IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2022] NZHRRT 16**

I TE TARAIPIUNARA MANA TANGATA

	Reference No. HRRT 020/2020
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**RUSSELL THOMAS HOBAN**
	PLAINTIFF
AND	**ATTORNEY-GENERAL**
	DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines ONZM QC, Chairperson
Ms GJ Goodwin, Deputy Chairperson
Ms NJ Baird, Member
Ms SB Isaacs, Member

REPRESENTATION:
Mr M Timmins and Ms J Sebastian for plaintiff
Ms G Taylor and Ms C Wrightson for defendant
Mr JS Hancock and Ms EC Vermunt for Human Rights Commission as intervener

DATE OF HEARING: **14 and 15 June 2021**

DATE OF DECISION: **23 March 2022**

DECISION OF TRIBUNAL[1]

INTRODUCTION

Overview

[1] Whereas the Human Rights Act 1993 (HRA), s 21 lists 13 prohibited grounds of discrimination (many of them containing several sub-grounds), only three (colour, race, ethnic or national origins) are protected by the racial disharmony provisions in HRA, s 61 which provides a civil remedy for what in shorthand is sometimes (and not always helpfully) referred to as "hate speech". The criminal law counterpart is HRA, s 131 which

[1] [This decision is to be cited as *Hoban v Attorney-General* [2022] NZHRRT 16.]

makes it an offence to excite hostility or ill-will or bring into contempt or ridicule a group of persons on the grounds of colour, race, or ethnic or national origins.

[2] Section 61 conceives racist hate speech as a form of discrimination in the public sphere directed against a group of persons, not a specific individual. It is unlawful (inter alia) to use in any public place words which are threatening, abusive or insulting if the words are likely to excite hostility against or bring into contempt any group of persons on the ground of the colour, race, or ethnic or national origins of that group of persons:

> **61 Racial disharmony**
>
> (1) It shall be unlawful for any person—
> (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
> (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
> (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—
> being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
> (2) It shall not be a breach of subsection (1) to publish in a newspaper, magazine, or periodical or broadcast by means of radio or television or other electronic communication a report relating to the publication or distribution of matter by any person or the broadcast or use of words by any person, if the report of the matter or words accurately conveys the intention of the person who published or distributed the matter or broadcast or used the words.
> (3) For the purposes of this section,—
> **newspaper** means a paper containing public news or observations on public news, or consisting wholly or mainly of advertisements, being a newspaper that is published periodically at intervals not exceeding 3 months
> **publishes** or **distributes** means publishes or distributes to the public at large or to any member or members of the public
> **written matter** includes any writing, sign, visible representation, or sound recording.

[3] The plaintiff's complaint is that s 61 is discriminatory because the actions made unlawful in relation to the grounds of colour, race, or ethnic or national origins are not also made unlawful in respect of sexual orientation. By extension the same complaint could be made in relation to the other nine prohibited grounds listed in s 21.

[4] This proceeding accordingly raises the important issue whether the "racial disharmony" provision in HRA, s 61 is, in relation to the ten non-included grounds, inconsistent with the right under the New Zealand Bill of Rights Act 1990 (NZBORA), s 19 to be free from discrimination on each of the listed grounds, including sexual orientation.

The evidence

[5] The plaintiff was the only witness in the proceedings. His credibility was not put in issue.

[6] On 15 August 2017 an Auckland newspaper published a report of a sermon delivered by a West Auckland pastor in which he (the pastor) called for gay people to be shot:

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

[7] On reading the report Mr Hoban, himself a homosexual man, was horrified. When no action was taken by the Police or the Human Rights Commission on account of the limited application of HRA, ss 61 and 131 he was left feeling threatened, unprotected, undermined and unsafe. He said feeling protected by human rights is important to him because, as a homosexual man, he has experienced years of feeling hounded, discriminated against and silenced. He believes that while others are protected by HRA, s 61 he is treated differently because of his sexual orientation. He would like to see the legislation changed to include other groups, such as transgender and persons with disabilities.

[8] While the Attorney-General called no formal evidence, he did rely on legislative fact evidence containing the legislative history, policy rationale and parliamentary consideration of HRA, s 61. Those documents were included in the common bundle and admitted without opposition.

The Human Rights Commission

[9] By virtue of HRA, s 92H(1) the Human Rights Commission has a right to appear and to be heard in proceedings before the Tribunal.

[10] On 4 May 2021 the Commission gave formal notice of its intention to appear and to be heard on the grounds the proceedings raised an important question of law. The Commission considered the Tribunal was likely to be assisted by its intervention for the following reasons:

> **[10.1]** The Commission's complaints functions under HRA, Part 3 provide that it can respond to complaints of racial disharmony under both Part 2, s 61 and discrimination under Part 1A, s 20L.
>
> **[10.2]** The Commission has advocated for the groups that are protected under HRA, s 61 to be expanded beyond colour, race, ethnic or national origin.
>
> **[10.3]** The Commission has a history of and continues to advocate for rights regarding sexual orientation, gender identity and expression and sex characteristics in terms of preventing violence, abuse and discrimination.
>
> **[10.4]** The Commission has expertise on New Zealand's obligations under international human rights law.

[11] At the hearing the Commission called no evidence, confining itself to submissions on the following issues:

> **[11.1]** The approach to discrimination under HRA, Part 1A and what must be proved in the construction of NZBORA, s 19;
>
> **[11.2]** Purposive interpretation in a human rights context;
>
> **[11.3]** The international human rights framework; and
>
> **[11.4]** The declaration sought and the principles relevant to relief.

[12] While the Commission did not provide a full analysis as to whether HRA, s 61 is discriminatory, it did set out some factors for the Tribunal to consider in its assessment of s 61 by addressing the background to the provision, the changes in legal context since the provision was enacted, the harm caused by hate speech based on sexual orientation and hate speech laws in other countries. The Tribunal acknowledges the helpful assistance provided by counsel for the Commission.

Possible legislative changes

[13] The Commission also made reference to the 26 November 2020 report of the Royal Commission of Inquiry into the Terrorist Attacks on Christchurch Mosques on 15 March 2019 (Royal Commission of Inquiry) and highlighted the fact that on 7 December 2020 Cabinet agreed to extend the legal protection of s 61 (and the criminal counterpart provisions of HRA, s 131) to a wider range of groups targeted by inciting speech. The intention is that the protection of both sections be extended to all groups listed in HRA, s 21 as prohibited grounds of discrimination. See Cabinet Minute "Proposed Changes to the Incitement Provisions in the Human Rights Act 1993" (7 December 2020) CAB-20-MIN-0507 at [2].

[14] The proposal has proved in some respects controversial given the potential for overbroad application of hate speech regulation.

ANALYSIS

[15] As HRA, s 20J(1) makes clear, Part 1A of the Act applies (inter alia) to the legislative branch of the Government of New Zealand:

> **20J Acts or omissions in relation to which this Part applies**
>
> (1) This Part applies only in relation to an act or omission of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990, namely—
> (a) the legislative, executive, or judicial branch of the Government of New Zealand; or
> (b) a person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[16] Both acts and omissions of the legislature are subject to the anti-discrimination provisions of Part 1A. Such act or omission can include an enactment. See HRA, s 20L:

> **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.

[17] Here the claim by the plaintiff is that the omission by the legislative branch of government to include sexual orientation in HRA, s 61 results in him being discriminated against.

[18] It is necessary, however, to point out that the plaintiff's omission from s 61 is not absolute. That is, persons of a sexual orientation who are also the subject of hate speech by reason of their colour, race, or ethnic or national origins are within the reach of s 61.

The plaintiff's real complaint is that persons of a sexual orientation who are also the subject of hate speech by reason of their sexual orientation (but not of their colour, race, ethnic or national origins) do not have access to s 61.

[19] As can be seen from s 20L, to succeed the plaintiff must establish, on the balance of probabilities, that the omission to extend HRA, s 61 to include the ground of sexual orientation is inconsistent with NZBORA, s 19. That is, that the omission limits the right to freedom from discrimination and is not under NZBORA, s 5 a justified limitation on that right. The burden of establishing a justified limitation rests on the Attorney-General.

[20] Not to be overlooked in the justification context is the fact that NZBORA, s 19 is expressly limited. It does not apply to measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination. Such measures do not constitute discrimination:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

[21] The application of s 19(2) will require consideration, particularly given HRA, s 61 was enacted to implement New Zealand's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD), obligations which were considered at length by the Tribunal in *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 17, (2017) 11 HRNZ 165 and by the High Court in *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471.

The test for determining whether there has been a breach of NZBORA, s 19

[22] Although the plaintiff structured his written submissions using the six-step framework of *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 (*Hansen*) at [92], both the Attorney-General and the Human Rights Commission submitted the approach used in *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 (*Atkinson*) was more appropriate. We are in agreement as the wording of HRA, s 61 is clear and the Tribunal is not (as in *Hansen*) being asked to consider two possible meanings of a provision. In fairness it is noted the plaintiff in oral submissions abandoned *Hansen* and acknowledged the analysis in *Atkinson* was more appropriate given the facts of the case. In the result the parties agree there is only one reasonable interpretation of s 61 and it follows Parliament's intended meaning must prevail.

[23] The established test for determining whether there has been a breach of NZBORA, s 19 is stated in *Atkinson* at [55]:

> **[55]** .. the first step in the analysis under s 19 is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The second step is directed to whether that treatment has a discriminatory impact. [Footnote citations omitted]

[24] As to the first step, the requirement to show differential treatment as between those in comparable situations raises an issue about who comprises the appropriate comparator group. See *Atkinson* at [56]. It is necessary to determine whether the aggrieved person

or group is being treated differently to another person or group in comparable circumstances. See *Atkinson* at [60].

[25] Because the selection of a comparator in Part 1A cases has already been addressed by the Tribunal in *Adoption Action Inc v Attorney-General* [2016] NZHRRT 9, (2016) 10 HRNZ 622 at [59] and [60] and *Heads v Attorney-General* [2015] NZHRRT 12, (2015) 10 HRNZ 203 at [120], it is necessary to emphasise only the following:

> **[25.1]** The task is to select the comparator which best fits the statutory scheme in relation to the particular ground of discrimination. See *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 (*McAlister*) at [34].
>
> **[25.2]** A comparator is not appropriate if it artificially rules out discrimination at an early stage of the inquiry. See *McAlister* at [51].
>
> **[25.3]** The comparator exercise will miscarry if the comparator group is framed in terms which result in the comparator not having work to do. See *Atkinson* at [67].

[26] The plaintiff submitted the comparator was "members of a group who meet the specified grounds to access the protection of s 61", that is members of a group discriminated against on the grounds of their colour, race, ethnic or national origins.

[27] The Attorney-General submitted this formulation simply points to a benefit or treatment that another group enjoys and the plaintiff is asserting that exclusion from that benefit equates to discrimination. Reference was made to the statement in *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [115] that "legislation and policy decisions will often involve different treatment of groups of persons to a greater or lesser extent. For there to be prohibited discrimination under the Bill of Rights, there must be more than the different treatment of groups of people in a community [being] material disadvantage on a person or group differentiated against".

[28] The submission for the Attorney-General was that in the circumstances of the present case differential treatment required a difference in treatment not between persons of sexual orientation and persons of colour, race, ethnic or national origins but between people of different sexual orientations. That is, the plaintiff had to show homosexual persons were treated differently to those of heterosexual, lesbian or bisexual orientation. As all in this group (ie HRA, s 21(1)(m) [sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation]) are treated the same way in that none have recourse to s 61, no differential treatment could be established.

[29] The Human Rights Commission expressed no formulation of its own but did submit the need for a broad approach to be taken.

Finding in relation to comparator group

[30] In practical terms, the comparator exercise can be approached on the basis that most, if not all persons, will have a colour, race, ethnic or national origin. That is, all persons with the characteristics listed in HRA, s 21 are also within s 61 irrespective of any other characteristic they may have as listed in s 21.

[31] When the protected characteristic of sexual orientation (which is the basis of the plaintiff's claim) is considered, two groups can be distinguished:

[31.1] Persons who are the subject of hate speech by reason of their colour, race, ethnic or national origins.

[31.2] Persons who are the subject of hate speech by reason of their sexual orientation (but not of their colour, race, ethnic or national origins).

[32] In our view it is plain from the face of HRA, s 61 that while three of the prohibited grounds of discrimination (colour, race, ethnic or national origins) are within the scope of s 61 the other ten grounds are not. Those in the first group have access to the remedy in s 61. Those in the second group do not and are in this respect materially disadvantaged. In our view it is those in the first group who are the appropriate comparator.

[33] The formulation advanced by the Attorney-General artificially compares the four categories of sexual orientation in s 21(1)(m) with each other rather than simply using "sexual orientation" as the ground. Section 21 makes it clear that sexual orientation "means" a heterosexual, homosexual, lesbian, or bisexual orientation. By artificially drawing both the group and the comparator group from a single definition the resulting comparator artificially rules out discrimination at an early stage of the inquiry and does not best fit the statutory scheme. It also frames the comparator group in terms which result in the comparator having no work to do. The intention of the Human Rights Act is to take a "purposive and untechnical" approach to whether there is prima facie discrimination and so it is important to avoid artificially ruling out discrimination at the first stage of the inquiry. See *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [48].

[34] The second step in the analysis requires an examination whether the differential treatment has had a discriminatory impact.

[35] On the facts, only an affirmative answer is possible. The plaintiff's narrative illustrates why the Human Rights Commission has advocated for the groups who have access to s 61 to be expanded beyond colour, race, ethnic or national origins. Inability to access the Commission's dispute resolution procedures and to thereafter seek recourse from the Tribunal is a material disadvantage.

[36] The plaintiff having discharged his burden of proof in relation to the discrimination inquiry it is now necessary to consider NZBORA, s 19(2) and the issue of justification under NZBORA, s 5.

SECTION 19 NZBORA

[37] Section 19(2) of the NZBORA provides:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
> (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

The submissions

[38] The plaintiff submits this provision is directed at so-called "affirmative action" measures and does not have the effect of making discrimination to which HRA, Part 2

applies lawful. In a post-hearing memorandum dated 17 June 2021 the plaintiff acknowledged there is no generally accepted definition of affirmative action.

[39] The Attorney-General agrees that NZBORA, s 19(2) is generally understood to apply to affirmative action measures but submits if HRA, s 61 is determined to be discriminatory, it falls within the exception provided for in NZBORA, s 19(2) as it is a good faith measure to advance the interests of a disadvantaged group. A measure cannot be discriminatory just because it does not protect every other protected group.

Discussion

[40] The "measures" referred to in NZBORA, s 19(2) must satisfy two criteria:

[40.1] They must be taken in good faith.

[40.2] Their purpose must be to assist or to advance persons or groups of persons who have been disadvantaged because of discrimination that is unlawful under HRA, Part 2. That is, while disadvantage is key to the application of s 19(2) the subsection is concerned only with remedying disadvantage that is the result of unlawful discrimination. The provision is directed at remedying particular acts of illegal discrimination rather than broader societal problems. In this respect s 19(2) is more narrow than HRA, s 73. In the latter section there is no requirement that those who benefit from affirmative action measures be persons who have been disadvantaged by discrimination. It is enough that they be persons or groups against whom discrimination is unlawful, who need or may reasonably be supposed to need assistance or advancement. See generally Paul Rishworth "Freedom from Discrimination" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 366 at 390-391 (*Rishworth*).

[41] The Human Rights Commission submitted HRA, s 61 may be out of date because of changes in social attitudes and values and the increased visibility of discrimination faced by those based on sexual orientation. As to this, while there have undoubtedly been changes in social attitudes, the significance of hate speech directed against persons on the grounds of their colour, race, ethnic or national origins must not be underestimated. Racism is both endemic and enduring. The point was recently made by António Guterres, Secretary-General of the United Nations in his Foreword to *United Nations Strategy and Plan of Action on Hate Speech* (United Nations, 2020) at 1:

> Fighting hate, discrimination, racism and inequality is at the core of the United Nations principles and the Organization's work. It is enshrined in our founding Charter, in the international human rights framework and in our collective efforts to achieve the Sustainable Development Goals. Hate speech, including online, has become one of the most frequent methods for spreading divisive and discriminatory messages and ideologies …
>
> The Strategy [United Nations Strategy and Plan of Action on Hate Speech] embodies a commitment by the United Nations to step up coordinated action to tackle hate speech both globally and at the national level. It responds to the worrying growth of xenophobia, racism and intolerance, including anti-Semitism and anti-Muslim hatred, around the world. Hate speech undermines social cohesion, erodes shared values and can lay the foundation for violence, undermine peace, stability, sustainable development and the fulfilment of human rights for all.

[42] Because HRA, s 61 implements New Zealand's treaty obligations under ICERD and makes hate speech on the grounds of colour, race, ethnic or national origins unlawful, it is in our view a measure taken in good faith for the purpose of assisting or advancing persons or groups of persons who have been disadvantaged because of discrimination

(which includes hate speech) on the grounds of their colour, race, ethnic or national origins.

[43] We see no justification for reading down the phrase "for the purpose of assisting or advancing" by restricting it to "affirmative action" programmes however formulated and which are discussed by Andrew Butler and Petra Butler in *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) (*Butler*) at [17.19.1] to [17.19.11]. See also *Rishworth* at 389 to 393.

[44] Our conclusion is that NZBORA, s 19(2) applies in the circumstances of the present case with the result that HRA, s 61 does not discriminate against the plaintiff.

JUSTIFICATION

[45] The relationship between NZBORA, s 19(2) and NZBORA, s 5 is not clear. On one view s 5 applies only if the measure is not within s 19(2). However, should the conclusion reached at [44] be wrong, we consider next the issue of justification.

[46] Section 5 of NZBORA provides:

> **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.

[47] The methodology in *Hansen* at [104] requires the challenged measure to be assessed as follows:

> **[47.1]** Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> **[47.2]** Is the limiting measure rationally connected with its purpose?
>
> **[47.3]** Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> **[47.4]** Is the limit in due proportion to the importance of the objective?

[48] The context of that formulation was a statutory deeming clause. By contrast the context in the present case is a complaint of an omission, namely a failure by the legislature to amend HRA, s 61 (or to enact separate legislation) to ensure that the prohibition on the use of words likely to excite hostility or bring into contempt is extended also to sexual orientation and by implication, to all of the ten prohibited grounds of discrimination not presently listed in s 61.

[49] The protection afforded by s 61 does in fact apply to the plaintiff (and to all of the persons who are within the 13 prohibited grounds of discrimination) in circumstances engaging the colour, race, ethnic or national origins of those persons. Access to the remedy in s 61 is, however, barred if some other prohibited ground is the reason for the hate speech.

[50] In these circumstances it is far from clear whether the *Hansen* steps are directly applicable or provide any real assistance in a case where the complaint is one of

legislative omission or under-inclusion. No legislative "omission" case in which the *Hansen* steps have been applied by a senior court has been cited in argument. For this reason it is necessary to return to the text of NZBORA, s 5 and to determine whether the failure to include sexual orientation and by inference all the remaining prohibited grounds of discrimination within the hate speech provisions of HRA, s 61 is a reasonable limit prescribed by law and can be demonstrably justified in a free and democratic society.

The submissions for the Attorney-General

[51] The Attorney-General carries the burden of proving justification.

[52] The submissions for the Attorney-General placed some emphasis on the fact that both HRA, s 61 and HRA, s 63 were enacted to implement New Zealand's international law obligations under ICERD, art 4. The good faith obligation under the Vienna Convention on the Law of Treaties, 1969, art 26 required no less. All this has been fully explained by the Tribunal in *Wall v Fairfax New Zealand Ltd* at [115] to [140] and approved by the High Court on appeal in *Wall v Fairfax New Zealand Ltd* at [16] and [23].

[53] The point made by the Attorney-General is that New Zealand has no treaty obligations which require the enactment of legislation prohibiting the advocacy or incitement of hatred or discrimination based on sexual orientation.

[54] The Attorney-General further submitted:

> **[54.1]** Parliament is the appropriate venue for debate about the appropriate ambit of hate speech laws in New Zealand and the balance between freedom of expression and the harm caused by that speech. That does not detract from the Tribunal's role to determine whether an Act of Parliament amounts to unlawful discrimination, and if it is, to issue a declaration. But:
>
> > **[54.1.1]** The Tribunal is not required to consider the policy reasons why s 61 might be expanded to include sexual orientation.
> >
> > **[54.1.2]** In considering whether any discrimination is justified (and if not, to grant a declaration of inconsistency), regard must be had to the comparative institutional competence of Parliament to resolve policy debates: *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [75] and [153].
>
> **[54.2]** As to the second point, Tipping J said in *Hansen* at [117] that "Judges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise". Depending on the subject-matter, Parliament is entitled to a variable degree of discretion in determining whether limits on rights are reasonable and justified. Major political, social and economic decisions will attract the greatest degree of deference: *Hansen* at [105] and [111] to [116]. Reference was also made to *Child Poverty Action Group Inc v Attorney-General* at [91].
>
> **[54.3]** Because of the social policy content involved in choosing how to cast hate speech laws and to balance freedom of expression with the need to protect vulnerable groups, and Parliament's likely consideration of the issue in the near future, considerable deference to the legislature's policy choices is appropriate.

[54.4] The Attorney-General does not accept that Cabinet's December 2020 recognition of the policy reasons for extending the hate speech provisions to sexual orientation and the balance of the prohibited grounds of discrimination is an acknowledgement that the existing provision amounts to unjustified discrimination.

[55] The evidence relating to the two earlier occasions on which Parliament considered the possibility of expanding the hate speech provisions was described by the Attorney-General in the following terms:

[55.1] In 1993, the Department of Justice reported on submissions on the Human Rights Bill suggesting the expansion of the hate speech provisions to other grounds of discrimination. The Department did not recommend any extension, and Parliament did not make any changes – Human Rights Bill 1993 (214-2) (Report of the Department of Justice) (28 May 1993) at 42 (CB303). The same point was made in respect of the criminal provision at 58 (CB306):

> While a need for clause 75 [now HRA, s 61] has been demonstrated in respect of racially insulting statements the same cannot be said for other grounds of prohibited discrimination. This is borne out by experience in other jurisdictions. Therefore we do not recommend any extension of clause 75 to other prohibited grounds of discrimination.

[55.2] In 2001, the Human Rights Amendment Act 2001 made a number of significant changes to the law and practice of human rights and relevant bodies. The select committee report noted that submitters had also suggested a review of the hate speech provisions with a view to extending them to protect other vulnerable groups. This suggestion was not adopted and not considered further – Human Rights Amendment Bill 2001 (152-2) (Select Committee report) at 22 (CB329).

[56] The Attorney-General reinforces the deference point by referring to the fact that more recently on 7 December 2020, Cabinet proposed extending the legal protection of HRA, s 61 (and the criminal counterpart provisions of HRA, s 131) to all groups listed in HRA, s 21. Difficult policy choices are being considered and decisions made.

Discussion

[57] The submissions for the Attorney-General are persuasive and are accepted. We add only the following.

[58] The focus of the justification inquiry is not the justification for HRA, s 61 having a limited reach. The focus is on the justification for the legislature not including in s 61 the other ten grounds of discrimination (including sexual orientation) or having standalone legislation which similarly prohibits the advocacy and incitement of hatred and discrimination.

[59] Human rights do advance in New Zealand, but not on all fronts simultaneously. In a free and democratic society there will always be public and political contest over priorities to be given to human rights protection. In recent times those contests have included the right to adequate housing, freedom from poverty, indigenous rights, violence, children's rights and mental health. In addition to difficult policy choices there are also challenges relating to resourcing, the assessment of the prospect of agreement to legislation in (say) a coalition government environment, resolving competing demands on the legislative programme and assessing the political reality of the measure eventually being passed. These are all part of the political process in a free and democratic society.

[60] Sexual orientation has been included in the HRA, s 21 prohibited grounds of discrimination since 1993 and the protection given by the remedies under the HRA is accordingly available. The specific complaint by the plaintiff is that an additional layer of protection is required by the inclusion of sexual orientation in s 61. But in a free and democratic society it is not required or practicable for every possible improvement to human rights protection to be enshrined in legislation. The point is captured in the following two quotes taken from *Butler* at [17.20.3] and [17.20.12]:

> [17.20.3] Further, where matters of social policy are in issue courts have also been willing to accept that the state is not required to tackle all aspects of a problem at once: incremental measures are permitted. Distinctions required by international instruments are also likely to be upheld, though they are not beyond scrutiny. [Footnote citations omitted]
>
> [17.20.12] … the range of factual inequality within society is so great that one cannot reverse the effects of all inequality at once. In our view, it is acceptable for the state to choose those areas on which it wishes to concentrate its efforts and resources. It is not discrimination for the state to choose one group over the other for the purposes of affirmative action (unless it can be shown that a particular subgroup has been left out for no good reason and out of ill will).

Conclusion

[61] For these reasons we have concluded the Attorney-General has discharged the burden of proof and established justification for the legislature not including in HRA, s 61 the prohibited ground of sexual orientation. The omission is a reasonable limit prescribed by law and can be demonstrably justified in a free and democratic society.

[62] We explain now the reasons why the Tribunal would not, in any event, have made the declaration sought by the plaintiff.

REMEDY

[63] The remedy sought by the plaintiff is a declaration under HRA, ss 92I, 92J and 92L declaring HRA, s 61 inconsistent with the right to freedom from discrimination affirmed by NZBORA, s 19.

[64] Under HRA, s 92J a declaration of inconsistency can only be made if an enactment is in breach of HRA, Part 1A:

> **92J Remedy for enactments in breach of Part 1A**
>
> (1) If, in proceedings before the Human Rights Review Tribunal, the Tribunal finds that an enactment is in breach of Part 1A, the only remedy that the Tribunal may grant is the declaration referred to in subsection (2).
> (2) The declaration that may be granted by the Tribunal, if subsection (1) applies, is a declaration that the enactment that is the subject of the finding is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.
> (3) The Tribunal may not grant a declaration under subsection (2) unless that decision has the support of all or a majority of the members of the Tribunal.
> (4) Nothing in this section affects the New Zealand Bill of Rights Act 1990.

[65] In an omission case such as the present it is not clear whether a declaration of inconsistency can be made as the enactment itself is not in breach. The omission, if there be one, is that of the legislative branch of the Government. It is that branch which has failed to include sexual orientation in HRA, s 61.

[66] In any event the grant of a declaration of inconsistency is discretionary and we would not want to grant a declaration of inconsistency in relation to a statutory provision

which implements ICERD, a longstanding human rights treaty obligation of the first importance.

[67] The application for a declaration would for these reasons be declined.

OVERALL CONCLUSION

[68] The plaintiff's claim is dismissed.

COSTS

[69] As we have been advised by counsel that neither party seeks costs, no order as to costs is made.

.....	.....	.....	.....
Mr RPG Haines ONZM QC	**Ms GJ Goodwin**	**Ms NJ Baird**	**Ms SB Isaacs**
Chairperson	**Deputy Chairperson**	**Member**	**Member**