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JUSTIFIED DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION? A CRITIQUE OF THE DECISION IN *HOBAN V ATTORNEY-GENERAL*

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Abstract

Hoban v Attorney-General displays the shortfall of the New Zealand legal system as it fails to protect people from hate speech based on their sexual orientation. However, it also highlights how the fluid application of the Bill of Rights Act by courts can lead to insufficient investigations into rights limitations. Following the publication of objectionable, homophobic comments made by a pastor, Mr Hoban was unable to take legal action in response as these comments were entirely legal under New Zealand law. Mr Hoban argued that he is discriminated against based on his sexual orientation as he cannot access legal protection from hate speech under s 61, due to the provision being limited to hate speech based on race or ethnicity. This paper argues that Cooke J's s 5 analysis in *Hoban* was insufficient as he failed to adequately probe into Parliament's justification for the limitation on the right to be free from discrimination. Cooke J erred in his conclusion that *Hoban* was a case like the kind discussed in *Make it 16* and subsequently a limited justification provided by international obligations was sufficient to justify the breach of the right. Additionally, Cooke J was implicitly deferential to Parliament as he felt consideration of the controversial topic was not within the Court's institutional competence. Further, Cooke J wrongly stated that the acceptance of Mr Hoban's argument would place an obligation on Parliament to enact measures to protect all minority groups from hate speech. Consequently, the High Court may have erred in concluding that the limit on freedom from discrimination was justified under s 5 of the Bill of Rights.

Keywords: "Discrimination", "Sexual orientation", "Hate speech, "NZBORA", "*Hoban v Attorney-General*".

Table of Contents

I Introduction

In April 2017, a West Auckland pastor, Logan Robertson, delivered a sermon in which he called for gay people to be shot by stating "I am not against them getting married ... as long as a bullet goes through their head the moment they kiss."[1] This sermon has since been published online and in a newspaper.[2] Russell Thomas Hoban, a gay man, was horrified by the pastor's violent comments. Mr Hoban had spent years feeling discriminated against because of his sexual orientation.[3] He felt distressed that there had been no actions taken in response to the pastor's comments either by the Police or the Human Rights Commissioner. It came as a shock to Mr Hoban that the pastor's highly objectionable comments were entirely legal under New Zealand law.

Mr Hoban applied to the Human Rights Review Tribunal (HRRT) for a declaration of inconsistency under section 92L of the Human Rights Act (HRA). He argued that since s 61 did not include hate speech directed at groups on the ground of sexual orientation, this meant it was inconsistent with the right to be free from discrimination under s 19 of the New Zealand Bill of Rights 1990 (NZBORA).[4] In other words, Mr Hoban is discriminated against based on his sexual orientation as he cannot access legal protection from hate speech under s 61, due to the provision being limited to hate speech based on race or ethnicity. Mr Hoban's claim was dismissed by the Tribunal.[5]

Mr Hoban appealed to the High Court, in which there were three issues for determination. The first issue to be determined by the High Court was whether the HRRT was correct to conclude that s 61 of the HRA had a discriminatory effect within s 19(1) of the NZBORA. The second issue to be determined by the High Court was whether the HRRT was correct to conclude that the discriminatory effect created by the underinclusive nature of s 61 fell within s 19(2) of NZBORA so in effect the section was not inconsistent with s 19. The third issue to be determined was whether the HRRT was correct to conclude that the discriminatory effect was a demonstrably justified limit on the right to be free from discrimination within s 5 of the NZBORA. In the author's view, the Court dealt with

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[1] Dubby Henry "West Auckland pastor preaches gay people should be shot" *The New Zealand Herald* (online ed, 15 August 2017).

[2] Dubby Henry "West Auckland pastor preaches gay people should be shot" *The New Zealand Herald* (online ed, 15 August 2017).

[3] *Hoban v Attorney-General* [2022] NZHC 3235, at [6].

[4] At [6].

[5] *Hoban v Attorney-General* [2022] NZHRRT 16, at [68].

issues one and two appropriately, thus, an analysis of issue three will be the primary focus of this paper.

This paper seeks to critique the decision on the basis that the High Court may have erred in concluding that the limit on freedom from discrimination was justified under s 5 of NZBORA. Given that all evidence submitted by both parties to the Court is not available for analysis, this paper cannot conclude that the discrimination was unjustified. Nevertheless, Cooke J's s 5 analysis was insufficient as he omitted to consider any other evidence supporting or negating the limitation on the right other than the existence of international obligations.

Specifically, this paper will discuss three critiques of Cooke J's section 5 analysis. Firstly, Cooke J erred in concluding that *Hoban* was a case like the kind discussed by the Supreme Court in *Make it 16*, namely, one in which a justification for a limiting measure could be found in common law or international obligations. In doing so, Cooke J neglected to consider sufficient evidence and did not adequately examine the reasonableness and proportionality elements of s 5 of NZBORA. Secondly, Cooke J was implicitly deferential to Parliament, and he mischaracterised the Court's role in scrutinising legislation which is essential in human rights cases. Thirdly, Cooke J erred in stating that Mr Hoban had not actually suffered discrimination and that acceptance of his argument would prevent Parliament from enacting targeted measures.

A Overview

1 Issue 1 – Is s 61 discriminatory?

The first issue to be determined by the High Court was whether the HRRT was correct to conclude that s 61 of the HRA had a discriminatory effect within s 19(1) of NZBORA. In the High Court, Cooke J found that s 61 of the HRA was discriminatory within the meaning of s 19(1) of NZBORA.[6]

Section 61 of the HRA creates a civil offence that renders hate speech unlawful. "Hate speech" means speech that is threatening, abusive, or insulting, that is likely to excite hostility or bring into contempt any group of persons in or who may be coming to New

[6] *Hoban v Attorney-General*, above n 3, at [25].

Zealand.[7] This section is limited to "hate speech" against "on the ground of colour, race, or ethnic or national origins of that group of persons".[8]

Section 19(1) of NZBORA states that everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA.[9]

Section 21 of the HRA sets out the prohibited grounds of discrimination.[10] Section 21(1)(m) includes sexual orientation as a prohibited ground, which means a heterosexual, homosexual, lesbian, or bisexual orientation.[11]

Under s 19 of NZBORA, a two-stage process to identifying discrimination is required. [12] The first step in the analysis is to determine 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".[13] The second step involves a decision as to whether that treatment causes a discriminatory impact.

The High Court was assisted by the Canadian decision of *Vriend v Alberta*.[14] In *Vriend* the issue was that sexual orientation was not included as a prohibited ground of discrimination in the Individual's Rights Protection Act 1980. The Canadian Supreme Court stated that the omission of sexual orientation from the IRPA created a distinction based on sexual orientation.[15] Furthermore, it was asserted that:[16]

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[7] Section 61.

[8] Section 61.

[9] Section 19(1).

[10] Human Rights Act, s 21.

[11] Human Rights Act, s 21(1)(m).

[12] *Ministry of Health v Atkinson* [2012] NZCA 184, at [55] per Ellen France J.

[13] At [55] per Ellen France J.

[14] *Vriend v Alberta* [1998] 1 SCR 493.

[15] At [86].

[16] At [86].

> …gay men and lesbians are treated differently from other disadvantaged groups and from heterosexuals. They, unlike gays and lesbians, receive protection from discrimination on the grounds that are likely to be relevant to them.

The High Court in *Hoban* agreed with this view and applied it to the relevant provision.[17] Section 61 protects groups who experience hate speech based on race, but not those who experience hate speech based on their sexual orientation. Thus, the two groups are treated differently. This differential treatment causes a disadvantage for the group excluded from protection as they are unable to seek a legal remedy. Consequently, Cooke J found that s 61 of the HRA was discriminatory within the meaning of s 19(1).

2 Issue 2 – Is s 61 protected by s 19(2)?

The second issue to be determined by the High Court was whether the HRRT was correct to conclude that the discriminatory effect created by the underinclusive nature of s 61 fell within s 19(2) of the NZBORA so in effect the section was not inconsistent with s 19. Section 19(2) of NZBORA states that:[18]

> 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 HRA 1993 do not constitute discrimination.

Cooke J disagreed with the HRRT and found that s 61 was not protected by s 19(2) of NZBORA, as that section was intended to be limited to affirmative action programmes that "advance or assist" people who suffer from systemic discrimination, as opposed to encapsulating unlawful discrimination as contemplated by s 61.[19] Section 19(2) was enacted to ensure that schemes involving affirmative action would not be considered discrimination under s 19 of NZBORA.[20] At first instance, the HRRT found it significant that s 61 of the HRA fulfils New Zealand's international obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), through rendering hate speech based on colour, race, ethnic or national origins unlawful.[21] Due to this, the HRRT determined s 61 to be a measure taken in good faith

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[17] *Hoban v Attorney-General*, above n 3, at [19].

[18] Bill of Rights Act 1990, s 19(2).

[19] *Hoban v Attorney*-General, above n 3, at [34].

[20] *J v Attorney-General* [2018] NZHC 1209 at [518].

[21] *Hoban v Attorney-General*, above n 5, at [42].

for the purpose of assisting and advancing persons who have been disadvantaged by being subject to discrimination due to their colour, race, ethnic or national origins.

Cooke J in *Hoban* reasoned that it would be artificial to determine that s 61 fell within the intended scope of s 19(2).[22] The wording of s 19(2) stating "assisting or advancing" suggests that the provision was intended to encapsulate positive advantages given to systemically disadvantaged people. Rather, s 61 was intended to protect people from hate speech based on race. It could not be viewed to be "advancing" people, but instead providing them with a legal remedy for the discrimination they have suffered. The Attorney-General argued that s 61 is "assisting" people who are subject to racial hate speech. Yet, Cooke J asserted that "assisting" was coloured by "advancing",[23] meaning that the provision as a whole is targeted at positive advantages or forms of assistance for those who are disadvantaged by racial discrimination.

To conclude, Cooke J found that s 61 was not protected by s 19(2) of NZBORA. Accordingly, the underinclusive nature of s 61 was found to be inconsistent with the right to be free from discrimination under s 19.

3 Section 5 NZBORA

The third issue to be determined by the Court was whether the HRRT was correct to conclude that the discriminatory effect was a demonstrably justified limit on the right to be free from discrimination within s 5 of NZBORA. Section 5 is used to determine whether a limit on a right complies with the Act. A limit on a right will be NZBORA compliant if it is reasonable, prescribed by law and demonstrably justified in a free and democratic society.[24] If an enactment places a limit on a right it must be assessed against s 5. This provides an opportunity to check the reasonableness of any limit. Furthermore, to demonstrate that a limit is demonstrably justified in a free and democratic society, a Court must consider whether the limit is proportional. The remainder of this paper will discuss three critiques of the reasoning in Cooke J's s 5 analysis.

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[22] *Hoban v Attorney-General*, above n 3, at [32].

[23] At [32].

[24] Bill of Rights Act 1990, s 5.

II Cooke J failed to consider sufficient evidence and key aspects of NZBORA

Cooke J determined that the decisive issue in *Hoban* was whether the prima facie discriminatory effect resulting from the underinclusive nature of s 61 was demonstrably justified under s 5 of NZBORA.[25] It was acknowledged that the onus was on the Crown to provide evidence in support of the justification. Yet, Cooke J believed that the circumstances in *Hoban* fell within a type of case that does not require extensive evidence to be filed in support of the justification.[26] This kind of case was discussed by the Supreme Court in *Make it 16 Incorporated v Attorney-General*,[27] in which Ellen France J stated that a limitation on a right may be one that is recognised in international instruments or common law.[28] This conclusion affected the remainder of Cooke J's analysis.

This chapter argues that Cooke J's conclusion that *Hoban* was a case like the kind discussed by the Supreme Court in *Make it 16* led to the Judge wrongly concluding that international obligations were determinative. Consequently, sufficient evidence was not considered which contradicts the intended purpose of NZBORA. Furthermore, as Cooke J relied solely on the existence of international obligations to justify the underinclusive nature of s 61, he did not properly consider the reasonableness and proportionality of the limiting measure which are key aspects of s 5 of NZBORA.

A Was Hoban *a case like the kind discussed in* Make it 16?

The statement made by Ellen France J on behalf of the Supreme Court in *Make it 16* became the starting point for Cooke J's judgment. Cooke J recognised that s 61 corresponded with the CERD and Article 20 of the International Covenant on Civil and Political Rights (ICCPR) which created an obligation to make hate speech based on race illegal.[29] Conversely, the Court considered it compelling that there was no human rights obligation arising out of domestic or international law contending that hate speech based on sexual orientation should be unlawful. As the limited nature of the provision

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[25] *Hoban v Attorney*-General, above n 3, at [40].

[26] *Hoban v Attorney*-General, above n 3, at [41].

[27] *Make it 16 Incorporated v Attorney-General* [2022] NZSC 134.

[28] At [45].

[29] International Convention on the Elimination of All Forms of Racial Discrimination and International Covenant on Civil and Political Rights, art 20(2).

corresponded directly with New Zealand's international obligations, Cooke J felt the limitation on the right could be justified under s 5 solely on this basis.[30]

While the statement made by the Supreme Court is authoritative, it provides very little guidance as to whether this statement was intended to encompass all situations in which there is an international obligation or common law justification. Additionally, it is arguable that when more serious rights are at stake, higher evidence of justification may be necessary. If, for example, there was a significant rights breach in which the limiting measure was not considered reasonable or proportional, but it corresponded with a common law principle, it seems absurd that a Court would choose to not conduct a comprehensive s 5 analysis.

Furthermore, Ellen France J's statement could be read to encompass situations in which the international obligation or common law principle overwhelmingly creates a justification for the limiting measure. In *Hoban*, evidence was provided by counsel for Mr Hoban that was not considered by Cooke J. With respect, when there are valid opposing arguments it seems prudent that a court will consider all relevant evidence, rather than resolving the case on one decisive factor. Therefore, it is tenable that *Hoban* was not a case like the kind discussed in *Make it 16*.

B International obligations were not determinative

Regardless of whether *Hoban* was a case like the kind discussed in *Make it 16*, international obligations were not determinative in providing a s 5 justification. The UN Special Rapporteur David Kaye has argued that due to the expansion of protection against discrimination worldwide, the prohibition of incitement of discrimination, hostility or violence under art 20(2) should be viewed to apply to broader categories that are covered by international human rights law, such as sexual orientation.[31] Cooke J felt that this evidence did not suggest that an international obligation to prohibit hate speech based on sexual orientation exists, unlike the consistency between s 61 and the international obligations found in the ICCPR and CERD.[32] However, while the evidence supporting a wider scope of art 20(2) may not create an international obligation, it should have indicated to Cooke J that the international obligation provided by the ICCPR and CERD

[30] *Hoban v Attorney-General*, above n 3, at [44].

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

[32] *Hoban v Attorney-General*, above n 3, at [44].

was not determinative. This is supported by discussion in the BORA White Paper in which it was outlined that under s 5 a court should consider not only the purpose of the restrictive legislation but how it has evolved.[33] The High Court could have been cognisant of any evolution in the wider context behind the international obligation given that it provided the justification for the rights limitation. Accordingly, the Special Rapporteur's comments could have been taken into account as they displayed evolution in the interpretation of art 20(2). Therefore, Cooke J erred in concluding that the international obligations arising solely out of the ICCPR and CERD were determinative.

C Further evidence was necessary

As Cooke J concluded that *Hoban* was a case like the kind identified by the Supreme Court in *Make it 16*, it was thought to be unnecessary for the Crown to file extensive evidential materials.[34] Instead, Cooke J stated that the s 5 justification "stands or falls on a more limited basis."[35] Due to this, the only evidence the Court felt it was necessary to consider was the existence of international obligations. Consequently, Cooke J's decision to consider limited evidence was contrary to the purpose of NZBORA.

1 Culture of justification

There is a 'culture of justification' intended to lie beneath s 5 of NZBORA. This concept entails a culture in which citizens are permitted to enquire as to the reasoning behind measures affecting their rights, and subsequently, be able to challenge those reasons.[36] Additionally, citizens are entitled to expect that when a right has been limited the Legislature would have given thought to the reasonableness of this limit.[37] In *Suavé v Canada (Chief Electoral Officer)* it was stated that "…at the end of the day, people should not be left guessing about why their Charter rights have been infringed."[38] Accordingly, the existence of international obligations agreed to half a century ago may be inadequate to display that the Legislature has contemplated the reasonableness of a rights breach. Thus, Cooke J's conclusion that limited evidence was sufficient in this case contradicts

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[33] Geoffrey Palmer A Bill of Rights for New Zealand: A White Paper ([1984–1985] I AJNR A6 at [10.32].

[34] *Hoban v Attorney-General*, above n 3, at [41].

[35] At [41].

[36] Andrew Butler and Petra Butler, The New Zealand Bill of Rights Act: A Commentary, at [6.8.1].

[37] At [6.8.1]

[38] *Sauvé v Canada (Chief Electoral Officer)* [2002] SCR 519 at [23].

the purpose of s 5 of NZBORA as it is expected that sufficient evidence will be considered to foster a 'culture of justification'.

2 Legislative history of NZBORA

The legislative history of NZBORA suggests that the intention behind s 5 was that a Court will consider the purpose of the restrictive legislation, but also investigate how it has evolved.[39] It was expected that counsel would provide economic, statistical and social information to shed light on the rationale of the limiting measure and its evolution.[40] Accordingly, a justification for a limiting measure that was once sufficient, may no longer be considered adequate upon consideration of the evolution of the measure.

Section 61 was first enacted in 1977.[41] Whilst it is significant that the provision was enacted in accordance with CERD, it should be acknowledged that other issues have become prevalent over time. In New Zealand, complaints to the Human Rights Commission indicated that following race and ethnicity, disability and sex (including sexual orientation) were the grounds with the highest number of complaints for discrimination. This suggests that people with diverse sexual orientations are at risk of hate speech in New Zealand, yet they have no appropriate legal remedy.[42] By choosing to limit the evidence considered in the Court's s 5 analysis, Cooke J failed to question if any recent evidence may have affected the validity of international obligations justifying the underinclusive nature of s 61.

D Key aspects of s 5

Due to Cooke J's conclusion that *Hoban* was a case like the kind discussed in *Make it 16*, His Honour did not analyse s 5 using a structured test like the commonly used *Hansen* test which allows for separate consideration of each element of s 5. It is important to note that a s 5 analysis can be conducted thoroughly without the adoption of the *Hansen* test.[43]

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[39] Palmer, above n 33, at [10.32].

[40] At [10.33].

[41] The Race Relations Act 1977 first contained a provision prohibiting hate speech based on race before it was later included into the Human Rights Act 1993.

[42] Supplementary Analysis Report: Incitement of Hatred – Amending the Human Rights Act to include ground of religious belief (Ministry of Justice, November 2022) at 9.

[43] *R v Hansen* [2007] 3 NZLR 1.

Yet, if a court decides to stray from the conventional approach, they must be careful to engage with each aspect of s 5. Cooke J's decision to follow a "simple analytical pathway" [44] meant that he completed a one-sided assessment of any demonstrable justification for the limited nature of s 61. It was incumbent on Cooke J to sufficiently consider the reasonableness and proportionality of the limiting measure, with some examination of the opposing arguments.

1 Reasonableness

The Supreme Court in *Make it 16* stated that when a limitation on a right is recognised in relevant international instruments or common law, evidence about the reasonableness of the limit may not be required or may be minimal.[45] While Cooke J did not explicitly consider the reasonableness of the limiting measure, it was implicit in his reasoning that the limit was reasonable as it corresponded with international obligations. This section will raise some considerations that could have been examined by Cooke J under the 'reasonableness' element of s 5. In particular, the reasonableness question will call for an examination of the purpose of the limiting measure and consideration of whether there were a range of reasonable alternatives.[46]

The Court of Appeal in *Make it 16* reiterated that the purpose of the limiting measure is the purpose to be identified under the *Hansen* s 5 analysis.[47] However, in *Vriend v Alberta*, Iacobucci J in the Canadian Supreme Court stated that the focus was on the objective of the omission, rather than the objective of the impugned limitation, which would typically be considered.[48] As *Hoban* involves a legislative omission, under Iacobucci J's formulation a court would need to determine whether the omission of sexual orientation from s 61 serves a purpose sufficiently important to justify curtailment of the right to be free from discrimination.

Furthermore, Iacobucci J held that consideration should be given to both the purpose of the Act as a whole and the relevant legislative omission so that a court can fully consider

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[44] *Hoban v Attorney*-General, above n 3, at [42].

[45] *Make it 16 Incorporated v Attorney-General*, above n 27, at [45].

[46] *R v Hansen*, above n 43, at [104] per Tipping J.

[47] *Make it 16 Incorporated v Attorney-General* [2021] NZCA 681, at [51].

[48] *Vriend v Alberta*, above n 14, at [110] per Iacobucci J.

the wider context of the omission within the broader legislation.[49] Accordingly, the HRA was intended to focus on preventing discrimination based on irrelevant personal characteristics for all people in New Zealand.[50] The protection of human rights is an honourable goal that is pressing and substantial.

Additionally, it can be useful to consider whether the limiting measure is rationally connected with its purpose. Prima facie, there is a rational connection between the goal of protecting citizens from hate speech based on race, and the omission to include sexual orientation in s 61. This is because s 61 was intentionally enacted to protect against racial hate speech, as it is in line with international obligations.[51] Thus, it seems evident why s 61 was not expanded to include sexual orientation, as this would go beyond the provision's intended purpose. Yet, upon adoption of a wider view of the purpose of the limiting measure, namely one that considers the holistic view of the Act's intention to promote equality between all citizens, a rational connection is not present. As the importance of the right of non-discrimination is emphasised throughout the HRA, it cannot be concluded that there is a rational connection between the policy behind the Act and the omission to include sexual orientation in s 61. This is because the provision itself causes discrimination as displayed by issue one, as Cooke J concluded that people with diverse sexual orientations suffer a 'real' disadvantage due to a lack of a legal remedy for hate speech.[52]

Cooke J in the High Court went on to state that the inclusion of sexual orientation within s 61 of the HRA would likely be a demonstrably justified limit on the right of freedom of expression in s 14 under s 5 of NZBORA.[53] Accordingly, including sexual orientation as a ground for prohibited discrimination in s 61 was within a range of reasonable alternatives for Parliament. Thus, on balance, the limitation on the right was likely unreasonable because it contradicts the HRA's purpose of preventing discrimination.

2 Proportionality

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[49] At [111] per Iacobucci J.

[50] *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573.

[51] International Convention on the Elimination of All Forms of Racial Discrimination, above n 29, and International Covenant on Civil and Political Rights, above n 29, art 20(2).

[52] *Hoban v Attorney-General*, above n 3, at [25].

[53] *Hoban v Attorney-General*, above n 3, at [49].

The Supreme Court in *Make it 16* did not assert that evidence relevant to the proportionality of the limit would not be required when a justification for a limiting measure arises out of a common law or international obligation.[54] Yet, Cooke J did not explicitly consider the proportionality of the measure.

The relevant limb of the *Hansen* test that considers proportionality requires a Court to ask, "Is the limit in due proportion to the importance of the objective?".[55] As discussed in *Moncrief-Spittle*,[56] there is no immutable methodology to be utilised when approaching the proportionality considerations in s 5. The Court of Appeal in *Child Poverty Action Group* stated that "once it is accepted that the other limbs of the s 5 test are met, it inevitably becomes harder to say that the measure is not proportionate."[57] Whilst all questions in the *Hansen* test are indeed interrelated, this view may erode rights protection by reducing the onus on Parliament to justify limiting a right.[58] Furthermore, certain considerations will only arise under the proportionality test. Accordingly, Cooke J likely failed to consider important factors by choosing not to explicitly scrutinise the proportionality of the limiting measure. This section will offer broad considerations that Cooke J could have examined.

A Court should complete the proportionality analysis with reference to evidence provided by the parties that lends itself to the costs and benefits of the measure. Yet, Cooke J considered limited evidence and did not examine the deleterious effects of the limiting measure. Due to s 61 offering protection only to people who have experienced hate speech based on race, people who have suffered hate speech based on their sexual orientation are unable to receive a legal remedy to compensate for the harm suffered. Broadly speaking, hate speech "is an assault first and foremost on the dignity of the individuals affected".[59] It seeks to "dominate and exercise power over minority social groups and interfere with their speech rights".[60] Additionally, it causes psychological harm to individuals by

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[54] *Make it 16 Incorporated v Attorney*-General, above n 27, at [45].

[55] *R v Hansen*, above n 43, at [104] per Tipping J.

[56] *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] 3 NZLR 433 at [91].

[57] *Child Poverty Action Group v Attorney-General* [2013] NZCA 402, at [52] per Ellen France J.

[58] Max Harris "Justified discrimination?" [2013] NZLJ 363 at 365.

[59] Jeremy Waldron "Why Call Hate Speech Group Libel" in *The Harm in Hate Speech* (Harvard University Press, Boston, 2012) 34 at 59.

[60] Owen M. Fiss "The Supreme Court and the Problem of Hate Speech" (1995) 24(2) Cap. U. L. Rev. 281 at 287.

affecting their self-esteem and causing feelings of humiliation and self-hatred.[61] At its extreme, hate speech can be a trigger for violence.[62] Mr Hoban's reaction to the hate speech displayed the harm it can cause. Following the pastor's comments, Mr Hoban as a gay man was left feeling threatened and unsafe when he was unable to take any action.[63] Subsequently, the deleterious effects of the lack of a legal remedy for hate speech based on sexual orientation is a significant cost of the legislative omission that was disregarded by Cooke J.

Therefore, by undertaking a limited s 5 analysis with no clear focus on the proportionality of the limiting measure, Cooke J failed to address considerations that only arise in the proportionality test. Due to this, Cooke J did not consider the deleterious effects of the underinclusive nature of s 61, such as empirical evidence detailing the harm that discrimination based on sexual orientation has for the LGBT community.

E Summary

Ultimately, the Supreme Court in successive cases should provide further direction as to what cases it intended to be encompassed by its statement in *Make it 16*. Due to Cooke J's reliance on the statement, he wrongly concluded that international obligations were determinative, and that little evidence was required to support the justification for the limiting measure. Furthermore, Cooke J's 'simple analytical pathway' meant reasonableness and proportionality were not adequately considered, which are key elements of s 5 of NZBORA. If successive courts take a similar path as Cooke J when there is an international obligation or a common law principle that justifies a limiting measure, subsequent considerations of s 5 may stray from NZBORA's purpose and in turn erode rights protection. However, Cooke J's reliance on the limited justification provided by the international obligations was likely due to His Honour being implicitly deferential to Parliament by accepting legislative judgment without further scrutiny.

III Cooke J was implicitly deferential to Parliament

The Attorney-General submitted that "questions of deference" were involved in *Hoban*, implying that the Court should allow some leeway to Parliament when analysing any

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[61] Katharine Gelber and Luke McNamara "Evidencing the harms of hate speech" (2016) 22(3) Soc. Identities 324 at 325.

[62] Rita Izsák Report of the Special Rapporteur on minority issues A/HRC/29/24 (11 May 2015) at 5.

[63] *Hoban v Attorney-General*, above n 3, at [6].

justification for the underinclusive nature of s 61. Cooke J rejected this submission with reference to *Make it 16* in which the Supreme Court asserted that the Court should fulfil its role "which is to declare the law".[64]

This chapter will argue that despite the rejection of the Attorney-General's submission, Cooke J's reasoning was implicitly 'deferential' or allowed undue 'leeway' to Parliament with consideration of three interlinking points. Firstly, Cooke J mischaracterised the appropriate role that the Court should fulfil. This was displayed both through his assertion that the Court should not decide the dividing line for hate speech and how certain questions were perceived to be political when they were part of the expected analysis under s 5. Secondly, it was implicit in Cooke J's reasoning that acceptance of Mr Hoban's argument by the Court could place pressure on Parliament or skew public debate. Thirdly, a higher standard of scrutiny was likely justified given the important subject matter of human rights in the circumstances.

A The institutional role of the Court

A comprehensive consideration of 'deference' is not within the scope of this paper, however, it is necessary to introduce the concept to explain how it affected Cooke J's reasoning in *Hoban*. Courts in New Zealand and other jurisdictions have grappled with when, or even if, a court should draw the line between legal and political questions to refrain from considering matters that fall into the latter category. The typical reasoning for doing so is that consideration of political questions may be outside of the court's institutional role.[65] This concept has commonly been referred to as 'deference' in case law and scholarship.[66]

In *Child Poverty Action Group Inc v Attorney-General,* the Court of Appeal stated:[67]

> … the term 'deference' as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away or shirk that task.

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[64] *Make It 16 Incorporated v Attorney-General*, above n 27, at [68].

[65] *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 at [164] per Lady Hale DP.

[66] See *Child Poverty Action Group Inc v Attorney-General*, above n 57, at [45] and Jeffrey Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] RL. 592.

[67] *Child Poverty Action Group Inc v Attorney-General*, above n 57, at [45].

It has been accepted in academic commentary and judgments from other jurisdictions that 'deference' is not the appropriate term as it implies "overtones of servility". [68] Thus, it does not accurately capture the necessary institutional role of the Courts. Courts generally seem to oppose the idea of 'deference', or at the very least the term, as its connotations contradict the court's important role of scrutinising legislation.

Ultimately, the case law and scholarship about 'deference' does not provide sufficient assistance in identifying the type of situations in which it may be warranted. For example, the Court of Appeal in *Make it 16* stated that "deference" or the doctrine of "margin of appreciation" allows for courts to give Parliament some leeway but "can only go so far".[69] Thus, there is no explicit situation in which a Court must 'defer' or allow for some 'leeway' to Parliament. Instead, a Court must consider the context surrounding the case and exercise its judgment. Accordingly, it might be likely that Courts will be overly deferential to Parliament. Arguably, in NZBORA cases, as the Court is unable to change the law or strike down legislation when it is found to be incompatible with NZBORA, a Court should err on the side of caution and conduct a thorough scrutiny of the limiting measure. As acknowledged by Richard Clayton:[70]

> …the need to defer to Parliament or the executive is less compelling once it is acknowledged that the Human Rights Act (the English equivalent of NZBORA) envisages the other branches of government will have a second bite of the cherry.

Accordingly, if Cooke J had properly scrutinised the justification for the limited nature of s 61, this would not have been outside the institutional role of the Court.

1 Cooke J's mischaracterisation of the Court's role

The first way in which Cooke J mischaracterised the role of the Court was by stating that while the scope of hate speech laws involves some legal questions to be addressed by the Court, ultimately, decisions relating to the placement of the dividing line for hate speech laws and what amounts to hate speech are matters for Parliament.[71] Yet, the High Court was not tasked with determining these matters. Rather, the Court's task was to consider a legal question, namely whether the omission to include sexual orientation in s 61 was consistent with NZBORA. This was a role that was afforded to them by Parliament. In

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[68] *R (ProLife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 at [75]. See also Jowell, above n 66.

[69] *Make It 16 Incorporated v Attorney-General*, above n 47, at [53].

[70] Richard Clayton "Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human Rights Act" (2004) 33 PL at 16.

[71] *Hoban v Attorney-General*, above n 3, at [48].

light of this, Cooke J was wrong to state that the Court should not be deciding where to draw the dividing line for who can receive protection from hate speech.[72] There was no room for Cooke J to interpret s 61 widely to allow someone who experienced hate speech based on sexual orientation to receive a remedy due to the provision's strict wording limiting the provision to race. Therefore, the Court would not be deciding the dividing line for hate speech, instead, it would be Parliament's decision.

As asserted by Lady Hale in *Nicklinson*, "Parliament is certainly the preferable forum in which any decision should be made."[73] Accordingly, if a rights limitation is not demonstrably justified or if a declaration of inconsistency (DOI) is made,[74] this cannot be viewed as evidence of the Court acting outside of its institutional competence as ultimately Parliament will be the forum in which important decisions are made. Subsequently, Cooke J was implicitly deferential to Parliament as he agreed with Parliament's position without further examination of the justification.

The second way in which Cooke J mischaracterised the role of the Court was that he asserted that this matter required consideration of policy issues, for example, a judgment had to be made on the importance of freedom of expression. His Honour stated that the Court's role in this debate is limited to addressing questions of law.[75] However, through s 5 of NZBORA, Parliament enables the Court to balance competing rights and make a judgment on which one should prevail in any given context. It follows that in doing so a Court would consider the importance of both conflicting rights. Thus, Cooke J was wrong to state that a judgment on the importance of freedom of expression is a policy question. Rather it is a part of the contemplated analysis under s 5, thus, it is a question of law that the Court is able to consider. This displays that Cooke J misconstrued the relevant matters to be considered by a Court in a s 5 analysis.

Furthermore, a Court should be wary of choosing not to scrutinise a rights limitation due to overlap of policy issues. In *Hansen*,[76] Tipping J advocated for a spectrum approach for deciding which cases warrant greater 'deference' than others. At one end of the spectrum,

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[72] *Hoban v Attorney-General*, above n 3, at [48].

[73] *R (Nicklinson) v Ministry of Justice*, above n 65, at [190] per Lady Hale DP.

[74] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

[75] *Hoban v Attorney-General*, above n 3, at [48].

[76] *R v Hansen*, above n 43, at [116].

there are matters that involve social, political or economic decisions and at the other end of the spectrum, there are matters that involve substantial legal content.[77] As discussed by the HRRT in *Child Poverty Action Group*, it would be absurd to suggest that when the legislation at issue concerns a social, political or economic question Parliament can infringe rights without proper justification.[78] Often, legal issues will overlap with social and political questions, as in *Hoban*. Therefore, it was not tenable for Cooke J to withhold from conducting a proper s 5 analysis due to the overlap between political, social and legal issues in the case.

B Risk of the Court placing pressure on Parliament or skewing public debate

It was implicit in Cooke J's reasoning that he felt the Court should not examine this matter due to its controversial nature, and that at the time of the hearing and the writing of the judgment, Parliament was in the process of reviewing hate speech laws following the Royal Commission of Inquiry into the Terrorist Attacks on Christchurch Mosques.[79] Part of the reasoning behind allowing 'deference' to Parliament is that it is thought that the Court could skew public debate or place an obligation on Parliament to alter the law, especially upon consideration of controversial topics like hate speech laws or assisted suicide. Thus, often Courts will allow Parliament to consider the issue first, as displayed in *R (Nicklinson) v Ministry of Justice*.[80]

In *Nicklinson* the United Kingdom Supreme Court (UKSC) considered the interplay between s 2 of the Suicide Act 1961, which makes assisting a suicide an offence and the right to respect for private life under art 8 of the European Convention on Human Rights (ECHR).[81] The Court grappled with the issue of whether the matter was within its institutional competence, but it ultimately concluded that Parliament should first consider the issue.[82] Lord Sumption was of the view that legislative judgment was determinative

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[77] At [116] per Tipping J.

[78] *Child Poverty Action Group Inc v Attorney-General* [2008] NZHRRT 31, at [214].

[79] Ko tō tātou kāinga tēnei - Report: Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (Royal Commission of Inquiry into the terrorist attack on Christchurch mosque, 26 November 2020).

[80] *R (Nicklinson) v Ministry of Justice*, above n 65.

[81] *R (Nicklinson) v Ministry of Justice*, above n 65, at [27] per Lord Neuberger P.

[82] At [148(b)] and [148(c)(i)] per Lord Neuberger P, at [150] and [191] per Lord Mance SCJ, at [196]– [197] per Lord Wilson SCJ, at [300] per Lady Hale DP and at [326] per Lord Kerr SCJ.

upon consideration of the social and moral context of the issue of assisted suicide.[83] On the other hand, Lady Hale did not accept Lord Sumption's view and instead affirmed that in judicial decision-making at appellate level, it is difficult to separate what is fair or moral from legal principles.[84] As stated by Lady Hale: [85]

> …the view that Parliament might have the means to consider the issue more fully or on a broader canvas does not impel the conclusion that the courts should shy away from addressing the question whether the provision is incompatible with a Convention right, judged on the material that has been presented.

When applying this reasoning to *Hoban*, Cooke J should have not been swayed by the fact that Parliament was currently in the process of reviewing hate speech laws at the time of the hearing.[86] The argument that a Court should not consider a controversial issue because the Legislature is simultaneously considering the issue is not sound. This is because Parliament legislated in a way to allow courts to scrutinise legislation without any limits on the matters they can consider.[87] Moreover, Cooke J's recognition of hate speech's controversial nature and the ongoing examination in Parliament at the time display a need for higher scrutiny of the issue as it displays the importance of the rights at stake and for arguments on either side to be heard.

This apparent reluctance to properly consider controversial issues is likely based on the expectation that the Court's decision on a controversial matter may skew the public debate. As discussed in *Make it 16*,[88] this argument overemphasises the Court's role in law-making. If a Court states that a provision was inconsistent with a NZBORA right, this merely displays the Court's view of the law.

Additionally, Cooke J implied that acceptance of Mr Hoban's argument may place pressure on Parliament to consider altering the law.[89] NZBORA is not supreme law, thus,

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[83] At [191] per Lady Hale DP.

[84] At [191] per Lady Hale DP.

[85] At [347] per Lord Kerr SCJ.

[86] Human Rights (Incitement on Ground of Religious Belief) Amendment Bill 2022 (209-1).

[87] Bill of Rights Act 1990.

[88] *Make it 16 Incorporated v Attorney-General*, above n 27, at [31].

[89] *Hoban v Attorney-General*, above n 3, at [45].

a Court is not able to invalidate any provision that is inconsistent with it. Only a DOI can be made, which then requires a response from Parliament.[90] Whilst a DOI strengthens a claimant's argument that the law should be changed to eliminate this inconsistency, Parliament can choose not to alter the law in the desired way.[91] In *Regina (Steinfeld) v Secretary of State for International Development* the UKSC reinforced that "a declaration of incompatibility does not oblige the Government or Parliament to do anything".[92] Additionally, Lord Kerr SCJ in *Nicklinson* reasoned, "The courts say to Parliament, 'This particular piece of legislation is incompatible, now it is for you to decide what to do about it.'"[93] Accordingly, a court should not shy away from considering a rights limitation in fear of swaying public debate or placing pressure on Parliament.

C Increased scrutiny may have been justified

This chapter has argued that Cooke J was implicitly deferential to Parliament as he mischaracterised the expected role of the Court. Even so, in human rights cases, a Court should be careful not to give too much 'leeway' to Parliament as they may fail to adequately scrutinise the limiting measure.

In human rights cases, a complainant should be afforded a thorough inquiry into the potential justification for the limit on their rights and should observe the Court engage with the merits of both arguments. Several jurisdictions, such as the English Courts,[94] support strict scrutiny of the reasonableness of any interference with a human right. Yet, Butler and Butler assert that not all human rights will constitute the same intensity of review.[95] Subsequently, consideration must be given to the context of a rights breach. The right to be free from discrimination is a considerably important human right, especially given its prominence in the ICCPR.[96] Furthermore, in *EB v France* the ECtHR held that differences in treatment based on sexual orientation require "particularly serious reasons"

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[90] Bill of Rights Act, s 7B.

[91] Bill of Rights Act, s 7B.

[92] *Regina (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32, at [60].

[93] *R (Nicklinson) v Ministry of Justice*, above n 65, at [343] per Lord Kerr SCJ.

[94] *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 415 (HL) at 531 per Lord Bridge, at 537 per Lord Templeman.

[95] Butler and Butler, above n 36, at [6.9.22].

[96] International Covenant on Civil and Political Rights, above n 29, art 26.

by way of justification.[97] Thus, in *Hoban,* scrutiny of the justification of the limiting measure beyond acceptance of correspondence with international obligations was warranted due to the important right at stake.

In *Bank Mellat v HM Treasury (No 2)* Lord Reed stated: [98]

> …the intensity with which the test is applied – that is to say, the degree of weight or respect given to the assessment of the primary decisionmaker - depends on the context.

Given the importance of the right to be free from discrimination, Cooke J should have probed further into the justification for the limiting measure, rather than concluding that international obligations were determinative, subsequently affording substantial weight to the decision of Parliament. As argued by Trevor Allan, "surrender of judgment is inconsistent with the rigorous scrutiny of governmental action that the protection of human rights require."[99] While Cooke J did not wholly surrender his judgment in analysing the justification for the limited nature of s 61, he did not conduct a sufficiently rigorous inquiry that was required in this human rights case.

D Summary

Cooke J mischaracterised the role of the Court in *Hoban* by choosing to avoid what he viewed to be 'political' questions when instead they were indispensable considerations under the s 5 analysis. In turn, it was unnecessary for Cooke J to give 'leeway' to Parliament as acceptance of Mr Hoban's argument would not oblige Parliament to do anything other than provide a response or skew public debate. Furthermore, given the importance of the right to be free from discrimination, Cooke J should have conducted a more rigorous analysis of the justification for the limiting measure rather than concluding that international obligations were determinative. In doing so, Cooke J's reasoning for concluding that the limited nature of s 61 was justified was threadbare and insufficient given the important subject matter. Yet, Cooke J's 'leeway' to Parliament in this discrimination case was arguably affected by his perception that Mr Hoban had not 'actually' suffered discrimination.

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[97] *EB v France* (2008) 47 EHRR 21, at [58].

[98] *Bank Mellat v HM Treasury* (No 2) [2013] UKSC 39, at [75].

[99] Trevor Allan "Human rights and judicial review: A critique of due deference" (2006) 65(3) CLJ 671 at 694.

IV Cooke J erred in stating that acceptance of Mr Hoban's 'artificial' argument would prevent Parliament from enacting targeted measures

This chapter objects to Cooke J's view that Mr Hoban's argument was artificial in nature as Mr Hoban had not actually been discriminated against. Furthermore, Cooke J was wrong to contend that the effect of accepting Mr Hoban's argument would prevent Parliament from being able to enact targeted measures for minority groups.

Despite concluding that the limitation on the right was justified, Cooke J took issue with the substance of Mr Hoban's argument, as he considered Mr Hoban's argument to be artificial in nature.[100] The Court viewed that Mr Hoban could not be said to actually have suffered from discrimination due to his inability to access s 61.[101] It was stated that s 61 is only discriminatory with the meaning of s 19(1) as it "does not address a range of other prohibited grounds of discrimination at the same time. For this reason, it can be seen as not truly discriminatory at all." [102] Yet, the Human Rights Commission (HRC) has contemplated that 'real' discrimination can occur between minority groups.

A 'Intra-ground' discrimination

The HRC in its Consistency 2000 Report indicated that 'intra-ground discrimination' could arise from provisions in the HRA.[103] The Report referred to a Canadian case *Masse v Ontario (Ministry of Community and Social Services)*.[104] In brief, the case involved a reduction in the value of social assistance benefits except for the benefits of the permanently disabled and aged, which arguably violated ss 7 and 15 of the Canadian Charter of Rights and Freedoms. Corbett J's judgment in *Masse* was significant as it was found that a discriminatory distinction had been made between temporarily disabled people and other disabled people, as it denied those disabled individuals an equal benefit.[105]

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[100] *Hoban v Attorney*-General, above n 3, at [43].

[101] At [43].

[102] At [21].

[103] Report to the Minister of Justice pursuant to Section 5(l)(k) of the Human Rights Act 1993 - *Consistency 2000 Report* (Human Rights Commission, 31 December 1998) at 68.

[104] *Masse v Ontario* (Ministry of Community and Social Services) (1996) 134 DLR.

[105] *Consistency 2000 Report*, above n 103, at 71.

Whilst the report was written within the context of disability, this reasoning could be applied more broadly to any inter-ground discrimination between the prohibited grounds of discrimination within s 21 of the HRA. This suggests that the HRC has contemplated that there can be discrimination between prohibited grounds of discrimination if, for example, they do not have access to the same remedies. Therefore, Cooke J's argument that Mr Hoban has not suffered discrimination is incorrect, as upon consideration of issue one, it was concluded that there was a real disadvantage experienced by those minority groups that could not access a legal remedy for hate speech. Yet, while there can be discrimination between the grounds in s 21, acceptance of Mr Hoban's argument would not compel Parliament to protect other minority groups in the same way.

B Targeted measures

Both the High Court and the HRRT contended that it is important to ensure that Parliament can respond to discrimination in society by enacting limited measures that protect specific disadvantaged groups.[106] Accordingly, Cooke J found that the ultimate effect of Mr Hoban's argument was that these targeted measures are unlawful as they discriminate against other disadvantaged groups who are not protected by the provision.[107] It was said that the right of non-discrimination should not impose an obligation on Parliament to extend protection to all disadvantaged groups at the same time.

Mr Hoban and the HRC argued that targeted measures, such as s 61, do not have to protect all prohibited grounds of discrimination.[108] They stated that the question in this case was whether excluding sexual orientation from s 61 was justified. Yet, the High Court did not accept this argument as it avoided "confronting a necessary element of this challenge",[109] because it ultimately turned on whether the limit is justified under s 5. Section 61 is only discriminatory because it only protects citizens from hate speech based on their race and does not include any other groups referenced in s 21. Thus, the Court found that if they were to limit the s 5 analysis by adding only one prohibited ground, this would fail to address the discriminatory effect arising out of s 61.

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[106] *Hoban v Attorney-General*, above n 3, at [45].

[107] At [45].

[108] At [46].

[109] At [46].

To bolster his reasoning, Cooke J asserted that when taking Mr Hoban's argument to its logical conclusion "the establishment of the Race Relations Commissioner under s 8(1A)(c) of the HRA, or the existence of the Ministry for Women" could be considered discriminatory measures.[110] But, those measures are exactly the kind that would fall within s 19(2) of the HRA, as they would be viewed as a measure that is intended to assist or advance a historically disadvantaged group. Accordingly, these measures would not be seen as discriminatory at all. Thus, this aspect of Cooke J's reasoning was insufficient. Importantly, in *Hoban,* it was concluded that s 61 did not fall within s 19(2).[111]

Whilst it is correct that including sexual orientation within s 61 would not change the discriminatory effect of the underinclusive measure, the focus should remain on those disadvantaged groups who have been the target of hate speech. In his judgment, Cooke J accepted that some protected groups are more likely to experience hate speech than others.[112] Accordingly, for each ground of prohibited discrimination under s 21, there would be different evidence that could be provided to demonstrably justify the limitation on the right to be free from discrimination under s 5. For example, there may be no legitimate evidence to support the prohibition of hate speech based on age. Thus, the omission to include a protected group from s 61 could be considered discriminatory within s 19(1) yet may be demonstrably justified under s 5.

While Mr Hoban's argument can extend to all protected groups mentioned in s 21, there will be different justifications warranting the lack of protection for a particular group under s 61. Some groups may not even want or feel as if they need protection. Accordingly, it is rational to consider each group on a case-by-case basis as claims are brought to the courts.

C Summary

Given that Cooke J had concluded that Mr Hoban had suffered a real disadvantage by not being able to access a legal remedy to hate speech under s 61, his conclusion that Mr Hoban had not 'actually' suffered discrimination was questionable. This is supported by the Consistency 2000 Report which provides a basis for discrimination between protected

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[110] At [45].

[111] At [32].

[112] At [20].

grounds in s 21. However, Cooke J was correct to state that the effect of Mr Hoban's argument was that the other protected grounds in s 21 were discriminated against as they could not access s 61. While Parliament should be able to enact targeted measures, acceptance of Mr Hoban's argument would not impose an obligation on Parliament to include all protected groups in s 61 at the same time. There would be different evidence supporting the inclusion of each protected group within s 61, thus, each group could be considered individually as cases arise.

V Conclusion

Cooke J's conclusions on the first and second issues of *Hoban* were sound, but this paper argues that the s 5 analysis was inadequate. Given that NZBORA is a complex and fluid area of law, the critiques of His Honour's s 5 analysis may not be considered outright errors. Yet, the analysis was insufficient due to Cooke J's willingness to accept limited evidence and the lack of consideration of relevant counterarguments. By concluding that *Hoban* was a case like the kind discussed in *Make it 16*, Cooke J failed to consider adequate evidence, wrongly concluded that international obligations were determinative and did not examine the reasonableness and proportionality questions arising out of s 5 sufficiently. Furthermore, Cooke J misunderstood the Court's institutional role in this case, and in turn was implicitly deferential to Parliament by accepting the justification for the limited nature of s 61 that was provided by international obligations, despite further scrutiny being warranted in a human rights case. Finally, Cooke J's perception that Mr Hoban had not 'actually' suffered discrimination and that acceptance of his argument would prevent Parliament from enacting targeted measures was incorrect. Consequently, the High Court may have erred in concluding that the limit on freedom from discrimination was justified under s 5 of the Bill of Rights. Ultimately, in NZBORA cases, courts should err on the side of caution and comprehensively scrutinise rights limitations to better align with the intended purpose of the Act and to afford claimants a proper inquiry into the rationale behind measures that limit their rights.

VI Word Count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 8144 words.

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