

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

SUBMISSIONS FOR TE KĀHUI TIKA TANGATA HUMAN RIGHTS
COMMISSION

Dated: 4 September 2026

Counsel certify that these submissions are suitable for publication under the Supreme Court Submissions Practice Note 2023.

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MAY IT PLEASE THE COURT:

I. ISSUES AND POSITION

1. At a high level, this case is about how the New Zealand Bill of Rights Act 1990 (**NZBORA**) responds when a legislative provision that aims to protect against one type of inequality ends up creating another.
2. At a lower level, the Court of Appeal treated this case as raising three issues: (i) whether the omission of sexual orientation from s 61 of the Human Rights Act 1993 (**HRA**) is discriminatory under s 19(1) of NZBORA; (ii) if so, whether that omission is nonetheless a measure under s 19(2), such that it is “saved”; and (iii) if not, whether that omission is a demonstrably justified limit on s 19 pursuant to s 5 of NZBORA.
3. On appeal, the Crown has put in issue the framework to be applied under s 19. Thus, the main issues for determination by the Court are: (i) what is the relationship between s 19(1) and (2) of NZBORA; (ii) in the light of that relationship, whether the omission of sexual orientation from s 61 is discriminatory under s 19; and (iii) if it is, whether the Crown has demonstrated that the discriminatory omission of sexual orientation from s 61(1) a justified limit in a free and democratic society.
4. The Commission’s position is: (i) s 19 is concerned with substantive equality; (ii) s 19(2) is not an exception to s 19(1); it informs the s 19(1) analysis such that, together, ss 19(1) and (2) substantiate a principle of substantive equality; (iii) s 19(2) pertains only to “reverse discrimination” claims, not to “outsider under-inclusion” cases such as the present; (iv) the Court is required under s 5 to conduct a proportionality assessment, a *Hansen* analysis being appropriate in the context of legislative limits on NZBORA rights; and (v) the justifications advanced by the Crown either do not meet the legal test in s 5 or fail to engage with the inquiry demanded by s 5, which the Court cannot abdicate on the grounds of “deference”.
5. Parliament is able to prioritise between different equality-enhancing measures. But if the courts consider that the *way* it has prioritised is discriminatory, then it must be justified, or the provision will be inconsistent with rights. That is what Parliament has directed by enacting NZBORA.

II. LEGAL FRAMEWORK UNDER S 19

A. Section 19 is about substantive equality

6. The purpose of s 19 is to give substance to the principle of equality under the law.¹ More particularly, s 19 is about *substantive*, rather than formal, equality. The principle of substantive equality recognises that while it may often be fair to treat people or groups alike, differences in their characteristics and circumstances may render like treatment unfair and require different treatment. For example, a height limit that applies equally to men and women may be considered discriminatory,² while scholarships targeting women in underrepresented fields may not be.
7. The principle of substantive equality has long been recognised as underpinning s 15 of the Canadian Charter.³ While not so far expressly articulated by a New Zealand court, it also underpins s 19 of NZBORA. It is reflected in: (i) the acceptance that discrimination includes indirect discrimination,⁴ which focuses on the impact on different groups of a facially neutral law; (ii) the express provision for affirmative measures in s 19(2); and (iii) the requirement under the *Atkinson* discrimination test that material disadvantage be assessed in context.⁵ A substantive, rather than formal, approach is also required of New Zealand under art 26 of the International Covenant on Civil and Political Rights (ICCPR), the anti-discrimination provision.⁶
8. As discussed below, recognising that s 19 is about substantive equality has implications for the relationship between s 19(1) and 19(2), and for the interpretation of s 19(2).

¹ See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573 per Tipping J, affirmed in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [116]. See also *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483 at [16]; and *R v Sharma* 2022 SCC 39, [2022] 3 SCR 147 at [37]–[38].

² Called a “text book example of indirect discrimination” in *Fehling v Appleby* [2015] NZHC 75, [2015] NZAR 547 at [85], citing Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) at 278.

³ *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 164–165 and 171; and recently affirmed in *Quebec (Attorney-General) v Kanyinda* 2026 SCC 7 at [7].

⁴ Indirect discrimination is prohibited by s 65 of the Human Rights Act 1993 [HRA]. It is also encompassed within s 19 of the New Zealand Bill of Rights Act 1990 [NZBORA]: see *NRHA v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236–238.

⁵ *Ministry of Health v Atkinson*, above n 1, at [109].

⁶ See UNHRC General Comment No 18 Non-discrimination, 10 November 1989, UN Doc HRI/GEN/1/Rev.1 at [10].

B. Section 19(2) is not an “exception” to s 19(1)

9. There is an issue as to the relationship between s 19(1) and s 19(2).⁷ The relationship between analogous provisions in the Canadian Charter, ss 15(1) and (2), was considered by the Canadian Supreme Court in *R v Kapp*.⁸ Three approaches were identified there:⁹
 - (a) section 15(2) is an interpretive aid to s 15(1);¹⁰
 - (b) section 15(2) is an exemption to s 15(1);¹¹ or
 - (c) sections 15(1) and 15(2) are confirmatory of one another and should be read together to promote substantive equality.¹²
10. The Canadian Supreme Court endorsed option (c), although it is not clear that (c) is a conceptually distinct approach, and parts of the Court’s reasons also lend themselves to (a) and (b).¹³ To date, New Zealand courts have assumed that s 19(2) is an exception, with analysis proceeding under s 19(1) and then moving to s 19(2) if prima facie discrimination is found (i.e., (b) above).
11. The Commission submits that (c) is to be preferred. Section 19(2) is not an exception to s 19(1);¹⁴ the two provisions are to be read together as substantiating the content of the anti-discrimination right.¹⁵ It is therefore incorrect to see s 19(2) as cutting back the scope of a right conferred by s 19(1); the provisions colour, and are consistent with, each other. This follows from both the substantive equality purpose of s 19 and the legislative history of s 19(2).
12. Under a substantive conception of equality, it should not generally be considered discriminatory to remedy discrimination. Treating two groups differently

⁷ Arising from the Crown’s submissions at [33]–[44].

⁸ *R v Kapp*, above n 1.

⁹ At [35]–[37].

¹⁰ *Lovelace v Ontario* 2000 SCC 37, [2000] 1 SCR 950 at [94].

¹¹ At [97], [99].

¹² *R v Kapp*, above n 1, at [37].

¹³ At [37]–[40]. The Court’s reasoning is not altogether clear. In practice, it adopted an approach that effectively treats s 15(2) as an exception, although it noted at [41] that that test was only “a basic starting point” and that “future cases may demand some adjustment to the framework in order to meet the litigants’ particular circumstances”. Notably, *Kapp* was a “reverse discrimination” case.

¹⁴ See also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.19.5], although the authors there considered s 19(2) to be an aid to what discrimination may be justified. The Commission’s view is that affirmative measures are not discrimination that is justified; it is not discrimination at all.

¹⁵ See *Lovelace v Ontario*, above n 10, at [105]–[108]; and *R v Kapp*, above n 1, at [37]–[38].

because one has been disadvantaged by discrimination is an *expression* of substantive equality, not contrary to it.¹⁶ It would therefore be odd for such treatment to be labelled discrimination under s 19(1) only to be “saved” by s 19(2).

13. This is supported by the legislative history behind s 19(2), which is set out in the Crown’s submissions at [34]–[35]. The short point is that such a provision was not considered necessary in the *White Paper* because (consistent with a substantive equality view) affirmative action measures were considered unlikely to be seen as discrimination at all.¹⁷ A version of s 19(2) was inserted only during the Select Committee process because doubts had been raised about affirmative action, making it “desirable to make the position quite clear”, and because the Committee considered that such a provision “could have an important educative function”.¹⁸ Thus, as enacted (and as it remains), s 19(2) is not an exception to s 19(1);¹⁹ it provides that affirmative measures “do not constitute discrimination”. Although drafted as a separate provision, s 19(2) was never intended to do more than clarify the meaning of s 19(1).
14. To this extent, the Commission agrees with the Crown’s suggestion that ss 19(1) and 19(2) may not require a separate, sequential, analysis.²⁰ However, the Commission does *not* agree that this means the s 19(1) analysis can be skipped altogether and s 19(2) treated as controlling.²¹ That would be tantamount to treating s 19(2) as an exception and would improperly divert focus away from s 19(1), which remains the heart of the anti-discrimination right. Rather, s 19(2) informs the s 19(1) analysis, and both provisions should be interpreted consistently so as to advance their underlying principle of substantive equality.²²

¹⁶ See *R v Kapp*, above n 1, at [37], citing P W Hogg *Constitutional Law of Canada* (5th ed supp, Carswell, 2007) vol 2 at 55-53.

¹⁷ Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1984–1985] I AJHR A6 at [10.79].

¹⁸ “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 [**Interim Report**] at 51.

¹⁹ Contrast the “exceptions” in the HRA: ss 24–60.

²⁰ Crown’s submissions at [33].

²¹ Which seems to be the approach taken by the Crown in its submissions at [40]–[65].

²² See *R v Kapp*, above n 1, at [37].

C. Section 19(2) informs the material disadvantage limb of the *Atkinson* test

15. In terms of the how s 19(2) relates to the *Atkinson* test, it dovetails with the material disadvantage limb. Indeed, where a measure is said to be affirmative, s 19(2) and the material disadvantage enquiry can be viewed as two sides of the same coin.²³
16. The *Atkinson* test requires material disadvantage to be assessed *in context*.²⁴ This is important because it means that not every formal disadvantage will render differential treatment discriminatory under s 19(1). For example, benefits for single parents draw a distinction on the basis of marital status²⁵ and technically disadvantage non-single parents. But, when viewed in context, non-single parents would not be considered substantively worse off than single parents if the benefit merely addresses the prior disadvantage faced by single parents who lack a partner for support. This is just another way of saying—to use s 19(2) language—that providing a benefit only to single parents assists a group that is disadvantaged because of their marital status and therefore does not constitute discrimination against non-single parents.
17. Conversely, a s 19(2) case can be analysed in terms of material disadvantage. For example, a scholarship targeted at women in a field where women are underrepresented would be a measure for the purpose of assisting those disadvantaged in that field because of their sex. But it would also not be discriminatory against men under the s 19(1) *Atkinson* test because, when viewed in context, men are not materially disadvantaged by their exclusion from the scholarship owing to the fact that they are overrepresented in the field.
18. This means that under the material disadvantage limb, attention should be paid to both the nature of the benefit that is withheld *and* the relative positions of the two groups concerned.

D. Section 19(2) has relative, not absolute application

19. For simplicity, the above examples have concerned “reverse discrimination” cases: hypotheticals in which discrimination is alleged by the group whose

²³ This explains why, in Canadian jurisprudence, ameliorative provisions have been variously considered under both the s 15(1) test (such as in *AC v Manitoba* 2009 SCC 30, [2009] 2 SCR 181) and under s 15(2) (such as in *Kapp*, above n 1).

²⁴ *Atkinson*, above n 1, at [109] and [136].

²⁵ A prohibited ground under s 21(1)(b) of the HRA.

relative advantage is the very reason the other group is receiving the benefit. The present case is not of this kind. The alleged discrimination is on behalf of a group (gay, lesbian and bisexual people) that is not advantaged but instead suffers from the same kind of disadvantage that s 61 of the HRA addresses, namely hate speech on the basis of a prohibited ground.²⁶

20. These sorts of claims have been called “outsider under-inclusion” cases (as opposed to “insider under-inclusion” cases, where the measure is under-inclusive of the very group it seeks to target).²⁷ Outsider under-inclusion cases present a seemingly unique problem because a measure may be genuinely targeted at assisting a group disadvantaged because of a protected characteristic, yet *at the same time* be underinclusive in a way that materially disadvantages another group. For example, a provision targeted at protecting gay men from hate speech may not be discriminatory against heterosexual people, but it may be discriminatory against lesbian women if they are equally in need of the same protection. In such cases, it might appear that s 19(1) and (2) would pull in different directions.
21. That, however, is not the case. This is because s 19(2) can (and should) be interpreted relatively rather than absolutely. The appellant’s further submissions observe at [4.2] that the proposition that affirmative measures do not constitute discrimination invites the question: “discrimination against whom?” This is an important point about the interpretation of s 19(2). Discrimination necessarily denotes differential treatment of one person or group as against another; a bare assertion that X “does not constitute discrimination” implicitly requires an “...against Y”.
22. The text of s 19(2) is silent on this question. The provision could mean: (a) that affirmative measures do not constitute discrimination against anyone, in absolute terms; or (b) that affirmative measures do not constitute discrimination against those who are relevantly advantaged relative to the group benefited by the

²⁶ The Commission submits that the Court can take judicial notice of the prevalence of hate speech against gay, lesbian and bisexual people.

²⁷ See Jena McGill “Ameliorative Programs and the *Charter*: Reflections on the Section 15(2) Landscape Since *R v Kapp*” (2017) 95 CBR 213 at 229–232 and 248. An example of an “insider under-inclusion” case is a claim brought by women against amendments to a pay equity scheme targeted at women: *Quebec v Alliance du Personnel Professionnel et Technique de la Santé et des Services Sociaux* 2018 SCC 17, [2018] 1 SCR 464.

measure. There is thus an interpretive choice for the Court²⁸ that lies at the heart of the dispute in this case. Interpreting s 19(2) in absolute terms would protect all affirmative measures from s 5 scrutiny regardless of what disadvantage it may cause to other protected groups. Interpreting it in relative terms would protect affirmative measures from s 5 scrutiny only in “reverse discrimination” claims.

23. The Commission submits that the latter is the better reading of s 19(2).
24. *First*, this interpretation harmonises s 19(2) with s 19(1) in a way that advances the substantive equality purpose of s 19 as a whole. Just as s 19(2) should inform the interpretation of s 19(1), so should s 19(1) inform the interpretation of s 19(2). Affirmative measures are generally consistent with substantive equality where they treat differently groups whose circumstances differ. It is *not* consistent with substantive equality to benefit one group and, in doing so, materially disadvantage another group in the same circumstances. An interpretation of s 19(2) that prevents “reverse discrimination” claims but still accommodates “outsider under-inclusion” claims better serves the principle of substantive equality.²⁹
25. *Second*, and relatedly, this interpretation is more consistent with the well-established principle that NZBORA rights should be interpreted generously to give individuals “the full measure of the enacted fundamental rights and freedoms” and to render those rights “practical and effective”.³⁰ If materially disadvantaging group *A*, in the substantive sense, on the basis of a prohibited ground constitutes discrimination, as *Atkinson* says it does, then the fact that the disadvantage is caused by a measure intended to alleviate disadvantage faced by group *B* relative to group *C* does not make it any less discriminatory against

²⁸ A similar interpretive question arose in *Giggle for Girls Pty Ltd v Tickle* [2026] FCAFC 64 in relation to s 7D of the Sex Discrimination Act 1984 (Cth), which provides that a person does not discriminate by taking special measures for the purpose of achieving substantive equality. The Court held that s 7D should not be interpreted to protect measures that impaired the achievement of substantive equality by a different protected group: at [74]–[81].

²⁹ See also *Giggle for Girls*, above n 28, at [74]; and *Law v Canada* [1999] 1 SCR 497 at [70]: “The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s 15(1) guarantee.”

³⁰ See, for example, *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [41] per Winkelmann CJ, citing *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328; *R v Mist* [2005] NZSC 77, [2006] 3 NZLR 145 at [45]; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) at 268; and *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [25] and [103].

group *A*. Section 19(2) should not be interpreted to undermine that conclusion, as it would amount to authorising other forms of discrimination by a side wind.³¹

26. In fact, an absolute interpretation of s 19(2) would produce anomalous consequences that cannot be reconciled with what the *Atkinson* test would tell us is discriminatory, or with what most people would understand discrimination to be. For example, it would mean that the following measures would not be considered discriminatory as long as they were enacted in good faith:

- (a) A law protecting Māori men from hate speech but not Māori women.
- (b) A law providing equal pay protections only to Pākehā women.
- (c) A law protecting the rights of gay men in relation to the adoption of children, but not lesbian women.
- (d) A law prohibiting age-based discrimination in employment only against men.

27. *Third*, this approach is more consistent with New Zealand’s international obligations, notably art 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**). Art 1(4) essentially provides that affirmative measures taken to advance certain ethnic or racial groups to secure substantive equality shall not be deemed discrimination “provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups”. Thus, art 1(4) of ICERD itself contemplates that a special measure may be discriminatory in some circumstances, specifically where one of its consequences is to confer different rights on different groups and create further substantive inequality. This is important because ICERD was the reason Parliament enacted the Race Relations Act 1971 (**RRA**),³² including s 9 of that Act, which the language of s 19(2) can be traced back to.³³

28. *Fourth*, it is most likely that s 19(2) was enacted to deal with “reverse discrimination” cases. The Interim Report of the Select Committee that

³¹ See *Giggle for Girls*, above n 28, at [74].

³² See Race Relations Act 1971, long title: “An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination”.

³³ See the legislative history set out in the Crown’s submissions at [27]–[30].

suggested the addition noted that “[affirmative action] programmes are not contrary to any public policy”,³⁴ suggesting that the problem of under-inclusion along prohibited grounds was not contemplated at the time. As illustrated by the examples above at [26], such under-inclusion is not obviously problem-free as a matter of public policy. As Emeritus Professor Paul Rishworth has observed, “Section 19(2) was designed to deal with classic foreseeable cases” so that, for example, men cannot complain about measures designed to assist women, not cases “when the grounds of the two groups involved do not match”.³⁵ The Canadian Supreme Court has described s 15(2) as operating in the same way.³⁶

29. *Finally*, it is not the case that adopting a relative approach to s 19(2) would convert decisions to provide protection for one group into a “constitutional obligation” to protect “all groups protected by the HRA”, or that governments would be “paralysed by the necessity to assist all”.³⁷ The need to provide affirmative measures arises from the existence of disadvantage, not from the mere fact that a ground is protected by the HRA. For example, it is not obvious that a failure to include marital status within hate speech protections would be discriminatory because it is not clear that hate speech on the basis of marital status is a prevalent phenomenon, such that the absence of such protection creates a material disadvantage on any of those sub-groups.

E. Implications generally and for this case

30. All of the above means that s 19(2) is not a second “step” in discrimination analysis, as if both provisions are properly interpreted, it should not produce a different result from s 19(1). It could be used as a check against the assessment of material disadvantage under s 19(1) but should not be treated as a tick-box list of criteria generated by breaking down the literal words of the provision,

³⁴ Interim Report, above n 18, at 51.

³⁵ Paul Rishworth “What is Consistency with the Bill of Rights?” (paper presented to CLE New Zealand Law Society Human Rights Forum, March 2026) 45 at 61. Professor Rishworth takes a different view as to whether s 19(1) applies in this case: at 59–60. This is just another way of making the same point in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* 2011 SCC 37, [2011] 2 SCR 670 at [45] that the distinction drawn has to serve the ameliorative purpose. Excluding the advantaged group serves the ameliorative purpose; excluding an equally disadvantaged group does not.

³⁶ *Alberta v Cunningham*, above n 35, at [41]. See also *Lovelace v Ontario*, above n 10, at [105]; and *Law v Canada*, above n 29, at [72].

³⁷ Crown’s submissions at [102].

satisfaction of which automatically dispenses with a claim without regard to the purpose of s 19. Section 19(2) should not be read technically.

31. Indeed, if such an approach were appropriate, then this case could be resolved on the basis of the words in the second half of s 19(2): “persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993”. Read literally, these words suggest that s 19(2) protects only those measures that address treatment that was made unlawful by Part 2 of the HRA, not more generally by s 19 of NZBORA, and not any treatment before Part 2 was enacted. If that were the case, then s 61 could not be protected by s 19(2), because s 61 is the very provision which makes hate speech unlawful under Part 2. Logically, s 61 cannot be a measure taken to assist persons disadvantaged because of discrimination that is only made unlawful by virtue of s 61 itself.
32. The Commission does not endorse such a technical reading of s 19(2).³⁸ As early as 1993, Richardson J wrote for a full court of the Court of Appeal that “The Bill of Rights Act is not a technical document. It has to be applied in our society in a realistic way.”³⁹ That is the approach that should be taken to s 19.
33. In this case, it is clear that s 61 creates differential treatment on the basis of a prohibited ground: as the Court of Appeal correctly identified, it “puts some categories of prohibited grounds of discrimination in a special category which it denies others”.⁴⁰ The omission of sexual orientation also disproportionately impacts sexual minorities compared to heterosexual people because generally only sexual minorities are the subject of hate speech on the basis of sexual orientation.⁴¹
34. The question is then whether that differential treatment materially disadvantages sexual minorities compared to racial minorities when viewed in context. As noted, this assessment should include both the nature of the benefit that is withheld and the relative positions of sexual and racial minorities. On the latter point, it seems clear that sexual minorities are not a privileged class compared

³⁸ Butler and Butler consider that this wording in s 19(2) is just a “ham-fisted way” of saying that all the grounds in s 21(1) of the HRA apply to s 19(2): Butler and Butler, above n 14, at [17.19.9].

³⁹ *R v Mallinson* [1993] 1 NZLR 528 (CA) at 531.

⁴⁰ *Hoban v Attorney-General* [2025] NZCA 644 [CA Judgment] at [62] [[102.0243]].

⁴¹ See *Vriend v Alberta* [1998] 1 SCR 493 at [82].

to racial minorities when it comes to hate speech, in the way that, for example, men are a privileged class compared to women when it comes to pay equity. As noted, this is not a “reverse discrimination” case. That means that s 19(2) can be put to one side. The only remaining issue would be whether the omission of sexual orientation from s 61⁴² imposes disadvantage of a sort that is material.⁴³ If this Court considers that it does, then that omission is discriminatory for the purposes of s 19, and the analysis must move to s 5.

III. THE OMISSION OF SEXUAL ORIENTATION HAS NOT BEEN DEMONSTRABLY JUSTIFIED

A. Section 5 fundamentals

i. *The place of deference within the legal test in s 5*

35. The appellant submits that, in enacting s 5, Parliament entrusted the Courts with determining whether a rights limiting measure is demonstrably justified in a free and democratic society.⁴⁴ It is unclear whether the Crown accepts this. At points, the Crown appears to contend that the Court should simply endorse Parliament’s judgment as to the scope of s 61(1),⁴⁵ suggesting that it does not regard s 5 as imposing a legal test that the Court is required to apply.
36. The Commission’s position is that s 5 imposes a legal test that the Court must determine has been met. As observed in *Attorney-General v Chisnall*,⁴⁶ “the court has a duty under the Bill of Rights to assess whether limitations on rights are justified, as they are required to be by s 5 of that Act. The court cannot shirk that responsibility.” The effect of this passage is that the Court cannot, as the Court of Appeal seemed to suggest,⁴⁷ decline to undertake the s 5 analysis on the

⁴² This is the proper characterisation of the impact of the measure for all purposes. The Crown’s characterisation of the measure as purely the enactment of s 61 and the suggestion that this does not impose disadvantage is artificial.

⁴³ There is no merit to the Crown’s argument at [41] of its submissions that because there is no entitlement to hate speech protections, the omission in s 61 cannot be a material disadvantage. A law granting tax credits only to men would clearly be discriminatory, even though there is no general entitlement to tax credits. The disadvantage arises due to the existence of the benefit that is conferred on another group.

⁴⁴ Appellant’s submissions at [7.2]–[7.4] and [7.25].

⁴⁵ Crown’s submissions at, for example, [76] and [104].

⁴⁶ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [29] (footnote omitted). See also *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [108].

⁴⁷ CA Judgment, above n 40, at [124] [[102.0265]].

grounds of “deference”.⁴⁸ This does not mean that the Court can never give weight on certain matters; that Parliament must arrive at a perfect solution;⁴⁹ or that there can be only one “reasonable” solution.⁵⁰ Rather, it means that the place of deference is *within* the s 5 analysis.⁵¹

37. There are limits to the matters upon which the Court can defer without abdicating the s 5 analysis.⁵² Importantly, the Court cannot defer to another’s judgment on the ultimate question whether a limitation is justified in a free and democratic society.⁵³ What it may do is give appropriate weight to another’s assessment of matters relevant to the proportionality analysis in reaching its own judgment under s 5. Those may, for example, include Parliament’s assessment of the importance of the legitimate objective;⁵⁴ whether less intrusive means are available;⁵⁵ and predictive judgments about whether the measure will achieve its objective. “Deference” is therefore a potentially misleading term because, contrary to what s 5 requires, it invites abdication, “servility, or perhaps gracious concession,”⁵⁶ by the Court to another’s judgment.

ii. *Proportionality is mandatory*

38. The appellant and respondent advance different positions on the role of proportionality under s 5. The appellant’s is that, while a structured *Hansen* analysis is not mandatory in every case,⁵⁷ some form of proportionality assessment is,⁵⁸ and that a *Hansen* analysis is appropriate here.⁵⁹ The respondent

⁴⁸ *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291; (2022) 19 NZELR 125 at [62].

⁴⁹ *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11, [2013] 1 SCR 467 at [78].

⁵⁰ *Carter v Canada (AG)* 2015 SCC 5, [2015] 1 SCR 331 at [96]–[98].

⁵¹ *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37, [2009] 2 SCR 567 at [187]; *RJR-MacDonald Inc v Canada (AG)* [1995] 3 SCR 199 at [128]; and *Newfoundland (Treasury Board) v NAPE* 2004 SCC 66, [2004] 3 SCR 381 at [114].

⁵² *RJR-MacDonald Inc v Canada (AG)*, above n 51, at [136], [138]. See also *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* 2000 SCC 69, [2000] 2 SCR 1120 at [221]. This is implicit in the approach taken in *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

⁵³ *RJR-MacDonald Inc v Canada (AG)*, above n 51, at [128], [134], [136].

⁵⁴ *Alberta v Hutterian Brethren of Wilson Colony*, above n 51, at [55].

⁵⁵ At [53].

⁵⁶ *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 AC 185 at [76].

⁵⁷ Appellant’s submissions at [7.5], citing *Attorney-General v Chisnall*, above n 46, at [98].

⁵⁸ At least in cases where a defendant puts justification in issue.

⁵⁹ Appellant’s submissions at [7.5].

contends that s 5 does not necessarily require any proportionality assessment at all and eschews a proportionality analysis in this case.⁶⁰

39. The immediate difficulty with the respondent's submission is that it suggests that, because a *Hansen* analysis is not required under s 5 in every case,⁶¹ a proportionality assessment also is not. But the *Hansen* analysis is only one means of assessing the proportionality of a rights limiting measure. It does not follow, therefore, that where a *Hansen* analysis is not required, no proportionality assessment is required.
40. The Commission's position is that s 5, and in particular its requirement that a limit be "reasonable", cannot be satisfied unless the limit is proportionate.⁶² Recently, in *Grinder v Attorney-General*,⁶³ it was said:

Section 5 of the Bill of Rights requires that limitations on rights be reasonable, prescribed by law and demonstrably justified in a free and democratic society. Justification for these purposes has been held to require an assessment of whether the limit is in due proportion to the important of the objective.

41. Furthermore, in the context of legislative measures limiting rights, this Court's case law strongly suggests that proportionality is tested via a *Hansen* analysis.⁶⁴ Consistent with this, in cases involving limits on the right to be free from discrimination affirmed by s 15 of the Canadian Charter, the Canadian Supreme Court has consistently applied an *Oakes* proportionality analysis.⁶⁵
42. The merits of structured proportionality have been extensively traversed and recognised.⁶⁶ But one advantage that is relevant given the Crown's decision to lead no evidence on justification in this case, is it promotes a "culture of

⁶⁰ Crown's submissions at [73]–[76]. The absence of the word "proportionality" or any related discussion in the submissions is noticeable.

⁶¹ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [91]–[92].

⁶² *RJR-MacDonald Inc v Canada (Attorney General)*, above n 51, at [128], [136]; and *Newfoundland (Treasury Board) v NAPE*, above n 51, at [102]–[103].

⁶³ *Grinder v Attorney-General* [2025] NZSC 165, [2025] 1 NZLR 1062 at [50] (footnotes omitted). See also *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [18]; and *Attorney-General v Chisnall*, above n 46, at [85].

⁶⁴ *Attorney-General v Chisnall*, above n 46, at [84]–[86].

⁶⁵ *Andrews v Law Society of British Columbia*, above n 3, at 154; *Quebec (Attorney General) v Alliance du Personnel Professionnel et Technique de la Santé et des Services Sociaux*, above n 27, at [43]–[45]; *Centrale des Syndicats du Québec v Québec (Attorney General)* 2018 SCC 18, [2018] 1 SCR 522 at [157]; and *Quebec (Attorney General) v Kanyinda*, above n 3, at [94]–[105], [169]–[176], [182]–[203], [247]–[254].

⁶⁶ See, e.g., *Attorney-General v Chisnall*, above n 46, at [195]–[197].

justification”.⁶⁷ Structured proportionality requires the Crown to “show its work” by requiring it to answer discrete questions in sequence. A culture of justification is inherent in (or assumed by) New Zealand’s human rights framework but has not always been observed in recent times.⁶⁸

43. The Commission’s broader concern here is that, where the Crown chooses to defend a human rights case at public expense but fails to meaningfully engage with s 5 justification, it risks undermining the constitutional balance on which NZBORA and the HRA are premised. The framework contemplates distinct but complementary roles: Parliament may enact legislation limiting a right; the Crown identifies and substantiates the reasons said to justify the limit; and the Court determines whether the limit has been demonstrated to be justified in a free and democratic society.⁶⁹
44. A declaration of inconsistency is intended to represent a considered finding that a statutory provision is inconsistent with a protected right because the limitation cannot be demonstrably justified in a free and democratic society. That conclusion carries its intended constitutional weight only if the s 5 enquiry is properly engaged with. Where the Crown does not substantively advance or develop a justification, the Court is left to assess the limit without the benefit of a developed justification case. A declaration made in those circumstances risks reflecting the Crown’s failure to demonstrate that the limit is justified, rather than a considered finding that the limit itself cannot be demonstrably justified. That undermines both the force of the declaration and the foundation of the statutory framework.
45. Three reasons have been advanced for eschewing a proportionality analysis altogether in this case. The first is that “the *Hansen* framework is an analytical tool, rather than a mandatory methodology”.⁷⁰ That proposition is not controversial if it means only that the Court is not invariably required to go through each *Hansen* step in every case. But it does not answer the question

⁶⁷ Etienne Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 SAJHR 31; and David Dyzenhaus “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 SAJHR 11.

⁶⁸ *Make It 16 Incorporated v Attorney-General* [2022] NZSC 134, [2023] 1 NZLR 683.

⁶⁹ See also *RJR-MacDonald Inc v Canada (AG)*, above n 51, at [136].

⁷⁰ Crown’s submissions at [73]; and *Hoban v Attorney-General* [2022] NZHC 3235 [HC Judgment] at [42] [[102.0207]].

whether proportionality is required in substance, nor does it address the weight of this Court’s authorities supporting *Hansen* as the methodology for legislative limits on rights.

46. The second reason, advanced by the High Court, is that the *Hansen* approach is “a tool for, or an approach to, assessing justified limits. Such justification can be established by a simpler analytical pathway, and we consider that to be so in the present case.”⁷¹ That suggestion is not consistent with this Court’s case law, and no case was cited. Furthermore, the justification relied upon by the High Court, namely the International Instruments Justification discussed below, is logically flawed, which would have been apparent had a proportionality analysis been applied.
47. The third reason advanced for resisting a proportionality analysis is, in the Court of Appeal’s words, that “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.”⁷² The Court added that “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.”⁷³
48. The suggestion that the Crown need not justify a legislative provision limiting a right would be a significant departure from settled NZBORA jurisprudence and is contrary to Parliament’s own directive that NZBORA applies to acts done by the legislature.⁷⁴ Further, it is irrelevant to the s 5 analysis whether Parliament has “set out” to limit rights, because limits are about effect, not intent. Finally, to the extent that the omission of sexual orientation from s 61(1) curtails Mr Hoban’s s 19 right, there is in a very “real sense” a limit on an NZBORA right, and there is no authority for the proposition that s 5 analysis can be avoided where, despite finding that a right has been limited, that limit is not in some sense

⁷¹ HC Judgment, above n 70, at [42] [[102.0207]].

⁷² CA Judgment, above n 40, at [105] [[102.0257]].

⁷³ At [106] [[102.0257]].

⁷⁴ NZBORA, s 3(a).

“real”.⁷⁵ That remains a limitation of a NZBORA right even though it arises through an omission.⁷⁶

B. The International Instruments Justification

49. The Crown has led no evidence directed to justification. Its primary s 5 justification for curtailing Mr Hoban’s right to be free from discrimination is that, when the predecessor to s 61(1) was enacted, New Zealand was subject to international obligations concerning racial discrimination and hatred, but no equivalent obligation concerning sexual orientation.⁷⁷ That may explain why Parliament protected against racial hatred. It does not explain why it is justifiable to withhold the same protection from persons targeted on the ground of sexual orientation. The Crown identifies a reason for protecting one group, not a justification for discriminatorily denying protection to another. For example, the fact that there may be:

- (a) an obligation to permit a particular age group to vote, such as people aged 18 and over, does not demonstrate that it is reasonable to omit 17-year-olds.⁷⁸
- (b) an obligation to permit heterosexual couples to marry does not demonstrate that it is reasonable not to permit same sex couples from marrying.
- (c) a good reason for protecting a group from dismissal on particular grounds, such as race or religious belief, does not demonstrate that it is reasonable to omit gay and lesbian people from the same protection.⁷⁹
- (d) a good reason for allowing a particular group to adopt children, such as married heterosexual couples, does not demonstrate that it is reasonable to omit married same sex couples from adopting.⁸⁰

50. The suggestion that justifications reflecting the International Instruments Justification were “recently recognised by the Supreme Court in *Make It 16*

⁷⁵ It is not entirely clear what this means.

⁷⁶ *Vriend v Alberta*, above n 41.

⁷⁷ Crown’s submissions at [10].

⁷⁸ *Make It 16 Incorporated v Attorney-General*, above n 68.

⁷⁹ *Vriend v Alberta*, above n 41.

⁸⁰ *Du Toit v Minister for Welfare and Population Development* 2002 (10) BCLR 1006 (CC).

Incorporated v Attorney-General”⁸¹ overstates the position. All this Court said there was that “a limitation on a right may be one that is well recognised either in the relevant international instruments (such as the International Covenant on Civil and Political Rights) or common law.”⁸² International instruments do not recognise a limitation consisting of the omission of sexual orientation from hate speech protections.

51. Ultimately, the narrow scope of s 61 is a historical artefact; it derives from racial hate speech laws developed in response to post war international efforts to address racial discrimination and incitement to racial hatred, when race and ethnicity were the principal lenses through which group-based harm was understood.⁸³ Sexual orientation and sex characteristics were largely absent from those frameworks. The fact that s 61 has remained static while other parts of the HRA have evolved has created a disconnect between its scope and contemporary understandings of group-based harm.

C. The Incremental Development Justification

52. A second justification advanced by the Crown for curtailing Mr Hoban’s right to be free from discrimination is that Parliament is not required to “address every analogous social harm in the same manner or at the same time. Parliament is entitled to proceed incrementally”.⁸⁴ There are two issues with this.
53. *First*, this does not actually identify a justification for limiting Mr Hoban’s s 19(1) right. It is of course correct that Parliament is not required to address every analogous social harm in the same manner or at the same time. What ss 5 and 19 require, however, is that where Parliament chooses to prioritise in a way that is discriminatory, it must justify why it chose to prioritise in a discriminatory rather than non-discriminatory way. The fact that Parliament *can* prioritise has no bearing on *why* it was justified to prioritise in a discriminatory way.

⁸¹ HC Judgment, above n 70, at [41] [[102.0207]]; and Crown’s submissions at [75].

⁸² *Make It 16 Incorporated v Attorney-General*, above n 68, at [45] (footnote omitted). This is illuminated by this Court’s footnoted example, art 19(3) of the ICCPR, which provides an express exception to the right to freedom of expression (for respect of the rights or reputations of others, or for the protection of national security, public order, public health or morals).

⁸³ Vinod Bal *LGBTI+ Rights in Aotearoa New Zealand: The Past and the Future* (Adhikaar Aotearoa, March 2026) at 106–107.

⁸⁴ Crown’s submissions at [100].

54. *Second*, the Crown’s characterisation of the approach as “incremental” cannot be sustained. More than 50 years have passed since legislation addressing race-based hate speech was enacted, without Parliament addressing hate speech based on sexual orientation.⁸⁵
55. In that time, criminal prohibitions on hate speech directed to sexual orientation have become pervasive throughout common law jurisdictions. Examples include s 29B(1) of the Public Order Act 1986 (UK); s 319(1) of the Canadian Criminal Code 1985 (Can); s 93Z of the Crimes Act 1900 (NSW); s 4 of the Prevention and Combating of Hate Crimes and Hate Speech Act 2023 (RSA); ss 1(1) and 2(1) of the Prohibition of Incitement to Hatred Act 1989 (Irl); and s 4(2) of the Hate Crime and Public Order Act 2021 (Scots). In the civil context, examples include s 49ZT of the Anti-Discrimination Act 1977 (NSW)⁸⁶ and s 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (RSA). Consistent with this pattern, the ECtHR has held on several occasions that penalties for hate speech directed at gay people did not unjustifiably interfere with the right to freedom of expression.⁸⁷ These cases and legislation demonstrate that Mr Hoban’s complaint is not that Parliament must do everything at once; but that in the specific case of s 61’s omission of sexual minorities, New Zealand’s position is an outlier that demands justification.
56. The Crown also suggests that it is justifiable to curtail Mr Hoban’s right to be free from discrimination because “Parliament [i]s entitled to treat racial disharmony as a distinct problem requiring a targeted response” and that Mr Hoban’s “argument would transform this legislative choice into a constitutional obligation to provide equivalent protection for all other groups protected under the HRA”.⁸⁸ Again, there are two issues with this.

⁸⁵ At [98] of its submissions, the Crown makes the difficult to reconcile submission that “over the past nearly 40 years, Parliament has chosen not to expand restrictions on threatening, abusive, or insulting speech to apply to other groups.” No evidence is provided as to why this “choice” has been made.

⁸⁶ See also Discrimination Act 1991 (ACT), s 67A; Anti-Discrimination Act 1998 (Tas), s 17(1); and Anti-Discrimination Act 1991 (Qld), s 124A.

⁸⁷ *Vejdeland v Sweden* ECHR 1813/07, 9 February 2012; *Lilliendahl v Iceland* ECHR 29297/18, 12 May 2020; and *Lenis v Greece* ECHR 47833/20, 27 June 2023.

⁸⁸ Crown’s submissions at [12].

57. *First*, it mischaracterises the issue and overstates the effect of a declaration of inconsistency, which does not impose a “constitutional obligation” to enact legislation of a certain form.
58. *Second*, it still does not answer the demand of s 5. The question is not whether Parliament could enact targeted protection against racial disharmony. It plainly could. But if s 61 is considered discriminatory under s 19, then targeting protection against racial disharmony to the exclusion of hate speech against sexual minorities is precisely the problem, and the question that s 5 requires an answer to is *why* such exclusive targeting is justified in a free and democratic society. In the face of that demand, the assertion that Parliament is simply entitled to treat racial disharmony as a distinct problem requiring a targeted response effectively amounts to a submission that it is entitled to be discriminatory without explaining itself under s 5. While that may be so in practical terms, if that is the *legal* position the Crown chooses to take, then the legal consequence is that a declaration of inconsistency should follow.

D. The Appeal to Other Potential Factors

59. A third argument advanced by the Crown for curtailing Mr Hoban’s right to be free from discrimination is that questions concerning whether, and to what extent, hate speech should be regulated involve evaluative judgments about, among other things, freedom of expression, social harm and enforceability⁸⁹ that fall within Parliament’s institutional competence and democratic legitimacy.⁹⁰ But the Crown does not actually rely on freedom of expression, enforceability, prevalence of hate speech, the severity of the harm, or any other such consideration,⁹¹ as an actual justification for the limit in this case. Rather, these matters are invoked only as considerations that *might* be relevant to the s 5 justification inquiry.
60. One interpretation of this argument is that the Court should decline to undertake the s 5 analysis, and therefore simply accept that the curtailing of Mr Hoban’s s 19(1) right is justified, because of the types of issues that *may* be relevant. That is inconsistent with s 5 being a legal test the Court must apply. Another is that

⁸⁹ Crown’s submissions at [103]–[104].

⁹⁰ Crown’s submissions at [103]–[104]. This type of argument was rejected in *Newfoundland (Treasury Board) v NAPE*, above n 51, at [101], [104], [109]–[111].

⁹¹ Crown’s submissions at [103].

possible justifications are enough to satisfy s 5 and justify limiting Mr Hoban’s right to be free from discrimination. That would treat “can be demonstrably justified” as meaning “might be justified”, which is contrary to the words of s 5 and inconsistent with the authorities placing the burden on those seeking to uphold the limit. As this Court observed in *R v Hansen*,⁹² “The onus is on those who claim the limit is reasonable and justified to satisfy the Court that this is demonstrably so.”

61. If the Crown is suggesting that excluding sexual orientation from hate speech protections is justified because such hate speech is less prevalent than racist hate speech, or because hate speech against sexual minorities causes less severe harm than racist hate speech,⁹³ then it is required to say so, and to demonstrate that that is the case. Only then can the Court properly assess whether the limit on the right is proportionate to whatever goal is sought to be achieved.

Dated 4 September 2026

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⁹² *R v Hansen*, above n 46, at [108]. See also *Frank v Canada (Attorney General)* 2019 SCC 1, [2019] 1 SCR 3 at [39].

⁹³ See Crown’s submissions at [103].