
IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 8/2026

BETWEEN

RUSSELL THOMAS HOBAN

Appellant

AND THE

ATTORNEY-GENERAL

Respondent

AND

TE KĀHUI TIKA TANGATA | THE HUMAN
RIGHTS COMMISSION

Intervener

RESPONDENT'S SUBMISSIONS ON APPEAL

16 July 2026



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WHAT THIS APPEAL IS ABOUT

1. Parliament has determined that some forms of expression cause such harm to others that they justify legal restriction. Section 61(1) of the Human Rights Act 1993 (the **HRA**) makes unlawful threatening, abusive, or insulting speech likely to excite hostility against, or bring into contempt, groups defined by race, colour, or ethnic or national origins.
2. This civil prohibition is “directed at the prevention of discrimination in the form of racist speech, and the promotion of racial harmony”.¹ It gives effect to New Zealand’s international obligations, and reflects a legislative judgement that racist speech causes a distinct social harm warranting a specific statutory response.
3. This appeal asks whether, having chosen to proscribe threatening, abusive, or insulting speech on three of the grounds upon which discrimination is prohibited by s 21(1) of the HRA,² Parliament was also required to proscribe threatening, abusive, or insulting speech on the other prohibited grounds, including sexual orientation.³ The respondent says it was not.

THE RESPONDENT’S POSITION

Section 19(1) of the Bill of Rights Act

4. A traditional discrimination analysis may be unhelpful in analysing a case of legislative under-inclusion, in the form of an affirmative action provision. It implies a general entitlement to simultaneous and equivalent protections from threatening, abusive, or insulting speech for all groups defined by prohibited grounds of discrimination, and frames the absence of protection for groups defined by sexual orientation as exclusion from that entitlement.
5. In a free and democratic society, expression is generally lawful. Not all forms of expression some may consider harmful are proscribed by a specific law—including speech that some consider might threaten, abuse,

¹ *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 at [31] **[[App BoA Tab 14]]**.

² Specifically ss 21(1)(e)–(g) **[[App BoA Tab 23]]**.

³ Section 21(1)(m) **[[App BoA Tab 23]]**.

or insult groups defined by sex, religious belief, disability, or sexual orientation. But the absence of any particular type of formal legal sanction does not mean such speech is condoned, or cannot be addressed by other means.

6. Section 61 is an exception, not the rule. It does not remove protection from groups defined by sexual orientation; rather, it confers targeted protection on groups defined by race, colour, or ethnic or national origins. Parliament's choice to provide a particular form of legal protection for some groups does not, without more, impose material disadvantage on others.

Section 19(2) of the Bill of Rights Act

7. Section 61 falls within s 19(2) of the New Zealand Bill of Rights Act (the **Bill of Rights Act**). Accordingly, it does not constitute unlawful discrimination.
8. Section 19(2) should be given a "normal purposive interpretation".⁴ The relevant measure was Parliament's positive action to enact s 61. It was enacted for the bona fide purpose of implementing New Zealand's international obligations. There is no basis to suggest its limited scope was shaped by any view of the relative status or worth of different groups that might be discriminated against on prohibited grounds. Moreover, it would be artificial to characterise a *legislative omission* as a "measure taken".
9. Section 61 was enacted to assist (and possibly also to advance) groups disadvantaged on the grounds of colour, race, or ethnic or national origins. Section 61 provides them with symbolic and practical protection.⁵

Section 5 of the Bill of Rights Act

10. However, if s 61 limits the right to freedom from discrimination, that limit is demonstrably justified. Parliament had a rational and objective basis for enacting s 61. New Zealand has assumed specific international obligations in relation to racial discrimination and racial hatred. New Zealand is not

⁴ *Hoban v Attorney-General* [2022] NZHC 3235 at [31] [*Hoban* (HC)] [[102.0203]].

⁵ See *Hoban v Attorney-General* [2025] NZCA 644 at [77] [*Hoban* (CA)] [[102.0248]].

obliged, in the same way, to prohibit threatening, abusive, or insulting speech towards groups defined by sexual orientation.

11. The possible extension of protections from threatening, abusive, or insulting speech to groups defined by other prohibited grounds of discrimination has been frequently considered by Parliament and the Executive. However, the scope of s 61 has, to date, not been expanded.
12. The Bill of Rights Act does not require Parliament to address every analogous social harm in the same manner or at the same time. Parliament is entitled to proceed incrementally, particularly where protection for one group may limit the rights of others. Parliament was entitled to treat racial disharmony as a distinct problem requiring a targeted response. The appellant's argument would transform this legislative choice into a constitutional obligation to provide equivalent protection for all other groups protected under the HRA.
13. Whether, and to what extent, speech should be regulated requires judgements about freedom of expression, social harm, practical enforceability, and international commitments. They involve balancing competing rights and social policy considerations, and are matters in respect of which the elected branches of government have institutional competence and democratic legitimacy.

Remedy

14. If this Court concludes s 61 unjustifiably limits the right to be free from discrimination, a declaration ought not be made. It would risk undermining the importance of New Zealand's commitment to its international obligations about racial hate speech. And given the acute issues of institutional competence and democratic legitimacy it raises, it would be appropriate for the judicial branch to exercise restraint.

BACKGROUND

Facts

15. In July 2017, Westcity Bible Baptist Church pastor Logan Robertson delivered a “sermon” that included the following remarks:⁶

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.

16. The appellant, who is homosexual,⁷ found the remarks “threatening, abusive and insulting”.⁸ He says the absence of any formal State response,⁹ or any legal recourse,¹⁰ left him feeling unprotected, threatened and unsafe.¹¹
17. The appellant complained to the Human Rights Commission (the **HRC**), which treated his complaint as one of breach of pt 1A of the HRA. That is, by failing to prohibit threatening, abusive, or insulting speech targeting groups defined by sexual orientation, s 61 unjustifiably discriminated against them.

Statutory provision at issue

18. Section 61(1) of the HRA provides that it shall be unlawful for any person:

61 Racial disharmony

(1) It shall be unlawful for any person—

(a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television

⁶ Dubby Henry “West Auckland pastor preaches gay people should be shot” *New Zealand Herald* (online ed, 15 August 2017) **[[301.0002]]**; and “Police investigate Auckland pastor who said homosexuals should be shot: ‘Members of our communities will be concerned’” *One News* (online ed, 16 August 2017) **[[301.0006]]**.

⁷ Statement of claim (2 July 2020) at [10] **[[101.0003]]**.

⁸ Statement of evidence for Russell Thomas Hoban (27 June 2021) at [6] **[[201.0004]]**. The appellant’s choice of language mirrors s 61(1) of the Human Rights Act 1993 **[[App BoA Tab 23]]**.

⁹ Both the Human Rights Commission and Police criticised the remarks: “Police investigate Auckland pastor who said homosexuals should be shot: ‘Members of our communities will be concerned’” *One News* (online ed, 16 August 2017) **[[301.0006]]**. However, Police concluded no criminal offence had been committed: Matt Burrows “‘No criminal offence’ committed by anti-gay Auckland pastor—police” *NewsHub* (online ed, 18 August 2017) **[[301.0010]]**.

¹⁰ Statement of evidence for Russell Thomas Hoban (27 June 2021) at [7] **[[201.0004]]**.

¹¹ Statement of evidence for Russell Thomas Hoban (27 June 2021) at [4] **[[201.0003]]**.

or other electronic communication words which are threatening, abusive, or insulting; or

(b) to use in any public place as defined in s 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or

(c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—

being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

19. Section 61 is located within pt 2 of the HRA, which is headed “unlawful discrimination”. Part 3 establishes procedures for resolving disputes about unlawful discrimination, including s 61. In particular, the HRC may receive and assess complaints; gather information; offer resolution services, including information, expert problem-solving support, mediation, and other assistance; and act on complaints.¹² If the complaint remains unresolved, the HRC or a complainant may bring civil proceedings in the Human Rights Review Tribunal (the **Tribunal**).¹³

Legislative history

20. Section 61 must be seen in its historical context. The Race Relations Act 1971 (the **RRA**) included s 25, which created the offence of “inciting racial disharmony”.¹⁴ It criminalised publishing or expressing publicly threatening, abusive, or insulting material or words with *intent* to excite hostility against, or bring into contempt, a group of persons defined by colour, race, or ethnic or national origins.
21. In 1977, the Government rejected a suggestion that to facilitate prosecutions, the intent requirement in s 25(1) should be removed.¹⁵

¹² Human Rights Act 1993, ss 76(2)(a)–(d) **[[App BoA Tab 23]]**.

¹³ Human Rights Act 1993, s 92B(1)(c) **[[App BoA Tab 23]]**.

¹⁴ Race Relations Act 1971 **[[App BoA Tab 30]]**.

¹⁵ (20 July 1977) 411 NZPD 1477 (Hon David Thomson, Minister of Justice) **[[301.0159]]**.

However, as an alternative, s 9A was enacted, creating civil liability for lower-level speech *likely* to create racial disharmony.¹⁶ Investigation and conciliation functions in relation to such speech were conferred upon the Race Relations Conciliator.¹⁷ The intention was to:¹⁸

... import the milder processes of conciliation and the civil law to deal with cases where the language used is not sufficiently flagrant to lend itself readily to a criminal prosecution. ... this should be a useful additional power for the Race Relations Conciliator when combating manifestations of racial prejudice.

22. In 1989, s 9A was repealed.¹⁹ However, in 1993, Parliament enacted the HRA as a single, comprehensive human rights statute. Section 25 of the RRA (the criminal offence) was effectively re-enacted as s 131 of the HRA.²⁰ And former s 9A of the RRA (the civil prohibition) was largely re-enacted as s 61 of the HRA.²¹

SUBMISSIONS

Legislative history

23. Sections 19(1) and (2) must also be seen in their distinct historical contexts.

¹⁶ Human Rights Commission Act 1977, sch 1 **[[App BoA Tab 24]]**.

¹⁷ Race Relations Act 1971, s 13 (as amended) **[[App BoA Tab 30]]**.

¹⁸ (20 July 1977) 411 NZPD 1477 (Hon David Thomson, Minister of Justice) **[[301.0159]]**.

¹⁹ Race Relations Amendment Act 1989, s 2 **[[App BoA Tab 31]]**. This seems to have been driven by:

- evidence s 9A complaints were overwhelming the Race Relations Conciliator, whose procedures were considered unsuited to resolving them;
- a sense that s 9A, as drafted, was producing absurd results; and
- a perception that s 9A (and complaints of contravention of it) was chilling speech on racial issues.

See Human Rights Commission *Review of the Human Rights Commission Act 1977—Report to the Minister of Justice* (21 August 1987) at [13.3] **[[301.0214]]**; (13 December 1988) 495 NZPD 8933 (Hon Geoffrey Palmer, Minister of Justice); (5 December 1989) 503 NZPD 14043 (Warren Kyd); and Human Rights Bill 1993 (214—2) (report of the Department of Justice, 28 May 1993) at 42 **[[302.0307]]**. See also Grant Huscroft “Defamation, racial disharmony, and freedom of expression” in Grant Huscroft and Paul Rishworth *Rights and freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995, Brookers, Wellington) 171 at 194–196 **[[Resp BoA Tab 11]]**.

²⁰ The differences between the Race Relations Act 1971 and Human Rights Act 1993 versions of the criminal offence were an increase in the maximum fine (to \$7,000) and updated definitions.

²¹ The differences between the Race Relations Act 1971 and Human Rights Act 1993 versions of the civil prohibition were:

- subcl (1)(c) was added, to avoid distinction between words used in a public or private place, if the speaker knew or ought to have known that the words were likely to be reported in the media;
- it no longer prohibited matter or words which might “incite ... *ill will*” or “bring into ... *ridicule*” (emphasis added);
- subcl (2) excluded accurate media reporting of speech; and
- updated definitions.

Section 19(1)—Progressive expansion of the prohibited grounds

24. New Zealand enacted its first domestic anti-discrimination provisions in 1971, in the form of the RRA. They protected against discrimination on the grounds of colour, race, and ethnic or national origins.²²
25. In 1977, Parliament extended the prohibited grounds of discrimination to include sex, marital status, and religious or ethical belief.²³ In 1992, the grounds were further extended to include age.²⁴ And in 1993, they were extended again to include disability, political opinion, employment status, family status, and sexual orientation.²⁵
26. As enacted in 1990, s 19(1) of the Bill of Rights Act expressly referred to each of the then-prohibited grounds. However, with the 1992 and 1993 expansions, continuing this approach would have become increasingly unwieldy. Parliament instead adopted the drafting technique of incorporating them by reference to the HRA, which now provides: “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.”

Section 19(2)—From equality to positive measures

27. From 1971, s 9 of the RRA provided:

9 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 [...] of a particular colour, race, or ethnic or national origin; and

²² Race Relations Act 1971, ss 3–7 **[[App BoA Tab 30]]**.

²³ See Human Rights Commission Act 1977, ss 15, 18–19 and 20–26 **[[App BoA Tab 24]]**.

²⁴ Human Rights Commission Amendment Act 1992. This extension was not reflected in the New Zealand Bill of Rights Act 1990 until 1993.

²⁵ Human Rights Act 1993 (as enacted), s 21.

²⁶ Sections 10 and 20 of the Human Rights Commission Amendment Act 1983 corrected a typographical error in the original versions of s 9(a) of the Race Relations Act 1971, and s 29(a) of the Human Rights Commission Act 1977. To enhance readability, the corrected version is reproduced here.

(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.

28. In 1977, Parliament enacted a similar provision as s 29(1) of the Human Rights Commission Act (the **HRC Act**).²⁷

29. The 1985 *White Paper* preceding the Bill of Rights Act did not propose an equivalent to s 9 of the RRA, or s 29 of the HRC Act. However, Parliament's Justice and Law Reform Committee proposed the inclusion of s 19(2).²⁸ As enacted in 1990, it read:²⁹

Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief do not constitute discrimination.

30. In 1993, s 73(1) of the HRA re-enacted s 9 of the RRA, and s 29(1) of the HRC Act. Section 73(1) authorised measures that might otherwise constitute discrimination, if taken in good faith to assist or advance persons or groups disadvantaged because of unlawful discrimination. At the same time, Parliament amended s 19(2) of the Bill of Rights Act: bringing it into line with s 73(1) of the HRA, and employing similar drafting to s 19(1).³⁰ It now reads:

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

Section 19(1) of the Bill of Rights Act

Decisions below

31. Adopting a traditional s 19(1) analysis, the Tribunal compared the protection of groups from threatening, abusive, or insulting speech on the ground of colour, race, or ethnic or national origin; with the absence of

²⁷ Human Rights Commission Act 1977, s 29 **[[App BoA Tab 24]]**.

²⁸ "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 at 50–51 **[[App BoA Tab 43]]**. The Committee's reasons are reproduced further below at [35].

²⁹ New Zealand Bill of Rights Act 1990, s 19(2) (as enacted) **[[App BoA Tab 26]]**. This express identification of each of the then-prohibited grounds of discrimination mirrored then-s 19(1): see above at [25]–[26].

³⁰ See above at [30].

such protections from groups defined by sexual orientation.³¹ It held the latter suffered material disadvantage: they could not access the HRC complaints process, nor seek Tribunal remedies.³² Section 61 was therefore *prima facie* discriminatory.³³

32. For reasons like those given by the Tribunal, the High Court and Court of Appeal both considered *prima facie* discrimination was established.³⁴

Methodological approach

33. The Tribunal and Court of Appeal both proceeded as if resolution of the appellant's claim required separate analysis of ss 19(1) and (2).³⁵ But this is not the only framework through which a measure such as s 61 of the HRA might be analysed. An alternative approach recognises that the kinds of measures s 19(2) may authorise might not even limit the s 19(1) right at all.
34. This approach finds support in the *White Paper*. The original draft Bill did not include what ultimately became s 19(2).³⁶ The Minister of Justice (Hon Geoffrey Palmer) took the view:³⁷

“affirmative action” laws and programmes to overcome existing disadvantages would be valid. *They are unlikely to be seen as discrimination at all.* This is why, unlike the Canadian Charter, the Bill contains no specific exception in favour of affirmative action.

35. Parliament's Justice and Law Reform Committee agreed:³⁸

It is probable that affirmative action programmes would be valid either because the courts found that they *did not offend against*

³¹ *Hoban v Attorney-General* [2022] NZHRRT 16 at [31] [*Hoban* (HRRT)] [[101.0183]].

³² At [35] [[101.0184]].

³³ At [36] [[101.0184]].

³⁴ *Hoban* (HC), above n 4, at [19] [[102.0199]]; and *Hoban* (CA), above n 5, at [62]–[64] [[102.0243–102.0244]].

³⁵ This Court's grant of leave may be predicated on the same methodological approach: *Hoban v Attorney-General* [2026] NZSC 48 at [1] [[05.0029]].

³⁶ See also above at [29].

³⁷ Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1984–1985] I AJHR A6 at [10.79] (emphasis added) [[App BoA Tab 44]]. At the time the White Paper was published, it was envisaged that enactments inconsistent with affirmed rights would be declared invalid: See for example at [6.2]. But see New Zealand Bill of Rights Act 1990, s 4 [[App BoA Tab 25]].

³⁸ “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 at 51 (emphasis added) [[App BoA Tab 43]]. At that stage, what became the “sections” of the New Zealand Bill of Rights Act 1990 were referred to as “articles”.

Article 12 (ie, they were not discriminatory) or, even if they did so offend, because they were justified under Article 3. Nonetheless, we would favour amending the bill by inserting a provision along the lines of section 15(2) of the [Canadian] Charter.^[39] As some doubts have been raised on this matter it would seem desirable to make the position quite clear.

36. This approach is echoed by Professor Grant Huscroft⁴⁰ in a seminal Bill of Rights Act text.⁴¹ Reflecting Canadian jurisprudence of the time,⁴² he suggested a “purposive conception of discrimination in s 19(1) would overcome some of the limitations inherent in s 19(2). Indeed, a purposive approach might have the effect of rendering s 19(2) irrelevant.”⁴³ He contrasted this with:⁴⁴

a neutral conception of discrimination in s 19(1) [which] would leave s 19(2) with an important role to play, since any distinction based on the prohibited grounds would prima facie violate the right. If this approach were adopted, s 19(2) would operate as a saving provision prior to s 5 ...

37. He concluded:⁴⁵

Neither interpretive approach is, at the end of the day, an elegant one ... however, consideration of affirmative action questions in the context of a purposive conception of the right [(the first approach)] is preferable.

38. The High Court below acknowledged something akin to the *White Paper* and Huscroft approaches. That is, that a positive (albeit under-inclusive) measure directed at addressing a particular form of discrimination (such as

³⁹ Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982 **[[App BoA Tab 33]]**. Section 15(2) reads: “Subsection [15](1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

⁴⁰ Now Judge of the Court of Appeal of Ontario, Canada.

⁴¹ Grant Huscroft “Freedom from Discrimination” in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne 2003) 366 **[[Resp BoA Tab 12]]**.

⁴² The respondent does *not* suggest the Canadian approach of considering historic disadvantage ordinarily forms part of the s 19(1) analysis. This approach was rejected in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [121] **[[App BoA Tab 8]]**. However, the concept of “assisting or advancing persons or groups of persons disadvantaged because of discrimination” is built into the text of s 19(2) of the Bill of Rights Act, and arguably requires consideration of the historic position of such persons or groups.

⁴³ Huscroft, above n 41, at 391 **[[Resp BoA Tab 12]]**.

⁴⁴ At 392 **[[Resp BoA Tab 12]]**.

⁴⁵ At 392 **[[Resp BoA Tab 12]]**.

s 61) might be characterised “as not truly discriminatory at all”.⁴⁶ It went on to say:⁴⁷

This approach suggests there could be a more refined definition of what amounts to discrimination. Discrimination would be defined in a more purposive way focusing on the harms caused by it and involving elements of unjustified or unreasonable differentiation.

39. Nonetheless, the High Court considered this issue was better addressed through the s 19(2) and s 5 analyses.⁴⁸

Traditional discrimination analysis may be unhelpful

40. The above review highlights that the analytical framework New Zealand courts traditionally adopt in discrimination cases—identifying one or more comparator groups, and examining whether discriminatory treatment has caused material disadvantage⁴⁹—might not be required (nor indeed helpful) in cases where s 19(2) is arguably engaged.
41. Section 61 is directed to addressing a particular form of discrimination: that on the ground or colour, race, or ethnic or national origins. The appellant’s allegation is that the “omission” of groups defined by sexual orientation from the protection of s 61 materially disadvantages them. However, “material disadvantage” is inapt to describe what is happening in these circumstances. It implies a general entitlement to simultaneous and equivalent protections from threatening, abusive, or insulting speech for all groups defined by prohibited grounds of discrimination, and suggests groups defined by sexual orientation are excluded from it.
42. In a free and democratic society, there is no general entitlement to be protected from others’ expression; speech is generally lawful unless proscribed by a legal rule. Not all forms of expression some may consider harmful are proscribed by a specific law—including speech that some

⁴⁶ *Hoban* (HC), above n 4, at [21] **[[102.0200]]**.

⁴⁷ At [22] (footnote omitted) **[[102.0200]]**.

⁴⁸ At [23]–[24] **[[102.0201]]**.

⁴⁹ See for example *Ministry of Health v Atkinson*, above n 42, at [55] and [109] **[[App BoA Tab 8]]**.

consider might threaten, abuse, or insult groups defined by sex, religious belief, disability, or sexual orientation.⁵⁰

43. The absence of any particular type of formal legal sanction does not mean such speech is condoned, or cannot be addressed by other means. For example, Mr Robertson’s comments were publicly condemned by leaders in government and civil society.⁵¹ The general provisions of the criminal law may also be available to deal with some kinds of harmful speech.⁵²
44. Section 61 is the exception, not the rule. It does not *remove* protection from groups defined by sexual orientation. Rather, it has been “carefully framed” to create *targeted* protection for groups defined by race, colour, or ethnic or national origins.⁵³ Parliament’s choice to provide a particular form of legal protection for some groups does not, without more, impose material disadvantage on others.

Section 19(2) of the Bill of Rights Act

Decisions below

45. The Tribunal held s 61 implemented New Zealand’s international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (the **ICERD**),⁵⁴ and was a measure taken in good faith for the purpose of assisting or advancing disadvantaged groups.⁵⁵ Accordingly, the differential treatment fell within s 19(2) of the Bill of Rights Act, and did not amount to discrimination.⁵⁶ In particular, the

⁵⁰ To identify just some of the prohibited grounds of discrimination: Human Rights Act 1993, ss 21(1)(a), (c), (h) and (m) **[[App BoA Tab 23]]**.

⁵¹ Dubby Henry “West Auckland pastor preaches gay people should be shot” *New Zealand Herald* (online ed, 15 August 2017) **[[301.0002]]**; and “Police investigate Auckland pastor who said homosexuals should be shot: ‘Members of our communities will be concerned’” *One News* (online ed, 16 August 2017) **[[301.0006]]**.

⁵² See for example Summary Offences Act 1981, s 4(1)(b) and (c) **[[Resp BoA Tab 3]]**; Harmful Digital Communications Act 2015, s 22 **[[Resp BoA Tab 2]]**; and Crimes Act 1961 ss 66(1) and 311(2), if such speech incites, counsels, or procures others to offend against persons or property **[[Resp BoA Tab 1]]**.

⁵³ Vinod Bal *LGBTI+ rights in Aotearoa New Zealand: The past and future* (Adhikaar Aotearoa, 2026) at 106 **[[Resp BoA Tab 13]]**.

⁵⁴ 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) **[[App BoA Tab 47]]**. New Zealand ratified this in 1972.

⁵⁵ *Hoban* (HRRT), above n 31, at [42] **[[101.0185]]**.

⁵⁶ At [44] **[[101.0186]]**.

Tribunal rejected the argument s 19(2) is confined to “‘affirmative action’ programmes however formulated”.⁵⁷

46. The High Court departed from the Tribunal’s conclusion, holding s 61 was *not* a measure of the kind s 19(2) contemplated. It reasoned:⁵⁸

[Section 61] is a provision designed to make such conduct unlawful, and to provide a remedy for those affected by hate speech. Such provisions are not measures taken to assist or advance the position of persons subject to racial discrimination. Their purposes are different.

47. However, like the Tribunal, the Court of Appeal held s 61 satisfied s 19(2) of the Bill of Rights Act. It considered “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”.⁵⁹ The Court accepted s 61 was under-inclusive, as it protects some groups (but not others) who may be targeted by threatening, abusive, or insulting speech. However, this did not prevent it from constituting a s 19(2) measure. It was enacted to give effect to New Zealand’s obligations under the ICERD and the International Covenant on Civil and Political Rights (the **ICCPR**),⁶⁰ and “[t]here is an element of artificiality in identifying and focusing on the failure to include in s 61 proscriptions of hate speech in respect of other forms of discrimination never intended to be covered”.⁶¹

Interpretive approach

48. The High Court saw “no reason to either read down, or read up s 19(2). The sub-section should be given a normal purposive interpretation”.⁶²
49. As discussed earlier, the original draft Bill of Rights Act did not include what ultimately became s 19(2).⁶³ The drafter considered such a provision was

⁵⁷ At [43] **[[101.0186]]**.

⁵⁸ *Hoban* (HC), above n 4, at [33] **[[102.0204]]**.

⁵⁹ *Hoban* (CA), above n 5, at [77] **[[102.0248]]**.

⁶⁰ 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) **[[App BoA Tab 48]]**.

⁶¹ *Hoban* (CA), above n 5, at [79] **[[102.0248]]**.

⁶² *Hoban* (HC), above n 4, at [31] **[[102.0203]]**.

⁶³ See above at [29]–[30].

unnecessary because “affirmative action” laws and programmes would nonetheless be “valid”.⁶⁴ Parliament’s Justice and Law Reform Committee nevertheless recommended it be inserted to put the legitimacy of such measures beyond doubt.⁶⁵

50. One conception of “affirmative action” measures is those which seek to advance historically disadvantaged groups, with respect to historically advantaged groups, in circumstances where both groups are defined by the same prohibited ground of discrimination. An example may be a scholarship designed to increase women’s participation in science, technology, education and mathematics (“STEM”) fields that have historically been male dominated. Both the historically disadvantaged group (women) and historically advantaged group (men) are defined by the same prohibited ground (sex).
51. The present case concerns (at least) two historically disadvantaged groups.⁶⁶ To take the above example further, a scholarship does not lose its “affirmative action” character simply because it might:
 - 51.1 preference one subgroup of women over others,⁶⁷ for example, mature age women.⁶⁸
 - 51.2 not be available to other groups that may be historically under-represented in STEM fields, such as men with disabilities.⁶⁹
52. In any event, excessive focus on some true or objective meaning of “affirmative action” risks distracting from the statutory language of s 19(2).

⁶⁴ Palmer, above n 37, at [10.79] (emphasis added). As to the concept of “validity”, see above n 37.

⁶⁵ “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 at 51 (emphasis added) **[[App BoA Tab 43]]**.

⁶⁶ For the purposes of this analogy, groups defined by colour, race, or ethnic or national origin might be considered a single “group”.

⁶⁷ See for example *Giggle for Girls Pty Ltd v Tickle* [2026] FCAFC 64 at [26]–[27] and [81] **[[Resp BoA Tab 7]]**.

⁶⁸ Age discrimination is a prohibited ground of discrimination: Human Rights Act 1993, s 21(1)(i) **[[App BoA Tab 23]]**.

⁶⁹ Disability discrimination is another prohibited ground of discrimination: Human Rights Act 1993, s 21(1)(h) **[[App BoA Tab 23]]**.

The Tribunal’s reference to “‘affirmative action’ programmes however formulated” appears to reflect this point.⁷⁰

“Measures taken in good faith”

53. The relevant “measure taken” is Parliament’s enactment of s 61. The Tribunal, High Court and Court of Appeal each proceeded on the basis that the enactment of legislation can constitute a “measure taken” for the purpose of s 19(2).⁷¹
54. Section 61 was enacted for the bona fide purpose of implementing New Zealand’s international obligations. The relevant international developments, and their relationship to domestic legislative developments, are discussed further below.⁷²
55. Nothing in the legislative history suggests the limited scope of s 61 was motivated by any view of the relative status or worth of different groups which might be discriminated against on prohibited grounds. Indeed, there is no indication in the legislative history that Parliament turned its mind (either in 1971 or in 1993) to whether groups defined by sexual orientation ought to be protected from threatening, abusive, or insulting speech—even while it was extending other anti-discrimination protections to such groups.⁷³
56. The position is therefore different from that considered by the Supreme Court of Canada in *Vriend v Alberta*.⁷⁴ In that case, sexual orientation was omitted—by deliberate legislative choice⁷⁵—from the prohibited grounds of discrimination in a provincial human rights statute that purported to be founded on the “inherent dignity and the equal and inalienable rights of all

⁷⁰ *Hoban* (HRRT), above n 31, at [43] **[[101.0186]]**.

⁷¹ At [43]–[44] **[[101.0186]]**; *Hoban* (HC), above n 4, at [32] **[[102.0204]]**; and *Hoban* (CA), above n 5, at [74] **[[102.0247]]**.

⁷² See below at [77]–[89].

⁷³ See above at [20] and [25], and below at [82].

⁷⁴ *Vriend v Alberta* [1998] 1 SCR 493 **[[App BoA Tab 19]]**.

⁷⁵ At [100] **[[App BoA Tab 19]]**.

persons”.⁷⁶ The Court held the omission constituted unjustified discrimination:⁷⁷

The comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection. *It is not as if the Legislature had merely chosen to deal with one type of discrimination. In such a case it might be permissible to target only that specific type of discrimination and not another.* This is, I believe, the type of case to which L’Heureux-Dubé J was referring in the comments she made in obiter in her dissenting reasons in *McKinney*:^[78] “in my view, if the provinces chose to enact human rights legislation which only prohibited discrimination on the basis of sex, and not age, this legislation could not be held to violate the Charter.” ...

57. The appellant seeks to characterise the *legislative omission* of groups defined by sexual orientation as a “measure taken” other than in good faith.⁷⁹ However, that reading of a “measure taken” sits uneasily with both the language and structure of s 19(2).
58. Parliament’s enactment of s 61 has given rise to this proceeding. There is no domestic law obligation to enact protections from threatening, abusive, or insulting speech. Had Parliament chosen not to legislate in this field at all, there would be no “measure taken” capable of assessment under s 19(2)—the appellant would have been left with the *absence* of any “measure”. Treating a legislative omission (or the absence or under-inclusive aspect of a measure) as constituting the “measure taken” places considerable (and unnecessary) strain on the statutory language.
59. In addition, it severs the phrase “measures taken” from the requirement they be taken “in good faith for the purpose of assisting or advancing”. Omissions do not ordinarily “assist” or “advance”. Such concepts are more naturally associated with positive action, such as a legislative enactment.

⁷⁶ At [94], citing the Individual’s Rights Protection Act RSA 1980 (CA) **[[App BoA Tab 19]]**.

⁷⁷ At [96] (emphasis added) **[[App BoA Tab 19]]**.

⁷⁸ *McKinney v University of Guelph* [1990] 3 SCR 229 at 436 **[[Resp BoA Tab 8]]**.

⁷⁹ See the appellant’s submissions (22 June 2026) at [6.1]–[6.2].

“for the purpose of assisting or advancing”

60. Like the rest of s 19(2), “assisting” and “advancing” should be given a normal purposive interpretation.⁸⁰
61. At the very least, s 61 assists groups that may experience racist speech. As the Court of Appeal below observed (albeit in relation to s 19(1)):⁸¹

Section 61 both has symbolic value and contains practical rights. It is a legislative statement that racist speech is inherently damaging to New Zealand society, but it also allows people subject to that speech to seek redress using the resources of the state and the machinery provided by the HRA.

62. Those symbolic and practical protections “assist”. The appellant’s case necessarily proceeds on that basis: the alleged “material disadvantage” is that groups defined by sexual orientation are denied access to the assistance of the same protections and mechanisms for redress.⁸²

“groups of persons disadvantaged because of discrimination”

63. Section 61 was enacted to assist and advance groups disadvantaged on the grounds of colour, race, or ethnic or national origins. That discrimination is a well-established historical and contemporary reality. Parliament has recognised it through the inclusion of these grounds in pt 2 of the HRA. The international community has similarly acknowledged that racist speech can foster hatred and discrimination (and, in its most extreme forms, contribute to widespread human rights violations, genocide, and armed conflict).⁸³
64. This is not to suggest other groups do not also experience threatening, abusive, or insulting speech. However, that is not the issue before this

⁸⁰ *Hoban* (HC), above n 4, at [31] **[[102.0203]]**. See also above at [36]–[37] and [48].

⁸¹ *Hoban* (CA), above n 5, at [64] **[[102.0244]]**. See also the Court’s discussion at [74]–[75] **[[102.0247]]**.

⁸² The respondent respectfully suggests the High Court erred on this point, by failing to consider the assistance provided by the pt 3 dispute resolution procedures to persons who allege a breach of s 61: *Hoban* (HC), above n 4, at [32]–[33] **[[102.0204]]**.

⁸³ Committee on the Elimination of Racial Discrimination *General Recommendation No 35 (2013) on combating racist hate speech* UN Doc CERD/C/GC/35 (26 September 2013) at [3] and [5] **[[Resp BoA Tab 18]]**.

Court. The question is whether groups defined by colour, race, or ethnic or national origin are disadvantaged by discrimination. Plainly, they are.

“do not constitute discrimination”

65. For these reasons, s 61 falls within s 19(2) of the Bill of Rights Act. Accordingly, it does not constitute discrimination, such that s 19 is limited.

Section 5 of the Bill of Rights Act: justification

66. If this Court considers s 61 limits the right to freedom from discrimination, s 5 of the Bill of Rights Act becomes relevant.

Decisions below

67. The Tribunal held any limitation would be justified. Section 61 was enacted to implement New Zealand’s international obligations under the ICERD. New Zealand has no corresponding international obligation to proscribe threatening, abusive or insulting speech targeting groups defined by sexual orientation.⁸⁴
68. In addition, Parliament is the appropriate venue for policy debates about the balance between protecting groups from threatening, abusive or insulting speech, and freedom of expression.⁸⁵ That Parliament has not extended a particular form of human rights protection to all groups simultaneously does not necessarily render the resulting distinction unjustified.⁸⁶
69. The High Court’s reasons for deciding the limitation was justified largely mirrored those of the Tribunal.⁸⁷
70. Because of the Court of Appeal’s view that s 19(2) applied, it was strictly unnecessary to determine whether any limitation was justified. Nevertheless, it made several important observations. It noted Tipping J’s

⁸⁴ *Hoban* (HRRT), above n 31, at [52]–[53] and [57] **[[101.187 and 101.188]]**.

⁸⁵ At [54] and [57] **[[101.187 and 101.188]]**.

⁸⁶ At [59]–[60] **[[101.0188–101.0189]]**.

⁸⁷ *Hoban* (HC), above n 4, at [43]–[45], [48] and [50] **[[102.0207–102.0209, 102.0210 and 102.0211]]**. Albeit justification was dispositive of the appeal to the High Court, whereas it was not in the Tribunal at first instance.

comments in *Hansen v R* that s 5 has “some inherent room for parliamentary appreciation”,⁸⁸ and the:⁸⁹

... spectrum which extends from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other ... the intensity of the court’s review is likely to be greater when the matter is ‘closer to the legal end of the spectrum’.

71. The Court considered the issues arising in the context of threatening, abusive, or insulting speech “are very much at the end of major political and social decisions, as opposed to those which have a substantial legal content”.⁹⁰
72. The Court also noted that if the Bill of Rights Act required groups defined by sexual orientation to be protected from threatening, abusive, or insulting speech, this suggested corresponding protection must also be afforded to all groups defined by prohibited grounds of discrimination. Such an outcome “would be a dramatic extension of the limited hate speech proscription currently contained in the HRA”.⁹¹ The Court noted the legislative history of s 61 evidenced an absence of “consensus regarding the need to expand hate speech provisions and, if so, the extent to which they should be extended”.⁹²

Methodological approach

73. When considering justification, the Bill of Rights Act does not mandate any particular methodology. Courts have sometimes found the analytical framework articulated in *Hansen* to be of assistance.⁹³ However, courts have also recognised the *Hansen* framework is an analytical tool, rather than a mandatory methodology.⁹⁴ As the High Court noted below,

⁸⁸ *Hoban* (CA), above n 5, at [101] **[[102.0256]]**, citing *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [106] **[[App BoA Tab 5]]**.

⁸⁹ *Hoban* (CA), above n 5, at [102] **[[102.0256]]**, citing *Hansen v R*, above n 88, at [116] **[[App BoA Tab 5]]**.

⁹⁰ *Hoban* (CA), above n 5, at [108] **[[102.0258]]**.

⁹¹ At [106] **[[102.0257]]**.

⁹² At [110]–[114] **[[102.0259–102.0262]]**

⁹³ *Hansen v R*, above n 88, at [42] per Elias CJ, [64] per Blanchard J, [103]–[104] and [120]–[121] per Tipping J and [203]–[205] and [212] per McGrath J **[[App BoA Tab 5]]**. It draws upon the framework developed in Canada in *R v Oakes* [1986] 1 SCR 103 **[[App BoA Tab 17]]**.

⁹⁴ See *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 552 at [46] per Winkelmann CJ; *New Health New*

sometimes the question of whether a limitation is demonstrably justified can be resolved by a simpler analytical pathway.⁹⁵

74. None of the Tribunal, High Court or Court of Appeal considered it necessary to undertake a formal *Hansen*-style analysis in this case. The Court of Appeal, in particular, expressed reservations about its utility in a case of legislative under-inclusion:⁹⁶

[104] It is important to note that Tipping J's statements in *R v Hansen* were made with reference to legislative restrictions on rights and freedoms. ...

[105] In this context there is an awkwardness about approaching the justification issue on the basis that it is necessary for the Crown to justify a legislative provision limiting a right. On the face of it, Parliament has not set out to limit anyone's rights.

75. The nature of the apparent limitation on rights also bears upon what might be required in order to demonstrably justify it. In *Attorney-General v Chisnall*, a majority of this Court wrote:⁹⁷

sometimes evidence relevant to the reasonableness of the limit may not be required or may be minimal. In *Make It 16 Inc v Attorney-General*, this Court observed that such a situation might arise where a limitation on a right is well-recognised either in the relevant international instruments or common law.^[98] ... It may also be the case that the justification for the limitation is plain on the face of the legislation.

76. The justification inquiry here turns on legal and constitutional considerations, rather than social or empirical facts. The respondent says this Court ought assess s 61 against considerations such as New Zealand's international obligations, the history of proposed reforms to the provision, and the respective roles of Parliament and the courts. In this context, *Hansen*-style steps assessing "rational connection" and "minimal

Zealand Inc v South Taranaki District Council [2018] NZSC 59, [2018] 1 NZLR 948 at [298] per Elias CJ and n 94 per O'Regan J; and *NZDSOS Inc v Minister for Covid-19 Response* [2022] NZHC 716, (2022) 13 NZHRR 296 at [68].

⁹⁵ *Hoban* (HC), above n 4, at [42] **[[102.0207]]**. See also *New Health New Zealand Inc v South Taranaki District Council*, above n 94, at [298] per Elias CJ; and *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [87] **[[App BoA Tab 9]]**.

⁹⁶ *Hoban* (CA), above n 5, at [104] **[[102.0257]]**.

⁹⁷ *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [186] **[[App BoA Tab 1]]**.

⁹⁸ *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [45] **[[App BoA Tab 7]]**.

impairment” are unlikely to be particularly illuminating.⁹⁹ Courts are familiar with these types of considerations, without the need for legislative-fact evidence.

International developments

77. The RRA asserted it implemented the ICERD.¹⁰⁰ The Bill of Rights Act affirms New Zealand’s commitment to the ICCPR.¹⁰¹ And the HRA was enacted “to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”.¹⁰² These legislative statements highlight the importance of understanding the international context in which s 61 (and its predecessors) were enacted.
78. In 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights (**UDHR**) as a “common standard of achievement” (albeit not one creating binding rights).¹⁰³ It affirms the entitlement to enjoy all UDHR rights and freedoms without discrimination (art 2); equality before the law, equal protection of the law, and equal protection against discrimination and incitement to discrimination (art 7); and freedom of opinion and expression (art 19).
79. In 1965, the General Assembly adopted the ICERD.¹⁰⁴ Article 4 relevantly provides:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake

⁹⁹ *Hansen v R*, above n 88 **[[App BoA Tab 5]]**.

¹⁰⁰ Race Relations Act 1971, long title **[[App BoA Tab 30]]**.

¹⁰¹ New Zealand Bill of Rights Act 1990, long title **[[App BoA Tab 25]]**.

¹⁰² Human Rights Act 1993, long title **[[App BoA Tab 23]]**.

¹⁰³ GA Res 217A (1948) **[[Resp BoA Tab 20]]**.

¹⁰⁴ GA Res 2106 (1965). 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) **[[App BoA Tab 47]]**. New Zealand ratified the ICERD in 1972. Articles 2(1)(d) and (e) are also relevant:

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;

(e) Each State Party undertakes to ... discourage anything which tends to strengthen racial division.

...

to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in art 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; ...

80. And in 1966, the General Assembly adopted the ICCPR.¹⁰⁵ Similar to art 2 of the UDHR, art 2(1) of the ICCPR affirms the right to enjoy ICCPR rights without discrimination. And similar to art 7 of the UDHR, art 26 of the ICCPR affirms the right to equality before the law, equal protection of the law, and equal and effective protection against discrimination.
81. Article 19(2) of the ICCPR affirms the right to freedom of expression. But art 19(3) recognises restrictions on that right, to protect the rights of others and public order. Further, art 20(2) requires the advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence to be prohibited by law.¹⁰⁶

Connecting the international developments to New Zealand's domestic law

82. Parliament's 1971 criminalisation of inciting racial disharmony implemented New Zealand's obligation under art 4(a) of the ICERD.¹⁰⁷ It also contributed to meeting our obligation under art 20 of the ICCPR.¹⁰⁸

¹⁰⁵ GA Res 2200A (1966). International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) **[[App BoA Tab 48]]**. New Zealand ratified the ICCPR in 1978.

¹⁰⁶ Article 26 is also relevant:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁰⁷ (15 December 1971) 377 NZPD 5306 (Hon David Thomson, Acting Minister of Justice) **[[App BoA Tab 37]]**. See also C Jury and others *Human Rights Law* (looseleaf ed, Thomson Reuters) at [HR61.01] **[[Resp BoA Tab 10]]**; and Minister of Justice *Proposed changes to the incitement provisions in the Human Rights Act 1993* (13 April 2021) at [18] **[[301.0060]]**.

¹⁰⁸ At that time, New Zealand had signed but not ratified the International Covenant on Civil and Political Rights.

83. However, New Zealand's international obligations were not exhausted by criminalising the most serious forms of racist speech. The Committee on the Elimination of Racial Discrimination has emphasised the importance of broader legislative measures. Its *General Recommendation 35* states:¹⁰⁹

[9] As a minimum requirement, and without prejudice to further measures, comprehensive legislation against racial discrimination, *including civil and administrative law as well as criminal law*, is indispensable to combating racist hate speech effectively. ...

[12] The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, *while less serious cases should be addressed by means other than criminal law*, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups.

84. New Zealand's civil prohibition is consistent with that recommendation, as well as its general obligations under art 4 of the ICERD. As the High Court observed in *Wall v Fairfax New Zealand Ltd*:¹¹⁰

[21] Nor is art 4 concerned only with criminal sanctions for racist speech. The chapeau to art 4 requires states to "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination". The creation of civil sanctions in s 61 of the Human Rights Act is arguably an example of such a measure taken under art 4. ...

[31] Section 61 and its predecessor, s 9A of the Race Relations Act 1971, were designed to meet New Zealand's obligation to combat racist discrimination under ICERD. ...

85. This view of s 61 is consistent with the reservation New Zealand entered to art 20 of the ICCPR in 1978.¹¹¹

The Government of New Zealand having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons, and having regard to the right of

¹⁰⁹ Committee on the Elimination of Racial Discrimination *General Recommendation No 35 (2013) on combating racist hate speech* UN Doc CERD/C/GC/35 (26 September 2013) **[[Resp BoA Tab 18]]**. Although General Recommendations are not binding, they are authoritative interpretations issued by the expert body responsible for supervising the ICERD's implementation.

¹¹⁰ *Wall v Fairfax New Zealand Ltd*, above n 1, at [21] and [31] **[[App BoA Tab 14]]**. See also *Hoban* (HRRT), above n 31, at [21] **[[101.0182]]**; and *Hoban* (HC), above n 4, at [33] **[[102.0204]]**.

¹¹¹ 1120 UNTS 489 (28 December 1978). Both the criminal offence and the civil prohibition were in force at that time. See also Minister of Justice *Proposed changes to the incitement provisions in the Human Rights Act 1993* (13 April 2021) (13 April 2021) at [18] **[[301.0060]]**.

freedom of speech, reserves the right not to introduce further legislation with regard to article 20.

86. The international position is different in relation to sexual orientation. New Zealand is not obliged, in the same way, to prohibit threatening, abusive, or insulting speech towards groups defined by sexual orientation.¹¹² As the Court of Appeal noted in *Living Word Distributors Ltd v Human Rights Action Group (Wellington)*:¹¹³

... whereas international anti-discrimination principles have gradually extended their reach to protect wider classes of vulnerable persons, the international prohibitions of hate propaganda have remained confined to the categories of race and religion; and that prohibition of hate propaganda is not seen as synonymous with more general anti-discrimination protections.

87. Article 20(2) of the ICCPR is confined to proscribing the advocacy of “national, racial or religious hatred”. As the Human Rights Committee has explained in its *General Comment 34*:¹¹⁴ “It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions.”
88. Sections 61 and 131 are targeted measures directed at meeting New Zealand’s international obligations. They were enacted in response to specific international and domestic concerns about racial equality.¹¹⁵ There was a demonstrated need for this specific protection at the time they were enacted, domestically and internationally,¹¹⁶ and the concerns are “endemic and enduring”.¹¹⁷

¹¹² Notwithstanding more general obligations such as those contained in arts 2 and 26 of the ICCPR **[[App BoA Tab 48]]**. See also *United Nations Strategy and Plan of Action on Hate Speech* (United Nations, 2019), excerpted in *Hoban* (HRRT), above n 31, at [41] **[[101.0185]]**.

¹¹³ *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570 (CA) at [31] **[[Resp BoA Tab 6]]**. See also Vinod Bal, above n 53, at 106–107 **[[Resp BoA Tab 13]]**.

¹¹⁴ UN Human Rights Committee *General Comment No 34—Article 19: Freedoms of opinion and expression* Un Doc CCPR/C/GC/34 (29 July 2011) at [52] **[[Resp BoA Tab 19]]**.

¹¹⁵ 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.” **[[App BoA Tab 30]]**.

¹¹⁶ Human Rights Bill 1993 (214—2) (report of the Department of Justice, 28 May 1993) at 42 **[[302.0305]]**.

¹¹⁷ *Hoban* (HRRT), above n 31, at [41] **[[101.0185]]**. See for example Committee on the Elimination of Racial Discrimination *General Recommendation No 35 (2013) on combating racist hate speech* UN Doc CERD/C/GC/35 (26 September 2013) **[[Resp BoA Tab 18]]**.

89. As the Court of Appeal said, there is an “element of artificiality in identifying and focusing on the failure to include in s 61 proscriptions of hate speech in respect of other forms of discrimination never intended to be covered”.¹¹⁸ New Zealand’s international obligations provide a rational and objective basis for Parliament’s decision to restrict only speech that is likely to cause racial disharmony, while not restricting other forms of threatening, abusive, or insulting speech.

Legislative (and political) history

90. Equally important to understanding the current scope of s 61 is the repeating pattern over nearly four decades of active consideration (and non-enactment) of broader protections from threatening, abusive, or insulting speech.
91. Parliament introduced discrimination protections on the grounds of sex, marital status, religious and ethical belief in 1977.¹¹⁹ The same Act also inserted s 9A into the RRA. It is notable this prohibition of (only racist) speech was enacted concurrently with general anti-discrimination protections expanding beyond colour, race, and ethnic or national origin.
92. In 1987, a suggestion to extend protection from threatening, abusive, or insulting speech to groups defined by gender or religion appears to have been circulating. However, the HRC cautioned the Government against it, citing concerns about freedom of expression, workability, and overuse of its complaints processes.¹²⁰
93. In 1993, the HRA extended anti-discrimination protections to a much broader range of grounds, including sexual orientation.¹²¹ However, the Department of Justice advised a parliamentary committee considering the Bill that, unlike racist speech, no comparable need to prohibit threatening,

¹¹⁸ *Hoban* (CA), above n 5, at [79] **[[102.0248]]**.

¹¹⁹ Human Rights Commission Act 1977, ss 15–27 **[[App BoA Tab 24]]**.

¹²⁰ Human Rights Commission *Review of the Human Rights Commission Act 1977—Report to the Minister of Justice* (21 August 1987) at [13.3] **[[301.0214]]**.

¹²¹ Human Rights Act 1993, s 21(1). See especially s 21(1)(m) **[[App BoA Tab 23]]**.

abusive, or insulting speech targeting other groups had been demonstrated.¹²²

94. And in 2001, submitters to Parliament’s Justice and Electoral Select Committee on the Human Rights Amendment Bill proposed extending “incitement to racial hatred” provisions to other groups. However, the Committee declined to consider the issue.¹²³

95. Most recently, following the 2019 Christchurch mosque attacks, the Government commissioned a review of both the civil prohibition (s 61) and criminal offence (s 131).¹²⁴ In 2020, Cabinet agreed to extend both to cover all groups listed in s 21(1) of the HRA.¹²⁵

96. In 2022, the Government introduced a Human Rights (Incitement on Ground of Religious Belief) Amendment Bill to Parliament.¹²⁶ At the same time, it referred to the Law Commission the broader issue of:¹²⁷

speech that expresses hostility towards, or contempt for, people who share a common characteristic. This will include whether further protections should be afforded to specific groups, including the Rainbow and disabled communities.

97. However, in early 2023, the Government discharged the Bill, on the basis its subject matter would be considered as part of the Law Commission review.¹²⁸ And following the election of the 54th Parliament, the

¹²² Human Rights Bill 1993 (214—2) (report of the Department of Justice, 28 May 1993) at 42 and 58 **[[302.0307 and 302.0310]]**.

¹²³ Human Rights Amendment Bill 2001 (152—2) (select committee report) at 22 **[[302.0333]]**.

¹²⁴ Minister of Justice *Proposed changes to the incitement provisions in the Human Rights Act 1993* (13 April 2021) at [2] **[[301.0060]]**.

¹²⁵ Minister of Justice *Proposed changes to the incitement provisions in the Human Rights Act 1993* (13 April 2021) at [39]–[41] **[[301.0065]]**; and Cabinet Minute “Proposed Changes to the Incitement Provisions in the Human Rights Act 1993” (7 December 2020) CAB-20-MIN-0507 at [2.1] and [2.5] **[[301.0072]]**. This would have included groups defined by sexual orientation: Human Rights Act 1993, s 21(1)(m) **[[App BoA Tab 23]]**. Almost concurrently with Cabinet’s decision, the Royal Commission of Inquiry into the 2019 Christchurch mosque attacks recommended expanding the criminal offence (s 131) to include harmful speech targeting groups defined by religion: Hon Sir William Young and Jacqui Caine *Ko tō tātou kāinga tēnei / Report: Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (2020) at pt 9, ch 4 at [48] and pt 10, recommendation 40 **[[Resp BoA Tab 14]]**.

¹²⁶ Human Rights (Incitement on Ground of Religious Belief) Amendment Bill 2022 (209—1) **[[Resp BoA Tab 15]]**.

¹²⁷ Minister of Justice “Human Rights Act enhanced to protect religious communities” (press release, 19 November 2022) **[[Resp BoA Tab 17]]**. See also Human Rights (Incitement on Ground of Religious Belief) Amendment Bill 2022 (209—1) **[[Resp BoA Tab 15]]**.

¹²⁸ Human Rights (Incitement on Ground of Religious Belief) Amendment Bill 2022 (209—1) (select

Government withdrew the Law Commission reference insofar as it related to speech.¹²⁹

98. To summarise, over the past nearly 40 years, Parliament has chosen not to expand restrictions on threatening, abusive, or insulting speech to apply to other groups. This is notwithstanding the regularity with which the issue has been revisited.

The roles of Parliament and the courts

99. As the High Court below recognised, questions relating to the scope of hate speech laws are primarily political.¹³⁰ In assessing justification:¹³¹

the court affords the legislature a reasonable margin of appreciation in the choice of measure; it suffices if the measure does not exceed reasonable limits. That approach has been justified on democratic grounds and by reference to the respective institutional competencies of the legislature and the Court, particularly when assessing matters of social policy.

100. The Bill of Rights Act does not require Parliament to address every analogous social harm in the same manner or at the same time. Parliament may proceed incrementally, particularly where extending protection to one group would require additional limits on the rights of others.
101. Parliament is entitled to affirm, protect and promote the rights and freedoms of different groups through targeted mechanisms.¹³² It was open to Parliament to regard racial disharmony as a distinct social problem—one in respect of which New Zealand had assumed specific international obligations—and legislate accordingly.

committee report) **[[Resp BoA Tab 16]]**.

¹²⁹ Te Aka Matua o te Ture | Law Commission *Hara Ngākau Kino | Hate Crime — Consultation Paper* (NZLC IP55, 2025) at [1.15] **[[App BoA Tab 45]]**. This reflects a commitment in the *Coalition Agreement: New Zealand National Party and New Zealand First—54th Parliament* (24 November 2023) at 9:

To uphold the principles of liberal democracy, including equal citizenship and parliamentary sovereignty, the Parties will: ... Protect freedom of speech by ruling out the introduction of hate speech legislation and stop the Law Commission's work on hate speech legislation.

¹³⁰ *Hoban* (HC), above n 4, at [48] **[[102.0210]]**.

¹³¹ *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [97] (footnotes omitted) **[[Resp BoA Tab 5]]**. See also *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [75] **[[Resp BoA Tab 4]]**.

¹³² Other examples of targeted measures are ss 62–63A of the Human Rights Act 1993 **[[App BoA Tab 23]]**.

102. The appellant's argument would effectively convert Parliament's decision to provide statutory protection for one group into a constitutional obligation to provide equivalent protection for all groups protected by the HRA. The HRA identifies 13 prohibited grounds of discrimination. It would be unexpected if Parliament's decision to protect some groups (in fulfilment of New Zealand's international obligations) created an obligation to extend corresponding protection to all such groups. Such a ratcheting effect risks discouraging targeted legislative implementation of international obligations by treating every incremental extension as potentially requiring further extensions. Governments ought to be permitted "to assist one group without being paralyzed by the necessity to assist all".¹³³
103. Any prohibition on speech necessarily engages the expressive rights of others. Although speech some may consider threatening, abusive, or insulting may have limited value in a democratic society, attempting to regulate such speech may nonetheless have broader effects on lawful expression, particularly at the margins. Parliament is entitled to considerable latitude when balancing competing rights and interests. The decision whether, and how, to regulate threatening, abusive, or insulting speech may depend on numerous factors, including the prevalence of the conduct, the severity of the harm it causes, the availability of non-legislative responses, practicalities of implementation and enforcement, and international commitments. Assessing and balancing considerations such as these falls squarely within the institutional competence of the democratically accountable branches of government.
104. As Tipping J wrote in *Hansen*, "[j]udges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise".¹³⁴ Here, Parliament is entitled to determine whether regulation similar to s 61 should be extended to other forms of threatening, abusive, or insulting speech. That is fundamentally a policy judgement

¹³³ *Alberta v Cunningham* 2011 SCC 37, [2011] 2 SCR 670 at [49] **[[App BoA Tab 16]]**.

¹³⁴ *Hansen v R*, above n 88, at [117] per Tipping J **[[App BoA Tab 5]]**.

involving the balancing of competing rights, social harms, practical considerations, and international obligations. That judgement falls within an area in which Parliament should be afforded substantial latitude.

Remedy

105. Even if an unjustified limit on s 19 had been established, the Tribunal would have declined to grant a declaration of inconsistency.¹³⁵ Section 92J of the HRA does not *require* the Tribunal to grant a declaration, if an unjustified limit is established.¹³⁶ And it “would not want to grant a declaration of inconsistency in relation to a statutory provision which implements [the] ICERD, a longstanding human rights treaty obligation of the first importance”.¹³⁷
106. In *Make it 16 Inc v Attorney-General*, a majority of this Court suggested the relative institutional competences of Parliament may bear upon the courts’ remedial discretion in particular types of cases:¹³⁸

[64] There is some support also in *Nicklinson* for the argument that these types of questions are very much within the competence of Parliament.^[139] The position there can, however, be distinguished in a number of respects. For example, three of the Judges made the point that *Parliament had considered the statutory approach to suicide frequently*. By contrast, here, as the evidence of Caroline Greaney of the Ministry of Justice shows, there has not been the same degree of engagement at that level. ...

[66] As to the argument based on institutional competence, *we acknowledge the particular institutional competence of Parliament in these matters. But this is not a case of such complexity in terms of its resolution as to mean the Court is hampered in fulfilling its usual function*.

[N 78] It does not, as *Make It 16* submits, involve a complex regulatory scheme.

¹³⁵ *Hoban* (HRRT), above n 31, at [66] **[[101.0189]]**.

¹³⁶ See for example *Howard v Attorney-General (No 2)* [2007] NZHRRT 24 at [42].

¹³⁷ *Hoban* (HRRT), above n 31, at [66] **[[101.0189]]**. Neither the High Court nor the Court of Appeal addressed the issue of remedial discretion.

¹³⁸ *Make It 16 Inc v Attorney-General*, above n 98, at [64]–[66] (emphasis added) **[[App BoA Tab 7]]**. This discussion was in the context of a *Taylor* declaration, not a declaration being contemplated under s 92J of the Human Rights Act 1993. However, for present purposes, the distinction is immaterial.

¹³⁹ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657 at [115]–[116] and [148(c)(ii)] per Lord Neuberger P, [150] and [190] per Lord Mance SCJ and [196]–[197] per Lord Wilson SCJ **[[Resp BoA Tab 9]]**.

107. If this Court concludes s 61 unjustifiably limits the right of groups defined by sexual orientation to be free from discrimination, a declaration ought not be given for reasons similar to those advanced in relation to justification.

107.1 A declaration that domestic legislation implementing the ICERD is inconsistent with the Bill of Rights Act may harm the credibility of this “longstanding human rights treaty obligation of the first importance” in the eyes of New Zealanders.¹⁴⁰

107.2 This is an issue Parliament and the Executive have frequently considered. Like the impugned provisions in *Nicklinson*,¹⁴¹ Parliament has considered the relevant issues frequently. In addition, this is a complex policy matter for which there is no single right answer—indeed, non-expansion despite four decades of repeated consideration demonstrates the complexity.¹⁴² Given the concerns of relative institutional competence it raises, it would be constitutionally appropriate for the judicial branch to exercise restraint.

CONCLUSION

108. This appeal should be dismissed. The respondent does not seek costs.

16 July 2026

D J Perkins / O Kiel
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.

AND TO: The appellant.

AND TO: The intervener.

¹⁴⁰ *Hoban* (HRRT), above n 31, at [66] **[[101.0189]]**.

¹⁴¹ *R (Nicklinson) v Ministry of Justice*, above n 139, at [190] per Lord Mance **[[Resp BoA Tab 9]]**.

¹⁴² As the Court of Appeal below noted: *Hoban* (CA), above n 5, at [109]–[110] and [114]–[115] **[[102.0258–102.0262]]**.

LIST OF AUTHORITIES TO BE CITED BY THE RESPONDENT

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