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

SC 8/2026
[2026] NZSC Trans 18

BETWEEN **RUSSELL THOMAS HOBAN**
Appellant

AND **ATTORNEY-GENERAL**
Respondent

Hearing:	07 October 2026
Court:	Winkelmann CJ Ellen France J Williams J Campbell J Ellis J
Counsel:	R A Kirkness, M D N Harris and M P Handford for the Appellant D J Perkins and O Kiel for the Respondent H Z Yáng, T W M Pilkington and S C Burton for Te Kāhui Tika Tangata | Human Rights Commission as the Intervener

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CIVIL APPEAL

MR KIRKNESS:

E ngā Kaiwhakawā, tēnā koutou. Ko Kirkness tōku ingoa. Kei kōnei mātou ko Harris, ko Handford mō Russell Hoban.

WINKELMANN CJ:

Tēnā koutou.

MR PERKINS:

Mihi ana ki te Kōti Mana Nui o Aotearoa. Ko Perkins ahau. Kei kōnei māua ko Ms Kiel mo te Rōia Matua Karauna. May it please the Court, Counsel's name is Perkins and I appear with Ms Kiel for the Attorney-General.

WINKELMANN CJ:

Tēnā Kōrua,

MS YÁNG:

E ngā Kaiwhakawā, tēnā koutou. Ko Yáng tōku ingoa. Kei kōnei mātou ko Pilkington, ko Burton mō Te Kāhui Tika Tangata. May it please your Honours, Counsel's name is Ms Yáng and I appear with Mr Pilkington and Ms Burton for the Human Rights Commission.

WINKELMANN CJ:

Tēnā koutou. Mr Kirkness.

MR KIRKNESS:

Thank you, your Honour. Just a few matters by way of housekeeping, if I may. The first is that the appellant has a roadmap that has been circulated electronically and I would propose to hand that up with leave.

WINKELMANN CJ:

I think we have it.

MR KIRKNESS:

Great and then the second is another set of hand-ups which are three supplementary authorities which I understand you also have. I understand the Crown has an additional authority. Would it be convenient to hand it up now?

In terms of other housekeeping issues, Mr Harris is going to address your Honours on s 19 of the Bill of Rights, I am proposing to address you on s 5 and Mr Handford will address you on relief.

Your Honours, Mr Hoban is asking this Court to answer a question of law. That question, which is set out at paragraph 3.1 of the appellant's submissions, is whether the omission of sexual orientation on the prohibited grounds of hate speech in s 61 of the Human Rights Act 1993 is consistent with the right to freedom from discrimination affirmed in s 19 of the New Zealand Bill of Rights Act 1990. In our submission, the answer is no. The omission is not demonstrably justified in a free and democratic society.

The remedy Mr Hoban seeks is a declaration under s 92J of the Human Rights Act that the omission is inconsistent with freedom from discrimination on the ground of sexual orientation. That is the only remedy that Mr Hoban is entitled to in respect of this type of claim. The purpose of that declaration is to notify Parliament that legislation is inconsistent with a constitutionally protected right and it is then for Parliament to consider and choose what, if any, response. If a declaration is made, it is then a matter for Parliament.

There are three points of context that I wish to make at the outset. The first, is that this case has been brought by an individual, Mr Russell Hoban, a homosexual man who has been deeply marked by hateful speech. To borrow a phrase from the former Chief Justice Elias, we should be careful not to take the human out of human right.

The speech in question was not merely offensive or distasteful. It called for gay people to be shot. At tab 1 of volume 201, it's the light yellow cover of the case on appeal, you have Mr Hoban's statement of evidence about the speech and its impact on him. At 201.0002, paragraph 3, Mr Hoban talks about a headline where he read in an article in the *New Zealand Herald* that: "West Auckland pastor preaches gay people should be shot." Pastor Logan Robertson had reportedly said, and I quote: "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." These are plainly words likely to excite hostility against a group of persons. It calls for homosexual men to be shot in the head the moment they kiss at their wedding. Let that sink in.

This is something that in our society is a moment of celebration. Everyone in our society expects to be able to celebrate that type of moment, if they choose to do so. The message here is that a particular group of people not only cannot celebrate that moment, but that they should be shot in the head for having the temerity to attempt to celebrate their love and commitment to each other through the institution of marriage. Why? Because they are homosexual.

We all know members of the rainbow community. They are our sons, daughters, brothers, sisters, our cousins, friends, teachers, colleagues and increasingly they will be father and mothers. They are part of our communities, part of our families, and they should be protected from public calls that they be shot in the head for observing basic social institutions that most of us take for granted.

This is not an isolated example. Mr Hoban's evidence goes on to describe how he has lived in a society where regrettably this type of hate has been rampant for far too long. He gave uncontested evidence of this at 201.0003, which is just over the page in his affidavit, where he says: "... as a homosexual man, I had experienced years of feeling hounded, discriminated against, and silenced." He goes on to say: "I have seen a homosexual man thrown through a plate-glass window by a stranger." And Mr Hoban, when he read Pastor Robertson's comments, says at 201.0004: "I wondered how such a thing could go unchallenged legally in 2017." Mr Hoban draws the link there with his memory, recent memory, of the shooting and killing of 49 people at a gay nightclub in Orlando, Florida a year earlier.

Mr Hoban said that this made him feel: "... confused, undermined, threatened, and unsafe." In short, Mr Hoban felt unfree in a society that purports to be free and democratic. His perception was, in his own words: "... while others are

afforded protection, because of my sexual orientation, I did not have the same protection."

None of this was challenged by the Attorney-General before the Tribunal during Mr Hoban's cross-examination. The transcript of the Tribunal hearing can be found at – I don't propose to take your Honours to it – but it's at volume 1, the fifth volume, the blue cover, at 101.0013 and the cross-examination of Mr Hoban by Crown counsel can be found at 101.0026 to 101.0030. I commend it to your Honours. Mr Hoban shows remarkable prescience when he is pushed by Crown counsel at the time about whether he is simply trying to speed up a process that is already happening. Because recall at this stage there was a policy agenda for including for including sexual orientation in the relevant provisions, and he says that he is not going to hold his breath given his experience over his life that these things often don't come to pass.

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The second point of context is the accepted harm that violent hate speech causes for targeted groups in New Zealand, and this impact is recognised in the Minister of Justice's 13 April 2021 Cabinet paper on *Proposed changes to the incitement provisions in the Human Rights Act 1993*. That's at tab 11 of volume 301 of the case on appeal. It's the mint green cover at 301.0059, if your Honours have that?

WINKELMANN CJ:

Yes, I just have a problem that my ClickShare screen is not working. I've been seeking intervention but it appears to be dead. Mr Registrar, you couldn't come up and see if you can see if its plug has disconnected or something? We don't tend to have the physical copies. We tend to have the electronic.

MR KIRKNESS:

That puts Mr Harris and myself to shame, your Honour.

WINKELMANN CJ:

Oh, I think we might have fixed it. Well done, it's fixed. Very clever.

MR KIRKNESS:

Thank you, your Honour. Your Honours, I want to be clear about what we say this document is useful for. We do not express a view on the policy proposal made to and eventually at that time accepted by Cabinet although ultimately withdrawn, as your Honours will be aware. Rather, in my submission, what is important here is the recognition in this type of document following this type of review by the Ministry of Justice of the social harm caused by hate speech, including specifically against rainbow communities.

The Minister of Justice's Cabinet paper stated, this is at 301.0060, paragraph 3: "Hate speech causes significant harm. It seeks to divide communities and hinders social inclusion." The Cabinet paper then stated that the Ministry of Justice's review of hate speech laws had: "… reinforced that exposure to demeaning and derogatory comments has a cumulative negative effect," noting evidence of the "… spread of hate speech and inciting speech (alongside other circumstances) being a precursor to violence."

Elaborating at paragraph 24 of this paper, the Cabinet paper records that: "The hostility that accompanies hate speech, sometimes with an implicit threat of violence, can lead people to withdraw from public spaces and, in practice, limits their right to freedom of expression. Hate speech …" the document goes on "runs counter to core New Zealand values" such as freedom of expression, and the document specifically recognises that rainbow communities are one of the groups typically targeted by hate speech. And you find those specific references at paragraph 7 and 39 respectively. And, as is now well-known, the proposed reforms that are discussed here were overtaken.

The third point of context is that New Zealand's failure to proscribe hate speech on the grounds of sexual orientation has marked us out as an anomaly when compared to the approach taken in other free and democratic societies. The Court of Appeal in this case recognised as much at paragraph 125 of their judgment when it recorded that hate speech targeting persons because of their sexual orientation is now proscribed in the United Kingdom, Ireland, Canada and Australia. That's paragraph 125, I don't propose to turn that up now.

In case it's useful, your Honours, the Human Rights Commission has helpfully identified additional prohibitions on hate speech directed at sexual orientation at paragraph 55 of the Intervener's synopsis of submissions and the accompanying footnotes.

In addition, the European Court of Human Rights has explicitly recognised that: "... discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour"," and the authority for that is *Vejdeland v Sweden* ECHR 1813/07, 9 February 2012 at paragraph –

WINKELMANN CJ:
Can you just repeat that name?

MR KIRKNESS:
Vejdeland v Sweden at paragraph 55. V-E-J-D-E-L-A-N-D, in case I've massacred that, at paragraph 55. It's the appellant's authorities, volume 3, tab 20, and that's one of a series of cases that, in the typical fashion that the European Court of Human Rights does, there's recognition of a general normative proposition such as this one. And then a number of other cases that we cite in our submissions build on that. I think there's three cases that we've provided your Honours from the European Court making that point.

To be clear, the anomaly is not just a matter of under-inclusion. The anomaly is that New Zealand's hate speech proscription laws suggest there is something less concerning about vilification on the basis of sexual orientation than vilification on the basis of race.

Turning then to the legal framework, and I think it's important to make a couple of general points here at the outset because of the quite stark differences there are in how Mr Hoban on the one hand and the Crown on the other hand perceive the legal framework. What Mr Hoban is asking this Court to do here is to give effect to a legislative framework, specifically a legislative framework established by Parliament in the Human Rights Act 1993 and the

New Zealand Bill of Rights Act 1990. There are three points about that framework that I wish to make at the outset.

The first is that the Bill of Rights enlists the branches of State in a joint project of protecting and promoting fundamental rights and freedoms. This is the effect of s 3(a) of the Bill of Rights, which states that it applies to acts done "by the legislative, executive, or judicial branches of the Government of New Zealand", that is the State.

And the fact that this is a joint project is particularly apparent in cases where declarations are sought that legislation is inconsistent with fundamental rights. These types of declarations answer a legal question that is whether a legislative measure is consistent with fundamental rights, and you see the framework that has been established for that under the Human Rights Act at tab 23, volume 4 of the appellant's authorities. We have a copy of that, ss 92J and 92K.

Section 92J, just to give your Honours a summary, provides that the only remedy available for inconsistency with an enactment is a declaration. Section 92K makes clear that a declaration does not affect the validity or enforcement of an enactment.

So Parliament has here determined that it should be notified when a declaration in respect of legislative inconsistency is made by the Courts, and thereby reserved for itself the role of determining the appropriate response to such a declaration. And it follows that what to do with a declaration is a matter for Parliament. But the key point here, your Honours, is that Parliament has established the appropriate constitutional division of labour between it and the courts. The courts answer the legal question of consistency. Parliament determines what to do. And at various stages, your Honours, in the way this case has progressed, it seems like that is lost sight of at times. When you talk about imposing an obligation on Parliament or when you talk about cutting across an agenda or entitlement, that is not what is happening. It is an answer to a legal question that is provided and becomes an input in a broader debate or process.

To return to my submission that this needs to be understood as a joint project, volume 4, tab 28 of the appellant's authorities is the report of the Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

CAMPBELL J:

Which tab?

MR KIRKNESS:

That should be at tab 28, Sir. Sorry, tab 27, I think. Tab 27 is the Amendment Act, your Honour, and then at tab 28 you have a report from the Privileges Committee. I just wanted to focus on a couple of the passages in this document that I think are useful for conveying the posture that the different branches are anticipated to take in relation to these types of cases.

So at the first page of this document, if your Honours all have that in front of you, it records the following: "[This] Court's 2018 judgment in *Attorney-General v Taylor* confirmed that senior courts have the power to issue declarations that legislation is inconsistent with the New Zealand Bill of Rights Act 1990. This Bill [was introduced seeking] to create a statutory mechanism for bringing declarations to the attention of the House of Representatives, with the aim of facilitating consideration of the judiciary's declarations by the legislative and executive branches of government." This is the language of facilitation and a proposal to build statutory framework and scaffolding around a Court decision. 1020

At the bottom of the page you have the acknowledgement that there already is this declaration remedy given by statute under the Human Rights Act, and the need to align the statutory mechanisms under the Bill of Rights Act and Human Rights Act, and then over the page in the third paragraph, starting with the words "our package", the Privileges Committee says: "Our package of recommendations seeks to achieve this" this being proper consideration of declarations "by providing a clear framework for dialogue between the branches

of government. We believe it would represent a significant development in New Zealand's constitutional architecture relating to fundamental rights, and hope that it will promote genuine engagement with rights issues. It is worth noting that we are not proposing," the Privileges Committee says, "that either the legislative or executive branches be required by law to respond to a declaration of inconsistency in any particular way. In the spirit of dialogue and our constitutional arrangements, that is properly a matter for each branch to determine on its own."

So, your Honours, that's why we say this is, and has always been, a joint project of promoting and protecting human rights. In many ways it is Parliament that has taken the lead in recent years in this jurisdiction through the enactment of legislation like the New Zealand Bill of Rights Act, and the Human Rights Act, as well as its prompt response to the *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 decision. The reason I'm stressing this is because this is not a situation where you have a tension between Parliament and the courts. It is a joint project. They are pulling in the same direction. Branches can be expected to be seeking to uphold, promote and protect fundamental human rights in New Zealand, all the branches of government. And to the extent there is an attempt to introduce such a tension, or create a false choice, that should be something this Court is very sceptical of.

The second point about the statutory framework is that Parliament has set out the applicable statutory pathway for bringing declaration of inconsistency claims in relation to discriminatory legislation. Volume 4, tab 23 of the appellant's authorities says, that's the Human Rights Act again, in section 20L of that Act, you see there, or perhaps starting at section 20I: "The purpose of this Part is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 is in breach of this Part if the act or omission is that of a person or body referred to in s 3 of the New Zealand Bill of Rights Act 1990."

Section 20L is interesting because there you have an explanation that for, at s 20L(2): "For the purposes of subsection (1), an act or omission is inconsistent

with s 19 of the New Zealand Bill of Rights Act 1990 if the act or omission— (a) limits the right to freedom from discrimination affirmed by that section; and (b) is not, under s 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right."

The reason we're stressing this point, your Honours, is because Parliament has anticipated and legislated for specifically acts and omissions. Discriminatory omissions and the need to justify those omissions have been clear on the face of the Human Rights Act for some time.

Section 19 of the Bill of Rights Act, which your Honours will be well familiar with, says that: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993." Again the intersection between the two pieces of legislation. Discrimination on any of the grounds is prohibited including by the legislature, executive and judiciary. The grounds themselves are listed in the Human Rights Act and they include at s 21(1)(m) sexual orientation. And this sets the legal standard that Parliament has enacted into New Zealand law. And then there's also the statutory pathway then under the Human Rights Act for seeking a declaration of inconsistency. And that's the pathway that Mr Hoban has followed in this case.

The third point, your Honour, is that Parliament has directed in s 5 of the Bill of Rights that: "… the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This is a legislative standard for limiting rights. It contains a clear statement that the only, that is the exclusive, limit that can meet that standard is the one that meets the s 5 test. It imposes an obligation on the person defending a limit to demonstrate that the limit is justified and it is ultimately, in our constitutional order, the duty of the Courts to assess whether the standard is met.

There is now an established body of case law from the appellate courts in this jurisdiction on how to understand the role of the courts in relation to s 5 and the duty in it.

In the appellant's supplementary authorities at tab 2, you have the Court of Appeal's decision in *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729. I just wanted to flag a paragraph in that case. This is about the Working for Families tax credits, but the point that I'm interested in is the point at paragraph 92 of that decision, discussing s 5 and the approach to be taken. The Court of Appeal says: "It must also be kept in mind that the effect of the Human Rights Act and the Bill of Rights is that when a measure is prima facie discriminatory the courts have to decide whether or not the measure meets the s 5 threshold. As Lord Scott said in *A v Secretary of State for the Home Department*, the function of measuring compliance with human rights norms is not one that – and the Court quotes – "'the courts have sought for themselves' but it is nonetheless a function that has been 'thrust' on the courts by the Human Rights Act and the Bill of Rights. In that context, the term 'deference' as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away from or shirk that task. Rather, it is a question of recognising the respective roles of the courts and the decision maker, here, the legislature."

The reason for starting with the *Child Poverty Action Group* case is because it shows you how long-standing the position has been. But the best and most recent statement, in my submission, is that of the unanimous Supreme Court in *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 which you find at volume 2, tab 1 of the appellant's authorities. This is the leading authority in New Zealand on the approach to declaration of inconsistencies for legislative limits. The section of it that I am interested in for present purposes is the section beginning at paragraph 249 where the Court says: "There is another issue, however. What weight should the court give to the choice that Parliament did in fact make?"

And the Court then goes through some discussion about this idea of weight, endorses as it subsequently did in *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 the helpful statement by

Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167 that what we're actually talking about is: "… performance of the ordinary judicial task of weighing up the competing considerations … and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice."

At paragraph 250, the Court then talks about Parliament's institutional capacity.

At paragraph 251, the Court goes on to a different point and says: "There is also ample discussion in the literature and case law as to whether the courts should show deference to Parliament's legislative choices – this is a different point to that made in relation to Parliament's institutional capacity."

At paragraph 252, the Court goes on: "While, as noted above, we do not characterise the court's task in connection with declarations of inconsistency as one of reviewing Parliament's choices, we accept it is appropriate for the courts to acknowledge that the legislation in question has been enacted by a democratically elected body, so that a finding that it is inconsistent with the affirmed rights is not to be lightly be made. Beyond that point, we think the issue is better addressed as one of institutional capacity as discussed above."

And then the key section for present purposes: "Ultimately, Parliament has imposed on the courts the duty to undertake the s 5 analysis, and the courts cannot shirk the responsibility to address issues of rights consistency. As the Human Rights Commission submits, it cannot be the case that the courts must assume that a pressing social need and the compatibility of means chosen to pursue it are justified just because Parliament has adopted them," citing to the Supreme Court of Canada which takes the same view.

So, put simply, Parliament has imposed a duty on the Court to assess consistency with the rights affirmed in the Bill of Rights, including where the defendant contends a limit is justified, and that's a litigation choice that is made, by undertaking the analysis required by s 5. It is that duty we ask this Court to

uphold and assess whether the omission of sexual orientation from protection against hate speech is consistent with s 19 of the Bill of Rights. In doing so, this Court is simply giving effect to the legal framework that Parliament has established for precisely that purpose.

I ask this Court to recognise Mr Harris, who will address s 19 of the Bill of Rights.

WINKELMANN CJ:

Thank you.

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MR HARRIS:

E ngā Kaiwhakawā, tēnā koutou. I am going to address the appellant's submissions on s 19(1) and s 19(2) of the New Zealand Bill of Rights Act 1990, which I will refer to as the Bill of Rights, and my submissions will proceed in four parts.

So, first, I will address the decisions below and the background. And really that serves a couple of purposes. First, that reminds us of the standards that have been accepted and the approach to these issues that has been accepted in all the courts below. And secondly, it draws out how the approach of the Crown in this Court diverges significantly from the approaches agreed in the courts below.

The second part of my submissions will address what we say is the correct approach to the relationship between s 19(1) and s 19(2) and in short our submission is that those issues should be addressed sequentially. That is consistent with the Legislation Act 2019. And that the Crown's approach is not supported by authority and produces more problems than it solves.

The third part of my submissions will address s 19(1). I hope I can be quite brief on this. The point is simply that there is plainly differential treatment or effects as between individuals or groups in comparable situations on the basis

of a prohibited ground, and that there is plainly material disadvantage or discriminatory impact.

And fourth, I will address s 19(2) and the submission here is that, properly construed, s 19(2) does not protect the omission in this case, and that the approach urged on the Court by the Crown is overly literal, mechanistic and will produce absurd consequences.

But let me just begin by going over some key parts of the decisions in the courts below. I think it is accepted that the two-step test in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 applies. That is the approach that has been taken in all of the courts below. And I just begin with the decision of the Human Rights Review Tribunal and that's at tab 11 of volume 101 of the case on appeal.

I just wanted to take your Honours to paragraph 32 of the decision of the Human Rights Review Tribunal. And the Human Rights Review Tribunal found that: "… it is plain from the face of HRA, s 61 that while three of the prohibited grounds of discrimination (colour, race, ethnic or national origins) are within the scope of s 61 the other ten grounds are not. Those in the first group have access to the remedy ... Those in the second group do not and are in this respect materially disadvantaged."

And on the question of discriminatory impact, at paragraph 35, the Tribunal was relative cursory on this point: "...only an affirmative answer is possible," on the question of whether the differential treatment has had discriminatory impact. The final sentence of paragraph 35: "Inability to access the Commission's dispute resolution procedures and to thereafter seek recourse from the Tribunal is a material disadvantage."

WINKELMANN CJ:

How does the Tribunal define the comparator group? I mean, what methodology does it use?

MR HARRIS:

Yes, it addresses a comparator group in the paragraphs just above those passage I've quoted. So, paragraph 31: "When the protected characteristic of sexual orientation ... is considered, two groups can be distinguished: [31.1] Persons who are the subject of hate speech by reason of their colour, race, ethnic or national origins. [31.2] Persons who are the subject of hate speech by reason of their sexual orientation." So comparing victims of hate speech on those different grounds.

WINKELMANN CJ:

And that's the approach in this area you submit is appropriate?

MR HARRIS:

Yes, yes.

CAMPBELL J:

Section 61 doesn't talk about people being subject to hate speech. It is neutral on that, isn't it? I mean, s 61, it's much wider. In a way, everybody is subject to the hate speech that is targeted in s 61.

MR HARRIS:

Yes, I'll just pull up the provision, Sir. So, first of all, there's not a specific use of the phrase "hate speech". And I use that as shorthand for the wording in s 61. But our point is that there is specific reference in s 61 to: "... matter or words likely to excite hostility against or bring into contempt any group of persons ... on the ground of their colour, race, or ethnic or national origins." So it is carving out from that wider category of words likely to excite hostility, particular protection for those grounds of discrimination.

CAMPBELL J:

My point is that the, if you like, the targeted groups you're treating as the only victims, but s 61 is addressing hate speech in a way that, to use its heading, that creates "racial disharmony". And there are plenty of people that would be

outside the targeted groups who would feel equally as affronted by that hate speech, even if they are not, to use your terminology, subject to it.

MR HARRIS:

I see, Sir.

CAMPBELL J:

So, it seems to me that there's – that the group that the Tribunal identifies and which I think comes through in your submissions, doesn't actually reflect s 61. In a way, everybody is a victim of the hate speech that s 61 is addressing. And I just wonder, I'm not sure what implications that might have for your argument, but it does seem to me that you've narrowed down the impact or, in fact, the rationale for s 61.

MR HARRIS:

Yes, I think I understand the point, Sir, and I think we would accept that it might be argued that everyone could be affronted by such hate speech. The point is that a particular kind of hate speech is prohibited by s 61 and our submission is that some victims of hate speech, through this prohibition, through the way this prohibition is expressed, are treated as less worthy than others.

WINKELMANN CJ:

I think Justice Campbell's point is that this is actually a provision which is protective of society as a whole because society is corroded by hate speech. But that kind of analysis could be brought to bear in respect of all rights, couldn't it? Because, in fact, our Bill of Rights Act and our Human Rights Act is constructed to be – is designed to be constructive of a free and democratic society. So individual rights are protected to construct a free and democratic society where people can live with dignity.

MR HARRIS:

Yes.

WINKELMANN CJ:

But it does this by protecting individual rights. And so, although hate speech is corrosive of society as a whole, this provision recognised something that was apparent post-World War II, which was that some people are most victim of hate speech. And that, post-World War II, that was known to be racial discrimination.

MR HARRIS:

Yes, and I think I understand the point, and I'm just reflecting aloud, if I can, on the implications of the argument. And I think I'd agree with the Chief Justice that, if I understand the point correctly, that we all have an interest in upholding all of the rights in the Bill of Rights. That in one sense everyone is affronted by a breach of freedom of expression, for example. But the point nevertheless is that a particular kind of hate speech, while it may address a point of societal significance, is marked out by this legislation. That is hate speech on the ground of colour, race or ethnic or national origins.

1040

There is no recourse for hate speech on the ground of sexual orientation. I think that distinction or that difference remains, notwithstanding your point, your Honour, that all might be affronted by this kind of racial hate speech.

CAMPBELL J:

Well, that's a difference or discrimination between different types of speech, whereas s 19 is concerned about discrimination between people.

MR HARRIS:

I'm not sure that that distinction can be sustained, since different kinds of speech have impacts on people. So that is right, s 19 refers to people and I have made a point about speech. But the point is, the point that I'm trying to make, is that one kind of protection of particular speech allows, yes, allows particular protection for people likely to be vulnerable to this kind of speech. And the absence of like protection for another kind of speech has impacts on a different group of people. And I think Mr Kirkness' introduction set out the kind

of impact on a person that arose in this case. But I will reflect further on the point, Sir, and perhaps we can return to it if your Honour doesn't feel like we fully addressed that point.

CAMPBELL J:

No, I think you have addressed it sufficiently.

MR HARRIS:

Thank you, Sir.

ELLEN FRANCE J:

Mr Harris, I'm not sure if this is a question for you or Mr Kirkness, but in terms of the scope of your argument —

MR HARRIS:

Yes.

ELLEN FRANCE J:

If there wasn't a s 61, do you say you could argue there should be one, whoever it was covering?

MR HARRIS:

Yes, that's a very fair question, your Honour. I think the answer in short is, no. And that there is a quite important point to make about when the government or Parliament enters the fray and this is a – or the like – then there is an obligation for the government or Parliament to be non-discriminatory. And there is a Human Rights Committee decision that we cite to this effect. I am happy to go to that point now, if that is helpful.

So this is the *Zwaan-de Vries v Netherlands* UN Doc CCPR/C/29/D/182/1984 (9 April 1987) in the Netherlands, the Human Rights Committee, and it's also endorsed in Justice Gwyn's argument in the *New Zealand College of Midwives v Attorney-General* [2026] NZHC 405 case in the High Court.

WINKELMANN CJ:

In her judgment.

MR HARRIS:

Sorry, her judgment.

WINKELMANN CJ:

So what's the name of the case, sorry?

MR HARRIS:

It's a view of the Human Rights Committee.

WINKELMANN CJ:

Oh, Human Rights Committee.

MR HARRIS:

Zwaan-de Vries v the Netherlands, it's in our hand-up authorities at tab 3, and it's just – the simple point is that once Parliament or government enters an area of regulation, it then has obligations to be non-discriminatory.

WINKELMANN CJ:

Is your junior putting that up on the screen?

MR HARRIS:

That’s right, sorry. So, it's paragraph 12.3 of that view of the Human Rights Committee in *Zwaan-de Vries*.

WINKELMANN CJ:

What year is this case? It must be quite old. It seems to be typed on a conventional typewriter.

MR HARRIS:

Yes, 1984, I believe, yes, 1984. But we say the principle still stands.

WINKELMANN CJ:

What paragraph, sorry?

MR HARRIS:

About paragraph 12.4.

WINKELMANN CJ:

Paragraph 12.3? Oh, 12.4.

MR HARRIS:

Paragraph 12.4 and 12.3. So paragraph 12.3, the last part of the penultimate sentence, this is referring to article 26: "It derives from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities." That's the first point, so once public authorities enter a field.

And then that point is picked up again at paragraph 12.4 in the last two sentences, and I think this answers your question directly, your Honour: "Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security." Or we might say, by analogy, hate speech doesn't require a s 61. "However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant."

WINKELMANN CJ:

Is there – I've lost the thread of this, but is there a more positive obligation on the State imposed by the ICCPR in relation to hate speech in relation to discrimination on the basis of race?

MR HARRIS:

No, but there is in the International Convention on the Elimination of Racial Discrimination, yes.

WINKELMANN CJ:

Okay, so that's, yes, so that's a point that's made against you by the Crown?

MR HARRIS:

That's correct.

WINKELMANN CJ:

And are you addressing that?

MR HARRIS:

Yes, and that will also be addressed in relation to s 5.

WINKELMANN CJ:

Thank you.

ELLEN FRANCE J:

Just following on from that, do you say that applies only in relation to entering into the field where the prohibition, where the regulation or practice, whatever the regulation and protection, are you saying that that's confined to discrimination? Or would it apply vis-à-vis any of the rights, say, in the Covenant or the Bill of Rights?

MR HARRIS:

That's an interesting question. I think this Court wouldn't need to pronounce on that wider point, but my initial answer would be that it has arisen in a discrimination context, in the *Midwives* case, and in this Human Rights Committee view. And so I think what I would want to say, to be sure, is it certainly applies in relation to discrimination. I would want to reflect more about any wider scope than that. I might just –

WILLIAMS J:

It's likely to, though, isn't it? If, for example, you didn't get the unemployment benefit if you – unless you signed an undertaking not to criticise the government, that would be in breach of freedom of speech and would be problematic for that reason. So you must have – it must be the case that you cannot, in your engagement with the State, be required to concede other rights that you have under the Bill of Rights, and not just not to be discriminated against.

MR HARRIS:

I think that's right, Sir, yes, I think that's right.

ELLEN FRANCE J:

Yes, my point is slightly different. For example, how far on your approach would you go in terms of saying, well, you could get a declaration, for example, that some other right should be included in the Bill of Rights. Like, what is – is there something about discrimination that you say makes it different or are you saying no, it's – it could extend well beyond that?

MR HARRIS:

Let us reflect on that for a moment, your Honour, and –

Yes, it's a point I'd like to reflect on a little more, your Honour, but as my colleague has helpfully said, at least in New Zealand law this kind of analysis will be particularly appropriate in relation to discrimination because of the way s 21 of the Human Rights Act lists prohibited grounds and instructs the courts to consider whether those grounds have been upheld across the gamut of the law. But I appreciate that might not address fully your point about the wider scope, or your point, your Honour, about its application elsewhere.

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WINKELMANN CJ:

Isn't there something underpinning all of this, which is equal protection of the law?

MR HARRIS:

Yes.

WINKELMANN CJ:

So it's the equality thing that drives the discrimination. So it is, in a sense, a particular thing because it goes to the heart of the law.

MR HARRIS:

Yes.

WINKELMANN CJ:

As opposed to other rights that don't necessarily do that.

MR HARRIS:

Yes, I think so, and we would say that is a preset that lies behind section 19, and that that invites the kind of analysis that is reproduced here in the view of the Human Rights Committee.

WINKELMANN CJ:

And also there's something else where which is it identifies people who need particular protection, so it's identifying that society tends to operate to discriminate against, tends without –

MR HARRIS:

That's right.

WINKELMANN CJ:

It may tend to operate to discriminate against them.

MR HARRIS:

That's right, and there's a line in the High Court, which I can take you to if it's helpful, where Justice Cooke for the panel there says: "... hate speech on the [grounds] of sexual orientation is a well-recognised phenomena." And I think that relates to the same point. It was recognised this is a group in need of particular protection.

So, sorry, your Honour, to come back to your question. The point is once Parliament has entered the fray, or regulated a particular area by adopting s 61 and s 131 of the Human Rights Act, we say questions of non-discrimination arise, consistent with the Human Rights Committee.

ELLEN FRANCE J:

Yes, it's just it seems to me that you could say that in relation to all of the rights, for example, in the Bill of Rights. And so argue, well, for example, if you take something like fair trial, that not everything is being captured that should be captured. Or privacy, protection of property and so on. I'm just trying to understand, is it the nature of discrimination that changes the position?

MR HARRIS:

Yes, I think it's particularly –

ELLEN FRANCE J:

The Chief Justice's argument about equality, et cetera? Although that underpins quite a lot of the rights.

MR HARRIS:

Yes, I think it's at least particularly acute in relation to discrimination in s 19. *Vriend v Alberta* [1998] 1 SCR 493 did involve human rights legislation purporting to be comprehensive that omitted sexual orientation. That might be a little closer to the kind of situation you have in mind, although I appreciate you're talking about the Bill of Rights, your Honour.

WILLIAMS J:

I just wonder whether that's that different, though, if there's debate over what's, over the content of a fair trial right, that's going to be contextual, of course. Just the same as if there's a debate over a discrimination right. That's also going to be contextual, isn't it?

MR HARRIS:

I think I would agree, yes. Yes.

WILLIAMS J:

Perhaps I'm misunderstanding?

MR HARRIS:

No, no, I think that debate would be contextual, and it's partly why I'm –

WILLIAMS J:

So there's some discrimination which would be in breach of s 19, and some which would be logical and required and not be in breach of s 19, you'd think, for example.

MR HARRIS:

And let me know if I'm not answering your question, your Honour, but certainly we say that's reflected in the structure of the test for s 19 which does envisage there might be some differential treatment that does not impose a material disadvantage and so is not a breach of s 19.

WINKELMANN CJ:

So, if we take – I'm not, I don't necessarily have the answers – but if we take fair trial rights. Say Parliament chooses to legislate in the area of a fair trial and regulating process in trials, and it is inconsistent with a fair trial right, then we would exercise – we would issue a declaration of inconsistency if that, if it wasn't a reasonably justified limitation. Same with other rights. So this is just the nature of the right, isn't it? If they legislate in a way to protect a known risk – so, say they legislated, it must be right that if they legislated to protect people with, I don't know, black hair, from being murdered, but didn't legislate to protect others, you'd say well that's discriminatory. And that's really the essence of it. It's because once they enter the field, they can't use the law to discriminate.

MR HARRIS:

That gives rise to particular obligations. It doesn't guarantee the conclusion that it's unlawful discrimination.

WINKELMANN CJ:

No.

MR HARRIS:

So I think those are helpful questions in clarifying the nature of the argument.

I've gone through the Human Rights Review Tribunal. I won't go through the High Court in a lot of detail. That's at tab 12, volume 102 of the case on appeal.

I suppose the points I wanted to make about the High Court judgment are that there's comment on the limited utility of the comparator exercise. That's at paragraph 16. And then there's a conclusion at paragraph 19 that there is differential treatment or effects and that's: "… because remedies for prohibited conduct are not available for the unprotected group."

At paragraph 20, there is that sentence I referred to in response to your Honour the Chief Justice about: "... hate speech on the basis of sexual orientation [being] a well-recognised phenomena." There is a slightly modified discussion of the comparator. I don't think we need to pause on that.

Then on s 19(2), Justice Cooke's approach for the Panel is set out at paragraph 32. So the Crown, as in this Court, submitted that ss 61 and 131 fall within s 19(2). That's of course the reference to: "Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged …" And that states that such measures "do not constitute discrimination," to use shorthand, and Justice Cooke for the Panel says: "… it would be artificial to consider s 61 as falling within the intended scope of s 19(2)." And critically, and this is several sentences ahead, "assisting" is coloured by "advancing", and: "… read as a whole s 19(2) is directed at measures that give positive advantages or other forms of assistance to people that are disadvantaged by

discrimination." And we broadly adopt that approach, and I'll elaborate on that point in a moment, if I may.

There is also at paragraph 33, a point that I will return to, which is s 131 creates an offence, it punishes specified conduct. Section 161 [*sic*] makes conduct unlawful. And those provisions are – this is the penultimate sentence in paragraph 33 – those provisions: "… are not measures taken to assist or advance the position of persons subject to racial discrimination." So, the point is they have a purpose of punishment or of rendering conduct unlawful, rather than being measures that give positive advantages to people disadvantaged by discrimination.

If I can just come to the Court of Appeal. The Court of Appeal, and this is at tab 16 of volume 102 of the case on appeal, the Court of Appeal reaches the same conclusion on section 19(1) but takes a different view on s 19(2). So in paragraph 62 of the Court of Appeal, President Cooper for the Court says: "... it is clear there is differential treatment." Some "categories of prohibited grounds" are treated differently from others. There is a material disadvantage, and that I have drawn from the second sentence of paragraph 62.

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But if we keep scrolling down to paragraph 63, 64, there's material disadvantage, no statutory remedy is provided for the unprotected group, and then at paragraph 64, further material disadvantages. Section 61 has symbolic value, contains practical rights, though that symbolic value and that practical rights do not apply in the same way for those facing hate speech on the ground of sexual orientation.

And at paragraph 72, just note in passing that Mr Butler, who represented the Commission in the Court of Appeal, also adopted the point made by the High Court that it's "inappropriate to describe a statutory prohibition on hate speech" as falling within s 19(2) since s 61 is about assisting or advancing – or, sorry, s 61 is not about assisting or advancing. It's about protecting people from

hate speech. It's raising that point about how a statutory prohibition sits awkwardly with the words of s 19(2).

Then at paragraph 75, this is hopefully helpful for some points to come, the Court of Appeal's conclusion on s 19(2) is made clear. So the Court finds that ss 61 and 131 fall within s 19(2), and the Court gives reasons for this at paragraph 77 and 79, and I will come back to this, but the Court claims that the High Court's reasoning treats assisting and advancing as if they had the same meaning, and rejects that point.

The Crown in the lower courts addressed ss 19(1) and 19(2) sequentially, but as your Honours are aware, early August the respondent provided notice to support the judgment in the Court of Appeal on another ground, namely that properly understood there's no breach of s 19(1) in this case, and the approach of the Crown in its submissions in this Court is that the so-called traditional analysis to discrimination is unhelpful and that measures properly understood to fall within s 19(2) don't limit s 19(1) at all. And the Crown says and this is paragraph 40 of its submissions, that where s 19(2) is arguably engaged, there's no need to go to s 19(1).

So, I think it's characterising the Crown's argument correctly to say the Crown's approach is to ask whether s 19(2) is arguably engaged? If it's arguably engaged, skip s 19(1). If the measure falls within s 19(2), don't address s 19(1).

To move to the second part of my submissions that I flagged earlier, to say that our submission is that the Court, or the submission of the appellant, is the Court should approach s 19(1) and s 19(2) sequentially. And that's for three reasons.

First, it's consistent with the Legislation Act. I mean, that's not in the bundle, your Honours, although I anticipate that it's well understood, but s 10, of course, of the Legislation Act says: "The meaning of legislation must be ascertained from its text and in the light of its purpose and its context." And then s 10(4) of the Legislation Act, I'm happy to provide a hand up if that's necessary, later says, well, s 10(3) says: "The text .. includes the indications provided in the

legislation," and s 10(4) says indications include the organisation and format of the legislation, and we say that includes the order of the legislation, and that it would be orthodox to read legislation in the order that it's generally presented.

Second, the appellant's submission is that the Crown's approach is not supported by authority. It's not the approach to ss 19(1) and (2) that has been adopted in New Zealand. The Crown suggests there may be hints of support for this approach in comments made by the Minister of Justice in Hansard when the Bill of Rights was passed and by the Committee in the legislative history. We don't accept that, properly understood, those comments support –

WINKELMANN CJ:

You said it's not supported by authority in New Zealand, and now you're going to the legislative history, are you?

MR HARRIS:

Yes, yes.

WINKELMANN CJ:

Is that your third reason?

MR HARRIS:

That's the second reason, sorry, your Honour.

WINKELMANN CJ:

Okay.

MR HARRIS:

So the first reason is the Legislation Act.

WINKELMANN CJ:

Okay.

MR HARRIS:

The second reason is –

WINKELMANN CJ:

Not supported by legislative history.

MR HARRIS:

Not supported by authority.

ELLEN FRANCE J:

Just in terms of they're not supported by authority, what do you say is the best illustration not supporting the Crown's approach?

MR HARRIS:

Well, the Crown says that there are hints of this in the Minister of Justice's comments.

ELLEN FRANCE J:

Yes. No, no, I'm going to your – you said the Crown's approach is not supported by authority –

WINKELMANN CJ:

Case law.

ELLEN FRANCE J:

– and I just want your best authority for that proposition?

WINKELMANN CJ:

Case law.

MR HARRIS:

In my – sorry, your Honour, my point was responsive to the Crown, just that the authorities that they claim don't, properly read –

ELLEN FRANCE J:

So you don’t have one for your proposition?

MR HARRIS:

Well, I think –

ELLEN FRANCE J:

Sorry, I am just trying to understand.

MR HARRIS:

I think – yes, no, no, it's a fair question and I think the existing cases that have addressed s 19 don't, I think, give any hint of a different approach to the order of s 19(1) and 19(2). I'll accept that there hasn't been significant case law addressing s 19(2) squarely. But, no, sorry, your Honour, my point is more a response that the authority or supporting evidence that the Crown cites doesn't support this approach.

CAMPBELL J:

Well, wouldn't it be a case that almost every case authority in this jurisdiction that's dealt with s 19(1) and 19(2) have addressed them sequentially?

MR HARRIS:

That's right, yes.

CAMPBELL J:

So they haven't engaged with the particular suggestion that they not be addressed sequentially, because from what I can see it hasn't been suggested before?

MR HARRIS:

Yes, I have to accept that, Sir.

ELLEN FRANCE J:

Just in relation to the sequential idea, given the legislative history, might there not be an argument that it's done in two parts because it would be a very long sentence if you ran the two together? In other words, if you look at some of the observations in the course of the legislative history, there was nothing originally

because it wasn't thought to be necessary. They then add something, Parliament then adds this 19(2) in to clarify.

MR HARRIS:

Yes, yes.

ELLEN FRANCE J:

And follows the Canadian approach, s 15(1) and (2).

MR HARRIS:

Yes.

ELLEN FRANCE J:

But given that the idea is to say, well, this is not discriminatory, you could, in fact, have done it as a package?

MR HARRIS:

Yes, yes.

ELLEN FRANCE J:

And I just wonder whether that has any impact on the weight you place on this should be done sequentially?

MR HARRIS:

Yes, I suppose what I would say on that, your Honour, is while it could have been done as a package, it wasn't. And there should be some weight on the fact that that particular drafting choice was made to separate ss 19(1) and 19(2).

WINKELMANN CJ:

That's not your best point though, is it? Isn't your legislative history your best point? Or is it not?

MR HARRIS:

I think so, your Honour, and I'll return to the legislative history in overlapping context in a moment.

WINKELMANN CJ:

Because, I mean, I haven't myself done a search, but I suspect there are probably quite a few pieces of legislation where the courts have made them work by coming up with a test which places the first question in a different order than it appears in the legislation.

MR HARRIS:

Yes, I'll accept that's not unheard of. We also say the Crown's approach creates a threshold test that may produce awkwardness in requiring courts to consider, first, whether s 19(2) is arguably engaged.

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And perhaps a fourth point is I do think it's consistent with how other rights are addressed in the Bill of Rights, to consider prima facie breaches of rights initially, and rather than to go –

WINKELMANN CJ:

Are you not taking us the legislative history?

MR HARRIS:

In the interests of time I was – I'm going to come back to legislative history relevant to this point, I think.

WINKELMANN CJ:

Right.

MR HARRIS:

But the point is that there are references by the Minister of Justice and the Committee to how affirmative action might not be discrimination. And the simple point is that, in our submission, discrimination is used in the everyday

sense there as code for unlawful discrimination, so as reflecting a conclusion of the inquiry. And I don't think the High Court supports the Crown's approach.

So, the High Court at paragraph 31…

WINKELMANN CJ:
I'm just a bit lost what you're doing here, Mr Harris. Are you actually giving us your main points as to why you say the Court of Appeal's approach is wrong?

MR HARRIS:
I'm coming to that, sorry your Honour, I'm just saying we should approach s 19(1) and s 19(2) sequentially, so let me come to why the Court of Appeal is wrong on –

WINKELMANN CJ:
On s 19(2)?

MR HARRIS:
Subsection (2), yes, yes. So I've gone through the decisions below. I've explained that we think s 19(1) and (2) should be dealt with sequentially.

We say s 19(1) should be addressed first, and there is plainly differential treatment or effects. That the legislative omission treats some victims of hate speech as less worthy than others. And that's explained at paragraph 5.4 of our submissions, including with reference to the comparator group. We also think there's clearly a material disadvantage, for the reasons given in the Courts below: the absence of legal remedies, the lack of legal recourse for victims of hate speech on the ground of sexual orientation. I'm not sure this contested by the Crown, the Crown simply says we don't get to s 19(1).

So, let me come to why we say the Court of Appeal was wrong on s 19(2). We say that the Court of Appeal's approach to s 19(2) is overly literal, somewhat mechanistic, and overbroad with the effect of having absurd consequences. It's artificial, and there are several subpoints I want to make here. The first is a

point about the Legislation Act. The second is a point about focusing on the omission in this case and relating the omission to s 19(2). Third, there is a point about the meaning of assisting or advancing. And then finally, there's a point about how the approach of the Court of Appeal is inconsistent with the purpose of contextual approach that's needed.

Some of these points overlap but the first point is that, and if we go back to the Legislation Act, at s 10(1) of the Legislation Act, as is well-known, says that: "The meaning of legislation must be ascertained from its text and in the light of its purpose and its context." Not only from its text.

The second subpoint here is that the Court has to address the claim as it's brought by the claimant, except perhaps in cases where the claim is clearly ill-thought-through or incapable of being addressed. And the claim is very clearly here about the legislative omission of hate speech on the ground of sexual orientation being discriminatory. And so we say that it's the omission that has to be related to s 19(2).

For s 19(2) to properly bite, it has to be said that the omission is taken in good faith for the purpose of assisting or advancing persons or groups. And we say it's plain that that omission doesn't have that purpose.

ELLIS J:

Can I just ask a question? I'm afraid it goes back to what you were talking about before more than what you're talking about now. But I just wanted to be really clear as to your position in terms of what s 19(2) is doing.

MR HARRIS:

Yes?

ELLIS J:

Is s 19(2), in your submission, an exception to s 19(1)? Is it saying this would be discriminatory, but it's not? Or is it simply there for the avoidance of doubt and saying this kind of conduct could never be discriminatory because what

we're concerned with – or what we're not concerned with is discrimination between two equally vulnerable groups. We're concerned with discrimination between a group that's not vulnerable and a vulnerable group.

MR HARRIS:

Yes, I understand the question.

ELLIS J:

I'm really picking up on the intervener's submissions, or I'm trying to anyway, what the interveners have said about this.

MR HARRIS:

Yes, yes, I understand, and I'm familiar with the point. I think our position is, and I don't want to be unhelpful, but that the Court doesn't necessarily have to settle that matter. It's certainly the case that s 19(2) relates to s 19(1). And I think there's two possible approaches. One is that s 19(2) nods to the end of the s 5 inquiry, and it says that affirmative action is likely to be capable of being justified under s 5.

ELLIS J:

Yes, the advantage of what the interveners are submitting is that you don't have to go through the exercise that you were just starting to take us through –

MR HARRIS:

Yes.

ELLIS J:

– because it simply doesn't arise in this case.

MR HARRIS:

Yes, yes, and I think we are broadly comfortable with what the interveners suggest. But our position is that the Court doesn't necessarily need to take a position on that for the purpose of correcting the error made in the Court of Appeal.

WINKELMANN CJ:

I'm finding your submissions hard to follow.

MR HARRIS:

Apologies for that, your Honour, let me –

WINKELMANN CJ:

Yes, I mean, which is not – I'm not intending to be critical. But I just wonder if it might help us if you actually started with the text, then moved to the purpose. And I think the legislative history might be helpful –

MR HARRIS:

Yes.

WINKELMANN CJ:

– for the purpose. Because you keep on kind of keeping us at the high level, and it would help us to see your argument.

MR HARRIS:

Certainly, your Honour, thanks for that. So first of all, let's go to the text of s 19(2), which is: "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." The question is whether the omission of hate speech on the ground of sexual orientation falls within s 19(2). And the question is how s 19(2) should be interpreted.

WINKELMANN CJ:

So there your point is that even if you take the literalist approach –

MR HARRIS:

Yes.

WINKELMANN CJ:

– it doesn't help the Attorney-General with their argument because the omission can't meet that test.

MR HARRIS:

That's right. That's right, so –

ELLEN FRANCE J:

But another way of looking at that is to say that s 61 does come within that s 19(2), because it is designed, it is a measure taken in good faith for the purpose of assisting or advancing groups. It just doesn't go beyond that, go far enough, from your perspective.

MR HARRIS:

I'll come to that point. I think, so the first point, is that the omission does not have the purpose of assisting or advancing groups. And then we come to the more textual point next.

So, the second point is that – the next point is that assisting or advancing has a compound meaning. This is a textual point, and it refers to positive measures to counteract discrimination. That's not the same as saying assisting or advancing mean the same thing, as the Court of Appeal claimed. It's to say assisting or advancing has a compound meaning. And that compound meaning is positive measures to counteract discrimination. And we say – and I think this goes to the point of Justice Ellen France – that ss 61 and 131 are not such positive measures because they are prohibitions.

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And I'll say in passing but I won't perhaps take you to this, but that that distinction arises and is affirmed in the Canadian case law which, I think, does have different statutory language. But in the *R v Kapp* [2008] 2 SCR 483 which is in the supplementary bundle tab 5, at paragraph 54, there is also a reference to the difference between positive measures, ameliorative measures, and prohibitions. And, yes, we say that this is consistent with the legislative history.

This, I think, is *Kapp* – my friend has brought up paragraph 54, if we want to just briefly address this: "We would suggest that laws designed to restrict or punish behaviour would not qualify for section 15(2) protection." I acknowledge that the slightly different legislative context, but that conceptual distinction is –

CAMPBELL J:

Well, I don't understand that conceptual distinction. Why can't a prohibition which is aimed at protecting a group assist or advance them? If it's aimed at protecting a group from discrimination, why is that not assisting them?

MR HARRIS:

I understand the question, Sir. I think one response is that Parliament had in mind, and this is drawn out by the legislative history, a narrower view of positive measures to counteract discrimination, and those are –

WILLIAMS J:

That's really the point, isn't it, the history of this is that it's affirmative action.

MR HARRIS:

It's affirmative action.

WILLIAMS J:

And it's covered by this which is a positive measure to ameliorate discrimination.

MR HARRIS:

That's right.

WILLIAMS J:

This isn't a positive measure, it's a prohibition.

MR HARRIS:

That's right.

WILLIAMS J:

So, I mean, perhaps these words could stretch to the other meaning, but that certainly wasn't their intention.

MR HARRIS:

That's right, that's the submission.

WILLIAMS J:

They were designed for positive discrimination?

MR HARRIS:

That's right. That's right and there are references in our submissions to the way that the wording of s 19(2) was drawn from pre-existing affirmative action provisions. The words affirmative action are explicitly referred to in the legislative history and those references are in our submissions.

WINKELMANN CJ:

So we've got a quote from the Member for Remuera, Doug Graham. I take it he wasn't the responsible Minister at the time?

MR HARRIS:

That's right, your Honour.

WINKELMANN CJ:

Who was? Riddiford? Oh, no. No, no. David Thompson? Anyway, someone, not Doug Graham.

ELLEN FRANCE J:

What paragraph is that?

WINKELMANN CJ:

It's at paragraph – I'm just reading from paragraph 6.9 of the appellant's submissions.

MR HARRIS:

Of our submissions, yes, your Honour.

WINKELMANN CJ:

I mean, your first, when you first read it, it looks like it's directed at affirmative action.

MR HARRIS:

That's right.

WINKELMANN CJ:

That's most obvious, that's your first impact point.

MR HARRIS:

Yes, yes.

WILLIAMS J:

But it also reflects the entire history of the anti-discrimination movement.

MR HARRIS:

Yes.

WILLIAMS J:

This comes out of the civil rights movement and the creation of special access to education and *Brown v Board of Education of Topeka* 347 US 483 (1954) and so on and so forth, being seen as non-discriminatory. Because they're positive acts to redress historical oppression.

MR HARRIS:

Yes. Yes, that's right. It might be thought on a very literal meaning and I think this was acknowledged by Justice Cooke, too, that affirmative action – or that, so this kind of case might fall within s19(2). But we say to accept that, to accept a wider approach or to accept an approach to s 19(2) distinct from seeing it as concerned with affirmative action would have absurd consequences. Because it would mean that under-inclusive legislation or policy would often, if not

always, be protected by s 19(2), introducing an element of arbitrariness that the drafters of s 19(2) could not have intended.

And a hypothetical example may help here. So, if your Honours could imagine the Residential Tenancies Act 1986 and could imagine that we didn't have any of the prohibited grounds of discrimination in the Human Rights Act, and we assume that there is evidence of discrimination by landlords on the basis of sexual orientation and race, if both were a well-recognised phenomenon. If Parliament chose to pass legislation only prohibiting discrimination on the basis of race and pointedly omitting sexual orientation, that legislation would be protected by s 19(2). And we say that is an absurd consequence, an arbitrary consequence, that cannot have been intended.

WINKELMANN CJ:

Or, for instance, the Government knows that there is a lot of cybercrime, and so they pass legislation to protect elderly people but not young people and they do it in good faith because they say it's a high enforcement cost. That would come through – under that analysis, it would be fine under s 19(2)?

MR HARRIS:

That's right, I think. And as you say, it could be done in good faith but pointedly omitting a known vulnerable group.

And the final point I want to make is that this overly literal reading of the words of s 19(2) is inconsistent with the approach needed in discrimination cases which, yes, involves paying attention to text but must involve engagement with the purpose and context. And we say that approach to purpose and context leads to the conclusion that this is about affirmative action. And I think the best way of briefly just elaborating on this point is by going to *Law v Canada* [1999] 1 SCR 497 which is in the Intervener's bundle of authorities. So, that's at tab 5, *Law v Minister of Human Resources Development* but indexed as *Law v Canada*.

There's several relevant points here. First, if we go to paragraph 59, I accept that there is more of a focus on dignity in the Canadian legislation, but that point notwithstanding: "… the evaluation of the contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be conducted from the perspective of the claimant." And then paragraph 72, a helpful discussion of how – we say relevant to interpreting s 19(2) of how there should still be attention to how what appears to be an ameliorative piece of legislation might be under-inclusive or might be arbitrary. In particular the last sentence of paragraph 72: "Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination."

And going over the page to paragraph 73, "I would not wish to be taken as foreclosing the possibility that a member of society could be discriminated against by laws aimed at ameliorating the situation of others".

And paragraph 80, just a useful reminder the focus in discrimination law is not on the subjective motivations of the legislature. It's not relevant that the particular legislature didn't intend to exclude what's important as the purpose or the effect of legislation.

And then, most relevantly, at s 88, Justice Iacobucci sets out we say helpful principles including s 88(1) under "General Approach": "A purposive and contextual approach to discrimination analysis is to be preferred …" And then scrolling down to point (7) "Context": "The contextual factors which determine whether legislation has the effect of demeaning a claimant's dignity must be construed and examined from the perspective of the claimant." And we say this reinforces that the Court should take the perspective of the claimant, the argument made by the claimant, Mr Hoban in this case, that the focus must be on the omission.

The final point, paragraph 110, is that – the last sentence of paragraph 110: "It is important to identify such cases through [an analysis that] ... does not become mechanistic, but rather addresses the true social, political and legal context

underlying each and every equality claim." So, we say the approach taken by the Court of Appeal is mechanistic, overly-focused on one literal reading of the text at the expense of context and purpose. This provision, s 19(2) is, properly construed, about affirmative action. Sections 61 and 131, or the legislative omission, is not, properly understood, affirmative action.

1130

WINKELMANN CJ:

It is the morning break, Mr Harris. How are we going?

MR HARRIS:

That ends my part of the submissions and I was going to pass over to Mr Kirkness for after the break.

WINKELMANN CJ:

Thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.48 AM

MR HARRIS:

E ngā Kaiwhakawā. I'm just going to make three brief further points if I may.

WINKELMANN CJ:

Yes. Because you did say there was some things you were going to come back to?

MR HARRIS:

Yes, partly in, after reflecting on some of the questions in the morning session: so first, just a point about and your Honour Justice Campbell's question in relation to affronts to society; second, a further point about a logical link between s 19(1) and 19(2) which favours reading them sequentially; and then third, a point in response to the Crown on omissions and s 19(2).

1150

So just first, your Honour Justice Campbell raised a point about how ss 61 and 131 are directed also at the affront to society precipitated by that kind of speech. And what we would say is, what the appellant would say to that, is while it is true that hate speech on the ground of race, colour, ethnicity or national origin gives rise to an affront to society, there remain two kinds of harm. First, the harm to society as a whole, that society may be corroded by such speech. But second, that harms are disproportionately borne by individual members of groups affected by such speech. And it's consistent with the effects-based approach of anti-discrimination law to take proper note of that second kind of harm.

Second, just a further point on why s 19(1) and (2) ought to be read sequentially. There is a logical link between s 19(1) and (2) that favours reading the provisions sequentially. That logical link exists as follows. The reference in s 19(2) is to measures taken that do not constitute discrimination, and the appellant says that properly understood, that is a reference to measures that would otherwise be discriminatory, and that –

ELLIS J:

So that answers my questions from before.

MR HARRIS:

Yes, I think it does your Honour. So measures that would otherwise be discriminatory are then protected by s 19(2). And that implies that there would be an initial assessment of discrimination, we say.

Finally, the Crown. Third, the Crown says at paragraph 57 of its submissions, I was going to get to this before the break, that: "The appellant seeks to characterise the *legislative omission* of groups defined by sexual orientation as a 'measure taken' other than in good faith. However, that reading of a 'measure taken' sits uneasily with both the language and structure of s 19(2)."

I think that slightly mischaracterises the appellant's argument and is a point in the appellant's favour. The appellant says for s 19(2) to bite in this case, it must apply to the omission. And so for s 19(2) to apply it must be that the omission has the purpose of assisting or advancing persons or groups. And that the omission sits uneasily with the language of s 19(2) is a reason, a further reason, that s 19(2) is inapt for this kind of case.

So in some, in s 19(1) and 19(2), and in particular in s 19(2), your Honours, the appellants says the Court must be careful in adopting an interpretation of s 19(2) that licenses arbitrary or absurd outcomes. Indeed, it must be careful of adopting an interpretation that might give rise to further discrimination. That would be contrary to the context and purpose and text of s 19.

But those are our submissions on s 19, so if there are no further questions I'll pass back to Mr Kirkness.

WINKELMANN CJ:
Thank you Mr Harris.

MR HARRIS:
Thank you your Honour.

MR KIRKNESS:
Thank you, your Honours. I just want to pick up from where Mr Harris left off with the issue of demonstrable justification which we deal with on our road map, and in written submissions at paragraph 7.1 and following. And this is the s 5 justification analysis that I gave some initial flavour to in introductory comments.

Basically, the submission is, as a matter of framework at least, that there is now a well-established approach to s 5 justification. There's perhaps a preliminary point here in that, at least as at the date that we drafted the written synopsis submissions, it appeared to us, as we say at paragraph 7.1, that the target of the justification was common ground in this case. And we said that because common ground in the sense that the legal question for the Court is whether

the legislative omission of sexual orientation from the protections against hate speech in the Human Rights Act can be demonstrably justified.

And as I've already shown you, the Human Rights Act itself contemplates the need to justify omissions specifically, but that was also how the Crown put it when it filed its notice seeking to support the judgment appealed from on other grounds, dated 2 June. That's at volume 05, appeal documents volume 101, that's the blue cover, under tab 6. And when the Crown sought to support the judgment appealed from other grounds and gave notice of that, it said at paragraph 7: "…the respondent hereby gives notice of his intention to support the judgment appealed from on the basis that the omission of sexual orientation from s 61 of the Human Rights Act 1993 is a justifiable limit under s 5 of the Bill of Rights Act." So, that was how it was framed there.

The written submissions for the Crown make me less certain that it is common ground but, in any event, we say that is the correct way to understand the s 5 exercise. And when you turn to the exercise itself and what that should involve, it's clear that, as this Court explained in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459, we're dealing with a legal standard, that the application of that standard may involve mixed questions of fact and law.

It's also well-established now that s 5 and demonstrable justification implies a proportionality analysis, and that's now been accepted by this Court on a number of occasions.

There's some discussion in the Crown submissions about different approaches, but I would stress that they are different approaches to proportionality that this Court has entertained. The two recent examples, there's a number of dicta but the two recent examples that come to mind, are *Moncrief-Spittle* where it was recognised that it may be appropriate in that type of administrative decision-making context not to do the full structured proportionality approach from the Canadian *R v Oakes* [1986] 1 SCR 103 test that went through into *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1, and then picked up again in

Chief of Defence Force, where it was referred to as administrative decision-making under statute. But the key point made in *Moncrief-Spittle* and also in *Chief of Defence Force* explicitly is that it is still a proportionality analysis. And as Justice Ellen France wrote in *Moncrief-Spittle*, there's no less rigour in the alternative approach that the Court has started developing in that line of cases.

WINKELMANN CJ:

That's also in *D v Attorney-General* [2025] NZHC 4028, isn't it, I think?

MR KIRKNESS:

It's also in *D*, and the point I simply want to make is the Court has never moved off the fact that it is a proportionality analysis. And in my submission, critically, the Court has explicitly said, to be clear to everyone, there is no lesser threshold that needs to be met to pass the s 5 test, just because you might change the components within that s 5 analysis. And so you need to do a proportionality analysis, and if you're going to suggest one that is new or different then, in my submission, you need to explain why a new or different approach should be used.

The reason why that would be something the Crown would have had to do here is because it is relatively well accepted, in my submission, that when legislative limits are involved, this Court does use the structured proportionality method that was adopted in *Hansen* to assess a legislative limit, and then also in *Chisnall* to assess a legislative limit. And in *Chisnall* there was some discussion between the Bench and, in particular, Mr Butler KC, about whether that should be revisited. In the end the decision was made that it actually provided an adequate framework for assessing legislative inconsistency.

The reason for engaging on that point is because there is a flavour in the Crown submissions that something else is being proposed. At one point I think there's the phrase that there was a "rational and objective basis" for the measures that are being advanced. It's unclear whether that is an attempt to develop a new test. But if it was, then it would have needed to be expanded upon and flagged,

given that you are going against a number of Supreme Court authorities in not adopting a proportionality test. And one of the concerns we have here is that there is no attempt to explain why the omission meets the proportionality standard, or a proportionality standard, let alone the proportionality standard that we say applies, which is the one that has been adopted in other cases involving legislative limits.

The defendant obviously has the burden, as I have already mentioned earlier, of justifying the s 5 limit. That's actually made express in the Human Rights Act under s 92F(1), but it also is a point that's been picked up in the case law and treated as a matter of necessary implication from the inclusion of the word "demonstrable" in s 5.

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And the Court made some useful comments, in my submission, in *Chisnall* about the way in which that needs to be done, how you demonstrate reasonableness, how you are – the posture that a party needs to adopt. The Court of Appeal referred to this in a nice phrase as "a proactive justificatory role". We would endorse that. But in *Chisnall*, which your Honours will find at volume 2, tab 1 of the appellant's authorities –

WINKELMANN CJ:

This is the Court of Appeal in this case, referred to it as "a proactive justificatory role"?

MR KIRKNESS:

That's correct, your Honour. That was at paragraph 101 of the Court of Appeal in this case.

At paragraph 181 of *Chisnall*, if your Honours have that, the Court there states: "It is a necessary implication of s 5 that it is for the party defending the limits to 'demonstrably' justify them." And then the Court goes on to say: "The burden the Attorney-General bears is to justify any limits on rights as reasonable," and then cites the *RJR-MacDonald Inc v Canada (AG)* [1995] 3 SCR 199 case and

the comments there of Justice McLachlin where she "described the justificatory burden in this manner".

Justice McLachlin says: "The question is rather whether it can be justified" – that's the limit – "by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility … the State must show that the violative law is "demonstrably justified." The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word reasonable of rational inference from evidence or established truths."

In my submission, this part of the Supreme Court's reasoning in *Chisnall* is fundamentally important in this case, because that's not what's happened here. There has not been an attempt to engage in a process of demonstrating, relying on reason based on "rational inference from evidence or established truths", that the omission is justified in a relevant sense – that is, it is proportionate in a free and democratic society.

And that poses something of a problem for the appellant in trying to grab hold of what it is that the Crown is actually saying by way of justification that fits within the existing framework that this Court has established in cases like *Hansen* and *Chisnall*. Because what the Crown's submissions read like is a fairly radical departure from the way in which these cases would typically be argued.

And the reason, in my submission, that that is important is because it was a tactical choice or a litigation choice to put justification in issue here. The Crown did not have to argue that if the omission was discriminatory, it could be justified. It could've rested on s 19(2) and accepted that if this Court found that there was discrimination then there wouldn't be justification for that discrimination. Or it could've simply made the submissions it wishes to make on relief. But instead,

it chose to put in issue the fact that it says that this omission can be justified and then doesn't carry out a justification exercise, and that puts the appellant in a very difficult position.

It would've been clear from the written submissions that because of that what the appellant had to do was take its proposed structured proportionality test, the one that was used in *Oakes*, in *Chisnall*, in *Hansen*, the one that the UK Supreme Court – a very similar one, sorry, to the one the Supreme Court uses, the Supreme Court of the UK uses in *R (Steinfeld and another) v Secretary of State for International* Development [on appeal from *Regina (Steinfeld*) *v Secretary of State for Education*] [2018] UKSC 32 which is one of the authorities that were handed up today. It's tab 2 of the additional authorities, *R and Steinfeld v Secretary of State for Education* where the Court looks at a declaration of incompatibility under the Human Rights Act 1998 UK and at paragraph 41 talks about: "The four-stage test designed to establish whether an interference… can be justified," and calls it well-established.

So, if we're going to move off that type of well-accepted approach to assessing the justification of legislative limits, there needs to be more work done and more assistance given to the appellant to understand precisely what it needs to engage with, and that hasn't happened here.

WINKELMANN CJ:

So, the Crown says, invoking the passage in *Moncrief-Spittle* which says: "On occasion it may be that jurisprudence already establishes that a certain limitation is, as a matter of course, justified." So some of the provisos or recognised limits to the ICCPR rights are good examples of that, for instance, when it's recognised that it's an appropriate limitation on the right to free speech that you can't incite violence. So, they're invoking that. So what do you say about that?

MR KIRKNESS:

Well, with respect, we say that misunderstands what the Supreme Court was seeking to do in *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683. The point that the Supreme Court was making was –

WINKELMANN CJ:

It was *Make It 16,* sorry, yes.

MR KIRKNESS:

And the point that the Supreme Court was making in *Make It 16*, in my submission, was a practical one, which is if you do have these – if you have the reasoning available to you in the common law, or through international instruments, such as some of those that your Honour's just referred me to, that explicitly include in them, in the structure of the right, the circumstances where you can limit the right, the European Convention being the prime example and I think that's the one cited in *Make It 16*. Where you have that, then we would accept that you don't need to re-do the analysis and so that's why I say, in my submission, there's a practical point being made here. You can rely on that and use that. You're still making the decision, but you're drawing on it. It's not a case that you're saying you somehow don't have proportionality or don't have to engage in justification. That's the general point.

The more specific point is it's simply not relevant here, because there's nothing that allows you to invoke that type of reasoning in respect of the omission. And we made that point in our written submissions. And so, with respect, I think it's a misunderstanding and a misapplication of what the point in *Make It 16* is which, if I have understood it correctly, we would endorse.

So, what we did in the written submissions was essentially reconstruct what we thought might be plausible, available objectives to allow the structured proportionality analysis to take place. The structured analysis, as your Honours are well familiar with, as was set out in *Chisnall*, involves in broad terms testing whether there's a sufficiently important objective for overriding a protected right. Looking at whether there's a rational connection, looking at whether it's the least

intrusive way of doing so effectively and then, after you've winnowed it down in that way, if you're still standing, engaging in what one might call "proper proportionality analysis" balancing the measure and the right to determine whether or not you have satisfied the proportionality requirement and thereby establish that you have a reasonable limit on a constitutionally protected right.

And so, we've engaged in that in the written submissions and I don't propose to take your Honours through that in detail, because we tried to reconstruct it as best we could, relying on different points that we had seen in the courts below. It appears, at least, my understanding of the way the Crown's argument has evolved, is that the clearest indication of an objective is at paragraph 89 of the Crown submissions, where there's a suggestion that: "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."

If you take that logic and put it together with the deference argument, the weight argument that the Crown is making towards legislative choices, you put those things together and, as I understand it, that's the justification case that's been put forward.

The problem with that justification case is that it does not engage with the omission. It's providing a reason why something was included. It's not speaking to the omission itself. And that's very similar to what concerned the Supreme Court of Canada in *Vriend*, which your Honours have at volume 3 of the appellant's authorities, tab 19, and the equivalent of the s 5 analysis under s 1 of the Charter commences at paragraph 554.

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The Canadians have a slightly different way of framing their *Oakes* test, where they treat sufficiently important objective, or pressing and substantial objective, as a preliminary step and then they call the proportionality test the other three steps that I articulated. In New Zealand, we tend to see them as one proportionality test.

But you need to have an articulated objective in order for the engine room to be there to do structured proportionality. If you don't articulate an objective then the *Oakes* test is depowered, because that's what runs through it, is identifying the objective that the defendant puts up and says: this is sufficiently important that it should be or that it is able to override a constitutionally-protected right. And that gets you over the initial threshold. But if you haven't done that then, as happened in *Vriend*, you fail at that initial threshold, because the burden is on the defendant to establish that there is such an objective.

And we cite this in our written submissions, but there's a useful distinction drawn, in my submission, by the Judges writing for the Supreme Court on this point where – there's a discussion around, at paragraph 113, page 556 of the judgment: "… what can be said of the objective of the omission?" is the question the Court rhetorically poses to itself. The respondents in that case only engaged on the overall objective of the Act, not on the specific omission, and so that was the specific point before the Court. And in the absence of any evidence in the Court below, the Judges had tried to infer different possible objectives and looked at this legislative history about why sexual orientation hadn't been added.

That's set out here in summary form by the Supreme Court but then at paragraph 114, a helpful clarification that: "… although these statements go some distance toward explaining the Legislature's choice to exclude sexual orientation from the *IRPA*, this is not the type of evidence required under the first step of the *Oakes* test. At the first stage of that test, the government is asked to demonstrate that the 'objective' of the omission is pressing and substantial. An 'objective', being a goal or a purpose to be achieved, is a very different concept from an 'explanation' which makes plain that which is not immediately obvious."

And it follows through on page 557 to say: "In the absence of any submissions regarding the pressing and substantial nature of the objective of the omission, the respondents have failed to discharge their evidentiary burden, and thus, I

conclude that their case must fail at this first stage of the s. 1 analysis." And we say the same applies here because of the way the Crown has chosen to run their case.

The Supreme Court does, however, go further, having made that primary finding, and entertain the idea that you might be able to discern some objective from the Act as a whole. But also rejects that as a possible approach.

And just to show other jurisdictions following in similar ways, in the *Steinfeld* case I referred your Honours to which is tab 2 of the hand-up authorities from today, after identifying that legitimate aim under the heading: "Legitimate aim," at paragraph 41, the four-stage proportionality test, the version of it that's applied in the United Kingdom, which is very similar but not quite identical to the one that is adopted in *Chisnall* and also in the Canadian courts. At paragraph 42 the Court says: "The legitimate aim articulated by the respondent in the present appeal" – note that in that case the respondent articulated the aim – "is the need to have time to assemble sufficient information to allow a confident decision to be made about the future of civil partnerships."

And apologies, your Honours, I should've said this is an interesting case. It relates to a situation where before the Marriage (Same Sex Couples) Act 2013 came into force, couples of the same sex were unable to get married but could enter into civil partnerships, but different sex couples could marry but were precluded from entering into civil partnerships. And the particular individuals here had an objection, a conscientious objection to marriage and wanted to enter into a civil partnership, which they couldn't do.

And so that's the context for how this came as a discrimination declaration of incompatibility case before the Supreme Court. But the key point here is the objective or aim articulated by the respondent is: "... the need to have time to assemble sufficient information to allow a confident decision to be made about the future of civil partnerships" – but as Lord Bingham stated in *A and others v Secretary of State for the Home Department* [2004] UKHL 56: "What has to be justified is not the measure in issue but the difference in treatment between one

person or group and another" – "To be legitimate, therefore, the aim must address the perpetration of the unequal treatment, or as Ms Monaghan put it, the aim must be intrinsically linked to the discriminatory treatment. In this case it does not and is not. The respondent does not seek to justify the difference in treatment between same sex and different sex couples" – and so it goes on.

And so, again, you see here the focus zeroing in on once you've established what the discrimination is, that's what your aim has to speak to. And so whether it's in Canada or the UK or, in my submission, here, you have the same outcome which is the Crown hasn't done that and fails at that first step of the *Oakes* test.

If, in an exercise for the sake of argument, you take what the Crown has said is their objective, at least as I understand it, paragraph 89, that the objective was to enact provisions because of an international obligation to take certain measures domestically in respect of racist speech, as a general compendious catch-all for what they had to do there. If you run that through the structured proportionality analysis and allow for it to continue through, despite the fact it's failed the first step, it would fail at each step.

For example, if you get to rational connection and you're looking at, here, the discriminatory treatment being the omission of sexual orientation, then the fact that the Crown might put in place a measure that covers racist hate speech is one thing. But to do it in a way that also has the discriminatory effect of excluding persons on the basis of their sexual orientation would be an arbitrary and unfair outcome and therefore not a rationally connected measure to the aim.

And that same problem is going to occur at whichever step you are. It's particularly difficult, in my submission, in this case to engage in the third step, the least intrusive means, because there you really do need some counterfactual material.

In *Chisnall* the Court was able to dredge together from materials sufficient models that it was able to look at and work through in a reasoned way the

analysis, but acknowledged that it was hampered in having to do so given the absence of evidence.

But here, that would be almost impossible, given there are very few, there was very little in the record that would allow this Court to understand the choices that are said to have been made by Parliament about excluding sexual orientation from the proscription on racist hate speech provisions.

ELLEN FRANCE J:

If the objective of enacting s 61 is as the respondent submits, which is presumably not challenged. That s 61 can be seen in the context of the Race Relations Act 1971, the international obligations, et cetera – is that accepted?

MR KIRKNESS:

That's accepted, yes.

ELLEN FRANCE J:

Why can't that have some relevance to – I mean, at a basic level, that is explaining the choice to some extent, isn't it?

MR KIRKNESS:

At a basic level it is and, in my submission, it would be fair to say that obviously that's relevant. The problem, in my submission, is that if you apply the structured proportionality approach, you will find that you could have done what the Crown says it wanted to do without trenching on sexual orientation. So, that's why you fail rational connection, for example, because you have something which is under-inclusive. And rational connection, as a step, shears off under-inclusive and over-inclusive measures.

1220

You have a real problem, I think, at the sufficiently important objective stage, because there you do need to articulate an objective that relates to the discriminatory treatment. And by the point you're in this part of the analysis, that is the omission. And so if you don't do that then you do run into the *Vriend*

problem about explaining it isn't good enough. You actually have to have an objective. But even if the Court was to relax that for this type of case, you still will run into problems because you aren't dealing with a measure that has been tailored in a way that that test requires to get through and end up in the position where it has been balanced against a constitutionally protected right. And that ultimate value judgement is made at the final step.

ELLEN FRANCE J:

It does very much turn on what you say the initial question is, doesn't it?

MR KIRKNESS:

Well, I think for the purposes of this analysis, your Honour, I'm entitled to –

ELLEN FRANCE J:

No, no, I mean in your written submissions, you say the question, in the courts below, they've addressed the wrong question? Your –

MR KIRKNESS:

I think we tried to be more fair than that, because I think they vacillate between two different questions at different stages of both those judgments, in my submission. And let's face it, the Crown has vacillated in its own documents before the Court between acknowledging, as I showed your Honours, that it is the omission that is at issue here, and then taking what appears to be a different approach.

So, I think we've never said there's been one approach adopted and that's been followed through consistently. We've said the problem is that things have been jumping around all the way through, and I appreciate that makes it less than easy for this Court. That is what the record, in my submission, shows. That there has been vacillation throughout between these two different characterisations of the – but I accept your Honour's proposition that it does turn on that, yes.

ELLEN FRANCE J:

Could I also ask in terms of the s 5 analysis, to what extent is the interrelationship with other statutory provisions relevant? And I'm thinking about, for example, s 4 of the Summary Offences Act 1981 and so on. Other ways of dealing with, at least, aspects of the concern here. Does that come into that analysis?

MR KIRKNESS:

Yes it would come into it, your Honour, as part of the contextual consideration that you necessarily are having to engage in. But none of those alternative pathways, as Mr Hoban's own narrative makes very clear, is going to address the omission here in a way that means you don't have the discriminatory concern. Then when you're running through s 5, they don't provide, in my submission, an answer to those steps. For example, you're not going to be able to rely on those for an answer to rational connection. It's not going to answer the objective that you need to articulate, as opposed to an explanation.

You might be able to draw on them and there's probably two sources you can draw on. You might be able to draw on them in the third stage, if you got there, to try to understand a little bit more holistically the options in the field. The other source of material that you could use, you have in the record examples of offence provisions from other jurisdictions. I mentioned them in opening. Those would give you an indication of how you could frame provisions and you could start to look at ways to build in defences or do whatever you needed, raise thresholds, to ensure that they were the right type of provisions.

So, you might look at those two sources of material there, I think. And then in the overall proportionality it would be relevant, because there you would be looking at the actual weight of these different values as they have been now contextualised, the right and the measure. And at that stage the severity of the impact is going to be affected, in my submission, by some of those other things that might be ameliorative, if that is established. But I'm not conceding that that has been established. And my friend points out that that's also not an argument that the Crown has actually explicitly made.

ELLEN FRANCE J:

No, but I'm not sure that would mean the Court couldn't consider it, given that it's a question of what other statutes –

MR KIRKNESS:

Yes and so, sorry, that was a long answer, your Honour, but I think the part of it that is more relevant, with apologies that it came last, is at that final step you would be looking at, I think holistically, once you had the contextualised infringement or curtailment of right in focus, and you also had the measure, having survived those three steps, or four steps, three steps, in focus, you would be looking at the impact and how those weighed against each other. And at that stage, I think, drawing on those materials.

To my earlier point about bring it in at the least intrusive means stage, I think that's probably you'd get more assistance from offence provisions or some of the reasoning of the European Court than necessarily those types of arguably ameliorative provisions within the New Zealand system. But it might be that one or two of them are relevant.

That hasn't been an argument we've had an opportunity to face and consider in the context of an actual proper s 5 analysis which, as I said at the outset, is the problem for us. We'd be left with it trying to run through a framework that is relatively accepted without the engine room that it needs in order for the steps to be applied. And so we are forced into a position where we are reconstructing, as best we can, what we thought at the time of writing the written submissions and now. is the argument that has been made. But what you get at the end of this is an attempt to move off the framework this Court has set by the Crown and say: we're going to do this differently. There's reasons why they say they can do that, but that's what's happening here.

So, the only other points I want to make related to deference, if I can turn to that issue. And really just a couple of short points, because the principal point on this idea was hopefully covered in those introductory comments where I set out the way this Court has previously engaged in the idea that legislative choices

should be given some sort of significant latitude, and I think the Court in *Attorney-General v Chisnall* (Declarations of inconsistency) [2025] NZSC 126, [2025] 1 NZLR 619 position is one that we simply endorse as correct, and it is a recent one by unanimous Supreme Court.

But four points briefly on this idea. And I think the key point is, and really it's raised a little bit by the Court of Appeal's reasoning where, if your Honours have seen the Court of Appeal judgment at paragraph 125, they say they don't need to engage in justification analysis because of their finding on s 19(2) but indeed it would be wrong to do so, says the Court of Appeal, because this is a matter for Parliament. And that can't be squared with the logic of *Chisnall* or, if you were to go back behind *Chisnall*, a number of decisions of this Court – right back to *Hansen* and what Justice Tipping has said there. Because the Court has to undertake the s 5 analysis, Parliament has made that a requirement, it's a duty for the Court, it's not one that can be shirked, as the *CPAG* decision said explicitly, as the same language found its way through decades later into *Chisnall*.

So the four points would be these which is we've got a problem here where deference, which for the moment I'll use, has been advanced in a form that essentially involves abdication of the judicial function. Not making a decision because it's not for you; it's for Parliament. And that goes to a point about language that came up in *Chief of Defence Force*, because there's a number of different words floating around this space – margin of appreciation, deference, weight, latitude, probably more. But in my submission, deference is possibly the most dangerous because deference is what you might think of as a portmanteau concept, which is that if you open a briefcase, there's a number of different compartments, and we could all be using the same word, pull out deference, use that word, and it would mean something different, because the way the Court of Appeal was thinking of it was abdication. The way the Crown uses it in its submissions is a weaker form of abdication and that is a sense in which deference can be used. I think the Human Rights Commission cite Lord Hoffmann's well-known bridling at these types of arguments where he refers to deference as a word and its overtones of gracious civility in the

R (ProLife Alliance) v British Broadcasting Corporation [2003] UKHL 23, [2004] 1 AC 185 case that the Commission cites in their authorities.

But deference can and has also been used to mean something quite different. Deference as respect is the version that Professor Taggart and Professor Dyzenhaus have endorsed, and there are various other versions. And so it's not a helpful term because you can talk past each other too easily about this when you use that sort of portmanteau concept.

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And that's why, in my submission, weight – and weight comes through very strongly in *Chisnall* and it's been endorsed by this Court in a number of contexts – is better because it grounds the decision with the decision-maker, which is you, and you are giving weight to whatever it is but the decision sits with the Court.

The risk with deference is that you muddle that and there's the potential to conceive of it as something where you are deferring completely to Parliament or whoever else it may be. And so it's a minor point on terminology but I think there are better words to use than others, even if they are all words that are used, is the submission.

Margin of appreciation has an entirely separate issue, which is that, in my submission, it's language that we understand as lawyers to be used for particular doctrine by the European Court of Human Rights, and that freighted language seems like a strange, poor candidate to introduce into a domestic system when it's going to run into some of the issues around that. Some of that is discussed –

WILLIAMS J:

I think in that context, though, the margin of appreciation was because you were dealing with a State institution that has the means to mete out fatal violence. And so there are some matters which are just beyond the ken of judges and they should tread very carefully going in there or they'll make a mistake.

MR KIRKNESS:

We're talking about *Chief of Defence Force*?

WILLIAMS J:

Correct.

MR KIRKNESS:

Yes, understood, Sir. And –

WILLIAMS J:

So that was the margin of appreciation, when it was an institutional competence expertise issue.

MR KIRKNESS:

Yes, Sir.

WILLIAMS J:

But it does seem to me the argument here is a little different from the Crown. It is that there is not yet sufficient political consensus around this category for this step to be taken. It doesn't come out and say that, but that's what I'm reading.

MR KIRKNESS:

That's how we understand the case.

WILLIAMS J:

Right.

MR KIRKNESS:

And that's the reason why in the introductory comments I took your Honours to, the idea that this is a joint project where –

WILLIAMS J:

I understand, yes, I understand. So what does one make of that? Do you suggest that the word "weight" allows the Court to understand in this case why

it was that Parliament has not taken that step, and to give some weight to that reason before making its own decision within its institutional competence?

MR KIRKNESS:

No, I don't submit that, your Honour. Can I just go back to the point your Honour raised with me, and apologies if this is repeating something that your Honour has already taken away. But we say obviously that one of the key bits that has been misinterpreted by the legal framework is that all we are doing is asking for a legal question to be answered. And that the decision about that political debate – are we ready, are we not ready, what should come in, what should not – is for Parliament. And as a refinement of that position, that is exactly what Parliament intended through the pathway it set out.

WILLIAMS J:

Yes, so I think we are agreeing.

MR KIRKNESS:

Yes.

WILLIAMS J:

So I'm not suggesting that the result is that there's an abdication of function. I am asking you whether what you're saying in terms of taking into account the result of democratic engagement on this issue is to accord it weight when making the Court's own legal decision within its institutional expertise?

MR KIRKNESS:

Yes, thank you. So the answer to that point is, in our submission, no, because you have to earn weight.

And this goes to a point that, in my submission, is possibly where we left off this analysis in *Chisnall*. Because in *Chisnall* it was acknowledged that there needs to be some care taken in how this area of the law develops case-by-case, incrementally, because there are so many different ways in which these types

of issues can manifest themselves that coming up with some sort of unified field theory is high risk.

And the point I make is this, which is if you are going to ask for weight – or insert whatever other word you like – then you need to be able to establish your entitlement to it through evidence and cogent reasons. In other words, it's not just evidence and cogent reasons that you need for your first order reasons for whether it is or isn't a justified limit. If you say to a court, you should give me weight for my expertise for those factors, those epistemic factors, that the Court acknowledged in *Chisnall* – I skipped over the paragraph but there's a good paragraph at around paragraph 249, I think, where the Court sets out what it accepts is institutional capacity considerations. Similarly in *Moncrief-Spittle* the Court went through factors there. If you're going to ask for those, then you have to establish that you're entitled to them.

Because what you're risking if the courts don't require cogency there is that you are then using these assertions of expertise, assertions that there's an epistemic deficit, to illuminate, or look at, or affect the way in which you then assess the primary balancing exercise. And so you need cogency of evidence and reasons both in the balancing exercise but also before you are going to accept, in my submission, that it's appropriate to recognise that there is expertise that entitles weight to be given. In which case, you then look at the reasons given in the justification analysis differently, because you've given weight in a way that –

WILLIAMS J:

Right, in this case the Crown cites the coalition agreement, for example, which required the proposal that was on the table, and you talked about your submissions, to be withdrawn. What more – if this is the essence of the Crown's case, that the consensus, the political consensus does not exist – it's of course up to this Court to make a decision about what it thinks of that, in terms of our job under s 19 and s 5. But what more need the Crown do on that point? Do you want a survey?

MR KIRKNESS:

No, but that, your Honour, I would say that isn't the type of thing that should – I mean, why does that entitle the Crown to be given weight? It's a reason why they may have made a decision and it's a reason that may play out at a political level, if this Court makes a declaration that goes to Parliament in the manner it's meant to –

WILLIAMS J:

Yes.

MR KIRKNESS:

– but in terms of this Court's analysis, it has no role that I can see, in my submission, no role in influencing the way in which the Court assesses the justification analysis.

WILLIAMS J:

Right, so we should ignore the demos?

MR KIRKNESS:

The existence of a coalition agreement that requires some sort of step to be taken as a policy matter, and that provides a reason for what happened, yes. That doesn't assist you with giving weight in the sense that you give in the s 5 analysis, in my submission. No, that's not going to help you, no.

ELLEN FRANCE J:

Do you accept it's relevant to whether or not you grant a declaration?

MR KIRKNESS:

No, I don't think so. Well, your Honour, it obviously is in the sense that it's a discretion. I think there's a broader point there about the rule of law that the Court would be very reluctant, in my submission, to not grant a declaration, having found an unjustified limit. But it may raise the *Make It 16* issue more starkly about what the declaration is in a case like this where – and at a certain point, hopefully, this changes – but where there are repeated situations where

a Court is left not being sure whether a justification might have been possible because of the way the case was run. That may, as it did in *Make It 16*, as I understand it, affect the formulation of a declaration. We say it shouldn't, but that would be the type of consideration that would be, in my submission, the discussion area – rather than not making one at all, which I think would be an extreme reaction.

ELLEN FRANCE J:

Might that not, in the present context, arguably raise issues about institutional competence and/or incompatibility with democratic consideration? I'm thinking about, I know there are differing approaches in England in relation to that, but you have *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, for example, as opposed to *Steinfeld*. But that is obviously the fact that there has been democratic consideration, or is going to be, has been treated as part of the discretionary analysis. Are you saying that's not right?

MR KIRKNESS:

I don't think I'd put it in those terms, your Honour. I think the concern that I would have is there's a risk there of depowering a tool, a considered opinion from the courts as to the fact there's an unjustified limit, and the role that that input plays as a legal answer in a broader social debate. Because if the Court withholds that declaratory remedy, then that input does not go forward to Parliament. And whatever attaches to that in the political realm, which is not for this Court to worry about too much, but that doesn't play out the way that Parliament anticipated it could and should when it set out a route for that so that that legal answer was before it. And, in my submission, the Court should answer the legal question, if it finds it. Unless there's an extraordinary reason, it should make a declaration.

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And then, if you see it from the perspective of Mr Hoban, the position that he found himself in, and this is where his cross-examination is very illuminating, of saying, when he was pressed by Crown counsel about this is all changing, don't worry, don't you just want to change faster, and he said, no, in my experience

there is no guarantee anything will happen. This is his tool and his way of influencing that debate to the greatest extent that our legal system allows him to, to address an injustice. And that would be removed if the Court were to follow that sort of approach.

WINKELMANN CJ:

Isn't your simple answer here that that approach asks us to be political. And our role is to apply the law, not to make political assessments?

MR KIRKNESS:

Yes, I think –

WINKELMANN CJ:

So not – and so *Nicklinson*, for instance, was a case involving a right which had not been enacted in law, which was a right to – the right to, what is the expression?

MR KIRKNESS:

To assist a –

WINKELMANN CJ:

Assisted dying. Assisted dying. And that's a complex, ethical kind of an issue of the type that is referred to in *Chisnall*.

MR KIRKNESS:

Yes.

WINKELMANN CJ:

But here, Parliament has said that people should be – that protected groups should be free from discrimination. So the fact that there might be a lack of political will to carry that into effect in legislation is not something I think the courts could legitimately take into account when the legislative – where this question of law has been set.

MR KIRKNESS:

Yes, your Honour, I would absolutely agree with all of that. And I would say that the Privileges Committee passages suggest precisely that. This Court should not be gazing over it. It should do its bit, which is give the legal answer to the legal question. That is all it can do. It can't do more. It can't answer the debate. And as that Privileges Committee analysis acknowledges, there is no obligation then on anyone to do anything. It is simply a process of dialogue where one piece has been provided by the courts, and then it is to be picked up by the Executive in Parliament in accordance with the norms that they are operating within to address. But the Court shouldn't be straying into anticipating the way something might be received, for example.

WINKELMANN CJ:

Because that's consistent with our limited role. It's actually us recognising how small our role is, as opposed to becoming political actors.

MR KIRKNESS:

That's exactly – so, your Honour. I would say limited but important, but nonetheless it is limited to questions of law. And that's why we started these submissions by saying what Mr Hoban is doing is putting before you a question of law and asking for a legal answer.

WILLIAMS J:

What do you make then of the democratic, and free and democratic? How does that speak to us? Because we are right at the interface here, aren't we?

MR KIRKNESS:

Well, I think the calibration has already happened in the statutory framework for how that should be played out in this context. I don't think –

WILLIAMS J:

You mean in s 92J and so forth?

MR KIRKNESS:

I think the fact that you have created a halfway whereby even though a constitutionally protected right has been unjustifiably limited, there is now this constitutional division of labour where Parliament has been very clear: we've enacted a law, which is the democratic entitlement they have, which allows us to decide what happens as a result of that. What we need from you is and the only thing you can do as relief, if someone brings a claim, is to get that declaration.

So, I would say that that scheme already encapsulates the democratic credentials type of logic. But as a corollary to that, the courts are also part of a free and democratic society, as a number of judges have acknowledged. I think Lord Bingham said that fairly eloquently, part of a representative democracy, a modern representative democracy, is to have the courts determining questions of law and to have the courts upholding fundamental human rights.

And so I think a free and democratic society, yes, I think it's an under-utilised touchstone in that s 5 test, but I don't think it assists the Crown here. I don't think it gives a lesser role for judges. Quite the contrary, I think a modern liberal democracy would recognise a fundamental role of the rule of law and judges within it, including the relation –

WILLIAMS J:

I wonder, anyway, whether democracy is intended always to mean a requirement that the majority rule or that a consensus is required? Does seem to me, democracy is a bit more complicated than that, for it to work.

MR KIRKNESS:

That's a simpler, better way of saying what I was trying to get at, Sir, yes. But I was using judges as an example of the fact that it –

WILLIAMS J:

Doing their law.

MR KIRKNESS:

Doing the law, yes, that's right. But no, I agree with that. I mean, we are dealing here in a context where some of the points I was making earlier about the evidence that's there and the impact on individuals and groups – of targeting through speech or other communications that excite violence and other things, like shooting people through the head if they get married. That causes, as I think the Ministry of Justice review suggested, people to shrink back from and not participate in society. So, your Honour put to me the democracy part of it, but the free part of it is also relevant. Because I think Mr Hoban says he didn't feel or he implies he did not feel free, and that would be a position that other persons like him would also be in.

WINKELMANN CJ:

Now, I'm looking at the timetable and I've realised you're outside it. Have you finished, Mr Kirkness?

MR KIRKNESS:

I seem to be a repeat offender, your Honour, so apologies for that. But if I could, unless there are any questions, close there and invite Mr Handford to address you on relief very briefly.

CAMPBELL J:

I just have one, and I just want to explore some of the implications of the overall argument which, as I understand it is that – I think you've used the term "under-inclusive prohibition" – that s 61 doesn't include everybody that it should. And I'm trying to understand other instances of that, one of which I think is in the Human Rights Act itself, the prohibition on conversion practices which is only directed at conversion of sexual orientation, gender identity, gender expression. So, is that – would that be another instance where, on your argument, you would slip very easily through s 19(1) and past s 19(2) and have to go directly to justification under s 5? Because there are a whole lot of other groups who don't have the same protection offered by s 63A?

MR KIRKNESS:

Your Honour, I would like a little bit more time to think about that point, if that's okay, and perhaps address you after lunch, or – because I know the Crown has submitted an authority, or is intending to submit an authority relating to this issue. So either if I could come back to you on that point –

CAMPBELL J:

And just to be clear, my question is really about – the argument seems to me to latch onto this idea of under-inclusive prohibitions. Section 63A is just an example that I've seen, it's actually hard to imagine many others and I'm not sure that there are any others on the statute book at the moment, there might be, so that's what my question – it's at that broad level, it's not about s 63A.

MR KIRKNESS:

Absolutely understood and that's helpful clarification, thank you, Sir. The point I'd made in opening was that, and I don't think this changes the point, but I just raise it because it's a nuance in our argument which is, this isn't just a case of simple under-inclusion. It's the fact that you are essentially, in the current formulation, treating vilification of racist hate speech as if is more deserving of protection than vilification of sexual orientation through hate speech. And so that is a different point from simple under-inclusion which might have a more vanilla look. I don't think that changes the point your Honour is pointing to me and, if that's okay, I will take the indulgence and come back to you on that, Sir.

CAMPBELL J:

Certainly.

MR KIRKNESS:

Thank you.

WINKELMANN CJ:

Is that statement correct? It's not treating racist hate speech as more entitled to protection; it's treating other kinds of hate speech as more entitled to protection.

MR KIRKNESS:

It's – because it proscribes just racist hate speech, it's treating it as if that is something that is a greater concern.

WINKELMANN CJ:

Yes, so it's more protective of other kinds of hate speech. It's elevating the freedom of speech in relation to other people propagating hate other than racist.

MR KIRKNESS:

Yes.

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WINKELMANN CJ:

Mr Handford.

MR HANDFORD:

Your Honours, I'll be addressing three points in relation to the issue of relief. Those points principally are, first of all, that if this Court is with us that there is an inconsistency with s 19 and it is not justified then a declaration should follow, consistently with the approach this Court took in particular in *Make It 16*.

Secondly, I will respond to the arguments raised by the Crown. And this includes the argument of institutional competence which there has already been some dialogue on. And I will briefly elaborate a little bit on some of the questioning that just occurred. And I'll also address the point relating to the importance of the Convention on the Elimination of All Forms of Racial Discrimination, and how in our submission an appropriately formulated declaration would not couch upon the reputation of that international instrument.

And finally, I will address the form of the declaration and why it is submitted by Mr Hoban that the stronger "is not justified" formulation of a declaration is appropriate in this case as opposed to the "has not been justified" formulation from *Make It 16*.

Just perhaps – just to start by picking up on the question that your Honour Justice Williams raised about the role of the judiciary in a democracy, vis-à-vis Parliament. I think it is perhaps somewhat relevant at this point to have a look at the case in *Nicklinson* at paragraph 164, which is from the judgment of Lord Mance, I hope I'm pronouncing that right. And about – near the bottom of page 805 he states: "On some issues, personal liberty and access to justice being prime examples, the judiciary can claim greater expertise than it can on some others. The same applies to the legislature – even though I fully accept, that, while the legislature is there to reflect the democratic will of the majority, the judiciary is there to protect minority interests, and to ensure the fair and equal treatment of all."

So I would submit to you, building upon what Mr Kirkness has said in relation to institutional competence, that particularly where we are concerned with minority rights, it is particularly important that in the declaratory context the Court fulfil its usual role, which has been to declare the law – which in this case is what, for the reasons Mr Kirkness has already given, is what Parliament has asked the Court to do.

But just returning quickly to the reasons why we say in the Court's discretion it is appropriate for a declaration to be made in this case. These are principally similar to the reasons given by this Court in *Make It 16* at paragraphs 67 and 68 of that judgment. And that is firstly, that a declaration in this case would serve a remedial purpose by vindicating the rights of sexual minorities generally and in particular the rights of Mr Hoban who has testified about the personal impact that the perceived inconsistency has had upon him. Second, as s 92J specifies, it is the only remedy available for this particular form of inconsistency. And third, for the reasons that again Mr Kirkness has already touched on in some depth, it would perform an important clarificatory function by making clear to Parliament the answer to what are self-evidently some difficult questions of law in relation to the consistency of this provision with the right to freedom from discrimination.

To address the Crown's submission in relation to the International Convention on the Elimination of All Forms of Racial Discrimination, which is at paragraph 107.1 of the Crown's written submissions, I would submit firstly that the suggestion that a declaration of inconsistency in relation to s 61 would necessarily bring into question New Zealand's commitments to the Convention has no basis.

I submit that if the declaration is appropriately formulated, then it will make clear that the criticism, to the extent there can be said to be criticism in the declaration, is directed at the omission of sexual orientation from s 61 and not the protection that s 61 provides to the victims of hate speech on the basis of a race, colour, ethnicity. The declaration would merely record that it is inconsistent in terms of s 19 and s 5 of NZBORA that this protection does not also apply equally to those who are subject to hate speech on the basis of their sexual orientation.

Just to cover off the point in relation to institutional competence, and perhaps drawing upon the facts of *Nicklinson* which were already somewhat discussed earlier, I submit that this is not the type of case in which there are complex social issues or questions of morality in which it is particularly appropriate that Parliament give the answer.

On the facts of *Nicklinson*, what was at issue in that case and what was concerning to many of the Judges was that there were complex issues of balancing the rights of those who wished to have access to assisted dying with particularly those of vulnerable persons who might potentially feel pressured into participating in assisted dying.

In this case, the question as it has been framed fundamentally is one of a legislative inconsistency. It comes down to a question of law. And where the case turns on a question of law it is particularly within the competence of the judiciary to grant a declaration in relation to the matter.

I do not propose to go to these in any depth, given timing, but I would in relation to the general role of the courts, I would commend to the Court in particular this Court's endorsement in *Make it 16* at paragraph 68 of Lady Hale's dissenting judgment in *Nicklinson* at paragraph 325.

I would also endorse from the case of *Steinfeld* at paragraph 60 – so that was a unanimous judgment of the UK Supreme Court – that unanimous court's quotation, and what I read as an endorsement of Lord Kerr's dissenting judgment also in *Nicklinson*. And just to quote that from the second half of that quote: "A declaration of incompatibility is merely an expression of the Court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. In other words, the courts say to Parliament, 'This particular piece of legislation is incompatible, now it is for you to decide what to do about it.' And under the scheme of the Human Rights Act ... it is option to Parliament to decide to do nothing."

Finally, your Honours, just to turn to the issue of the form of the declaration. So I submit that this case is fundamentally similar in terms of the form of the declaration to *Chisnall* and I refer the Court to paragraph 7 of the *Chisnall (Declarations on Inconsistency)* judgment. And I would submit that, like in that in that case, there are two reasons why the "is not justified" formulation is appropriate in this case. The first is that the judgment's conclusions, for the reason I referred to earlier, are based in a significant part on the language of legislative provisions or the absence of language in a legislative provision. And second, if the Crown's case, which it appears to be, is that the limitation is justified, then the Crown carries the onus of justification.

The assessment of that in *Chisnall* was that the Crown had not met that burden and therefore the "is not justified" form of words was appropriate. And I submit that if the Court agrees with Mr Hoban that the Crown has not met this burden of proof, then the "is not justified" formulation is also appropriate in this case.

1300

WINKELMANN CJ:

Can I, before we adjourn for lunch, may I ask you one question for you to take away over lunch. The form of declaration that is sought in the statement of claim is that s 61 of the Human Rights Act is inconsistent with a right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act. Section 21 of the Human Rights Act actually protects, has got quite a few grounds, protected grounds, including marital status and age. The declaration sought therefore is quite broad. And I wonder if you would be inclined to think there should be a more limited – should we be with you, there should be more limited, more particular – it should be more particular in terms of how it is inconsistent with s 19? Because s 21 includes religious belief, age, et cetera, marital status, so ...

MR HANDFORD:

Yes, your Honour, if I can just suggest turning to the last page of our road map. We have set out some possible forms of declarations which would hopefully provide the necessary clarity as to what exactly the Court would be bringing to the attention of Parliament in this instance.

WINKELMANN CJ:

Right, so it's more limited. Okay, thank you. So you are finished then, are you, with your submissions?

MR HANDFORD:

If it pleases the Court, yes.

WINKELMANN CJ:

And we'll have Mr Perkins after lunch. Mr Kirkness?

MR KIRKNESS:

I beg the indulgence – I have got one point after lunch to come back to Justice Campbell on for a very brief period.

WINKELMANN CJ:

Right, okay, and then we will hear – a very brief period. We'll take the luncheon adjournment.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Mr Kirkness.

MR KIRKNESS:

Thank you your Honour. Just to return to Justice Campbell's question to me, which related to the extent to which the type of under-inclusion issue that is at issue in the case brought by Mr Hoban – whether there is a similar issue that would arise in relation to conversion practices, if I understood your Honour's question correctly.

I think the phrase was whether it would sail through the *Atkinson* test for s 19. In our submission, no, there is a distinction between the type of case that has been brought here, and that type of hypothetical.

Here, the case that you have is one where the concern at the material disadvantage stage is that there's an absence of legal recourse where there's evidence of a well-recognised phenomenon of social harm through the form of hate speech targeting persons because of their sexual orientation. And that comes through in the Ministry of Justice review and Cabinet paper document that I took your Honours to at the start of the day. The difference then, in my submission, for the conversion practices example is that there you don't have the same type of evidence of social harm being suffered by persons on other prohibited grounds than the ones that are actually included in the provision itself.

And so the most useful exercise perhaps, Sir, if you're looking for an analogy with the case, would be to take – and the Crown's just handed up the statute, so if you look at s 5, of the definition, the meaning of conversion practice, and what would get you close to the type of case you have here is if you took s 5(1)(a) and took out sexual orientation, if that happened, then you would start to get an analogy, I think, with the type of case that Mr Hoban has brought.

CAMPBELL J:
Thank you.

MR KIRKNESS:
Thank you, Ma'am.

WINKELMANN CJ:
Thank you, Mr Kirkness. Mr Perkins.
1420

MR PERKINS:
E te Kōti. I would like to begin the Crown's submissions with one of the unusual features of this proceeding and it's something that was highlighted by Justice France in kōrero with my colleagues. No party suggests that Parliament was obliged as a matter of domestic law to enact legislation prohibiting any forms of hate speech and I understand Mr Harris confirmed that point when he was addressing the Court.

But having entered the field and prohibited some forms of hate speech in order to fulfil New Zealand's international obligations, is Parliament then required as a matter of domestic human rights law to prohibit all forms of hate speech? Put another way, having prohibited hate speech on three of the grounds of discrimination, is Parliament constitutionally required to prohibit it on the 10 other grounds? The Attorney-General's submission is that Parliament is not, and he advances four principal arguments which I will now outline.

The first relates to s 19(1) of the Bill of Rights Act. We say that s 61 of the Human Rights Act provides targeted protection to three groups that are susceptible to racist hate speech. It does not remove protection from other groups that may be susceptible to other forms of hate speech. Parliament's decision to confer additional protection on three groups does not, without more, impose material disadvantage on the other 10 groups. This is not a zero sum exercise. We submit that if there is no material disadvantage then on conventional analysis s 19(1) would not ordinarily be engaged.

The second principal argument that I will advance today: s 61 engages s 19(2) of the Bill of Rights Act. It is a measure taken in good faith for the purpose of assisting or advancing groups of persons disadvantaged because of unlawful discrimination that is unlawful by reason of Pt 2 of the Human Rights Act. It satisfies each of the s 19(2) criteria and it therefore does not constitute discrimination within the meaning of s 19.

The third principal argument I'll be advancing: any limit on the s 19 right is demonstrably justified. That is, if s 61 limits the non-discrimination right the limit is demonstrably justified in a free and democratic society.

The Attorney's justification argument rests on at least three considerations. Firstly, s 61 gives effect to New Zealand's international obligations regarding racial discrimination. New Zealand is not subject to equivalent international obligations requiring it to prohibit other forms of hate speech.

Second consideration: s 5 allows a degree of what was referred to in *Hansen* as "inherent room for parliamentary appreciation", particularly where the question is a political and social one. As Ms Kiel will explain, whether other forms of hate speech ought to also be prohibited has been the subject of frequent consideration by the elected branches of Government over almost four decades. They have consistently concluded they should not.

The final justification argument I will advance is that the institutional competence of the elected branches of Government to determine contestable questions of social policy justifies the action that Parliament has taken.

Finally, as to remedy, we say no declaration should be granted. Even if the Court concludes that s 61 unjustifiably limits the non-discrimination right, it ought not make a declaration.

The International Convention on the Elimination of Racial Discrimination is a long-standing human rights treaty obligation of the first importance. A declaration would risk undermining New Zealand's commitment to its international obligations concerning racial discrimination.

The second consideration favouring remedial restraint: the issues at play in this proceeding engage acute questions of institutional competence and democratic legitimacy. In such circumstances, we say judicial restraint is particularly appropriate.

I'll now turn to advance substantive submissions in relation to the s 19(1) point. I note at the outset that leave to appeal to this Court was granted in general terms but counsel were directed to address the applicability of both ss 19(2) and 5 of the Bill of Rights Act. We took from that that the Court may be less interested in exploring s 19(1), and I do acknowledge the Crown's arguments in relation to s 19(1) were not accepted in any of the Tribunal or the courts below. However, we considered that it was appropriate upon coming to this Court to rethink issues from first principles, and we therefore want to make some introductory remarks about methodology.

Our submission is that s 61 is a measure that arguably engages s 19(2), and I'll come on to make submissions that it does engage s 19(2). But that gives rise to an anterior question: whether such a measure engages s 19(1) at all.

Coming to a point that was I think raised by both Justice France and Justice Campbell in questions to Mr Harris, we have not been able to identify

any authorities that have given substantive consideration to the analytical approach to the interplay between s 19(1) and s 19(2). I think that reflects the infrequency with which s 19(2) has been argued before the Courts.

We have identified two cases where the Court has engaged with s 19(2). Neither of these are in the bundle. They were just cases that we looked for specifically following the exchange with the Bench earlier. And those cases are *Gordon v Attorney-General* [2024] NZSC 149, and we can provide these citations to the Court following the hearing today, and also the *J v Attorney-General* [2018] NZHC 1209 case when that was before the High Court, which ultimately came up to this Court.

We say that neither of those cases, which did consider s 19(2), gave any detailed analytical consideration as to whether the sections will be approached in a sequential order of the kind that my friend Mr Harris urged upon the Court today.

Our submission is that a measure of the kind that is contemplated by s 19(2) may not fit easily within conventional understandings of s 19(1). I do want to take the Court to some documents that we've quoted in our written submissions at paragraphs 34 through to paragraph 37.

The first of those is the *White Paper*, and my friend Mr Harris referred to the Minister of Justice. I think we'd all recognise that Sir Geoffrey Palmer, whilst Minister of Justice in this capacity, is really seen as the godfather of the Bill of Rights Act, and certainly a leading mind behind the drafting of the *White Paper* which led to its introduction.

So this was a passage that's excerpted from the *White Paper*. And it's quoted at paragraph 34 of our submissions that are on the screen before the Court: "... 'affirmative action' laws and programmes to overcome existing disadvantages would be valid" – and I just interpose here, the *White Paper* was being circulated at the time when it was going to be a supreme Bill of Rights and so questions of validity arose, so that's why you see the word "valid" used

there. Just returning to the quote – “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.”

So that was the view taken by Sir Geoffrey in 1985, three years after the enactment of the Canadian Charter. And I will be addressing the Court about what the Court might make of any which we say are substantial differences between the way in which s 19 of our Bill of Rights Act and s 15 of the Canadian Charter, are framed.

Just moving on to the quote from Parliament’s Justice and Law Reform Committee, which is excerpted at paragraph 35: “It is probable that affirmative action programmes would be valid either because the courts found that they did not offend against 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 5(2) of the [Canadian] Charter. As some doubts have been raised on this matter it would seem desirable to make the position quite clear."

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And we say this is important, because when the Court comes to grapple with how ss 19(1) and 19(2) speak to each other, we think it is important legislative history to recognise that what became s 19(1) was the principal provision that was in the Bill of Rights Act that was annexed to the *White Paper*. And you then have the Parliamentary select committee saying: well, let's put the matter beyond doubt and introduce a provision that ultimately became s 19(2). So, it can be understood as a “for the avoidance of doubt provision”, is a submission I make.

You then have and I will not read this out in any great detail, but some reflections of Professor Grant Huscroft, now a judge of the Court of Appeal of Ontario, where he observed that a: "... purposive conception of discrimination in section 19(1) ... might have the effect of rendering section 19(2) irrelevant."

So what do we invite the Court to make of all this? We say that these materials suggest some caution before importing conventional discrimination analysis into a case concerning what is arguably a measure of the kind contemplated by s 19(2). And the High Court below in this proceeding at paragraph 21, noted this way of thinking. It said that a positive albeit under-inclusive measure directed at addressing a particular form of discrimination might be characterised as: "... not truly discriminatory at all."

So, the Court will note that we have not made detailed submissions before this Court as to comparator groups.

WINKELMANN CJ:

So Mr Perkins, do you see those passages you have taken us to as supporting your argument? Because I suppose you could say they are amenable to two readings, couldn't you? One is they are directed at the kind of affirmative action take-down that we see in other jurisdictions where people say: oh, it's discriminatory to affirmatively elevate one group, so it is against a comparator group which is the rest of the population. Which is what the appellant's case is – that s 19(2) is designed to enable affirmative action to be taken. Or, you're saying, s 19(2) is enabling, enables you, to discriminate between protected classes?

MR PERKINS:

I think the submission I'm making at this point is, first of all, I would say that notwithstanding phrases such as "affirmative action" are used as a shorthand here by Mr Geoffrey Palmer, by the Parliamentary committee. I'm not sure if Professor Huscroft uses it. And I will be inviting the Court when it comes detailed analysis of s 19(2) to set aside any preconceived notions of what classical affirmative action might be.

Because, Parliament has not legislated s 19(2) to say affirmative action shall be lawful notwithstanding s 19(1). It has chosen a particular form of statutory language. And we say and I will be taking the Court through the elements of the test in s 19(2), that we need to set aside – whilst affirmative action is part of

the Parliamentary materials that were being considered, it's not – well, the proper approach is for the Court to understand that context and purpose but only insofar as it is actually reflected in the text. So, that's the first remark I will say about that.

I think in relation to what I do say about the effect of s 19(2) and the way it interacts with s 19(1) is that it was originally not thought as necessary. And the Parliamentary material suggests it was included as a "belts and braces" – to put the issue beyond avoidance of doubt, some doubt having been raised before the committee. And so I think we can get ourselves into lots of knots trying to understand, well, what did Parliament really intend? And is there some nuanced way in which these two provisions come together?

I think it is important to understand that they evolved in distinct ways, rather than as part of a cohesive legislative scheme. What became s 19(1) was Sir Geoffrey's initial proposition and then you have got a Parliamentary committee tacking onto that in a "belts and braces" type way what became s 19(2). And so without wanting to default to the classic Kiwi No. 8 wire analogy, which can be a bit overdone sometimes, it does ring of perhaps not a fully formed legislative scheme having been conceived and enacted as such. I am not sure if I have answered your question, Chief Justice?

WINKELMANN CJ:

No, not really. I mean, I suppose the point is that the obvious thing they are trying to stop with s 19(2) is any attempt to address the disadvantage of groups that are evidentially shown to be commonly discriminated against, the protected groups. To enable them to be protected from such discrimination through legislation and avoid arguments being made that that in itself is discriminatory.

MR PERKINS:

So I think the classical example, if one can accept that such thing exists, that you might be referring to Chief Justice or you might be referring to others, might be to say men who complain against a quota for public sector board governance –

WINKELMANN CJ:

Yes, having been discriminated against on the basis of their gender.

MR PERKINS:

By the having of a quota, that men have been discriminated against, because it should all just be on merit and if you're, you know. And that's, I guess, what some people conceive of as affirmative action within the same prohibited ground of discrimination. So, these are men who have been saying: we're being sexually discriminated against, because these women are being advanced. That's fine –

WINKELMANN CJ:

Section 21 uses very broad descriptors of the prohibited grounds of discrimination.

MR PERKINS:

And so what one might think of as classical affirmative action is taking that ground and saying the other group within or another group within that same ground is receiving preference, and that's not fair. And seeking to head off those sorts of challenges at the pass.

Now, we say: s 19(2) does that. But we also say that's not exactly what Parliament enacted in the Bill of Rights Act. It enacted something quite different. It chose specific language which has got a uniquely New Zealand flavour to it. It harks back to the 1971 Race Relations Act and some of the language that's there. It's influenced by s 15(2) of the Canadian Charter, as we see from the parliamentary materials I've just taken the Court to. But it's a distinct and a different provision which has got to be interpreted on its own terms, free from notions that it's only designed to protect so-called classical affirmation action.

WINKELMANN CJ:

I was just going to say, when you address this you should probably bring – you will have to bring to bear a rights-consistent interpretation to s 19(2). Because

it occurs to me that there is a rights consistency issue here, isn't there? Because you could have – rights consistency could enable you to discriminate in a way which is rights-maximising but not discriminate in a way which is rights-minus? So that seems to be the relevant interpretation of s 19(2). But I haven't heard anyone use a s 6 kind of approach to interpreting s 19(2)?

MR PERKINS:

If occurred to me for the first time about two hours ago, so I will reflect on that, thank you, Chief Justice. Sorry, Justice France?

ELLEN FRANCE J:

Sorry, I was just going to say that it's interesting that the two examples given in the select committee report of other savings provisions, as they describe them, as the committee described it, as you say are the Race Relations Act 1971, s 9, and the Human Rights Commission Act 1977, s 29, which are both measures to ensure equality in that more general sense.

MR PERKINS:

Yes. So we do address this, well, for convenience, but it is an incomplete reference in our written submissions. So if I could just take the Court to paragraph 27 of our written submissions where we've reproduced section of the Race Relations Act. So when I refer to a distinctly New Zealand flavour, this predates the Canadian Charter's enactment in 1982. And interestingly – so let's observe, firstly, it's referred to as: "Measures to ensure equality," which some would argue is a more substantive conception of equality than the freedom from discrimination, more negative conception, that we have in s 19, so that's the first thing I'd observe about that.

The second thing I'd observe is it refers to: "Anything done or omitted." And so you see by the time we get to the Bill of Rights Act in 1990 that that terminology becomes "measures taken." And so given the kōrero that we've had earlier today about acts and omissions and what the difference might be there and how that might inform the analysis, I think it is relevant to note that one of the two significant influences on s 19(2) of the Bill of Rights Act was a provision

which referred to acts done – or, sorry, anything "done or omitted", which becomes "measures taken".

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And then if you move down to s 9(a) you have that phraseology of "done or omitted" again: "... for the purpose of assisting or advancing particular persons or groups of persons of a particular colour, race, or ethnic or national origin". Now, the fact that it refers to just those three prohibited grounds of discrimination is unsurprising given New Zealand's anti-discrimination story insofar as statute law goes. It really starts here in 1971 with the Race Relations Act.

You see, we haven't excerpted it in our submissions, but at paragraph 28 we observe that in 1977 Parliament enacts a very similar provision as s 29(1) of the Human Rights Commission Act. And that's the same time at which there is some expansion of the prohibited grounds of discrimination. But what becomes s 29(1)(a) still continues to refer to "colour, race, or ethnic or national origin." So those have always been considered bases upon which measures to ensure equality have assumed a particular prominence in our statutory arrangements.

But then I take you through, in paragraph 29, we excerpt the original version of s 19(2) as it was enacted. And then when you have the consolidation of New Zealand's human rights law in 1993 with the Human Rights Act you then have a new version of s 19(1) and s 19(2) enacted. And rather than enumerating 13 prohibited grounds it incorporates the prohibited grounds from the Human Rights Act by reference.

So, I think what this, coming back to my original point, which is that one can spend a lot of time reflecting on how s 19(1) and 19(2) are supposed to work together. And I accept that this Court needs to find a way to make them work sensibly together, but our submission is – and this is one I'll be coming back to – is that there is a sense in which measures that are of the kind that s 19(2) speaks to are not even discrimination at all.

So I want to come back to what I describe in our submissions as "conventional discrimination analysis." And I won't take the Court through the authorities such as *Atkinson* where – and *Ngaronoa v Attorney-General* [2018] NZSC 123, [2019] 1 NZLR 289. But this Court will be very familiar with that case law which traditionally asks whether deferential treatment has caused material disadvantage by reference to comparator groups.

We say that material disadvantage is not apt to describe the legal landscape in which s 61 operates. That characterisation carries with it an implication that: one, there is a general entitlement to statutory protection from harmful speech; two, that groups defined by colour, race, ethnic or national origins receive that general entitlement; but three, groups defined by sexual orientation, or indeed any other of the prohibited grounds of discrimination, are excluded from that general entitlement.

We say that under New Zealand law there is no general entitlement to be protected from others' expression, even if some may regard that expression as harmful. That's true of speech that is directed at groups defined by sex, religious belief, disability, or sexual orientation as much as any other.

So, it's important to see that s 61 is the exception, not the rule. It does not remove protection from any group. Rather, it provides targeted protection to groups that are vulnerable to a particular and historically significant form of discrimination, namely racial discrimination.

WILLIAMS J:
That's true as to civil process, but there's s 4 of the Summary Offences Act, which you cite, which arguably would cover these facts. At least arguably so.

MR PERKINS:
Indeed.

WILLIAMS J:

And I understand from the evidence that police were contacted about what was said, although we don't know what happened there.

MR PERKINS:

And also reference in our submissions to the Harmful Digital Communications Act 2015, because I understand that this – it's been characterised as a sermon, but I think everyone puts inverted commas very heavily around that – was broadcast on the internet. And there's also reference to the aiding and abetting provisions of the Crimes Act 1961, if you –

WINKELMANN CJ:

That's your third point, is it? That there is no – that the analysis is wrong if it assumes that there is no such protection?

MR PERKINS:

Well, all groups, including Mr Hoban, are entitled to the protection of the general criminal law, and I apprehended that was the point that Justice Williams was averting to. It's not clear to me why police decided that, on the evidence before them, no offence had been committed or that it didn't meet the test for the Solicitor-General's Prosecution Guidelines. Certainly, the Human Rights Commission reached the view that, notwithstanding it had been contacted by Mr Hoban and invited to do something, that it didn't have the jurisdiction to take action in the way it would have had similar speech been directed towards groups defined by colour, race, or ethnic or national origin.

But I think the point that I would take from Justice Williams' reflection to me is that Mr Hoban and others in his position are entitled to the general protection of the criminal law so far as it is engaged – just not this particular s 61 provision, which is a civil prohibition giving rise to civil remedies.

WINKELMANN CJ:

So, your first ground is that there is no general entitlement to protection in this area. So you say that the appellant's analysis is wrong, because it assumes

that there is a general entitlement to protection in the area of hate speech and there is no such entitlement?

MR PERKINS:

Putting – whilst noting the general entitlement that Mr Hoban and anybody else would have –

WINKELMANN CJ:

Has under the general –

MR PERKINS:

– under the general criminal law.

WINKELMANN CJ:

And what do you say to the Canadian authorities and to the European Court of Human Rights authorities, which say well, that may be so but once Parliament does speak, it can't speak to protect one protected group and not another when there is evidence that that protected group needs protection from hate speech?

MR PERKINS:

That, I acknowledge the authority that Mr Harris took us to today, that quite elderly typewritten authority from the European Court of Human Rights, and I acknowledge –

WINKELMANN CJ:

No, it was the view from the Human Rights Committee, that one, I think, was it?

MR PERKINS:

The 1984 case? I beg your pardon, and I acknowledge that Justice Gwyn has made similar comments very recently in the High Court in relation to the *New Zealand Midwives* case, which I understand has gone on appeal. There's a degree of – I'd say that really runs the risk of "perfect being the enemy of the good." And I'll be making this submission when I come to s 5, which is if the elected branches of government had to wait until there was a sufficient

parliamentary majority to protect all groups concurrently in the same way at the same time, then human rights would not advance very quickly in this country.

WINKELMANN CJ:
Well, that might be so.

MR PERKINS:
It's an incrementalism point.

WINKELMANN CJ:
Yes, I mean I understand the point and I see the force in it, but not perhaps in the legal context. Because the Court's role is to say: well, Parliament, you have said that these groups are protected from discrimination. And that obligation will sound differently in different contexts, and it must be based on evidence. And here we have evidence and it's accepted, as I understand it, from the Crown that Mr Hoban is a representative of a group where there is evidence that they need – that they are the victims of hate speech and, therefore, you might say there's a case for protection made out.

MR PERKINS:
I acknowledge the Cabinet paper that Mr Harris took you to earlier today, which was evidence that, I think it was either 21 or 22, that the Cabinet certainly can recognise that there were harms caused to communities defined by sexual orientation by hate speech.

Our position is that it would be a very odd thing if, in 1971, to give effect to New Zealand's international obligations under the International Convention on the Elimination of Racial Discrimination, and then the enactment of the Bill of Rights Act in1990, and the enactment of 13 prohibited grounds of discrimination in 1993, had a combined ratcheting effect that New Zealand must protect all groups who are defined by reference to the prohibited grounds of discrimination, the 13. Or maybe even some subset, although the limiting principle around which ones is somewhat nebulous and I don't think my friends have really – I mean, to be fair to them, Mr Hoban only wants them in relation

in sexual orientation. But if that, why not religious belief? If that, why not disability?

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WINKELMANN CJ:

Well, we have to make the case that there was evidence that certain racial – certain religious groups are the victim of a damaging level of hate speech, wouldn't you? So why not if certain religious groups are the victims of damaging levels of hate speech? And same with age? I mean, you might think it's ridiculous to protect, you know, middle-aged Baby Boomers, Boomers from hate speech –

WILLIAMS J:

Not that ridiculous.

WINKELMANN CJ:

– from hate speech, but if there was a case made out that, in fact – I mean, I shouldn't have chosen Boomers. Say the very young – the elderly were the victims of extraordinary hate speech campaigns, then why not if – but the critical thing you attack is the notion that once you step into the field, once Parliament says we're going to protect this group from hate speech, that somehow that is discriminatory not to protect another group from hate speech?

MR PERKINS:

Because the real-world assessment is Parliament is very much less likely to step into the field and enact protections for those groups in which there is a – I don’t want to use a word "consensus", because we have a majoritarian Parliament, but with which there is a Parliamentary majority. And the idea that we can't move forward and protect some groups in respect of which who have experienced a particular and historically significant form of discrimination and in respect of which New Zealand has assumed international obligations until we can get a sufficient consensus or Parliamentary majority in relation to others, would leave human rights protection worse off rather than better.

WINKELMANN CJ:

Okay, so that is really – that's almost like the superset of your submission, isn't it?

MR PERKINS:

It's one of the key themes that runs through it, yes, and I will be coming back, probably can touch on a little bit more lightly now about what we say is the ratcheting effects, which is certainly something which concerned the Court of Appeal.

WILLIAMS J:

By worse off, do you mean only that by that you disincentivise any moves in respect of any subgroup because of the exposure to complaint in relation to any other subgroup? Is it just that point which you make in your submissions? Or are you saying that a declaration, for example, in this case would be a retrograde step for sexual orientation or religious group protection?

MR PERKINS:

Certainly the first of those two suggestions. I do make the point in our submissions when it comes to remedial discretion that – and it was a point that the Human Rights Review Tribunal found persuasive, which is that a declaration of inconsistency which impugns or brings into question New Zealand's commitment to an international human rights treaty of the first order would be undesirable and –

WILLIAMS J:

Well, I don't understand the logic of that. How can that be?

MR PERKINS:

Well, it potentially introduces a chilling effect. Does that – unless New Zealand can –

WILLIAMS J:

Oh, I see, so that's your first, the first argument, a chilling effect for other purposes. Not for that purpose, though, because that shot has already been fired a long time ago.

MR PERKINS:

But then you have there's other treaty obligations that New Zealand is asked to assume from time to time. We could think more recently of the rights of persons with disabilities, the rights of indigenous people. It does – it would have an effect because if New Zealand is going to in good faith turn around to the international community and say we've signed up to this treaty, we've ratified it, we've domestically implemented it and but we've – then it has to, on the interpretation or the argument advanced by my friends, it would have to do so. But also scan the wider horizon and say who else might also benefit from some of the protections we're about to give to indigenous people, or people with disabilities, or whoever it might be?

So, there is the potential for a chilling effect about the international obligations we assume if they create all these unintended consequences, because I think it must be accepted that in 1971 no one who contemplated New Zealand was signing up to the Race Relations Act understood that they were creating a hate speech obligation in relation to other groups to be found by this Court – I won't do the math – 55 years down the track.

WINKELMANN CJ:

Well that might be – the problem with that submission is that the world moves on, and we enacted the Bill of Rights Act and s 19. And moreover, over time understanding grew of the impact of hate speech directed at other groups. And so that's really the case that you have to meet: (a) the fact that the world has moved on, most jurisdictions are now protecting –

MR PERKINS:

Some jurisdictions, not all.

WINKELMANN CJ:

Oh, right. And secondly, there's the point that were we to issue a declaration of inconsistency, we would not be compelling Parliament to be acting. We would just be giving them the benefit of the law, the legal position, as a consequence of the Bill of Rights Act that Parliament enacted.

MR PERKINS:

Of course, and when I come to making submissions about remedy I will be – it is accepted by everyone that a declaration of inconsistency here granted under s 92J. So it's not quite a *Taylor* declaration, it's actually a statutory declaration –

WINKELMANN CJ:

Yes.

MR PERKINS:

– does not overcome s 4 of the Bill of Rights Act. The enactment is not rendered invalid. Parliament itself in s 7A and s 7B has assumed obligations and taken on the responsibility for responding. And we've been through that process on four occasions already in relation to declarations that have been issued. And, of course, no one is suggesting that it would compel Parliament to do anything, but it would be a statement by the apex court of this country that the legislature or the statute book is discriminatory. And there is a constitutional significance to that statement, which I don't suggest this Court doesn't understand, but it is a statement of constitutional significance.

WINKELMANN CJ:

This is not a point against you but what occurs to me from what you're saying is that Parliament might in fact be assisted, which is the whole idea of declarations in the Human Rights Act – which was a very, you know, significant piece of legislation in New Zealand's history – that the power to issue the declaration was that Parliament might be assisted in its deliberations in difficult areas such as freedom of speech and how to balance that against the rights it's protecting under the Human Rights Act. Parliament would be assisted by the

courts giving their opinion. So it's not that it would have a chilling effect, but rather that it's operating like it should.

MR PERKINS:

I have enjoyed this constitutional discussion and I hope to take it forward at the remedial aspect of my submissions.

WINKELMANN CJ:

Yes, fair. Good response, Mr Perkins.

MR PERKINS:

I think that's probably a convenient time for me to move on to what I wish to say about s 19(2), and inevitably there will be some callback to what I've been making submissions about in relation to s 19(1). I think the fundamental point, which I said in my opening, is this is not a zero-sum exercise. Giving additional statutory protection to three groups, colour, race, ethnic or national origin, does not take it away from other groups and therefore does not constitute material disadvantage as the conventional discrimination analysis has appeared to do.

Section 19(2). The Attorney submits that s 61 of the Human Rights Act satisfies each of the criteria in s 19(2) and we say the consequence of that is that s 61 does not constitute discrimination. I've made the point in response to the Chief Justice at an earlier stage but I will reiterate it here because it is a very important point in the Attorney's submission, there is a tendency in this case to approach it through the lens of affirmative action, as if there were some universally-agreed accepted definition of affirmative action which governs the interpretation of s 19(2) in a way that is not obvious from the text.

ELLIS J:

The International Convention on Elimination of All Forms of Racial Discrimination does itself make that distinction though, doesn't it? It talks –

MR PERKINS:

Is there a particular aspect of the –

ELLIS J:

Well, I'm talking about Article 2.2, which seems to be about affirmative action in that way that you don't like it being defined. And then it goes on later on to talk about protective measures in providing remedies and creating criminal offences. Two quite different things.

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MR PERKINS:

So, New Zealand subscribed to the International Convention on the Elimination of Racial Discrimination, I think in the 1960s, and ratified it in 1971. And we then – and from that time we start to see through s 9 of the Race Relations Act and then into, I think it's s 23 of the Human Rights Commission Act, measures to ensure equality, which I took the Court to earlier.

ELLIS J:

Which I think is Article 2.2?

MR PERKINS:

If I could just have that brought up please.

ELLIS J:

"Concrete measures to ensure the adequate development and protection of certain racial groups." I mean it probably goes a little wider than ensuring equality but equal enjoyment of human rights and fundamental freedoms.

MR PERKINS:

And my submission is that when we get to the enactment of s 19(2) in 1990 we now have a much wider group of prohibited grounds of discrimination, not just the ones associated with the Racial Discrimination Convention. And we don't have the language of substantive equality that is in the Canadian Charter in Article 15(2). We've chosen something quite different. We've chosen this idea of measures taken, and we've chosen that in relation to a much broader set of grounds of discrimination than just race. And I say that at least the choice of those words is significant. And so whilst there is discussion in materials, both

international and domestic, regarding affirmative action, the Court must ask itself what has been carried forward into the text of s 19(2)?

ELLIS J:

So are you saying that s 19 is not just about equality?

MR PERKINS:

I'm saying s 19 of the New Zealand Bill of Rights is about freedom from discrimination and it's where – and it can be contrasted in that respect from s 15 of the Canadian Charter which is expressly entitled: "Equality Rights".

The Canadians have a much more substantive equality conception of their equivalent right, and I say that it's important to remember that when the Court looks at both the Canadian jurisprudence but also the Canadian statutory provisions. They are directed towards substantive equality. We've also understood s 19 of the New Zealand Bill of Rights Act as being a negative right, a freedom from discrimination, rather than a substantive equality provision.

WINKELMANN CJ:

"We" is the Crown?

MR PERKINS:

I'd like to say all of us engaged in the collaborative enterprise of trying to work out what s 19 means and I include the Courts in that. I'm not aware of any authorities which would suggest that s 19 is intended to be, focus on, or deliver substantive equality. It's entitled: "Freedom from discrimination." It's about negative rights not to be discriminated against. Quite different to the Canadian provisions which very explicitly, both in terms of the heading to s 15 of the Charter, but also cases like *Kapp* – and I can take the Court to the references if necessary – much more clearly focused on substantive equality.

WINKELMANN CJ:

They are, nevertheless, underpinned. Section 19, however, must be underpinned by the notion of equality, mustn't it? It may not be that there's a positive obligation to achieve it, but it's underpinned by a notion.

MR PERKINS:

I would suggest it's a more modest provision. If you look at the Race Relations Act, s 9: "Measures to ensure equality," which is the equivalent of s 19(2). But even, and I'll take the Court back to our submissions where I've excerpted s 9, so it's paragraph 27 – I'll just wait for that to be brought up, and scrolling – so, we'll look at this provision. It's a measure to ensure quality. And then scrolling over the page to 9(b), so: "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."

WINKELMANN CJ:

Yes, I mean I'm not suggesting, and I'm not suggesting either way, that this is a positive obligation. But what I'm saying is underpinning a right not to be discriminated against is a right to be treated – is the value that equality has, and human dignity, which is what the Canadian Supreme Court links it directly to. So I'm not suggesting there's not, it brings in the positive discrimination.

MR PERKINS:

Yes. I can accept – it all depends on what one means by underpinned by. So, equality is an animating, maybe an animating, aspect of a right to be free from discrimination.

WINKELMANN CJ:

Yes.

MR PERKINS:

But I obviously would make submissions against that importing those more substantive equality notions from Canadian case law. The Canadians in 1982

actually turned quite deliberately away from – they had a pre-existing human rights instrument that predated the '82 charter, which had been focused on more narrow, formal equality. This was recited in the *Kapp* judgment in the Supreme Court of Canada. They expressly turned away from that, left the charter and raised a more substantive conception of equality.

WINKELMANN CJ:

Well, it's not said against you that there was any obligation to enact this protective measure.

MR PERKINS:

No.

WINKELMANN CJ:

So, it's not said against you that s 19 imported that. What's said against you is that once Parliament chose to protect one group where there was an evidential basis that they were the victims of hate speech, they also should have protected the others, and they've failed to do so.

MR PERKINS:

That is what's said against us.

WILLIAMS J:

So, did the *White Paper* draw this distinction you're drawing?

MR PERKINS:

Between a –

WILLIAMS J:

A negative right and a substantive right. Did it say: that's what the Canadian model is; we're not following it?

MR PERKINS:

I am not going to answer that with any degree of certainty. What I will – I'd rather reflect on that overnight and do a bit more research before I gave your Honour a clear answer.

I do note that and I need to accept that in the provisions I took the Court to earlier, you do see both in the *White Paper* they say we don't need an affirmative action, might be at s 15(2), because it's not discrimination in the first place, that's what Geoffrey Palmer says. This is what –

WILLIAMS J:

That would probably count against you on the formalist approach that you're taking, because it would be caught by a more formalist approach?

MR PERKINS:

I'm not sure I understand that question.

WILLIAMS J:

Maybe I'm not understanding you.

ELLIS J:

It's not discrimination because it's designed to achieve equality.

MR PERKINS:

And you see Professor Huscroft talk about that in the paragraphs I've excerpted. He talks about a more purposive interpretation of s 19(1) rather than a more neutral conception. So, I don't make the s 19(1) submissions I make to say this is the way it's got to be done now. The point is, the Crown's lost three times below, we thought we'd try something different. And we thought –

WILLIAMS J:

Yes, fair.

MR PERKINS:

And we thought it responsible to draw the Court's attention to a school of thought that existed at the time the Bill of Rights was enacted that these types of measures are not actually within the conception of s 19(1) at all.

Now, the Court might say we've already gone – this Court might say the jurisprudence has built up over time. I would say not that much jurisprudence. But we're too far down this track now that we can't just reconceptualise s 19(1) as a more purposive approach, and I would have to accept that. The point we're trying to do is to flush out some of the challenges when one comes to try to understand how ss 19(1) and 19(2) work together. Not easily, is the answer.

WINKELMANN CJ:

Yes, so have you thought through the s 6 impact on your interpretation argument?

MR PERKINS:

No, I'm going to park that until overnight, Chief Justice.

WINKELMANN CJ:

Okay, because it is – it will be, would require, a different interpretation than you're adopting, I think.

MR PERKINS:

What I will reflect on overnight is whether it's just, I mean, s 6 applies to enactments and the Bill of Rights Act is an enactment.

WINKELMANN CJ:

And *Make It 16* said it applied to the Bill of Rights Act, I think.

MR PERKINS:

But precisely what the implications of that would be for –

WINKELMANN CJ:

It's quite hard to think through.

MR PERKINS:

– the interpretation, so I'm going to take my time to do that, thank you.

ELLEN FRANCE J:

I mean, you can see the argument for another analysis when the argument is one of under-inclusion, I suppose, is part of your point.

MR PERKINS:

Yes, I accept that, Justice France, thank you. So, a point that you'll hear me say quite a bit is I do want to draw the Court's attention to the fact that in the Tribunal, the appellant acknowledged that there is no generally accepted definition of affirmative action. And my principal submission here is the Court's task is not to decide whether s 61 accords with some abstract conception of affirmative action. It is to decide whether s 61 satisfies the criteria that Parliament actually enacted in s 19(2).

We say that, as the High Court observed, there is no reason to read s 19(2) down or up. It should be given a normal purposive interpretation and by reference to s 10(1) of the Legislation Act, that means: "... text and in the light of purpose and its context." And I say there is significance that "text" is first and you have "in light of purpose and context". It's not an invitation for "purpose and context" to wag the "text" dog.

1510

So, our submission is that the analysis must begin and probably end with the text of s 19(2), is this a measure: "... 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 Pt 2 of the Human Rights Act 1993"? If that test is met, it does not constitute discrimination.

So, I am going to, whilst recognising that is a complex construction and one does need to read it in its fullest context, it is helpful to break it down but then also to understand how the different aspects of that test relate to one another.

So, the Attorney submits that the measure taken here is the legislative measure that has been impugned in this proceeding, and that is s 61. And we note that the Tribunal, the High Court and the Court of Appeal all approached the issue on that basis. If s 61 is the measure that was taken, it is readily capable of assessment against s 19(2) and the criteria it contains.

My submission is that the appellant suggests a different approach. He submits that the measure taken that must be analysed is Parliament's omission of sexual orientation from s 61. In effect, this is a submission that the absence of a legislative measure is the measure taken. And we say that approach sits uneasily with both the language and the structure of s 19(2).

A legislative omission or an under-inclusive aspect of a legislative measure would not naturally be described as a measure taken. Indeed, had Parliament chosen not to legislate in this field at all, or enter the fray, however one characterises it, there would be no measure taken that would be capable of assessment under s 19(2). The appellant would be left with the absence of any measure.

So, treating a legislative omission or the absence of legislation or an under-inclusive aspect of a measure as constituting a measure taken places what we say is considerable and unnecessary strain on the statutory language. And we say, and this is part of the cross-checking of different aspects of the test against one another, that approach would disconnect the concept of a measure taken from the requirement that it be taken in good faith for the purpose of assisting or advancing disadvantaged persons or groups.

Omissions do not ordinarily assist or advance anyone. Those concepts are much more readily directed towards positive action. And we say that is why the

enactment of s 61 in the terms it is enacted is the measure that was taken that must be assessed for the purposes of s 19(2).

I next want to turn to good faith which is the second element of the s 19(2) test. Section 61 and –

WILLIAMS J:
You do have to – sorry, we seem to right at the nub of this thing and it seems useful to engage.

It refers to "measures taken" in respect – sorry, "measures taken." Yes, let's say in respect of colour, race, national origin, "do not constitute discrimination." It does seem to be implicit in that, that it's discrimination against the target category, it's just that the drafter didn't feel the need to add those words for the sentence to make sense, because I doubt that anyone was thinking anything else at the time. Because they hadn't struck this kind of case.

MR PERKINS:
There were probably a range of choices available to the drafter and I think we do need to be thoughtful about the way we read in what they may or may not have had within their conception at that time.

WILLIAMS J:
We seem to do that a lot on this bench.

MR PERKINS:
So just to recapitulate some matters I've been referring to recently. You've got 1971 the Race Relations Act and the connection between s 9(a) of the Race Relations Act or the commonality of the phraseology that is used is really striking: "... 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." So the antecedent provision here was specifically thinking about the advancement of persons in relation to race, ethnic, or national origin.

And then when you move –

WINKELMANN CJ:

And that was against the general population, Mr Perkins, wasn't it? They weren't thinking about say it being one disadvantaged racial group complaining, probably. Then, they were thinking about the general population.

MR PERKINS:

So –

WINKELMANN CJ:

Because they didn't have s 19.

MR PERKINS:

So this, can I – if I can just reframe what I understand to be your question, Chief Justice.

WINKELMANN CJ:

Can we just get the section up on the – so who were they thinking? What I'm asking is: who were they thinking might be complaining in this circumstance?

MR PERKINS:

Well let's take the classic example, and I use "classic" advisedly. We've talked about the male/female affirmative action. In this circumstance you would expect that if there was provision for certain racial groups who had been historically disadvantaged in employment to be assisted by quotas or something of that ilk, that those who had been historically advantaged or not experienced that historic advantage couldn't bring a discrimination claim, is I think what we might think of as the classic discrimination.

What I think is interesting is that – and it's unfortunate that I – oh, it is in the bundle, if I can have it brought up. Appellant's bundle at tab 24 is the Human Rights Commission Act which is the next iteration of the expansion –

WINKELMANN CJ:

1977?

MR PERKINS:

1977, correct, which is the next iteration of New Zealand's human rights expansion. What's really interesting here – and I'll wait for it to be brought up. I'm after s 29(1).

So it must be remembered this is when – I'm just trying to remember precisely what the extra prohibited grounds that were being added at this time were. Ms Kiel will help me. So this is the point in time at which sex, religious belief, ethical belief, and marital status are being added to New Zealand's human anti-discrimination protections. Yet if we read s 29(a): "Anything done or omitted which would otherwise constitute a breach of any of the provisions … of this Act shall not constitute a breach if— … done or omitted in good faith for the purpose of assisting or advancing particular persons or groups of persons or persons of a particular colour, race, ethnic or national origin."

So the curiosity here is that it's talking about provisions that are affirmative action in relation to sex, marital status, religious belief, ethical belief, but saying if they're to advance racial groups that's okay or it's not discriminatory. So this idea that it only works within grounds is not supported by the history of these sorts of provisions.

WINKELMANN CJ:

Well, actually, I don't know about that, because the particular provisions it's referring to are those which tell unions and employers that they can't ask for certain particulars. So it's saying that's not going to be a breach of particulars, so…

MR PERKINS:

I'll have to review each of those five provisions more carefully to see if they do –

WINKELMANN CJ:

Yes, it's looking like they're addressing – this is the trouble about just picking this up as a model and carrying it through into the Bill of Rights Act, is that it was a model that was operating in a different context. So s 18, it's: "... unlawful for any person to use or circulate any form of application for employment or to make any inquiry of or about any applicant" about – which indicates they might be about to breach s 15. So it's that sort of thing. So, it's enabling you to get that kind of information if you're going to be using it to further the interests of those discriminated-against groups.

1520

MR PERKINS:

Maybe the best use that can be made of this is to show that through both s 9 of the Race Relations Act and s 29 of the Human Rights Commission Act has been a particular focus on protecting those provisions in the statute book that might be done in good faith for the purposes of advancing persons affected by racial discrimination.

WINKELMANN CJ:

Yes.

ELLEN FRANCE J:

It's the case, isn't it, that s 20, for example, referred to there, does include the broader range of protected grounds?

MR PERKINS:

Yes, I think you're right, with –

ELLEN FRANCE J:

By reason of sex, marital status, religious or ethical belief.

MR PERKINS:

And the point I was hoping to make with this provision is that if we trace the antecedents to s 19(2), whilst one might have in one's mind conceptions of

affirmative action and so-called classical affirmative action, that's not necessarily borne out by all aspects of observed history. There are indicators pointing other ways, which is that things that are done to advance groups that are defined by colour, race, ethnic or national origin, which may discriminate against other groups on the basis of sex, marital status, religious or ethical belief, are saved by s 29.

WILLIAMS J:

I don't – my sense of it is that that's not the point in the provision. It's a more – it's making a more general slam dunk, which is: when I discriminate in your favour as an historically disadvantaged group, that is not discrimination for the purpose of this Act. That's all it's saying. It's not actually talking about a comparator group at all. Because it's clearly discrimination on the plain meaning of that word, because other people with similar characteristics other than those characteristics which are historical vulnerabilities belonging to an historically oppressed group, that whatever you might think it is, dear reader, it is not discrimination for the purpose of this Act.

MR PERKINS:

I think my submission is that we can only take s 19(2) – we have to look at the text of s 19(2) and it's the primary submission I keep going back to, which is we need to understand it, we need to look at the text Parliament actually enacted, informed by this history. But given the appellant himself has acknowledged there's no universally accepted definition of affirmative action, those concepts, notwithstanding you see them littered through some of the legislative history, only help us so far. And they can't be governing to say, well, notwithstanding something meets each of the criteria within s 19(2), it couldn't possibly have meant this, because of some overriding and unexpressed idea about affirmative action which is the flavour you get from the submissions that are made against us.

WINKELMANN CJ:

When I read the Human Rights Commission Act in 1977, I think it rather reads against you. So you'll probably need to go through those particular provisions

overnight, Mr Perkins, because I think it is really aimed at – because it comes from the language of affirmative action, because of what they were contemplating here, that you could take positive steps to advance disadvantaged groups.

MR PERKINS:

And this is a positive step which has advanced the position, so it's committed to the core provision at issue. Section 61 is a positive step which has advanced the position –

WINKELMANN CJ:

Yes, but the things it was not breaching was the things it was saying other people can't complain that they haven't, that they're being excluded. So the white man can't complain he's being excluded by the fact that a woman is being advanced or – in 1977 New Zealand, if we can remember back to that time.

MR PERKINS:

And then we come back to s 19(2) of the Bill of Rights Act 1990. And whilst these historical materials are informative, they can only take us so far. And what we need to analyse is, does a provision like s 61, independently of any free-standing or idiosyncratic ideas about what affirmative action is or isn't, does it meet that test? And our submission is it does.

Can I turn to good faith. Section 61 and, before it, s 9(a) of the Race Relations Act, were enacted to implement New Zealand's international obligations, particularly under the International Convention on the Elimination of Racial Discrimination. And I do note that by the time s 9(a) was enacted New Zealand had not yet ratified the International Covenant on Civil and Political Rights. That came later, but we do say that s 9(a) contributed to New Zealand's domestic implementation of its obligation under Article 20(2).

Nothing in the history suggests Parliament defined the scope of either s 61 or its predecessor, s 9(a), by reference to the relative worth, status or dignity of different groups. Nor is there indication that Parliament acted from any hostility

towards groups other than colour, race, ethnic or national origin, or regarded them as any less deserving of protection.

ELLIS J:

So do you not accept that's it the effect that's relevant? You're talking about Parliament's intent?

MR PERKINS:

Well, good faith is part of the test and intent must be relevant if we're talking about questions of good faith.

ELLIS J:

Well, I – yes, is anyone saying that the measure was enacted in bad faith or not in good faith?

MR PERKINS:

I don't think it's said that the measure enacted in 1993, or its predecessor in 1971, was enacted in bad faith.

ELLIS J:

Or not in good faith even?

MR PERKINS:

Or not in good faith.

ELLIS J:

It's not my sense that's part of the appellant's argument?

MR PERKINS:

No, but I – taking the approach my colleagues do on this side, they look at omission and there is a sense that there is – Parliament has illegitimately chosen to exclude groups defined by sexual orientation from the types of protection that other groups get by the reason of s 61. I don't think they put it as high as bad faith or the absence of good faith. I don't attribute that to them.

ELLIS J:

And it's certainly not being said that that was the case back when it was enacted, right?

MR PERKINS:

No, and that would be inconsistent with you see in 1993, at the same time s 61 is enacted, sexual orientation becomes a prohibited ground of discrimination. And so the entire trajectory is we advance different groups in different ways at different times. And groups who have been, for historically significant reasons, have experienced racial discrimination are protected through measures like s 61 and s 131. Groups that have experienced or will experience sexual orientation discrimination are protected through other measures. And I will be coming back to something that Justice Campbell referred to earlier which was s 63A of the Conversion Practices Prohibition Legislation Act 2022, because we do say that's part of the story about different groups who have got different needs, being protected in different ways.

I think it's important and as I will just re-emphasise, I don't say my friends or Mr Hoban makes an assertion of an absence of good faith, that in terms of when s 61 was enacted in 1993. And I think that's a reason why this case is distinct from the *Vriend* case – I didn't pronounce that very well, let's try again – *Vriend.*

WINKELMANN CJ:

That's all right. We take it from you, Mr Perkins.

MR PERKINS:

That's been brought up in discussion earlier. So in *Vriend*, sexual orientation was deliberately omitted from an anti-discrimination regime that purported to be comprehensive. And the Canadian Supreme Court concluded that that omission, in the context of legislation that purported to comprehensively protect equality of rights, was discriminatory. So, putting that in the language of s 19(2), the concern in *Vriend* was the absence of a good faith legislative choice to protect equality on equal terms.

The Canadian Supreme Court itself in *Vriend* recognised that legislatures may choose to address one form of discrimination without simultaneously addressing all others. This might be something of a counterpoint to the UN Human Rights Committee and *Midwives* points that once you enter the field you've got to go the whole way.

So if I can have the reference in *Vriend* brought up. And Ms Kiel will be surprised by that, so we'll give her a moment.

1530

Paragraph 96, please. So: "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 [Justice] L'Heureux-Dubé was referring in the comments she made in *obiter* in her dissenting reasons in *McKinney*" – I think *McKinney v University of Guelph* [1990] 3 SCR 229 is in the authorities. And this is picking up what Justice L'Heureux-Dubé said: "'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*.'"

And so I do make that as a counterpoint to the suggestion that once you enter the field, you must enter the field in a comprehensive way which deals with all similarly situated, or those groups one might consider or assert are similarly situated.

ELLIS J:

Sorry, I'm getting a bit confused, forgive me, but are you saying the Human Rights Act is not a comprehensive Act in that sense?

WINKELMANN CJ:

Is your point that this judgment is saying that the legislation in that case was problematic, because it in a discriminatory way excluded one group from its

protection? It protected everybody from discrimination except this one group, is what it says here?

MR PERKINS:

The Chief Justice has accurately summarised to the point. I'm referring to the Albertan I think it was called The Individual's Rights Protection Act RSA 1980. It purported to be a comprehensive equality code, and left out sexual orientation.

ELLIS J:

I understand the difference, but the Human Rights Act is still a comprehensive Act that protects people –

MR PERKINS:

It's comprehensive but it protects different –

ELLIS J:

– such as Mr Hoban, except in relation to s 61.

MR PERKINS:

Well, it's, with respect Justice Ellis, it's not quite the case. We would say that section – and I was actually about to come to this point in a moment – s 21 provides prohibited grounds of discrimination. And there's 13 of them listed. You then have a range of different contexts in which discrimination is prohibited on those grounds, so employment, accommodation, there's others, provision of services, those sorts of things.

And you then have in the “s 60s” in that Act different provisions that work different ways for different types of discrimination. So, you have conversion practices which is defined as a form of unlawful discrimination. That only applies to sexual orientation. You have racial disharmony and incitement to do that, s 61, which only applies to a few or three of the prohibited grounds of discrimination. You have others in relation to persons who experience family violence.

So, what I would say is most provisions of the Human Rights Act are comprehensive, in that they deal across all 13 of the prohibited grounds but not all of them. I don't think that undermines the adjective some people might use to say we have a comprehensive Human Rights Act, but it deals with different prohibited grounds of discrimination in different ways. Some of them are dealt with, for example, in relation to employment, all 13 grounds work across the employment domain, but when you get into the "s 60s" and some other – and the provisions there, you see different types of groups being protected in different ways through different mechanisms. So, I don't know whether that means it is not comprehensive or it is. I'd say in a – yes, I don't, I...

So I want to turn to, before I –

WILLIAMS J:

I guess the – sorry, the point is, that if treatment is to be differential then you need to look at the purpose of the different treatment and undertake an analysis as to whether it is rational, proportionate and so forth. Difference itself isn't an answer. It's a question to be answered, isn't it?

MR PERKINS:

So if we are answering – if the question is being asked: is this truly distinguishable from *Vriend*? We would say the entire purpose of that code was to be a comprehensive equality code. Section 6 and 61 has never purported to be anything it's not. It's always been directed towards the implementation of New Zealand's international obligations and so I think that is the key distinction here that –

WILLIAMS J:

So all roads lead us to your reasons, don't they, for the exclusion.

MR PERKINS:

The s 5 justification type.

WILLIAMS J:

Yes, *Vriend* would apply unless there is a reason for the difference which can be justifiable in law, in accordance with, you know, s 19(2) and s 5, et cetera.

MR PERKINS:

I wouldn't say all roads. The point I would make is that, and I do make, there is a difference between a comprehensive equality code which, motivated by animus, omits a particular ground but says: this code is premised on the inherent dignity of all individuals. I haven't accurately quoted the preamble to the Individual's Rights Protection Act, AS 1972 of Alberta, but it's something along those lines – but is notable for the omission it makes in relation to sexual orientation. And there's findings that there's a degree of animus to be associated with that. And s 61, which is one part of a consolidation of New Zealand's human rights protections. It sits as a companion piece to the New Zealand Bill of Rights. But it is quite different to look at that one provision which was enacted for a particular and quite specific purpose with a genealogy and a rationale, which I will explain tomorrow when we get deeper into the s 5 analysis, as opposed to a human rights protection scheme which purported to be comprehensive but wasn't.

WINKELMANN CJ:

So the preamble to the Alberta Act says: "[W]e have committed ourselves to suggest that Alberta is not the place for partial rights or half freedoms, but that Alberta hopefully will become the place where each and every man and woman will be able to stand on his own two feet" – that's a bit of an unusual thing for a woman to stand on his own two feet – "and be recognized as an individual and not as a member of a particular class."

MR PERKINS:

Some pretty lofty legislative statements. But then failed to live up to it.

WINKELMANN CJ:

Yes.

MR PERKINS:

And I think the criticism is –

WINKELMANN CJ:

And sexual orientation was the one ground left out.

MR PERKINS:

Absolutely. And I say it's an enactment of a qualitatively different character from what we're talking about here.

Can I spend some time talking about assist and advance. We say that at the very least s 61 assists groups that are affected by racist hate speech. As the Court of Appeal said at paragraph 64 – this was in the context of its discussion about material disadvantage, but I think it works just as well here: "Section 61 both has symbolic value … It is a legislative statement that racist speech is inherently damaging to New Zealand society …" It also connects to practical rights. It: "… allows people subject to [racist hate speech] to seek redress using the resources of the state and the machinery provided by the HRA."

So, to be more granular, what that means is a complaints-handling function by the Commission, and this is in Pt 3 of the Human Rights Act, and information-gathering and using the good officers of the Commission to help people resolve their differences. If they can't be resolved, there is then a remedial jurisdiction to make an application to the Human Rights Review Tribunal with the possibility of remedies, including financial penalties that might flow from that.

My friends make the submission that a prohibition can't assist or advance anyone. And we say that is a decontextualised reading of what s 61 does. Section 61 is a gateway to some very important and very useful machinery. It's the machinery of the Human Rights Commission's complaints-handling function and it's the machinery of an adjudicative tribunal which has the power to issue binding orders. And we say it's unduly narrow just to look at s 61 on its own terms decontextualised from what s 61 provides access to. And we say that

the Tribunal and the Court of Appeal were correct to identify access to those resources and machinery of the State as a form of assistance. Indeed, there's a certain unreality to a suggestion otherwise.

1540

Mr Hoban brings this case because he wanted to access the resources of the Commission in order to obtain redress for his experience of the comments that Mr Kirkness referred to earlier. It is difficult to understand why Mr Hoban would do that unless he perceived that as providing some assistance to him. So we rely upon what the Tribunal and the Court of Appeal said, contra what the High Court said, that the dispute resolution mechanisms to which s 61 is a gateway are in a very real sense an assistance which is provided to people by – through the mechanism of s 61.

WILLIAMS J:

Doesn't that make the entire Human Rights Act a s 19(2) mechanism? Because you get access to that machinery by various means pursuant to s 21, and so forth.

MR PERKINS:

This is an important – I'm going to say one more thing before I come to answer your question, which I do want to deal with in a more substantive way, Justice Williams, so apologies.

WILLIAMS J:

Sure.

MR PERKINS:

This is a point I've noted earlier, which is assisting and advancing has been part of New Zealand's anti-discrimination law since 1971, when the Race Relations Act was enacted. And we say it is a distinctly different formulation than what is used in s 15(2) of the Canadian Charter, which talks about "amelioration of conditions."

I've made the submission to you earlier, and I reiterate it here, that whilst s 15(1) and s 15(2) no doubt influenced s 19, they are different types of provisions. They do different things. One is a negative freedom from discrimination. The other is a positive, substantive equality right. And we say that assisting and advancing is distinctly New Zealand language, that it's different from the Canadian language in their s 15(2).

I want to come to address the point, Justice Williams, you were making to me, and this is a point on which we depart slightly from the way it was articulated in our written submissions, and it was something I spent a lot of time reflecting on. And it's somewhat counter-intuitive, so I'm going to try to explain it once and if it doesn't work we'll try a different way.

It goes to a point I was raising with Justice Ellis earlier, which is that we say that the Court needs to have a very clear focus on how section – sorry, how Pt 2 of the Human Rights Act works. And when I say that, s 21 identifies prohibited grounds of discrimination and then the following sections, right through until the late "s 60s", talk about different contexts in which you can't discriminate on any of those prohibited grounds. And then when you get into the "s 60s": s 61, racial disharmony; s 62, sexual harassment; s 62A, family violence, racial harassment, conversion practices – you see some particular manifestations of different types of unlawful discrimination.

The point I want to make here is that discrimination is not made unlawful by s 21. Discrimination is made unlawful by these substantive provisions throughout the balance of Pt 2 by reference to the prohibited grounds in s 21. And I think it's very – something I've done myself, which is – I think a red herring to think that s 21 is what makes discrimination unlawful. For the purposes of the Human Rights Act, s 21 provides the prohibited grounds. But the actual substantive provisions that make things unlawful are actually interspersed throughout the balance of Pt 2.

WILLIAMS J:

My point was a different – although keep going if you need to.

MR PERKINS:

No, I'm obviously – I might come back to that point, but I do want to fully understand what your Honour wants me to answer.

WILLIAMS J:

My point was not that s 21 is the prohibition mechanism, I agree with you, it's the grounds. But the rest of the Act provides comprehensive machinery in all of those, both private and public, contexts covered by the Act, which would make –

MR PERKINS:

Part 3 certainly does, yes.

WILLIAMS J:

Which would make each of them individually, and all of them collectively, s 19(2) mechanisms or a s 19(2) mechanism, depending on how high your helicopter flew, not a s 19(1) measure.

MR PERKINS:

I don't have a ready answer to that.

WILLIAMS J:

Something else to reflect on.

MR PERKINS:

Yes, I've got my overnight thinking. I think one, without wanting to cut against myself, it is more challenging to think about an entire statutory scheme like the Human Rights Act being a measure taken that links into – and then self-refers to Pt 2 of that scheme. There's a degree of circularity there, because Pt 2 – sorry, because section 19(2) does refer just to Pt 2, that … it does cause me to question whether that is a sensible way to understand it. And there is a degree in which an entire enactment, to call an entire enactment a "measure taken" that's protected by s 19(2), does force one to confront: can you say an entire enactment is a measure?

WILLIAMS J:

Well, you could if, depending on the enactment, for example, a special measure to provide education assistance to a minority group. And there are a couple of those. That would clearly be a s 19(2) measure. But the impression I have is the Human Rights Act, if it can be categorised at all, is primarily a s 19(1) measure. It is an embodiment, albeit a retrospective one, of the direction in s 19(1) against discrimination on those bases. It's not an assistance or an advancing – or it would really disappear in a puff of its own illogic, wouldn't it?

MR PERKINS:

Well, I think part of the way we can work through this is to think that the Race Relations Act predated the Bill of Rights Acts, as did the – so there was a progressive expansion beyond colour, race, ethnic or national origin, sex, marital status, religious belief, ethical belief. All these preceded 1990 –

WILLIAMS J:

Yes.

MR PERKINS:

– and so, the – and I acknowledge they weren't consolidated into the Human Rights Act until 1993, which obviously post-dates the New Zealand Bill of Rights Act, but I think – I acknowledge the force in what your Honour is saying. There does come a point at which the circularity tends to cut against itself, and I think that's something I want to think through overnight.

So, I am pleased that the way I explained it the first time, apparently, at least resounded with Justice Williams, that contrary to what we say in our written submissions, which suggest that a focus on "is this one of the prohibited grounds in s 21?" is the work that "unlawful by reason of Part 2 of the Human Rights Act" has to do. Actually, it's the substantive provisions after s 21, right up until the late "s 60s", that do the substantive work of making discrimination unlawful.

Section 61, the impugned provision in this case, is located in Pt 2 of the Human Rights Act. Pt 2 is headed: "Unlawful discrimination." Indeed, the heading immediately preceding s 61 itself is: "Other forms of discrimination," and so what I draw from this is s 61, the prohibition of racial disharmony or the racist hate speech provision, is exactly the kind of discrimination that is unlawful by reason of Pt 2 of the Human Rights Act, and therefore it meets the final element of the test articulated by s 19(2).

I note we're coming close to the end of the day. I have one more point I wish to make about s 19(2) and it's to address a hypothetical that was raised by the Chief Justice in discussion with my colleagues at the other bench. And then that might be the most convenient time to break for the day and to recommence tomorrow with s 5.

So, the point – the engagement that the Chief Justice had was you postulated an example which was the over-65s cybercrime analogy. And the hypothetical you advanced there – I think you were testing the proposition with my friend Mr Harris of would that law be saved by s 19(2)? And doesn't that just prove the absurdity, or is that a way that the absurdity of the formalistic or mechanistic approach that we are said to be advancing can be undermined?

1550

And I think the answer to that question actually comes back to whether protecting victims or potential victims of cybercrime is actually a form of unlawful discrimination. Or being a victim of cybercrime is in the form of unlawful discrimination under Pt 2 of the Human Rights Act. It's not. And so a remedial measure that focused on the elderly as opposed to the young, because it was more efficient to do so, or the elderly are particularly at risk of being predated upon for scams – whatever the rationale might be. A measure that is designed to provide assistance to the elderly, to use an unfortunate shorthand, is not something that is to assist or advance people who are disadvantaged because of discrimination that is unlawful by reason of Pt 2 of the Human Rights Act.

Racial discrimination or racist hate speech is something that's unlawful by reason of Pt 2 of the Human Rights Act. Being a victim of cybercrime or the commission of cybercrime offences is not something that's unlawful by reason of Pt 2 of the Human Rights Act, so –

WINKELMANN CJ:

Yes, I suppose it's getting at whether discrimination per se on these prohibited grounds is unlawful. And your point is that – right, okay, I think I'm following you, Mr Perkins. My hypothetical doesn't work. I'll have to come up with another one.

MR PERKINS:

If your Honour can come up with another one you want to put to me tomorrow morning –

WINKELMANN CJ:

I'm sure I can. I'm sure I can.

WILLIAMS J:

She'll be reflecting on it overnight.

MR PERKINS:

If it's good enough for me, it's good enough for you, Chief Justice.

I just note that we're approaching the end of the day and this is the point which I would ordinarily – well, I will turn to focus on s 5 justification. I'm confident that at this rate I should be finished within 30 to 45 minutes tomorrow, which –

WINKELMANN CJ:

And although you have a reply to the Intervener, you're probably covering most of that material in any case. It'll probably just be a sweeper-type reply.

MR PERKINS:

The timetables proposed had generous replies and also some overrun, so I think we're still on track to finish before lunch tomorrow, acknowledging my friends for the Commission are entitled to an hour and that my friends at this bench will want to reply, as will we.

I fear diving into justification at seven minutes to the break is a dangerous exercise.

WINKELMANN CJ:

So you think – so you wish to take an early adjournment?

MR PERKINS:

I think I'll get started on s 5, we'll get down a rabbit hole, and it'll be 4 o'clock and it'll be an unsatisfactory ending for everybody.

WINKELMANN CJ:

So we are re-convening in another capacity as part of the Court's outreach programme, I think, at – what time are we reconvening in this courtroom?

WILLIAMS J:

4.15.

WINKELMANN CJ:

No, later, that's the –

CAMPBELL J:

4.40.

WINKELMANN CJ:

4.15 for the students and counsel in the foyer and then 4.40 in here. Just advice to counsel, we're going to have our papers cleared and Justice Cooke will be joining us on the Bench. He could not join us on the Bench for the hearing since

he was the subject of the appeal, in a sense. But he'll be joining us for the interaction.

Right, we'll take the adjournment now.

MR PERKINS:

As the Court pleases.

COURT ADJOURNS: 3.53 PM

COURT RESUMES ON THURSDAY 8 OCTOBER 2026

WINKELMANN CJ:

Mr Perkins.

MR PERKINS:

As the Court pleases. Your Honours, I will first just speak to a few matters of time management. I have had the benefit of a conversation with Ms Young and Mr Kirkness who you are to hear from today as well. My preference would be that I have the opportunity to fully develop the arguments I wish to make in my substantive submissions now. And that I do so and accept a contraction of any reply opportunity that I might otherwise have claimed, on the basis that we are covering many of the points in substantive submissions.

WINKELMANN CJ:

Thank you, Mr Perkins.

MR PERKINS:

That means I will probably be on my feet until about 11 am, after which you will hear from the Commission. And then they will continue after the morning tea adjournment, and both myself and Mr Kirkness will endeavour to be as brief in reply as we can be. And we think there will be no difficulty accommodating that before lunch.

I would like to start this morning by answering or trying my best to answer some of the questions that the Court graciously gave me the opportunity to reflect on overnight. And then I am going to dive into s 5. And it is important that Ms Kiel has some matters to take you through as well in the s 5 context, so I do want her to have a full opportunity to do so, and then I will come back and address you about the significance of the matters that she takes you to and the questions of remedy.

So, the questions that I was posed yesterday. The first question I will try and address is that that was posed to me by the Chief Justice, which I will

summarise as: what might a s 6 consistent reading of s 19(2) look like? And I accepted, as I must in light of *Make it 16*, that the Bill of Rights Act is itself as enactment which must, in accordance with s 6, be given a rights-consistent interpretation where that is available to do so. However, I would suggest that there is a real difficulty with trying to give a provision like s 19(2), which expressly authorises things that might otherwise be thought to be discrimination, a rights-consistent meaning.

It is inherent in s 19(2) that things that might otherwise be inconsistent with s 19(1) are authorised or do not constitute discrimination. And so there would be, in my submission, a degree of circulatory in trying to affirm rights that are affirmed by s 19(1) and bring those to bear on s 19(2), when the entire purpose of s 19(2) is to save things that might otherwise be thought to constitute discrimination. In my submission, the trade-off is already made in s 19(2): an acceptance that some things might not constitute discrimination. And the mediating criteria are good faith, assisting in advancing and the need to remedy discrimination that is otherwise unlawful by reason of Pt 2.

So, it's not a large provision. It has constraining components to it. And that is how the legislature has struck the balance between provisions that might otherwise be thought to be discriminatory and saves them if they meet those criteria.

And so to return to the point the Chief Justice put to me, it is inherent in s 19(2) that some degree of what might otherwise be thought of as discrimination is contemplated and saved or excused or deemed not to constitute discrimination. And so there would be an unworkableness in trying to bring a s 19(1) rights-consistent approach to that when the entire purpose of s 19(2) is to authorise things that might otherwise be discrimination.

I do note that, and I am not sure if the Chief Justice's question was prompted by paragraph 22 of the Human Rights Commission's submissions, where they do postulate two different possible interpretations of s 19(2). And my submission in relation to those is that –

WINKELMANN CJ:

What paragraph is that, sorry?

MR PERKINS:

Paragraph 22 of the Human Rights Commission's submissions. They postulate two different possible interpretations of s 19(2). I don't think they expressly invite the Court to, or they don't expressly invoke s 6 as a reason to pick one of those. But they do articulate some considerations. I think the point I would make is that both of those interpretations involve reading in a substantial amount of language and assumptions that are just not evident on the face of s 19(2) itself, and I reiterate the primary submission I made yesterday which is: it's text in light of context and purpose, not purpose and then try and retrofit it to the text.

WINKELMANN CJ:

Well, the Bill of Rights Act might change that though, mightn't it?

MR PERKINS:

Well, s 10(1) of the Legislation Act still talks about text in light of context and purpose.

WINKELMANN CJ:

Although the Bill of Rights Act tells that the overriding purpose that we should look at is rights-affirming and consistency.

MR PERKINS:

And we say a provision like s 61 does affirm the rights of persons who are otherwise discriminated against by reason of colour, race, ethnic or national origin.

If I am able to move on to a different question that I was posed by Justice Williams, and that was whether, on our analysis, the entirety of the Human Rights Act might be considered a s 19(2) measure?

1010

I equivocated a bit on that and I have had the opportunity to sort of think it through a little bit more. Our submission would be, there is no inherent problem with an entire enactment being considered to be a measure taken for the purposes of s 19(2). That is, there is no evident reason why only a particular section or part of an Act might be the measure taken as opposed to the enactment in its entirety.

I don't think anyone would suggest that the Human Rights Act, as a consolidation of New Zealand's human rights domestic law and in order to give effect to our international obligations, wasn't enacted in good faith.

We do say that the Pt 3 dispute resolution mechanisms in the Human Rights Act 1993 assist or advance those who have been disadvantaged by discrimination that's unlawful by reason of Pt 2. So, on that analysis, stepping it all through, the Human Rights Act in its entirety would appear to meet each of the elements of what we say s 19(2) authorises. But it does beg the question: to what end?

It's difficult to conceptualise anyone suggesting that the Human Rights Act is discriminatory such that it needs to be saved by something like s 19(2). So if I just take the question that was put to me, on that analysis, would the Human Rights Act in its entirety be a s 19(2) measure? My answer is there's no reason why not. But it does raise the question about who would be asking that question and why, and in what context?

The third issue that I took to consider overnight was what we might learn from s 29 of the Human Rights Commission Act of 1977, and if I could have that brought up, please. Just to remind the Court, in 1971 we've had the Race Relations Act, which contains a provision quite similar to this. And then in 1977 we have the Human Rights Commission Act. The principal purpose of the Human Rights Commission Act was to expand the grounds of discrimination beyond those we might group together as the racial grounds to other grounds: sex, marital status, religious belief, and ethical belief. So that's what else is

happening elsewhere in this Act, and we'll take you to some of these particular provisions. And actually, I might just take you to s 19 now by way of an indication.

So, this is a prohibition deeming that it will be unlawful for a firm consisting of partners to refuse to offer a person admission to the partnership, et cetera, by reason of colour, race, ethnic or national origins. So that is bringing forward grounds that were already prohibited and applying it in the context of partnerships, but also bringing in new grounds, sex, marital status, religious or ethical belief.

And, just returning to s 29, if we're to think of this as an affirmative action measure or a positive measure – just back to s 29, please – we note that s 29 only saves or authorises measures that advance persons on the basis of colour, race, ethnic or national origin. So you see that the other newly added grounds of discrimination are not supported by this measure to ensure equality or this affirmative action-type provision.

In my submission, there's two ways the Court could read this, and I submit – I just do also want to contextualise this, this is just by way of background legislative history to how we get to s 19(2) in 1990. But there's two ways you could read this. One is to say that racial affirmative action is expressly authorised by s 29, but not other types of affirmative action (that is, sex-based affirmative action). Or you could read it as: s 29 authorises racial affirmative action, notwithstanding it does not also assist or advance other groups that might reasonably be seen to need assistance or advancement by the inclusion of this Act.

So, I think it's striking that this Act authorises some types of affirmative action provisions, if you want to call it that, in relation to colour, race, ethnic or national origin. But doesn't authorise it in relation to other grounds that it has just recognised. And so this idea that different grounds might be advanced in different ways at different times is implicit in s 29 at that time.

Now, we do say that when that gets carried forward into an analogous provision, it lops off (b) by the time we're getting to the Bill of Rights Act. But an analogous provision has expressly contemplated this idea that some groups might be advantaged by particular measures and other groups who might also need assistance or advancement will not necessarily be advanced by those measures, and that that will not constitute discrimination.

That's all I wish to say about the Human Rights Commission Act.

A final question I wished to address was whether would I suggest it is a commonly held understanding of whether the Bill of Rights Act and in particular s 19 confers or prescribes negative rights, or confers positive rights, is something that has any support or authority outside just the Crown position. And so I want to just take the Court to paragraph 10.179 of the *White Paper*, which led five years later to the enactment of the Bill of Rights. I'll just wait for that to come up.

So, from the *White Paper*, starting at the second sentence of that paragraph: "It is concerned almost exclusively with what are commonly called 'civil and political' rights, and, indeed, not with all of those. They are the rights for which the citizen seeks protection against the Government and Government officials, rather than against intrusion by other citizens. Further, they are principally negative rights in that they impose a duty on the State to refrain from infringing them. They do not impose positive obligations on the State to do something."

And I simply use that to illustrate the point that it has been inherent in the conception of the New Zealand Bill of Rights, and distinct from what was happening with the Canadian Charter a few years earlier, that our Bill of Rights was more modest. And it is designed to principally be around negative rights, and that's why we have freedom from discrimination in s 19, as opposed to the more positive and substantive equality right in the Canadian Charter, which is literally headed in s 15: "Equality Rights." And I referred you to the *Kapp* case of the Supreme Court yesterday which recounts what the shift in Canada in

1982 meant moving from a more negative conception to a more positive conception.

WILLIAMS J:

Wasn't it, didn't *Kapp* really say, that s 15(2) is the substantive clause which allows substantive acts to achieve equality? So it doesn't, it really doesn't say any more than that. It doesn't turn Canada into a socialist State, any more than it already is.

MR PERKINS:

I accept that and I probably don't need to go – the point I wish to make simply is that the idea that our s 19(1) is a source of a negative "the State shall not" type-right, as opposed to different conceptions of rights, is, in my submission, supported by the *White Paper*. I don't think I need to go very far into where Canada is, and I wouldn't profess to have enough of an understanding of their jurisprudence and situation to be able to authoritatively say that. I simply point to this idea that ours is a negative Bill of Rights, a freedom from interference by the State in certain domains, has been an underpinning concept in the Bill of Rights since the *White Paper*.

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WILLIAMS J:

Yes, I don't think Canada in its context would take any different view from that.

MR PERKINS:

About New Zealand or about itself?

WILLIAMS J:

No, about Canada, that theirs is a negative Charter in the sense that it prevents discrimination, but that s 15(2) entitles positive measures to be taken to achieve substantive equality – acknowledging that formal equality can sometimes give an incorrect impression of the state of equality in a community. And I don't really read s 19 as saying anything different. I mean, it's in New Zealand words, because I presume that's based on the fact that there had been 15-odd years

of experience of an affirmative action clause in New Zealand, and the drafters probably didn't want to introduce new language from Canada when we had experience of the same sort of mechanism here.

MR PERKINS:

You can see that when the Parliamentary committee examining the Bill of Rights says, oh, we could just pinch something from Canada that looks like their s 15(2). And then you actually look at the language of what our Parliamentary drafters did and what our Parliament enacted and it is different to what Canada enacted.

WILLIAMS J:

Yes, but it's the same as what's in – what was in the Human Rights Commission Act.

MR PERKINS:

And that's why – not entirely. So there's two –

WILLIAMS J:

But that formula.

MR PERKINS:

Yes, the first – there's two, there's a subsection (a) and a (b), subsection (2) of the Human Rights Commission Act.

WILLIAMS J:

Right, subsection (b) is gone.

MR PERKINS:

Subsection (b) is gone, because that is much. Subsection (b) is in the Human Rights Act 1993, I think it's s 73. So that idea that: "Measures to ensure equality," having that subparagraph (b) persists when it comes to the Human Rights Act. But in terms of what was enacted in s 19(2), it's very much focused

on what I would describe as a New Zealand flavour of provision which draws upon our own heritage of the 1971 and 1977 Acts in ss 6(a) and 29(a).

WILLIAMS J:

Okay.

MR PERKINS:

All right, if I might turn to s 5, and obviously I'll –

WINKELMANN CJ:

Well, can I – before you do, can I just ask you to clarify for me, are you conceding that but for the s 19(2) argument, this is discriminatory?

MR PERKINS:

I don't think I need to. I advanced yesterday an alternative view about what s 19(1) means. And that view would say that whether you call it affirmative action measures or you call it measures that seem to engage s 19(2) are not truly discriminatory. And I took you through authorities to support that. On that view, you might consider that's not discriminatory. And the reason I'm advancing that in a slightly hedged way is not to be evasive. It's because the Court directed focus on s 19(2) and s 5 in its grant of leave, and so – and it's in recognition of the fact that a s 19(1) argument, the Crown has been unsuccessful on below and so we took the hint that we were to focus on s 19(2) and s 5, and that's what we have done. So that's why it's presented in that hedged way.

WINKELMANN CJ:

Well –

ELLEN FRANCE J:

Oh, sorry, I was just going to say I understood you to say yesterday that at the outset you were developing the idea if no material disadvantage, then it's not s 19(1) and that it wasn't s 19(1) for the reasons you gave?

MR PERKINS:

Yes, so there's two strands. Thank you, Justice France. There's two strands to that argument.

And they are interdependent. We say they are – one, is you could say that on that view which we traced through from Geoffrey Palmer through to the Parliamentary committee through to Grant Huscroft, these types of measures don't constitute discrimination at all.

The second dimension of the argument is: well, even if you bring the traditional discrimination analysis of material disadvantage to bear, there isn't one here. Because groups other than groups defined by colour, race, ethnic or national origin are not disadvantaged. It's just that those groups received some additional protection.

And then I made the point about this is not a zero-sum exercise. Just because some groups get something against a baseline of no prohibition of speech generally, except for those criminal offences we discussed yesterday, that's not a disadvantage.

WINKELMANN CJ:

Okay, well, can I ask you two questions that probably fit into the category of stupid. If you look at s 19(1): "Everyone has the right to freedom from discrimination on the grounds for discrimination in the Human Rights Act 1993." The grounds of discrimination are not just the stipulated s 21 grounds – but on your argument are they also the prohibited acts of discrimination? How do you read s 19? Do you read it to prevent discrimination just per se on the basis of religious beliefs? Which is something we were discussing yesterday afternoon. Or do you read it to prohibit discrimination on the grounds, say, of religious belief in employment for – in professional organised associations, partnerships?

MR PERKINS:

I think a more natural reading of grounds of discrimination takes you to s 21, because it does talk about in s 21 in the chapeau: "... the prohibited grounds of discrimination are—". That said, there are other contexts in –

WINKELMANN CJ:

So you don't need to bring yourself within one of the specific prohibited forms of discrimination?

MR PERKINS:

Contexts, for the purposes of s 19(1). For the purposes of s 19(1) I would say no.

WINKELMANN CJ:

Is there any authority on that?

MR PERKINS:

Not off the top of my head. I do think that it's an important point to make, though, that as we get into the provisions after s 61, I think it's – Ms Kiel, if you could bring up the index to the Human Rights Act. For example, there is a form of unlawful discrimination which is referred to as effectively being a victim of family violence. And I'm not sure how something like that naturally fits with one of the s 21 prohibited grounds. I mean, the Court may take judicial notice that family violence is something that women are much more likely to experience than men, but not exclusively, so s 62A: "Adverse treatment in employment of people affected by family violence." So that is another form of discrimination. You'll see that that comes under an italicised heading: "*Other Forms of Discrimination*". It doesn't sit very neatly with any of the s 21 grounds. There is a substantial overlap with sex, but not an exclusive one.

So to come back to the question you've asked me, Chief Justice, s 19(1) I think primarily hooks into the s 21 grounds, but it might also hook into other things like being affected by family violence as a form of discrimination.

ELLEN FRANCE J:

If your complaint is under the Human Rights Act, would that suggest that your focus is then on the various ways in which that Act says you can't discriminate?

MR PERKINS:

If you were to invoke the Human Rights Act rather than just bringing a straightforward s 19 claim in the courts, yes, it must be. You can't engage the Pt 3 mechanisms of the Human Rights Commission unless you are discriminated against on one of the prohibited grounds in one of the prohibited contexts.

Chief Justice, I think you had a second question for me?

CAMPBELL J:

Just before she asks that.

WINKELMANN CJ:

No, well, it's all right, carry on.

CAMPBELL J:

In relation to the question that the Chief Justice just asked, two things. One, it does strike me as rather odd that s 19 simply refers to the grounds of discrimination and not the prohibited grounds. But am I right that in its previous iteration before amendment I think in 1994 it set out the grounds specifically, and that they mirrored the ones that were then prohibited? And this is in a way – one could read the s 19(1) reference to the grounds of discrimination in the Human Rights Act, if you like, as a shorthand.

MR PERKINS:

Justice Campbell – between 1990 when the Bill of Rights Act was enacted and 1994 when it was amended, there was a much more specific itemisation of what we would now call the prohibited grounds that were applicable at that time. That's described in paragraphs 25 and 26 of our written submissions, that evolution. I think there might have been a year where age might have been

protected in one and not the other, as drafters tried to catch up to each other. And I think by the time we get to the enactment of the Human Rights Act in 1993, rather than just continuing this itemisation, a different drafting technique was adopted, which was just to cross refer into the Human Rights Act.

1030

WINKELMANN CJ:

Okay.

CAMPBELL J:

I've got a, I'm not sure if the Chief Justice used the word stupid question but this, if she did, this may fall into that.

WINKELMANN CJ:

It was stupid question.

CAMPBELL J:

In relation to the question whether s 61 is discriminatory, you answered by reference to material disadvantage. But I've got a prior question about differential treatment. And the Tribunal and the two courts below said there was differential treatment by, as I understand it, comparing those who are subject to or potentially subject to what I will call racist hate speech under s 61 and groups of persons who might be subject to sexual orientation hate speech. And, as I understand it, in the Tribunal the Attorney-General argued that every person of whatever sexual orientation had the same protection under s 61, and so there was no differential treatment.

My question is, whether the appropriate comparator is between the various groups who could potentially be the subject of hate speech on the basis of all the other grounds in s 21 that are not yet captured by s 61, because all of those groups are treated in the same way. That is to say those who might be the subject of religious hate speech or disability hate speech –

MR PERKINS:

Or sex or gender, yes.

CAMPBELL J:

– have no protection equivalent to that under s 61 and so why is that not the appropriate comparator?

MR PERKINS:

I don't see any reason why those other groups which might as a – which, I mean, the Court can take religious hate speech is the easiest, and the one which has been most frequently considered should it be in, should it be out, and it was a recommendation of the Royal Commission following the mosque attacks in 2019 that it should. And so why shouldn't we compare persons who experience hate speech by reason of sexual orientation who don't receive protection to persons who don't receive it, because they might experience religious-based hate speech? There is no reason why you couldn't or shouldn't.

I think the instruction from the courts over time has been the search for comparators can sometimes become a little bit arid, and the Crown has not had good luck in that regard in terms of the comparator-type analysis. And so having – that's not something we've directly advanced. But it's far from a stupid question with respect your Honour and that is certainly an available comparator analysis.

That said, the case law tells us there isn't necessarily one right comparator analysis, and that is part of the aridity of a search for: this is the definitive comparator set. And so I would respectfully submit that that is an available comparator set which could be considered.

WINKELMANN CJ:

But that's not what you're advancing. I don't think it is, anyway.

MR PERKINS:

I'll take it, any point I can get.

WINKELMANN CJ:

So can I ask a follow-up question, because the reason I asked you about s 19 – because of the conversation we had yesterday, my mind started to go into some horrible sort of freefall. Because if s 19 is not read as you say – if it is read as speaking not just to s 21 but also to the prohibitions, then there would be no discrimination here. Because you have specific protections from discrimination in the Act as opposed to a generalised – so, s 19 will protect the specific acts of discrimination which are prohibited under the Act as opposed to just affirming the right not to be discriminated against on the s 21 grounds per se. Do you see the point?

If there is no discrimination on that reading of s 19, there is no discrimination. I mean, it's not an argument I particularly find attractive, but I just have a horrible thought about it. If you read s 19 to when it says about grounds of discrimination to mean not just s 21 but also the acts of discrimination, then it would only protect people who are in the protected categories from those acts?

MR PERKINS:

I think the way I'd like to answer that question, Chief Justice, which I think I understand now, is ss 19(1) and 19(2) speak in different ways, so –

WINKELMANN CJ:

Well, I have a follow-up question about that.

MR PERKINS:

My submission is that s 19(1) brings in all of the grounds of discrimination in the Human Rights Act, whether we call them what we've always used as shorthand, prohibited grounds s 21, or other aspects of other grounds, family violence –

WINKELMANN CJ:

I mean, it might be better to refer to the s 21 people as protected groups for our purposes of our discussion, because then you've got the prohibited particular acts of discrimination.

MR PERKINS:

And then you have this third category of, taking the family violence example that I used earlier, which is not a neat or clean fit with any of the prohibited grounds, which isn't obviously to underplay the lived experience of domestic violence and family violence, I should say. But it is a third – almost a standalone ground on which discrimination is prohibited under the Human Rights Act.

So, my submission is, and then when you get s 19(2) it actually specifically refers to Pt 2, so it zooms in on those contexts in Pt 2, whereas part of the answer to this might be Pt 1A of the Human Rights Act which is where – which is, I guess, State interference with the prohibited grounds, or State discrimination on the basis of prohibited grounds. It's not constrained to the particular context that you then see later in Pt 2. It's more at large.

WINKELMANN CJ:

Right, okay, well that's very helpful, thank you. Now, the next question is, s 19, is there an available reading – and I don't know if anybody has proposed this, because I am now confused about who is proposing what reading – other than yours, I am very clear about yours – that s 19(2) is not really talking about the protections in the Human Rights Act, but is actually saying: "And furthermore, if people take affirmative action to protect people from discrimination then that is not discrimination"?

MR PERKINS:

Sorry, can you –

WINKELMANN CJ:

It's a sort of "and in addition" kind of point – as opposed to protecting the negative rights? Because I was just thinking, on your construction of the obligation not to discriminate, you construct it as purely negative. So it is hard to see any scenario, including under the old Race Relations Act, where you could argue it's discrimination – just to not discriminate against an individual on that ground. It's hard to see how that itself could cause someone else to claim that they have been discriminated against.

But if you are taking affirmative action to assist or advance the protected groups, then it could be. So, is it a possible reading that it's “and in addition”, as opposed to somehow qualifying s 19(1)?

MR PERKINS:

I'm trying to think about it through the lens of a hypothetical Women on Government Boards Act, which mandates a quota, and the animating idea that there may be a group of men who consider that that has unduly discriminated against them because they don’t have a protected position in terms of access to a quota requirement. And I think we all accept that one of the things that s 19(2) must do is to recognise the historical disadvantage in employment and partnerships, et cetera, that women have experienced. And a measure like that ought not to be able to be impugned by men, because it is absolutely within the terms of s 19(2).

WINKELMANN CJ:

Yes, so what I am saying is s 19(1) is about the work the Act does which is: don't actively discriminate against me, don’t shut me out of jobs, et cetera. But s 19(2) could be about when you enact legislation like that which is positive.

MR PERKINS:

And then the men coming along and saying, you're shutting me out of board positions because you've enacted that provision. And it's saying, no, no, no, you can't do that.

WINKELMANN CJ:

Well, that’s against your argument though, is it?

MR PERKINS:

I’m not sure?

WINKELMANN CJ:

I think it is?

MR PERKINS:

Can I move to s 5? I am very conscious my friends will have things to say.

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WINKELMANN CJ:

Yes, right.

MR PERKINS:

Section 5. So obviously the Court only reaches s 5 if you find against us on ss 19(1) and 19(2). And that obviously provides that a limitation on rights, here right to non-discrimination, must be able to be justified in a free and democratic society. There's three principal arguments that I want to advance, and then an analytical approach which I think I do need to spend some time on. So the three principal strands to the argument in support of justification: New Zealand's international obligations; parliamentary appreciation; and institutional competence.

I want to spend a little bit of time on an analytical approach. Mr Kirkness yesterday made a good deal of what he says is the failure of the Crown to engage in what is sometimes called a structured proportionality analysis, or other times called the conventional *Hansen* analysis. I think it must be noted that none of the Human Rights Review Tribunal, the High Court, or the Court of Appeal approached this with a *Hansen* test. And I think each of them were grappling with the fact that a test like *Hansen* is particularly inapt in circumstances of what is being alleged as legislative under-inclusion.

And just to take you to a passage from the Court of Appeal, paragraph 105: "... 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" – by enacting s 61 – "to limit anyone's rights."

Our submission is a *Hansen* analysis, whilst it is often helpful, may be, and we say is, inapt in a case like this. Now, I think my friend Mr Kirkness yesterday

was pointing to the fact that cases in which this Court has said that *Hansen* may not always be necessary were cases that involved judicial review of administrative action. And he pointed to *Moncrief-Spittle* and *Four Members of the Armed Forces* as both judicial review-type cases, notwithstanding they had a Bill of Rights dimension to them, rather than a case like this where a primary enactment of the legislature is being considered.

I can accept that both those cases were judicial review cases. But I think there's some important passages in there, and I'll take the Court to paragraph 88 of *Moncrief-Spittle*: "To illustrate the New Zealand position, in the context of considering whether making an order that a child sex offender be placed on the Child Sex Offender Register [the judges of the Court] … said that it will not always be appropriate to go through all of the steps in *Hansen*."

Then skipping down to paragraph 89. "We agree that it is necessary to adjust the steps undertaken as part of the proportionality inquiry to reflect the particular context." And the Court then goes on to specifically focus on judicial review cases.

My submission is that whilst we might be able to contrast judicial review versus s 6 interpretive-type cases and say a *Hansen* analysis remains appropriate in those s 6 interpretation-type cases, this is not one of those. This is a case for a straight out declaration of inconsistency. There is not an interpretive exercise being undertaken here.

Indeed, it's not just a declaration of inconsistency case in the way that *Taylor* and *Chisnall* and *Make It 16* were. It's one about an under-inclusive measure. And we say that there that is a different species of case from the s 6 type case in which a *Hansen* analysis has been traditionally used as a helpful way of thinking through proportionality.

So I'm going to bring up *Chisnall*, of this Court, at paragraph 197, a straight declaration of inconsistency case.

"We accept that, as the Human Rights Commission submits, *Hansen* remains adequate and appropriate, for the reasons the Commission advances. Having said that, although the *Hansen* methodology breaks the proportionality exercise down into steps, the s 5 issue is not amenable to a paint-by-numbers exercise."

And I think there was a flavour of submissions from my friends yesterday that we are inviting the Court to shirk or to not undertake the s 5 justificatory case. That is not our submission. We accept s 5 is necessary. We are just saying that *Hansen* is a test that the courts have found useful in the context of s 6 interpretive cases and have also found useful in the context of some applications for declarations of inconsistency. Our submission is: it is not helpful in a case such as this, involving an under-inclusive measure.

Now, against me I do need to acknowledge that in *Vriend*, the Supreme Court of Canada case, yesterday, the Court did embark upon its *Oakes*-style assessment of whether the Alberta legislature's under-inclusion measure was one that could be demonstrably justified. And it worked through its fairly standard methodology, although it was a very unsatisfactory position the Court found itself in, because the Albertan Crown equivalent, I'm not sure how they style themselves in the provincial courts, didn't advance a very persuasive or comprehensive evidential case. But they did move through a traditional s 1 Charter analysis, which is equivalent to our s 5.

WINKELMANN CJ:

What's wrong with the *Oakes* analysis for an under-inclusive measure?

MR PERKINS:

Well, as the Court of Appeal said, there's an awkwardness to trying to, what are you actually assessing? Are you assessing the Human Rights Act in its entirety? Are you assessing s 61 specifically? Are you assessing the absence of a s 61A which deals with sexual orientation hate speech? There's some really difficult questions that one needs to grapple with as to what you would

actually be doing in terms of analysing legislative purpose, minimal impairment, all the traditional steps the Court might go to.

We say that there is a risk in terms of actually obscuring the real exercise in a case like this, of one of legislative under-inclusion, which is an ultimate assessment, and this is paragraph 245 of *Chisnall* where the Court says: "… the ultimate assessment, whether the balance struck in that legislation 'between social advantage and harm to the right' was proportionate."

And so it's just a caution against what I've heard described by Professor Knight, referring to somebody else, as "stepification". We need to not lose sight of what the s 5 task is actually about by introducing a level of structure and analysis which is inapt in the circumstances.

WINKELMANN CJ:

But isn't identifying the underlying question – doesn't that require you to work out what it is you're assessing?

MR PERKINS:

In *Vriend* the Court had a bob three ways. They looked at the Act in its entirety. They looked at the particular provisions. And they looked at the omission. And I think the fact that the Court was trying to look at it through three different lenses shows the level of artificiality that is involved in trying to bring a traditional *Hansen*-style analysis, or an *Oakes* analysis, to a case of legislative under-inclusion.

We say that because this issue of justification, in our submission, turns upon issues of New Zealand's international obligations, but also some fairly acute issues of parliamentary appreciation and institutional competence – is another reason why, as all the Courts and the Tribunal below did, moving through some ritualistic set of steps is unhelpful and tends to occlude the real issues here.

This is not a case of social or empirical analysis where you might expect, or you might ask for legislative fact evidence to be brought to justify a limitation on

rights. It's a case which turns on legal and constitutional considerations, not social or empirical facts.

It's well-traversed in our written submissions how you map s 61 against New Zealand's international obligations, and I don't take it to be contested that it is. In the *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 case, the High Court gave some consideration, which we respectfully adopt, as to how this provision works in the context of New Zealand's broader international obligations.

I don't think it's contested that international law imposes an obligation of corresponding weight on New Zealand to prohibit hate speech on the basis of sexual orientation. That was identified in the *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) case, which is in the authorities. And that was the position in the early 2000s when that case was decided and it remains the position.

And we say that the distinction it draws in New Zealand law between colour, race, ethnic or national origins, being those grounds on which hate speech is prohibited, and the remaining prohibited grounds of discrimination on which hate speech is not prohibited is one that is readily explicable by reference to New Zealand's international obligations.

It reflects the particular obligations New Zealand assumed in relation to racial discrimination which, as was averted to yesterday, are rooted in the experience of World War II, decolonisation, and desegregation. Racial discrimination has always been considered by the international community and New Zealand to be especially pernicious. And that is not to say that hate speech experienced by groups on the basis of their sexual orientation is not pernicious, but it is to acknowledge that racist hate speech has played a particular role in the international community and New Zealand, and provides an explanation as to why Parliament has addressed it in the way it has.

The second point I want to make, before calling on Ms Kiel, is to recall Justice Tipping's comments in *Hansen* at paragraph 108.

We have expressly tried very hard not to use the word deference in our submissions and we haven't, with all the notions of servility that that connotes and that Lord Hoffman bridled against. But at paragraph 108, whilst acknowledging the significant review role given to the courts, I do just want to pick up at line 12 of what's on the screen: "The concept of a society being democratic, and the express reference to that concept in section 5, suggests that some weight should be given to Parliament's appreciation of the matter."

I think that was a point being averted to by Justice Williams yesterday. And just coming down to paragraph 111, this is at line 37: "…there is a place for some latitude, greater or less according to the circumstances, to be given to Parliament. The concept of a free and democratic society signals the kind of values which the Bill of Rights is designed to protect. But it also signals the need to give appropriate weight to the fact that a limit has been democratically enacted."

Now, it has never been our law that the courts, when conducting the s 5 analysis, should take an absolutist view and have no regard to what happens in the elected branches of government. In the sense that you're being invited to just decide the law and then let Parliament work out the messy politics, we say that's never been part of the s 5 analysis.

Just going down to paragraph 116, and this is at line 34 – sorry, I'll start at line 32: "How much latitude the Courts give to Parliament's appreciation of the matter will depend on a variety of circumstances. There is a 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 closer to the legal end of the spectrum, the greater the intensity of the Court's review ...", the flipside of that being that the closer it is to the political, social, and economic decisions end of the spectrum, the intensity of review might be

different. And obviously, we're not using intensity of review in the way that we do – it's sometimes talked about in the judicial review context.

Indeed, the Court of Appeal, and I won't take you to this passage, but at paragraph 108 considered that: "... the issues arising" – in this proceeding – "are very much at the end of major political and social decisions, as opposed to those which have a substantial legal content."

I'm going to invite Ms Kiel to take the Court through the consideration that's been given by the elected branches at various points over the last four decades as to the scope of hate speech prohibitions.

WINKELMANN CJ:

Can I just ask you though, before you do that, Mr Perkins, well, how do you say – does this stop us doing the *Hansen* analysis at all? I mean what's your point, where does it come in?

MR PERKINS:

It doesn't stop you doing the *Hansen* analysis at all. It simply says that the way in which you approach a proportionality analysis, whether that's *Hansen* or some other approach, may be more or less exacting in terms of the choices Parliament has made by reference to where it sits on that spectrum identified by Justice Tipping. And we say, and the Court of Appeal said this, it sits very much at the political and social end of the spectrum in which some greater latitude to Parliament's choices ought be accorded.

WILLIAMS J:

That's really to say that there's no political consensus on this? Stay away from it?

MR PERKINS:

I will ask Ms Kiel to address you on the actual give and take of it all. It's not our submission that it's anything as crude as a whip count or inviting this Court to look at how close or how far things have been from obtaining a majority in the

Parliament at various points over the last four years. And if by putting the coalition agreement into the case on appeal – it should not be taken as our position that you're to look at the real politic of it all and say: well, Parliament's had a go at this a few times, it's probably going to have a go at it a few more times. The courts should have regard to whip counts or vote counts and calibrate what they do accordingly.

Our point is a more subtle one than that, and it's to say that this is the kind of issue which Parliament has grappled with and which reasonable people in terms of where you draw the lines, have differed about over various points in time. And that debate has been going on for 40 years and it will continue to go on. It's not to say that the – it's to make the point, it's not as if Parliament has overlooked this issue. It is something that has been grappled with and will continue to be grappled with.

WINKELMANN CJ:

The difficulty with that is that it's actually ignoring the commitments that Parliament has made in another context. If on your analysis – the point we're at in this analysis is that a determination has been made that this is a limitation on the right, and we are set the task under the Human Rights Act to determine if it's justified in terms of s 5 of the Bill of Rights Act. And so how can we properly say, oh, well other people think it's a hard question? It just seems like an abdication of the role.

MR PERKINS:

With respect, I would say it's not – it doesn't need to be that absolute. It recognises a spectrum that was first identified by Justice Tipping. And, indeed, this is the kind of thing the UK Supreme Court has grappled with in the context of *Nicklinson* and assisted suicide. There are some issues which are very much in the space of political contestation. That's not to say the courts don't have a role in relation to them. It's just that the Court's role – the Court has particular institutional competencies in relation to issues like legal rights, fair trials, those sorts of things. And that's why *Hansen* was an example where the Court felt it

could see the issue clearly and had an institutional competence that justified it acting in the way it did. This is at a different end of the spectrum.

WINKELMANN CJ:

Well, it's at a very different end of the spectrum, to go back to yesterday's discussion, to *Nicklinson*. So it's not as if anybody would plausibly say that opinion is divided about whether it's okay to direct hate speech at the protected groups. But people might plausibly and in fact do plausibly and convincingly argue both sides of the assisted dying debate. So that's a finely balanced social and ethical issue, whereas this is not. No one would really say it's not terrible to direct hate speech at protected groups.

MR PERKINS:

After Ms Kiel's address to you, and I'd like her to do that now, I will engage with your question, Chief Justice, in the context of institutional competence. It is not our submission that hate speech in relation to groups who are defined by sexual orientation is desirable or to be condoned. And we've expressed in our submissions a whole cohort of ways in which it is not. But I do want to make the submission to you that not all types of hate speech are the same or need to be regulated against in the same way, and there are some complex policy issues involved. With that –

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WILLIAMS J:

What's – sorry. What's clear is that there are three groups within these articulated groups who have been historically uniquely subjected to oppression and violence. These are groups defined by race, defined by religion, and defined by sexual orientation. There are other forms of discrimination in respect of other groups. But those three groups are the ones who have been subjected to particularly pernicious forms of oppression in which incitement through hate speech has often been a trigger. It may be that, while the politicians find it difficult, the lawyers are the appropriate ones to take the first step in order to assist in the discussion and the resolution of this problem.

MR PERKINS:

To answer, with respect, Justice Williams, I think there are other groups who have been the subject of pernicious forms of hate speech, gender-based violence and incitement to hate speech.

WILLIAMS J:

Not – I mean, I'm not deprecating that.

MR PERKINS:

I wouldn't necessarily accept that those are the only three.

WILLIAMS J:

Organised mob violence against those three groups has been widely recorded throughout history and often has been incited by inflammatory speech by purported spokespeople for other communities.

MR PERKINS:

And I would suggest, whilst accepting that proposition, it is not precisely the same types of hate speech that have led to precisely the same places – or need to or should be regulated in the same way.

WILLIAMS J:

Yes, my point is really that this, the political difficulty of this, may end up counting against you, as it has in New Zealand's legal history in other contexts. Often the courts take the first step and the politics follows, or chooses not to. But often it follows.

MR PERKINS:

It's not to deny the role of legal reasoning in the task that has been given to this Court and to the senior courts and the Tribunal in this country of calling it out when the tests are met: unjustifiable discrimination. And the courts work through these issues using a different set of values and reasoning processes than might be used on the other side of Molesworth Street. And so I don't disclaim that sometimes courts can, within the proper bounds of their

constitutional role, take steps that are politically difficult for others to take. I accept it cuts both ways.

Ms Kiel is going to take you through some of that parliamentary history, that history of consideration by the elected branches now, and then I'm going to briefly return to talk about institutional competence and remedies. And then I need to leave some time for my friends.

MS KIEL:

As my colleague explained, I'll be taking the Court through the history of how the elected branches of government have considered expanding the prohibitions against hate speech to groups other than those defined by their colour, race, or ethnic or national origin. And I've just had him share on the screen paragraph 76 of our submissions, which he has already outlined for the Court today.

We say there, the justification inquiry here turns on legal and constitutional considerations, rather than social or empirical facts. And 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.

And I'll be addressing the Court on the second consideration referred to there, which is the history of proposed reforms to the provision. In doing so, I'll make the point that there has in fact been consideration about the expansion of the prohibition, yet the elected branches of Government have not yet enacted any change.

Mr Perkins will then tie the history that I outline to the Crown's s 5 submissions, particularly that any expansion of the prohibition is a policy judgement involving the balancing of competing rights, social harms, and practical considerations. And that judgement falls in an area in which Parliament should be afforded substantial latitude.

I'll begin my outline by speaking to the section of our submissions that begins at paragraph 90. The Race Relations Act was enacted in 1971, and for the first seven years that it was in force it contained provisions prohibiting discrimination on the basis of race and criminalising the incitement of racial disharmony. During that period there was no corresponding civil prohibition against hate speech.

Then in 1977 Parliament enacted the Human Rights Commission Act, and relevantly that Act did two things. It added the civil prohibition to the Race Relations Act, and that was s 9(a), and it introduced new grounds of prohibited discrimination, including sex, marital status, and religious or ethical belief. And we say at paragraph 91 of our written submissions that the timing of both of these things is notable because despite the grounds of prohibited discrimination expanding, there was no equivalent expansion of the criminal or civil prohibitions against hate speech to address other forms of non-race-based hate speech.

Next, in 1987 it seems there was a suggestion that a prohibition ought to be considered against hate speech directed at groups defined by their gender or religion. But at the time, the Human Rights Commission cautioned the Government against this, explaining that there were already concerns about the limitations on free speech as a result of the pre-existing prohibitions, and there were concerns about the workability of the civil prohibition – particularly in light of the significant burden upon the Race Relations Conciliator's workload at the time.

Then in 1993, the Human Rights Act comprehensively reformed New Zealand's anti-discrimination laws. In particular, it expanded the grounds of prohibited discrimination to include sexual orientation, and it reinstated the civil prohibition on racial hate speech. In response to submissions made, the Department of Justice advised the select committee that was considering the Bill that no comparable need had been demonstrated to prohibit hate speech directed at groups other than those defined by their colour, race, or ethnic or national

origins. And ultimately no expansion of the prohibitions was pursued in the context of the Bill.

In 2001 the Human Rights Act was amended, and the select committee considering the amendment Bill received submissions that the prohibitions ought to be reviewed with a view to extending them to protect other groups who were protected from discrimination. However, the Committee declined to take those suggestions up at the time.

More recently, following the 2019 Christchurch mosque attacks, the Government commissioned a review of both the criminal and civil prohibitions in the Human Rights Act. Subsequently, in 2020 Cabinet agreed to extend both the prohibitions on hate speech to all of the groups protected from discrimination in s 21 of the Human Rights Act. However, in 2022 a government Bill was introduced to the House to amend the criminal and civil prohibitions – but only in relation to speech directed at religious belief. Simultaneously, the government referred to the potential expansion of the prohibitions to the remainder of the grounds listed in s 21 to the Law Commission for its consideration.

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Then, in 2023, the government withdrew the Bill that was proposing the expansion to speech directed at religious belief as the subject matter was with the Law Commission for its consideration.

Then, following the 2023 general election, the government withdrew the Law Commission reference insofar as it related to hate speech, focusing the Law Commission instead on hate crime.

WINKELMANN CJ:

I think the Law Commission made a recent recommendation in this space?

MS KIEL:

I understand it was focused on hate crime rather than hate speech.

WINKELMANN CJ:

Right.

MS KIEL:

There's nothing in the case on appeal at this time with that information. Unless you –

WINKELMANN CJ:

Well, we've got the Human Rights Commission. We might be able to ask.

MS KIEL:

Unless the Court had any questions about the outline I've provided, Mr Perkins will now continue the s 5 submissions for the Crown.

WINKELMANN CJ:

Thank you, Ms Kiel.

MR PERKINS:

Your Honours, in the interests of time, I am going to just focus on three matters now and leave my written submission to speak to the rest. The first point I want to make, tying together what Ms Kiel has addressed you on, is that these are difficult issues of policy which different organs of government have grappled with at different points in time. And they are not – the point I was making to Justice Williams a few moments ago is that not each type of hate speech will necessarily be best responded to in the same way.

And to illustrate this point regarding different types of measures being apt to protect the interests of different types of groups, but also the very complex policy questions that are involved when you're working out how to balance the rights of different groups, I just want to take the Court to the authority that was handed up yesterday which is the Conversions Practices Legislation Act.

It's inserted an offence provision in s 63A of the Human Rights Act. And I think Justice Campbell noted that that is something which is specifically focused on

the needs of groups who have experienced and continue to experience discrimination on the basis of sexual orientation.

Perhaps the more important point for my present purposes, though, is the definition of "conversion practice" that is given in s 5(1) of the Conversion Practices Prohibition Legislation Act. I am just going to have Ms Kiel bring that up, and I don't propose to take the Court through this in any detail, except to illustrate that when the elected branches of government need to grapple with how the rights and interests of different groups in society need to be balanced in these very complex areas, it requires substantial thinking and substantial policy work. And the definition of "conversion practice", and the examples of conversion practices that are given, are illustrative of the kind of complex issues and trade-offs that need to be grappled with here.

Section 5(2)(f) is an example: "(f) the expression only of a belief or a religious principle made to an individual ... not intended to change or suppress ... sexual orientation, gender identity, or gender expression," is not a conversion practice. And so that's the Parliament trying to balance legitimate religious expression from protecting people who have historically and continue to experience sexual orientation discrimination.

So, I'm not making a submission that sexual orientation hate speech cannot be limited in a manner that is consistent with s 6. It can be justifiably limited, because of the harmful effects it has. It's just noting that how you go about balancing rights, where you draw lines, the possible chilling effects that has on people who are outside those lines but don't realise they're outside those lines, are complex ones. They involve policy trade-offs which the elected branches of government have a particular institutional competence to determine. It is not –

WILLIAMS J:
Is that really the case with hate speech though? I mean, it either is or it isn't, there's no real complexity there.

MR PERKINS:

With respect, your Honour, s 61 of the Human Rights Act which talks about – we've used hate speech as a shorthand for actually a very complex statutory provision. And in terms of threatening, insulting, harming, public place, publications, there are some real policy issues to grapple with.

WILLIAMS J:

I mean, these are ideas that have been in the law for, in fact they've been in the common law for centuries. They're pretty familiar concepts. We're not talking about advances in medical technology and, you know, what makes a conversion a conversion and what isn't a conversion. We're just talking about speech that incites, encourages, or threatens. Incites violence towards, encourages, or threatens these things.

MR PERKINS:

And it's my not submission that that would be an unjustified limitation on either right to religious expression, or the right to expression more generally. My submission is a more nuanced one than that, is that others' rights are engaged, not just those who might be committing or inciting violence or committing hate speech, but those who might have their speech chilled –

WILLIAMS J:

Yes, well, that's –

MR PERKINS:

– because they're on the penumbra of that. These are complex issues and I just would – it's not like *Make It 16*, where the Court could say: well, Parliament, you, if you want to make your electoral acts rights-consistent, strike 18, write 16. The issues are much more complex in this space and so they –

WILLIAMS J:

But they're familiar issues to lawyers. The balancing of expression against non-discrimination is a common lawyer conundrum. There are probably thousands of cases on this throughout the rule of law world.

MR PERKINS:

My point is this your Honour. The regulation of other forms of hate speech, such as sexual orientation hate speech, involves questions of balancing competing rights, social harms, practical considerations, international obligations, as well as political judgement. The elected branches of government have a unique institutional competence to do that, and they've been grappling with the issue for four decades.

Your Honours, I need to, the final point I want to make, which is something on s 5, which is something the Chief Justice raised with me yesterday and I said I'll deal with at this point, which was what do I mean by "chilling effect"? And it's something I took up with Justice Williams yesterday as well, that one of the – thinking through where New Zealand was when it ratified the Race Relations Act in 1971, the enactment of the Bill of Rights Act in 1990, the introduction of sexual orientation as a prohibited ground in 1993 has – putting those things together, if we're to end up at rights inconsistency in a declaration, that has a ratcheting effect. Because it brings in a whole bunch of groups who are not otherwise thought would require this protection when New Zealand made that international commitment in the early 1970s.

The point was made yesterday that society moves on. And that can, of course, be accepted. But my submission is it would require a very different process to be undergone before New Zealand accepts other forms of international obligations, which it would be expected to replicate in its domestic law. Because it's going to require thinking through, well, who else might benefit, or who else, notwithstanding there is no international convention, is in a similarly situated situation, and what obligations are we signing up to in respect of those?

And so this ratcheting effect, I think, is a legitimate concern to which this Court must consider, as the Court of Appeal in particular below did, that this – that is a consideration as to why some leeway towards Parliament, or even withholding a declaration as a matter of remedial discretion, might be appropriate in this case.

The final point I want to make about remedy is just to respond to some points Mr Handford made yesterday. The actual wording of the declaration in this case is prescribed by s 92J(2) of the Human Rights Act. So this would not be a *Taylor*-type declaration, or a *Make It 16*-type declaration where an application has been brought in the senior courts at –

WINKELMANN CJ:

Section 92J, is it?

MR PERKINS:

Section 92J(2), and the prescribed form of declaration in this case is that the enactment is inconsistent with the New Zealand Bill of Rights Act and cannot be justified. And so I would say that it's not a matter at which the Court is at great liberty to fashion a different type of declaration.

But it does raise the question of, what is the enactment that is being referred to here? Is it s 61? Is it the Human Rights Act in its totality, because it doesn't have sexual orientation in s 61 or a "s 61A" that deals with sexual orientation in a similar but different way? So that is the bit that is at large.

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WINKELMANN CJ:

Has there been any consideration of the ability of the Court, of the Tribunal to add words, amend, et cetera? I mean is that, has that been read as a non-negotiable prescription as to the wording to be used, or as to the substance of it?

MR PERKINS:

I'm not going to take a guess at that now, your Honour –

WINKELMANN CJ:

Mr Kirkness is giving you a hint.

MR KIRKNESS:

I was just going to say, your Honour, and Mr Perkins may recall this, there was a discussion – so, none of the counsel here were involved in the Tribunal or I believe the High Court. But in the Court of Appeal there was some discussion of this issue that Mr Perkins may not recall but I'm happy to cover that.

WINKELMANN CJ:

Oh, you can cover that later, yes.

MR PERKINS:

I think probably the best way is if I just do a bit of research and if there is some meaningful discussion of this in the Human Rights Review Tribunal's jurisprudence we can file a memo. I'm sure Mr Kirkness and I – or if there's a particular way it was dealt with in the Court of Appeal that it is just not coming through right now, I'm sure Mr Kirkness and I –

WINKELMANN CJ:

Because I think in *Chisnall* we accepted the argument, which was not of course under the Human Rights Act, that the form of the declaration also performs an educative function.

MR PERKINS:

Yes.

WINKELMANN CJ:

So it would for instance be useful to actually for instance just stipulate the name of the enactment and the particular provision and why the inconsistency.

MR PERKINS:

I think it actually – sorry, and I shouldn't be taking it, just saying the Court would just say the enactment. I think the Court has actually got to fill in there what it means by the enactment. Is it s 61? Is it the Human Rights Act in its totality? What is the enactment? I do think that's something the Court and the Tribunal at first instance can supply. But in terms of questions about "is inconsistent",

has not been justified – well, it doesn't even say that, it just says "is inconsistent" is the rest of the language. I'm sure Mr Kirkness and I can come to an agreement about remedy.

WINKELMANN CJ:

Right, okay, "is inconsistent".

MR PERKINS:

As the Court pleases. Thank you.

WINKELMANN CJ:

Thank you, Mr Perkins. So, Ms Yáng. Don't rush.

MS YÁNG:

Your Honours, just preliminarily by way of structure, I will be dealing with the issue of s 19, and then my learned colleague Mr Pilkington will address your Honours on s 5.

WINKELMANN CJ:

Thank you.

MS YÁNG:

I know your Honour said don't rush but I am conscious of time and I want everybody to have an opportunity to reply, and so I thought in the eight minutes before the break I might go through at a high level the key points that the Commission would like your Honours to take away in relation to s 19. And then after the break we, you know, might get into a bit more of a detailed discussion.

So, the first point in relation to s 19 for the Commission is that s 19 broadly is about substantive equality. By substantive equality, what we mean is the principle that identical treatment in all cases can produce unfair outcomes. And fairness sometimes demands that we treat different groups differently. That's all that we mean by substantive equality.

The second point is that discrimination and equality are necessarily a comparative and relative concept. So, when we say whether something is discriminatory it's something is – it's because A has been treated or has suffered effects differentially as against B.

Because of that, and this is point 3, because of that, when we're talking about affirmative measures, an affirmative measure can both be ameliorative or discriminatory depending on which groups we are comparing. In other words, which relationship of groups we are looking at.

And that leads to the fourth point, which is s 19(2) should be read only to apply to those relationships where the measure, the affirmative measure, is intended to be remedial between. Another way of putting that is that s 19(2) really only applies to claims of "reverse discrimination". A reverse discrimination claim being a claim where the measure is said to be discriminatory against the very group whose relative advantage is the reason for providing that measure in the first place.

And then the fifth point, which follows from that interpretation of s 19(2), is that s 19(2) does not apply to this case because this case is not a reverse discrimination case. And the correct methodology is just to apply, go through the *Atkinson* test in s 19(1), and if that is made out then the analysis proceeds to s 5.

That is the broad shape of the Commission's position. Before I go into those points in detail, I thought it might be useful to just address the question of comparators which your Honour Justice Campbell raised earlier, and about the first stage of the *Atkinson* test. And there are two things I want to say about that.

The first, is that the comparator is framed in the cases in *Atkinson* and *CPAG* as a useful tool in the analysis. What is it a tool for? It is a tool for identifying whether there has been differential treatment between two groups on a prohibited ground, and whether or not that treatment or those effects result in

material disadvantage. That's the purpose of undertaking a comparison. And so it is not very useful, in my submission, to ask, well, what about this other comparison we could make? Because there are always other comparisons that we could make. The question is whether the comparison that is being made in the claim that is brought discloses discrimination in terms of the limbs of the *Atkinson* test.

The second – sorry?

CAMPBELL J:

Does that mean the claimant just chooses the comparator group?

MS YÁNG:

In my submission, yes. And if the comparator that the claimant has chosen is not appropriate, then chances are it would not disclose discrimination under the *Atkinson* test. But if it does disclose discrimination under the *Atkinson* test then it is appropriate to move to s 5.

CAMPBELL J:

What does not appropriate mean in this context?

MS YÁNG:

Sorry, I?

CAMPBELL J:

Your answer was that if the claimant hasn't identified an appropriate comparator, then there won't be discrimination. So my question is what do you mean by appropriate?

MS YÁNG:

So, if the comparator – if the claimant has identified a comparator, say that is too different or too far removed, what often you see is that when you make that comparison, you do not find that there is differential treatment that is on the basis of a prohibited ground. The differential treatment – you make that

comparison, you see the differential treatment is on a different ground, it's because of something else. So that's all I mean. I don't mean, by appropriate I don't mean that it's not a correct comparator or anything like that.

WILLIAMS J:

Can you give us an example of that phenomenon?

MS YÁNG:

Of?

WILLIAMS J:

Of the choice of the wrong comparator producing the result you're suggesting? Unfair question this close to the break?

WINKELMANN CJ:

So for instance, in the criminal justice sector, that's often the example, isn't it, where people are treated differently on the grounds of mental health and some – yes, I can't construct it either, it's a pretty tricky question he just asked you, that all I can say.

But I follow you. I can see your point, but is that always true? I mean, is there something other than, that comes into the comparator group, which is not – probably not, actually, it's a compelling account you just gave, Ms Yáng.

1130

MS YÁNG:

The issue of comparators is a very vexed issue, and I think in the interests of time I would direct your Honours to footnote 58 of the appellant's submissions.

WILLIAMS J:

Is that reference to your article, is it?

MS YÁNG:

There are other articles in there.

WILLIAMS J:
So but we should read your article, is that what –

MS YÁNG:
It might be helpful.

WILLIAMS J:
It gives us the answer? Okay.

MS YÁNG:
There are various authorities.

WINKELMANN CJ:
There's also a reference to you in it, Justice Williams. We'll take the morning adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.48 AM

MS YÁNG:
Your Honours, before the break I said I had two things to say in relation to your Honour Justice Campbell's question, and the second thing was just in relation to the idea of indirect discrimination.

Not only do we prohibit differential treatment, we also prohibit differential effects on or along the lines of prohibited grounds that cause material disadvantage. And so just in relation to that, all I would do, for the sake of time, is direct your Honour to the case of *Vriend*, which is at the appellant's authorities, tab 19, paragraph – I want to say 82 – paragraph 82. And there's just a discussion there about the disproportionate impact that a neutral provision can have as between heterosexual and homosexual people.
1150

ELLEN FRANCE J:

Just one thing. I don't take you to be saying, well, it's just up to the claimant in terms of what the comparator group is. But just in terms of, you know, there's no right or wrong, this Court in *McAlister v Air New Zealand Ltd* [2009] NZSC 78 did say the comparator has to be the best fit for the statutory scheme. So to that extent at least that's suggesting some sort of legal yardstick?

MS YÁNG:

It may do. The difficulty, at least for me, is how one applies that yardstick, and I have difficulty thinking about how that would translate to an actual case.

ELLEN FRANCE J:

Well, in *McAlister* I suppose you get to the point of saying: you've been using the wrong one, you know, the comparator is, in fact, different. This is the pilots, you know, and the age. So I think there may well be situations where the particular statutory scheme does lead you to a specific comparator.

MS YÁNG:

There may be, yes. I will accept that the statutory scheme may make certain classes of comparator more obviously relevant than others. Because they're, as I said, you can compare against any group and there will be comparators that are just irrelevant for the purposes of the question that you're asking, yes.

So, I thought I would talk a bit about substantive equality. We've set that out in our submissions, and I don't need to labour why we say that the principle of substantive equality just comes across in our s 19 jurisprudence.

What I will say, because I think there was some discussion with the Crown about the negative right or the positive right, substantive, formal. And I wanted to clarify the idea that substantive equality is as opposed to formal equality. That, as an analytical distinction I suppose, is distinct from the positive/negative distinction. You can have a substantive conception of equality, and you can also at the same time have a negative conception of the right. Those things are not, I guess they're not the same thing.

And, of course, we don't say that substantive equality is the test, because it's not. The test is *Atkinson*, under s 19(1) and, to the extent it's relevant, s 19(2). But we do say that, bearing in mind that this is the underpinning principle. It informs the way that we think about s 19 and it informs how we interpret in particular s 19(2) and, as I'll come to, there is an interpretive choice for this Court in relation to that provision.

So, my second point was that discrimination and equality are comparative concepts. Equality is measured as between groups A or B, and in this way s 19 is unique among the Bill of Rights Act rights. There may have been some discussion yesterday about, you know, whether if under-inclusion is an issue under s 19 could that also extend to the other Bill of Rights Act rights? And what I would say is that under-inclusion is a phenomenon that is unique to s 19 because of the relative nature of discrimination and of equality. Unlike the other rights which specify the particular content in the provision – the right to life, the right to a fair trial, the right to freedom of speech – the right not to be discriminated against, what that specifically requires, is always by reference to what some other group has or does not have.

And it's also for that reason why it's not correct for the Crown to say that because there's no entitlement to hate speech protections, therefore no material disadvantage can arise from s 61. It is the fact that s 61 provides a benefit to certain groups that other groups do not have access to which gives rise to the disadvantage. It's the relative nature of that comparison, and we also address that in our written submissions at footnote 43.

WINKELMANN CJ:

Footnote, sorry?

MS YÁNG:

Footnote 43.

WINKELMANN CJ:

Forty-three.

MS YÁNG:

And so, I come to point three, which is that it doesn't make sense in light of the relativity, the comparative nature of equality, to think about affirmative measures in binary terms. And I think there has been a tendency to do that, to say, well, is this measure discriminatory or not? The question is, it can be discriminatory as against group A, but it can also at the same time be ameliorative as between groups B and C.

So, just to elaborate on that a bit, a measure is usually enacted to address an inequality between some groups. Let's say A and B. Because of just – because of reality, a measure that applies to group A in order to ameliorate disadvantage against group B can also affect the position of group A as against group C. And when we're looking at that relationship the measure might be discriminatory in the context of that relationship, despite the fact that it is ameliorative in the context of the relationship between A and B.

And so, this is the point I made earlier which is that one measure can be discriminatory against A or B, and at the same time not discriminatory as against C, D, E, F.

It matters who it is that is claimed to have been discriminated against. And so, from the Commission's perspective, the real question is not really whether this measure assists or advances, whatever that might mean. Because a measure that does assist or advance in one context can at the same time create inequality in the context of another relationship. And the real question, I think, from the Commission's perspective, is: how should s 19(2) respond to that reality?

WILLIAMS J:

How does the comparator group cope with the B and C scenarios?

MS YÁNG:

I'm not sure I understand the question.

WILLIAMS J:

The comparator group question.

MS YÁNG:

Yes?

WILLIAMS J:

How does it help with deciding which is the – well, no, let me put it this way. When deciding whether something is discriminatory rather than ameliorative, how does the comparator group tool help us distinguish between group C and group B for the purpose of legal analysis?

MS YÁNG:

I don't think that analysis helps us –

WILLIAMS J:

Oh, really?

MS YÁNG:

– because that analysis is directed at a different question. What tells you whether we're looking at A or B, or B and C, is who – in simple terms, at least, in this case – who the claimant is. In other words, who it is that is said to have been discriminated against. Because the ameliorative measure applies to some other group out there. Let's say that's A.

WILLIAMS J:

Yes, so traditionally unoppressed group versus traditionally oppressed comparator group.

MS YÁNG:

Yes, yes.

WILLIAMS J:

Sorry for using the word "comparator." That's your B and C scenario?

MS YÁNG:

I've confused myself with the letters that I've used, but I'll take your Honour's word for it.

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The comparison that we make – so, if the allegation is that the majority group or the advantaged group, let's say, has been discriminated against, then that is a case, that is a situation, where we would say s 19(2) applies, because the purpose of s 19(2) was to prevent claims of reverse discrimination. It was to prevent, in a case where you provide scholarships for women only in an area in which women are under-represented –

WINKELMANN CJ:

Well, can I ask you something there?

MS YÁNG:

Yes.

WINKELMANN CJ:

What form could a complaint by, say, men in that circumstance take, because they'd have no grounding under the Human Rights Act to complain of discrimination? So this is the argument against you, I think, that s 19(2) doesn't really have anything to bite on unless it's actually a complaint into, say, the protected groups? Because it's not discrimination that's unlawful.

MS YÁNG:

Oh, not – because it's not unlawful by virtue of Pt 2 of the Human Rights Act?

WINKELMANN CJ:

In terms – yes.

MS YÁNG:

The Commission doesn't read s 19 as literally and as technically as that, and the authors of the Butler text take the same view. I think they say that that sort of phrasing was just a ham-fisted way of saying that the grounds in the Human Rights Act are – measures under s 19(2) should be aimed at addressing discrimination faced by the protected groups under the Human Rights Act. And the Commission endorses that view.

WINKELMANN CJ:

Yes, but my point is that there's really no form, legal form for – s 19(2) seems to be stopping the advantaged group complaining of discrimination. There's actually not a legal pathway for them to do so. And that – I mean I don't think that's necessarily an argument against you, because, in fact, the *White Paper* said it wasn't necessary – for that reason probably. But then it was included as a belts and braces thing to make it clear peradventure, maybe, perhaps?

MS YÁNG:

Yes, I suppose I was thinking about a situation where the measures provided by a public body, that would fall under s 3 of the Bill of Rights Act, in which case one might say: well, that's discriminatory against me under s 19.

WINKELMANN CJ:

Is that a, if you're not a protected group, is that a possible pathway? So, if you're a, say, you're a white male who doesn't fall into any of the protected groups?

MS YÁNG:

Well –

WINKELMANN CJ:

I suppose they could say it's on the basis of gender?

MS YÁNG:

Yes. The ground of sex is symmetrically protected under the Human Rights Act.

WINKELMANN CJ:

Yes, so that would be the format, right form, yes.

MS YÁNG:

Yes, so technically you can –

WINKELMANN CJ:

Most people could bring themselves within one of the protected groups in some form.

MS YÁNG:

Yes.

WINKELMANN CJ:

So men would be the classic thing. And back in the 1970s when women were being allowed rights they hadn't previously had they could've said they were being discriminated against.

MS YÁNG:

Yes, yes. So, that is – sorry, I think I was in the middle of answering your Honour's question.

WILLIAMS J:

You were.

WINKELMANN CJ:

Sorry about that.

MS YÁNG:

That is the claim, that is the type of the claim that we say s 19(2) applies. If the claim is different, it's not that a disadvantaged group is being discriminated

against, it's that a different disadvantaged group in a different protected ground is being discriminated against, then you're looking at a different situation. I forget if it's an A and B situation, or a B and C situation, but you understand what I mean.

WILLIAMS J:

So your point is, you always need a comparator group in order to make your – you must be able to identify the group against which you are being discriminated?

MS YÁNG:

Yes, who it is that it is said to be discrimination against.

WILLIAMS J:

Yes, it's not everyone but the claimant group, if you like. It's never everyone but the claimant group?

MS YÁNG:

Yes, usually the claimant group is the group that is said to have been discriminated against.

WILLIAMS J:

Yes, but the comparator is not everyone else.

MS YÁNG:

Oh, no.

WILLIAMS J:

It has to be –

MS YÁNG:

No, the comparator is the group that, in this sort of case, anyway, the group that is said to have the benefit that the claimant group does not have.

WILLIAMS J:
Yes.

MS YÁNG:
I'm just conscious of time. I'm content to rely on our written submissions in relation to the interpretive choice about s 19(2). I think I've made it clear what our position on that is. I would just refer your Honours – I won't go into it, but just to refer your Honours to the case of *Giggle for Girls Pty Ltd v Tickle* [2026] FCAFC 64, which is at the Crown authorities, tab 7. And just very briefly, that was a case about a similar provision in the Australian Sex Discrimination Act 1984.

The case there was about an app that was said to be – the purpose was to provide a safe space for women, but the app excluded transgender women. And so the question was whether the app was a special measure for the purposes of s 7D of the Sex Discrimination Act and therefore could not be discriminatory on the basis of gender identity.

And the Court there found that, no, s 7D does not prevent claims of the sort that was being brought in that case. And I would direct your Honours in particular to paragraphs 68 to 74 of that judgment.

The last thing I would note about that judgment is that since we filed our written submissions, the High Court of Australia has declined leave to appeal in respect of that judgment and the citation for that decision is [2026] HCADisp 209.

I think perhaps the last thing it might be useful for me to speak to is, well, I got the sense from various discussions that there might be a floodgates concern. If we take this approach to s 19(2), well, does that mean that everybody could bring claims about – on the basis of under-inclusion in relation to all sorts of measures? And there are a few things I want to say about it.

The first, is to caution against reason by instinct through hypotheticals without detailed facts, because so much of discrimination, historical discrimination, has

been as a result of assumptions that have been held by society and which have not been questioned.

Today, we look back at some of these assumptions and we find them quite alarming but the purpose of discrimination law is to discipline the analysis by stepping through the legal tests – and in our case, in our jurisdiction, it's the *Atkinson* test – to decide whether or not something is discriminatory.

And it's, I should say, that the *Atkinson* – as your Honour Justice France will be familiar with this, of course – the *Atkinson* test was very deliberately calibrated in terms of its two limbs.

There was debate in the early days about whether discrimination just means any sort of distinction? We've chosen not to adopt that approach.

There was also a question about whether we should import the Canadian approach (i.e., to require some sort of indication of prejudice or stereotyping, or...) –

WINKELMANN CJ:

Undermining of human dignity.

MS YÁNG:

Yes, undermining dignity – and the Court of Appeal chose not to go with that approach. So, it is a very carefully calibrated test.

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In addition to that, we have the grounds, the prohibited grounds that Parliament has set out in the Human Rights Act, and those grounds are, again, deliberately calibrated. Earlier, I referred to the fact that sex is a ground that is symmetrically protected (i.e., it protects all sexes). Some grounds are asymmetrically protected. An example of that is disability. Able-bodied people are not protected under the Human Rights Act.

And so Parliament has gone through and made these choices and the point that I am making is that we have the legal tools, deliberately configured legal tools, to determine whether or not something is discriminatory. And it is up to the particular case, it is down to the particular facts in each case, whether or not those tests are met. And if they are met then the case deserves to scrutinised under s 5.

WINKELMANN CJ:

And so that, the approach you've just articulated, I imagine you would also apply as a reply to the Crown's position in relation to deference to the political process?

MS YÁNG:

Yes.

WINKELMANN CJ:

Parliamentary process?

MS YÁNG:

Yes, I understood that discussion more to be in the realm of s 5, but certainly we would say that that's not a relevant consideration when we're talking about s 19.

WINKELMANN CJ:

Right, oh, so you're just on s 19 at the moment?

MS YÁNG:

Yes, sorry, yes.

WINKELMANN CJ:

I thought you were winding up your entire submissions.

MS YÁNG:

Oh, no, no, no. Mr Pilkington is yet to speak on s 5.

WINKELMANN CJ:

Okay.

MS YÁNG:

One last thing that I want to mention, and this came up in the Crown's oral submissions yesterday, because when it wasn't clear from the written submissions whether or not they were taking a literal reading of that final segment of s 19(2). And in our written submissions, we have discussed this very briefly at paragraph 31, but this is the point of the circularity.

If we are to take a literal textual interpretation that the Crown urges on your Honours, which is that s 19(2) only protects measures which are there to assist or advance the groups discriminated as a result of unlawful discrimination under Pt 2 of the Human Rights Act and, as I understood my learned colleague Mr Perkins yesterday, the Crown takes a very literal reading of that. And if that is the case, then it would seem to me that would undermine the Crown's position, because s 61 is the very provision in the Human Rights Act which makes hate speech unlawful. And so it could not be the measure that is designed to assist groups disadvantaged as a result of unlawful discrimination under s 61 itself. There's a circularity there.

WINKELMANN CJ:

That’s covered in your submissions?

MS YÁNG:

Yes, that's covered in our submissions at paragraph 31 but I just – it wasn’t, when we wrote those submissions, we assumed that. We didn't know if the Crown was taking a literal position.

WILLIAMS J:

Is the circulatory between, you say, in respect of s 19(2) because section –

MS YÁNG:

Section 61 –

WILLIAMS J:

– 61 is the very measure.

MS YÁNG:

Is the very provision that makes hate speech unlawful under Pt 2 of the Human Rights Act and what the Crown is saying –

WILLIAMS J:

Right, so s 21 is not the –

MS YÁNG:

No, no.

WILLIAMS J:

– is not the provision, I see your point.

MS YÁNG:

No, no, s 61 just lists the grounds.

WILLIAMS J:

Section 21, yes.

MS YÁNG:

Section 21, sorry, yes.

WILLIAMS J:

But what about the fact that it's focused on hate speech only, as opposed to other forms of discrimination?

MS YÁNG:

That’s – that’s all wrong? Don't know.

WILLIAMS J:

Doesn’t matter?

MS YÁNG:

No, that's – I don't see that as inconsistent with our position. So those were the points that I wanted to make. Did your Honour's have any further questions, no?

WINKELMANN CJ:

No. Thanks, Ms Yáng.

MS YÁNG:

Thank you, in that case, I will pass on to Mr Pilkington.

MR PILKINGTON:

Thank you, your Honours. What I was proposing to do was start with a brief point about proportionality. I then have four points about the place of deference within the s 5 legal test. Finally, if I have time, I'll say something about the Crown's justification.

What I was proposing to say about proportionality has largely been overtaken by what Mr Perkins has said today. The short point that we want to make here is that in our submission the reason that there is an awkwardness of applying an *Oakes* test is because no objective has been identified for the limit on Mr Hoban's right. And in my submission, that awkwardness is, in fact, acknowledged in *Vriend*. I won't go to it, but that is what we submit is causing the discomfort in the test.

I also understood Mr Perkins to suggest that there was a problem with applying an *Oakes* test or a *Hansen* test here in an under-inclusion case because it is unclear what you are assessing. And, in my submission, that is a question of characterisation of the limit on the right. The limit on the right here is the right to be free from discrimination, and the question would simply be: in what respect is s 61 of the Human Rights Act interfering or limiting that right?

ELLEN FRANCE J:

Well, one of the aspects, going back to if you look in *Hansen*, Justice Blanchard refers to the way Justice Richardson in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) looked at s 5. And the final factor he talks about is the effectiveness of the intrusion in protecting the interests put forward to justify it. And in this case, the interests put forward are presumably the International Convention and the need, the wish, to comply with that. And I'm just not quite sure how, on your sort of alternative analysis, which says, well, you've got to have an objective for the limit, quite how that fits in with that idea?

So, here you have something that no one is quibbling about. The compliance with the convention. So in terms of the effectiveness of the intrusion and protecting the interests put forward to justify it, that provides you with that.

MR PILKINGTON:

Let me answer this way, the way we would characterise this what we've called in our written submissions this “international instruments justification”, I don’t think that’s really an apt label. What I would describe that, I think that’s more properly described as an explanation. And in *Vriend*, I think it's at paragraph 113, there's a distinction drawn there between explanations for why a provision is the way it is, and a justification for the limit on the right. I'm not sure I would see it as the correct question as being about the interest in this case, that the rights limit is the omission of sexual orientation from s 61, that’s what is infringing or limiting Mr Hoban's s 19 right.

Now, to sort of take a hypothetical, you could have a case where an omission might be disclosed – excuse me, a legitimate objective. An example of that, you might say we have omitted hate speech protection on the grounds of sexual orientation because of free speech concerns. So, I mean, that might be an objective that you're pursuing, a legitimate objective through that omission.

But I mean, I think it really is the absence of a legitimate objective for the limit on the right that is causing the difficulty here.

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CAMPBELL J:

Is there a difference between, let's say, the position very soon after the enactment of the hate speech provision to give effect to the international covenants and the position that we're presently in, 30 or 40 years down the track? If this sort of claim had been brought straight away, and assume the Bill of Rights had already been passed and the Human Rights Act had the same expansive s 21 grounds, the Crown might say, well, we had to do this, we haven't got around to looking at the other protected rights yet. And that might be not just an explanation but a justification for the omission, because these things require investigation, analysis and take some time. But we're in a different position here because effectively there has been investigation, consideration, analysis and really a decision has been made not to fill the gap.

MR PILKINGTON:

There's a few aspects to that question. My short answer to your Honour's question, to the first part of your Honour's question, is no and – sorry, just before I answer –

WINKELMANN CJ:

You're very – what was the first part of his question?

CAMPBELL J:

My question was simply that if this case had been brought very soon after the hate speech provision had been enacted, the Crown's response could more easily be characterised not merely as an explanation but also a justification for the omission. But it gets harder to do that when, let's say, 20 years have passed without any decision having been made?

MR PILKINGTON:

So I wouldn’t – so the short answer on this question is no. I wouldn’t accept also what your Honour says – that it starts as an explanation and then somehow over time transforms into a justification –

WILLIAMS J:

I think it was the reverse, wasn't it?

CAMPBELL J:

It was the other way round.

ELLEN FRANCE J:

It's the other way round.

WINKELMANN CJ:

It's the reverse.

WILLIAMS J:

It starts as justification and ends up only as an explanation.

MR PILKINGTON:

Sorry, my apologies. But could I make good the "no" answer by taking your Honours to *Steinfeld*. And that is in the appellant's hand-up authorities, tab 2. And the key paragraph – so if I could pick it up at paragraph 41, sorry at paragraph 42 – I'm sorry, are your Honours there?

WINKELMANN CJ:

What page is it, sorry?

MR PILKINGTON:

Sorry, this is *Steinfeld* and it was handed up as part of the –

WINKELMANN CJ:

Yes, go it.

MR PILKINGTON:

Thank you. And at paragraph 42, you see essentially the type of justification that Justice Campbell has put to me being recorded. And that justification is rejected at paragraph...

CAMPBELL J:

It is in paragraph 42.

MR PILKINGTON:

Sorry, yes, in paragraph 42. And the distinction there that gets drawn is between a case where Parliament enacts a measure and that measure creates the inequality, if you like. And a case where Parliament is, over time, considering whether to address an inequality that it has not created.

WINKELMANN CJ:

In England, considerations such as Justice Campbell has referred to have been taken into account at the discretionary stage in relation to the issue of declaration, haven't they? Which, I mean, it's a hypothetical in a way, because we're not dealing with it, but just –

MR PILKINGTON:

Yes.

WINKELMANN CJ:

– if Parliament is actively engaged in the processes, and I should say England has its own particular jurisprudence in relation to the exercise of the discretion to issue declarations. But that's sort of allowing space – the political process has been taken into account, I think.

MR PILKINGTON:

Yes, I think in *Nicklinson* there was really two reasons that – there are really two reasons that Lord Mance gave for not making a declaration. And I think it's – I don't have it in front of me – but I think it's about paragraph 197 of the judgment. And the first one is that this is a vexed social issue that Parliament has considered on multiple occasions over time.

And the second point, which I think is quite important, is that this issue was imminently coming before the House of Lords. It was an issue that was about to come before Parliament and about to be considered, and we would suggest

that is really quite an important distinction. I would note also that that was, as I understand it, it was only Lord Mance and Lord Neuberger who signed up to that view. And there was, as your Honours know, there was an enlarged bench in that case and two judges, Lady Hale being one of them, was prepared to make a declaration, as I recall it.

Your Honours, I'm conscious of the time. The second point I wanted to make, I can make this point really fairly briskly, was, as your Honours know from *Chisnall* paragraph 252, s 5 imposed a legal standard that the Court has a duty to apply. And one thing that follows from that is that it's not open to the Court to abdicate the s 5 analysis. And we just wanted to draw attention to the fact that there's really more than one way abdication can occur, and I'll just go through these very briefly.

The first, is that the Court refuses to undertake the s 5 analysis. And, in my submission, that's really what the Court of Appeal suggested was appropriate in this case, at paragraph 125.

The second, is that the Court simply accepts another's judgement on the ultimate question of whether a rights limit is justified. And there are hints in the Crown's submissions of this being what it is inviting the Court to do. What I mean by – to be clear, I'm not suggesting, in saying that, that it's never open to the Court to give weight to Parliament's view. The point is that it is not open to the Court to simply accept Parliament's judgement that the legal standard in s 5 has been met.

The third form of abdication, which is – I won't go to it, but it's noted in Justice McLachlin's judgment in *RJR-McDonald* at paragraph 136, which is that the Court gives so much weight to another's assessment that the Court is not really forming its own judgment on whether the rights limit is reasonable.

That brings me to our third point, which is one thing that follows from proportionality being mandatory under s 5 is that the proper place of deference is within the proportionality analysis. What I mean by that is that weight may

be given at different steps in the analysis, and this point was also recognised by Chief Justice McLachlin at paragraph 37 in a case called *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567. I won't go to it, but it's –

WINKELMANN CJ:

Sorry, what was the name of the case?

MR PILKINGTON:

It's called *Alberta v Hutterian Brethren of Wilson Colony*. It's at tab 2 of the intervener's authorities, and the Chief Justice there said: "Where a complex regulatory response to a social problem is challenged, courts will generally take a more deferential posture throughout the s. 1 analysis ..." And you can see from, for example, paragraphs 53 and 55, what the Chief Justice means by that is that when you're giving weight, you do it at the different steps in the proportionality analysis, and you may give weight in different amounts to different questions within that analysis.

CAMPBELL J:

Which paragraph, sorry, was it again?

MR PILKINGTON:

Sorry, the –

WINKELMANN CJ:

Thirty-seven.

1230

MR PILKINGTON:

It was paragraph 37 and then I was just referring to paragraphs 53 and 55 as illustrations of weight being given at different steps in the proportionality analysis.

CAMPBELL J:

Thank you.

MR PILKINGTON:

Our fourth point relates to a submission that the Crown makes from paragraphs 99 to 104 of its written submissions, which is that the Court should defer to Parliament in this case by virtue of Parliament's constitutional role. This sort of constitutional propriety argument, if I can use that language, was met with scepticism in *Chisnall* at paragraph 252, where it was observed that it was in tension with s 5 in posing a legal test that the Court must determine is being met.

We respectfully agree with that observation and would add that respect for constitutional propriety is built into the s 5 test itself in the formulation of a proportionality test. As your Honours know, what s 5 does is require the Court to consider whether a limit is reasonable in a free and democratic society. That is different from the Court considering whether the specific limit is, all things considered, one that should be adopted.

That idea is carried through the *Hansen* proportionality test. So, for example, the first step asks whether the objective is "pressing and substantial". It doesn't invite the Court to decide whether, all things considered, the objective is one that Parliament should actually be pursuing.

Similarly, at the third stage of the analysis, the Court doesn't ask whether the measure is the one that's most calibrated available to its objective. It enquires about reasonable necessity.

The proportionality test, therefore, leaves room for a range of policy choices, rather than requiring the Court to identify the policy choice it considers optimal in a free and democratic society.

And just finally, my final point relates to when weight is properly given and how it's to be understood. In my submission, weight is properly understood as a device that helps the Court arrive at a certain conclusion. Just to give perhaps a trivial example, if one wanted to know if public transport in New York or London was better it would normally make sense to give weight to the view of

someone who had lived in both places. Similarly, in the context of s 5, weight is a tool that the Court must use to help satisfy itself that the legal standard in s 5 has been met. Weight should therefore only be given to things that are capable of assisting a court in answering the question s 5 requires it to answer.

In this case, it is difficult to see why weight should be given, given that the Crown has chosen to lead no evidence on justification. One reason that this makes it difficult to give weight is that the Court doesn't know what things have been taken into account, and how rigorously the issue has been considered. This is, therefore, like a case where you have an expert who on a very complex problem doesn't show any of their working, even though they could have. In my submission, that isn't a situation where weight would be given.

Your Honours, I note the time. Unless there's anything further?

WINKELMANN CJ:
No, that's fine, thank you.

We have some capacity to sit a little bit after lunch, but only a little bit after lunch, so I don't want people to feel too rushed. In terms, Mr Perkins, you have a – you'll respond after that?

MR PERKINS:
I'm anticipating five to 10 minutes, and I know Mr Kirkness would be keen to get away as soon as possible.

WINKELMANN CJ:
Right, so, Mr Kirkness, you're looking like you want to say something?

MR KIRKNESS:
I was just going to ask if it may be possible, given that I also expect to be quite short, whether it might be possible to sit a few minutes after one rather than take the full lunch break and come back?

WINKELMANN CJ:

Okay, yes, we should be able to.

MR KIRKNESS:

That would be of assistance, if that was possible. Thank you.

MR PERKINS:

I'll be as brief as I can. Two points of clarification or mopping up, as it might be. And then three points of response to the submissions you've just heard.

The first, goes to the issue of form of declaration which the Chief Justice raised with me just as I was about to sit down. I've had a discussion with Mr Kirkness and what we propose to do is to file a joint memorandum soon after the hearing which directs your attention to the particular wording of a declaration that has been used in s 92J cases decided by the Tribunal – I recall there being four – and also how s 92J might work with what this Court described in *Chisnall* as its more educative function when it comes to giving declarations. So, you'll get a memo on that by agreement.

WINKELMANN CJ:

When will you file the memo?

MR PERKINS:

That'll be next week, Chief Justice.

WINKELMANN CJ:

Thank you, so within seven days.

MR PERKINS:

Thank you. The second clean-up point is we got into a discussion regarding whether s 19(1), when it just refers to grounds of discrimination in the Human Rights Act, is just engaged in s 21 or it engages other grounds which might be found, particularly into those provisions in the "s 60s" of the Human Rights Act.

And I just note there are some – I don't wish to recapitulate my submission – but some of the implications of that might be protections for whistleblowers, as well as persons who experience family violence. So there are some, perhaps some slightly surprising consequences of that interpretation, which might need to be taken into account. And a reading of the Court of Appeal's decision in *Atkinson*, and particularly – I won't take the Court to it, but I think it's paragraphs 36 through to 38 – suggests that s 19(1) is referring more directly to the s 21 grounds rather than grounds that might emanate from elsewhere within the Act. So, I just think it's important the Court understands there's, without having directly considered that issue, I think that's a fair reading of what the Court of Appeal said in *Atkinson*, paragraphs 36 through to 38.

So, the three points of reply I wished to make to the Commission's submissions. The first is, and I commend the Commission for the way it kept to time, which I was unable to do, I had expected Ms Yáng to perhaps engage with the Court on paragraph 26 of her submissions, where she postulates some hypotheticals and invites the Court to prefer an interpretation of s 19(2) contrary to what the Crown advanced, because it would produce unpalatable or absurd results of the kind she describes at paragraph 26.

What I was going to say in response to that is a point that I made when I stood up today, which is one that s 19(2) contained within it the mediating influence of the good faith requirement. And so one can think of any number of hypotheticals of the kind the Commission advances at paragraph 26. And my submission is that the good faith requirement has work to do, and in each of these examples it is very difficult to understand how those kinds of distinctions may be good faith-based distinctions.

And I come back to the point I've advanced about the unimpeachable good faith of the New Zealand Parliament in 1971 and the re-enactment in 1973 – I beg your pardon, 1993 – of the racial disharmony provision, and which is one of the factors that we say is present within the terms of s 19(2) in a way that the kinds of hypotheticals the Commission described at paragraph 26 would not come within.

The next point I wish to make in reply to the Commission is just the *Giggle for Girls* reference that Ms Yáng gave you, and the only point I'd make is that only so much can be taken from the comparative jurisprudence in these sorts of matters.

We've spent a good deal of time discussing how the Canadian Charter s 15 is framed and uses different ideas and animating principles from our s 19.

And the other point I would make is: what counts or doesn't count as a special measure for the purposes of the Sex Discrimination Act in Australia will inevitably turn upon the specific statutory language that is used. And that's a very complex and difficult judgement, and I'm not saying don't read it. But I just do urge the Court to recognise that it can only take so much from the way in which other courts in other jurisdictions have interpreted other enactments. We say the language of s 19(2) is distinctly New Zealand language, and that is where the focus must be.

1240

The final point is really in reply to Mr Pilkington. He made a submission to you, very close to the end of his submissions, which was about effectively that weight has to be earned through showing the working out. And we would say, and we don't use the word deference, we use the term institutional competence. And what we do say is that Parliament and the elected branches of government more generally have a particular democratic mandate, understanding of the interests of their constituents and a representative character, which is important. And not everything is amenable to a detailed, worked out policy process.

Some things and I do say that I did make the point earlier, that actually the kind of policy process you would need to engage in to craft effective protections against hate speech, whether it's on sexual orientation or religious grounds, have actually got to be worked out in the particular circumstances.

I made the point to Justice Williams earlier that we've used the word hate speech in this appeal because the fuller formulation of insulting, threatening, inciting, et cetera, becomes very wordy but that must not detract from the Court actually looking at the very nuanced and complex provisions in s 61 and thinking about: these have been designed for the particular purpose of what's described as racist hate speech. Even if it is accepted there are other forms of hate speech, should they, must they, do they require protection in exactly the same way? Or do they have their own unique characteristics which require distinctive responses?

And I really urge the Court to be mindful of the significance of the actual statutory language used in s 61, and to not just as we all have inevitably used the language of hate speech and affirmative action in this proceeding. That's only been a shorthand and it must not detract from the actual words of the statute and understanding what it does, how it does it and how the needs and interests might be worked out in different ways and different contexts.

Unless the Court has some more questions for me, those are my submissions in reply.

WINKELMANN CJ:
Thank you, Mr Perkins.

MR PERKINS:
As the Court pleases.

WINKELMANN CJ:
Mr Kirkness.

MR KIRKNESS:
Thank you, your Honours, just a few brief points by way of reply to what we heard yesterday and this morning, starting with points on s 19.

In Mr Hoban's submission, when you are dealing with a s 19(2) issue as it is now before the Court with different interpretative approaches being floated, what you are essentially looking at, the nub of the issue, is that you have a provision that protects a prohibited ground and then also includes within it an effect that would be discriminatory under the *Atkinson* test, for example.

It has those two aspects to it. And the point here is that the Attorney-General's interpretive argument would operate so as to save the entire provision in both those aspects. It would in some ways throw a protective blanket over the discriminatory effect on persons on the basis of sexual orientation and prevent this Court from subjecting it to justification analysis under s 5.

That seems to us to be at the heart of the particular type of measure that is before the Court or the issues before the Court. And a number of different interpretative approaches have been floated and Mr Harris in exchange with Justice Ellis suggested that there wasn't perhaps one way through this. And I think to pick up on that point, the position Mr Hoban takes is that the interpretation of s 19(2) cannot have that type of effect that you are insulating the discriminatory aspect, the effect on, here, persons of sexual orientation, you can't insulate that in that way from scrutiny.

And as I understood the Chief Justice's proposition this morning about the way in which you might read s 19(1) and s 19(2), that would, for example, address this issue or make it simpler to address the issue and see it more clearly.

We would therefore, based on this point, endorse the Human Rights Commission's submissions at paragraph 25 of their written submissions. But this is the exchange that Ms Yáng had with Justice Williams on the ABCs, because that discrimination against whom is in fact the key point. When there is discrimination against the other group or targeted group, that should not be saved by a provision that is seeking to have a positive effect for group B.

And on that point, and the *Giggle for Girls* case that's been referred to a bit this morning which was introduced by the Crown into the authorities, that's at tab 7,

volume 1 of their authorities. We would commend that to the Court and in the interests of time simply say the Court will be interested in the observations on this issue at paragraph 74 of that judgment, albeit in the context of the Australian legislation it was looking at. But still the same problem being identified and a concern expressed.

The reason that an interpretive approach needs to avoid the effect of the Crown's approach is that it would then allow you to avoid perverse effects. Because to accept the Attorney-General's approach would be perverse, it would be arbitrary, and it would be rights-eroding, because you would be preventing scrutiny of something that would be discriminatory under s 19(1). And the Court should be slow to reach a conclusion that allows the Crown to avoid having to justify its conduct.

WINKELMANN CJ:

And that's where s 6 comes in, then.

MR KIRKNESS:

So that's the second point, your Honour, which is this is a different version of the proposition – that you could use s 6 interpretively. And the point I was going to make now but I won't make now is simply to say, actually, that would get you to exactly the same answer. So, however you approach it, that might be one tool. But we've set forward some interpretive approaches, the Commission has set forward interpretive approaches, the Crown has, and some of the members of the Bench have proposed some.

The distinction I'm trying to draw between those approaches and for the purposes of reply is the approach from the Crown would have that effect. A number of the other approaches would not have the effect of ruling out the ability to scrutinise the discriminatory effect.

So, I accept the point about the potential role of s 6 Bill of Rights Act, which has the same outcome, we say, as addressing the concern that perverse effects, arbitrary effects, concerns are identified first.

WINKELMANN CJ:

Ruling out the ability to scrutinise the discriminatory effect and to see whether it is justified, that aspect of it?

MR KIRKNESS:

Those two pieces to it, yes. Both ruling it out in the way that you would be seeking to insulate it from actually going through the s 19(1)-type tests that have been established to establish discrimination in this jurisdiction. And also, as a consequence, it would also foreclose justification. And both of those things – related but separate points – are ones to be avoided in any interpretation adopted. Whether that's just as a matter of interpretation on an effects-based interpretation, or if you're using s 6 as a tool, it simply can't have been what was intended by s 19(2).

The third point to make responds to the Attorney-General's claim about it being odd that Parliament should have been expected to protect all targeted groups at an earlier stage. And the example I think from yesterday was that Parliament could not have been expected in, say, 1993 to protect all targeted groups from hate speech, there's three brief responses.

First, the argument made is not that Parliament is required to enact legislation on hate speech on the ground of sexual orientation. What is being asked for, in this case, is that this Court issue a declaration of inconsistency which assists Parliament in its ongoing deliberation of these matters, or draws to its attention that there should be such deliberation of these matters to the extent that deliberation has ceased.

Second, societies change. The world moves on. And evidence of social harm becomes available.

1250

And third and relatedly to that last point, the time for assessing discrimination is when the case is heard. This isn't a situation where you take a freeze-frame of society and the evidence as at the time of enactment. Take 1993, for

example. This case has been brought a number of decades later, the world has changed, it's this world that we are assessing and the evidence that is available now.

The fourth point addresses this idea that once you go into the fray, you have to go the whole way. I think was the way it was framed by my colleague. This mischaracterises our argument. The case for the appellant is that once Parliament or government enters the field, Parliament or the government must answer and justify any discrimination that is unaddressed. And in many cases, the legislative or executive measure will be comprehensive in respect of the relevant harm, so there is no evidence that another group is affected by the same harm and has been omitted from the measure. The example that I discussed in exchange with Justice Campbell yesterday, conversion practices, we say fits within that type of category because it is directed at all those persons where the social harm of conversion practice has been identified. And there is no evidence that other groups, other prohibited grounds, could bring a claim saying that they were somehow disadvantaged.

Here, on our case, there is uncontested evidence that hate speech in respect of sexual orientation is something that is a harm that disadvantages persons because of their sexual orientation. So and what we say is, what you should not do is collapse the need to justify discrimination into a requirement to legislate. That is not what we have ever pitched this case as.

On the chilling effect argument about entering a field, there is no evidential basis for that statement. It seems to us this is contrary to the basic logic of the joint project of affirming, protecting and promoting fundamental rights and freedoms. The Court can, on the basis of the Bill of Rights Act, expect Parliament to be seeking to give effect to its own statute, or to be explicit about why it is not doing so. And to the extent that there is a lack of awareness, the Court's considered opinion is likely to assist and draw that issue to Parliament's attention. In fact, one might say that’s precisely why we have the pathways that Mr Hoban has used in this case.

The fifth point, we would simply endorse Ms Yáng's submissions for the Commission on the approach to comparator. The starting point is to take the claimant's choice of comparators as the aid to analysis. We endorse the discussion that she engaged and reasons she gave for why.

And the further point, fifth point and last one on s 19, in terms of potential future cases or possible other cases raising under-inclusion concerns in respect of the application of s 19, you have Ms Yáng's submissions about the particular nature of s 19 and how that operates.

We have endorsed those. But it is also important to recall that in order to bring and succeed in a case involving, let's say, under-inclusion, you would need to establish that a prohibited ground, one of the prohibited grounds, was at issue. That creates an initial frame, if you will. There would need to be evidence of a discriminatory effect, such that you could make it through the test developed by the courts currently known as the *Atkinson* test for assessing that. And then you would also reach the point where there may be situations where Parliament has a good reason for under-inclusion that would allow it to meet the burden of justifying the limit. So, there would then be the opportunity for the defendant to justify the limit.

So, this isn't a case where the spectre of multiple claims is something that should stay the Court's hand. There are robust analytical frameworks – this is a variant of the point Ms Yáng was making – that have been carefully developed by the courts to assess conduct and particularly in the context of discrimination, where some of the issues may not immediately be apparent on their face. Putting conduct or treatment through those analytical frameworks that the Courts have developed – I'm talking about the s 19 frameworks and the s 5 justification analysis – is important and an exercise that should be engaged with.

In terms of s 5, just a few points very briefly. The first of those is that it has been repeated again that there's this issue around the target in this case. What is it that is being analysed? And the Chief Justice made the point that once you

get to this stage of the analysis, what you're talking about is the limit. And we have been clear throughout that the limit is the omission.

And there's no difficulty in that, because s 20L(2)(b) of the Human Rights Act tells us that omissions must be justified under s 5. Parliament anticipates this type of need to address specifically the omission.

But it is a fairly fundamental point in this case, because in some ways it marks a fork in the road between how the case has been argued and how the Crown's responded to it. And so it is important that you do need to justify the omission. You can ask about other things that may also assist in that contextual exercise, but you can't get away from the need to justify the limit, which is the omission. And that's the case that's been put before the Crown and that's the case they needed to answer – and, in my submission, haven't done so.

On proportionality and the *Hansen* analysis, there's a mixing, in my submission, there was a mixing this morning of two different things. One is, do you need to do a proportionality analysis in order to meet the s 5 justification requirement? And the other is what type of proportionality analysis you need to do? And we have made both points in our submissions and we've put it fairly starkly. The engagement has primarily been with *Hansen* would be inapt – I think was the phrase used by my friend, my colleague, this morning. But that doesn't address why the Crown has not done a proportionality analysis at all.

I said yesterday that if there was going to be a variant to the *Hansen* approach advanced, it should have been advanced in more detail and elaborated upon throughout the course of these proceedings. And it hasn't been. That's a critique, but the real point is, you haven't actually done a proportionality analysis, even after we've called that out, whether that's a *Hansen* analysis or some other form of analysis. And I would simply point to what the unanimous Court, or this Court said in *Moncrief-Spittle* at paragraph 91, because I think as we talk about different versions of proportionality analyses that may be appropriate in different contexts.

Moncrief-Spittle was a case, as my friend said, where the Court decided that a different proportionality approach may be appropriate. And what the Court said that, in my submission, is the thread that needs to run through any of this type of engagement, is: "We should also make it clear that not applying the *Hansen* structured approach does not entail a lesser threshold." And we've said in our written submissions throughout that we don't say there is one test to be adopted. But we do say that it's proportionality and that you can't backslide on the threshold that the courts have developed for assessing s 5. And that is the point made in *Moncrief-Spittle* when the Court was looking at changing the test slightly.

We also then go on to say that in this case, it's appropriate to use the structured proportionality test as this Court has in other legislative limits cases. And my friend, my colleague, Mr Perkins quite rightly acknowledged that in *Vriend* that occurred. It also occurred in *Steinfeld*. It's exactly what the UK Supreme Court did too. And for our part, we have not heard any reason why we should not use it. The problem is the one Mr Pilkington identified, which is there has been a failure to advance or to articulate the justification for the omission. That's the fork in the road that's created the complexities in this case.

1300

There is a discussion around the international materials and the role they have here, the idea being that it's readily explicable why we have s 61. I think yesterday in exchange with Justice Ellen France, I accepted that. But to pick up on this readily explicable language in the written submissions for the Crown, it's an understanding is referred to. That is precisely the point that Mr Pilkington referred to and I referred to yesterday in *Vriend*, where a distinction is drawn between an explanation for a measure and the objective of the limit. And it is the objective – that's what the Crown needs to articulate at step one of the proportionality assessment, and that hasn't been done.

You do have an explanation for why we have s 61. It's different thing. And so we would simply say that for the same reasons as in *Vriend*, that logic means you haven't met that burden.

On the *Hansen* point –

WINKELMANN CJ:

What do you say about Mr Perkins' read of *Vriend*, which was it's discriminatory because of the whole thing was – it was an extreme – it was a detailed protective statutory scheme with one group left out?

MR KIRKNESS:

That is what *Vriend* was looking at, yes. We are here talking about, or the point I was making was the way in which the judges in *Vriend*, the Supreme Court in *Vriend*, made it clear how you used the justification analysis. What Mr Perkins is talking about there is the sort of macro issue in the case, that caused it to be a case. But once you get to the more specific point I am making, is in relation to how the Supreme Court said you apply that first step.

WINKELMANN CJ:

Yes, so he was calling it in aid of his argument that once you go – that your argument entailed the point once you go into the fray, you have to go the whole way. And he was saying *Vriend* wasn't really saying that?

MR KIRKNESS:

He was engaging at that point –

WINKELMANN CJ:

Yes.

MR KIRKNESS:

– and I'm relying on, so that separate issue –

WINKELMANN CJ:

Yes, so I'm asking you reply on that point, but I know I'm taking you out of your order, so do that when you wish.

MR KIRKNESS:

Thank you, your Honour. So *Hansen*, very quickly, it's just important to look at what Justice Tipping actually said, in my submission, so we're at volume 2 of the appellant's authorities, tab 5, paragraph 108. This is Justice Tipping, one of the judgments, only one, in *Hansen* and when I say only one it is because it is very difficult, in my submission, to construct a clean ratio in that case.

However – difficult for me at least – however, when you look at what Justice Tipping says here at paragraph 108, he says in the middle of his paragraph: "Parliament must therefore be taken to have disclaimed any kind of presumptive justification" – and we endorse that, so Parliament, according to Justice Tipping, has disclaimed any kind of presumptive justification – "simply because it has enacted the limit." He then goes on to conclude with this idea of weight, what weight: "... should be given to Parliament's appreciation of the matter."

And so that's where the distinction comes in between asking someone to give you a presumptive justification, which we say you can't do, not when it's your burden. And as essentially the Court said in *Chisnall* as well. And then going through an exercise where you put in the evidence and argument in support of why weight is appropriate.

Because if you do that, then the complexion of what the Court is faced with, what the Court is doing as it undertakes a s 5 analysis is completely different. The Court isn't faced with an argument, as it is in this case, which is talking about the roles of Parliament on the one hand, the role of the courts on the other as a constitutional impediment, the presumptive justification on democratic grounds. The Court is, there, looking at material that has been put forward in response to each of the steps in the proportionality analysis and assessing whether that material shows that a process has been followed where it may be appropriate to give some weight.

And that's one of the ways in which weight can be given that was contemplated by this Court in *Moncrief-Spittle*, where the process is robust and has been

followed in such a way, and I would say demonstrated to have been robust, that the Court says: we're going to give some weight to how this was done.

And there is a few different ways in which those sorts of epistemic concerns come through in *Moncrieff-Spittle* that we would endorse as all legitimate reasons for looking at institutional competence. But it goes back to my point I made at the end of my submissions yesterday, that isn't covered off by *Chisnall*, which is if you come to a court and you ask that court to give you weight, then in order to maintain a rigorous proportionality assessment the court is going to have to make sure that the reasons that are being advanced for weight to be given, whatever epistemic concern is identified – expertise, for example – have been made out cogently. It's not enough to come in and simply assert it.

And this really goes to the last couple of points that I wanted to make about two related points that my friend made this morning. He said, look, it's not as if this issue has been overlooked. That there's this legislative history, recent history at least, that suggests that it's been on the policy agenda. And that is, again, clear on the record that that has occurred in a chronological sense. Things were put into different fora for consideration and then removed from them, for example.

But what's really missing from that is that if this is being studied, if this is being considered, then the materials showing that are what the Court needs if it wants to use it for the purposes of doing the s 5 analysis. If you haven't provided those materials, if you haven't put forward cogent reasons of evidence, then you haven't discharged your burden. We said in our written submissions, again yesterday, this is a case where the burden is important, and it's important for that reason.

The second aspect of that, that is the same point essentially, is this idea that this is a very complex area of social policy. It may be. It may not be. But there's no real attempt by the Crown in this case to put before the Court even the very limited materials the Court has in, let's say, *Chisnall*.

That needed to happen, and this would have been a very different case. Because if that had happened, you might see evidence that this was a really complex issue of social policy. There might be, or might have been, evidence that issues were considered, judgement calls were made, and so as a result of that, this Court started to think that it was appropriate, because of that evidence, to give some weight to how those calls were made.

That isn't this case. And that would be a more difficult case in terms of the way s 5 worked, where you were essentially reaching that point that I think the Chief Justice put to me yesterday, that you might have a case where you had this genuinely vexed issue where you've considered a really well articulated and defended justification analysis, and the Court was concerned it couldn't actually give a clear answer, following its assessment, when incommensurability-type concern arises.

You might have cases like that. It's conceivable, but that is certainly not this case, because in this case there's been a tactical choice not to try to articulate and justify the omission. Not to argue proportionality. And simply to advance the reasons why we have s 61 and say that that's an answer. And that isn't how the well-established framework for assessing justification of limits on rights in this jurisdiction works.

And so, whether your Honours take it as a point, if your Honours reach s 5, at which point the question is, can you justify the omission which is discriminatory? If your Honours are at that point, then either it's as simple as you have not sought to do so and you fail, which is the primary finding in *Vriend* on section 1 of the Charter. You haven't met your burden, the statutory burden under the Human Rights Act. Or it's putting it through the proportionality analysis to the extent possible. And, as I said yesterday, you would simply fail at every step, because this measure does include an unjustified discriminatory aspect.

It shouldn't be insulated from scrutiny through s 19(2). And it certainly shouldn't be insulated from scrutiny under the established approach for assessing

legislative limits under s 5 of the Bill of Rights Act, simply because of litigation choices that have been made in this particular case.

1310

Your Honour, you put one point to me, and I thank the Court for their patience, that we're now 10 past the break. But your Honour just put to me whether I had a response to Mr Perkins' articulation of the basic issue in *Vriend*. And my colleague Mr Harris just helpfully suggests that to the extent that *Vriend* is going to be influential for this Court that cares to read it in context, the analysis that the Chief Justice has picked up on is in a section of the judgment on: "Discriminatory effects." That is the subheading on the page before the section that Mr Perkins took the Court to yesterday.

And so, here, the discriminatory effects have ratcheted up, because you're talking about a comprehensive, or purportedly comprehensive, law. So, it's of a concern that the passages Mr Perkins took your Honours to that is animating that discussion, that part of the judgment, is you have come out and said this is comprehensive. When we are looking at the discriminatory effects of the exclusion of sexual orientation from the IRPA, I will use the acronym if I can, it is particularly bad here, because you have got all these things saying how comprehensive what you are doing is and yet you have omitted sexual orientation.

The inference that you draw from that, according to the Court, the adverse inference, adverse in the sense of negative to persons on the basis of their sexual orientation, is that it is somehow less worthy and somehow something that you would see as not entitling the people to the same types of consideration as all those other grounds that are recognised when, as the Alberta legislature says, it is seeking to be comprehensive in human rights protection in a statute.

So, I am not saying that what Mr Perkins said was wrong. I'm simply saying that you need to take what he said, take those passages, read it in the context of the subsection of the judgment where it appears. And that is what the Court

is conveying. I'm not sure that that is on all fours with the issue in this case. We have a slightly different “macro issue”, I called it before.

Unless there are any questions, your Honours, those are the submission for Mr Hoban.

WINKELMANN CJ:

Thank you very much. Well, we thank all counsel for your excellent submissions. The Court will reserve its decision and we will now retire.

COURT ADJOURNS: 1.12 PM