

Appellant's Roadmap
Hoban v Attorney-General

Counsel certify that they have made appropriate inquiries to ascertain whether this submission contains any suppressed information and that, to the best of their knowledge, this submission is suitable for publication.

Issue	Cross-reference
Approach to s 19(1) and s 19(2) NZBORA	Decisions below on these points • Human Rights Review Tribunal: [32], [34]–[35], [42]–[43] • High Court: [6], [9], [10], [32], [33] • Court of Appeal: [62], [63]–[64], [72], [75], [79] Approach of Crown – Respondent's submissions: [4], [33], [40] Approaching s 19(1) and s 19(2) sequentially is consistent with the Legislation Act 2019; the Crown's approach is not supported by authority and creates a convoluted threshold test
Whether legislative omission of sexual orientation from s 61 is discriminatory under s 19(1) NZBORA	Legal framework: [5.2], Appellant's submissions There is plainly differential treatment on the basis of a prohibited ground: [5.4] The omission of sexual orientation from the scope of hate speech protection clearly gives rise to a material disadvantage: [5.5]
Whether legislative omission of sexual orientation from s 61 falls within s 19(2) of NZBORA	Starting point: Legislation Act 2019, s 10(1) The omission of sexual orientation from the scope of hate speech protection does not have the purpose of assisting or advancing disadvantaged groups: [6.1]–[6.3] • Crown argument that omission “sits uneasily” with s 19(2) is a point in our favour: that this omission should not be saved by s 19(2)

Issue	Cross-reference
	“Assisting or advancing” in s 19(2) has a compound meaning referring to positive measures to counteract discrimination; the prohibitions in ss 61 and 131 are prohibitions, not positive measures: [6.6]–[6.9] • Court of Appeal error at [77] • Consistent with legislative history • Wider interpretation, based on an overly literal reading of the legislation, would have absurd consequences
Whether legislative omission of hate speech on ground of sexual orientation is demonstrably justified limit on right to freedom from discrimination, under s 5 NZBORA	There is a well-established approach to s 5 justification: [7.1], [7.5]–[7.10] • Whether a limit is demonstrably justified is a legal question and the correct application of the legal standard in s 5 NZBORA involves mixed question of fact and law. • Section 5 requires a proportionality assessment. When legislative limits on rights have been involved, New Zealand courts undertake a structured proportionality assessment to determine whether limit is justified. • Defendant has the burden of justifying the limit. Express under s 92F(1) HRA. • Requires defendant to engage in “proactive justificatory role” (CA, at [101]). Not question of deferring to Parliament’s choice. Process of demonstration: rational inference from cogent evidence and established truths. Application of proportionality assessment: [7.11]–[7.23] • Crown has put justification in issue. That is a litigation choice. It was open for the Crown not to do so and argue case on other grounds. • Crown has failed to engage in structured proportionality assessment or advance an alternative form of proportionality assessment (“rational ... basis” formulation in Crown subs [89]) is not developed and not consistent with approach in New Zealand courts. • Crown position appears to be that New Zealand’s international obligations to proscribe racist hate speech but not other forms of hate speech (Crown subs, at [86]) taken with deference to Parliament’s choice mean justification is satisfied (Crown subs, at [99]–[104]) • If Crown position is accepted for sake of argument and tested by reference to structured proportionality, Crown fails at each step of the analysis:

Issue	Cross-reference
	○ responding to international obligations in respect of racist hate not an “objective” for the limit (ie, the omission), let alone a pressing and substantial one; ○ no rational connection because arbitrary and unfair to discriminate on basis of sexual orientation in seeking to proscribe racist hate speech; ○ less rights intrusive alternatives were available because proscription of racist hate speech can be secured without discriminating on basis of sexual orientation; ○ not proportionate in general sense either because significant incursion into right to be free from discrimination on basis of sexual orientation and no countervailing consideration as to why such incursion necessary has been articulated International agreements do not provide justification: [7.24] • Question about justification of the legislative <i>omission</i> of sexual orientation not answered by pointing to international instruments leading to inclusion of proscription for racist hate speech in HRA The Court cannot invoke “deference” to abdicate its duty to undertake the s 5 assessment [7.25] • CA error at [125] • Crown argument misunderstands role of DOI under HRA. Declaration by the courts does not create an “obligation” for Parliament or cut across any “entitlement” (at Crown’s subs, [99]-[104]) • Weight or “deference” must be earned, not assumed. Crown has failed to advance cogent reasons for why it should be afforded weight.
Whether this Court should issue a declaration of inconsistency and, if so, what the terms of that declaration should be	A declaration should be issued in this case: [8.1] • Constitutionally protected significant rights of a minority group; consistent with courts’ role in declaring the law; serves vindication purpose; lack of alternative remedy; draws legislature’s attention to answer to legal question: <i>Make It 16</i> at [66]-[68]; <i>Taylor</i> at [121]; DOI Amendment Bill SC Report; <i>Steinfeld</i> at [60]; <i>Chisnall</i> at [250]-[252], [264]; <i>Nicklinson</i> at [325], [343]; <i>Electoral Commission v Tate</i> at [35].

Issue	Cross-reference
	This is not a case where a narrowly formulated declaration is appropriate: [8.2] • “[I]s not justified” or “cannot be justified” language appropriate. “[H]as not been justified” language not appropriate: <i>Chisnall (Declarations)</i> at [7]. ○ Inconsistency “based in significant part on legislative provisions or their absence.” ○ Respondent has not demonstrably justified the limit on the right, and a standard declaration should follow. Possible formulation of declaration: • Section 61 of the Human Rights Act 1993 is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 insofar as it does not apply where the relevant matter or words is likely to excite hostility against or bring into contempt a group of persons on the ground of their sexual orientation; this inconsistency is not justified in terms of s 5 of the New Zealand Bill of Rights Act. • Section 131 of the Human Rights Act 1993 is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990 insofar as it does not apply where the relevant matter or words is likely to excite hostility or ill-will against, or bring into contempt or ridicule, a group of persons on the ground of their sexual orientation; this inconsistency is not justified in terms of s 5 of the New Zealand Bill of Rights Act.