IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-192
[2022] NZHC 3235

BETWEEN	RUSSELL THOMAS HOBAN Appellant
AND	ATTORNEY-GENERAL Respondent

Hearing:	31 October – 1 November 2022
Court:	Cooke J, M Keefe and L Ashworth
Appearances:	M Timmins and N Browne for the Appellant A M Powell and T Li for the Respondent J S Hancock and E C Vermunt for the Human Rights Commission
Judgment:	5 December 2022

JUDGMENT OF THE COURT
(Delivered by Cooke J)

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[1] Pursuant to s 92J of the Human Rights Act 1993 (the HRA) the Human Rights Review Tribunal (the Tribunal) may declare that a Parliamentary enactment is

inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). Mr Hoban appeals against the decision of the Tribunal dated 23 March 2022 in which it declined to make a declaration that s 61 of the HRA, was so inconsistent with s 19.[1] His appeal is supported by the Human Rights Commission. It is opposed by the Attorney-General who supports the decision of the Tribunal, including on alternative grounds.

Relevant background

[2] Section 61 of the HRA is broadly described as a provision that makes "hate speech" unlawful — that is speech that is threatening, abusive, or insulting directed at inciting hostility or contempt against a group of persons when made in defined public ways. The unlawful speech is limited to so inciting hostility and contempt for any group "on the ground of colour, race, or ethnic or national origins of that group of persons".[2] The section provides:

> **61 Racial disharmony**
>
> (1) It shall be unlawful for any person—
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> (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
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> (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
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> (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—
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> being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
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> (2) It shall not be a breach of subsection (1) to publish in a newspaper, magazine, or periodical or broadcast by means of radio or television

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1 *Hoban v Attorney-General* [2022] NZHRRT 16.
2 Human Rights Act 1993, s 61(1).

> or other electronic communication a report relating to the publication or distribution of matter by any person or the broadcast or use of words by any person, if the report of the matter or words accurately conveys the intention of the person who published or distributed the matter or broadcast or used the words.
>
> …

[3] In addition, s 131 of the HRA creates an offence of inciting racial disharmony by such hate speech. It provides:

> **131 Inciting racial disharmony**
>
> (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—
>
> (a) publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or
>
> (b) uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—
>
> being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
>
> …

[4] The enactment of these provisions gave effect to New Zealand's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD).[3]

[5] On 15 August 2017 an Auckland newspaper published a report of a "sermon" delivered by a Westcity Bible Baptist Church Pastor in which he said:

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[3] International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, in force 4 January 1969).

> My view on homo marriage is that the *Bible* never mentions it so I'm not against them getting married … As long as a bullet goes through their head the moment they kiss … Because that's what it talks about — not homo marriage but homo death.

[6] Mr Hoban is a homosexual man who has felt years of feeling discriminated against because of his sexual orientation. He was extremely concerned that no action was taken by the police or the Human Rights Commission in relation to the publicised comments made by the Pastor. He applied to the Tribunal for a declaration of inconsistency under s 92L of the HRA on the basis that the fact that the legislation did not make hate speech directed against groups on the ground of sexual orientation was inconsistent with the right to be free from discrimination under s 19 of the Bill of Rights.

[7] Section 19 of the Bill of Rights Act provides:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
>
> (2) 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.

[8] The prohibited grounds of discrimination in the HRA are those specified in s 21 in the following terms:

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the **prohibited grounds of discrimination** are—
>
> (a) sex, which includes pregnancy and childbirth:
>
> (b) marital status, which means being—
>
> (i) single; or
>
> (ii) married, in a civil union, or in a de facto relationship; or
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> (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or
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> (iv) separated from a spouse or civil union partner; or

(v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended:

(c) religious belief:

(d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:

(e) colour:

(f) race:

(g) ethnic or national origins, which includes nationality or citizenship:

(h) disability, which means—

(i) physical disability or impairment:

(ii) physical illness:

(iii) psychiatric illness:

(iv) intellectual or psychological disability or impairment:

(v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:

(vi) reliance on a disability assist dog, wheelchair, or other remedial means:

(vii) the presence in the body of organisms capable of causing illness:

(i) age, which means,—

(i) for the purposes of sections 22 to 41 and section 70 and in relation to any different treatment based on age that occurs in the period beginning with 1 February 1994 and ending with the close of 31 January 1999, any age commencing with the age of 16 years and ending with the date on which persons of the age of the person whose age is in issue qualify for national superannuation under section 7 of the New Zealand Superannuation and Retirement Income Act 2001 (irrespective of whether or not the particular person qualifies for national superannuation at that age or any other age):

(ii) for the purposes of sections 22 to 41 and section 70 and in relation to any different treatment based on age that occurs on or after 1 February 1999, any age commencing with the age of 16 years:

(iii) for the purposes of any other provision of Part 2, any age commencing with the age of 16 years:

(j) political opinion, which includes the lack of a particular political opinion or any political opinion:

(k) employment status, which means—

(i) being unemployed; or

(ii) being a recipient of a benefit as defined in Schedule 2 of the Social Security Act 2018 or an entitlement under the Accident Compensation Act 2001:

(l) family status, which means—

(i) having the responsibility for part-time care or full-time care of children or other dependants; or

(ii) having no responsibility for the care of children or other dependants; or

(iii) being married to, or being in a civil union or de facto relationship with, a particular person; or

(iv) being a relative of a particular person:

(m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

(2) Each of the grounds specified in subsection (1) is a prohibited ground of discrimination, for the purposes of this Act, if—

(a) it pertains to a person or to a relative or associate of a person; and

(b) it either—

(i) currently exists or has in the past existed; or

(ii) is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.

[9] The Tribunal dismissed Mr Hoban's claim. By way of summary, the Tribunal agreed that the fact that s 61 did not prohibit hate speech on the basis of sexual orientation meant that it was discriminatory within the meaning of s 19(1) of the Bill of Rights. But it held that such discrimination fell within s 19(2) so that it was not ultimately inconsistent with s 19. Further, it held that even if it did not that such discriminatory effect was demonstrably justified under s 5 of the Bill of Rights.

[10] There is a right of appeal against decisions of the Tribunal under s 123 of the HRA which Mr Hoban exercises. Pursuant to s 126 the Court has sat with additional members appointed under s 101. The appeal proceeds as a general appeal, and the principles outlined by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* apply.[4]

[11] It is common ground that there are three key questions on appeal, namely:

(a) Whether the Tribunal was right to find that s 61 of the HRA had discriminatory effect within the meaning of s 19(1) of the Bill of Rights.

(b) Whether the Tribunal was right to find that such discriminatory effect fell within s 19(2) of the Bill of Rights such that it is not inconsistent with the right in s 19.

(c) Whether the Tribunal was right to find that even if not within s 19(2) the discriminatory effect was nevertheless a demonstrably justified limit on the right to be free from discrimination in accordance with s 5 of the Bill of Rights.

First issue: Is s 61 discriminatory?

[12] The first question is whether s 61 of the HRA is discriminatory within the meaning of s 19(1) of the Bill of Rights. The approach to assessing whether discrimination arises was described by the Court of Appeal in *Ministry of Health v Atkinson* in the following terms:[5]

> It is agreed that the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact. …

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4 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141; *Attorney-General v Dotcom* [2018] NZHC 2564, [2019] 2 NZLR 277 at 17.

5 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 446 at [55] (footnote omitted).

[13] On the first step the Tribunal found:[6]

> When the protected characteristic of sexual orientation (which is the basis of the plaintiff's claim) is considered, two groups can be distinguished:
>
> > Persons who are the subject of hate speech by reason of their colour, race, ethnic or national origins.
> >
> > Persons who are the subject of hate speech by reason of their sexual orientation (but not of their colour, race, ethnic or national origins).
>
> In our view 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 in s 61. Those in the second group do not and are in this respect materially disadvantaged. In our view it is those in the first group who are the appropriate comparator.

[14] On the second step the Tribunal found that "only an affirmative answer is possible" as the inability to access the Commission's dispute resolution procedures and to seek recourse from the Tribunal were material disadvantages.[7]

[15] On appeal the Tribunal's findings are supported by Mr Hoban and the Commission, although the Commission argues that the Tribunal's findings can be refined further by using groups that have a vulnerability to harm caused by hate speech as the comparator. The Attorney-General challenges the Tribunal finding, contending that there is no discrimination at all. That is because all persons have the protection against hate speech in the manner identified in s 61 irrespective of sexual orientation — for example a homosexual man and a heterosexual man have exactly the same rights to be protected from hate speech under s 61.

Analysis

[16] As the Court of Appeal indicated in *Atkinson* there is considerable discussion concerning the utility of the comparator exercise and how it should be approached.[8] In Canada there has been a debate over how exact the comparison must be,[9] and in the

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6 *Hoban v Attorney-General*, above n 1, at [31]–[32].
7 At [35].
8 *Ministry of Health v Atkinson*, above n 5, at [60].
9 See *Withler v Canada* [2011] SCC 12, [2011] 1 SCR 396; *Moore v British Columbia (Education)* [2010] 3 SCR 360, 2012 SCC 61.

United Kingdom it has been described as an arid exercise.[10] The Court of Appeal identified the comparator exercise as a "helpful tool".[11] In using it as a tool, care should be taken that the analysis does not become overly technical or unrealistic. In our view it should always be remembered that the purpose of comparisons is to assist in identifying whether discrimination takes place in a real world sense.

[17] The Attorney General's argument on comparable groups is an illustration of how the exercise can illegitimately define away apparent discrimination. It is true that s 61 treats everybody the same way irrespective of sexual orientation. But by enacting a measure directed to only one type of prohibited discrimination in the HRA, other groups disadvantaged by such discrimination are, by definition, treated differently. And that different treatment causes disadvantage. We see those conclusions as unavoidable.

[18] Although considerable care must be taken when applying the Canadian cases given the differences that exist between the jurisdictions we are assisted by the decision of the Canadian Supreme Court in *Vriend v Alberta*. In that case Alberta had not included sexual orientation within the list of prohibited grounds of discrimination in their Individual's Rights Protection Act 1980. The Supreme Court held that this amounted to discrimination contrary to article 15 of the Canada Charter of Rights and Freedoms, the equivalent of s 19 of the Bill of Rights. The Court held:[12]

> The omission of sexual orientation as a protected ground … creates a distinction on the basis of sexual orientation. The "silence" … with respect to discrimination on the ground of sexual orientation is not "neutral". Gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.

[19] We agree with this view. Section 61 protects groups subject to racial hate speech, but does not protect those subject to sexual orientation hate speech. There is different treatment depending on the group you are in. That different treatment causes

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10 See *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434 at [28] per Lady Hale. The Equalities Act 2010 was subsequently enacted.

11 *Ministry of Health v Atkinson,* above n 5, at [60].

12 *Vriend v Alberta* [1998] SCC 816, [1998] 1 SCR 493 at [86].

disadvantage because remedies for the prohibited conduct are not available for the unprotected group.

[20] We also accept the Commission's submission that the Tribunal's comparator groups can be further refined in a way we see as consistent with the analysis in *Vriend*. Although there are a number of other categories of protected group arising from the list of prohibited grounds of discrimination in s 21 of the HRA, some groups are more commonly subjected to hate speech. As the present case illustrates, and as the international materials we refer to later below also suggest, hate speech on the basis of sexual orientation is a well-recognised phenomena.[13] The more accurate comparator groups are accordingly those who are known to be victims of hate speech on the one hand, and those within s 61 on the other. There is a different, and disadvantaged treatment of those not in the group to which s 61 applies.

[21] It is significant, however, that this is different treatment of a particular kind. It arises from a measure directed at prohibiting racial disharmony. Section 61 is a positive measure directed at countering one form of discrimination. The issue arises because the legislation is under inclusive. It is only discriminatory with the meaning of s 19(1) because it does not address a range of other prohibited grounds of discrimination at the same time. For this reason it can be seen as not truly discriminatory at all. Mr Powell pointed out that the Supreme Court in *Vriend* had addressed this point. The Court said:[14]

> 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. … a type of legislation different from that at issue in this case, namely, legislation which seeks to address one specific problem or type of discrimination. The case at bar presents a very different situation. It is concerned with legislation that purports to provide comprehensive protection from discrimination for all individuals in Alberta. The selective exclusion of one group from that comprehensive protection therefore has a very different effect.

[22] This approach suggests there could be a more refined definition of what amounts to discrimination. Discrimination would be defined in a more purposive way

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13 See [44] below.

14 *Vriend v Alberta,* above n 13, at [96].

focusing on the harms caused by it and involving elements of unjustified or unreasonable differentiation.[15]

[23] It is arguable that the Court of Appeal in *Quilter v Attorney-General* adopted an approach that included such concepts in the definition of discrimination.[16] But a key reason not to adopt such an approach to the definition of discrimination arises from the structure of the New Zealand Bill of Rights. All the rights are subject to s 5, and accordingly to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Moreover in s 19(2) particular types of differential treatment are expressly permitted. We consider that it is preferable to allow all matters of justification to be considered in these subsequent steps, rather than indirectly through the definition of discrimination. We understand this to be the approach adopted by the Court of Appeal in *Ministry of Health v Atkinson*. There the Court held:[17]

> The Commission in support of its position is concerned to avoid what Hart Schwartz called "justification creep" whereby matters which should be considered in the context of s 5 are shifted to the s 19 analysis. We have found Hart Schwartz's analysis helpful in this context. He suggests that a definition focused on disadvantage has a number of benefits. First, it allows examination of a "neutral" rule or law that nevertheless has an adverse impact. Second, it ensures that the "good reason" for the law is kept separate from the determination of prima facie discrimination. By contrast, he suggests a focus on the … factors of prejudice and stereotyping means a focus only on the intent of the legislation or policy. Measures may of course be introduced with the best of intentions but nonetheless, on analysis, comprise prima facie discrimination.

[24] This will mean that s 19(2) and s 5 may have a lot of work to do in discrimination cases. But we see no difficulty in that. Indeed adopting this approach assists in the analysis being simpler and more structured, as it avoids the answers to hard cases being determined by a less certain definitional approach. We also note that the authors of the White Paper indicated that the different approaches to interpretation should not ultimately result in different outcomes.[18]

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15 See Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* ([1984–1985] I AJNR A6 at [10.78]. See also Paul Rishworth and Others *The New Zealand Bill of Rights* (Oxford University Press, Australia, 2003) at 375–376 and 391.

16 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

17 *Ministry of Health v Atkinson*, above n 5, at [132] and [135] (footnotes omitted).

18 Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper",* above n 15.

[25] For these reasons, which are similar to the reasons adopted by the Tribunal, we conclude that the Tribunal was correct to conclude that s 61 has a discriminatory effect in the sense contemplated by s 19(1) of the Bill of Rights.

Second issue: Is s 61 protected by s 19(2)?

[26] The second issue is whether s 61 is nevertheless protected as a measure taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged by unlawful discrimination. If so s 19(2) provides that the measure does not constitute discrimination.

[27] The Tribunal held that s 19(2) applied. It held:[19]

> Because HRA, s 61 implements New Zealand's treaty obligations under ICERD and makes hate speech on the grounds of colour, race, ethnic or national origins unlawful, it is in our view a measure taken in good faith for the purpose of assisting or advancing persons or groups of persons who have been disadvantaged because of discrimination (which includes hate speech) on the grounds of their colour, race, ethnic or national origins.
>
> We see no justification for reading down the phrase "for the purpose of assisting or advancing" by restricting it to "affirmative action" programmes however formulated and which are discussed by Andrew Butler and Petra Butler in The New Zealand Bill of Rights Act: A Commentary (2nd ed, LexisNexis, Wellington, 2015) (Butler) at [17.19.1] to [17.19.11]. See also Rishworth at 389 to 393.

[28] Mr Hoban challenges this approach on appeal and his position is supported by the Commission. They argue that s 19(2) is limited to what is thought of as affirmative action programmes. They rely on legislative history,[20] previous New Zealand case law,[21] academic commentary,[22] and Australian and Canadian decisions.[23] The Commission also referred to other international human rights instruments recognising the legitimacy of affirmative action special measures. They argue that s 61 was not intended to assist or advance groups subject to the harm of discrimination in a way

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19 *Hoban v Attorney-General*, above n 1, at [42]–[43].
20 (10 October 1989) 502 NZPD 13043.
21 See *J v Attorney-General* [2018] NZHC 1209 at [518].
22 Paul Rishworth and others, *The New Zealand Bill of Rights*, above n 15, at 390; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis 2015) at [17.19.7].
23 *Gerhardy v Brown* (1985) 57 ALR 472; *Lovelace v Ontario* [2000] 1 SCR 950; *R v Kapp* [2008] 2 SCR 67; *Alberta v Cunningham* [2011] 2 SCR 670.

intended to achieve substantive equality. For example the authors of *The New Zealand Bill of Rights Act: A Commentary* say:[24]

> The object of the affirmative action measure must be to assist or advance persons disadvantaged because of discrimination. Accordingly, a measure which confers an advantage on a group of disadvantaged persons but does not have as its purpose the assistance or advancement of that group cannot claim the protection of s 19(2).

[29] The Attorney-General supports the approach of the Tribunal contending there is no need to read down the words of s 19(2). Allowing a group historically affected by the effects of hate speech a civil remedy advances or assists that group in accordance with s 19(2). That is because it offers them a remedy for the particular kind of harm they have been affected by.

Analysis

[30] In s 19(2) Parliament has identified particular measures that are not to be considered to be unlawful discrimination. Section 19(2) was not in the original form of the Bill of Rights as proposed in the White Paper, but was introduced during the Select Committee phase. As Mr Hoban and the Commission submitted, it was introduced to make it explicit that affirmative action measures should not be treated as unlawful discrimination.

[31] We see no reason to either read down, or read up s 19(2). The sub-section should be given a normal purposive interpretation. In that context it is relevant that it does not encompass the entire scope of justified limits on apparently discriminatory measures, as s 5 continues to operate in relation to measures not within the reach of s 19(2). In our view s 19(2) is best considered as a situation where Parliament has expressly turned its mind to a particular kind of measure, and determined that it should not be regarded as unlawful discrimination. We also agree with the authors of *The New Zealand Bill of Rights Act: A Commentary* that it is "an aid to recognising the kind of formal breaches of s 19(1) that will be justifiable in terms of s 5 and accordingly lawful".[25]

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[24] Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary,* above n 22, at [17.19.7].

[25] At [17.19.5].

[32] In our view it would be artificial to consider s 61 as falling within the intended scope of s 19(2). Although the words "measures taken" can include legislative provisions, when read as a whole we consider s 19(2) is focused on positive steps taken to counteract the adverse effects of discrimination by assisting or advancing the position of disadvantaged persons. Section 61 could not be considered as "advancing" such persons. We accept the Attorney-General's argument that the word "assisting" is different from "advancing", and that it can be argued on a literal meaning that s 61 assists those subjected to racial hate speech in an indirect way. But we see "assisting" as coloured by "advancing", and that read as a whole s 19(2) is directed at measures that give positive advantages or other forms of assistance to people that are disadvantaged by discrimination. Such measures are in themselves discriminatory because the advantage/assistance is not available to those not within the disadvantaged category. So s 19(2) was included to make it clear that taking such positive steps to assist or advance prejudiced persons was not unlawful. We see no reason to give s 19(2) a broader interpretation given that s 5 will still apply to measures that are not within these concepts.

[33] The position is made clearer when s 131 of the HRA is also considered. Section 131 can be seen as the companion provision to s 61 as both were enacted to give effect to ICERD. Section 131 creates an offence for inciting racial disharmony of the kind contemplated by s 61. Section 131 could not be seen as a measure whose purpose is to assist or advance the position of people who have been discriminated against. Its purpose is to create an offence, and to punish those who engaged in the specified conduct. Similarly s 61 is a provision designed to make such conduct unlawful, and to provide a remedy for those affected by hate speech. Such provisions are not measures taken to assist or advance the position of persons subject to racial discrimination. Their purposes are different.

[34] For these reasons we accept the submission that the Tribunal erred in finding that s 19(2) applied, and in concluding that s 61 was not inconsistent with s 19 of the Bill of Rights for this reason.

Third issue: Is the limit justified?

[35] The final question is whether the discriminatory effect of s 61 is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society in accordance with s 5 of the Bill of Rights. On this question the Tribunal accepted the submissions of the Attorney-General, which included the submission that New Zealand had enacted s 61 in these terms because of New Zealand's international obligations under ICERD. The Tribunal further held:[26]

> The focus of the justification inquiry is not the justification for HRA, s 61 having a limited reach. The focus is on the justification for the legislature not including in s 61 the other ten grounds of discrimination (including sexual orientation) or having standalone legislation which similarly prohibits the advocacy and incitement of hatred and discrimination.
>
> Human rights do advance in New Zealand, but not on all fronts simultaneously. In a free and democratic society there will always be public and political contest over priorities to be given to human rights protection. In recent times those contests have included the right to adequate housing, freedom from poverty, indigenous rights, violence, children's rights and mental health. In addition to difficult policy choices there are also challenges relating to resourcing, the assessment of the prospect of agreement to legislation in (say) a coalition government environment, resolving competing demands on the legislative programme and assessing the political reality of the measure eventually being passed. These are all part of the political process in a free and democratic society.
>
> Sexual orientation has been included in the HRA, s 21 prohibited grounds of discrimination since 1993 and the protection given by the remedies under the HRA is accordingly available. The specific complaint by the plaintiff is that an additional layer of protection is required by the inclusion of sexual orientation in s 61. But in a free and democratic society it is not required or practicable for every possible improvement to human rights protection to be enshrined in legislation. The point is captured in the following two quotes taken from *Butler* at [17.20.3] and [17.20.12]:
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> > [17.20.3] Further, where matters of social policy are in issue courts have also been willing to accept that the state is not required to tackle all aspects of a problem at once: incremental measures are permitted. Distinctions required by international instruments are also likely to be upheld, though they are not beyond scrutiny. [Footnote citations omitted]
> >
> > [17.20.12] … the range of factual inequality within society is so great that one cannot reverse the effects of all inequality at once. In our view, it is acceptable for the state to choose those areas on which it wishes to concentrate its efforts and resources. It is not discrimination for the state to choose one group over the other for the purposes of

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[26] *Hoban v Attorney-General*, above n 1, at [58]–[60].

> affirmative action (unless it can be shown that a particular subgroup has been left out for no good reason and out of ill will).

[36] In challenging the Tribunal's approach Mr Hoban relied on the test for justification under s 5 articulated by the Supreme Court in *Hansen v R*.[27] He argued that the state had not met its burden, as it had not put forward any evidence explaining why it had not protected its people from hate speech based on sexual orientation, and accordingly it could not establish justification. ICERD might have explained the enactment of hate speech in relation to race, but that did not provide a justification for not protecting hate speech based on sexual orientation. In advancing that point a number of international materials concerning the importance of protecting groups from discrimination based on sexual orientation were relied upon. In supporting Mr Hoban, the Commission referred to the observations of the Supreme Court of Canada in *Vriend v Alberta* that it was no defence to a claim of discrimination that the state was taking incremental steps to protect those discriminated against.[28]

[37] The Attorney-General supported the Tribunal's findings. He again relied on the observations of the Supreme Court of Canada in *Vriend* that targeted underinclusive legislation would not infringe the equivalent of s 19, a proposition the Court developed in later cases.[29] In relation to New Zealand's international obligations, in addition to ICERD, the Attorney-General also referred to art 20 of the International Covenant on Civil and Political Rights 1966 (the ICCPR) which provides:[30]

> 2. Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

[38] New Zealand had entered a reservation to art 20, which still stands, in the following terms:

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

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27 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [92].

28 *Vriend v Alberta*, above n 12, at [121]–[122].

29 *Vriend v Alberta*, above n 12, at [96]; *Lovelace v Ontario*, [2000] 1 SCR 950, [2000] SCC 37; *Alberta v Cunningham* [2011] 2 SCR 670, [2011] SCC 37.

30 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

> speech, reserves the right not to introduce further legislation with regard to art 20.

[39] The Attorney-General further submitted that assessing how far the legislation should go in providing remedies for discriminatory conduct involved difficult questions of political judgment, and that a degree of deference from the Court was appropriate in relation to these matters.

Analysis

[40] In our view the decisive issue in this case is whether the prima facie discriminatory effect arising from the underinclusive effect of s 61 is demonstrably justified in accordance with s 5 of the Bill of Rights.

[41] There is no dispute that the burden is on the Crown to establish a demonstrably justified limit. But we do not consider that substantial evidence is required to establish such a limit in this case. In our view this case falls within the category of justification recently recognised by the Supreme Court in *Make It 16 Incorporated v Attorney-General* where it potentially arises from international instruments or the common law.[31] It is not the type of justification that requires the Crown to file extensive evidential materials. The justification stands or falls on a more limited basis.

[42] For the same reasons we do not consider it necessary to methodically apply the steps for assessing demonstrably justified limits outlined by the Supreme Court in *Hansen v R*.[32] These steps are also a tool for, or an approach to, assessing justified limits. Such justification can be established by a simpler analytical pathway, and we consider that to be so in the present case.

[43] As we have indicated, the discriminatory effect of s 61 is of a limited kind only, arising from it being an underinclusive remedial measure. We consider it significant that there is no human rights obligation, in either domestic or international law, to make hate speech on the basis of sexual orientation unlawful. By contrast there is such an obligation in relation to racial hate speech, both in ICERD and the ICCPR. Given

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31 *Make It 16 Incorporated v Attorney-General* [2022] NZSC 134 at [45].
32 *Hansen v R*, above n 27, at [92].

that, we see the appellant's argument as having an artificial aspect. In our view Mr Hoban would have justifiably found the statements of the Pastor highly objectionable, and the lack of any provision making such comments unlawful concerning, whether or not s 61 had been in existence. Yet the existence of s 61 provides the necessary pre-requisite for his human rights argument. We do not consider the argument based on the existence of s 61 squarely focuses on what Mr Hoban substantially objects to.

[44] Section 61 only has apparently discriminatory effect because it is a targeted remedial measure. We consider that the existence of the international obligations in ICERD and the ICCPR in of themselves provide the s 5 justification for s 61 of the HRA being in the targeted terms that it is. The New Zealand legislation is limited, but the limit corresponds to the international obligations. Mr Hoban and the Commission referred to a number of international materials that demonstrate a growing call to make hate speech on the ground of sexual orientation unlawful. In 2006 a group of international human rights experts drafted the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation, and a number of principles are relevant, including principle 5 requiring states to take all necessary measures to provide protection from all forms of violence and harassment, including by imposing criminal penalties for incitement.[33] In 2019 the Special Rapporteur on Freedom of Opinion and Expression expressed the view that art 20(2) of the ICCPR "… should be understood to apply to the broader categories now covered under international human rights law".[34] In September 2020 the United Nations Strategy and Plan of Action on Hate Speech included recommending measures directed to similar ends.[35] But it is not suggested that this material reaches the point of establishing an international obligation. The international obligation in both ICERD and art 20 of the ICCPR is reflected in the terms of the New Zealand legislation as it presently stands. We consider that the discriminatory nature of s 61 is demonstrably justified on that basis alone.

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33 International Commission of Jurists , *Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007.

34 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/74/486 (2019) at [9].

35 *United Nations Strategy and Plan of Action on Hate Speech: Detailed Guidance on Implementation for United Nations Field Presences* (United Nations, September 2020) at 11.

[45] Furthermore, and as the Tribunal emphasised, in our view it must be legitimate for a state to respond to the effects of discrimination by taking more limited and targeted responses addressing particular disadvantaged groups. This is consistent with the Supreme Court of Canada's observations in *Vriend v Alberta*. The ultimate effect of the appellant's discrimination argument is that such targeted measures are themselves unlawful as they discriminate as between disadvantaged groups. But it is common for measures to respond to the needs of particular disadvantaged groups, and we see such measures as rights enhancing, and certainly rights compliant. Even measures such as the establishment of the Race Relations Commissioner under s 8(1A)(c) of the HRA, or the existence of the Ministry for Women, could be seen as measures that are discriminatory when the appellant's argument is taken to its logical conclusion. As the Tribunal held, the right to be free from unjustified discrimination cannot mean that measures taken to address disadvantages must address all discriminated groups at the same time and in the same way. That would be an impracticable obligation. Targeted measures are an important aspect of countering the effects of discrimination, as s 19(2) itself contemplates.

[46] Counsel for the appellant and the Commission sought to respond to these points by arguing that they did not contend that the measures had to provide remedies for discrimination equally in this way. They argued that s 61 would not need to prohibit hate speech in relation to all prohibited grounds of discrimination. They accepted that there may be legitimate arguments in relation to some grounds of prohibited discrimination in s 21 of the HRA. For example under s 21(1)(j) discrimination on the basis of political opinion is prohibited, and legitimate debate could arise about including this ground within s 61. They contended that the question was limited to whether excluding sexual orientation from s 61 was justified. The law should then be allowed to develop on a case by case basis where each ground of prohibited discrimination could be assessed in turn, including in successive cases in which declarations of inconsistency could be sought before the Tribunal or the Court.

[47] We do not accept that argument as it avoids confronting a necessary element of this challenge, particularly as it ultimately turns on justified limits under s 5. In order to establish grounds for a declaration of inconsistency it is essential to demonstrate the discriminatory nature of s 61. The appellant's contention does more

than move the discriminatory line complained about to a different point. But s 61 has prima face discriminatory effect only because it protects against racial hate speech, and does not address any of the other forms of prohibited discrimination. Limiting the counterfactual analysis under s 5 to an exercise of adding only one more prohibited ground does not squarely address the discriminatory effect arising from s 61. It is an artificial exercise that avoids the hard questions.

[48] The fact that hate speech laws raise difficult questions of delineation is reflected in the debates that have taken place in New Zealand over time about its existence and scope. A criminal hate speech offence was first introduced by the Race Relations Act 1971.[36] A civil complaints regime was added in 1977.[37] That provision was reconsidered, and then repealed in 1989. It was re-enacted in its present form in the HRA in 1993. It is currently again under review, and the policy debates have continued both before and after the hearing of this appeal. They are not limited to whether sexual orientation should be included within hate speech. The report of the Royal Commission of Inquiry into the Terrorist Attacks on Christchurch Mosques on 15 March 2019 recommended that s 131 of the HRA should be repealed and replaced with a new offence extending hate speech to include religious beliefs.[38] Such questions involve political as well as legal issues. The Court's function is confined to addressing the questions of law. That is also true of the Tribunal. When doing so we do not accept the Attorney-General's submission that questions of deference are involved, as the Court "should fulfil our role which is to declare the law".[39] But we see the questions relating to the scope of hate speech laws as primarily political. They also involve important legal questions which the Court should address, but the placement of the dividing line for hate speech laws, and the identification of what amounts to hate speech, including what the elements of prohibited hate speech are, and whether they should also amount to an offence, are primarily matters for Parliament.

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36 Race Relations Act 1971, s 25.

37 Section 9.

38 *Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020), see Recommendation 40.

39 *Make It 16 Incorporated v Attorney-General*, above n 31, at [68].

[49] We feel bound to say, however, that we have considerable sympathy for Mr Hoban. It will be surprising to many that the comments made by the Pastor in this case were not unlawful under New Zealand law. But there are nevertheless policy questions to consider. These include considering the importance of freedom of expression, which itself is a fundamental right. The Court's role in these debates is limited to determining questions of legality. We can say that the inclusion of sexual orientation within ss 61 and 131 of the HRA would likely be a demonstrably justified limit on the right of freedom of expression in s 14 under s 5 of the Bill of Rights. Given the recommendation of the Royal Commission, a similar extension of the provisions to cover hate speech on the basis of religion would also likely be so justified. We see these questions as the primary issues of law to be addressed by the Court in relation to such matters. For the reasons outlined above, we do not see that the right to be free from discrimination under s 19 to be the apposite right to apply to determine whether hate speech laws as enacted by Parliament are Bill of Rights consistent.

[50] For these reasons, which are substantially the same as those adopted by the Tribunal, we agree that the limit on the freedom from discrimination arising as a consequence of s 61 of the HRA is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society. For that reason no declaration of inconsistency is appropriate.

Conclusion

[51] For the above reasons the appeal is dismissed.

Cooke J

Solicitors:
Crown Law for the Respondent