

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              |

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APPELLANT'S WRITTEN SUBMISSIONS  
22 JUNE 2026

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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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## MAY IT PLEASE THE COURT

### 1. OVERVIEW

- 1.1 On 15 August 2017 a newspaper reported that a pastor at Westcity Bible Baptist Church wanted gay people to be shot upon kissing each other. The pastor said:<sup>1</sup>

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.

- 1.2 Russell Hoban is homosexual. He read the report of the pastor's comments and was "horrified".<sup>2</sup> When he learned that there was no legal recourse for him to challenge this statement, he felt threatened, unprotected, undermined and unsafe.<sup>3</sup>
- 1.3 Mr Hoban commenced proceedings in the Human Rights Review Tribunal. He sought a declaration<sup>4</sup> that the legislative omission of sexual orientation from the prohibited grounds of hate speech in s 61 of the Human Rights Act (**HRA**) is inconsistent with the right to freedom from discrimination in s 19 of the New Zealand Bill of Rights Act 1990 (**Bill of Rights**).
- 1.4 Mr Hoban has had some measure of success in the Tribunal, the High Court, and the Court of Appeal. All decisions below have concluded that the omission of sexual orientation from the protection afforded by the hate speech provisions (ss 61 and 131) is prima facie discrimination under s 19(1) of the Bill of Rights. But each of the Tribunal and the lower courts ultimately dismissed his claim. The Tribunal and the Court of Appeal found that the

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<sup>1</sup> *Hoban v Attorney-General* [2022] NZHRRT 16 (**Tribunal Decision**) at [6]: [[101.0179]].

<sup>2</sup> At [7]: [[101.0180]].

<sup>3</sup> At [7]: [[101.0180]].

<sup>4</sup> Under s 92J of the Human Rights Act 1993.

prima facie discrimination does not, properly understood, constitute discrimination because Mr Hoban's case falls within s 19(2) of the Bill of Rights. The High Court found that s 19(2) of the Bill of Rights did not apply, but that the limit on the right was demonstrably justified under s 5 of the Bill of Rights.

1.5 The decisions below have erred by vacillating between seeing the omission as the focus of the case and considering whether it was legitimate for Parliament to enact ss 61 and 131 of the HRA. The relevant legal question for this Court is whether the omission of sexual orientation from the scope of hate speech protection under the HRA is consistent with the right to be free from discrimination on the ground of sexual orientation under the Bill of Rights.

1.6 Mr Hoban's answer to that legal question is straightforward: the omission is a limit on the right that cannot be demonstrably justified in a free and democratic society. New Zealand's existing law treats some victims of hate speech based on race, colour, ethnicity or national origin as more worthy of protection than victims of hate speech based on sexual orientation. That different treatment serves no pressing and substantial objective, is arbitrary and is not justified in a free and democratic society such as New Zealand. A declaration of inconsistency should follow so that the inconsistency is drawn to the attention of Parliament.

## 2. DECISIONS BELOW

2.1 The Human Rights Review Tribunal's decision. The Tribunal observed that Part 1 of the HRA applies to legislative omissions.<sup>5</sup> The Tribunal recorded that Mr Hoban's claim was "that the omission by the legislative branch of government to include sexual orientation in HRA, s 61 results in him being discriminated against".<sup>6</sup> The Tribunal ultimately held that: (i) the right to

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<sup>5</sup> Tribunal Decision at [15]–[16]: [\[\[101.0181\]\]](#); citing HRA, ss [20J](#) and [20L](#).

<sup>6</sup> At [17]: [\[\[101.0181\]\]](#).

freedom from discrimination in s 19(1) of the Bill of Rights was engaged because the omission of sexual orientation from the protection afforded by s 61 constituted a limit on the right;<sup>7</sup> but (ii) there was no breach because s 61 was a measure to assist or advance persons disadvantaged by discrimination under s 19(2) of the Bill of Rights.<sup>8</sup> The Tribunal stated that: “The focus of the justification inquiry is not the justification for HRA, s 61 having a limited reach.”<sup>9</sup>

2.2 Given this formulation, the Tribunal accepted the Attorney-General’s submissions that New Zealand has no treaty obligations requiring the enactment of legislation prohibiting the advocacy or incitement of hatred based on sexual orientation and Parliament is the appropriate venue for debate about the scope of hate speech laws in New Zealand.<sup>10</sup> The Tribunal added that human rights do not advance on all fronts simultaneously<sup>11</sup> and “it is not required or practicable for every possible improvement to human rights protection to be enshrined in legislation”.<sup>12</sup>

2.3 The High Court’s decision. The High Court found that: (i) s 19(1) was engaged because the omission of sexual orientation was a limit on the right to freedom from discrimination;<sup>13</sup> and (ii) s 19(2) is directed at affirmative action measures and so did not apply;<sup>14</sup> but (iii) there was no breach because the omission was demonstrably justified for the purposes of s 5.

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<sup>7</sup> Tribunal Decision at [35]: [[101.0184]].

<sup>8</sup> At [42]–[44]: [[101.0185 – 0186]].

<sup>9</sup> At [58]: [[101.0188]].

<sup>10</sup> At [57]: [[101.0188]], accepting the submissions for the Attorney-General, which it recorded at [52] to [56]: [[101.0187 – 0188]].

<sup>11</sup> At [59]: [[101.0188]].

<sup>12</sup> At [60]: [[101.0189]].

<sup>13</sup> *Hoban v Attorney-General* [2022] NZHC 3235 (HC Decision) at [16]–[25]: [[102.0198 – 0202]].

<sup>14</sup> At [32]–[34]: [[102.0204]].

- 2.4 The Court held for “reasons ... similar to the reasons adopted by the Tribunal” that the legislative omission of sexual orientation from the protection of s 61 “has a discriminatory effect in the sense contemplated by s 19(1)”.<sup>15</sup> The Court stated that s 19(2) “should be given a normal purposive interpretation”.<sup>16</sup> Given s 19(2) “was introduced to make it explicit that affirmative action measures should not be treated as unlawful discrimination”,<sup>17</sup> it would be “artificial to consider s 61 as falling within the intended scope of s 19(2)”.<sup>18</sup> Sections 61 and 131 of the HRA do not have the “purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination”; s 131 creates an offence and s 61 provides a civil remedy.<sup>19</sup>
- 2.5 The decisive issue for the High Court was whether the “discriminatory effect arising from the underinclusive effect of s 61 is demonstrably justified”.<sup>20</sup> The Court held that the underinclusive effect was justified because it fell within the “category of justification ... recognised ... in *Make It 16 Incorporated v Attorney-General*”<sup>21</sup> because New Zealand’s international obligations in CERD and ICCPR did not impose an “obligation ... to make hate speech on the basis of sexual orientation unlawful.”<sup>22</sup> The Court found that the existence of international obligations “in and of themselves provide the s 5

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<sup>15</sup> HC Decision at [25]: [[102.0202]].

<sup>16</sup> At [31]: [[102.0203]].

<sup>17</sup> At [30]: [[102.0203]].

<sup>18</sup> At [32]: [[102.0204]].

<sup>19</sup> At [33]: [[102.0204]].

<sup>20</sup> At [40]: [[102.0207]].

<sup>21</sup> At [41]: [[102.0207]]; citing *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 (*Make It 16*) at [45] per Winkelmann CJ, Glazebrook, O’Regan and Ellen France JJ.

<sup>22</sup> HC Decision at [43]: [[102.0207 – 0208]], referring to 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) (**CERD**), 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).

justification for s 61 of the HRA being in the targeted terms that it is”.<sup>23</sup> The Court rejected that “questions of deference are involved”, but said “the placement of the dividing line for hate speech laws” and associated questions “are primarily matters for Parliament”.<sup>24</sup> The Court observed that hate speech law was “currently again under review”,<sup>25</sup> stated that it had “considerable sympathy for Mr Hoban”,<sup>26</sup> and added that “[i]t will be surprising to many that the comments made by the Pastor in this case were not unlawful under New Zealand law”.<sup>27</sup>

2.6 The Court of Appeal’s decision. The Court of Appeal found that s 19(1) was engaged because the omission of sexual orientation from the protection afforded by s 61 was a limit on the right to freedom from discrimination on the ground of sexual orientation.<sup>28</sup> The Court of Appeal framed the issue as whether “the omission to enact provisions proscribing hate speech ... equivalent to s 61” was discriminatory.<sup>29</sup> It found there was plainly differential treatment causing disadvantage “because no statutory remedy is provided for the unprotected group”.<sup>30</sup>

2.7 However, the Court found that s 19(2) “applies to s 61 of the HRA, with the result that it does not constitute discrimination.”<sup>31</sup> According to the Court, 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

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<sup>23</sup> HC Decision at [44]: [[102.0208]].

<sup>24</sup> At [48]: [[102.0210]].

<sup>25</sup> At [48]: [[102.0210]]. As the Court of Appeal recorded, a decision was made in February 2023 that the Government would not proceed with proposed hate speech reforms: *Hoban v Attorney-General* [2025] NZCA 644 (CA Decision) at [112]: [[102.0261]].

<sup>26</sup> HC Decision at [49]: [[102.0211]].

<sup>27</sup> At [49]: [[102.0211]].

<sup>28</sup> CA Decision at [63]–[64]: [[102.0244]].

<sup>29</sup> At [63]: [[102.0244]].

<sup>30</sup> At [63]: [[102.0244]].

<sup>31</sup> At [80]: [[102.0249]].

of discrimination that is unlawful” under the HRA.<sup>32</sup> Section 61 was enacted for that purpose, and 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)”.<sup>33</sup> The Court further reasoned that “assisting or advancing” connotes more than “affirmative action measures”, and “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”.<sup>34</sup> It also stated that s 19(2) should not be regarded as the equivalent of s 15(2) of the Canadian Charter of Rights and Freedoms (**Charter**), which is “more plainly in the direction of affirmative action measures than s 19(2)”.<sup>35</sup>

2.8 Even though s 19(2) was determinative, the Court recognised “the importance of the issue [of justification for the purposes of s 5]”.<sup>36</sup> The Court disagreed with the High Court’s conclusion that the case fell within the “category of justification” recognised in *Make It 16*,<sup>37</sup> but agreed that the inclusion of sexual orientation within s 61 would likely be a justified limit on the right to freedom of expression in s 14 of the Bill of Rights.<sup>38</sup> However, the Court considered it was “not necessary for us to express a conclusion on the issue of justification” and noted that “it would be wrong to do so, as we see the issue as one for Parliament to resolve”.<sup>39</sup> The Court did, however, record that the omission of hate speech proscription based on sexual orientation in New Zealand is increasingly anomalous in the light of legislative developments in

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<sup>32</sup> CA Decision at [74]: [[102.0247]].

<sup>33</sup> At [75]: [[102.0247]].

<sup>34</sup> At [77]: [[102.0248]].

<sup>35</sup> At [78]: [[102.0248]].

<sup>36</sup> At [82]: [[102.0249]].

<sup>37</sup> At [116]–[121]: [[102.0262 – 0264]].

<sup>38</sup> At [123]: [[102.0264]]; see also HC Decision at [49]: [[102.0211]].

<sup>39</sup> CA Decision at [125]: [[102.0265]].

the United Kingdom, Ireland, Canada and Australia, and agreed with the High Court that “many in the community would be surprised that the comments made by the pastor were not unlawful under New Zealand law”.<sup>40</sup>

### 3. CORRECTLY IDENTIFYING THE CORE ISSUE IN THIS CASE

- 3.1 Mr Hoban asks the Court to answer a question of law: whether the legislative omission of sexual orientation from the prohibited grounds of hate speech in s 61 of the HRA is consistent with the right to freedom from discrimination in s 19 of the Bill of Rights.
- 3.2 Correctly formulated, this question raises three issues: (i) whether the *omission* of sexual orientation from the prohibited grounds of hate speech is *prima facie* discriminatory under s 19(1); (ii) if so, whether the *omission* of sexual orientation from the prohibited grounds of hate speech is a “[measure] taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination” under s 19(2); and (iii) if not, whether the *omission* of sexual orientation from the prohibited grounds of hate speech is a justified limitation upon the right to freedom from discrimination under s 5.
- 3.3 The Tribunal, the High Court and the Court of Appeal all agreed that the omission to include hate speech on the basis of sexual orientation in the prohibition of hate speech was *prima facie* discriminatory under s 19(1).<sup>41</sup> But after establishing that the omission was discriminatory, the Tribunal and the lower courts: (i) considered, in relation to s 19(2), whether s 61 was *generally* a measure taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because

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<sup>40</sup> CA Decision at [125]: [[102.0265]].

<sup>41</sup> See Tribunal Decision at [17]: [[101.0181]]; HC Decision at [25]: [[102.0202]]; CA Decision at [63]–[64]: [[102.0244]].

of discrimination;<sup>42</sup> and (ii) in relation to s 5, were informed by the question of whether Parliament was *entitled* to enact underinclusive hate speech provisions.<sup>43</sup>

3.4 In doing so, the Tribunal and the lower courts lost sight of the fact that the discrimination identified at the s 19(1) stage was the *omission* of sexual orientation from s 61, not the enactment of s 61 in general. They further misunderstood Mr Hoban’s claim as asking the Court to interfere with Parliament’s role when Mr Hoban’s case simply invokes the statutorily prescribed pathway under the HRA for drawing legislative inconsistency with the right to freedom from discrimination on the basis of a prohibited ground to the attention of Parliament. The question of whether Parliament was entitled to enact ss 61 and 131 of the HRA is not the legal question raised by Mr Hoban. Nor is the legal question how a broader hate speech protection should be enacted, or even whether such a protection should be enacted. The HRA makes it clear that those issues are for Parliament to consider and determine.

3.5 All Mr Hoban asks is that the Court fulfil its role under the HRA by declaring that the state of the law as it stands is inconsistent with the right to freedom from discrimination on the ground of sexual orientation so that this inconsistency can be put to Parliament for its consideration and response.<sup>44</sup>

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<sup>42</sup> See Tribunal Decision at [42]: [[[101.0185 – 0186](#)]]; HC Decision at [26] and [32]–[34]: [[[102.0202](#)]] and [[102.0204](#)]]; CA Decision at [47](b), [65] and [73]–[80]: [[[102.0239](#)]], [[[102.0244 – 0245](#)]] and [[[102.0247 – 0249](#)]].

<sup>43</sup> See Tribunal Decision at [58]–[60]: [[[101.0188 – 0189](#)]]; HC Decision at [45]–[48]: [[[102.0209 – 0210](#)]]; CA Decision at [105]–[115]: [[[102.0257 – 0262](#)]].

<sup>44</sup> HRA, ss 92WA and 92WB. To ask whether Parliament is entitled to pass s 61 and s 131 of the HRA is not to ask the right question. It does not address the scope and meaning of the right to be free from discrimination under s 19 of the Bill of Rights. To ask the wrong question, focused on the legitimacy of Parliament’s action rather than on the consistency of the legislative omission with the Bill of Rights, is to be insufficiently rights-centred. See, for example: *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) (*Baigent’s case*) at 702 per Hardie Boys J: “... this Court has been consistent in the view that the terms of the Covenant and the terms of the Bill of Rights Act itself require a rights-centred response to infringements”.

#### 4. BACKGROUND: LEGISLATIVE HISTORY

- 4.1 A criminal hate speech prohibition on the ground of race was first enacted as s 25 of the Race Relations Act 1971 (**RRA**).<sup>45</sup> A civil hate speech prohibition was subsequently enacted as s 9A of the RRA by s 86 of the Human Rights Commission Act 1977 (**HRCA**). Section 9A was repealed by s 2 of the Race Relations Amendment Act 1989, before being re-enacted as s 61 of the HRA.<sup>46</sup> The RRA was always understood to be underinclusive. It only prohibited discrimination on the basis of “colour, race, or ethnic or national origin”.<sup>47</sup>
- 4.2 When the HRA was enacted, s 21 contained a list of prohibited grounds of discrimination, including “sexual orientation” in s 21(1)(m). This expanded the discrimination prohibitions in the former ss 3-6 of the RRA. The HRA also amended s 19 of the Bill of Rights to cross-refer to the s 21 grounds.<sup>48</sup> This expanded the right to freedom from discrimination to include sexual orientation, among other grounds. This expansion did not extend to hate speech prohibitions because these were re-enacted without updating the words “on the ground of ... colour, race, or ethnic or national origins” from the RRA. Those hate speech prohibitions thus remained underinclusive.

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<sup>45</sup> [RRA, s 25](#).

<sup>46</sup> The history of ss [61](#) and [131](#) of the HRA is discussed in Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, “Hate Speech and Hate Crime Related Legislation” (26 November 2020) [at 19](#).

<sup>47</sup> RRA, [ss 3–6](#) only prohibited specified kinds of discrimination on the grounds of “colour, race, or ethnic or national origin”. The [Long Title](#) of the RRA also described it as “An Act to affirm and promote racial equality in New Zealand and to implement [CERD]”. See also the comments at (9 July 1971) 373 NZPD [1703](#), [1705](#) and [1707](#), (15 December 1971) 377 NZPD [5315](#), and (16 December 1971) 377 NZPD [5365](#).

<sup>48</sup> HRA, [s 145](#). [Section 19\(1\)](#) of the Bill of Rights as enacted provided: “Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.”

## 5. BACKGROUND: SECTION 19(1)

- 5.1 Section 19(1) states: “Everyone has the right to freedom from discrimination on the grounds of discrimination.” The most authoritative statement of how courts should approach s 19(1) is found in the Court of Appeal’s judgment in *Ministry of Health v Atkinson*.<sup>49</sup>
- 5.2 The Court in *Atkinson* proposed a two-step analysis. The first question is “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”.<sup>50</sup> This involves “a preliminary issue about whether the differentiation” is “on the basis” of a prohibited ground or some other not prohibited ground,<sup>51</sup> and consideration of “who is the appropriate comparator group”.<sup>52</sup> The second question is whether the differential treatment on the basis of a prohibited ground has had “a discriminatory impact”.<sup>53</sup> This will be established if the treatment, “when viewed in context, ... imposes a material disadvantage on the person or group differentiated against”.<sup>54</sup> The Court observed that there was “no substantive difference” between a reference to “material disadvantage” and a reference to the disadvantage being “real” or “more than trivial”.<sup>55</sup> The language used to specify the causal connection was that differential treatment must, when viewed in context, “[give] rise to” a material disadvantage.<sup>56</sup>

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<sup>49</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 (*Atkinson*).

<sup>50</sup> At [55].

<sup>51</sup> At [56].

<sup>52</sup> At [56].

<sup>53</sup> At [55].

<sup>54</sup> At [109].

<sup>55</sup> At [135].

<sup>56</sup> At [136].

- 5.3 The Tribunal and the lower courts all concluded that the omission of speech directed at sexual orientation from the protection afforded by s 61 and s 131 of the HRA is discrimination for the purposes of s 19(1). The Attorney-General has not cross-appealed against the Court of Appeal’s conclusion on s 19(1) or sought to support the Court of Appeal’s decision on the basis this ground should have been decided differently.<sup>57</sup> While some caution has been expressed about the utility of the comparator exercise,<sup>58</sup> and the appellant agrees with that need for caution, this is a case in which all parties have been “content to apply the approach from *Ministry of Health v Atkinson*”.<sup>59</sup>
- 5.4 In relation to the first step in the *Atkinson* analysis: the appropriate comparison is between individuals facing hate speech on the ground of sexual orientation, and individuals facing hate speech on the ground of colour, race, or ethnic or national origins. The High Court found that “hate speech on the basis of sexual orientation is a well-recognised phenomena [sic]”, and therefore that the comparator groups are “those who are known to be victims of hate speech on the one hand, and those within s 61 [of the HRA] on the other”.<sup>60</sup>
- 5.5 Mr Hoban, as a gay man, does not have legal recourse for hate speech on the ground of sexual orientation (of the kind in issue in

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<sup>57</sup> See Crown Law “Memorandum of Counsel for the Respondent – Notice to Support Judgment Appealed from on Another Ground” (2 June 2026): [\[\[05.0035\]\]](#).

<sup>58</sup> See *J, Compulsory Care Recipient, by his Welfare Guardian, T v Attorney-General* [2025] NZSC 103, [2025] 1 NZLR 485 at [\[226\]-\[228\]](#) per Winkelmann CJ and at [\[347\]-\[348\]](#) per Williams J. Caution has also been expressed about the comparator exercise and/or the comparability requirement in the HC Decision at [16]: [\[\[102.0198 - 0199\]\]](#), *New Zealand College of Midwives v Attorney-General* [2026] NZHC 405 at [\[483\]-\[485\]](#), Asher Emanuel, ‘To Whom Will Ye Liken Me, and Make Me Equal? Reformulating the Role of the Comparator in the Identification of Discrimination’ (2014) 45 VUWLR 1 at [19](#); and Hannah Yáng, ‘The Problem with the *Atkinson* Discrimination Test and How to Fix It’ [2025] NZ L Rev 499 at [508-510](#).

<sup>59</sup> Compare *J*, above n [58](#), at [\[226\]](#) per Winkelmann CJ.

<sup>60</sup> HC Decision at [20]: [\[\[102.0200\]\]](#).

this case).<sup>61</sup> This means Mr Hoban faces treatment under the law that is different from a person subject to hate speech on the ground of colour, race, or ethnic or national origins. No elaborate comparator group is needed to substantiate that conclusion, and the Court of Appeal did not engage in comparator reasoning, presumably for this reason.<sup>62</sup>

- 5.6 In terms of the second step, the Attorney-General conceded in the Court of Appeal that if Mr Hoban’s comparator was accepted “then to be denied the protection of s 61 constituted a material disadvantage and prima facie discrimination would be established”.<sup>63</sup>

## 6. ISSUE 1: CORRECT APPROACH TO SECTION 19(2)

- 6.1 The Court of Appeal erred in two respects. First, it asked whether s 61 generally assists persons disadvantaged by discrimination, when the correct question was whether the *omission* of sexual orientation serves that purpose. The question under s 19(2), correctly construed, is whether the measure that is prima facie discriminatory under s 19(1) (i.e., the omission of sexual orientation from s 61) is “taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination”. Second, even accepting the Court of Appeal’s framing, s 61 is not a measure within the scope of s 19(2) because it prohibits conduct rather than conferring positive advantages (in other words, it is not “affirmative action”).
- 6.2 The focus of Mr Hoban’s case is the *legislative omission* of protection against hate speech on the ground of sexual orientation, not ss 61 and 131 of the HRA considered in isolation.

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<sup>61</sup> By ss 61 and 131 of the HRA.

<sup>62</sup> CA Decision at [58]–[64]: [[102.0242 – 0244]]; see also HC Decision at [20]: “hate speech on the basis of sexual orientation is ... well-recognised”: [[102.0200]].

<sup>63</sup> CA Decision at [57]: [[102.0242]].

It is that legislative omission that constitutes differential treatment and involves discriminatory impact. It would be contorted to conclude that the legislative omission is a measure taken in good faith to assist or advance a person or group of persons disadvantaged because of discrimination under s 19(2).

6.3 Once it is accepted that the measure, correctly construed, is the legislative omission of sexual orientation from hate speech provisions in the HRA – which the Attorney-General accepts in this case<sup>64</sup> – then for s 19(2) to apply, it must be contended *that the omission* has the purpose of assisting or advancing persons or groups disadvantaged because of discrimination.<sup>65</sup> It cannot be tenably maintained that the *omission* of sexual orientation from the scope of hate speech protection serves the “purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination”.

6.4 In some cases, s 19(2) may protect a prima facie discriminatory omission of a specified group from the scope of an anti-discrimination measure (such as an academic quota) because this exclusion has the purpose of assisting or advancing some other group. The purpose of s 61 as enacted was to prohibit hate speech on the ground of colour, race, or ethnic or national origins. Excluding sexual orientation from the scope of this protection does not serve the purpose of prohibiting hate speech against these groups. It follows that even if s 61 were generally a “measure” protected by s 19(2), the omission of sexual orientation is outside the scope of this measure and, therefore, the scope of the s 19(2) protection.

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<sup>64</sup> See Notice to Support at [7] (emphasis added): “the respondent hereby gives notice of his intention to support the judgment appealed from *on the basis that the omission of sexual orientation from s 61 of the Human Rights Act 1993 is a justifiable limit under s 5 of the Bill of Rights Act.*”: [\[\[05.0035\]\]](#).

<sup>65</sup> On the need for a measure to serve the purpose of an affirmative action programme, see also [Alberta v Cunningham](#) [2011] 2 SCR 670.

- 6.5 Even if the Court of Appeal was correct to ask whether s 61 has a purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination, it does not have such a purpose for the reasons explained by the High Court:<sup>66</sup>

We accept [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.

- 6.6 Section 61 of the HRA prohibits certain conduct; it does not “assist or advance” (i.e., confer an advantage on) persons or groups. This interpretation accords with s 19(2)’s purpose, which is to clarify that good faith affirmative action measures are not contrary to the equality-advancing purpose of s 19. The scope of s 19(2) is thus properly restricted to measures that are “in other words, affirmative action”.<sup>67</sup> The legislative history confirms that s 19(2) was designed (like s 15(2) of the Charter) specifically as an exception in favour of affirmative action programmes, which otherwise might be considered discriminatory. This undermines the contention of the Court of Appeal that s 19(2) had a wider purpose.<sup>68</sup>

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<sup>66</sup> HC Decision at [32]: [[[102.0204](#)]].

<sup>67</sup> (10 October 1989) 502 NZPD [13043](#).

<sup>68</sup> CA Decision at [78]: [[[102.0248](#)]].

- 6.7 The White Paper on a Bill of Rights – which noted the importance of the Charter to its drafting and substance<sup>69</sup> – did not include a provision akin to s 19(2).<sup>70</sup> The Interim Report of the Justice and Law Reform Select Committee noted that submissions had been received proposing that “the bill should incorporate a provision specifically saving affirmative action programmes”, with s 15(2) of the Charter “providing an appropriate precedent”.<sup>71</sup> The Committee concluded that it “would favour amending the bill by inserting a provision along the lines of section 15(2) of the Charter”.<sup>72</sup> This was said to be “desirable to make the position quite clear”.<sup>73</sup> It was noted that “these [affirmative action] programmes are not contrary to any public policy” so “there would seem to be no harm in ensuring their continuation”.<sup>74</sup>
- 6.8 The Final Report of the Justice and Law Reform Committee then included a provision drafted similarly to s 15(2) of the Canadian Charter, with specific references to bringing the Bill of Rights in line with the HRCA and the RRA, the statutes mentioned as examples of legislative precedents in which affirmative action programmes are saved.<sup>75</sup>
- 6.9 The drafting of what is now s 19(2) was then altered between what was proposed in the Final Report of the Justice and Law Reform

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<sup>69</sup> Geoffrey Palmer, “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 65 states that the Charter is “of major importance in the drafting as well as the substance of the Bill”, that “many provisions of the draft Bill are closely based on the Canadian text”, and that this “will be of major practical importance for New Zealand lawyers and courts will be able to draw on the rich and developing jurisprudence from Canada”. The draft freedom from discrimination article also referred to ss 15 and 28 of the Charter (at 85).

<sup>70</sup> The White Paper, above n 69, considered that “‘affirmative action’ laws and programmes to overcome existing disadvantages would be valid” at 86.

<sup>71</sup> “Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper – A Bill of Rights for New Zealand” [1986–1987] I AJHR 8A.

<sup>72</sup> At 51.

<sup>73</sup> At 51.

<sup>74</sup> At 51.

<sup>75</sup> “Final Report of the Justice and Law Reform Committee: On a White Paper on a Bill of Rights for New Zealand” [1987–1990] 1 AJHR 8C at 7.

Committee, and the first reading of the New Zealand Bill of Rights Bill.<sup>76</sup> The Canadian drafting was replaced with the drafting currently used in s 19(2). It is plain from a comparison of s 9 of the RRA, s 29 of the HRCA, and s 19(2) of the Bill of Rights that the drafting was adopted to mirror the New Zealand legislative drafting that had been used to authorise the affirmative action provisions that existed at the time that the Bill of Rights was passed: all of these provisions share the language of “good faith”, and the “purpose of assisting or advancing ... persons or groups”.<sup>77</sup> That these provisions of the RRA and the HRCA were intended to save positive discrimination and special affirmative action measures is confirmed by reference to the *Hansard* debates preceding the passage of the relevant statutes.<sup>78</sup> In the first reading of the Bill of Rights, Doug Graham (member for Remuera) described what is now s 19(2) as a clause “that excludes from the prohibition of discrimination measures taken in good faith for the purpose of assisting or advancing disadvantaged persons or groups of persons – in other words, affirmative action”.<sup>79</sup>

## 7. ISSUE 2: DEMONSTRABLE JUSTIFICATION

### 7.1 The legal question under s 5 of the Bill of Rights. Section 5 of the Bill of Rights provides that “Subject to s 4, the rights and freedoms

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<sup>76</sup> New Zealand Bill of Rights Bill 1989 (203-1), [cl 18](#).

<sup>77</sup> [Section 9](#) of the RRA provided: “Measures to ensure equality – Anything done or omitted which would otherwise constitute a breach of any of the provisions of sections 4 to 7 of this Act shall not constitute such a breach if – (a) It is done or omitted in good faith for the purpose of assisting or advancing particular persons or groups of persons or persons of a particular colour, race, or ethnic or national origin; and (b) Those groups or persons need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.” [Section 29](#) of the HRCA was in similar terms.

<sup>78</sup> See in particular the comments of Hon DJ Riddiford, Minister of Justice, at the first reading of the Race Relations Bill: (9 July 1971) NZPD [1700-1709](#). See also the exchange between Hon Matiu Rata and Hon David Thomson, Minister of Justice, at the first reading of the Human Rights Commission Bill: (9 December 1976) 408 NZPD [4689-4690](#).

<sup>79</sup> (10 October 1989) 502 NZPD [13043](#).

contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Whether a limit is demonstrably justified in a free and democratic society for the purposes of s 5 is a legal question and the correct application of the legal standard set out in s 5 involves mixed questions of fact and law.<sup>80</sup> It is common ground that the legal question for this Court to address in relation to s 5 of the Bill of Rights is whether the legislative omission of sexual orientation from the protections against hate speech in the HRA can be demonstrably justified in a free and democratic society.<sup>81</sup>

- 7.2 The legal framework to be applied under the HRA and s 5. Parliament has set out the relevant legal standards in the HRA and in s 5 of the Bill of Rights. As noted above, the HRA expressly requires consideration of whether legislative omissions are consistent with the right to freedom from discrimination affirmed in s 19(1) of the Bill of Rights.<sup>82</sup> The HRA also expressly requires consideration of whether limits on s 19(1) can be demonstrably justified in a free and democratic society for the purposes of s 5.<sup>83</sup> By applying these standards, the courts give effect to the statutory scheme set out in the HRA and s 5 of the Bill of Rights.
- 7.3 The legal questions that come before the Tribunal and the courts under the HRA will often be nested within broader social, political or economic debates. This does not alter the role of the Tribunal or a court to identify and answer the legal question before it. It simply underscores that by doing so, the courts play an important but ultimately limited role in contributing to those debates. What a court should not do, however, is abdicate its role in determining

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<sup>80</sup> *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 (*Moncrief-Spittle*) at [84].

<sup>81</sup> See Notice to Support at [7]: [[05.0035]].

<sup>82</sup> HRA, ss 20I-20L.

<sup>83</sup> HRA, s 20L.

such legal questions, as the Court of Appeal appears to have done in relation to s 5.<sup>84</sup> This subverts rather than gives effect to the applicable legal framework.

- 7.4 Mr Hoban is seeking the declaratory remedy prescribed by s 92J of the HRA.<sup>85</sup> A declaration of inconsistency under s 92J is part of a larger process.<sup>86</sup> A s 92J declaration provides an answer to the legal question of rights-consistency. If a s 92J declaration is made, it must be placed before Parliament by the Attorney-General.<sup>87</sup> The responsible Minister for the relevant legislation must then provide a report to Parliament setting out the Government's response to the declaration.<sup>88</sup> It is then for Parliament to determine how the declaration (and the government report) will inform its agenda and any response. Put simply, when making a declaration under this statutory framework, the courts are acting in accordance with the division of labour prescribed by Parliament in the HRA, rather than "trenching on matters which are for Parliament to determine".<sup>89</sup>
- 7.5 Section 5 requires a proportionality assessment. The HRA requires – at least where a defendant puts justification in issue – an assessment of whether a limit on the right to freedom from discrimination is demonstrably justified in a free and democratic society. It is well-established in New Zealand that courts undertake a proportionality assessment to assess whether a limit is justified for the purposes of s 5.<sup>90</sup> There is no single approach

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<sup>84</sup> CA Decision at [125] ("... 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"): [[102.0265]].

<sup>85</sup> HRA, s 92J.

<sup>86</sup> HRA s 92K(2).

<sup>87</sup> HRA, s 92WA.

<sup>88</sup> HRA, s 92WB.

<sup>89</sup> CA Decision at [108]: [[102.0258]].

<sup>90</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (*Hansen*), endorsing the structured proportionality test developed by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103, [1986] SCJ No 7 (*Oakes*).

to assess the proportionality of a measure that limits a constitutionally protected right.<sup>91</sup> The critical point is that giving effect to the legislative requirement to determine whether the legislative omission of sexual orientation from the protections afforded against hate speech under the HRA can be demonstrably justified in a free and democratic society under s 5 requires: (i) an assessment of the proportionality of the limit on a constitutionally protected right; and (ii) that the rigour of that assessment remains the same regardless of the form it takes. As this Court observed in *Moncrief-Spittle*, while there is no immutable rule as to the approach to be adopted, “not applying the *Hansen* structured approach does not entail a lesser threshold”.<sup>92</sup>

- 7.6 In cases involving the assessment of legislative limits such as *Hansen* and *Chisnall*, this Court has used the structured methodology developed in *Oakes* to assess the proportionality of the impugned limit. In *Vriend v Alberta*, the Supreme Court of Canada used the structured methodology to assess whether the legislative omission of sexual orientation as a protected ground of discrimination under the Individual Rights Protection Act RSA 1980 was an unjustified violation of s 15 of the Charter.<sup>93</sup>
- 7.7 Mr Hoban submits that this structured form of proportionality assessment is appropriate in the present case.<sup>94</sup> As most recently articulated by this Court in *Chisnall*, the structured proportionality

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<sup>91</sup> *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [98] (*Chisnall*). The New Zealand courts acknowledge that the assessment required under s 5 is a tool to test the proportionality of the measure(s) and the form of proportionality assessment used should be one that “is appropriate as properly reflecting the nature of the decision-making involved whilst giving due regard to the importance of the rights”: *Moncrief-Spittle*, above n 80, at [92]. This is consistent with the recognition by the Supreme Court of Canada in *Oakes*, above n 90, at 139 that: “the nature of the proportionality test will vary depending on the circumstances”.

<sup>92</sup> *Moncrief-Spittle*, above n 80, at [91].

<sup>93</sup> *Vriend v Alberta* [1998] 1 SCR 493 (*Vriend*).

<sup>94</sup> As the Supreme Court accepted in *Chisnall*, above n 91, at [196], this structured methodology enables a transparent evaluation of a legislative limit and gives a level of predictability to lawmakers (and citizens).

methodology requires consideration of the following series of interrelated questions:<sup>95</sup> (i) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom; (ii) is the limiting measure rationally connected with its purpose;<sup>96</sup> (iii) is there a less rights-intrusive alternative that would be effective at securing the measure's objective;<sup>97</sup> and (iv) is the limit in due proportion to the importance of the objective? No alternative form of proportionality assessment has been advanced by the Attorney-General in this case.

7.8 The Attorney-General has the burden of justifying the limit. Section 92F(1) of the HRA states that the onus of proving that “an act or omission is ... a justified limit” on s 19 “lies on the defendant” (here, the Attorney-General).<sup>98</sup> As the Court of Appeal correctly pointed out, s 92F(1) makes it clear that “the Crown has a proactive justificatory role in cases involving s 19(1) of the Bill of Rights Act”.<sup>99</sup>

7.9 This is a case where the burden of proof matters. The Attorney-General chose to contend that the limit on freedom from discrimination is demonstrably justified. The Attorney-General

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<sup>95</sup> *Chisnall*, above n 91, at [195]. The application of these questions “is not amenable to a paint-by-numbers exercise” and the proportionality assessment in the final step of the structured approach draws together the matters addressed in the earlier steps: see *Chisnall* at [197].

<sup>96</sup> *Oakes*, above n 90. The Supreme Court of Canada explained in *Oakes* that this step in the analysis requires consideration of whether the measures adopted have been carefully “designed” to achieve the “objective” in that they must not be “arbitrary, unfair or based on irrational considerations” or, put simply, they must be rationally connected to the objective: *Oakes* at 139. Although the New Zealand case law tends to reduce this step down into a simpler formulation (see *Chisnall*, above n 91, at [195]), it is submitted that the different aspects to rational connection identified in *Oakes* are relevant at this stage of the analysis.

<sup>97</sup> *Chisnall*, above n 91, at [211]. But see the slightly different formulation at [195]: “Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?”. The formulation in [211] is a useful refinement, as this Court appears to have accepted.

<sup>98</sup> HRA, s 92F(1).

<sup>99</sup> CA Decision at [101] (underlining added). The Court of Appeal further noted that 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”: [[102.0256]].

therefore assumed the burden of demonstrating that the legislative omission satisfies a proportionality assessment. This requires the Attorney-General to advance cogent and structured reasoning (supported by evidence, where appropriate) demonstrating the proportionality of the limit on a constitutionally protected right. As this Court explained in *Chisnall*:<sup>100</sup>

... the state must show that the violative law is “demonstrably justified”. The choice of word demonstrably is critical. The process is not one of mere intuition, nor is it one of deference to Parliament’s choice. It is a process of demonstration. This reinforces the notion inherent in the word “reasonable” of rational inference from evidence or established truths.

7.10 The Attorney-General has failed to demonstrate the justification. The Attorney-General’s approach in the Tribunal and lower courts has instead been to: (i) contend that a structured proportionality assessment such as the one endorsed by this Court in *Hansen* and *Chisnall* should not be utilised (but without proposing an alternative form of proportionality assessment); and (ii) advance arguments that seek to insulate the legislative omission of sexual orientation from the hate speech protections under the HRA from the scrutiny that s 5 directs the courts to bring to bear.

7.11 Application of proportionality assessment in the present case. The answer to the legal question before this Court is clear: the legislative omission of sexual orientation from the HRA’s protections against hate speech is not a reasonable limit that is demonstrably justified in a free and democratic society for the purposes of s 5 of the Bill of Rights. The difficulty in the present case is that the Attorney-General has chosen not to engage in a structured (or any) proportionality assessment. This hampers the

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<sup>100</sup> *Chisnall*, above n 91, at [182] (underlining in original). See also the comments by Hon Margaret Wilson, underscoring the need for robust justification in discrimination cases, when introducing the Human Rights Amendment Bill in 2001: “[section 5] means that Government agencies that seek to discriminate will need to provide empirical and policy justifications for that discrimination”: (17 August 2001) 594 NZPD 11033.

analysis. However, the following arguments can be inferred from positions adopted by the Attorney-General in the Tribunal and the lower courts: (i) there is a demonstrated and ongoing need for specific protection in relation to hate speech on the ground of race, colour or ethnic or national origin (and, as a necessary corollary of that position, no such need in relation to sexual orientation); and (ii) proscription of speech impinges to some extent on the right to freedom of expression affirmed by s 14 of the Bill of Rights such that the smallest possible restriction should be adopted. These bases are considered in relation to the steps in the structured proportionality method below.<sup>101</sup>

7.12 Whether sufficiently important objective to curtail right to freedom from discrimination. The objective invoked by a defendant should be one that is properly reflected in the policy or legislation.<sup>102</sup> The fact that ss 61 and 131 of the HRA were originally introduced to give effect to international obligations in respect of racist hate speech is not an *objective* for the legislative omission of sexual orientation.<sup>103</sup> As the Supreme Court of Canada observed in *Vriend*: “[a]t the first stage of [the *Oakes* test], the government is asked to demonstrate the “objective” of the omission is pressing and substantial” and noted that “[a]n “objective”, being a goal or purpose to be achieved, is very different from an ‘explanation’ which makes plain that which is not immediately obvious”.<sup>104</sup>

7.13 The Attorney-General has failed to advance any cogent basis (let alone any evidence) to demonstrate that omitting sexual

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<sup>101</sup> Mr Hoban had to undertake a similar exercise in written submissions in the Court of Appeal. This underscores how the Attorney-General’s failure to engage with his proactive justificatory role (at least where he chooses to contend that a limit can be demonstrably justified in a free and democratic society) can subvert the proper functioning of the legislative pathway for testing the inconsistency of legislative measures under the HRA.

<sup>102</sup> *Ex post facto* attempts to rationalise policy or legislation in a more favourable way than the actual objective of the policy or legislation should be approached with scepticism by the courts.

<sup>103</sup> CA Decision at [121]: [[[102.0264](#)]].

<sup>104</sup> *Vriend*, above n [93](#), at [556](#).

orientation from ss 61 and 131 serves a sufficiently important objective to justify limiting the right to freedom from discrimination on the prohibited ground of sexual orientation. Nor can an “objective” be discerned from the HRA generally, which seeks to “provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”.<sup>105</sup>

7.14 A purported concern about incursions into freedom of expression also cannot constitute an “objective” here. New Zealand law already tolerates such incursions to the extent they are demonstrably justified in a free and democratic society.<sup>106</sup> Even if such a purpose is claimed for the legislative omission in the abstract, no evidence or argument has been advanced to demonstrate that the concerns about limiting unjustified incursions into freedom of expression were the objective of the omission of sexual orientation from the hate speech protections in the HRA.

7.15 The incremental expansion of the grounds protected from hate speech is also not an “objective” of the legislative omission. In 2023, the Government announced that planned hate speech reforms that would have considered the potential inclusion of sexual orientation would not be progressing; and, in 2024, consideration of this aspect of hate speech reforms was withdrawn from the Law Commission’s agenda.<sup>107</sup> In any event, as the majority of the Supreme Court of Canada observed in

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<sup>105</sup> HRA, [Long Title](#). In *Vriend*, the Supreme Court of Canada held that the respondents failed the first step in the analysis on two alternative bases: (i) absent submissions on the pressing and substantial objective of the omission, the respondents had failed to discharge their evidentiary burden; and (ii) even if an objective could be discerned from the legislation as a whole, the objective of the IRPA is “the protection of the dignity and rights of all persons living in Alberta”, the exclusion of sexual orientation from the relevant legislation cannot be said to “indicate any discernible objective for the omission that might be described as pressing and substantial”. *Vriend*, above n [93](#), at [557](#).

<sup>106</sup> Bill of Rights, ss [14](#) and [5](#).

<sup>107</sup> CA Decision at [112] and [113]: [[102.0261](#)].

*Vriend*, “groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time” because the “guarantees of the *Charter* will be reduced to little more than empty words”.<sup>108</sup>

- 7.16 Whether the limit is rationally connected to that objective. Even assuming *arguendo* that limiting incursions into freedom of expression could be said to be the “objective” behind the omission of sexual orientation hate speech protections in the HRA (which is denied), the omission would not be rationally connected to that objective in the relevant sense. This step in the analysis requires consideration of whether the rights-limiting measure achieves the objective in a manner that is not arbitrary, unfair or based on irrational considerations.<sup>109</sup>
- 7.17 The legislative omission of sexual orientation from hate speech protection under the HRA is arbitrary and unfair. There is no principled basis to distinguish between incursions into freedom of expression through proscription of hate speech directed at an individual’s race, colour, ethnicity or national origin and incursions through the proscription of hate speech directed at an individual’s sexual orientation. As the European Court of Human Rights (ECtHR) has recognised, “discrimination based on sexual orientation is as serious as discrimination based on “race, origin or colour”.<sup>110</sup> Similarly, even if the objective could be said to be the incremental expansion of the protections against hate speech (which is also denied), it is both arbitrary and unfair to make gay, lesbian and bisexual individuals wait for protection against hate speech directed at their sexual orientation while that protection is

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<sup>108</sup> *Vriend*, above n 93, at 559–560.

<sup>109</sup> *Oakes*, above n 90, at 139.

<sup>110</sup> *Vejdeland v Sweden* ECHR 1813/07, 9 February 2012 at [55].

afforded to individuals who are targeted because of their race, colour, ethnicity or national origin. Attempts to justify the legislative omission would therefore also fail at this stage of the analysis.

7.18 Whether less rights-intrusive alternative available. There are obvious alternatives available that are less rights-intrusive than the complete absence of legal recourse for lesbian, gay, and bisexual people facing hate speech in the community. The simplest example is that hate speech protections under the HRA could include protection from hate speech directed at an individual's sexual orientation. This would address the prima facie discrimination without compromising the effectiveness of the hate speech protections under the HRA.

7.19 The inclusion of sexual orientation in hate speech protection is clearly an available option. The ECtHR has found in a series of cases that measures penalising hate speech on the basis of sexual orientation, including criminal offence provisions, do not involve an unjustified interference with freedom of expression.<sup>111</sup> A number of jurisdictions such as United Kingdom, Canada and Australia have already enacted legislation proscribing hate speech on the basis of sexual orientation.<sup>112</sup> Those legislative provisions confirm that it is possible to protect hate speech directed at sexual orientation without unjustifiably limiting freedom of expression.<sup>113</sup> This alternative would not jar with an objective of limiting incursions into freedom of expression because of the high threshold that must be established before the protections in ss 61 and 131 of the HRA are triggered. As the High Court recognised, the inclusion of hate speech on the ground of

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<sup>111</sup> *Vejdeland*, above n 110, see also *Lilliendahl v Iceland* ECHR 29297/18, 12 May 2020 and *Lenis v Greece* ECHR 47833/20, 27 June 2023.

<sup>112</sup> CA Decision at [125]: [[102.0265]].

<sup>113</sup> See for example Public Order Act 1986 (UK), s 29B, Canadian Criminal Code RS C 1985 c C-46, s 319 and Anti-Discrimination Act 1977 (NSW), s 49ZT.

sexual orientation in the HRA “would likely be a demonstrably justified limit on the right to freedom of expression in s 14 under s 5 of the Bill of Rights”.<sup>114</sup>

- 7.20 Whether limit is in due proportion to the objective. The starting point is to address the importance of the right that has been engaged: here, the right to freedom from discrimination on the basis of sexual orientation. Freedom from discrimination is of utmost importance in a free and democratic society, as reflected in Parliament’s enactment of a bespoke institutional and legislative architecture for the protection of the right under the HRA.
- 7.21 The next step is to consider the severity of the intrusion into freedom from discrimination. Here, the right to freedom from discrimination is not peripherally engaged; rather, the legislative omission strikes at the core of an individual’s right to be free from discrimination directed at their sexual orientation. There is a complete absence of legal recourse for such hate speech targeting individuals because of their sexual orientation. This conveys that hate speech on the ground of sexual orientation is not as serious or deserving of condemnation as hate speech directed at a person’s race, colour or ethnic or national origin.<sup>115</sup>
- 7.22 The absence of legal protection against such hate speech is likely to lead to concealment of the true identity of gay, lesbian and bisexual individuals.<sup>116</sup> As the Supreme Court of Canada has recognised,<sup>117</sup> failure to prohibit hate speech on the grounds of sexual orientation legitimises wider discrimination:<sup>118</sup> “[w]hen

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<sup>114</sup> HC Decision at [49]: [\[\[102.0211\]\]](#).

<sup>115</sup> See for similar concerns, albeit in a different legislative context, *Vriend*, above n 93, at 550.

<sup>116</sup> See *Vriend*, above n 93, at 551.

<sup>117</sup> *Saskatchewan Human Rights Commission v Whatcott* [2013] 1 SCR 467 (*Whatcott*).

<sup>118</sup> At [\[71\]](#).

people are vilified as blameworthy or undeserving” said Rothstein J for the Court, “it is easier to justify discriminatory treatment”.<sup>119</sup> The same logic applies in respect of gay, lesbian and bisexual individuals in New Zealand.

- 7.23 The final step in the analysis is to balance the severity of the intrusion into the right against any countervailing considerations. This balancing of the competing considerations is required by s 5 of the Bill of Rights.<sup>120</sup> Here, the countervailing considerations as to why such a legislative omission is proportionate are difficult to discern because the Attorney-General has never articulated them. But even if such considerations are constructed for the Attorney-General to enable a proportionality assessment to be undertaken, none would outweigh the severity of the incursion into the right to be free from discrimination on the basis of sexual orientation. As the High Court recognised in *Wall v Fairfax*, “the s 61 prohibition applies only to relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in a group being despised”.<sup>121</sup> Any incursion into freedom of expression would therefore likely be justified in a free and democratic society and, in any event, minimal. In sum, the severity of the curtailment of the right to freedom of discrimination on the ground of sexual orientation is not in proportion to any concern about potential impact on freedom of expression.

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<sup>119</sup> *Whatcott*, above n 117, at [71].

<sup>120</sup> The s 5 analysis necessarily requires the courts to make value judgments, as the appellate courts have recognised: see *Moonen Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18]. This type of judgment is facilitated by structured argument and evidence (from both sides) directed towards the disputed issues. This type of value judgment, including when it involves incommensurables, is not only required by the Bill of Rights but is the ordinary stuff of adjudication. See e.g., *Woolworths v Auckland Council* [2023] NZSC 45, [2023] 1 NZLR 113 at [86]; *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 at [235]. See also Robert Alexy *A Theory of Constitutional Rights* (trans Julian Rivers, Oxford University Press, Oxford, 2002) 100-109 on how balancing relies on the “justification model” to uphold rationality in law.

<sup>121</sup> *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 at [56].

- 7.24 The Attorney-General's arguments below. The Attorney-General advanced two main arguments in the lower courts. First, the Attorney-General relied on the High Court's reasoning that New Zealand's international obligations under CERD and ICCPR "provide the s 5 justification for s 61 of the HRA being in the targeted terms that it is".<sup>122</sup> The Court of Appeal correctly rejected that logic on the basis that "[t]he 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".<sup>123</sup>
- 7.25 Second, the Attorney-General has invoked "deference" to Parliament's choices as an answer to the justification exercise. But "deference" involves abdication of the role *required* by s 5 of the Bill of Rights.<sup>124</sup> In any event, the Attorney-General's submissions fail to appreciate the nature of the statutory scheme under the HRA (and s 5 of the Bill of Rights). Nothing about the Tribunal or the courts fulfilling their statutory role under the HRA trenches on Parliament's legislative agenda or choices; on the contrary, they are giving effect to the HRA. Nor can the Attorney-General contend that Parliament's enactment of the legislative omission should be afforded weight for epistemic reasons, because no basis for giving weight has been established.

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<sup>122</sup> HC Decision at [44]: [\[\[102.0208\]\]](#).

<sup>123</sup> CA Decision at [118] (emphasis in original): [\[\[102.0263\]\]](#).

<sup>124</sup> Courts must insist upon cogent reasons and evidence in support of claims that "deference" should be afforded. This reflects the fact that what may be termed "deference" or perhaps more appropriately "weight" involves second-order reasons that, if established, may provide a basis for affording weight as part of the s 5 assessment. For the distinction between first and second-order reasons, see Stephen Perry "[Second-order reasons, uncertainty, and legal theory](#)" (1989) 62 S Cal L Rev 913.

## 8. RELIEF

- 8.1 Where a legislative inconsistency with the Bill of Rights has been established, a declaration should be made unless there are strong reasons not to do so. This is consistent with the Court's constitutional role "to declare the law"<sup>125</sup> and with Parliament's intention that declarations of inconsistency form part of an ongoing "dialogue" between the judicial, legislative and executive branches.<sup>126</sup> This is not a case where a declaration is "unnecessary in the circumstances", or would otherwise be of little utility.<sup>127</sup> There is no suggestion that other avenues are available by which this issue can be addressed,<sup>128</sup> or that a declaration would be "premature".<sup>129</sup>
- 8.2 In the present case, the declaration should state that the ss 61 and 131 of the HRA are inconsistent with the right to freedom from discrimination affirmed in s 19 of the Bill of Rights.<sup>130</sup> The declaration should specify that the limitation upon the right to

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<sup>125</sup> *Make It 16*, above n 21, at [68] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ.

<sup>126</sup> New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill 2022 (230-2) (select committee report) at 2.

<sup>127</sup> See *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 (*Taylor*) at [58] per Glazebrook and Ellen France JJ; *Make It 16*, above n 21, at [62] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ; and *Chisnall*, above n 91, at [264] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

<sup>128</sup> At [67] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ.

<sup>129</sup> At [63]–[65] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ; compare *Chisnall*, above n 91, at [274] per Glazebrook J. A review of hate speech was previously on the Law Commission's work programme but was withdrawn by the Minister of Justice in 2024: Law Commission *Hara ngākau kino | Hate crime* (NZLC IP55, 30 September 2024) at [1.15].

<sup>130</sup> Nothing turns upon the fact Mr Hoban applied for a declaration of inconsistency under s 92J of the HRA rather than the High Court's declaratory jurisdiction. As Glazebrook and Ellen France JJ observed in *Taylor*, "s 92J was necessary to confer jurisdiction on the [Tribunal], as a statutory body without inherent jurisdiction, the power to make a declaration". *Taylor*, above n 127, at [47] per Glazebrook and Ellen France JJ. Section 92J gives the Tribunal the same power to make declarations of inconsistency with s 19 as the High Court. *The New Zealand Bill of Rights Act (Declarations of Inconsistency) Amendment Act 2022* also makes clear that the required response after a declaration is made is the same regardless of whether the declaration is made under s 92J, or by a senior court under some other jurisdiction (Bill of Rights, ss 7A and 7B).

freedom from discrimination “is not justified”<sup>131</sup> or “cannot be justified”.<sup>132</sup> The language of “ha[s] not been justified” used in *Make It 16* is not appropriate here.<sup>133</sup> A declaration that the inconsistency “is not” or “cannot be” justified provides greater clarity and therefore assistance to Parliament.

8.3 Mr Hoban does not seek costs.

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<sup>131</sup> *Attorney-General v Chisnall (Declarations of inconsistency)* [2025] NZSC 126, [2025] 1 NZLR 619 (*Chisnall (Declarations)*) at [18] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

<sup>132</sup> *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 at [79], as upheld in *Taylor*, above n 91, at [71] per Glazebrook and Ellen France JJ and at [121] per Elias CJ.

<sup>133</sup> In *Make It 16* this formulation was adopted to “leave open the possibility that the limit could later be held to be justified” because “evidence that might have rebutted the alternative view was not before the Court.” (*Make It 16*, above n 21, at [57] per Winkelmann CJ, Glazebrook, O'Regan and Ellen France JJ). Such concerns do not exist in this case because: (i) the Crown's arguments for justification have to date been legal arguments related to New Zealand's international obligations and deference to Parliament; and (ii) it is difficult to envisage any additional evidence that could justify excluding sexual minorities from s 61 hate speech protections. Even if additional evidence could justify the inconsistency, it is for the Attorney-General (who bears the justificatory burden) to produce this evidence. *Chisnall*, above n 91, at [118] and [242] per Winkelmann CJ, O'Regan, Williams and Kós JJ; and *Chisnall (Declarations)*, above n 131, at [7] per Winkelmann CJ, O'Regan, Williams and Kós JJ.