

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 8/2026

BETWEEN	RUSSELL THOMAS HOBAN
	Appellant
AND	ATTORNEY-GENERAL
	Respondent
AND	HUMAN RIGHTS COMMISSION
	Intervenor

APPELLANT'S WRITTEN SUBMISSIONS ADDRESSING RESPONDENT'S
NEW ARGUMENT
19 AUGUST 2026

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.

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Table of Contents

1. OVERVIEW	1
2. OMISSION HAS DISCRIMINATORY EFFECT.....	2
3. NEW S 19(1) ARGUMENT IS NOT LOGICAL	3
4. NEW S 19(1) ARGUMENT IS NOT SUPPORTED BY AUTHORITY	4

MAY IT PLEASE THE COURT

1. OVERVIEW

1.1 The Respondent's written submissions raise new arguments regarding s 19(1) of the New Zealand Bill of Rights Act 1990 (**Bill of Rights**). These arguments are without legal merit and distract from the core issues in this case.

1.2 This case is about the *omission* of sexual orientation from the prohibited grounds of 'hate speech' in s 61 of the Human Rights Act 1993 (**HRA**), not s 61 generally. It raises three issues:¹ (i) whether *this omission* is prima facie discriminatory under s 19(1); (ii) whether *this omission* is a "measure" to which s 19(2) applies; and (iii) whether *this omission* is a justified limitation upon the right to freedom from discrimination under s 5.

1.3 The Respondent's new arguments distract from these questions by arguing that s 61 did not have a discriminatory purpose. This is not relevant. If a state act or omission² has a discriminatory effect, then it limits the right to freedom from discrimination, and the state must justify that limit. To require the state to do so is to apply the standard set by Parliament, not to second-guess it.³

1.4 The thrust of the Respondent's new s 19(1) argument is that:⁴

Section 61 ... does not *remove* protection from groups defined by sexual orientation. Rather, it has been "carefully framed" to create *targeted* protection for groups defined by race, colour, or ethnic or national origins. Parliament's choice to provide a particular form of legal protection for some groups does not, without more, impose material disadvantage on others.

¹ Appellant's written submissions at [3.2].

² Human Rights Act 1993, s 20L.

³ See *B v Attorney-General* [2026] NZHC 2179 at [105]-[111].

⁴ Respondent's written submissions at [44].

1.5 This argument is divorced from reality. Section 19(1) is concerned with the discriminatory *impact* of distinctions based on the prohibited grounds identified by Parliament.

1.6 The suggestion that s 19(1) analysis “might not be required (nor indeed helpful) in cases where s 19(2) is arguably engaged”⁵ is unsupported by logic or authority. It implies that the Court should avert its gaze from the discriminatory impact of acts or omissions (including enactments) so long as the state actor was not deliberately discriminating against individuals based on one of the prohibited grounds.

2. OMISSION HAS DISCRIMINATORY EFFECT

2.1 The Tribunal, the High Court and the Court of Appeal each found that: (a) s 61 differentiates between those subject to hate speech on the basis of their sexual orientation and those who are subject to hate speech on the basis of their race, colour or national or ethnic origins;⁶ and (b) this has a discriminatory impact on those subject to hate speech on the basis of their sexual orientation.⁷ The Respondent conceded (b) in the Court of Appeal:⁸

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.

⁵ Respondent’s written submissions at [40].

⁶ *Tribunal Decision* at [32]-[33]: [[101.0184]]; *HC Decision* at [19]: [[102.0199 – 0200]]; *CA Decision* at [62]: [[102.0243 – 0244]].

⁷ *Tribunal Decision* at [35]: [[101.0184]]; *HC Decision* at [19]: [[102.0199 – 0200]]; *CA Decision* at [64]: [[102.0244]].

⁸ *CA Decision* at [64]: [[102.0244]].

- 2.2 The Respondent's submissions that "there is no general entitlement to be protected from others' expression"⁹ and that s 61 "does not remove protection"¹⁰ are not relevant. As explained in *Vriend v Alberta*:¹¹

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.

3. NEW S 19(1) ARGUMENT IS NOT LOGICAL

- 3.1 The ease with which the Tribunal and the lower courts found the existence of a discriminatory impact speaks to the absurdity of the Respondent's proposition that a s 19(1) analysis "might not be required (nor indeed helpful) in cases where s 19(2) is arguably engaged". Section 19(2) provides:

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. (Emphasis added)

- 3.2 The consequence of s 19(2) applying is that an identified measure "do[es] not constitute discrimination". But this matters only if the "measure" is an act or omission that is *prima facie* discriminatory under s 19(1). If the discriminatory act or omission identified under s 19(1) is different from the "measure" identified for the purposes of s 19(2) then s 19(2) will not save that act or omission.
- 3.3 It is therefore illogical to consider s 19(2) without first identifying the discriminatory act or omission under s 19(1). Section 19(1)

⁹ Respondent's written submissions at [42].

¹⁰ At [44].

¹¹ *Vriend v Alberta* [1998] 1 SCR 493 at [86]; quoted in the *HC Decision* at [18]: [[102.0199]]; and the *CA Decision* at [62]: [[102.0244]].

provides the necessary context for consideration of s 19(2). This is consistent with the approach to s 15 of the Canadian Charter.¹²

- 3.4 Further, addressing s 19(2) first cheapens s 19(1) by allowing the Court or Tribunal to avert its gaze from the discriminatory effect of an act or omission, provided the legislature was sufficiently well-intentioned.¹³ This is contrary to the “intention of the [HRA]” as described in *Child Poverty Action Group Inc v Attorney-General*:¹⁴ “to take ... 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”.

4. NEW S 19(1) ARGUMENT IS NOT SUPPORTED BY AUTHORITY

- 4.1 Contrary to the Respondent’s new position, none of the *White Paper*, the High Court judgment, or Professor Huscroft’s commentary are authority for the proposition that s 19(2) can be considered without first considering s 19(1).¹⁵
- 4.2 The statement in the *White Paper* that “affirmative action laws and programmes to overcome existing advantages ... are unlikely to be seen as discrimination at all” begs the question: “discrimination against whom?”. The *White Paper* impliedly assumes the archetypical situation where exclusion of one group serves or is necessary for the advancement of another (like education quotas for the advancement of Māori which necessarily limit spaces for non-Māori). In this case there is no claim, let alone

¹² *Alberta v Cunningham* [2011] 2 SCR 670 at [43]: “As in all s. 15 cases, the first question is whether the law makes an adverse distinction against the claimant group on the basis of one of the grounds set out in s. 15(1) or an analogous ground.”

¹³ *Fraser v Canada (Attorney-General)* [2020] 3 SCR 113 at [69] per Abella J (emphasis in original, citations omitted): “whether the legislature *intended* to create a disparate impact is irrelevant. Proof of discriminatory intent has never been required to establish a claim under s. 15(1). Nor is an ameliorative purpose sufficient to shield legislation from s. 15(1) scrutiny.”

¹⁴ *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [48].

¹⁵ The authorities relied upon in the Respondent’s written submissions at [33]-[39].

evidence, that permitting hate speech on the basis of sexual orientation serves or is necessary to advance those who are subject to hate speech on the basis of their race, colour or national or ethnic origins.

4.3 The High Court expressly rejected an alternative approach:¹⁶

But a key reason not to adopt such an approach to the definition of discrimination arises from the structure of the New Zealand Bill of Rights. All the rights are subject to s 5, and accordingly to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Moreover in s 19(2) particular types of differential treatment are expressly permitted. We consider that it is preferable to allow all matters of justification to be considered in these subsequent steps, rather than indirectly through the definition of discrimination. ...

This will mean that s 19(2) and s 5 may have a lot of work to do in discrimination cases. But we see no difficulty in that. Indeed adopting this approach assists in the analysis being simpler and more structured, as it avoids the answers to hard cases being determined by a less certain definitional approach. ...

4.4 Finally, to the extent Professor Huscroft's approach arguably reflects the state of Canadian jurisprudence in 2003, it does not reflect the modern approach articulated by the Supreme Court of Canada in its 2008 judgment in *R v Kapp*.¹⁷

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¹⁶ *HC Decision* at [23]-[24], quoting *Ministry of Health v Atkinson* [2012] NZCA 184; [2012] 3 NZLR 446 at [132] and [135], citations omitted: [[102.0201]].

¹⁷ *R v Kapp* [2008] 2 SCR 483 at [40]. The Court expressly diverged at [34]-[38] from *Lovelace v Ontario* [2000] 1 SCR 950, which was cited in Grant Huscroft "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 366 at 391 for the proposition that s 15(2) had been rendered "otiose".