tribunal does not need to consider the policy reasons why s 61 might be expanded to include sexual orientation. Parliament has greater institutional competence to resolve these policy debates,[27] and more deference is to be given when it comes to major political, social or economic decisions.[28] This is particularly so when Parliament (at that time) was likely to consider the issue in the near future.[29]

(c) Parliament had considered the possibility of expanding the hate speech provisions on two earlier occasions and, in both instances, had decided not to.[30] In December 2020, the Cabinet had proposed extending the legal protection to all groups listed in s 21 of the HRA.[31] The matter was squarely in the political realm.

[26] The Tribunal continued:

> [58] The focus of the justification inquiry is not the justification for the HRA, s 61 having a limited reach. The focus is on the justification for the legislature not including in s 61 the other ten grounds of discrimination (including sexual orientation) or having standalone legislation which similarly prohibits the advocacy and incitement of hatred and discrimination.
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> [59] Human rights do advance in New Zealand, but not on all fronts simultaneously. In a free and democratic society there will always be public and political contest over priorities to be given to human rights protection. In recent times those contests have included the right to adequate housing, freedom from poverty, indigenous rights, violence, children's rights and mental health. In addition to difficult policy choices there are also challenges relating to resourcing, the assessment of the prospect of agreement to legislation in (say) a coalition government environment, resolving competing demands on the legislative programme and assessing the political reality of

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26 At [54.1].

27 At [54.1.2], citing *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [75] and [153].

28 *Hoban* (HRRT), above n 1, at [54.2], citing *R v Hansen*, above n 14, at [105] and [111]–[116] per Tipping J; and *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [91].

29 *Hoban* (HRRT), above n 1, at [54.3] and [56].

30 At [55].

31 At [56]. The Cabinet was considering the response to *Ko tō tātou kāinga tēnei | Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020). The Government did not pursue the issue in Parliament and extension did not eventuate.

> the measure eventually being passed. These are all part of the political process in a free and democratic society.
>
> [60] Sexual orientation has been included in the HRA, s 21 prohibited grounds of discrimination since 1993 and the protection given by the remedies under the HRA is accordingly available. The specific complaint by the plaintiff is that an additional layer of protection is required by the inclusion of sexual orientation in s 61. But in a free and democratic society it is not required or practicable for every possible improvement to human rights protection to be enshrined in legislation. …

[27] In summary, the exclusion of sexual orientation (and the other prohibited grounds of discrimination) from s 61 was a reasonable limit prescribed by law and could be demonstrably justified in a free and democratic society.[32] Mr Hoban's claim could therefore not succeed.

[28] Finally, the Tribunal explained that, even if Mr Hoban had been successful, the Tribunal would not have made the declarations sought.[33] This was because under the HRA, declarations of inconsistency could only be made if an enactment was in breach.[34] It is not clear whether an omission could be subject to a declaration of inconsistency and, in any event, the granting of a declaration is discretionary and the Tribunal did not want to make a declaration in relation to a provision which implements the ICERD.[35]

High Court

[29] Mr Hoban's appeal to the High Court, as supported by the Commission, was dismissed.[36] The Court said in summary:

> [50] For these reasons, which are substantially the same as those adopted by the Tribunal, we agree that the limit on the freedom from discrimination arising as a consequence of s 61 of the HRA is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society. For that reason no declaration of inconsistency is appropriate.

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32 *Hoban* (HRRT), above n 1, at [61].
33 At [62].
34 At [64], referring to HRA, s 92J.
35 At [65]–[66].
36 Judgment under appeal, above n 2. Cooke J sat with two additional members in accordance with ss 101 and 126 of the HRA.

[30] Like the Tribunal, the Court first considered whether s 61 was discriminatory using the approach set out by this Court in *Ministry of Health v Atkinson*. The Court said the Attorney-General's position, that the appropriate comparator group was those who had different sexual orientations, was an example of how the comparator exercise "can illegitimately define away apparent discrimination":[37]

> It is true that s 61 treats everybody the same way irrespective of sexual orientation. But by enacting a measure directed to only one type of prohibited discrimination in the HRA, other groups disadvantaged by such discrimination are, by definition, treated differently. And that different treatment causes disadvantage. We see those conclusions as unavoidable.

[31] The Court then referred to the Supreme Court of Canada's decision in *Vriend v Alberta*.[38] In that case, Alberta had not included sexual orientation as a prohibited ground of discrimination in the Individual's Rights Protection Act 1980. The Supreme Court held this amounted to discrimination contrary to art 15 of the Canadian Charter of Rights and Freedoms. It said:

> [86] The omission of sexual orientation as a protected ground … creates a distinction on the basis of sexual orientation. The "silence" … with respect to discrimination on the ground of sexual orientation is not "neutral". Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.

[32] The High Court agreed.[39] It also refined the comparator group identified by the Tribunal by distinguishing between the various prohibited grounds of discrimination set out in s 21(1) and the groups who are more commonly subjected to hate speech:[40]

> [20] … Although there are a number of other categories of protected group arising from the list of prohibited grounds of discrimination in s 21 of the HRA, some groups are more commonly subjected to hate speech. As the present case illustrates, and as the international materials we refer to later below also suggest, hate speech on the basis of sexual orientation is a well-recognised phenomena. The more accurate comparator groups are accordingly those who are known to be victims of hate speech on the one hand, and those within s 61 on the other. There is a different, and disadvantaged treatment of those not in the group to which s 61 applies.

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37 At [17].
38 *Vriend v Alberta* [1998] 1 SCR 493.
39 Judgment under appeal, above n 2, at [19].
40 Footnote omitted.

[33] For these reasons, s 61 had a discriminatory effect in the sense contemplated by s 19(1) of the Bill of Rights Act.[41]

[34] On the second issue, the High Court disagreed with the Tribunal, finding that s 19(2) did not apply, and s 61 was consequently inconsistent with s 19 of the Bill of Rights Act.[42] First, the Court said s 19(2) should be given a normal purposive interpretation. In that context, it was relevant that the subsection does not encompass the entire scope of justified limits on apparently discriminatory measures, because s 5 of the Bill of Rights Act would continue to operate even if s 19(2) did not apply. Section 19(2) was "best considered as a situation where Parliament has expressly turned its mind to a particular kind of measure, and determined that it should not be regarded as unlawful discrimination".[43]

[35] The Court continued:

> [32] In our view it would be artificial to consider s 61 as falling within the intended scope of s 19(2). Although the words "measures taken" can include legislative provisions, when read as a whole we consider s 19(2) is focused on positive steps taken to counteract the adverse effects of discrimination by assisting or advancing the position of disadvantaged persons. Section 61 could not be considered as "advancing" such persons. We accept the Attorney-General's argument that the word "assisting" is different from "advancing", and that it can be argued on a literal meaning that s 61 assists those subjected to racial hate speech in an indirect way. But we see "assisting" as coloured by "advancing", and that read as a whole s 19(2) is directed at measures that give positive advantages or other forms of assistance to people that are disadvantaged by discrimination. Such measures are in themselves discriminatory because the advantage/assistance is not available to those not within the disadvantaged category. So s 19(2) was included to make it clear that taking such positive steps to assist or advance prejudiced persons was not unlawful. We see no reason to give s 19(2) a broader interpretation given that s 5 will still apply to measures that are not within these concepts.

[36] This conclusion was supported, the Court said, when s 61 was considered with s 131 of the HRA. The purpose of s 131 was to create an offence; it is not a measure to assist or advance people. Similarly, s 61 is a provision to make such conduct

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41 At [25].
42 At [34].
43 At [31].

unlawful and to provide a remedy. That is a different purpose to assisting or advancing the position of people subject to racial discrimination.[44]

[37] The final question for the High Court to consider was whether the discriminatory effect of s 61 is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society in accordance with s 5 of the Bill of Rights Act. The Court considered this was the "decisive issue" in the case.[45]

[38] The Court accepted that, while the burden was on the Crown to establish a demonstrably justified limit, substantial evidence was not required to establish such a limit. This case was similar to *Make it 16 Inc v Attorney-General*, where the Supreme Court held that justification can arise from international instruments or the common law, rather than extensive evidential materials.[46] The High Court therefore found it unnecessary in this case "to methodically apply the steps for assessing demonstrably justified limits outlined by the Supreme Court" in *R v Hansen*.[47]

[39] The Court held that the discriminatory effect of s 61 was of a "limited kind only", arising from being an "underinclusive remedial measure".[48] There was no obligation arising from either domestic or international law to make hate speech based on sexual orientation unlawful; by contrast there is such an obligation in both the ICERD and the ICCPR.[49] The existence of these international obligations "in [and] of themselves provide the s 5 justification for s 61 … being in the targeted terms that it is".[50]

[40] Furthermore, and consistently with the Supreme Court of Canada's decision in *Vriend v Alberta*, the Court held it is legitimate for the state to respond to the effects of discrimination through targeted responses addressing particular disadvantaged

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44 At [33].
45 At [40].
46 At [41], referring to *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [45].
47 Judgment under appeal, above n 2, at [42], referring to *R v Hansen*, above n 14.
48 Judgment under appeal, above n 2, at [43].
49 At [43].
50 At [44].

groups.[51] In support of this, the Court gave the examples of establishing a Race Relations Commissioner and the Ministry for Women. It cannot be that measures taken to address disadvantages address all discriminated groups at the same time and in the same way. Targeted measures are "an important aspect of countering the effects of discrimination, as s 19(2) itself contemplates".[52]

[41] The Court rejected the argument of Mr Hoban and the Commission that, given the question was whether the exclusion of sexual orientation was justified, the law could be developed on a case-by-case basis where each prohibited ground of discrimination was considered in turn.[53] The Court thought this approach avoided confronting a necessary issue, namely the justified limits under s 5, and "limit[ed] the counterfactual analysis under s 5 to an exercise of adding only one more prohibited ground" which would not "squarely address the discriminatory effect arising from s 61".[54]

[42] The Court said the questions relating to the scope of hate speech laws were primarily political, and the placement of the dividing line for hate speech laws and what amounts to hate speech was primarily a matter for Parliament.[55] The Court expressed its "considerable sympathy" for Mr Hoban, and noted that it would be "surprising to many" that the pastor's statement was not unlawful under New Zealand law.[56] Whether it should be, however, was a question for Parliament.

[43] Given its finding that the limit was demonstrably justified, the Court held no declaration of inconsistency was appropriate and dismissed the appeal.[57]

Irregularity in the grant of leave

[44] As noted, Mr Hoban obtained leave from the High Court to appeal to this Court.[58] Prior to the hearing in this Court, counsel for the Attorney-General raised

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51 At [45].
52 At [45].
53 At [46].
54 At [47].
55 At [48].
56 At [49].
57 At [50]–[51].
58 *Hoban* (leave), above n 3.

concerns that Mr Hoban's application for leave to appeal was made five days outside the 15 working day time period in s 124(2) of the HRA. That section provides that an application for leave to appeal must be made "within 15 working days after the determination of the High Court, or within such further time as that court may allow".

[45] Cooke J did not address the time period in his leave judgment. Counsel was anxious to ensure this Court was not troubled by "potential irregularity" in the granting of leave. At the hearing, we heard from both parties on the leave issue.

[46] We are satisfied that this case is covered by the second pathway in s 124(2), namely leave must have been granted using the court's discretion to grant leave "within such further time as that court may allow". The fact the High Court granted leave is an indication it allowed further time, notwithstanding the lack of specific reference to the grant of an extension. We do not see this as any barrier to the matter proceeding in this Court, and so we turn to the substantive issues arising on appeal.

The appeal

[47] The issues to be determined on appeal are:

(a) Whether the legislative omission of the ground of sexual orientation from the protection against hate speech afforded by s 61 of the HRA is discriminatory in terms of s 19(1) of the Bill of Rights Act.

(b) Whether s 61 of the HRA is a measure falling within s 19(2) of the Bill of Rights Act.

(c) Whether the legislative omission of hate speech on the ground of sexual orientation in s 61 of the HRA is a demonstrably justified limit on the right to freedom from discrimination for the purposes of s 5 of the Bill of Rights Act.

(d) Whether this Court should issue a declaration of inconsistency and, if so, what the terms of that declaration should be.

[48] We now address each issue in turn.

Is s 61 discriminatory in terms of s 19(1) of the Bill of Rights Act?

Submissions

[49] Mr Kirkness and Mr Harris submitted for Mr Hoban that s 61 is discriminatory: individuals who do not receive protection against hate speech on the ground of sexual orientation, when Parliament has extended that protection to other groups, face differential treatment and material disadvantage. Counsel supported the High Court's conclusion that it was "unavoidable" the legislative omission resulted in differential treatment and material disadvantage.[59] They also submitted the High Court was correct to compare those known to be victims of hate speech (including on the grounds of sexual orientation) with those individuals who fall within s 61, that is those who are victims of hate speech on the ground of colour, race, or ethnic or national origins.

[50] For the Commission, Mr Butler KC submitted the High Court's conclusion on this issue was correct. It was consistent with:

(a) the decision in *Ministry of Health v Atkinson*, which requires a substantive and not formulaic inquiry as to whether differential treatment has been offered to persons in comparable circumstances;

(b) the Supreme Court of Canada's decision in *Vriend v Alberta* and the indirect discrimination analysis; and

(c) common sense, in that gay people have historically been subject to violence, vitriolic abuse, and criminal sanction, which is still "present and biting".

[51] For the Attorney-General, Mr Perkins repeated the submission from the lower courts that the appropriate comparator group is people with a heterosexual, lesbian or bisexual orientation who are subjected to threatening, abusive, or insulting speech in their capacity as members of one of those groups. If this is the accepted comparator

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[59] Referring to judgment under appeal, above n 2, at [17].

group, then it will be apparent that s 61 does not treat people with a homosexual orientation differently from people with a heterosexual, lesbian, or bisexual orientation and s 61 is not prima facie discriminatory.

[52] Mr Perkins' argument about the appropriate comparator group built on this Court's statement in *Child Poverty Action Group Inc v Attorney-General* that:[60]

> The intention of the Human Rights Act is to take what has been described as a "purposive and untechnical" approach to whether there is prima facie discrimination and so to avoid artificially ruling out discrimination at the first stage of the inquiry.

[53] Mr Perkins argued the converse must also be true: the comparator should not be defined artificially to support a finding of prima facie discrimination at the first stage of the inquiry. He pointed to what he said was an unusual feature of this case inasmuch as it was not alleged there was discrimination within a prohibited ground. Mr Hoban's claim was that the omission of the entire ground of sexual orientation was discriminatory, not that he was treated less favourably than others on the basis of their sexual orientation.

[54] Mr Perkins acknowledged that in *Vriend v Alberta* the Supreme Court of Canada held the omission of sexual orientation as one of the prohibited grounds of discrimination, in an otherwise comprehensive human rights statute, unjustifiably discriminated on the ground of sexual orientation. However, Mr Perkins sought to distinguish that case on the basis that the omission was from a statute that was purportedly comprehensive and premised on "the inherent dignity and the equal and inalienable rights of all persons".[61] This was to be contrasted with an enactment such as s 61 of the HRA, in which Parliament has chosen to deal with one type of discrimination but not others.

[55] Because Mr Hoban had brought his claim as a person with a particular sexual orientation, the appropriate comparator is people with a heterosexual, lesbian or bisexual orientation subjected to threatening, abusive or insulting speech in their capacity as members of one of those groups. Choosing this comparator would avoid

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60 *Child Poverty Action Group Inc v Attorney-General*, above n 28, at [48] (footnote omitted).
61 Citing *Vriend v Alberta*, above n 38, at [94].

the problem identified in *Ministry of Health v Atkinson* of building contested assumptions into the selection of the comparator.[62]

[56] If this approach were accepted, s 61 would not treat people with a homosexual orientation differently from people with a different sexual orientation. All would be treated the same: s 61 and the dispute resolution procedures in pt 3 of the HRA would not be available to either group.

[57] However, Mr Perkins acknowledged that if this Court accepted the formulation advanced by Mr Hoban and the Commission, then to be denied the protection of s 61 constituted a material disadvantage and prima facie discrimination would be established.

Analysis

[58] The starting point for the analysis is the right affirmed by s 19(1) of the Bill of Rights Act to freedom from discrimination on the grounds of discrimination in the HRA. As set out above, in *Ministry of Health v Atkinson*, this Court said:[63]

> … the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact.

[59] In relation to the issue of comparator groups, in *Ngaronoa v Attorney-General* this Court said:[64]

> [120] … the concept of discrimination involves one group being treated differently from another in a comparable situation. The requirement for a differential treatment as between those in a comparable situation gives rise to the issue of who is to be compared to whom. The choice of an appropriate group or person with whom to carry out the comparison enables a determination of whether the person or group has been treated differently to another person or group in comparable circumstances.
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> [121] … We accept that a comparator exercise should not be treated as a formula to determine the answer to an allegation of discrimination. Comparator groups can be overly refined by building into the comparators the contested assumptions, thereby neutralising the comparator exercise.

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62 Referring to *Ministry of Health v Atkinson*, above n 15, at [67].
63 *Ministry of Health v Atkinson*, above n 15, at [55] (footnote omitted).
64 *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 (footnotes omitted).

> However, since discrimination is, in essence, treating persons in comparable situations differently, it is inevitable that the reasoning involved in such a process will include choosing a person or group for comparison purposes. As we will elaborate, it is not necessary to fix a single conclusive comparator.

[60] The context for the application of these principles in the present case is ss 21 and 61 of the HRA. Section 131 is also relevant. The substantive rule established by s 21(1)(m) is that sexual orientation is a prohibited ground of discrimination. The other grounds enumerated in s 21(1) are also prohibited grounds of discrimination. The discriminatory aspect of concern arises not from s 21, but from s 61, which only applies to language which is "threatening, abusive, or insulting" and likely to "excite hostility against or bring into contempt any group of persons … on the ground of the colour, race, or ethnic or national origins of that group of persons". Similarly, s 131 creates an offence of inciting racial disharmony in respect of language which is threatening, abusive or insulting and likely to "excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons … on the ground of the colour, race, or ethnic or national origins of that group of persons".

[61] Those subjected to threatening, abusive or insulting language which excites hostility against people belonging to the prohibited grounds of discrimination in subss 21(1)(e) (colour), (f) (race), and (g) (ethnic or national origins), receive the protection of ss 61 and 131. Their right to freedom from discrimination under s 19(1) of the Bill of Rights Act is acknowledged by those sections of the HRA. Those subject to language which excites hostility against people belonging to other prohibited grounds of discrimination in s 21(1) do not receive equivalent protection or acknowledgement. The question which must then be asked in accordance with *Ministry of Health v Atkinson* is whether this amounts to "differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination".[65]

[62] We consider it is clear that there is differential treatment. The statute puts some categories of prohibited grounds of discrimination in a special category which it denies to others. Yet, just as hate speech can be based on colour, race, or ethnic or national origins, it can also be based on sexual orientation. The common denominator of

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65 *Ministry of Health v Atkinson*, above n 15, at [55].

the victims of such speech can at a high level be seen as based on the perception that they are different or "other". This is the underlying reason why it is wrong to suggest the appropriate comparator here includes those whose sexual orientation is heterosexual, or others who are unlikely to be the subject of hate speech. The Court in *Vriend v Alberta* recognised the omission which created a distinction on the basis of sexual orientation was more consequential for gay men and lesbians:[66]

> The "silence" of the [statute] with respect to discrimination on the ground of sexual orientation is not "neutral". Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.

[63] The issue here is not the omission of homosexuality and other non-heterosexual persons from the prohibited grounds of discrimination, but the omission to enact provisions proscribing hate speech against them equivalent to s 61.[67] As the High Court found, this is differential treatment causing a disadvantage because no statutory remedy is provided for the unprotected group.[68]

[64] As both parties and the Commission agreed, it follows naturally from this conclusion that prima facie discrimination has been established. Section 61 both has symbolic value and contains practical rights. It is a legislative statement that racist speech is inherently damaging to New Zealand society, but it also allows people subject to that speech to seek redress using the resources of the state and the machinery provided by the HRA. We conclude that the omission to provide the same practical rights for other victims of hate speech is discriminatory, contrary to s 19(1) of the Bill of Rights Act.

Is s 61 of the HRA a measure falling within s 19(2) of the Bill of Rights Act?

[65] Section 19(2) of the Bill of Rights Act has been set out above. In summary, it provides that measures taken in good faith for the purpose of assisting or advancing

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66 *Vriend v Alberta*, above n 38, at [86].

67 It may be preferable to put the matter in that way, rather than requiring s 61 to carry the weight of the argument. The real issue is the statutory omission, whether it arises from the restricted ambit of s 61 or the failure to provide similar provisions directed against hate speech based on other forms of prohibited discrimination.

68 Judgment under appeal, above n 2, at [19].

persons or groups of persons disadvantaged because of unlawful discrimination are not discriminatory. As noted above, the issue in this part of the case is whether s 19(2) applies to s 61, a question to be asked bearing in mind that s 61 only refers to discrimination based on the prohibited grounds of discrimination in s 21(1)(e) to (g) of the HRA, not the other prohibited grounds.

Submissions

[66] Mr Perkins accepted that the High Court was probably right that s 19(2) was intended to ensure that affirmative action measures are not unlawful discrimination. But it was then necessary to identify what constitutes an affirmative action measure, and it is not obvious that s 61 is not such a measure.

[67] He submitted that, like the rest of s 19(2), the words "assisting" and "advancing" should be given a normal purposive interpretation. Section 61 has symbolic value, and also confers practical rights through the pt 3 dispute resolution procedures. These measures "assist" or "advance" the groups of people who may benefit from them.

[68] Mr Handford, who addressed Mr Hoban's argument about s 19(2), submitted that the provision applies to measures conferring an advantage on persons disadvantaged by unlawful discrimination. Section 61 of the HRA prohibits certain conduct, but it does not confer an advantage on persons disadvantaged by discrimination. He drew a comparison between s 19(2) of the Bill of Rights Act and s 15(2) of the Canadian Charter of Rights and Freedoms, which provides that s 15(1) (analogous to s 19(1) of the Bill of Rights Act):

> … does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Just as the Supreme Court of Canada had held that "laws designed to restrict or punish behaviour would not qualify for s 15(2) protection", the same outcome should apply to s 19(2) of the Bill of Rights.[69]

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[69] Citing *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483 at [54].

[69] Mr Handford also relied on the decision of the Supreme Court of Canada in *Alberta v Cunningham*, which held that s 15(2) of the Charter only protects distinctions that serve and are necessary to the purpose of the measure in question:[70]

> A purposive approach to s 15(2) focussed on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program. To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s 15's purpose of promoting substantive equality.

[70] Applied to s 19(2), this reasoning would mean that certain discriminatory measures can be consistent with s 19 if they promote overall substantive equality. Mr Handford submitted however that it would be anomalous if s 19(2) were held to protect a discriminatory measure that did not serve or advance the equality-advancing purpose of the measure. Here, the objective of s 61 is to protect those subject to hate speech because of their colour, race, or ethnic or national origins. Excluding those persons subject to hate speech because of their sexual orientation would in no way serve that objective. It would detract from, rather than advance, substantive equality.

[71] Mr Butler submitted this Court should endorse the analysis in the judgment under appeal. Section 19(2) should not be regarded as applying to s 61 as s 19(2) only applies to measures that give positive advantages to or otherwise assist those who are disadvantaged by discrimination.

[72] Mr Butler emphasised that the words "assist" and "advance" used in s 19(2) were inappropriate to describe a statutory prohibition on hate speech directed towards a person's colour, race, or ethnic or national origins. Section 61was not about assisting or advancing, but about protecting people from hate speech directed against them. If Parliament had intended s 19(2) to apply in cases such as the present, the language of assisting and advancing would not have been used.

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70 *Alberta v Cunningham* 2011 SCC 37, [2011] 2 SCR 670 at [45].

Analysis

[73] Section 19(1) of the Bill of Rights Act expresses the simple rule that everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA. Section 19(2) then states that:

> Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

[74] The "measures" referred to may be measures addressing persons or groups of persons disadvantaged by any of the prohibited grounds of discrimination, including of course discrimination on the basis of colour, race, and ethnic and national origin. Section 3(a) of the Bill of Rights Act states that the Bill of Rights Act applies to acts done by the legislative, executive or judicial branches of government. The High Court accepted that "measures taken" in s 19(2) can include legislative provisions, and we agree.[71] That is the plain intent of s 3(a) of the Bill of Rights Act. This enables the High Court to address issues of legislative compliance with the Bill of Rights Act. Section 61 of the HRA, then, is a measure taken by the legislative branch. The question for the purposes of s 19(2) is whether s 61 was enacted "for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful" under the HRA.

[75] We have concluded that s 61 was enacted for that purpose. The fact that it only assists or advances a limited class of those subject to unlawful discrimination does not deprive it of the character necessary for protection under s 19(2). It was, in the end, common ground that s 19(2) was intended to make it clear that measures designed to give positive advantages to those who have been, or might in future be, discriminated against, did not breach s 19(1).

[76] The words "assisting or advancing" are commonly used and understood words. As we have seen, the High Court took the view that they connote affirmative action measures, or "positive steps taken to counteract the adverse effects of discrimination

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[71] Judgment under appeal, above n 2, at [32].

by assisting or advancing the position of disadvantaged persons".[72] While accepting that "assisting" and "advancing" were different concepts, read as a whole s 19(2) was directed at measures giving positive advantages to people disadvantaged by discrimination. To reach that conclusion the Court treated "assisting" as "coloured by 'advancing'".[73] The subsection was intended to make it clear that measures of that nature were not unlawful.

[77] The High Court's reasoning really treated "assisting" and "advancing" as if they had the same meaning. We do not accept that is so. While "advancing" is clearly apt to connote affirmative action measures, and "assisting" would also apply to such measures, the latter word is also capable of a broader meaning. If Parliament had intended the words to be synonymous it would not have employed both. We consider a person may be assisted by receiving protection against hate speech, and some such idea must be what has led to the commencement of the present proceeding. Contrary to Mr Handford's submission, we consider persons subject to racial abuse are in a real sense assisted by laws which aim to prevent such speech occurring and to provide remedies when they do. That must be the reason ss 61 and 131 were enacted: to protect those who might be abused on a discriminatory basis.

[78] We are not persuaded that s 19(2) of the Bill of Rights Act should be regarded as the equivalent of s 15(2) of the Canadian Charter of Rights and Freedoms. The drafting of s 15(2) refers to laws, programs and activities which have the objective of the "amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". This seems to steer the statute more plainly in the direction of affirmative action measures than s 19(2). Even so, to the extent s 61 has the effect of preventing hate speech that might otherwise occur, there has been an "amelioration of conditions" for the persons protected.

[79] The complaint about s 61 is not that it does not assist those to whom it applies, but that it is underinclusive and does not assist the position of persons subject to hate speech on other grounds, in particular on the basis of sexual orientation. But this does

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72 At [32].
73 At [32].

not mean that s 61 cannot be regarded as a measure intended to protect those to whom it applies, or that it is not included in s 19(2). It is relevant to emphasise here that s 61 was always intended to have a limited ambit, responding to the international commitments New Zealand assumed under the ICERD and the ICCPR. There is an element of artificiality in identifying and focusing on the failure to include in s 61 proscriptions of hate speech in respect of other forms of discrimination never intended to be covered.[74]

[80] For these reasons we are satisfied that s 19(2) of the Bill of Rights Act applies to s 61 of the HRA, with the result that it does not constitute discrimination.

[81] This conclusion necessarily means that the appeal cannot succeed. It is not possible for us to conclude that s 61 is inconsistent with the right to freedom from discrimination affirmed by s 19(1) of the Bill of Rights Act.

[82] In the circumstances it is not necessary for us to determine the third issue raised on the appeal. We will however consider it, because of the importance of the issue and in case the matter goes to the Supreme Court. The discussion which follows proceeds on the basis that the omission of hate speech on the basis of sexual orientation from s 61 of the HRA is discriminatory in breach of s 19(1) of the Bill of Rights Act and, contrary to what we have actually held, is not within the ambit of s 19(2) of the Bill of Rights Act.

Is the omission of sexual orientation from s 61 a justifiable limit under s 5 of the Bill of Rights Act?

Submissions

[83] Mr Kirkness stressed the importance of s 5 of the Bill of Rights Act, which establishes the statutory test for determining whether a right has been subject to reasonable limitation. He submitted it required that constitutionally protected rights are only subject to limits that are based on reasoning, evidence, or argument, depending on what the context requires. This was very important in the case of

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[74] The criticism would be more appropriately directed against the HRA as a whole rather than s 61, which does exactly what the legislature intended.

legislative measures engaging constitutionally protected rights because of the wide application of legislative provisions, and the fact rights-limiting features might be hard to reverse.

[84] Mr Kirkness emphasised the need to be clear about the limit or right-limiting measure that is being analysed. Here, the relevant limit to be assessed is the legislative omission of sexual orientation. The High Court was wrong to focus on whether it was legitimate for Parliament to have enacted s 61; rather the question is whether the omission of sexual orientation from hate speech protection is demonstrably justified.

[85] Mr Kirkness submitted that, in accordance with the approach adopted in Canada and endorsed in New Zealand, it is necessary to engage in a structured proportionality analysis to ascertain for the purposes of s 5 whether the limit has been demonstrably justified. This involves asking whether the limit has a sufficiently important objective to which the measure is rationally connected, and is only such as is necessary to achieve the objective.[75] This was an exercise in which the Crown had not engaged. Its failure to do so should not have the consequence that the proper s 5 inquiry is avoided.[76]

[86] Mr Kirkness submitted the Crown could not properly rely on *Make It 16 Inc v Attorney-General* to assert that s 61 of the HRA could be justified on the basis of New Zealand's international obligations to adopt measures to address racist speech. In *Make It 16 Inc v Attorney-General*, the majority accepted that a limitation on a right may be one that is recognised in relevant international instruments or at common law, in which case evidence about the reasonableness of the restriction of the right might not be necessary.[77] But this was not such a case: the reasoning could not be applied to justify a limit in the form of omission of a protected right, to argue in effect that the limit is instead the positive justification for s 61. The existence of the obligation to protect against racial hate speech could not justify the omission of sexual orientation from hate speech protection.

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75 Citing *R v Hansen*, above n 14, at [121] per Tipping J; and *R v Oakes* [1986] 1 SCR 103.
76 Citing *Make It 16 Inc v Attorney-General*, above n 46.
77 At [45].

[87] Mr Kirkness was also critical of the idea that this was an issue in which the Court should defer to Parliament. It was not appropriate for the Crown to rely on deference as a reason not to carry out a proper proportionality analysis for the purposes of s 5. Rather, issues of deference should be reached as part of the s 5 analysis, in accordance with the approach taken by the Supreme Court of Canada in a number of cases, including *Vriend v Alberta*. The reasons of Cory and Iacobucci JJ in that case noted that although legislatures should be given "some leeway" when making choices between competing social concerns that was not without limits, and did not give the legislature "unrestricted licence to disregard an individual's Charter rights".[78] Mr Kirkness also quoted from McLachlin J's observations in *RJR-MacDonald v Canada*:[79]

> [136] … care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. …

[88] The role of deference was to be found in the approach to the individual components of an appropriate proportionality assessment when asking about the importance of the social objective served by the restriction on the right, rational connection, minimal impairment and so on. Further, deference might have a role in the way in which evidence provided in support of the restriction is analysed, so as to reach the assessment of whether "leeway" is appropriate. But that sort of exercise cannot be carried out if the Crown makes no attempt to justify the legislative measure concerned.

[89] In this context, Mr Kirkness sought to emphasise the fact that s 92J of the HRA specifically confers on the Tribunal power to make a declaration that an enactment found to be in breach of pt 1A of the HRA is inconsistent with the right to freedom

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78 *Vriend v Alberta*, above n 38, at [126], citing *Tétreault-Gadoury v Canada (Employment and Immigration Commission)* [1991] 2 SCR 22 at [49] (italics removed).

79 *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 (italics removed).

from discrimination affirmed by s 19 of the Bill of Rights Act. This was the role of the Court, considered appropriate by Parliament.

[90] Mr Butler addressed similar arguments on behalf of the Commission, and it is not necessary to set them out in detail here. But we mention some of the matters he emphasised.

[91] We note first his submission, in opposition to argument advanced by the Crown, that it was very doubtful that s 14 of the Bill of Rights Act (affirming the right to freedom of expression) would justify the omission of sexual orientation from the ambit of the hate speech provisions of the HRA. He noted the lack of any articulation by the Crown as to why hate speech directed towards colour, race, or ethnic or national origins does not unjustifiably burden the right to freedom of expression, while hate speech based on sexual orientation would do so. Nor was there any examination (or evidence) of the extent to which the freedom of expression would be curtailed in New Zealand if there were a prohibition on hate speech directed towards sexual orientation. Similarly, there had been no assessment of the nature and severity of the liability and penalty imposed by s 61 and any consequential effect on free speech if it were extended to sexual orientation. And he observed there had been no careful engagement with s 5 of the Bill of Rights Act in assessing whether expanding s 61(1) to sexual orientation would unjustifiably interfere with the right to freedom of expression.

[92] Mr Butler drew our attention to legislative provisions criminalising hate speech based on sexual orientation in several common law jurisdictions, including s 29B of the United Kingdom's Public Order Act 1986, s 319(1) of Canada's Criminal Code 1985, and s 2(1) of Ireland's Prohibition of Incitement to Hatred Act 1989. He pointed out that hate speech on the grounds of sexual orientation is one of a relatively limited class of prohibited forms of hate speech: none of the listed offences extended to all of the groups that are protected by the anti-discrimination statute in each respective jurisdiction.[80]

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[80] Equality Act 2010 (UK), pt 2 ch 1; Canadian Human Rights Act RSC 1985 c H-6, s 3(1); and Equal Status Act 2000 (Irl), s 3(2).

[93] Mr Butler mentioned the New South Wales Anti-Discrimination Act 1977, which provides that it is unlawful to incite hatred towards, serious contempt for, or severe ridicule of, a person on the grounds of homosexuality with an exception for public acts done reasonably and in good faith for public interest purposes.[81] There are equivalent civil regimes in Queensland, Tasmania and the Australian Capital Territory.[82]

[94] Mr Butler also referred to a number of decisions of the European Court of Human Rights regarding convictions for hate speech based on sexual orientation and deciding that the prohibition on such speech did not unjustifiably interfere with the right to freedom of expression.[83] Mr Butler emphasised that criminal convictions were upheld in those cases.

[95] There was no difference between Mr Butler and Mr Kirkness on the issue of deference. But it is appropriate that we note here the Commission's view that the combination of s 5 of the Bill of Rights Act and s 92F(1) of the HRA makes it clear that the Crown has a proactive justificatory role in cases involving s 19(1) of the HRA. This flows directly from the wording of s 92F(1):

> The onus of proving, in any proceedings under this Part, that an act or omission is, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limit on the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990 lies on the defendant.

And s 5 of the Bill of Rights Act uses the language "demonstrably justified", the significance of which has been addressed by the Supreme Court in a number of cases.[84]

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81 Anti-Discrimination Act 1997 (NSW), s 49ZT.

82 See Anti-Discrimination Act 1991 (Qld), s 124A; Anti-Discrimination Act 1998 (Tas), s 17(1); and Discrimination Act 1991 (ACT), s 67A.

83 *Vejdeland v Sweden* (2014) 58 EHRR 15 (ECHR); *Lilliendahl v Iceland* ECHR 29297/18, 11 June 2020; and *Lenis v Greece* (2025) 81 EHRR SE9 (ECHR).

84 See for example *R v Hansen*, above n 14, at [64] per Blanchard J and [103]–[104] per Tipping J; *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [86] and [195]–[197] per Winkelmann CJ, O'Regan, Williams and Kós JJ; and *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [96]–[97]. The New Zealand case law has largely followed the approach set out by the Supreme Court of Canada in *R v Oakes*, above n 75, at 138–140.

[96] For the Crown, Mr Perkins submitted the High Court correctly determined that the Crown was not required to bring substantial evidence to discharge the burden of establishing that s 61 was demonstrably justified. Nor was the Court required to "methodically apply" a *R v Hansen* analysis.[85] He argued that the case fell within the category of justification recognised in *Make It 16 Inc v Attorney-General* as rising from international instruments: the existence of international obligations requiring New Zealand to adopt measures addressing racist speech justified s 61 of the HRA being in targeted and underinclusive terms.[86] Where, as in this case, the limitation on rights is readily explicable by reference to New Zealand's international obligations, further scrutiny of the justification should not be required.

[97] Mr Perkins submitted further that Parliament is entitled to affirm, protect and promote rights and freedoms of different groups of people using different methods. Sections 61 and 131 of the HRA (and their predecessors) were introduced as targeted measures giving effect to New Zealand's international obligations, both under the ICERD and the ICCPR, and reflected a particular concern to promote racial equality in New Zealand and globally. Mr Perkins noted that there was a demonstrated and ongoing need for this specific protection. Thus, there was "an internally coherent justification" for why Parliament had implemented the targeted, underinclusive measure now complained of.

[98] The underinclusive measure was reasonable because, internationally, the expansion of prohibited grounds of discrimination over time had occurred quite separately to prohibited grounds for hate speech, and the latter had not seen the same expansion. Here, Mr Perkins referred to observations made by this Court in *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* that, whereas international proscriptions on discrimination have gradually been extended, prohibitions of "hate propaganda" have remained confined to the categories of race and religion.[87] In this context, it would be odd if s 61, enacted consistently with New Zealand's international obligations, were seen as requiring Parliament to enact

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85 Referring to *R v Hansen*, above n 14.

86 *Make It 16 Inc v Attorney-General*, above n 46, at [45].

87 Citing *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at [31].

legislation to protect ten other groups of people (those others enumerated in s 21(1) of the HRA) not the subject of similar international proscriptions of hate speech.

[99] Mr Perkins also relied on the fact that any proscription of speech necessarily engages others' right to freedom of expression. While hate speech may be of little value, making it unlawful might have a potential chilling effect on other speech and Parliament is entitled to deference as to the way competing rights of this kind are appropriately resolved. Parliament is in fact the appropriate forum for debate about the balance between freedom of expression and the harm speech can cause. Mr Perkins reminded us of Tipping J's observations in *R v Hansen* that "[j]udges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise".[88]

Analysis

[100] We start with s 19 of the Bill of Rights Act, which affirms that everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA. Under s 5 of the Bill of Rights Act, the rights and freedoms contained in the Act may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The way in which that provision must be applied was discussed by the Supreme Court in *R v Hansen*, and it is appropriate to note here what was said by Tipping J about the role of the courts under the section. He said:[89]

> [108] Parliament has … given the New Zealand Courts a significant review role. That role arises by virtue of s 5, which requires that a limit on a right or freedom be *demonstrably* justified. Determination of this question necessarily falls to the Courts. Parliament must therefore 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. But how much weight, if any, should be given to the fact that by enacting the limit, Parliament must be regarded as expressing its view that the limit is reasonable and justified? The concept of a society being democratic, and the express reference to that concept in s 5, suggests that some weight should be given to Parliament's appreciation of the matter.

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88 *R v Hansen*, above n 14, at [117].
89 Emphasis in original.

[101] Section 92F(1) of the HRA makes it clear that the Crown has a proactive justificatory role in cases involving s 19(1) of the Bill of Rights Act. This flows directly from the wording of s 92F(1), set out above. While there can be argument in some contexts about the nature of the justificatory onus, there is a clear legislative intent that where a legislative provision prima facie gives rise to discrimination on a ground prohibited under s 21(1) of the HRA, there is an obligation that the Crown show the limit on the right is justified. The strong word "proving" in s 92F(1) of the HRA is consistent with the "demonstrably justified" language of s 5 of the Bill of Rights Act. And as Tipping J also observed in *R v Hansen*, s 5 is:[90]

> … just as much an instruction to Parliament as it is to the Courts, and the role of the Courts can be regarded as keeping Parliament faithful to the s 5 instruction, but with some inherent room for parliamentary appreciation.

[102] Elsewhere, he observed that "[t]here is a spectrum which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other" and that the intensity of the court's review is likely to be greater when the matter is "closer to the legal end of the spectrum".[91] This statement was referred to with apparent approval by the Chief Justice in the majority reasons in *Attorney General v Chisnall*,[92] although she noted that most policy decisions have at least indirect implications for public spending.[93]

[103] In *Attorney-General v Chisnall*, the Supreme Court summarised the features of the *R v Hansen* proportionality assessment as requiring consideration of (1) whether the limiting measure serves a purpose sufficiently important to justify curtailment of the right or freedom, (2) whether the limiting measure is rationally connected with its purpose, (3) whether the limiting measure impairs the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose, and (4) whether the limit is in due proportion to the importance of the objective.[94] On the approach urged by Mr Kirkness, this analytical framework has to be applied to s 61,

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90 At [106].
91 At [116].
92 *Attorney-General v Chisnall*, above n 84, at [251].
93 At [251], n 330.
94 At [195].

characterising it as a legislative provision which omits sexual orientation as an unlawful subject of hate speech.

[104] It is important to note that Tipping J's statements in *R v Hansen* were made with reference to legislative restrictions on rights and freedoms. The language of justification is used to draw attention to a situation in which legislation has impinged upon a right affirmed by the Bill of Rights Act. In the present context the "restriction" relied on by Mr Hoban is not something that has been the subject of legislative affirmation. We are assuming in this part of the judgment that Mr Hoban has a notional right to protection equivalent to that given to persons subject to hate speech by reason of colour, race, or ethnic or national origin. In other words, the right is founded on the protection afforded to another group of the persons enumerated in s 21(1) of the HRA. But what is sought is the conferral of something which has no foundation in the Bill of Rights Act itself other than the non-discrimination provision of s 19(1): the direct source of the protection is s 61 of the HRA.

[105] In this context there is an awkwardness about approaching the justification issue on the basis that it is necessary for the Crown to justify a legislative provision limiting a right. On the face of it, Parliament has not set out to limit anyone's rights. What it has done is to afford protection to a limited class of the people likely to be subject to hate speech. Section 19(2) can be seen as endorsing or at least contemplating that approach. And responding to the way in which the arguments for Mr Hoban have been articulated, we think it is more accurate to speak of the omission of gay persons from the protection of s 61, rather than their exclusion (Parliament having not yet seen it appropriate to cast the hate speech net more widely).

[106] But in a real sense, there has been no curtailment of an existing right. The s 19(1) right to be free from discrimination on a prohibited ground is not a right to protection from hate speech. If it were, the same right could be claimed by every group listed in s 21(1) of the HRA. Such an outcome would be a dramatic extension of the limited hate speech proscription currently contained in the HRA.

[107] The justification issue must be approached on the basis that the provision said to create the unlawful discrimination is one that seeks to protect those to whom it

applies. In our view, contrary to the submissions made in support of the appeal, it must also be legitimate to take into account the fact that there are other groups of persons referred to in s 21(1) of the HRA who could also seek equivalent protection. That would not be in itself a justification for not legislating in respect of hate speech based on sexual orientation, but it is a factor that can legitimately be taken into account.

[108] This is what gives rise to such a significant issue here about deference and legislative choice. Despite Mr Kirkness's argument about deference, in this case there is a significant issue about the extent to which the Court passing judgment about justification risks trenching on matters which are for Parliament to determine. On the spectrum spoken of by Tipping J in *R v Hansen*,[95] it seems to us that the issues arising are very much at the end of major political and social decisions, as opposed to those which have a substantial legal content. A limited extension of the hate speech law to cover sexual orientation would raise legitimate questions (and further arguments based on discrimination) about why a more comprehensive approach had not been taken. Further, a more extensive hate speech law could give rise to issues about freedom of expression. In these circumstances, "leeway" for the democratically elected legislature must be a significant consideration and the quoted observations of McLachlin J in *RJR–MacDonald Inc v Canada (Attorney General)* do not appear apposite: this not a case where there has been a limit imposed on a guaranteed right.[96] As we have observed, the "right" would not exist but for Parliament's conferral of hate speech protection in accordance with s 61 of the HRA.

[109] The deference that is appropriately given to Parliament in the field of hate speech has to include the opportunity to establish its own agenda as to the expansion of the existing law and the coverage of any extended statutory provisions. Parliament might consider that not all of the prohibited grounds of discrimination will require the same human rights response. Different prohibited grounds may engage different, competing, human rights. While all forms of hate speech proscription engage with the competing right to freedom of expression, a human rights measure that is appropriate in respect of one prohibited ground may not be equally appropriate in respect of

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95 *R v Hansen*, above n 14, at [116].

96 *RJR–MacDonald Inc v Canada (Attorney General)*, above n 79, at [160].

another ground. These are assessments most appropriately made by the broadly representative legislative branch.

[110] The issues likely to arise are complex. They include the fact that, given the broad range of the prohibited grounds of discrimination in s 21, it is unlikely there would be a legitimate basis for including all of the prohibited grounds in hate speech proscriptions. Deciding whether the hate speech provisions should be expanded to include any or all of those grounds would likely be a complicated issue, raising significant policy considerations. There is no current consensus in New Zealand regarding the need to expand hate speech provisions and, if so, the extent to which they should be extended. This is demonstrated by some relevant history:

(a) In 1993, prior to the passage of the Human Rights Bill, the Department of Justice advised against extending cl 75 (now s 61) to other prohibited grounds of discrimination, stating that *the need* demonstrated for statements concerning race had not been borne out for other grounds.[97]

(b) In 2001, during the passage of the Human Rights Amendment Act, a Select Committee noted submissions recommending a review of hate speech provisions with a view to extending them to protect other vulnerable groups, but this suggestion was neither adopted nor further considered.[98]

(c) The 2019 terrorist attack on the Christchurch masjidain prompted proposals to strengthen and clarify existing human rights protections. The Royal Commission of Inquiry recommended that the criminal provision in the HRA (s 131) be repealed and replaced with a new offence in the Crimes Act 1961 which also extended coverage to include religious beliefs.[99] The Royal Commission also proposed sharpening the focus of the criminal offence (s 131) by replacing the existing language ("excite hostility or ill-will against, or bring into

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97 *Human Rights Bill — Report of the Department of Justice* (28 May 1993) at 42.
98 Human Rights Amendment Bill 2001 (152–2) (select committee report) at 22.
99 *Report of the Royal Commission*, above n 31, recommendation 40.

contempt or ridicule") with phrases like "to stir up, maintain or normalise hatred", arguing this reframed language would be more narrowly expressed and catch only extreme speech.[100]

(d) In December 2020, the Cabinet agreed in principle to proposals to extend the coverage of both the civil (s 61) and criminal (s 131) incitement provisions to all groups listed under the prohibited grounds of discrimination in s 21 of the HRA (including sex, religious belief, age, sexual orientation, and disability).[101]

(e) The Government subsequently issued a public discussion document in June 2021 seeking feedback on six proposals to address the identified gaps:[102]

(i) Proposal One (expanding protected groups): Change the language in the incitement provisions to protect more groups targeted by hateful speech. The public discussion document specifically not groups based on religion, gender, sexuality and disability are targeted by hate speech.

(ii) Proposal Two (new criminal offence): Replace the existing criminal provision (s 131) with a new offence in the Crimes Act that is clearer, replacing vague terms with "hatred" and prohibiting speech intended to "intentionally incite/stir up, maintain or normalise hatred" (the change suggested by the Royal Commission).

(iii) Proposal Three (increased penalty): Increase the maximum penalty for the new criminal offence to up to three years' imprisonment (up from three months) or a fine of up to $50,000 (up from $7,000).

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100 At 762–763.

101 Cabinet Office "Proposed Changes to the Incitement Provisions in the Human Rights Act 1993" (7 December 2020) CAB-20-MIN-0507 at [2].

102 Ministry of Justice *Proposals against incitement of hatred and discrimination* (June 2021).

(iv) Proposal Four (aligning civil provision): Change the civil incitement provision (s 61) wording to match the clarity of the proposed criminal provision, including adding "inciting/stirring up, maintaining or normalising hatred".

(v) Proposal Five (incitement to discrimination): Change the civil provision to make "incitement to discrimination" unlawful, aligning New Zealand law with international obligations under the ICCPR.

(vi) Proposal Six (clarifying discrimination grounds): Clarify the prohibited grounds of discrimination in s 21 of the HRA to explicitly protect trans, gender diverse, and intersex people.

[111] The consultation process generated extensive public debate, with 19,000 submissions received, highlighting significant differences of views. In November 2022, the Cabinet agreed to extend the coverage of ss 61 and 131 to include religious belief. This was the immediate legislative proposal in the Human Rights (Incitement on Ground of Religious Belief) Amendment Bill. The broader issue of expanding hate speech protections, including for sexual orientation, gender, and disability, was referred to the Law Commission | Te Aka Matua o te Ture for a first-principles review of hate-motivated offending and behaviour. This review was intended to consider what groups protected under s 21 should be covered by incitement laws.

[112] In February 2023, the Prime Minister, the Rt Hon Christopher Hipkins, announced the Government would not proceed with the proposed hate speech reforms.

[113] In March 2024, the Minister of Justice asked the Law Commission to review the law relating to hate *crime* with a focus on whether new hate crime offences should be added (as recommended by the Royal Commission). Hate speech, which had previously been on the Law Commission's agenda, was removed from the scope of the review.

[114] Given this history, it is plain that it would be wrong to conclude that because hate speech is prohibited in New Zealand in relation to some of the prohibited grounds, it must be prohibited in respect of *all* of the prohibited grounds, to avoid the claim of discrimination under s 19 of the Bill of Rights Act. A decision would need to be made as to which (if any) of the prohibited grounds should be included in hate speech provisions. Hate speech (if any) experienced by different groups, however, may be qualitatively and quantitatively different. A careful assessment of the evidence relating to this would need to be undertaken. This is unlikely to be a straightforward exercise and is not a process suitable for determination in litigation such as this.

[115] Further, for each prohibited ground, if a demonstrable need for protection from hate speech had been identified, it would then be necessary for Parliament or the Law Commission to carefully consider how enacting such protection would interact with other fundamental human rights such as freedom of speech and freedom of religion. A bespoke legislative response would need to be crafted for each prohibited ground (if a legislative response is seen as appropriate) that balances these competing human rights. It is not clear that a provision that adopted the wording of s 61 of the HRA would be appropriate with respect to all of the prohibited grounds.

[116] We make these further observations in relation to the matters relied on by the Crown in its justification argument. First, and as noted by the High Court, while s 61 was enacted in response to obligations assumed by New Zealand under the ICERD and the ICCPR, the section has an apparently discriminatory effect only because it is a targeted remedial measure. The High Court considered that "the existence of the international obligations in [the] ICERD and the ICCPR in [and] of themselves provide the s 5 justification for s 61 of the HRA being in the targeted terms that it is".[103] And later, having noted that there was no international obligation in respect of hate speech based on sexual orientation equivalent to s 61, the Court said:[104]

> The international obligation in both ICERD and art 20 of the ICCPR is reflected in the terms of the New Zealand legislation as it presently stands. We consider that the discriminatory nature of s 61 is demonstrably justified on that basis alone.

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103 Judgment under appeal, above n 2, at [44].
104 At [44].

[117] Mr Perkins supported this reasoning, but we are not persuaded by it. We think it downplays the importance of the justification requirement in s 5 of the Bill of Rights Act. We would not see the absence of a relevant international instrument requiring action in respect of hate speech based on sexual orientation as dispositive of the justification issue.

[118] The questions raised by s 5 in this case are whether the *omission* of hate speech on the grounds of sexual orientation is itself demonstrably justified, a question not logically answered by pointing to the international instruments that led to the *inclusion* in the HRA of hate speech on the grounds of colour, race, or ethnic or national origins. While the international instruments might explain the origin of ss 61 and 131 as they presently stand and the timing of their enactment, they do not justify the omission of laws proscribing hate speech based on other prohibited grounds of discrimination. And to explain the current ambit of s 61 solely on the basis of international obligations might be thought to underplay the New Zealand legislature's own commitment to human rights, reflected in the breadth of the conferral by s 19 of the Bill of Rights Act of the right to freedom from discrimination on the prohibited grounds in the HRA. The fact that this right was included in the Bill of Rights Act militates against any argument that would confine the justification argument to the circumstances addressed in the international instruments.

[119] It is also appropriate to note that the question raised by s 5 must be addressed on the basis of current standards: unless the "free and democratic society" to which the section refers is one that evolves with societal standards over the years, the intended effect of s 5 could be lost. An analysis which rests solely on the content of international instruments adopted 60 years ago (the ICERD in 1965, the ICCPR in 1966) seems inappropriate.[105] As Mr Butler pointed out, a criminal hate speech law was first introduced into New Zealand law by s 25 of the Race Relations Act. A civil complaints regime (s 9A) was added in 1977. Section 61 of the HRA was enacted in 1993. The question of whether the discriminatory effects of the section can be demonstrably justified today cannot properly be answered by focusing on Parliament's original motivation for enacting s 61. And it should go without saying that the Bill of

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[105] New Zealand ratified the ICERD in 1972 and the ICCPR in 1978.

Rights Act was enacted to affirm, protect, and promote human rights and fundamental freedoms in New Zealand, in addition to affirming New Zealand's commitment to the ICCPR.[106]

[120] It may also be noted that since the observations made by this Court in *Living World Distributors v Human Rights Action Group*, on which Mr Perkins relied, there have been significant international developments.[107] The cases and statutory provisions to which we were referred by Mr Butler, discussed above, make it clear that it would be wrong to proceed on the basis that hate speech based on sexual orientation would be unusual in international terms, at least in those free and democratic societies overseas to which we often turn for reassurance that our laws are not out of step.

[121] Putting all this another way, when regard is had to the role of s 5, and the duties of Parliament and the courts, a justification of the omission of proscriptions of hate speech based on sexual orientation cannot properly be based on the fact that there is no international obligation to enact such provisions.

[122] However, as Mr Perkins submitted, any proscription of speech necessarily impinges on the freedom of expression affirmed by s 14 of the Bill of Rights Act, which provides:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[123] The importance of this fundamental right has to be considered. Although it was unnecessary for its decision to do so, the High Court expressed the view that "the inclusion of sexual orientation within ss 61 and 131 of the HRA would likely be a demonstrably justified limit on the right of freedom of expression in s 14 under s 5 of the Bill of Rights".[108] We agree with that view. Mr Perkins argued this was not to the point: while threatening, abusive or insulting speech might be of little value, proscribing such speech would have the potential to chill other expression that might be hurtful and offensive but still have some value.

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106 Bill of Rights Act, long title.
107 *Living Word Distributors Inc v Human Rights Action Group Inc (Wellington)*, above n 87, at [31].
108 Judgment under appeal, above n 2, at [49].

[124] It is not clear to us why proscribing hate speech based on sexual orientation should impose any greater detriment to freedom of speech than was the case with the inclusion of colour, race, or ethnic or national origins in s 61. But it will be apparent from the earlier discussion that we see the resolution of that issue as a matter for Parliament.

[125] Because of our conclusion that s 61 of the HRA is within the ambit of s 19(2) of the Bill of Rights Act, it is not necessary for us to express a conclusion on the issue of justification. Indeed, it would be wrong to do so, as we see the issue as one for Parliament to resolve. We emphasise however that the provisions to which Mr Butler referred in the United Kingdom, Ireland, Canada and Australia make the omission of a hate speech proscription based on sexual orientation in New Zealand increasingly anomalous. In the circumstances we endorse the High Court's expression of sympathy for Mr Hoban, and agree with its observation that many in the community would be surprised that the comments made by the pastor were not unlawful under New Zealand law.[109]

Should this Court issue a declaration of inconsistency?

[126] Our conclusion that s 19(2) applies to s 61 of the HRA means that the appeal cannot succeed and no declaration of inconsistency can be made.

Result

[127] The appeal is dismissed.

[128] There is no order as to costs.

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109 At [49].