IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 21**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 019/2017
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**STEPHEN GILBERT BUTCHER**
	PLAINTIFF
AND	**NEW ZEALAND TRANSPORT AGENCY**
	FIRST DEFENDANT
AND	**ATTORNEY-GENERAL IN RESPECT OF THE MINISTRY OF TRANSPORT**
	SECOND DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms MG Coleman, Deputy Chairperson
Dr NR Swain, Member
Sir RK Workman KNZM QSO, Member

REPRESENTATION:
Mr SG Butcher in person
Mr P Rishworth QC and Mr M McKillop for defendants

DATE OF HEARING: **7 to 11 September 2020 and 14 September 2020**

DATE OF LAST SUBMISSIONS: **1 April 2022**

DATE OF DECISION: **30 June 2022**

DECISION OF TRIBUNAL[1]

[1] [This decision is to be cited as *Butcher v NZ Transport Agency* [2022] NZHRRT 21.]

OVERVIEW

[1] Mr Butcher is a Christian of orthodox beliefs. He lives in a rural location in the Wairarapa where public transport options are limited. Although he drives, he does not have a current licence because he believes the prescribed form of the current photo driver licence, which requires a digitised photograph, a digitised signature, and a bar code, to be the "mark of the beast".

[2] Mr Butcher claimed that the requirement for him to hold a licence in a form which is contrary to his religious beliefs is discriminatory contrary to s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act), which states:

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

[3] Religious belief is one of the prohibited grounds of discrimination set out in the Human Rights Act 1993 (HRA): s 21(c).

[4] Mr Butcher also relies on ss 13 and 15 of the Bill of Rights Act:

> **13 Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

[5] In light of those provisions, Mr Butcher submitted that the religious beliefs of people such as him whose religious beliefs are not widely shared are protected, directly and indirectly by s 19 of the Bill of Rights Act.

[6] Mr Butcher further relied on ss 13 and 15 to argue that the meaning of religious belief under the HRA must be understood to include both the belief itself and the manifestation of it. Mr Butcher also argued that s 19 of the Bill of Rights Act carries an obligation to accommodate his religious beliefs, and that any difference in treatment that does arise will not be justified if his religious beliefs could have been reasonably accommodated.

[7] Mr Butcher not only claimed the form of the licence discriminates against him but that the exceptions or accommodations permitted to others but not permitted to him also mean he is being treated differently to others. He further claimed that any discrimination is not justified. He challenged the road safety purpose of the statutory provisions and further argued the link with road safety is tenuous. To the extent there are road safety benefits arising from the requirement to hold a photo driver licence, he claimed these are outweighed by the impact on religious freedom. Mr Butcher submitted that his religious beliefs should be accommodated and could be accommodated without affecting the efficacy of the photo driver licence regime.

[8] The Crown disagreed with Mr Butcher that the meaning of religious belief under the HRA includes the manifestation of belief protected by s 15 of the Bill of Rights Act. It

submitted that if religious belief is interpreted to embrace every manifestation of belief, the effect becomes coterminous with a claim for an exemption (at least on a prima facie basis) from any law where there is a conflict between that law and conduct claimed to be an expression of that belief. It also pointed to the impact such an extended meaning would have on claims involving private actors under Part 2 of the HRA.

[9] The Crown also denied the driver licence requirements are discriminatory.

[10] It said that Mr Butcher is not being treated differently from anyone else. He is not therefore subject to direct discrimination.

[11] Mr Butcher's indirect discrimination claim also fails according to the Crown. It submitted that while indirect discrimination protects against group disadvantage arising from facially neutral policies or laws, there is no evidence here that Mr Butcher is part of a religious group who are comparatively disadvantaged by the requirement for a photo driver licence.

[12] It further said that the issue of reasonable accommodation of Mr Butcher's religious belief does not arise in the absence of the impugned provisions being indirectly discriminatory, which it said they are not.

[13] For these reasons, the Crown argued the question of justification under s 5 of the Bill of Rights Act does not arise.

[14] While the essence of Mr Butcher's claim relates to the form of the photo driver licence required by s 28 of the Land Transport Act 1998 (LTA) and various associated rules under the Land Transport (Driver Licensing) Rule 1999 (Rules), his statement of claim actually sets out 11 separate causes of action.

[15] These claims are set out in more detail later. It is useful first to set out the statutory scheme for driver licences.

DRIVER LICENCE REQUIREMENTS: THE STATUTORY SCHEME

[16] Section 5(1) of the LTA requires drivers to be licensed:

> **5 Drivers to be licensed**
>
> (1) A person may not drive a motor vehicle on a road—
>
> (a) without an appropriate current driver licence; or
> (b) in contravention of the conditions of the person's driver licence; or
>
> ….
>
> (4) A person driving a motor vehicle must produce without delay his or her driver licence for inspection whenever required to do so by an enforcement officer.

[17] Section 23 deals with the issue of driver licences. It states:

> **23 Issue of driver licences**
>
> (1) The Director must issue driver licences in accordance with the regulations and the rules.
>
> …

(4) All driver licences in force immediately before this subsection comes into force continue in force and expire on a date to be determined in accordance with the rules, even though they may have been valid for more than 10 years when issued.

[18] Section 24 permits the issue of temporary licences:

24 Director may issue temporary driver licences

(1) If an applicant for a driver licence meets the requirements for the issue of a licence of the class sought and the Director is satisfied there will be some delay in issuing the licence, the Director may issue to the person a temporary driver licence which—

(a) must be in such form and contain such details as may be specified in the rules; and

(b) is valid for such period, not exceeding 21 days, as may be specified on the temporary licence.

(2) A temporary driver licence issued under this section has the same effect as a driver licence of the same class issued under section 23.

(3) Despite subsection (1), in the case of a person whose licence has expired or been revoked, the Director may issue a temporary licence, valid for a period not exceeding 1 year as specified on the temporary licence, as necessary to enable the person to continue to drive while his or her fitness to drive is assessed by the Director or a person authorised by the Director.

[19] Section 28 requires a driver licence to be in the prescribed form and stipulates what it must have on it:

28 Photographic driver licence

(1) A driver licence must be in the prescribed form and must have on it—
(a) a photographic image of the holder; and
(b) the holder's name and signature; and
(c) the holder's date of birth; and
(d) unique identifiers to distinguish the licence and the holder from other driver licences and holders; and
…
(k) such other features as may be specified in the rules for the purposes of verifying or protecting the integrity of the licence.

(2) In addition, a driver licence may show the holder's address if the holder requests that those details be shown.

(3) A driver licence may not have on it any photographic image, information, or features other than those referred to in subsection (1) or subsection (2).

(4) …

(5) The Agency—
(a) must store the photographic image used for each licence until the licence expires; and
(b) may store the photographic image used for each licence after the licence has expired.

[20] There is a power to grant exemptions under the Rules except where the rule itself does not permit exceptions. At the time of the hearing that power was set out in s 166(4), which has now been repealed as from 1 April 2021 and replaced with s 168D(2)(b).

[21] Section 199(1) requires a national register of driver licences. Information on the register for each driver licence must include:

199 Agency to maintain register of driver licences

(1) The Agency must continue and maintain the national register of all driver licences that was established under section 45 of the Transport (Vehicle and Driver Registration and Licensing) Act 1986.

(2) The national register must show for each driver licence the following information:

(a) the holder's full name, address, gender, date of birth, place of birth (if known to the Agency), and signature:

(b) the number of the licence

….

(o) Photographic images of the holder taken for the purposes of this Act

…

[22] Section 200 restricts access to photographic images of driver licence holders.

200 Restrictions on access to photographic images of driver licence holders

(1) No person other than a person acting in the course of the person's official duties as an employee of the Agency may access or use any photographic image stored under section 28(5).

(1A) Subsection (1) is subject to—

(a) subsections (2), (3), and (4):

(b) section 141 of the Intelligence and Security Act 2017:

(c) subpart 2 of Part 7 of the Privacy Act 2020.

(2) A person who is acting in the course of the person's official duties as an employee of the Department of Internal Affairs may access or use any photographic image stored under section 28(5) to verify the identity of a particular individual.

(3) …

(4) A person who is acting in the course of the person's official duties as an employee of a specified agency may access or use any photographic image stored under section 28(5) to verify the identity of a particular individual for the purpose of law enforcement.

(5) For the purposes of this section,—

…

specified agency means any of the following:

(a) the Department of Corrections:

(b) the part of the Ministry of Business, Innovation, and Employment that administers the Immigration Act 2009:

(c) the Ministry of Justice:

(d) the New Zealand Customs Service:

(e) the New Zealand Police.

[23] The Rules also deal with the form and requirements for driver licences.

[24] Clause 11 sets out the evidence of identity required in order to apply for a photo driver licence:

11 Identification: application in person

(1) This clause applies if an application is made in person.

(2) An applicant who is applying to obtain the applicant's first New Zealand photographic driver licence must produce the following evidence of identity of the applicant to be sighted by a licensing agent:

(a) a current and valid New Zealand passport; or

(b) an original and current document specified in Part 1 of Schedule 9 and an original and current document specified in Part 2 of Schedule 9.

(3) In any case other than one to which subclause (2) applies, the applicant must produce the following evidence of identity of the applicant to be sighted by a licensing agent:

(a) a current New Zealand photographic driver licence; or
(b) a current and valid New Zealand passport; or
(c) an original and current document specified in Part 1 of Schedule 9 and an original and current document specified in Part 2 of Schedule 9.

(4) …

(5) If an applicant provides a document from Part 1 or 2 of Schedule 9 that does not contain a photographic image of the applicant, the applicant must also provide the Director with—

(a) a photographic image of the applicant that has been taken within the previous 6 months, and that complies with the requirements of clause 12(4) and (5); and

(b) a verification statement in relation to that photographic image that has been signed by an identity referee.

[25] That clause also refers to Parts 1 and 2 of Schedule 9 of the Rules. Parts 1 and 2 detail the documents accepted as primary evidence of identity and supporting evidence of identity respectively.

[26] Clause 12 provides the following:

12 Images on driver licences and driver identification cards

(1) An applicant who is applying to obtain the applicant's first New Zealand photographic driver licence must allow the licensing agent to take a photographic image of the applicant and an electronic impression of the applicant's signature.

(2) Subclause (3) applies if a person is applying to—

(a) renew or reinstate a driver licence or obtain an additional licence class; or
(b) obtain or renew a driver identification card; or
(c) replace a driver licence or driver identification card where clause 74(2)(c) applies.

(3) The applicant must,—

(a) if applying in person, allow the licensing agent to take a photographic image of the applicant; or
(b) if applying online, provide a photographic image of the applicant that complies with the specified requirements of the Director in relation to electronic format, file size, and any other matter.

(4) In the photographic image, the applicant must not be wearing sunglasses, a hat, any head coverings, or anything else that obscures the applicant's face or prevents the photographic image from being a good likeness of the applicant.

(5) Despite subclause (4), the Director may permit an applicant to wear an item on or near the applicant's face if—

(a) the Director is satisfied that the applicant is required to wear the item for religious or medical reasons; and
(b) the applicant provides the Director with a signed statement to that effect; and
(c) the applicant's facial features from the bottom of the chin to the top of the forehead and both edges of the face are clearly shown; and
(d) the Director is satisfied that the item does not prevent the photographic image from being a good likeness of the applicant.

[27] Clause 62 specifies the features that a driver licence must have for the purposes of verifying or protecting the integrity of the licence. These include a requirement for a

one-dimensional bar code containing the driver licence number, driver licence card number, and a quality control number in cl 62(h).

62 Features to verify and protect licence integrity —

A driver licence (other than a temporary driver licence) must have the following features for the purposes of verifying or protecting the integrity of the licence:

…

(h) A one-dimensional bar code containing the driver licence number, driver licence card number, and a quality control number;

…

[28] Clause 63 stipulates what information must be displayed on a driver licence. It includes:

63 Form of driver licence

(1) A driver licence must, at the discretion of the Director, display the following information on either the front or back of the licence:
- (a) …
- (e) the holder's signature:
  …
- (l) a one-dimensional bar code containing the driver licence number, driver licence card number, and a production quality control number.

(2) A driver licence must display the following information on the front of the licence:
- (a) …
- (c) a photographic image of the holder:
- (d) the holder's full name, unless it is impracticable to display the name in full:
  …
- (g) the driver licence number and driver licence card version number.

[29] Clause 64 sets out the form of a temporary driver licence:

64 Form of temporary driver licence

(1) A temporary driver licence must be—
- (a) printed on paper; and
- (b) signed by the holder; and
- (c) authenticated by a licensing agent.

(2) A temporary driver licence must display the following on the front of the licence:
- (a) the words "TEMPORARY NEW ZEALAND DRIVER LICENCE":
- (b the holder's name:
- (c) the holder's date of birth:
- (ca) the date on which the driver licence is issued:
- (d) the date on which the driver licence expires:

[30] Clause 88 deals with the recognition of an overseas driver licence or permit:

88 Recognition of overseas driver licence or permit

(1) A person, on arrival in New Zealand, is deemed to hold a New Zealand driver licence of a class that entitles the person to drive the motor vehicles that the person is entitled to drive under—
- (a) a valid and current driver licence or permit issued overseas to the person, after the person has produced proof of the person's driving competence, by an overseas authority, or an agent of that authority, authorised to issue a driver licence or permit; or
- (b) an international driving permit.

(2) However,—
  (a) subclause (1)(a) does not apply unless—
    (i) the overseas driver licence or permit is written in English; or
    (ii) the person who holds the overseas driver licence or permit also carries an accurate English translation of the licence or permit:
  (b) subclause (1)(b) does not apply unless the person who holds the international driving permit also carries the overseas driver licence on which the permit is based.

(3) A person who is deemed by subclause (1) to hold a New Zealand driver licence may continue to drive under that driver licence until the first of the following situations occurs:
  (a) the person has remained in New Zealand for a continuous period of 12 months; or
  (b) the document that enabled that person to be deemed to hold a New Zealand driver licence under subclause (1) expires, is suspended, or is revoked; or
  (c) an order is made disqualifying the person from holding or obtaining a driver licence, either in New Zealand or in the jurisdiction that granted the overseas driver licence or permit; or
  (d) the person obtains or renews a New Zealand driver licence.

(4) In this clause, international driving permit means a valid and current international driving permit as specified in Annex 10 of the United Nations Convention on Road Traffic signed at Geneva on 19 September 1949 or Annex 7 of the United Nations Convention on Road Traffic signed at Vienna on 8 November 1968 and issued overseas in accordance with the provisions of the appropriate convention.

[31] Clause 112 sets out the situations in which a licence, which has been extended under the LTA s 23(4), expires:

112 Expiry of driver licences, etc

(1) A driver licence continued in force by section 23(4) of the Act, and any endorsement held in accordance with clauses 107 to 110, expires when the first of the following occurs:
  (a) 60 days has elapsed after the date of the first birthday of the licence holder to occur on or after 3 May 1999; or
  (b) the holder is issued with a temporary licence or a photographic driver licence under these rules; or
  (c) if the person holds a driver identification card issued before 3 May 1999, when that identification card expires.

(2) If the holder of a driver licence referred to in subclause (1) is absent from New Zealand on the date that the licence would (but for this subclause) expire under subclause (1), that driver licence expires on the earlier of—
  (a) the expiry date specified on the licence:
  (b) 1 October 2011.

[32] The digitised photo requirement and the bar code provisions in cls 62 and 63 (to which Mr Butcher objects) are written in mandatory terms. Neither party argued that the exemption power in s 166, now provided for in s 168D, permits exemptions from rules written in mandatory terms. Further, there is no power to grant an exemption to the requirement for a driver licence to have a photograph on it as this is contained in s 28 of the LTA itself. Indeed, it is the prescribed nature of the driver licence requirements which do not permit accommodation of Mr Butcher's religious beliefs, which he complains is discriminatory.

[33] These mandatory provisions however do not apply to temporary licences or to those driving on overseas licences. Both permit a person to drive in New Zealand for up to a year without holding a New Zealand photo driver licence.

THE CLAIM IN MORE DETAIL

[34] Each of the eleven separate causes of action are summarised below.

[35] In relation to each cause of action, Mr Butcher sought a declaration of inconsistency that the LTA itself in relation to the first cause of action, or the particular impugned provisions in relation to the remaining ten causes of action, were inconsistent with s 13 and/or s 19 of the Bill of Rights Act.

[36] The Crown submitted that the Tribunal has no jurisdiction to grant a declaration in relation to breaches of s 13 of the Bill of Rights Act. That is plainly correct. The Tribunal's jurisdiction, including the jurisdiction to grant remedies, is a statutory one. In a case such as the present one, in which legislation is claimed to be discriminatory, s 92J of the HRA states that the only remedy the Tribunal can grant is a declaration that the legislation is inconsistent with the right to freedom from discrimination affirmed by s 19 of the Bill of Rights Act. However, there is no power under the HRA that would enable the Tribunal to grant a declaration of inconsistency in relation to other provisions of the Bill of Rights Act. Senior courts have that power, but no other courts or tribunals do. See *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [47], [65], [117]-[119].

[37] The other aspects of the Crown response to each cause of action or claim are summarised later in this decision when discussing whether there is a prima facie breach of s 19 of the Bill of Rights Act.

First cause of action

[38] Mr Butcher's first cause of action is that the LTA is inconsistent with s 13 and/or s 19 of the Bill of Rights Act because it was enacted without following the correct procedure which led to the failure to protect his religious beliefs. Had that not occurred, Mr Butcher claimed there would have been proper and balanced consideration of religious rights and the public benefit. He argued that the effect of the omissions was that the law does not protect his religious beliefs as a minority and treats him differently to those without such beliefs.

Second cause of action

[39] Mr Butcher's second cause of action is that s 28 of the LTA (and related Rules and regulations), in particular s 28(1)(a), (b), (d) and (k) which requires him to accept photo identification contrary to his religious belief if he wishes to hold a driver licence, treats him differently to those who do not share his belief. He also claimed there is no compelling road safety benefit to the requirement for photo identification and therefore the discrimination is not justified under s 5 of the Bill of Rights Act.

Third cause of action

[40] Mr Butcher's third claim is similar to his second. It alleges that s 28 of the LTA (and related Rules and regulations), in particular s 28(1)(a), (b), (d) and (k) and cls 62 and 63, which require him to accept biometric identification and embedded or graven data or images if he wishes to hold a driver licence, treat him differently to those who do not share his belief. He also claimed there is no compelling road safety benefit to these requirements and therefore the discrimination is not justified under s 5 of the Bill of Rights Act.

Fourth cause of action

[41] The fourth cause of action relates to s 23(4) of the LTA (and associated Rules and regulations), which relates to the expiry of synthetic or lifetime licences. Mr Butcher

alleged the removal of his right to use a synthetic paper licence which does not compromise his religious belief treats him differently to a person who does not share his belief. He submitted that the early expiry of what he referred to as the lifetime licence, without access to an equivalent paper licence is not a justified limit under s 5 of the Bill of Rights Act.

Fifth cause of action

[42] This cause of action relates to s 24 of the LTA which permits the issuance of temporary paper licences without photo identification when someone is awaiting a photo driver licence, but does not permit Mr Butcher to hold a paper licence instead of a photo driver licence even though this would accommodate his religious belief. This difference in treatment Mr Butcher alleged was discriminatory.

Sixth cause of action

[43] Mr Butcher alleged that cl 11 and Schedule 9 Parts 1 and 2 of the Rules, which require photo identification to be provided when applying for a driver licence, further prevent him from applying for a licence because of his religious belief. Mr Butcher said the effect of the rule is to provide an avenue for someone without his religious view to apply for or renew his or her driver licence and therefore treats him differently from someone who does not share his religious belief.

Seventh cause of action

[44] Mr Butcher claimed that s 200 of the LTA is discriminatory because it extends the scope and use of the photo identification to other agencies and therefore further limits the services he may be able to access within the parameters of his faith. He alleged this treats him differently from others who do not share his religious belief and does not protect his religious rights. He further alleged the extension of the use of the photo driver licence is not justified by s 5 as it is not for road safety purposes.

Eighth cause of action

[45] This cause of action alleges that s 12 of the LTA accommodates the consumption of alcohol and drugs, which he described as a lifestyle choice, but does not accommodate his religious beliefs. Mr Butcher claims the accommodation of alcohol and drug use (within limits) but not of his religious beliefs is discriminatory.

Ninth cause of action

[46] Mr Butcher alleged that cl 88 of the Rules is unjustifiably discriminatory because it permits foreign drivers with non-photographic licences to drive in New Zealand when he is not permitted to do so. This means, Mr Butcher claimed, that the religious beliefs of foreigners are better accommodated than those of New Zealand residents.

Tenth cause of action

[47] It is alleged that cl 12(5) of the Rules is discriminatory in that it permits accommodation of the religious beliefs of some but not those of Mr Butcher.

Eleventh cause of action

[48] Mr Butcher claimed that the definition of "unlicensed" driver in s 2 of the LTA, which was added in 2005, is discriminatory on the basis of religion because it permits others without his beliefs to be able to renew their licence but left him at risk of being forbidden to drive and having his car impounded.

DISCRIMINATION FRAMEWORK

[49] While Mr Butcher's claim is that his rights under s 19 of the Bill of Rights Act have been breached, he has brought this claim under Part 1A of the HRA rather than directly under the Bill of Rights Act.

[50] Section 20L of the HRA, which is in Part 1A, sets out the obligation of Government to act consistently with s 19:

> **20L Acts or omissions in breach of this Part**
>
> (1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.
>
> (2) For the purposes of subsection (1), an act or omission is inconsistent with section 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 section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.
>
> (3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment.

[51] As is provided for in s 20L, once a plaintiff has established that an act or omission, including in an enactment, has limited the right to freedom from discrimination affirmed by s 19, the issue then becomes whether any prima facie breach is justified under s 5 of the Bill of Rights Act.

[52] Section 5 requires that any limiting of rights contained within the Bill of Rights Act must be prescribed by law and be demonstrably justified in a free and democratic society:

> **5 Justified limitations**
>
> Subject to section 4, 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.

[53] Part 1A does not define discrimination. Rather, what amounts to discrimination contrary to s 19 of the Bill of Rights Act has been judicially determined. That test is that set out by the Court of Appeal in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 (*Atkinson*) at [55], [109] and [135]-[136]:

> **[53.1]** First, there must be differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination.
>
> **[53.2]** Second, there must be a discriminatory impact (meaning that the differential treatment imposes a material disadvantage on the person or group differentiated against).

[54] The prohibited ground does not need to be the sole reason or even the predominant reason for the treatment or effect. It need only be a material factor. See *Air New Zealand Limited v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [49].

[55] Whether there is differential treatment or effects and, if so, what the reason is for that difference is not always readily apparent. It is for that reason that comparators are often used. Comparators are those who are in analogous or comparable circumstances apart from the prohibited ground of discrimination. If all else is the same, it is easier to infer that the reason for any difference in treatment is the prohibited ground of discrimination. See *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [51]; *Attorney-General v IDEA Services Ltd (in Statutory Management)* [2012] NZHC 3229, [2013] 2 NZLR 512 (*IDEA Services*) at [139].

[56] While comparisons between actual or hypothetical comparators can be a useful tool to identify discrimination, care needs to be taken not to define the circumstances in such a way as to produce an inevitable answer. This can arise if the contested assumptions at issue in the case are built into the comparator group. See *Atkinson* at [61] and [66]–[67]; *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 (*Ngaronoa*) at [120]–[121].

[57] Direct discrimination arises through differential treatment on a prohibited ground. Indirect discrimination is different. It arises when neutral provisions, which apply to everyone, have the effect of treating people differently. As Lady Hale observed in *Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice* [2017] UKSC 27, 1 WLR 1343 at [1]:

> [Indirect discrimination] is meant to avoid rules and practices which are not directed at or against people with a particular protected characteristic but have the effect of putting them at a disadvantage. It is one form of trying to "level up the playing field".

[58] Indirect discrimination is defined in s 65 of the HRA as follows:

> **65 Indirect discrimination**
>
> Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part has the effect of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

[59] The Court of Appeal decision in *Ngaronoa* is the leading authority on indirect discrimination. It made no distinction between the specific prohibition on indirect discrimination as set out in s 65 of the HRA and effects-based discrimination under s 19 of the Bill of Rights Act: at [111], [134] and [140]. This is evident from the Court's description of indirect discrimination under s 65:

> [119] Indirect discrimination under s 65 of the Human Rights Act can arise when a criterion in a law or policy, which is not on its face discriminatory, corresponds to a feature (or lack thereof) of all or part of a group and results in that group being treated differently on a prohibited ground. A Canadian example we will refer to is a policy in a public health system which does not fund the provision of translation services to deaf patients who could otherwise use state care. The provision did not mention deafness, and did not explicitly exclude deaf patients from the benefit of state care, but a failure to provide translation services to deaf patients effectively denied them equal access to important benefits that were available to other persons who were not deaf. Accordingly, the discrimination does not need to be direct.

[60] Reasonable accommodation is conceptually different to either direct or indirect discrimination. A person or group seeking reasonable accommodation is inviting differential treatment. They want to be treated differently to others because of a prohibited ground of discrimination.

[61] Further, in contrast with those subjected to direct or indirect discrimination, those seeking reasonable accommodation are not asking to have the provision itself deemed unlawful. Rather, they are seeking an exception to it. For this reason, reasonable accommodation does not require group disadvantage but rather measures that are tailored to individual circumstances or needs: Katayoun Alidadi "Divergent Stepping Stones Towards Equality? Indirect Discrimination and Reasonable Accommodation on the Basis of Religion Competing for Attention in the European Workplace" (2021) 34 Harv.Hum.Rts.J. 281 at 289:

> [D]isadvantage is not necessarily experienced by all or most members of a particular group, but is … experienced on the individual level depending on both individual and environmental factors. Such individual forms of disadvantage can only rarely be revealed by making of group comparison, which is characteristic for both direct and indirect discrimination standards. Reasonable accommodation discrimination therefore requires a different approach to do justice to the particularities of an individual in a given situation.

[62] While the test for discrimination under s 19 is now settled, the question of whether s 19 extends to require reasonable accommodation has yet to be considered.

[63] The legal test for justification applied in discrimination cases is that set out by Tipping J in *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (*Hansen*) at [104]. See *Atkinson* at [143]. It requires the Government to establish the limiting measure is prescribed by law and that:

> **[63.1]** The purpose of the rights limiting measure is sufficiently important to justify curtailing the right to be free from discrimination;
>
> **[63.2]** The measure is rationally connected to its purpose;
>
> **[63.3]** It impairs the right no more than is reasonably necessary to achieve that purpose; and
>
> **[63.4]** The degree of intrusion on the right is proportionate to its purpose.

[64] It is not intended this formulation operate as a rigid test. Instead, it sets out a framework under which the issues of justification are to be considered. One of the other issues in this case is whether the *Hansen* test or framework remains appropriate in a case where the ground of discrimination is religious belief, or whether the claimed duty to accommodate religious beliefs also requires a different approach to s 5 of the Bill of Rights Act.

ISSUES

[65] The issues arising in this case can be divided into three sets.

[66] The first set relates to the meaning of religious belief and whether there is an obligation to accommodate religious beliefs. More specifically they are:

> **[66.1]** Does the meaning of religious belief in s 21(1)(c) of the HRA include manifestation of belief?

[66.2] Do ss 13 and 15 of the Bill of Rights Act create a duty on the Government to reasonably accommodate religious beliefs and, if so, does a failure of reasonable accommodation give rise to a prima facie breach of s 19 of the Bill of Rights Act?

[66.3] If so, has there been a failure to accommodate Mr Butcher's religious beliefs?

[67] The second set relate to the question of whether Mr Butcher has been directly or indirectly discriminated against contrary to s 19 of the Bill of Rights Act. This entails consideration of whether:

[67.1] Mr Butcher is treated differently by s 28 of the LTA and cls 62 and 63 of the Rules (or by any of the other impugned provisions of the LTA or Rules) because of his religious belief and, if so, whether there has been material disadvantage.

[67.2] Indirect discrimination requires group-based disadvantage, or whether Mr Butcher can establish indirect discrimination by demonstrating that a facially neutral law has an adverse impact on himself alone.

[67.3] If group-based disadvantage is required, what religious group is Mr Butcher a member of; and

[67.4] That group has been adversely impacted by any of the impugned provisions in comparison to others who do not share that belief.

[68] The final set relate to issues of justification. If there has been a breach of s 19, either through direct or indirect discrimination, or through a failure to accommodate Mr Butcher's religious beliefs, is that breach nevertheless justified under s 5 of the Bill of Rights Act? This will entail consideration of:

[68.1] Whether the impugned provisions are prescribed by law;

[68.2] The purpose of those provisions and whether they are rationally connected to that purpose; and

[68.3] The proportionality of the rights limiting measures including the role, if any, of reasonable accommodation in the s 5 justification test.

[69] Before turning to consider these issues, the evidence in relation to Mr Butcher's religious belief is discussed. On this question, the Tribunal heard from Mr Butcher himself as well as from Professor Trebilco, who was called by the Crown to provide expert evidence in relation to Mr Butcher's religious belief. Professor Trebilco is a professor of religious studies at the University of Otago with expertise in the Book of Revelation. The Tribunal acknowledges Professor Trebilco's expertise and accepts his evidence to the Tribunal.

[70] At the outset we also wish to record that the credibility of Mr Butcher was not in issue. Nor was the credibility of the witnesses called by the defendant.

MR BUTCHER'S RELIGIOUS BELIEF AND THE EVIDENCE OF PROFESSOR TREBILCO

[71] Mr Butcher describes himself as a Christian of orthodox belief. In his evidence to the Tribunal, he said:

> [T]his belief can be seen in confessions of faith, such as the Westminster Confession of the Protestant Churches and the Confession of the Antiochian Church to which Paul was sent after his Damascus Road conversion. The most succinct confession of faith, to my mind, remains that of the apostles in Jerusalem which was never formalised in writing but which is now recorded in written form as much as is possible after the event … .

[72] Mr Butcher's evidence about his religious beliefs was extensive, but at its core his religious objection to the photo driver licence arises out of his reading of the Book of Revelation and the need to avoid taking of the mark of the beast. Mr Butcher believes the photo driver licence is the mark of the beast based on his understanding of a specific instruction in the Book of Revelation.

[73] This instruction as contained in the New Standard Version of Revelation 13:18 reads:

> This calls for wisdom: let anyone with understanding calculate the number of the beast, for it is the number of a person. Its number is six hundred and sixty-six.

[74] According to Professor Trebilco, other bible translations are very similar to the King James version, for example, using the word "count" instead of "calculate".

[75] As Professor Trebilco explained, near the beginning of the Book of Revelation there are letters to seven churches in Asia Minor. These were the original recipients of the Book. As a consequence, Professor Trebilco believes that while the Book of Revelation includes a prophecy about future events, it also had a contemporary message for those seven churches at the end of the first century AD.

[76] The original texts of the New Testament are long gone. What we now have are copies, or rather copies of copies. Professor Trebilco said that the copies vary, either because scribes made mistakes, or the scribes thought they contained mistakes which they then sought to correct. According to Professor Trebilco, there are two variants for Revelation 13:18. The first is that set out above, which identifies the number of the beast as 666. The second identifies the mark of the beast as 616.

[77] Mr Butcher's reading of the Book of Revelation is based on a remnant of Papyrus 115 held at the Oxford Ashmolean Museum in the United Kingdom. A copy of Papyrus 115 provided to the Tribunal by Mr Butcher is set out below.

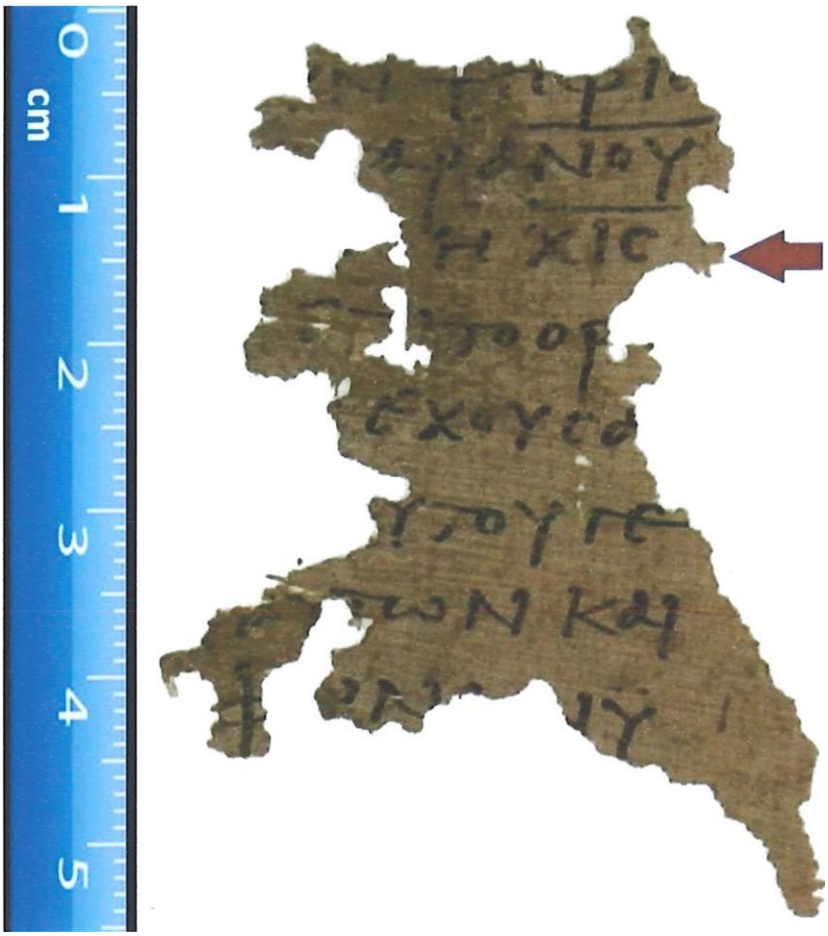
[78] Mr Butcher reads XIC in the third line as Roman rather than Greek numbers. He then reads the numbers (10, 1, 100) as containing 1's or 0's and thus in a binary computer form. It is the binary or digitised version format of the photograph and signature, which combined with the bar code, Mr Butcher says represents the mark of the beast. He also then adds or tallies the numbers to reach 3 (1+0+1+1+0+0), rather than subtracting them as he believes this is consistent with the instruction in the Book of Revelation. The number three he believes is the identity of the Anti-Christ.

[79] Mr Butcher also believes that a photo driver licence is inconsistent with the Second Commandment which forbids subjugation to graven images. Mr Butcher said that a photograph per se is not forbidden but when required as a prerequisite for something else or converted into biometric technology (facial recognition being one form) then in his view a serious measure of subjugation has been added.

[80] Professor Trebilco considers that Mr Butcher's understanding of the Book of Revelation based on Papyrus 115 is very unlikely to be correct. While he accepted that many interpreters of Revelation argue for two levels of meaning, there needs to be some

connection between them. The example he gave is that of Emperor Nero. The numerical value of the Hebrew spelling of Nero's name is 666. The beast could therefore be Nero or someone like Hitler who resembles the earlier Emperor. However, he said that Mr Butcher's view that the letters XIC in Revelation refer to the photo in a driver licence or to digital data has no echo with earlier meanings.

Papyrus 115



[81] Professor Trebilco said it was possible that 616 in Papyrus 115 is the original reading of Revelation 13:18. However, he also said that Mr Butcher's reading of XIC as a Roman number does not easily make sense as the normal ordering of Roman letters would be CXI. He further said whether the number is 616 or 666, it is unprecedented to read the Greek text as Roman numerals as Mr Butcher does. In his view, the Greek characters are to be read as Greek numerals where X = 600, I = 10 and C = 6, hence 616. He further said:

> [E]ven if XIC (616) was the original reading, … [i]t would still be a Greek number not a Roman one. I am aware of no evidence that anyone before Mr Butcher ever read XIC as a reference to Roman numerals (rather than Greek ones), nor did they take this number additively (10+1+100) rather than subtractively, nor did they take it as a tally (1+0+1+1+0+0) and hence as a binary code. In the history of interpretation, as far as I can tell, these interpretive steps are all unique to Mr Butcher.

[82] Professor Trebilco also explained that the meaning of the word "calculate" or "count" according to the New Testament lexicon is to probe a number for its meaning. He said that John is not calling on readers to do a mathematical sum but rather to "figure it out" because the number stands for a particular person who is the Anti-Christ. That, according to Professor Trebilco, is why the verse calls for wisdom.

[83] Professor Trebilco described Mr Butcher's interpretation as "unique" and the presuppositions behind his views as "idiosyncratic". This term was not used pejoratively, but descriptively of Mr Butcher's beliefs. In response to a question from Mr Butcher, Professor Trebilco said he was aware that some Christians in the United States and Canada object to carrying photo driver licences but to his knowledge not for the same reasons as Mr Butcher.

[84] Mr Butcher accepted that his reading of Revelation is not widely shared. He also accepted that others who believe that the Second Commandment prohibits them from having their photos taken, for example the Hutterian Brethren in Alberta, Canada do not share his belief of subjugation arising from the biometric technology used in the photo driver licence.

[85] While Mr Butcher has been opposed to the photo driver licence since its inception, his own belief has shifted over time. Mr Butcher summarised a shift in religious opposition to photo driver licences in the following way in his closing submissions:

> Previously most such cases hinged on a second commandment belief contained in the Old Testament. This was applied to documents containing a photo which was required to access services. As the nature of the photo changed to digital and biometric capability, there is now beginning a shift to measuring these attributes against the prohibition set out in the New Testament Book of Revelation. While still in its formative stages, the belief can usefully be summarised as a prohibition that believers of orthodox faith should reject documents required to access services, documents which contain image, name and number where these are in binary form together on a card licence or stored separately in databases.

[86] Mr Butcher said that others were coming to share his view, although no evidence was provided about this emerging wider group. He also said there was one other person that he knew of in New Zealand that shared his views, but he provided no evidence as to who that person was. He further said that his wife, who also refuses to have a photo driver licence on religious grounds, does not share his interpretation of "XIC" in Papyrus 115.

[87] Professor Trebilco further outlined what he understood by Mr Butcher's description of himself as a Christian with orthodox belief. He said that an "orthodox Christian" is a well-recognised title of someone who wants to be at the centre of classic Christianity. Professor Trebilco's evidence was that someone saying they are of orthodox faith means they would belong to a recognised group within the New Zealand church that regards the Apostolic Creed or the Nicene Creed or other early church creeds as authoritative, would regard the scriptures as the key authority and the person of Jesus as the revelation of God on earth.

[88] Professor Trebilco also gave evidence more generally about religion. Religion, he said, was a corporate exercise. While there are different ways of defining what a religion is, in the first instance he said it is about communities – there needs to be a kind of community belief system to be a religion. Within the Christian faith as traditionally understood, Professor Trebilco said a Christian becomes part of the body of Christ and part of the church; faith includes the person but also the community. However, he also said that does not mean that within that community people cannot hold their own personal views and accepted that there will be some who consider themselves Christians who are

not part of any worshipping community. However, from a New Testament theological perspective, Professor Trebilco said that a Christian is part of a new family, a new worshipping group.

Impact of Mr Butcher's adherence to his religious belief

[89] Mr Butcher gained his driver licence in 1972. In 1985 his licence was replaced with a "lifetime" or "synthetic" driver licence. Its expiry date was 31 August 2026. His lifetime licence was cancelled in 1999, after which he was required to hold a photo driver licence in order to be able to drive lawfully. He has never held a photo driver licence because of his religious beliefs.

[90] Mr Butcher says the sincerity of his belief is demonstrated by his refusal to hold the photo identification which is required for him to be able to practice as an architect or as a building inspector, both of which he is qualified for. He now works in casual roles which range from painting to tutoring to working as a violin teacher.

[91] Mr Butcher lives on a rural property in Gladstone, in the Wairarapa. The town centres of Masterton, Carterton and Martinborough are each 15 to 20 kilometres away. Mr Butcher's elderly father-in-law lives in Masterton and he requires assistance, necessitating travel to Masterton. The only public transport available where Mr Butcher lives in Gladstone is the school bus.

[92] Mr Butcher attempted to obtain and even build motorised transport that would be exempt from the Rules, without success. He says that while some alternatives might at first appear to be possible, the fine print in the Rules mean they do not comply. He referred to several inquiries and attempts.

[93] The first attempt to get around the legislative provisions was the purchase of an electric scooter of 250w in the early 2000s. While it was not fast, it had a 30km range and could carry small loads. However, it did not comply because of a requirement in the Rules that if an electric motor was the principal form of propulsion, it is a motor vehicle even if it is slower than a bicycle. He also referred to his scratch built three wheeled mobility device "Bumble", named after the child's pull-along buzzy bee toy. His evidence was that despite engagement with the New Zealand Transport Agency (Waka Kotahi), he was not able to get an exemption that would both meet his transport requirements and be safe for use on rural roads.

[94] Mr Butcher said that initially both he and his wife relied on Police discretion to be able to continue to drive. Mr Butcher's evidence was that both he and his wife would appeal to the Police officer's oath of allegiance to the Queen who is also the defender of the faith. The ability to rely on Police discretion ended in 2015 when Mr Butcher's wife was issued with an infringement notice for driving without a licence. The Police officer who stopped her demanded she hand over her keys. Mr Butcher said she was traumatised by the event and further driving by her risks the confiscation of her car.

[95] In short, Mr Butcher's evidence was that the loss of his ability to drive lawfully has had a significant effect both on him and his family. This impact has not been able to be mitigated by his attempts at a "work around" which have met with difficulties.

Factual findings in relation to Mr Butcher's religious belief

[96] We accept that Mr Butcher is part of a faith group that can broadly be described as Christians of orthodox belief. However, his objection to a photo driver licence stems from a religious belief aptly, in our view, described by Professor Trebilco as idiosyncratic. Other than a passing reference to one other person, there was no evidence before the Tribunal that his view about Papyrus 115 was shared by anyone else, including his wife. In this respect he can also be described as a solitary believer.

[97] We accept that his religious beliefs are genuinely held and that staying true to those beliefs has come at a cost in that he is faced with the dilemma of driving unlawfully or experiencing real inconvenience.

IS MANIFESTATION OF RELIGIOUS BELIEF PART OF THE DEFINITION?

[98] Turning then to the first set of issues which relate to the definition of religious belief and reasonable accommodation.

[99] Mr Butcher argued that religious belief in s 21(1)(c) of the HRA should be read in the broadest sense to include both the belief itself and its manifestation. He pointed to the originating provision in the International Covenant on Civil and Political Rights (ICCPR) which does not separate out the provisions relating to religious belief into two separate sections as the Bill of Rights Act does through ss 13 and 15.

[100] Sections 13 and 15 have been set out earlier in this decision but are repeated here for convenience.

> **13 Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> **15 Manifestation of religion and belief**
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

[101] Article 18 of the ICCPR states:

> **Article 18**
>
> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[102] Mr Butcher further argued that because the right to freedom of religious belief in s 13 is absolute, there would be no role for s 5 of the Bill of Rights Act if religious belief does not also encompass the manifestation of that belief.

[103] Mr Butcher also now relies on the judgment of Cooke J in *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291, (2022) 13 HRNZ 109 (*Yardley*). Following the release of that decision on 25 February 2022, further submissions on its relevance to the present decision were sought and received from both parties.

[104] *Yardley* concerned a challenge to the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021. Under that Order the Minister for Workplace Relations and Safety determined that work carried out by certain Police and Defence Force personnel could only be undertaken by workers who had been vaccinated. Judicial review proceedings were brought challenging the lawfulness of that order by three members of the Defence Force and Police who faced the termination of their employment as a result of their objection to being vaccinated. The proceeding included claims that the Order breached the plaintiffs' right to refuse medical treatment protected by s 11 of the Bill of Rights Act, as well as their right to manifest their religious beliefs protected by s 15 and to be free from discrimination on grounds of religious belief under s 19 of the Bill of Rights Act.

[105] The Bill of Rights Act s 15 grounds advanced were twofold. First, that a number of those affected objected to the Pfizer vaccine on the grounds that it was tested on cells that were derived from a human foetus, believed to be an aborted foetus. It was accepted that such testing did occur (although it was not known whether the foetus was aborted), and the Court held that requiring the plaintiffs who held that religious belief to be vaccinated amounted to an interference with their right to manifest their religion. Some of the deponents also expressed the view that the requirement to be vaccinated was inconsistent with Christian values, but these wider arguments based on Christian values failed. See *Yardley* at [47], [50], [52].

[106] While the discrimination claim in *Yardley* failed for reasons that will be discussed later, the Court rejected the Crown submission that the prohibited ground of discrimination in s 21 of the Human Rights Act is limited to religious beliefs and not also to the manifestation of those beliefs:

> [55] … If a measure disproportionately affects a group because it limits a particular religious practice, or other manifestations of belief, then it seems to me to be clearly subject to the right to be free from discrimination on the basis of religion. [Footnotes omitted].

In the footnote at the end of that paragraph, Cooke J gave the example of a measure preventing the wearing of head coverings as potentially discriminating against a number of groups whose manifestation of belief involves the wearing of head coverings.

[107] There are two ways to read the passage at [55] of *Yardley* set out above.

[108] The first is that relied on by Mr Butcher, which is that manifestation of belief is included within the meaning of religious belief in s 21 of the HRA, so that any differential treatment based on manifestation of belief can also give rise to discrimination. This would have the effect of widening the scope of direct religious discrimination claims, including under Part 2 of the HRA in relation to private actors.

[109] The second way to read that passage is that the Court is concerned with disproportionate effects on a group, not differential treatment of individuals. In other

words, the Court considered that manifestation of religion may be relevant in indirect discrimination cases where the comparative disadvantage or effects experienced by members of a religious group may arise through imposts being placed on the manifestation of belief by members of that group. That, however, is a very different issue to the treatment itself being directly unlawful on religious manifestation grounds alone.

[110] This is not a religious freedom case; we do not have jurisdiction to determine whether there has been a breach of s 15 of the Bill of Rights Act. The question for us is whether the definition of religious belief in s 21 of the HRA should include manifestation of belief as understood by s 15. That is a much more limited question, and one that must take into account the statutory scheme of the HRA, including the effect on discrimination cases under Part 2 of the HRA, where justification is not always or even usually permitted in direct discrimination cases.

Belief and manifestation of belief distinct concepts

[111] The distinction between the two concepts, religious belief and manifestation of belief, was discussed in another recent decision of the High Court in *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510, (2021) 12 HRNZ 693 (*Health Professionals Alliance*). As with *Yardley*, the judgment in that case was delivered subsequent to the hearing of this case in the Tribunal and the parties were provided with an opportunity to make further submissions on its relevance to this one.

[112] *Health Professionals Alliance* involved a challenge by an alliance of health professionals to some of the statutory provisions inserted into the Contraception, Sterilisation and Abortion Act 1977 by the Abortion Legislation Act 2020. It was claimed that certain of the new provisions unjustifiably infringed various rights conferred by the Bill of Rights Act, including the religious freedom rights in ss 13 and 15 and the freedom from discrimination right in s 19.

[113] In her decision, Ellis J noted that under art 18 of the ICCPR the right to manifest religion or belief is a subset of the wider freedom. However, Her Honour held it was important to make the distinction between holding a belief (protected by s 13) and the manifestation of a belief (protected by s 15). This is because internal freedom of thought is absolute and cannot be subject to justified limits while the external manifestation of a religious belief can be limited. The reason for the difference, as Ellis J explained, is that external manifestation has the potential to affect others. For that reason, the distinction to be a fundamental one. See *Health Professionals Alliance* at [62]-[86].

Argument that religious belief includes manifestation failed in United Kingdom

[114] Whether religious belief includes manifestation of belief was expressly addressed in an employment discrimination context by the United Kingdom Employment Appeal Tribunal (EAT) in the case of *McFarlane v Relate Avon Ltd* [2010] ICR 507 (UKEAT) (*McFarlane*). Mr McFarlane was a couples' counsellor who, for religious reasons, was not prepared to provide psycho-sexual therapy to same-sex couples. This resulted in his dismissal. Mr McFarlane argued that for his religious belief to be properly protected, it was necessary to prevent discrimination based on the manifestation of belief as well as the fact the belief was held. He submitted the right to hold a belief and the right to manifest that belief in conduct were inseparable. See *McFarlane* at [17].

[115] That submission was rejected:

> 18. We cannot accept this argument. It is of course correct that persons with a religious belief are likely to manifest that belief in their conduct. We further accept that in some cases where an employer objects to such a manifestation it may be impossible to see any basis for the objection other than an objection to the belief which it manifests; and in such a case a claim by the employer to be acting on the grounds of the former but not the latter may be regarded as a distinction without a difference. But in other cases there will be a clear and evidently genuine basis for differentiation between the two, and in such a case the fact that the employee's motivation for the conduct in question may be found in his wish to manifest his religious belief does not mean that that belief is the ground of the employer's action. Take the case of an employee who wears an item of jewellery or clothing with a religious significance. In the absence of any other context, it may be permissible to infer that an employer who dismisses an employee for wearing the item in question does so because of an objection to the belief so manifested: the protestation "I don't mind you being a Christian/Muslim, but I object to you wearing a cross/veil" might, without more, be rejected as spurious. If, however, it appeared from the context that there was some other ground for the objection – such as a general policy about the wearing of jewellery or practical reasons why the wearing of a veil was regarded as inappropriate - the position would be entirely different. In such a case any claim would have to be on the basis of indirect discrimination.

[116] Mr McFarlane's direct discrimination claim failed. The EAT held that he was treated no differently to any other counsellor who displayed a similar lack of commitment to the core values of the organisation, one of which was to provide counselling to all on a non-discriminatory basis: at [16]. That outcome may well have been different had the prohibited ground of religion included manifestation of religious belief. This is evident in the sister case to that of Mr McFarlane, that of Ms Ladele: *Islington London Borough Council v Ladele* [2009] ICR 387 (UKEAT) (*Ladele*).

[117] Ms Ladele was a strongly committed Christian employed by a London Borough as a Registrar of Births Deaths and Marriages. When the Civil Partnerships Act came into effect, she refused to register such partnerships because to do so was inconsistent with her religious beliefs. The Council insisted Ms Ladele carry out her full registration duties and threatened her with dismissal when she refused to do so. In finding there was no direct discrimination, Laws LJ writing for the EAT in *Ladele*, offered preliminary observations which illustrate the difference that an extended definition would make:

> 54 …[T]he ostensible reason for most of the conduct which is the subject of the complaint stemmed from the council's refusal to accept that the claimant should be permitted to refuse to do the relevant duties. If that was the genuine reason for their treatment of the claimant, then she is plainly not being discriminated against for her religious belief itself. That is so even though her reason for refusing was her religious belief.
>
> 55 It is true the council would be objecting to her putting that belief into practice, but it would still be her conduct rather than her beliefs which would then be the reason for the treatment.

[118] In concluding there was no direct discrimination, the EAT held:

> 89 …We can see no real evidence to justify an inference that the claimant was subjected to disciplinary action because of her beliefs rather than because she insisted on giving effect to those beliefs by refusing to participate in civil partnership work.

[119] Two things are evident from those passages. First, a distinction is made between the belief itself and manifesting that belief, with only the belief receiving protection against direct discrimination under United Kingdom anti-discrimination law. Secondly, had manifestation of belief formed part of the protected ground, the actions taken against Ms Ladele may well have amounted to direct discrimination, as the reason she was facing disciplinary measures and ultimately resigned was her insistence on being able to manifest her religion at work. Ms Ladele's treatment would then have been unlawful as there was no general ability to justify differential treatment on the ground of religion. As

Lady Hale noted in *Bull v Hall* [2013] UKSC 73, [2013] WLR 3741 at [16], the distinction between direct and indirect discrimination can be both crucial and difficult to draw.

[120] The crucial distinction between direct and indirect discrimination is similarly an issue under the HRA as not all direct discrimination under Part 2 is capable of justification. In other words, the scheme of Part 2 does not reflect the importance of the distinction drawn by Ellis J in *Health Professionals Alliance* that any limit on the right to manifest a belief is capable of justification because of the impact on the rights of others.

Expanded definition not supported by statutory scheme of the HRA

[121] Under Part 2 of the HRA, certain actions or activities amount to prohibited discrimination. However, unlike under Part 1A, where prima facie discrimination is always capable of being justified under s 5 of the Bill of Rights Act, under Part 2 direct discrimination will be unlawful unless one of the statutory exceptions or defences apply. It is only in cases of indirect discrimination governed by s 65 that notions of general justification apply.

[122] Take employment discrimination for example. Section 22 of the HRA provides:

> **22 Employment**
>
> (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—
>
> (a) to refuse or omit to employ the applicant on work of that description which is available; or
>
> (b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or
>
> (c) to terminate the employment of the employee, or subject the employee to any detriment, in circumstances in which the employment of other employees employed on work of that description would not be terminated, or in which other employees employed on work of that description would not be subjected to such detriment; or
>
> (d) to retire the employee, or to require or cause the employee to retire or resign,—
>
> by reason of any of the prohibited grounds of discrimination.

[123] Exceptions for the purposes of religion in an employment context are provided for in s 28 of the HRA. Relevant for current purposes is s 28(3):

> **28 Exceptions for purposes of religion**
>
> …
>
> (3) Where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities.

[124] Section 28(3) has been considered by the Tribunal in cases such as *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51 (*Meulenbroek*) and *Nakarawa v AFFCO New Zealand Ltd* [2014] NZHRRT 9 *(Nakarawa)*. In both cases, the employees were members of a Christian church which required its adherents not to work on the sabbath

and Mr Nakarawa and Mr Meulenbroek were dismissed for refusing to do so. In both cases the employer argued dismissal was not on the prohibited ground of religion but because the men refused to work on Saturdays and, in this sense, were treated no differently to other employees.

[125] This argument was rejected by the Tribunal, finding that it rendered the protection offered by s 22(1)(c) illusory. It said the comparison put forward by the employer was inapt as it negated the importance of religion, instead finding that the comparison should be with those who did not hold a religious belief requiring observance of the sabbath. See *Meulenbroek* at [125]–[130].

[126] While in both *Nakarawa* and *Meulenbroek* the Tribunal defined the comparators to take account of a core tenet of the religion, namely that paid work should not be undertaken on the sabbath, this does not mean that manifestation of belief per se falls within the definition of religious belief. Rather, as exhorted to do by the majority of the Supreme Court in *Air New Zealand v McAlister* the Tribunal selected a comparator that fitted the statutory scheme, which included the reasonable accommodation exception in s 28(3). See *Meulenbroek* at [126]–[129].

[127] Neither *Meulenbroek* nor *Nakarawa* are authority for the proposition that religious belief includes the manifestation of belief. This conclusion is supported by an analysis of the operation of s 28(3).

[128] Section 28(3) imposes an obligation on employers to reasonably accommodate religious practices. It could do this in one of two ways. First, as an exception to what would otherwise be lawful treatment of an employee under s 22. In other words, it is generally lawful to treat people differently based on the manifestation of religious belief unless it would not unreasonably disrupt an employers' business to accommodate that belief. Conversely, if religious belief includes its manifestation, s 28(3) would need to operate as a defence in situations where accommodation of religious practices would be unduly disruptive to the business.

[129] In our view, s 28(3) operates as an exception rather than a defence for three principal reasons.

[130] First, it would only provide a defence in situations where the religious practice in question is required by the religion. This is a narrower set of circumstances than the protection accorded to manifestation of belief under s 15, which eschews any suggestion that protection only exists in relation to required religious practices. See for example *Eweida and Ors v United Kingdom* [2013] ECHR 37 at [82] in relation to the analogue provision under the European Convention on Human Rights. This would mean that differential treatment based on religious practices related to religion but not required by it, remained unlawful. This outcome cannot have been intended.

[131] Secondly, it applies only to claims under s 22, meaning there is no defence to direct differences in treatment under an extended definition of religious belief in other contexts, other than the exclusion from the operation of the HRA in ss 54 and 55 in relation to accommodation or s 58(1) in relation to educational establishments. This is despite the acknowledgment that manifestation of belief can affect the rights of others. Again, this cannot have been intended.

[132] Thirdly, we note that the wording of s 28(3) makes a distinction between the religious belief and the practices which adherents of the belief are expected to follow. Had

an extended definition been intended, it would simply have required accommodation of the belief itself, rather than practices required by the belief.

Interpretive principles do not support expanded definition

[133] Reading in an expanded meaning is also inconsistent with s 21 of the HRA itself. This is evident from the wording of s 21:

> **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
> (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or
> (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 guide 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.

[134] As can be seen, there is nothing in s 21 itself that supports religious belief being given an expanded meaning. To the contrary. Where clarification of the meaning of any of the prohibited grounds is required under s 21, this is provided within the section itself.

[135] Arguments to expand the definitions of the prohibited grounds, including for reasons similar to those advanced by Mr Butcher, have to date been rejected. See *BPH New Zealand Steel Limited v O'Dea* (1997) 4 HRNZ 456, [1997] ERNZ 667 (HC) (*New Zealand Steel*); *Trevethick v Ministry of Health* (2008) 8 HRNZ, 485, (2008) NZAR 454 (HC) (*Trevethick* HC).

[136] One of the issues in *New Zealand Steel* was the meaning of "political opinion". Like religious belief, political opinion is one of the prohibited grounds of discrimination set out in s 21 of the HRA. It was argued that the Court should take a broad, purposive and generalised interpretation of the meaning of political opinion consistent with the ICCPR and other international obligations. While the Court noted that one of the purposes of the HRA was to provide better protection of human rights in New Zealand in general in accordance with the United Nations human rights treaties, the Court held there were limits to the interpretive role of those treaties: at p 471

> In our view the Court cannot ignore the fact that the New Zealand Parliament in the Human Rights Act has chosen to incorporate into domestic law only some of the rights recognised in various international covenants and conventions. In those circumstances, the Court cannot use the generality of provisions in the international instruments to increase the scope of what our sovereign Parliament has decided should apply domestically. Further, although in a sensitive and important area such as this words should not be read down, where Parliament has deliberately provided protection for some rights which enjoy international recognition, but not others, it would be wrong for a Court to stretch or manipulate the clear words of the statute so as to provide protection in a greater or different area than Parliament has determined should apply.

[137] That passage in *New Zealand Steel* was referred to by this Tribunal in *Trevethick v Ministry of Health (No 2)* (2007) 9 HRNZ 1 to reject the argument that disability, as a prohibited ground of discrimination, should be read to include the cause of disability. The Tribunal held at pp 7-9 of its decision that to find that disability included its cause would involve reading words into the legislation that simply were not there and amounted to a significant de facto amendment to the Act. It said that the incremental way in which the prohibited grounds of discrimination and the areas of activity to which those grounds apply have been added to, compels the conclusion that Parliament has been very deliberate in what will and will not amount to unlawful discrimination.

[138] The Tribunal's reasoning on this point was described by the High Court on appeal as "unassailable". See *Trevethick* HC at [26]. The Court further said:

> [28] It would be difficult to deny that a "generous and purposive" approach should apply to interpreting statutes affecting human rights. In this sense, I would treat "generous" as a synonym for "broad" when that word is used in contrast to "narrow" as an approach sometimes recognised in statutory interpretation. However, such an approach cannot transform the section into something that it clearly is not.
>
> [29] Similarly, the desirability of conforming to international covenants is, in general terms, unquestionable. However, in an extreme case, non-compliance with an international covenant in the terms of domestic legislation may give rise to arguments of irregularity in that law, but does not mandate the Court to re-write it.

[139] By arguing that the prohibited ground of discrimination should protect both his belief and his right to manifest it, Mr Butcher is in effect arguing that anti-discrimination law should not only protect his right to hold a belief but also its substance or content. This

general proposition was rejected by the England and Wales Court of Appeal in *McFarlane v Relate Avon Limited* [2010] EWCA Civ 880:

> 21. In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. …
>
> 22. The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, as preferring the subjective over the objective, but it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion, any belief system, cannot by force of their religious origins, sound any louder in the general law than the precepts of any other. …
>
> 23. So it is that the law must firmly safeguard the right to hold and express religious beliefs. Equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials.

[140] We agree. In particular, we agree there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. Yet conflation of the two would be the outcome under Part 2 cases where there is no ability to justify differential treatment. The inability to justify all direct discrimination under Part 2 supports religious belief having a more limited meaning in s 21 of the HRA.

[141] The conceptual differences between religious freedom rights and anti-discrimination rights lends further support to the view that the scope of the protections accorded by each need not and should not be identical.

[142] Religious freedom is both broad and subjective as the High Court notes in *Yardley*. It is designed to protect individual autonomy in matters of religion, subject in the case of manifestation of belief to the overriding public or societal interest. Non-discrimination rights on the other hand are status based. Individuals are protected against comparative disadvantage incurred by actual or perceived membership of a group whose interests are protected by the prohibited grounds of discrimination. This is evident from the wording of art 26 of the ICCPR which sets out a non-exhaustive list of prohibited grounds of discrimination (one of which is religion) and extends the protection to "other statuses".

[143] As a solitary believer, Mr Butcher's right to manifest his religion is protected by s 15. But his particular belief does not also describe a status group that enjoys the protection of art 26 of the ICCPR or s 19 of the Bill of Rights Act.

[144] That is not to say that manifestation of religion will never be relevant in relation to discrimination. There will be instances such as that referred to in the passage from the EAT decision in *McFarlane* set out above at [115] where it is possible to infer that the objection is to the belief itself rather than the manifestation of it. There will also be instances where the overlap between the belief of a faith group which has protected status and the manifestation of that belief by individual members of that group means that the distinction between the belief and its manifestation is hollow, as Cooke J notes in the footnote in [55] of *Yardley*. This overlap is given statutory effect in the employment context by s 28(3) in order to require reasonable accommodation. Nor does it mean that negative impact on faith groups arising from neutral measures cannot relate to the manifestation of

belief, again as it did in *Yardley*. However, none of these examples reveal a sound legal or policy rationale to give religious belief the same meaning in the discrimination context as it has under s 15 of the Bill of Rights Act.

[145] Finally, we are not persuaded by Mr Butcher's argument that an expanded definition is necessary to ensure there is a role for s 5 of the Bill of Rights Act in religious discrimination claims. We accept that the impact on an individual arising from both adherence and non-adherence to a religious belief in practice could, in principle, constitute a material disadvantage for the purposes of s 5. Whether it is or not, is context dependent. Further, under s 19 all limits on the right to be free from discrimination on religious belief grounds are potentially capable of being justified. Put simply, there is no need to extend the definition as there is always a role for s 5 in such cases.

[146] For all of these reasons, we find that the meaning of religious belief does not extend to manifestation of that belief. The relevance of the passages in *Yardley* relied on by Mr Butcher were in the context of a claim of indirect discrimination where disproportionate limits on the manifestation of religion of a religious group may well amount to such discrimination. That approach is completely orthodox and can be reached without expanding the meaning of religious belief in s 21 of the HRA.

[147] Whether ss 13 and 15 give rise to a duty to reasonably accommodate religious beliefs is a separate question to the scope of the prohibited ground.

IS THERE A DUTY TO ACCOMMODATE MR BUTCHER'S RELIGIOUS BELIEF?

[148] In his closing argument, Mr Butcher described his claim as more of an omission of Government than a discriminatory act. Mr Butcher argued that in light of the guarantees in ss 13 and 15 of the Bill of Rights Act, the Government is under a duty to protect his right to religious freedom which it has failed to do. He submitted that the right to be free from discrimination on the ground of religious belief extends to individuals as well as to groups and, by failing to extend the paper licence provisions in s 24 of the LTA to him, for example, it has failed to accommodate his religious beliefs. That failure, he claimed, is discriminatory.

[149] At the time of the hearing, Mr Butcher offered no authority to support this claimed duty, other than to rely on the rights themselves.

[150] In his recent submissions filed following *Yardley*, Mr Butcher submitted:

> [31] It seems to me that the right to manifest religion in my case is not affected by whether the discrimination is direct or indirect. Nor is it affected because others, for secular reasons, have similar concerns because in fact Counsel for the Defence have produced no evidence of any secular group with grounds that manifest the same way as mine.

[151] As an aside, in relation to the latter statement, there was significant evidence before the Tribunal regarding opposition to photo driver licences on non-religious grounds, including the unsuccessful case brought by Mrs McInnes who mounted a challenge to the legality of photo driver licences on a number of grounds including because it was not framed in the least privacy intrusive way. See *McInnes v Minister of Transport* [2001] 3 NZLR 11 (CA) (*McInnes*) at [17]-[23].

[152] While not using the word "duty" in his recent submissions, in essence Mr Butcher is making the same point: that if his right to manifest his religion under s 15 of the Bill of Rights Act is impacted by a government measure, there is a concomitant obligation to

accommodate his religious belief under anti-discrimination law without any need to establish either direct or indirect discrimination. We disagree.

[153] The question of whether ss 13 and 15 involve a positive duty on the state to promote someone's religious freedom was considered by the Court of Appeal in *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA), 5 HRNZ 1 (*Mendelssohn*).

[154] Mr Mendelssohn was a member of the Centrepoint religion. He claimed, amongst other things, that the Attorney-General's acts and omissions concerning the Centrepoint Community Growth Trust, a trust incorporated under the Charitable Trusts Act 1957, breached the statutory duty under ss 13 and 15 of the Bill of Rights Act to take positive steps to protect his freedom of religion. Mr Mendelssohn argued that the duty arising under those sections required the Attorney-General both to take positive steps to protect his freedom of religion and to abstain from conduct that would damage it.

[155] Most of the claim was struck out including the cause of action based on a duty under ss 13 and 15 of the Bill of Rights Act and was not reinstated on review. Mr Mendelssohn appealed to the Court of Appeal.

[156] The Court of Appeal upheld the view of the High Court that ss 13 and 15 did not impose positive duties on the State, except in relation to the obligation under ICCPR art 18(2) which relates to coercion, which is not in issue here. Instead, the rights were characterised by the Court as providing for a freedom from state interference, a freedom that was negative rather than positive in nature. See *Mendelssohn* at [14]-[16].

[157] That decision would seem to provide a complete answer to Mr Butcher's claim that the Government is under a duty to protect his right to religious freedom. Nevertheless, even if there were a duty arising under s 15, that does not explain why it arises also under s 19 of the Bill of Rights Act. The implications of doing so would be to privilege religious views over non-religious objections to the same law or policy.

[158] The nature of the s 19 discrimination right was extensively considered in *Atkinson*. The Court of Appeal noted at [112] that Part 2 of the HRA, which expressly requires reasonable accommodation in some areas, proceeded on a different basis to that required by s 19. While we accept that the question of whether reasonable accommodation is required at the s 19 stage of the discrimination analysis was not discussed, we were not referred to any authority to support that approach in this case.

[159] Canada has adopted a reasonable accommodation approach for all discrimination claims under provincial human rights legislation, including on the ground of religion: *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)* [1999] 3 SCR 3 (*Meiroin*). *Meiroin* concerned a challenge by Ms Meiroin's union to the aerobic standard required of firefighters, which Ms Meiroin was unable to meet, and which led to her dismissal despite satisfactorily working as a firefighter for several years. In its decision the Supreme Court held that a unified approach to all discrimination cases should apply irrespective of how the discrimination arose. It did not, however, alter the obligation of a claimant to establish prima facie discrimination, simply the response to it. See *Meiroin* at [50], [54]-[55], [69]-[70], [83].

[160] In other words, even where reasonable accommodation provisions apply, prima facie discrimination must still be established. Applying that approach to the New Zealand context means it is not sufficient under s 19 of the Bill of Rights Act to simply demonstrate

that a particular religious belief has not been accommodated. Other reasons support that conclusion.

[161] First, as a matter of practicality, holding there is a legal duty to accommodate all manifestations of belief at the s 19 stage of the discrimination analysis would mean that all legislation and all policy decisions by Bill of Rights Act actors will need to accommodate all religious views, not just those of Mr Butcher. So too will non-religious beliefs need to be accommodated as these are also protected by the Bill of Rights Act. While s 5 of the Bill of Rights Act would preserve the right to impose reasonable limits, given the individualised nature of both beliefs and their manifestation, this would still impose a very significant burden on public policy and legislative decision makers.

[162] Secondly, requiring claimants to first establish a prima facie breach based on differential treatment or effect before questions of reasonable accommodation are considered maintains the comparative nature of anti-discrimination law. A different analysis is required under s 19 than under s 15. This is evident from *Yardley* where the Court dismissed the discrimination claims while at the same time upholding the claim based on a breach of s 15 of the Bill of Rights Act.

[163] Whether reasonable accommodation is required at the justification stage where religious freedom rights were in issue was considered by the Supreme Court of Canada in *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37, [2009] 2 SCR 567 (*Hutterian Brethren*), a case brought by members of the Hutterian Brethren who objected to a photo driver licence on religious grounds.

[164] The claimants in that case argued that the requirement to hold a licence in a form that was contrary to their religious beliefs presented them with an invidious choice; either to violate the Second Commandment or accept the end of the self-sufficient communal way of life. The majority held that the requirement to hold a photo driver licence did not deprive the Hutterite community of a meaningful choice as to their religious practice. While alternative transport arrangements would impact on the community's self-sufficiency and would impose a cost that was not trivial, the Chief Justice said those effects did not negate the choice that lies at the heart of freedom of religion. McLachlin CJ further held that the money and inconvenience imposed on the community was outweighed by importance of the social goal of having an effective driver licence scheme that minimises the risk of fraud. See *Hutterian Brethren* at [96]-[103].

[165] While the majority in *Hutterian Brethren* found no breach of the rights to religious freedom or freedom from discrimination, (with the discrimination claim described at [105] as "weaker"), the issue of reasonable accommodation was nevertheless addressed.

[166] The majority held that a distinction must be maintained between the reasonable accommodation analysis undertaken under human rights laws, which are analogous to those under Part 2 of the HRA, and the justification analysis that applies under s 1 of the Canadian Charter, which is written in equivalent terms to s 5 of the Bill of Rights Act:

> [68] Minimal impairment and reasonable accommodation are conceptually distinct. Reasonable accommodation … envisions a dynamic process whereby the parties - most commonly an employer and employee – adjust the terms of their relationship in conformity with the requirements of human rights legislation, up to the point at which accommodation would mean undue hardship for the accommodating party. …
>
> [69] A very different relationship exists between the legislature and the people subject to its laws. By their very nature, laws of general application are not tailored to the unique needs of individual claimants. The legislature has no capacity or legal obligation to engage in such an individualized

> determination, and in many cases would have no advance notice of a law's potential to infringe *Charter* rights. It cannot be expected to tailor a law to every possible future contingency, or every sincerely held religious belief. Laws of general application affect the general public, not just the claimants before the Court. The broader societal context in which the law operates must inform the s. 1 justification analysis. … The question the court must answer is whether the Charter infringement is justifiable in a free and democratic society, not whether a more advantageous arrangement for a particular individual could be envisioned.

[167] We agree with the majority of the Canadian Supreme Court that the orthodox justification analysis applies when considering whether a law that is prima facie discriminatory is otherwise justified for the reasons advanced in that case. Neither the fact that the analysis was undertaken in the context of religious freedom rights, nor the fact that the test for discrimination under s 15 of the Charter differs from that under s 19 of the Bill of Rights Act, in our view impact on the salience of this decision to the present case.

[168] The approach to s 5 of the Bill of Rights Act set out in *Hansen* and followed in *Atkinson* therefore applies to cases alleging that legislation discriminates on grounds of religion. While the experience of individuals impacted by the law may be relevant to the s 5 analysis, it is not part of that test to ask at the minimal impairment stage whether the law could have accommodated a particular claimant. It does not operate at that level of granularity. The test requires an assessment of whether the limit on the non-discrimination right falls within a range of reasonable alternatives. See *Hansen* at [126]; *Atkinson* at [153].

IS THERE PRIMA FACIE DISCRIMINATION?

[169] The second set of issues address the question of whether there has been a prima facie breach of s 19 of the Bill of Rights Act.

[170] In determining whether there has been a breach of s 19, each cause of action is considered separately, with the exception of what we consider is Mr Butcher's key claim which is encapsulated in his second and third causes of action which we will deal with as one amalgamated claim.

First cause of action

[171] As outlined above, in his first cause of action Mr Butcher claims the LTA as a whole is discriminatory because of a flawed process which meant that his religious freedom rights and his right to non-discrimination under the Bill of Rights Act were not properly considered.

[172] The Crown submitted the HRA only permits claims about whether legislation substantively breaches Part 1A of the HRA. It does not permit an examination of the lawfulness of the procedure by which the law was adopted. It also submitted that hearing the claim would breach the Parliamentary Privilege Act 2014.

[173] We agree with the Crown that in any challenge to legislation (or policy), s 19 is concerned with the substance of the provision, not the process by which it was arrived at. Section 19 does not confer on claimants a right to have a decision taken in a particular way. See *R (on the application of Begum) v Denbigh Highschool v Governors of Denbigh High School [2006] UKHL 15, [2007] 1 AC 100* at [68]; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 at [13], [24], [26]-[27], [31], [44], [90].

[174] Process may be relevant to the degree of deference accorded by courts as part of the s 5 justification process once a breach of s 19 has been found, but it does not itself give rise to a standalone claim. See *IDEA Services* at [202].

[175] Process may also be relevant to the separate question of whether any limit or interference with a right is "prescribed by law" as required by s 5 of the Bill of Rights Act. This issue is discussed later.

[176] The first cause of action fails.

Key claim: causes of action two and three

[177] Mr Butcher claimed that he is treated differently to others because his religious beliefs do not permit him to hold a driver licence in the form required by s 28(1)(a), (b), (d) and (k) of the LTA and cls 62 and 63 of the Rules. Section 28 is set out above at [19] and cls 62 and 63 at [27] and [28] respectively.

[178] Section 28(1)(a), (b) and (d) respectively require a driver licence to have on it a photographic image of the holder, the holder's name and signature, and unique identifiers to distinguish the licence and the holder from other driver licences and holders. Section 28(1)(k) permits driver licences to have other features as specified in the Rules for the purposes of verifying or protecting the integrity of the licence. Clause 62 requires each driver licence to have a one-dimensional bar code containing the licence number, the licence card number, and the production quality control number. Clause 63 requires the bar code and the holder's signature to be on either the front or back of the driver licence. Clause 63 also requires the holder's photo, name and licence number and driver licence card number to be on the front of the driver licence.

[179] As already discussed, Mr Butcher believes the combination of a digitised photo and signature, along with a bar code to be the mark of the beast which, according to the Book of Revelation, he is not to take. While his particular belief is allegedly shared only by one other, we accept it is nevertheless a sincerely held religious belief. The Crown did not argue otherwise.

[180] Mr Butcher argued that these provisions treat him differently to those who do not share his religious belief because those others are not required to compromise their religious belief in order to be able to lawfully drive.

[181] In his opening submissions, Mr Butcher identified a number of potential comparators for his claim. The suggested comparator that most closely matches these causes of action is a person without his religious belief regarding photo identification who is able to obtain, retain or renew their driver licence. The difficulty with this and many of the other) suggested comparators is that Mr Butcher has built the contested assumptions into his comparator choice.

[182] In our view, the comparison is between Mr Butcher and someone without his religious views who also wishes to obtain or renew a driver licence, and the first question is whether s 28 and cls 62 and 63 treat those two groups differently.

[183] The Crown submitted these provisions treat everyone the same. We agree. The provisions are facially neutral. Everyone, whatever their religious belief, is treated the same by them. Neither s 28 nor cls 62 and 63 expressly or impliedly contemplate the use of religious belief as a basis for distinguishing between anyone. A claim of direct

discrimination here, as it did in *Health Professionals Alliance* and *Yardley*, falls at the first hurdle. See *Health Professionals Alliance* at [163]–[164]; *Yardley* at [56].

[184] Any discrimination arising in respect of s 28 and cls 62 and 63 must therefore be indirect. In other words, it is the effect of those provisions rather than Mr Butcher's direct treatment under those provisions that is, or could be, discriminatory.

Are s 28 and cls 62 and 63 indirectly discriminatory?

[185] Mr Butcher argued that indirect discrimination applies to individuals as well as to groups. The Crown submitted that group-based negative effects is required. It said that indirect discrimination protects groups of people whose characteristics are protected by the prohibited grounds of discrimination and was never intended to vindicate the claims of a class of one. The key question therefore is whether solitary believers are protected from indirect discrimination.

[186] As discussed above, *Ngaronoa* is the leading decision on indirect discrimination. That case concerned the indirect effects of s 80(1)(d) of the Electoral Act 1993 which disqualified prisoners from registering as electors. It was argued, amongst other things that the section was indirectly discriminatory to Māori.

[187] The Court disagreed. It held that there was no difference in effect between Māori and non-Māori prisoners. All were disenfranchised by the provision. It did accept, however, that the provision disproportionately deprived more Māori voters than non-Maori voters of the right to vote, as a greater proportion of Māori are imprisoned. But it did not consider the difference to be significant as less than one percent of either group are in prison. Given that, the Court held there was no material disadvantage to Māori and thus no breach of s 19 of the Bill of Rights Act. See *Ngaronoa* at [138], [147]–[148].

[188] The Court in *Ngaronoa* did not expressly address the question of whether effects-based or indirect discrimination applied only to members of groups. It did note at [115], however, that legislation and policy decisions often involve the differential treatment of groups of people in the community. The key question, it said, was whether the difference arises on one of the prohibited grounds. In other words, in order to succeed in a claim of discrimination, membership of a group protected from discrimination by s 21 of the HRA is required. Elsewhere, the Court also focussed on groups, describing discrimination at [120] as one group being treated differently from another.

[189] The issue of whether group-based effects are required to establish a case of indirect discrimination has been considered more recently by the High Court in *Health Professionals Alliance*. Drawing on the Court of Appeal's decision in *Ngaronoa*, Ellis J held at [165]:

> [W]hat must be shown to establish indirect discrimination is that the operation of s 15 [of the Contraception Sterilisation and Abortion Act 1977] in practice means that there is a group of health practitioners who, as a result of their shared religious belief, will be treated differently from (and worse than) a group of health practitioners who do not share that religious belief. It does not suffice to point to individuals who have been or may be negatively affected by a particular law.

[190] Applying that approach, Ellis J also held the evidence needed to support a claim was lacking. The affidavit evidence filed on behalf of the Health Professionals Alliance deposed that their belief is grounded in their Roman Catholic faith that abortion was wrong in absolute terms. However, the Court held there was no reliable evidence that Roman Catholics as a faith group shared their view, pointing to the support for abortion by

President Biden, who professed to be a devout Catholic. Her Honour also noted that those adversely affected by the new legislative process comprises all who conscientiously object regardless of the motivation for that objection. For these reasons, no indirect discrimination arose. See *Health Professionals Alliance* at [166]-[167].

[191] Cooke J similarly dismissed the discrimination claim in *Yardley*:

> [56] … Here there is no evidence, statistical or other kind, showing that a group is being disadvantaged because of a particular religious belief which they practice — here declining to be vaccinated because of the fact that the vaccine has been tested on cells derived from a human foetus. The fact that there are some affected workers who have explained that this is their reason not to be vaccinated does not do that of itself. Other affected workers have other reasons not to be vaccinated. For there to be discrimination it needs to be shown that a group having a particular religious practice was differentially treated, and in a way that has caused disadvantage. That has not been demonstrated. [Footnote citations omitted].

[192] There is no evidence that Mr Butcher's particular religious belief, that a photo, name, and bar code in binary form are the mark of the beast, are shared by a group. His evidence was that one other person he knew shared his belief but provided no details. He also referred generally to more people sharing his view, but no specifics were provided. His wife shared his view to an extent, although she did not subscribe to his reading of Papyrus 115. Mr Butcher's wife did not give evidence about her religious beliefs.

[193] Even if the small number of other people that Mr Butcher referred to who do or may share his view had been called by him to give evidence, it is difficult to conceive of them as a faith group, as distinct to a small number of individuals who hold idiosyncratic views, to use Professor Trebilco's description of Mr Butcher's views.

[194] Mr Butcher referred to the case of *Wishart v Police* HC Auckland A185/01, 27 March 2002. The decision in that case records at [7] Mr Wishart saying that his strong personal objection to photo licences derives from his committed Christian beliefs and his refusal, like Mr Butcher, to take the mark of the beast. There was no evidence from Mr Wishart about his current beliefs or that he shares those of Mr Butcher.

[195] Given the lack of direct evidence of Mr Butcher's specific religious view being held by someone other than himself, a different group must form the basis of any indirect discrimination claim.

[196] In this case, the appropriate religious belief group would be orthodox Christians of which Mr Butcher is part. To succeed, Mr Butcher would need to show that this group was disproportionately affected by the photo driver licence requirements in comparison to others who did not hold similar beliefs. We accept that the adverse effect includes both the emotional and spiritual discomfort of acting contrary to one's belief by holding such a licence as well as those in Mr Butcher's situation who drive without a licence because they are not prepared to do so.

[197] No evidence was adduced to suggest that this group were disproportionately affected. There was evidence of privacy concerns and the potential for function creep such as those expressed by the then Privacy Commissioner. However, those concerns were privacy-based, not religious ones.

[198] The lack of evidence of such effect is fatal to any claim of indirect discrimination, just as it was in *Health Professionals Alliance* and *Yardley*. Mr Butcher's principal claim that s 28 and cls 62 and 63 are discriminatory, based on the effect of the provisions on him alone, fails.

All indirect discrimination claims fail

[199] The same lack of evidence is equally fatal to all of his other causes of action as indirect discrimination claims. Indirect discrimination requires evidence of the legislation's impact on a group; an adverse impact on solitary believers is not sufficient to found an indirect discrimination claim. All causes of action based on indirect effects fail.

[200] To succeed in establishing that any of his remaining causes of action give rise to a prima facie breach of s 19 of the Bill of Rights Act Mr Butcher needs to establish that he has been treated differently to others who do not share his religious belief and that this treatment has caused him material disadvantage.

Fourth cause of action

[201] As already noted, Mr Butcher's fourth cause of action alleges that s 23(4) of the LTA and related Rules is discriminatory because it prematurely terminated a form of driver licence which was compatible with his religious beliefs, meaning that he is not able to continue to drive, whereas someone who does not share his belief is able to renew their licence. Section 23(4) is set out above at [17].

[202] The Crown submitted that s 23(4) (and the associated rule, cl 112(1)(a)) do not treat Mr Butcher differently to any other person. Those provisions apply in the same way to everyone irrespective of that person's religious viewpoint. All synthetic or lifetime licences were deemed to have expired 60 days after the licence holder's next birthday following the introduction of the rule.

[203] We agree. For these reasons, the fourth cause of action also fails. All are treated equally by s 23(4), irrespective of religious belief.

[204] Mr Butcher's reliance on what he described as "common contract law" does not assist his argument. Parliament is sovereign. Through legislation, it can both override the common law and amend existing law.

Fifth cause of action

[205] Mr Butcher's fifth cause of action concerns the issue of temporary paper licences. Section 24 of the LTA (set out above at [18]) permits temporary licences to be issued in two circumstances. First, while an applicant for a driver licence is waiting for a photo driver licence to be issued. A licence issued in these circumstances is valid for up to 21 days. The second situation in which a person can be issued with a temporary paper licence is when the fitness to drive of a person whose licence has expired or revoked is being assessed. A paper licence in these circumstances can be issued for up to a year.

[206] Mr Butcher said that these provisions, which offer accommodation to those without his religious belief while not offering it to him, treats him differently.

[207] The Crown's response was that s 24 treats everyone the same. It described this claim as a side-wind attack on s 28, saying that what Mr Butcher is seeking is a permanent licence with the features of a temporary licence.

[208] The Crown also pointed to the evidence of Charmaine Berry that any difference between ss 24 and 28 is, in effect, illusory, as all those who are seeking to renew licences

will have had their photo taken and signature captured for a photo driver licence prior to being issued with a paper licence. Ms Berry is Lead Adviser, Licensing at Waka Kotahi.

[209] We agree that s 24 is facially neutral. The fact that someone on a temporary paper licence can drive without holding a photo driver licence does not mean that Mr Butcher is being treated differently on the ground of his religious belief. Section 24 permits Mr Butcher to be issued a temporary licence on the same basis as anyone else.

[210] Any effect on Mr Butcher arising out of s 24 of the LTA is therefore an indirect one and, as already outlined, the effect on him alone is not sufficient for a finding of indirect discrimination.

Sixth cause of action

[211] This cause of action relates to the requirements in cl 11 (set out at [24] above) and Parts 1 and 2 of Schedule 9 of the Rules (which are summarised at [25]). These provisions govern the identification requirements when applying for a photo driver licence in person. Mr Butcher claims that his religious belief does not permit him to hold one of the forms of identification required.

[212] The Crown submitted that Mr Butcher has misread the provisions in the Rules meaning that it is not necessary to use an identification card to renew a driver licence. Instead, a birth certificate, which is one of the listed primary identity documents in Part 1 along with a recent verified photograph is sufficient for that purpose: see cl 11(2)(b) and cl 11(5)(b), Part 1 of Schedule 9 of the Rules.

[213] We agree that not all the supporting documents listed in Part 1 and Part 2 require a photograph which suggests Mr Butcher has misread the section. More broadly, we also agree with the Crown that this claim raises no new legal issues to those arising under what we have described as his key claim. All, irrespective of religious belief are treated the same by cl 11 and Parts 1 and 2. Any claim of indirect discrimination also fails for the reasons already given, that such claims apply only to groups which are adversely affected by facially neutral provisions, not to solitary believers such as Mr Butcher.

Seventh cause of action

[214] In the seventh cause of action Mr Butcher alleges that s 200 of the LTA (set out above at [22]) is discriminatory because it limits the services that he may be able to access consistently with his faith. Mr Butcher argued that the effect of s 200 is to make photo identification a more universal requirement which in turn impacts on his ability to access those services given his religious objection to a photo driver licence.

[215] The Crown denied the effect of the section was discriminatory. It said that s 200 permits but does not require the use of a photo driver licence for other purposes and that a lack of a driver licence does not limit Mr Butcher's ability to engage with other Government agencies.

[216] This cause of action also fails. We agree with the Crown that it rests on a misunderstanding of s 200, which is to limit access to the photographic image stored under s 28(5) of the LTA. Section 200 does not permit a photo driver licence to be used for wider purposes and nor does it create any requirement for individuals to have a photographic driver licence before engaging with listed agencies.

[217] On its face, s 200 treats Mr Butcher in the same way as all others. It is not, therefore, directly discriminatory; any indirect effects need to be experienced by a religious group and there is no evidence of this.

Eighth cause of action

[218] The eighth cause of action fails as well. Mr Butcher claims that s 12 of the LTA accommodates the consumption of alcohol and drugs. He said that by accommodating this lifestyle choice but not accommodating his religious views, s 12 is discriminatory.

[219] Section 12 states:

> **12 Persons not to drive while under influence of alcohol or drugs**
>
> A person may not drive or attempt to drive a motor vehicle while under the influence of drink or a drug, or both, to such an extent as to be incapable of having proper control of the vehicle.

[220] Issue could be taken with Mr Butcher's description of the purpose of s 12 which is to restrict rather than accommodate alcohol use. More fundamentally however, s 12 of the LTA treats Mr Butcher in the same way as all others and the effect of the provision is the same for Mr Butcher as it is for those without his religious beliefs. There is no evidence before the Tribunal that Mr Butcher would be impacted adversely on religious belief grounds by a provision that limits consumption of alcohol.

Ninth cause of action

[221] In the ninth cause of action Mr Butcher alleges that cl 88 of the Rules (set out above at [30]) is discriminatory because it accommodates the religious beliefs of visitors to New Zealand by letting them drive on a driver licence without a photograph or biometric identification when he is not permitted to do so. He claimed this is discriminatory on religious belief grounds because it accommodates the religious beliefs of foreign drivers better than those of a New Zealand resident.

[222] In response, the Crown said the allegation is not one of religious belief discrimination, given that those with the same belief may be treated differently by cl 88. It also submits that no discrimination could be advanced on the basis of national origin or citizenship either as Mr Butcher could use cl 88 to drive in New Zealand for up to 12 months, provided he had an overseas licence.

[223] We agree that this cause of action does not give rise to religious belief discrimination.

[224] If Mr Butcher were to hold an overseas driver licence, he too would be able to drive for up to a year under cl 88 of the Rules. The distinction raised by cl 88 is the country of origin of the driver licence not the religious beliefs held by the licence holder. This is illustrated by Mr Butcher's view that he should be entitled to have his religious belief accommodated at least to the same extent as a visitor from overseas. In other words, Mr Butcher too sees the distinction as being one of national origin.

[225] Further, in relation to Mr Butcher's particular religious belief, we accept that the distinction may be more theoretical than real in light of Ms Berry's evidence that overseas licences which are not photo licences must be presented alongside other identification containing a photograph.

[226] Mr Butcher also argued that greater accommodation for visitors from overseas is not justified under s 5 of the Bill of Rights Act. We accept that had Mr Butcher been able to establish a prima facie breach of s 19 this may well be a consideration at the s 5 stage of the analysis. However, this cause of action centred on cl 88 of the Rules fails to do so.

Tenth cause of action

[227] Mr Butcher claims cl 12(5) of the Rules is discriminatory because it accommodates the religious beliefs of others but not his.

[228] As set out above at [25], cl 12(5) allows the LTA to permit an applicant for a driver licence to wear an item on or near the applicant's face, if that item is required for religious or medical reasons, provided the facial features from the bottom of the chin to the top of the forehead and both edges of the face are clearly shown and the LTA is satisfied it is a good likeness of the applicant. Ms Berry confirmed that under this rule Pastafarians are permitted to be photographed wearing colanders on their heads. Under the rule, Ms Berry also said that Islamic women could wear headscarves or hijabs which left their faces visible, but that niqabs or burkas which cover the face were not permitted.

[229] The Crown submitted that cl 12(5) has no impact on Mr Butcher. While cl 12(5) permits people with genuine religious beliefs to wear a head covering provided it does not obscure the face and there is still a good likeness, the rule cannot be relied on to avoid the requirement in s 28 of the LTA for a photograph. It argued that Mr Butcher was seeking an accommodation not permitted by that section and is therefore not being treated differently to others.

[230] We agree that Mr Butcher is seeking greater accommodation than the rule permits. Mr Butcher is seeking to be exempt from the photo requirement for a driver licence which is not offered to those whose religious beliefs (including parody beliefs) differ from his. Therefore, he is not being treated differently by cl 12(5) and no discrimination arises.

Eleventh cause of action

[231] Mr Butcher claims that having been the holder of driver licence he should be entitled to have his licence renewed as others are who do not share his belief, rather than being disqualified from driving and being at risk of being forbidden to drive. He alleges this risk arises from a change to the definition of "unlicensed" driver in s 2 of the LTA in 2005 to include a previously licenced driver whose licence has expired which he claims is discriminatory.

[232] The background statutory context for this cause of action is the power to forbid an unlicensed driver to drive a motor vehicle in s 113(2)(e) of the LTA and the requirement in s 96(1)(c) to seize or impound the vehicle of a previously forbidden driver.

[233] The Crown's view was this cause of action is untenable. Contrary to his claim, the Crown submitted that an "unlicensed" driver has always included those whose lifetime licences have expired. It said the 2005 amendment simply put the matter beyond challenge. The Crown also said that while ss 96 and 113 create a risk that Mr Butcher's car could be impounded if he continues to drive without a licence, the barrier to becoming licenced is not the definition of "unlicensed" but s 28 of the LTA.

[234] It is apparent from Mr Butcher's evidence that the risk that his car could be impounded is stressful for him, just as it was for his wife after she was forbidden to drive

because she was not licenced. But that does not make the provision discriminatory. Those sections operate equally on all, irrespective of religious belief. Mr Butcher is not at any greater risk of having his car impounded than any other unlicensed driver. We also note the view of the High Court that unlicensed drivers have always included those whose licences have expired. See *Police v Sinclair* [2001] 1 NZLR 355 (HC) at [27].

[235] This cause of action fails for both reasons.

No prima facie discrimination

[236] In summary, Mr Butcher has failed to establish that any of the impugned sections of the LTA or Rules prima facie infringe his right to be free from discrimination guaranteed by s 19 of the Bill of Rights Act. He is not treated differently by the provisions because of his religious beliefs. Any impact is indirect. However, indirect discrimination arising out of legislation applies only to the effects of neutral laws on groups, it does not apply to solitary believers such as Mr Butcher.

[237] The outcome would not be different had we found that the meaning of religious belief in s 21 of the Human Rights Act encompassed manifestation of belief as well as the belief itself. Mr Butcher's case is quite distinct to that of Mr McFarlane or Ms Ladele. In both cases, the adverse treatment arose as a result of their refusal to carry out full duties because of their beliefs. In other words, a change of definition had the potential to reframe the nature of the discrimination from indirect to direct. That is not the case here. The impugned provisions remain neutral ones, even under an expanded definition of religious belief, just as they did in *Yardley*. A change in the meaning of religious belief does not alter the legal test for indirect discrimination. Mr Butcher is still required to establish he is part of a religious group disadvantaged by the impact of the provisions. He has failed to show that he is.

[238] Having found there has been no infringement of s 19 there is no need to consider whether any difference in treatment or effect is justified. For the sake of completeness and because most of the evidence was directed to that issue, the question of justification is discussed.

JUSTIFICATION

[239] Mr Butcher claims the LTA was passed on the understanding that the photo driver licence was not an identification card, which he says it is. He further argued that because the use of binary identification technologies was introduced after the LTA was passed, the current form of the photo driver licence is not authorised by the LTA.

[240] Section 5 of the Bill of Rights Act requires any limit imposed on a right under the Act to be prescribed by law. In *Hansen*, McGrath J set out what amounted to "prescribed by law" in the following terms:

> [180] … To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty. [Footnote citations omitted]

[241] Following the Court of Appeal decision in *McInnes* in which the Court upheld the vires of the Rules, there can be no question that the provisions are authorised by law.

[242] Nevertheless, the question whether the photo driver licence is justified remains. This requires consideration of the purpose served by the requirements for a digitised

photo, signature, and bar code on a driver licence and whether that purpose is sufficiently important to justify curtailing Mr Butcher's right to be free from discrimination because of his religious belief. It also requires the Tribunal to determine whether the photo driver licence provisions are rationally connected to that purpose and whether they are a proportionate limit on his right to be free from discrimination.

[243] Mr Butcher submitted the discriminatory treatment is not justified. He identified the purpose of s 28 of the LTA as road safety at a reasonable cost. He accepted that road use has become safer but challenged photo driver licences as responsible for this. The link, in his view, is at best tenuous. He also accepted that driver licence integrity forms part of that purpose but only insofar as it advances road safety. He is critical of what he describes as "function creep" beyond Parliament's original road safety purpose. Mr Butcher submitted that many of the current uses of photo identification on the driver licence are for purposes not related to road safety and therefore the photo driver licence falls outside the purposes of the LTA.

[244] To the extent there are road safety benefits from the current form of driver licence, Mr Butcher saw these as being outweighed by the impact on individual privacy and, importantly for this case, his freedom of religion. In his view, limited exemptions on religious grounds could be made without affecting road safety and safeguards could be built in to protect the integrity of the system. He pointed to the much longer phase out of paper licences in the United Kingdom and Europe along with availability of paper-based temporary licences and the ability of foreigners to drive on paper licences to support this submission. He also noted the accommodation of religious beliefs of others permitted by the LTA and Rules.

[245] The Crown submitted that photo driver licences were introduced for road safety purposes. It argued that ensuring a high degree of licence integrity furthers that purpose as does better roadside enforcement of traffic laws through the improved identification of unlicensed and disqualified drivers.

[246] Evidence of the history of photo driver licences and the process by which they came about was relied on by both parties as part of the evidence led to support the parties' differing contentions as to the purpose of the photo driver licence and whether it is rationally connected with that purpose.

[247] The Crown also called extensive evidence to justify any limits the LTA and Rules may have placed on the right to be free from discrimination. In the interests of brevity, this decision neither records it all nor attempts a summary. As earlier mentioned, the credibility of the Crown witnesses is not in issue and their evidence is accepted by the Tribunal.

SECTION 5: PURPOSE AND RATIONAL CONNECTION

Photo driver licence: the rationale and the process

[248] Both Mr Butcher and Brent Johnson, who is the Manager of Mobility and Safety at the Ministry of Transport, gave evidence about the process by which the photo driver licence requirements came into effect. The following summary of that process is based on that evidence.

[249] Up until December 1983, driver licences were issued on a local basis. Under the new provisions which took effect at that time, the Secretary of Transport issued driver licences and a national register was established.

[250] On 1 August 1987, further changes were made. These included the introduction of what became variously known as the "synthetic" or "paper" licence. The extension of the period of validity of this licence until the end of the month in which the person attained the age of 71 years also led to it being described as a "lifetime" licence though the licence period was not actually for the lifetime.

[251] Consideration of a photo on a driver licence was raised by Police with the Ministry of Transport in 1973. It did so on the basis that it would assist with crime prevention generally. The Ministry of Transport was opposed. It considered that any move to photo driver licences needed to be justified solely on the basis of traffic offence detection. By the late 1980s and early 1990s calls for photos on driver licences began to be made again. By the mid-1990s, official and public support for photo licences was increasing.

[252] In 1994 the Land Transport Safety Authority (LTSA), the predecessor to Waka Kotahi, began a major review of the driver licensing system with a view to introducing a new system before 2000. This was when the Wanganui computer system, which was where the driver licence register in digital form was held, was expected to be decommissioned. A discussion document entitled "Driver Licensing Review Issues" was issued in 1994. One of the questions posed in the document was whether a driver licence should contain a photo of the licensee.

[253] In May 1996 the LTSA issued a further discussion document entitled "Driver Licence Format". Submissions from the public were invited. Eighty-six per cent of the 40,700 responses to the discussion document favoured a move to photo driver licences.

[254] In August 1996, the Ministry responded to the LTSA discussion documents. It said that road safety was the only basis on which the LTSA could support a photo-bearing licence and, while a move to photo driver licences would seem to have significant benefits including improving the road safety culture in New Zealand, a cost/benefit analysis should be undertaken to determine whether there were sufficient road safety grounds for the proposal.

[255] In March 1997 the LTSA published a consultation document on the proposed new Land Transport Rules. In relation to the proposal for a photo driver licence the LTSA said the proposal was aimed at people who apply for licences when not eligible; get other people to sit driving tests on their behalf; forge or alter their licence; drive using someone else's licence; or drive without ever being licenced or while disqualified. The LTSA considered that a photo licence would make those offences harder to commit and would make detection of them easier, provided mandatory carriage of the photo driver licence was also required.

[256] In terms of road safety costs, the consultation document noted that in 1995 never-licensed drivers were involved in 747 crashes, resulting in $229.75 million in social costs. In the same year, disqualified drivers were involved in 290 crashes, resulting in $113.4 million in social costs. The LTSA said that while it was difficult to predict the expected reduction in social cost, most other jurisdictions which had moved to adopt photo driver licences had done so as a means of reducing the social cost of crashes caused by drivers without licences. It did not consider there was a less intrusive but equally effective way of identifying drivers, a fact it said was borne out by the international convention requiring a photograph of the driver on an international driving permit.

[257] Two hundred and sixty submissions to the proposed Rules were received. Nearly 80 per cent were in support of a photo driver licence. Half of the submissions in opposition pointed to a potential for a licence to become a national identity card.

[258] Approval for a bill to be introduced which would require photo driver licences was made in November 1997. The explanatory note for the Land Transport Bill stated:

> A photo licence will improve the integrity of the driver licensing system and ensure that only drivers with the necessary skills and training can operate vehicles on the roads. The road safety benefits of a photo licence can only be properly achieved if the licence is carried at all times while driving because this is the only way Police can accurately identify the driver, so drivers will be required to produce their licences on demand by Police at the roadside.

[259] A week later, a draft rule, known as the yellow draft, was issued.

[260] Mr Butcher said there was significant concern about the photo driver licence and its potential to be a national identity card. His evidence was that it was unlikely that it would have passed were it not for two steps that were taken during the legislative process. The first of these was to limit access to the photos under what became s 200 of the LTA to officials of the LTSA in the course of their official duties or to Police on production of a warrant unless there was consent of the licence holder. The second was to remove the provision that would have required the LTSA to issue a verifiable form of identification to non-drivers. The Explanatory Note to the Supplementary Order Paper for this amendment read:

> "Identity Cards" are not required in New Zealand and have no place in legislation on road safety, and on land transport generally.

Function creep

[261] Mr Butcher also gave evidence about what he referred to as "function creep". He said the LTA was passed on the understanding that strict controls were placed on the use of the photo. It was, he said, to be a "dumb" card, meaning that the stored digital image was not to be used with facial recognition software or be shared with other agencies. Despite these assurances, Mr Butcher said he could not at the time regard the photo driver licence as anything other than an identification card. Mr Butcher said that the facial recognition capability and the use of the driver licence more generally in the community as an identity card has confirmed his view.

[262] Mr Butcher pointed to the expanded access to the LTA photo database, through the amendment to s 200 of the LTA in 2017, which permits the Department of Internal Affairs (DIA) to access the database for identity verification purposes and permits a range of core government agencies to access it for law enforcement purposes. This, he said, was contrary to the original understanding at the time the legislation was passed, where access was limited to LTSA staff and to Police on production of a warrant. He said that these changes simply reinforced his original view that the purpose of the photo driver licence was as an identity card.

[263] Mr Butcher referred to his own difficulties in being unable to undertake ordinary banking activities without photo identification as an indication of the true purpose of the photo driver licence. He gave the example of the difficulties in paying the athletics coach of his youngest son. He said he is unable to deposit money into the coach's ASB account without photo identification and, as a work-around, he had to deposit money into a building society which then transferred to the ASB through a bank transfer through the BNZ.

[264] Mr Butcher also pointed to the increasing use of RealMe, a secure online identity verification service managed by the DIA, and the possibility of using verified RealMe photos as driver licence photos as a further example of how the driver licence is in effect a back door way of implementing a national identification card. In his evidence he said that if fully implemented, there would be an amalgamation of the DIA and Waka Kotahi photo databases into one cloud-based system where either the RealMe or driver licence photo could be used on driver licences or to exclude persons without such a form of identification from accessing key public services. Already, he said, a verified RealMe is mandatory in order for students to receive an allowance.

[265] Ms Berry, the Lead Advisor Licensing at Waka Kotahi, responded to these points raised by Mr Butcher. Her evidence was that the identity-verified RealMe credential was developed by the DIA to enable individuals to verify their identity to a high level of confidence when transacting online. She said that the use of the credential online is equivalent to the presentation of a New Zealand passport in a physical environment.

[266] Ms Berry also said that the only driver licensing transaction able to be completed online is the application for obtaining a replacement photo driver licence. This is because replacement licences are simply the reproduction of a previously issued licence and are routinely issued using existing stored licence holder images and details. All other applications for driver licences must be completed in person. Ms Berry said that there are no plans to use the RealMe images for driver licensing purposes.

[267] Ms Berry also responded to the concerns about the amendment to LTA, s 200. Ms Berry said that the motivation for amending that section was in response to the recommendations arising from the final report of the Government inquiry into the escape of Phillip John Smith where weaknesses in identity-related processes were highlighted as a key area of law enforcement risk.

[268] Ms Berry accepted that Police could access driver licence images without an appropriate warrant but stressed that this did not mean that Police have unrestricted access to the driver licence photo database. Formal protocols, she said, were in place. Police must make itemised queries which are then made available via an automated process. Under these protocols, Police mobility devices can store data for 30 days, but Police systems do not store driver licence images.

[269] Ms Berry also provided evidence around the use of facial recognition technology in relation to driver licences. She said that in 2006 a facial recognition trial was undertaken using 5,000 randomly selected image pairs from the driver license register. That trial involved comparing the original photographs against subsequent photographs when the same 5,000 licences were renewed. Ms Berry said that even within that small sample, fraud was detected. This arose through imposters using a lost or stolen licence with a similar licence-holder's image to get a new one with their own photo, but in the name of the original holder.

[270] In 2009 a privacy impact assessment of the use of facial recognition technology within the Driver Licence Register was undertaken by Dr Paul Roth. Dr Roth is a privacy expert and Emeritus Professor at the University of Otago. In his assessment Dr Roth noted that facial recognition software could be used to ensure that New Zealand driver licences are only issued to those drivers who are entitled to hold one and to play a part in wider efforts to reduce identity fraud as a driver licence is a breeder document. He acknowledged that improved reliability of driver licences as a form of identification would have the unintended consequence of promoting their use for a wider variety of secondary

purposes. However, he considered that the fear such licences may become a de facto identity card was probably overstated.

[271] Dr Roth also said that it is unacceptable to continue to maintain a Driver Licence Register that suffers from deficient security and integrity if that situation can be easily and unobtrusively remedied. He did not consider the application of facial recognition technology to the driver licence register raised any obvious human rights or discrimination issues under either the Bill of Rights Act or HRA. He also considered it posed no obvious risk of breaching either the letter or spirit of the Privacy Act. Rather, he believed it enhanced compliance with those information privacy principles which relate to the security and accuracy of information.

[272] Ms Berry said that since that privacy impact assessment was completed in 2009, no formal steps have been taken to build facial recognition capability within Waka Kotahi.

[273] Ms Berry also responded to Mr Butcher's assertion that the addition of a bar code has resulted in the photo driver licence becoming an internationally recognised identity card. She said that the bar code is assigned to the card and is not related to the individual driver. The bar code contains the licence number, the card sequence number – that is the number of licences that have been issued (including through renewal or replacement) and the card production number which is a quality control measure.

[274] Ms Berry's evidence was also that the licence holder's biographic details, image and bar code are not stored on the same platform and that it was only for practical and road safety reasons they are combined on the driver licence. In her view, a photo driver licence was a "dumb" card as it does not contain an electronic chip, with all the information it contains being printed on the card itself.

Driver licence fraud

[275] Ms Berry said the standards and processes contained in the Rules are designed to uphold the objective of each driver holding only one driver licence and only having one licence record. She said that this is fundamental to the licensing system's capability of achieving its purpose of supporting road safety and traffic law enforcement.

[276] According to Ms Berry, at the time she commenced employment at the LTSA in 1999 it was widely recognised that identity-related fraud within the licensing system was a key weakness associated with the previous synthetic or lifetime licences. This was because those licences were easily forged, altered or damaged, and were readily exploited by imposters, and sometimes siblings, to avoid driving tests and compliance with traffic penalties. She also said that imposter fraud could not be readily identified or investigated. Opportunity also existed for individuals to obtain more than one licence where the synthetic licence had been issued in their common-use name rather than their official name.

[277] In the first 10 years following the introduction of photo driver licences Ms Berry said there were 3,560 people identified as holding multiple licences under various fictitious or manipulated identities. In the 2018-2019 period, which was nearly 20 years after the introduction of the synthetic or lifetime licences, 342 multiple identity licence records were cancelled, 320 of which had their source of origin in one of those licences. Each of those instances was resolved through investigative use of the licence photo.

[278] Ms Berry gave a number of actual examples of common licensing fraud:

[278.1] Someone obtaining a driver licence in someone else's name, using a birth certificate of that person, after telling the licensing agent that he had lost his licence. He did this to avoid being arrested for other driving offences in his own name and admitted that he had previously been in trouble for this sort of licensing fraud.

[278.2] Someone who fraudulently obtained a driver licence in the name of his brother. He carried out multiple traffic and other criminal offending in his brother's name.

[278.3] Someone who obtained an additional driver licence fraudulently whilst suspended from driving and then driving on the fictitious licence to avoid complying with the suspension penalty for repeated traffic offending.

[278.4] Someone with more than one licence using both licences to avoid reaching the threshold for suspension from demerit points.

[279] Ms Berry advised that Police provide regular notifications of their duplicate licence records and other identity-related anomalies are found while conducting routine traffic enforcement and related queries. Staff currently involved in dealing with Police notifications of multiple identities and other fraud queries believe that around 100 notifications per week require investigation, some resulting in the cancellation of a licence.

[280] Ms Berry also referred to what she described as the most public and high-profile example of identity-related fraud where a driver licence had been exploited. This was the case where the Department of Social Welfare was defrauded of $3.2 million in 2007. The perpetrator amassed 123 different identities and around 50 New Zealand driver licences with different identities. As a result of this case, Cabinet directed the State Services Commission to undertake a review of identity management practices across government. Ms Berry said that this review resulted in the development of an Identity Assurance Strategy that supported the deployment of biometrics and facial recognition technology within agencies that store large amounts of identity information on databases such as the driver licence register. She said that had facial recognition technology been in place when the perpetrator applied for his second driver licence, the fraud would have been detected and possibly prevented.

[281] In relation to road safety harm, Ms Berry said that without a mechanism such as a photo to readily distinguish individuals a number of road safety harms would prevail with minimum risk of detection.

[282] One example was where an imposter covertly assumes the identity of an existing licence-holder to avoid the requirement for sitting tests, or where a test candidate engages another person to complete tests on their behalf. Ms Berry said that every candidate sitting a practical licence test will already have a photographic learner's licence which confirms their identity and eligibility to undertake the test. Testing officers do not have access to the driver licence register images and therefore the licence image check prior to conducting a practical test in her view is essential to ensure that an imposter has not been engaged to sit the test on behalf of the candidate.

[283] Another example was the potential ability to avoid the fit and proper licence criteria. Ms Berry said that individuals maintaining more than one licensing identity can evade detection for past criminal offending where offences are attributed to a different identity. Such individuals can also avoid satisfying medical criterial relevant to licensing entitlements.

[284] Ms Berry says that the licence-holder's photographic image is the single feature of a driver licence capable of confirming that a particular driver is appropriately licensed for the type of vehicle being driven, and verifying that the individual presenting it is the same person to whom it belongs. Common names mean that name identification is insufficient. Put simply, she said, without a photo, names are just titles without any manifestation to whom they belong.

[285] Ms Berry also responded to Mr Butcher's evidence that the synthetic or lifetime licence already permitted Police to verify drivers at the roadside because the licence omitted the day of birth, having just the month and year of birth on the face of the licence. According to Mr Butcher, this provided a mechanism to check identity as drivers could be asked for their birthdate which could be checked. Ms Berry said that while that may be effective in many cases of stolen identification, it was not a reliable safeguard for siblings or those using the non-expired licences of deceased persons, as ready access to this information was available either through acquaintance or displayed on tombstones. She also said that today birth dates are commonly posted on platforms such as Facebook.

[286] In addition to roadside enforcement by Police, Ms Berry said that a licence-holder's photographic image is used by Waka Kotahi staff to undertake audits of transport services. During these audits, not only is the identity of the person verified, but once that has occurred compliance with logbook work-time requirements can be carried out.

[287] Ms Berry also said the photo driver licence enables rental car firms to visually match the image of the prospective hirer to the image of the identity details on the licence card, ensuring that only licensed drivers are hiring cars, and enables employers to ensure that only licensed drivers can drive.

[288] Inspector McKennie, who is the Manager, Operations for the National Police Centre, concurred with Ms Berry's view that the introduction of photo driver licences has improved the integrity of the licensing system and reduced the incidents of people using borrowed or stolen licences. He said it also reduced the level of unlicensed and disqualified driving by accurately identifying whether a person held an appropriate licence thereby limiting the ability of drivers to evade enforcement by impersonating legitimate licence holders. It also better enabled identification of drivers at the roadside and ensured that persons complied with the conditions of their licences.

[289] Inspector McKennie agreed with Ms Berry that fast and accurate identification of drivers is essential to ensure that only qualified and licensed drivers are on the roads and that they are driving in accordance with relevant conditions. Those conditions could relate to the type of vehicle they are permitted to drive, whether they are required to wear correcting lenses for eyesight issues, and to the time and circumstances in which they may drive, as with graduated driver licences. Prompt access to driver licence photographs is very helpful to Police enforcement because it quickly provides confirmation that the person is who they purport to be.

[290] Inspector McKennie said that prior to the introduction of photo driver licences it was relatively easy for a person to convince Police that they were someone else. There was no robust mechanism to ensure that the documents being carried by drivers actually belonged to them as they may have been borrowed or stolen. He said that allowing offenders to drive off in a stolen car under the identity of the car's lawful owner was not an uncommon occurrence. He also said that offenders were readily able to avoid being arrested on a warrant for other offences.

[291] Inspector McKennie further said that if a Police officer had cause to suspect a person may have been providing false details, it could take quite some time to confirm identity. Such investigations might have involved trying to match Police records of scars and tattoos, arranging telephone inquiries with the owner of a vehicle or claimed home address, driving the person to an address to get occupants to officially confirm who they were or even arresting the driver for providing false details and taking them to a Police station to obtain fingerprints and photograph for matching against Police records. All this improved he said with ready access driver licence photographs at the roadside. While motor vehicle offenders could still provide false details and claim that they had left their driver licence at home or it had been lost, Inspector McKennie's evidence was that the identification of false claims was much quicker to deal with.

[292] The amendments to s 200 of the LTA have further improved this process according to Inspector McKennie. His evidence was that Police are now able to quickly identify and take appropriate action with high-risk offenders to reduce road safety outcome risks that they and their behaviours expose other road users to. Accurate and fast identification of those that Police stop also means that people are not unduly held up while inquiries are conducted to confirm identity. Offenders generally know that Police have access to photos and so are far less likely to try and provide false details as they understand they would be wasting their time in doing so. This means, according to Inspector McKennie, that drivers are not as readily able to avoid consequences of minor driving offences, or the more significant sanctions for serious driving offences, for example driving while disqualified. Inspector McKennie said that if offenders are not readily identified and held to account for their actions, they may continue to pose a risk on the roads or in the community in general.

What is the purpose of the photo driver licence and is it sufficiently important?

[293] Under the first step of the *Hansen* test, the purpose of the limiting measure, here the requirement for a digitised photo, signature, and bar code on a driver licence, needs to serve a purpose that is sufficiently important to justify overriding a right under the Bill of Rights Act.

[294] In our view, the purpose of photo driver licences is to improve driver licence integrity and through this to improve road safety. It does this by reducing the opportunity to fraudulently obtain or use a driver licence or to drive without a current valid licence, and to accurately identify those responsible for road safety breaches. The digitised photograph, signature and bar code which permit driver licence information to be electronically stored and easily retrieved, and the requirement to carry a photo driver licence, enhance detection of road safety infringements and licence fraud.

[295] That purpose is sufficiently important to justify the curtailment of Mr Butcher's right to non-discrimination under the Bill of Rights Act.

[296] We acknowledge that photo driver licences can be used more widely for identification purposes but in our view that has not transformed the purpose of such licences into that of a national identity card. A clear distinction needs to be made between knowing a photo driver licence could be used for wider identification purposes and finding that was its purpose.

[297] We also acknowledge that the 2017 amendment to s 200 of the LTA permits access to driver licence information for wider law enforcement purposes than those related to road safety. That has not altered our view of its purpose but, if wrong on that, both licence

integrity contributing to road safety and its wider law enforcement purposes are sufficiently important to justify curtailing Mr Butcher's rights.

Rational connection

[298] The next question under the *Hansen* test is whether there is a rational connection between that purpose and the driver licence provisions to which Mr Butcher objects.

[299] Mr Butcher argued that the Crown has not been able to demonstrate road safety improvements arising from the requirement to hold photo driver licences. He pointed to the lack of evidence that photo driver licences have had any effect on the number of fatal and serious injury accidents by unlicensed and disqualified drivers. Instead, he said that road safety impacts are just as likely to be the consequence of an increase to the driving age, a graduated driver licence system, a reduction in legal alcohol limits for driving, and better roads. He further said that the lowering of the drinking age had an adverse effect on both injury and fatality rates for ten years. Mr Butcher also submitted that the Ministry of Transport's statistics did not properly take account of population and distance travelled and were therefore not accurate.

[300] Mr Jenkins, who is the Manager of Analytics and Modelling at the Ministry of Transport, and who is responsible for the analysis and production of the official road safety statistics, agreed with Mr Butcher that there were a number of initiatives that had been introduced over the past 20 or so years that had had a positive impact on road safety. Mr Jenkins also agreed that population and distances travelled are important factors to consider in any analysis of road trauma. However, he disagreed that these factors were not accounted for in the Ministry's analysis. Specifically, in response to Mr Butcher's assertion that there had been an adverse impact arising from the lowering of the drinking age, Mr Jenkins said that in 1999, road deaths per 100,000 people reduced from around 13 in 1999 to 7 in 2016. He said a similar but smaller trend is observed for injuries.

[301] Mr Jenkins' evidence was that it was extremely difficult to isolate the impact of single interventions such as photographs on driver licences. Speed, alcohol, and weather were important factors in road crashes. So too were the graduated driver licence system, infrastructure improvements, improvements to car safety standards, as well as behavioural interventions such as speed limit changes and Police road safety activities. Mr Jenkins further said it was not envisaged that photo driver licences would have as great a direct impact that road restrictions for example might accomplish. He accepted that for the majority of motorists, having a photograph on their driver licence has no impact on their ability to drive, their actual driving behaviour or road safety outcomes. In contrast, he said a speed limit reduction or a reduction in the level of alcohol consumption permitted, will contribute to a much more perceptible safety change. For that reason, he said that photos on driver licences would be expected to have a smaller impact. However, it was his evidence that there is a proportion of recidivist offenders who pose a serious risk to themselves or other road users. In his view, more timely and reliable identification of these high-risk drivers will have a crash-outcome related benefit.

[302] We do not find it necessary to determine precisely what the impact of photo driver licences has been on the number of accidents causing serious injury or death. We accept Mr Jenkins' evidence was that it is difficult to precisely disaggregate the exact contribution of all road safety measures to the lowering of the road toll and road crashes. That is not, however, fatal to the Crown case. Rational connection is a threshold issue which is largely considered on an abstract basis without qualitative inquiry and is readily met. See *Hansen* at [121]; *IDEA Services* at [220]. The Government is not required to show that the limiting

measure will further the goal, only that it is reasonable to suppose that it will do so. See *Hutterian Brethren* at [48].

[303] We are also mindful of the finding in *Atkinson* at [164]-[166] that proof to the standard required by science is not required and can be met by the application of common sense to what is known. While that finding was made in relation to the proportionality stage of the *Hansen* test, it is equally apt in this context.

[304] We find as a matter of logic and common sense that having a more effective way of ensuring that only properly licenced drivers are using the roads has contributed to road safety. It is also reasonable to assume there is a link between a photo driver licence, which aids ready identification of drivers, and improved licence integrity and road safety. The rational connection between the rights limiting measures in s 28 and cls 62 and 63 is met.

[305] The next step in the *Hansen* test requires consideration of whether the limiting measures fall within a range of reasonable alternatives.

PROPORTIONALITY OF THE LIMIT

Is the limit on the right minimally impairing?

[306] The third step in the *Hansen* test requires the Tribunal to consider whether the measure impairs the right no more than is reasonably necessary to achieve its purpose. To put the question another way, does the right measure fall within a range of reasonable alternatives open to Government?

[307] Mr Butcher was critical of the failure to give any consideration to religious views when the policy of having a photo driver licence was being considered. He submitted that the Crown should have been aware of religious concerns and of the measures taken by some jurisdictions to meet those concerns. Had it done so, Mr Butcher submitted, accommodations could and should have been made.

[308] Mr Butcher points to the accommodations made to those from other religions, as well as the permission under the LTA and Rules for those on temporary paper licences and foreign drivers to drive without a photo driver licence as demonstrating that the requirement for a digitised photo, signature and bar code is insufficiently tailored. In relation to any concerns about floodgates, Mr Butcher submitted that Waka Kotahi could set up a panel to consider applications for exemption so that the sincerity of religious belief could be judged. Through this means, he argued, the road safety purpose served by a photo driver licence could be met by less intrusive means.

[309] We are not persuaded this is the case.

[310] Ms Berry's evidence was that temporary paper licences are valid only for a very limited period while the photo driver licence is produced. Further, while paper licences can be relied on for up to a year while fitness to drive is being assessed, as a matter of practice Ms Berry said that the paper licence is issued for a much shorter period, such as the day the assessment is taking place. For this reason, according to Ms Berry, the opportunity for misuse of the paper licence is very limited.

[311] In contrast, the Crown submitted that Mr Butcher was seeking to hold a permanent paper licence and, if he is successful, then others who similarly object to holding a photo

driver licence for religious or ethical reasons (such as privacy objections) will be able to do so as well. Ms Berry's evidence was that it would be difficult for Waka Kotahi to judge the sincerity of beliefs and that if dispensation were granted on this basis, it was inevitable it would be exploited by "bad actors".

[312] We accept Ms Berry's evidence that the integrity of the driver licence system would be undermined by drivers being able to drive on paper licences, as well as that of Inspector McKennie that in the past paper licences made it easier for drivers to evade the consequences of driving offences, including those which are serious. More broadly, we find that driver licence fraud, both in its nature and its extent, was (and still is) a serious issue within the driver licensing system and that it was more difficult to detect under the previous system of synthetic paper driver licences.

[313] In relation to foreign drivers, we note further that the arrangements applying to them are reciprocal ones arising under an international convention, which also requires a photograph on an international driver licence. We accept the evidence of Ms Berry that in practice nearly all those driving on foreign non-photo driver licences hold other photo identification such as a national identity card which is to be used in conjunction with the driver licence. This combined with the fact that the right to drive on such licences is for a maximum of a year, with most visitors staying only for much shorter periods of time, limits the road safety impacts, including that arising from licence fraud.

[314] We also do not accept that the accommodations permitted on religious grounds in the LTA, but which do not extend to accommodate Mr Butcher's belief, mean the limits are insufficiently tailored. While accommodations are offered to others, a good likeness is still required meaning those accommodations do not undermine the effectiveness of the photo driver licence in reducing driver licence fraud. That is not the case with the accommodation sought by Mr Butcher, which is to avoid the very measures which have been put in place to improve the integrity of the driver licence system. The accommodation sought by Mr Butcher falls outside of the range of reasonable alternatives as it is unable to achieve the purpose of the limit.

[315] In summary, were we required to consider the issue, we would have found that the photo driver licence provisions (to which Mr Butcher objects) impair his right to be free from discrimination as little as reasonably possible.

[316] We now turn to consider whether the benefits of a photo driver licence are in due proportion to the detrimental impact on Mr Butcher's right to be free from discrimination. This is sometimes referred to as an overall balancing test as it weighs the severity of the measures on the affected groups against the likely public benefit of the law (or policy).

Overall proportionality

[317] Both the majority and the dissent in *Hutterian Brethren* considered this to be the critical step in that case, a step at which they reached different conclusions.

[318] In part this was due to the way in which the purpose of the universal requirement for photo driver licences was characterised. The dissent considered the goal to be the elimination of all identity theft while the majority considered its scope was less broad, relating only to the integrity of the driver licence system which it held formed part of the legislation's overall traffic safety purpose. See *Hutterian Brethren* at [41]–[45], [63], [78], [120], [138]–[139], [149]–[150].

[319] The majority and minority in *Hutterian Brethren* also disagreed about the impact of the photo driver licence requirements.

[320] The majority accepted that if the effect of a law passed for the general good left someone without a meaningful choice in terms of religious adherence, the impact is likely to be very serious. But this was distinguished from a situation where the limit imposed financial costs or gave rise to inconvenience or impacted a tradition which still left adherents with a meaningful choice. McLachlan CJ said that many religious practices impose costs which society expects religious adherents to bear. The majority held that the cost did not rise to the level of depriving the claimants from a meaningful choice. The law did not compel the taking of a photograph or for this to be stored in a database, but rather required this only of someone wanting to drive. The majority accepted that it would be necessary for members of the Hutterite community to make alternative arrangements for transport and that this would impose additional costs and would go against the community's traditional self-sufficiency, but there was no evidence it would be prohibitive. The majority held those impacts did not negate the choice that lies at the heart of freedom of religion. It did not deprive members of the Hutterite Community the right to live in accordance with their beliefs. While not trivial, the majority held the effects fell at the less serious end of the scale. See *Hutterian Brethren* at [94]–[99].

[321] The minority disagreed. In the absence of the exemption which had been in place without incident for 29 years, the minority held that the inability to drive affected the Hutterites both individually and collectively as it would seriously compromise the character of their community, which it accepted was intensely self-sufficient and deeply religious. It considered the majority failed to appreciate the significance of self-sufficiency to the Hutterites' way of life if it became necessary to rely on transport provided by third parties. The minority view was if significant sacrifices have to be made to practice religion, choice is no longer uncoerced. The minority also said that as 700,000 Albertans did not hold driver licences, the impact of that number on identity fraud far outweighed the 250 or so exemptions that would be required by the Hutterite community. For these reasons, the minority held the harmful effects disproportionate to the public benefit. See *Hutterian Brethren* at [158]–[161], [165]–[167], [170], [174]–[177].

[322] There are key differences between the context of that case and Mr Butcher's situation. First, the majority's view of the legislation closely aligns with the purpose of the impugned provisions in this proceeding. This is important as the dissent relied on the wider purpose when taking account of the impact of the 700,000 Albertans without a driver licence in the overall balancing exercise. Second, Mr Butcher is not part of a traditional, autonomous, deeply religious community. The impact is that which relates to a single person adhering to his religious beliefs. In our view, the public benefit of a photo driver licence far outweighs the cost and inconvenience to Mr Butcher from adhering to his religious views. That cost and inconvenience does not rise to such a level that Mr Butcher could be said to be coerced to change his belief.

[323] It follows that if Mr Butcher had succeeded in establishing a breach of s 19, for the reasons we have outlined, we would have found that breach justified.

CONCLUSION

[324] Mr Butcher's claim fails. He has not established that the provisions of the LTA or Rules about which he complains are discriminatory.

[325] Following *Yardley*, there is an issue about whether manifestations of belief are protected under s 21 of the HRA. While we have concluded that the definition of religious belief does not extend to cover its manifestation, that issue has no bearing on the outcome of this case unless a failure to accommodate Mr Butcher's religious belief itself amounts to a prima facie breach of s 19 of the Bill of Rights Act. In our view it does not. Discrimination is either direct, arising through differential treatment, or indirect, arising through the differential effects on a group, in this case a religious group.

[326] Mr Butcher is not treated differently either in terms of his belief (or the manifestation of that belief). The laws which he claims are discriminatory are framed in neutral terms. Others who share his objection to the photo driver licence requirements but not his religious belief are treated in exactly the same way. This means, as in the recent cases of *Yardley* or *Health Professionals Alliance*, any discrimination that arises does so indirectly. Mr Butcher, like the plaintiffs in *Yardley* and *Health Professionals Alliance*, has failed to establish he is a member of a religious group disadvantaged by the impugned provisions.

[327] Had we considered the photo driver licence requirements prima facie breached s 19 of the Bill of Rights Act, we would have concluded they are nevertheless justified. Extensive and compelling evidence about the need to improve driver licence integrity was led. The accommodations offered to others could not be offered to Mr Butcher as a good likeness is still required for the integrity of the system to be maintained. Unlike those driving on temporary paper licences or foreign licences, the exemption sought was both permanent and unsupported by international conventions. Further, it would need to be offered to others, not just to Mr Butcher, further undermining the integrity of the system. In our view, the public benefit arising from the improvement to road safety through improved licence integrity far outweighs Mr Butcher's right to drive.

COSTS

[328] The question of costs was not addressed at the hearing. It is our preliminary view that this is not an appropriate case for costs. Should the Crown wish to seek costs, it will need to file a memorandum within 14 days of its receipt of this decision.

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Mr RPG Haines ONZM QC	**Ms MG Coleman**	**Dr NR Swain**	**Sir RK Workman KNZM QSO**
Chairperson	**Deputy Chairperson**	**Member**	**Member**