IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1192
[2018] NZHC 104

BETWEEN	LOUISA HARERUIA WALL Appellant
AND	FAIRFAX NEW ZEALAND LIMITED First Respondent
	MARLBOROUGH EXPRESS Second Respondent
	CHRISTCHURCH PRESS Third Respondent

Hearing:	22 November 2017
Appearances:	P J Kapua for the Appellant RKP Stewart for the Respondents M Corlett QC for the Human Rights Commission
Judgment:	12 February 2018

JUDGMENT OF MUIR J,
DR H HICKEY AND MR B K NEESON

This judgment was delivered by me on Monday 12 February 2018 at 2.30 pm
Pursuant to Rule 11.5 of the High court Rules.

Registrar/Deputy Registrar *Date:……*

Counsel/Solicitors:
P J Kapua, Tametakapua Law, Auckland
RKP Stewart, Izard Weston, Wellington

Copy to:
M Corlett QC, Barrister, Auckland

Introduction

[1] The appellant, Ms Louisa Wall,[1] appeals from a determination of the Human Rights Review Tribunal (the Tribunal) dismissing her complaint that two cartoons penned by Mr Al Nisbet and published by the first respondent (Fairfax) breached s 61 of the Human Rights Act 1993.[2]

[2] She says that the Tribunal misinterpreted s 61 by wrongly concluding that it was intended to capture only "behaviour … at the serious end of the continuum of meaning"[3] and that in so doing the Tribunal ignored relevant material relating to the origin, context and purpose of the provision. She says further that the Tribunal erred in applying an objective test with the result that the impact of the cartoons on those insulted by them is a relevant consideration in assessing their legality. In any event, she says the cartoons were so insulting in their treatment of Māori and Pasifika that the Court could comfortably conclude they were likely to excite hostility towards or bring into contempt people of that ethnicity.

[3] The case is the first to be considered by the High Court in relation to the section which is New Zealand's legislative response to its treaty obligations under the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD).[4] It raises important issues in terms of the interface between the right to freedom of expression, as recognised in s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), and the legislature's legitimate interest in enhancement of racial harmony by the suppression of certain types of publications – popularly identified as "hate speech", albeit that unlike several overseas equivalents, the legislation does not specifically identify exposure to "hatred" as the benchmark of illegality.

[4] We do not consider it appropriate to allow the appeal. Our reasons follow.

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1 Member of Parliament for Manurewa.
2 *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 17.
3 *Wall v Fairfax New Zealand Ltd*, above n 2, at [200].
4 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

The cartoons in their context

[5] These were published respectively in the Marlborough Express on 29 May 2013 (copy annexed as Appendix A) and the Christchurch Press on 30 May 2013 (copy annexed as Appendix B). Both were penned by Mr Nisbet and appeared on the opinion pages of the respective papers, which are published by Fairfax New Zealand Ltd (Fairfax).

[6] The context was the announcement on 28 May 2013 by then Prime Minister, the Rt Hon (now Sir) John Key that government funding would be available to expand the Kickstart Breakfast Programme already initiated by Fonterra and Sanitarium, allowing the programme to expand from two to five mornings a week and to be available in all decile one to four schools. The total anticipated cost to taxpayers of this initiative was said to be $9.5 million over five years.

[7] The Marlborough Express cartoon was published adjacent to an editorial which supported the government's proposal on the essentially pragmatic grounds that hungry children cannot learn, while also suggesting that "the Government needs to do a lot more work on making wayward parents accountable". Previously the paper had published nine news stories and two feature articles on the need for and value of a national breakfast in schools programme as its contribution to the public debate which led up to the government's decision.

[8] Likewise, the cartoon which appeared in The Press was one of a number of contributions relating to the programme which appeared in the paper during May 2013. These included reaction from politicians, educationalists and other experts. Significantly it was not the first cartoon to be run on the subject. The previous day The Press's other contributing cartoonist, Malcolm Evans, had depicted the Prime Minister holding Weetbix and milk standing between two signs which read "Hungry Kids" and "Their Poorly Paid Parents", the implication being that the programme would feed children but do nothing to address the underlying reasons for poverty.

[9] Both Mr Nisbet's cartoons generated significant public feedback. The Marlborough Express received over 10,000 responses to an online poll which it ran subsequent to the publication, when a typical response is no more than 300.

Approximately a quarter of respondents were "offended" by the cartoon and three quarters were not.

[10] Evidence from the editor of The Press, Ms Joanna Norris, was to similar effect with her noting strong reactions from readers and what the Tribunal records as:[5]

> … considerable discussion in relation to the utility and effectiveness of such a policy as well as the wider issues of deprivation and poverty.

An overview of the Tribunal's decision and the present appeal

[11] Having considered in detail the context in which the cartoons were published, the evidence heard before it, New Zealand's international obligations, and the correct approach to interpretation to s 61 in light of s 14 of NZBORA, the Tribunal concluded:

(a) For a publication to be unlawful it must be objectively threatening, abusive or insulting *and* objectively likely to excite hostility against or bring into contempt any group of persons on account of their ethnicity.

(b) The central adult male and female characters in the Marlborough Press cartoon were intended to portray Māori or Pasifika, and in the case of The Press cartoon the family could also reasonably (and readily) be identified as Māori or Pasifika.

(c) The cartoons were objectively insulting in that they depicted Māori and Pasifika as negligent parents pre-occupied with alcohol, cigarettes and gambling at the expense of their children's welfare.

(d) The requirement that the publication be either likely to excite hostility against or bring into contempt a racial group indicated that the actions sanctioned are of a "serious" kind. The behaviour targeted by s 61 was "at the serious end of the continuum of meaning".

(e) By "a substantial margin" the cartoons were not likely to bring Māori and Pasifika into contempt (or excite hostility against them).

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5 At [85].

[12] It is from this last finding that Ms Wall appeals. She raises various grounds of appeal, including that the Tribunal did not give the correct meaning to s 61; overlooked the evidence for the appellants; and failed to give a rationale to support its conclusion.

[13] There is no cross appeal by the respondents against the finding that the cartoons were objectively insulting. Mr Stewart accepts that they were. We agree. The depiction of Māori and Pasifika parents as lazy, neglectful, gluttonous, smokers and drinkers is undoubtedly insulting in that sense. Whether the Marlborough Express or The Press should publish cartoons which objectively insult a particular racial group is a matter for reflection by its editorial team, but we agree with the Tribunal that the issue of illegality is not decided on that basis alone.

Approach on appeal

[14] All parties agree that *Austin Nichols* principles apply to this appeal.[6] We adopt as a correct expression of the law the following summary in their joint memorandum dated 1 December 2017:[7]

(a) In *Ministry of Health v Atkinson*, the High Court held that the *Austin Nichols* principles apply to High Court appeals brought under s 123 of the Human Rights Act 1993.[8] The Court stated:[9]

> Section 123(5) provides that in determining any appeal under this section, the High Court has the powers conferred on the Tribunal under ss 105 and 106 of the Act. The appellant has the onus of satisfying the Court that it should differ from the decision under appeal. The principles set out in *Austin Nichols & Co v Stitching Lodestar* (sic) apply and this Court must make its own assessment of the issues.

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6 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

7 The position can be contrasted with the Canadian position described in *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11, [2013] 1 SCR 467 at [166]–[168]. In that jurisdiction the "standard of reasonableness" principle provides that deference will generally apply "where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" as for example a Human Rights Tribunal interpreting or applying the Human Rights Act.

8 *Ministry of Health v Atkinson* (2010) 9 HRNZ 47 (HC).

9 At [8].

(b) Section 123 of the Human Rights Act provides for a general right of appeal. It does not involve an appeal from a discretionary decision. Rather, the decision of the Human Rights Review Tribunal was a matter of assessment and judgment.

(c) *Austin Nichols* provides that, in making its own assessment of the issues in a general appeal, the appellate Court has no duty to accord any deference to the original tribunal of fact. In its judgment, the Supreme Court emphasised this point in unequivocal terms:[10]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.
>
> (footnotes omitted)

(d) The Supreme Court in *Austin Nichols* noted that an appellate court "may rightly hesitate" before concluding that the findings of fact or degree made by a Tribunal with specialist expertise are wrong.[11] However, no deference is required beyond the customary caution appropriate to be exercised in circumstances where seeing the witnesses provides an advantage in assessing matters such as credibility.

(e) This approach was very recently affirmed by Nation J in *Real Estate Agents Authority v A*:[12]

> I accept, consistent with the Supreme Court's opinion in *Austin Nichols*, that it is appropriate to hesitate before contending that findings of fact or degree, by a Tribunal with special expertise, are wrong.

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10 At [16].
11 At [5].
12 *Real Estate Agents Authority v A* [2017] NZHC 2929 at [18].

New Zealand's international obligations

[15] After giving a brief history of s 61 of the Human Rights Act, with which neither we nor the appellant take issue, the Tribunal reviewed New Zealand's relevant international obligations. It was appropriate for it to do so, given the presumption of statutory interpretation that so far as its wording allows, legislation should be read consistently with New Zealand's international obligations.[13] In the present case these include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR).[14] The Tribunal also had regard to the European Convention on Human Rights (ECHR),[15] to which New Zealand is not a party but which nevertheless provides useful interpretive guidance.

[16] In our view the Tribunal's analysis of the relevant international law was competent and thorough. However, because the appellant criticises certain aspects of the Tribunal's analysis, we briefly review its approach.

ICERD

[17] The Tribunal observed that art 4 "has functioned as the principal vehicle within ICERD for combating racial hate speech".[16] It is in terms:

> **Article 4**
>
> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

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13 See *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289; *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24].

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

15 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

16 At [123], echoing an observation in *General Recommendation No. 35: Combating racist hate speech* CERD/C/GC/35 (2013) at [8].

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

[18] The Tribunal noted that the chapeau to art 4 requires due regard to be given to the principles embodied in the Universal Declaration of Human Rights (UDHR),[17] and observed that this meant due regard was to be given to freedom of expression.[18] It further drew on the interpretive guidance found in *General Recommendation No 35* by the Committee on the Elimination of Racial Discrimination (the Committee).[19] Ultimately the Tribunal concluded that conduct captured by both civil and criminal sanctions under art 4 must be "at the serious end of the spectrum".

[19] Ms Kapua submits that the Tribunal should have had particular regard to art 2 of ICERD. The Tribunal did not explicitly refer to art 2, so it is appropriate to set it out in full:

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public

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17 *Universal Declaration of Human Rights* GA Res 217A, A/Res/217 (1948) [UDHR].

18 Found in art 19 of UDHR. See also *General Recommendation No. 35: Combating racist hate speech* CERD/C/GC/35 (2013) at [19], where the Committee refers to UDHR and recognises that freedom of opinion and expression "should … be borne in mind as the most pertinent reference principle when calibrating the legitimacy of speech restrictions".

19 *General Recommendation No. 35: Combating racist hate speech*, above n 18.

institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

[20] Ms Kapua says that art 2 contemplates civil sanctions for racist hate speech, while art 4 is concerned specifically with the creation of criminal offences for more serious manifestations of racist hate speech. She submits that the Tribunal incorrectly adopted art 4's more stringent test reserved for criminal cases and "grafted" it onto s 61 of the Human Rights Act, despite the fact that s 61 imposes civil rather than criminal sanctions.

[21] The Human Rights Commission takes issue with this categorisation. It submits that art 2 is merely a general provision under which states undertake to combat racial discrimination by, among other things, reviewing their national laws and policies. Article 4 is a refinement of art 2, containing more detailed guidance as to how to combat racist hate speech in particular. We accept that submission. Nor is art 4 concerned only with criminal sanctions for racist speech. The chapeau to art 4 requires states to "undertake to adopt immediate and positive measures designed to eradicate

all incitement to, or acts of, such discrimination". The creation of civil sanctions in s 61 of the Human Rights Act is arguably an example of such a measure taken under art 4.

[22] In our view, the Tribunal was correct to conclude that both civil and criminal conduct caught by art 4 will be "at the serious end of the spectrum".[20] That inference is warranted by the relatively strong language of art 4 ("ideas or theories of superiority of one race or group of persons" … "racial hatred and discrimination"), which we do not read as referring to low-level insulting speech. It is further warranted by the explicit reference to the principles embodied in the UDHR, which requires due regard to be had to freedom of speech when implementing art 4.[21]

[23] It follows that we consider the Tribunal appropriately summarised the principles arising from ICERD.

ICCPR and ECHR

[24] The Tribunal cited art 19 of the ICCPR, which contains the right to freedom of expression. Article 19(3) expressly acknowledges that freedom of expression may be subject to restrictions that are provided by law and necessary:

> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order, or public health or morals.

[25] The right to freedom of expression in art 10 of the ECHR also expressly carries certain "duties and responsibilities": it too may, for example, be restricted where necessary for the protection of the reputation or rights of others.

[26] After referring to academic commentary, case law and comment by the Human Rights Committee under these two instruments, the Tribunal observed that:

> [166.1] The right to freedom of expression is one of the most essential elements of a democratic society.

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20 At [132].

21 Ms Kapua raises counterarguments based on the Committee's *General Recommendation No 35*, above n 18. These are dealt with later in the judgment; see [58].

> [166.2] While the right can be restricted, the circumstances in which this is permissible are strictly limited by Article 19(3) and the restrictions must conform to the strict tests of necessity and proportionality. Specifically the restrictive measures must be appropriate to advance their protective function, they must be the least intrusive of the available measures and must be proportionate to the interest to be protected.

[27] These conclusions are balanced and carefully expressed. In our view they give appropriate weight to the right to freedom of expression, while properly acknowledging that the right may be limited in certain circumstances.

A conflict of rights?

[28] Before embarking on its analysis under the domestic framework, namely the New Zealand Bill of Rights Act 1990 (NZBORA), the Tribunal concluded that this was not a conflict of rights case:[22]

> In the present case the plaintiff does not allege she was personally discriminated against by the defendants on the grounds of her race in the context of any Part 2 HRA provision relating to, for example, employment, access to places, vehicles and facilities, the provision of goods and services, land, housing and other accommodation or in relation to access to educational establishments. Rather she alleges unlawful conduct under s 61 of the HRA by the publication of cartoons which were allegedly insulting and likely to bring into contempt a group of persons, namely Māori and Pasifika. The defendants dispute the plaintiff's interpretation of s 61, asserting it must be given a meaning consistent with the right to freedom of expression as secured by s 14 of the Bill of Rights. That is, of the parties before the Tribunal, it is the defendants who assert a right under the Bill of Rights, not the plaintiff. Section 19 of the Bill of Rights (the right to freedom from discrimination) does not apply directly and the plaintiff's reliance on it is misplaced. Expressed more simply, there is in this case no direct clash between rights recognised within the Bill of Rights. Rather the Bill of Rights operates as a limitation on s 61 of the HRA. The case is analogous to *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* at [40] to [42] and [76] and [77] and see also Professor Paul Rishworth "Interpreting and Applying the Bill of Rights" in Rishworth, Huscroft, Optican and Mahoney *The New Zealand Bill of Rights* (Oxford, Melbourne, 2003) 25 at 55-56.

[29] Ms Kapua submits that the Tribunal was wrong to conclude that only one NZBORA right is relevant to the interpretation of s 61, and that s 19 of NZBORA (the right to freedom from discrimination) is also engaged. She makes the following points:

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22 At [173].

(a) Section 61 falls within Part 2 of the Human Rights Act under the heading "unlawful discrimination".

(b) Section 61 falls under the more specific heading "Other forms of discrimination".

(c) The Human Rights Act is almost entirely concerned with discrimination.

(d) Section 19 of the NZBORA provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act.

(e) Freedom from discrimination is included in the NZBORA as a "democratic and civil right" as is freedom of expression.

[30] We take Ms Kapua's submission in totality to be that s 61 of the Human Rights Act is so self-evidently concerned with preventing discrimination that it is artificial to conclude the right to freedom from discrimination is not engaged when interpreting the provision.

[31] We accept that s 61 is directed at the prevention of discrimination in the form of racist speech, and the promotion of racial harmony. Section 61 and its predecessor, s 9A of the Race Relations Act 1971, were designed to meet New Zealand's obligation to combat racist discrimination under ICERD. That much is clear from the legislative context of s 61 within the Human Rights Act, as well as parliamentary comment on the introduction of s 9A into the Race Relations Act.[23]

[32] However, we consider the Tribunal was correct to conclude that this case does not present a "classic" conflict of NZBORA rights. Section 3 of NZBORA states that the Act only applies to acts done:

(a) by the legislative, executive, or judicial branches of the Government of New Zealand; or

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[23] See (20 July 1977) 411 NZPD 1477.

(b) by any 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.

[33] As Professor Huscroft (now Justice Huscroft of the Ontario Court of Appeal) pointed out in evidence before the Tribunal, Ms Wall's right to freedom from discrimination is not in any way threatened by the government or any person or body performing a public function. Rather, we are concerned with racially offensive speech by Fairfax, which is a private company falling within neither of the limbs of s 3, and which consequently was not bound to observe the NZBORA. The legal duty on Fairfax as a private entity not to discriminate arises solely from the Human Rights Act. In interpreting s 61 of the Human Rights Act, the only NZBORA right *directly* engaged is Fairfax's right to freedom of speech, because it is limited or threatened in some way by the enactment of s 61.[24]

[34] The present case can be contrasted with the following scenario, posited by Professor Huscroft as an example of a true conflict of rights: a woman wants to wear a full face covering while testifying in court, citing the right to religious freedom. Her right clashes with the defendant's right to a fair trial, which includes being able to see the witness's face. In such a situation both parties' rights are directly threatened by a governmental action, and it is necessary to weigh up both rights in making a decision.[25] In the present case, however, only Fairfax's right (namely freedom of speech) is infringed by governmental action.

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[24] We have considered whether s 61 can be conceptualised as an outworking of the state's *positive* obligation to protect NZBORA rights, meaning that the s 19 right to freedom from discrimination is more directly engaged. However, with regard to the discussion of positive and negative rights in Paul Rishworth "Interpreting and Applying the Bill of Rights" in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 25 at 57–60, we have concluded that the conflict is best framed as one between Fairfax's right and the government's interest.

[25] Compare also *Law v Minister of Human Resources Development* [1999] 1 SCR 497, cited by Ms Kapua broadly to support her argument that the freedom of discrimination is engaged here. In that case the appellant argued that the Canadian Pension Plan, which gradually reduced the survivor's pension for able-bodied surviving spouses without dependent children between the ages of 35 and 45 (of which the appellant was one), discriminated against her on the basis of age. The right to freedom from discrimination was directly engaged in that case because the appellant alleged discriminatory treatment by the state.

[35] Notwithstanding this conclusion, in our view the government's objective in enacting s 61 should not be minimised. It is just that we see the case as better framed in terms of a conflict between Fairfax's *right* to freedom of speech and the government's *interest* in protecting its citizens from harmful speech and discrimination. The Court of Appeal identified a rights-interest conflict in a similar situation in *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*:[26]

> The Bill of Rights is a limitation on governmental, not private conduct. The ultimate inquiry under s 3 [of the Films, Videos and Publications Classifications Act 1993] involves balancing the *rights* of a speaker and of the members of the public to receive information under s 14 of the Bill of Rights as against the state *interest* under the 1993 Act in protecting individuals from harm caused by the speech.
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> (emphasis added)

[36] The approach taken in *Living Word* has subsequently received support by leading academics. Butler and Butler's *New Zealand Bill of Rights Act: A Commentary* observes that:[27]

> The purport of this structuring of the BORA methodology was to make it clear that even where the *motivation* for a governmental limitation on a guaranteed right or freedom is to protect the rights and freedoms of other members of society, that limitation should not be couched in terms of a direct conflict of rights, with the neutral state mediating between the two. Rather, it should be seen as the state placing limits on one person's protected rights because, for example, by imposing that limit it hopes to secure the rights and interests of other members of society …
>
> In our view, the approach adopted in *Living Word* represents the correct methodology.
>
> (emphasis added)

[37] Paul Rishworth makes the same point.[28] We therefore reject Ms Kapua's submission that the Tribunal was wrong to hold only one NZBORA right was directly engaged.

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26 *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at [41].

27 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [6.6.25] and [6.6.34].

28 Paul Rishworth "Interpreting and Applying the Bill of Rights", above n 24, at 55.

The scope of the right to free speech

[38] Nor do we accept Ms Kapua's submission that the Tribunal failed even to identify the relevant countervailing interest. Although it did not expressly engage with the concept of a rights-interest conflict, we are satisfied that the Tribunal properly took into account the government's interest or objective in promoting racial harmony and freedom from discrimination in its construction of s 61 of the Act. It did so at the stage of interpreting the scope of the right to freedom of expression, which is the first step in the *Moonen* analysis,[29] holding that, although freedom of expression is one of the most essential elements in a democratic society, it carries with it certain rights and responsibilities:[30]

> … expression that advocates racial disharmony or hatred against a group of persons on the basis of their immutable characteristics is harmful to the achievement of the values of a democratic society which respects (inter alia) human dignity, equality and fundamental freedoms including the right to be free from discrimination.

[39] Contrary to Ms Kapua's submission, the Tribunal did not elevate s 14 of NZBORA to "a position of virtually being supreme law". It recognised that freedom of speech, while important, is not an absolute right.

[40] It is also necessary to comment briefly on the Tribunal's use of the *Moonen* framework for applying ss 4, 5 and 6 of NZBORA. The Tribunal recognised that *R v Hansen*, a judgment of the Supreme Court, is the more recent and authoritative decision on that subject.[31] However, the Court in *Hansen* did not mandate its approach for all cases. In passages cited by the Tribunal,[32] the Court accepted that NZBORA did not in fact compel any one analytical approach. It recognised that where statutory language is "conceptually elastic", giving rise to a continuum of meaning as opposed to two distinct meanings, there may be good reason to adopt the *Moonen* approach in order to determine where on the continuum Parliament intended the meaning to fall.

[41] We agree with the Tribunal that the language used in s 61 of the Human Rights Act ("insulting", "hostility", "contempt") is inherently elastic and potentially gives

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29 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [17]–[19].
30 At [186].
31 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
32 At [180]–[181].

rise to a continuum of meaning. As such we regard it as appropriate to adopt the *Moonen* analytical framework,[33] which was accurately summarised by the Tribunal as follows:[34]

> Step 1. Determine the scope of the relevant right or freedom.
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> Step 2. Identify the different interpretations of the words of the other Act that are properly open. If only one meaning is properly open that meaning must be adopted.
>
> Step 3. If more than one meaning is available, the next step is to identify the meaning that constitutes the least possible limitation on the right or freedom in question. It is that meaning that s 6 of the Bill of Rights, aided by s 5, requires the court or tribunal to adopt.
>
> Step 4. Having adopted the appropriate meaning, identify the extent, if any, to which that meaning limits the relevant right or freedom.
>
> Step 5. Consider whether the extent of any such limitation as found, can be demonstrably justified in a free and democratic society in terms of s 5. If the limitation cannot be so justified, there is an inconsistency with the Bill of Rights; but, by dint of s 4, the inconsistent statutory provision nevertheless stands and must be given effect.
>
> Step 6. The court or tribunal is to indicate whether the limitation is or is not justified. If justified, no inconsistency with s 5 arises, albeit there is, ex hypothesi, a limitation on the right or freedom concerned. If that limitation is not justified, there is an inconsistency with s 5 and the court may declare this to be so, albeit bound to give effect to the limitation in terms of s 4.

[42] We agree with and adopt the Tribunal's application of the *Moonen* framework. Having determined the scope of freedom of expression, in particular that it is not an absolute right, it went on to consider the ordinary meaning of the statutory wording by reference to dictionary definitions and international case law. It concluded that s 61 established a high threshold and was targeted to racist speech at the serious end of the spectrum. Such a conclusion was consistent with the right to freedom of expression, and it was therefore not necessary to proceed through the remaining stages of *Moonen*. Out of an abundance of caution, however, the Tribunal indicated that it did not consider the plaintiff's alternative interpretation of s 61 to be tenable as it substantially eroded the right to freedom of expression. We see no error in this approach.

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33 See *Moonen*, above n 29, at [17]–[19].
34 At [183].

[43] For completeness we also record that in our view application of the *Hansen* framework is unlikely to have produced any different result.

Interpreting s 61

[44] The Tribunal's finding that the cartoons were not likely to bring Māori and Pasifika into contempt (or excite hostility against them), and therefore did not breach s 61, was reached after an extensive and careful review of the Convention position, international authority and New Zealand jurisprudence relating to NZBORA. Nevertheless, it was in our view an essentially conclusory finding premised on an assumption that, were the conclusion otherwise, an unjustified incursion would occur on the right to freedom of speech. There is in our view a lacuna in the Tribunal's reasoning between its findings as to the meaning of s 61, and its conclusion that, by a "substantial margin", the cartoons were not likely to excite hostility or bring into contempt Māori and Pasifika. In particular, the Tribunal does not address what we consider to be the threshold issue, namely who is it that is likely to be excited to hostility against Māori and Pasifika, or likely to hold Māori and Pasifika in contempt? In our view, until that problem is grappled with, it is impossible to say whether the second limb of the s 61 test is satisfied or not.

[45] However, before doing so we identify a number of areas in which we agree with the Tribunal's construction of the section. We start by setting it out in full:

> **1 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.

A two-stage test

[46] To start with, we reject the appellant's submission that if a publication is objectively insulting then, as Ms Kapua put it, "on an ordinary meaning of bringing into contempt" the test will be satisfied. We agree with Mr Corlett QC for the Commission that such an approach conflates what is intended to be a two-stage test, and reads out of s 61 the required consequences stipulated by the phrases "likely to excite hostility against" or "likely to bring into contempt". The net result of Ms Kapua's proposed approach would of course be that no group of persons defined by their colour, race, ethnicity, or national origins could be insulted. We agree with the Tribunal that such an approach would mean that:[35]

> No meaningful recognition is given to the importance of freedom of expression notwithstanding such importance is explicitly recognised by

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35 At [221.2].

> Article 4 of ICERD in the context of hate speech. In addition Article 19 of the ICCPR (freedom of expression) confines permissible restrictions on that freedom to two circumstances only. The restriction must be provided by law and be necessary for respect of the rights or reputations of others or for the protection of national security or of public order (*ordre public*), or of public health or morals. The plaintiff's reading would negate the elements of proportionality and necessity. The CERD Committee in *General Recommendation 35* at para 25 explicitly recognised that the expression of ideas and opinions made in the context of academic debates, political engagement or similar activity, and without incitement to hatred, contempt, violence or discrimination, should be regarded as legitimate exercises of the right to freedom of expression, even when such ideas are controversial. The Human Rights Committee *General Comment* at para 11 explicitly acknowledges that Article 19(2) embraces "expression that may be regarded as deeply offensive", although such expression may be restricted in accordance with Article 19(3) and Article (20). At para 13 the Committee further acknowledged that a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other ICCPR rights.

[47] The New Zealand legislative response to the implicit tension between freedom of speech and attempts to promote racial harmony through suppression of some publications is to impose, as a second step in that analysis, an objective effects-based test. Without it there would be an inevitable tendency to erode the objective component of the first limb by focusing exclusively on the extent of perceived insult. So it serves to refocus the inquiry on objective consequences (or assumed consequences) of the allegedly infringing words.

[48] In so doing the legislature has adopted an approach conceptually similar to those jurisdictions which have set the test by reference to an exposure to "hatred" and which have, in that context, emphasised that the suppression of repugnant ideas is not of itself the aim of "hate speech" legislation. As Dickson CJ said in the Canadian Supreme Court decision in *Taylor v Canadian Human Rights Commission*:[36]

> … the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate.

[49] Likewise in *Saskatchewan Human Rights Commission v Whatcott* the same Court held:[37]

> The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper

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36 *Taylor v Canadian Human Rights Commission* [1990] 3 SCR 892 at 933.

37 *Saskatchewan Human Rights Commission v Whatcott*, above n 7, at [51].

> application of hate speech prohibitions. Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as a part of that debate. *It does not target the ideas, but their mode of expression in public and the effect that this mode of expression may have.*
>
> (Emphasis added)

Effect on persons outside the target group

[50] Secondly, we agree that the legislative mandate is to consider the effect of the words (or in this case, depictions) on others *outside the group depicted*. In that context Ms Kapua's submission that the cartoons caused stress and anxiety to Māori and Pasifika or "put them down", while based on the evidence of witnesses Dr Pihama and Mr Tamarua (and concerning), is irrelevant to the exercise we must undertake. That this is so is demonstrated by the phrase "excite hostility against" which we consider informs the appropriate meaning of "bring into contempt" so as to exclude notions of "self-contempt". It also aligns the New Zealand position with the Canadian where in the context of prohibitions on the publications "exposing or tending to expose to hatred", the focus has always been on exposure of the protected group to hatred, not immunity from self-hatred.[38] And it is consistent with the section heading "Racial disharmony", which suggests the legislative focus is on the nature of the inter-reaction between groups of citizens, not the response of the target group.

An objective test

[51] Thirdly, we accept that the requirement that the words/depiction "excite hostility" or "bring into contempt" likewise invokes an objective test so that the question the Tribunal was required to answer was whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as likely to expose the protected group to the identified consequences. Again this is consistent with the way equivalent provisions have been interpreted by the Canadian Supreme Court.[39]

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38 *Saskatchewan Human Rights Commission v Whatcott*, above n 7, at [56].
39 *Saskatchewan Human Rights Commission v Whatcott*, above n 7, at [56].

Ordinary meaning of the words in s 61

[52] Fourthly, we agree with the Tribunal that the ordinary meaning of the words used reinforces the conclusion that the behaviour targeted is at the "serious end of the continuum of meaning".[40] The *Concise Oxford Dictionary* defines "hostility" as "enmity; state of warfare",[41] and "enmity" as "hatred; state of being an enemy".[42] So an excitation to hostility differs little, in our view, from the exposure to hatred targeted in some foreign legislation. Likewise, "contempt" refers to a strong emotional response in the nature of despising or vilification.

[53] Again, we derive assistance from the Canadian jurisdiction where the phrase "hatred or contempt" which appears in s 13(1) of the Canadian Human Rights Act has been considered at Supreme Court level.[43] In *Taylor v Canadian Human Rights Commission*, Dickson CJ acknowledged that while these words have a "potentially emotive content" that could vary for each individual, there was "an important core of meaning in both" in the sense that "hatred" involved detestation, extreme ill-will and the failure to find any redeeming qualities in the target of the expression, and "contempt" a looking down on someone and treating them as inferior.[44] Together the two words were held to refer to "unusually strong and deep-felt emotions of detestation, calumny and vilification".[45]

[54] In the more recent decision in *Whatcott*, the same Court considered that disuse of the word "calumny" in everyday speech meant that it was an unnecessary inclusion in the definition, but affirmed a requirement for "detestation" and vilification" in a "hatred or contempt" context which "goes far beyond merely discrediting, humiliating or offending the victims".[46] The Court acknowledged that not all Canadian prohibitions included the word "contempt" and the Saskatchewan provision, which it was required to consider, did not. It said that although "contempt" had been previously

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40 At [200].
41 JB Sykes (ed) *The Concise Oxford Dictionary of Current English* (6th ed, Oxford University Press, Oxford, 1976) at 520.
42 At 344.
43 Canadian Human Rights Act RSC 1985 c H-6.
44 At 928.
45 At 928.
46 At [41].

interpreted as adding an element of looking down on or treating as inferior, in a human rights context the word hatred carried the same connotation:[47]

> The act of vilifying a person or group connotes accusing them of disgusting characteristics, inherent deficiencies or immoral propensities which are too vile in nature to be shared by the person who vilifies. Even without the word "contempt" in the legislative prohibition, delegitimizing a group as unworthy, useless or inferior can be a component of exposing them to hatred.

[55] Significantly, however, the Canadian Supreme Court has consistently resisted the proposition that the word "contempt" can be disconnected from the context in which it occurs (namely, "hatred or contempt") and then read down so as to capture humiliating words other than of "an unusual or extreme nature".[48] That is essentially what Ms Kapua urges on us in adopting the secondary meaning of contempt in the online *Oxford English Dictionary*, namely "the holding or treating as of little account".[49] We do not accept that proposition because in our view it would mean that the second part of the s 61 test merged with the first. If a bringing into contempt is reduced simply to discrediting or humiliating, it is difficult to identify in any meaningful way how the requirement is not already established by words considered objectively insulting. The position is different when the word is given its primary meaning identified in the *Concise Oxford Dictionary* as the "act or mental attitude of despising".[50]

[56] So defined, we consider that the s 61 prohibition applies only to relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in the group being despised. Adopting that approach, we consider that the prohibition in s 61(1) meets what is a demonstrably justified legislative objective – suppressing racial disharmony – while allowing what the Tribunal referred to as the broad "space" required in a free and democratic society to be able to express views which may offend, shock or disturb.[51] It is only, in our view, publications at the serious

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47 At [43].

48 *Saskatchewan Human Rights Commission v Whatcott*, above n 7, at [40]. See also Justice and Law Reform Committee *Report on the Human Rights Bill* (28 May 1993), in which it was recognised that the word "contempt" is coloured by the word "hostility".

49 "Contempt" Oxford English Dictionary <www.oed.com>.

50 At 219.

51 At [221.7]. In terms of s 6 of NZBORA and the rights-interest conflict referred to earlier, we consider this interpretation of s 61 is consistent with the right to freedom of speech, as limited by the government's legitimate interest in promoting racial harmony and protecting its citizens from the harmful effects of racist speech.

end of the spectrum which meet this legislative objective because, although lesser forms of delegitimising expression may be offensive or insulting, they are not likely to incite disharmony between New Zealand's racial groups. We also consider that this interpretation aligns with art 4 of ICERD, which requires due regard to be had to freedom of speech and by implication only targets behaviour at the serious end of the spectrum.

[57] Ms Kapua points out that at the time the Human Rights Act was being drafted, the Justice and Law Reform Committee's recommendation that the word "serious" be inserted into s 61 to qualify "contempt" was ultimately rejected.[52] She relies on this to submit that an interpretation of s 61 which focuses on behaviour at the serious end of the spectrum does not reflect Parliament's intention. We do not accept that a refusal to insert the word "serious" (without further parliamentary comment) can be construed in this way, given that the weight of overseas authority, our interpretation of New Zealand's international obligations, and the dictionary definitions of the words used in s 61 all support a meaning at the serious end of the spectrum.

[58] We acknowledge that in its *General Recommendation No 35* the Committee on the Elimination of Racial Discrimination recommended criminalisation of racist expression be reserved for serious cases while less serious cases should be addressed by means other than the criminal law.[53] Ms Kapua relies on that recommendation to submit that the civil remedy in s 61 need not be limited to cases of the type we have identified, namely those at the most serious end of the spectrum. We do not find that submission attractive in the context of a New Zealand legislative response which largely repeats the same test in both civil (s 61) and criminal (s 131) contexts[54] (while recognising of course the element of intention necessary to sustain the criminal charge and the different burdens of proof). If anything, the s 131(1) reference to "intent to excite hostility or ill-will" captures intentionality at a lower level than that of exciting hostility alone. The legislature has not therefore adopted a "more serious/less serious" test depending on whether criminal or civil sanctions are sought. The Committee's

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52 See Human Rights Bill 1992 (214-2) (select committee report).

53 At [12].

54 Section 131 criminalises publication of threatening, abusive or insulting material with "intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons on account of the ground of the colour, race, or ethnic or national origins of that group of persons".

recommendation of an alternative approach, while possibly a matter for consideration by Parliament, is not in our view a proper basis to assume existing legislation posits such a division.

Context and circumstances

[59] Fifthly, we agree with the Tribunal that any assessment of the effects of the publication must be made by reference to context and circumstances.[55] In *Whatcott* the Canadian Supreme Court expressed the position as follows:

> [52] An assessment of whether expression exposes a protected group to hatred must therefore include an evaluation of the likely effects of the expression on its audience. Would a reasonable person consider that the expression vilifying a protected group has the potential to lead to discrimination and other harmful effects? This assessment will depend largely on the context and circumstances of each case.

[60] It went on to say, in terms which assume considerable significance in this case and were noted by the Tribunal,[56] that:

> [53] For example, in the normal course of events, expression that targets a protected group in the context of satire … would not likely constitute hate speech.

Likelihood

[61] Finally, we accept the Tribunal's interpretation of the word "likely" in s 61 as meaning a "real and substantial risk that the stated consequence will happen".[57] We agree that in this respect there is no reason why the definition should be any different than that accepted in the several Court of Appeal authorities referred to by the Tribunal at [212].[58]

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55 See for example at [213.6].
56 At [213.7].
57 At [212].
58 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391; *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562–563; and *R v Atkins* [2000] 2 NZLR 46 (CA) at [15] and [16].

Who is it who must be likely to be excited to hostility or contempt?

[62] Having identified these broad areas of agreement with the Tribunal's approach, we now return to the difficult issue of who it is (and potentially in what numbers) the reasonable person must consider it likely will be excited to hostility or brought to a position of contempt by the offending publications.

[63] We predicate that however by first recording our acceptance of Mr Corlett's submission that the verbs "excite" and "bring" connote a change in behaviour or thinking, so that the question is whether such people (whoever they are) are likely to become hostile or contemptuous (or possibly more hostile and contemptuous than they currently are) as a result of the publication.[59]

[64] As indicated, the Tribunal does not address directly the "who is it" question. It does, however, cite the observations of Professor Huscroft in his essay "Defamation, Racial Disharmony, and Freedom of Expression".[60] We consider Professor Huscroft's comments a useful introduction to the problem:[61]

> The larger question is, on what basis will words be considered "likely" to excite hostility or cause contempt? How could this possibly be ascertained? Determinations as to the likelihood of these harms occurring would seem to depend on the extent to which others are racist, or are considered capable of being influenced by racist expression, but it has to be said that "likely" is not much of a test, especially when used in connection with subjective concepts like hostility and contempt. Ironically, a determination that the law has been violated ultimately depends on a decision by a human rights body that racist expression was persuasive.

[65] In *Whatcott* the Canadian Supreme Court approached this issue by reference to the likely effects of the expression on "its audience".[62] However, we consider this has the capacity to raise more questions than it answers, particularly in the context of

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59 The Tribuna's decision does not expressly engage this issue and thus why we refer to it at this point.

60 Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 171.

61 At 205.

62 At [52] and [58]. A similar approach was adopted by the Equal Opportunities Tribunal in *Neal v Sunday News Auckland Newspaper Publications Ltd* (1985) 5 NZAR 234. That case concerned a robust Sunday News article directed against Australians resurrecting the famous underarm bowling incident and referring to them, among other things, as "our loud mouthed neighbours across the Tasman". At 240 the Tribunal held that "the group to be considered is the 200,000 purchasers of the paper and the 700,000 odd who would read the same".

publication in a newspaper but even in cases like *Whatcott* itself where the flyers in question were distributed (presumably by letterbox drop) in two Saskatchewan cities, Regina and Saskatoon.

[66] We accept that there will be examples where the audience is reasonably homogenous and where the likely effects on its members can be identified with reasonable certainty. Distribution of threatening, abusive or racially insulting material at a meeting of "white nationalists" or "skinheads" is probably the paradigm case. But where dissemination is to the public at large, or at least a substantial cross-section of the public, it will, as McLachlin J said in her dissent in *R v Keegstra*, simply not be:[63]

> … possible to assess with any precision the effects that expression of a particular message will have on all those who are ultimately exposed to it.

[67] Likewise, care is necessary before adopting the Canadian "reasonable apprehension of harm" test which is sometimes referred to in this context. That test is premised on a "common sense" appreciation that certain activities, hate speech among them, inflict societal harms.[64] It was developed in response to criticism that it was an "unacceptable impairment of freedom of expression to allow its restriction to be justified by the mere likelihood of risk of harm, rather than a clear causal link between hate speech and harmful or discriminatory acts against the vulnerable group".[65] It is not, however, a test by which Canadian courts have measured likely effects and thus whether a particular publication is "hate speech" in the first place.

[68] Ms Kapua's response to this dilemma was to invite the Panel to consider all of the views of the potential audience. However, because the readership of both The Press and Marlborough Express inevitably reflects a very broad cross section of literate New Zealanders, we consider that such an approach has the potential to become preoccupied with the hypothetical lowest common denominator, that is the person/persons of such susceptible disposition that they are likely to be driven to hostility or contempt by a cartoonist's depiction despite the fact that it occurred in the context of a wide-ranging and balanced debate. The problem for the reasonable person

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63 *R v Keegstra* [1990] 3 SCR 697 at 857.
64 See *Whatcott*, above n 7, at [132]–[133].
65 As summarised in *Whatcott*, above n 7, at [130].

is determining whether such hypothetically susceptible people exist at all and if so, in what numbers. The consequential legal issue is whether there is a point at which the assumed numbers are so small that they do not animate the jurisdiction. If the reasonable person's assessment is that a cross section of The Press readership will inevitably include at least one such person, is that sufficient? We do not believe so. Such an approach gives s 61 too much scope and inappropriately impeaches the right to freedom of expression.

[69] Ms Kapua's fallback position was therefore to focus on the group targeted by the publication, but for the reasons we have already discussed we do not consider this accords with the scheme of s 61.

[70] For Fairfax, Mr Stewart proposed in his written submissions a test based on the reasonable person's apprehension of the reasonable person's reaction. But that cannot be correct because, ex hypothesi, the reasonable person will never be excited to hostility or driven to contempt towards an ethnic group by a racially insulting publication, still less by one person's expression of opinion in the form of a cartoon.

[71] Recognising this difficulty, Mr Stewart's oral submission posited an ordinary New Zealander across a mean or average – in effect the reasonable person's composite view of the average New Zealander.

[72] We likewise see difficulties with this approach. The reasonable person is not given to undue cynicism. We have no doubt that their view of the composite or average New Zealander is that such person is of sufficient intelligence never to be excited to hostility against Māori and Pasifika or driven to hold them in contempt by cartoon depictions such as in issue in this case. Certainly that is the assessment of all members of this Panel and (we assume from its decision) of the Tribunal. In short, by infilling the "identikit" New Zealander with assumed levels of discernment, s 61 is quickly reduced to a vanishing point. Such an approach gives too much weight to freedom of speech without recognising the legislative intention behind s 61, namely the prevention of racial disharmony and discrimination.

[73] For the Commission, Mr Corlett's response is to focus on the susceptible (by which he means persuadable) part of the audience that falls between two "unswayable" polarities.

[74] The first polarity he describes as not hostile and never capable of being persuaded to hostility or contempt based on colour, race or ethnic or national origin. Occupying the opposite polarity are what came to be identified in oral argument as the "Archie Bunkers"[66] – those obstinately committed to misinformed and bigoted views. Between those extremes Mr Corlett postulated a range of persuadibility to racially insulting publications and framed the effects-based test in terms of the likely "impactfulness" of the cartoons on "the susceptible". He submitted, and we accept, that the Tribunal's task was to consider this issue with knowledge of context and circumstance with the result that at different points in history, or in the context of different types of publications or depending on the nature of the wider debate within which the publication occurred, different results might follow. Since the legislative purpose of s 61 was to suppress racial disharmony, he submitted that "impactfulness" was to be measured by reference to the capacity of the cartoons to influence susceptible people to change their thinking or behaviour in a way which would increase racial disharmony. And he said that a Tribunal or Court required to decide that issue would look to actual demonstrated effects as well as its own experience and judgment.

[75] In support of this focus on the "susceptibles", Mr Corlett referred to the 1987 decision of the Equal Opportunities Tribunal in *Proceedings Commissioner v Zandbergen*[67] which was cited with approval in the later decision of the Complaints Review Tribunal in *Proceedings Commissioner v Archer*.[68] Both were proceedings under s 61 (or its predecessor, s 9A of the Race Relations Act 1971). In *Zandbergen* the Tribunal held:[69]

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66 A reference to the 1970's American sitcom "All in the Family" whose lead character, Archie Bunker, was defined (despite otherwise lovable and decent qualities) by his bigotry towards a very diverse group of minorities including Blacks, Hispanics, "women's libbers", "commies", "gays", "hippies", Jews and Catholics.

67 *Proceedings Commissioner v Zandbergen* Equal Opportunities Tribunal EOT1/86, 13 July 1987.

68 *Proceedings Commissioner v Archer* [1996] 3 HRNZ 123 (CRT) at 128–129.

69 At 26, cited in *Proceedings Commissioner v Archer*, above n 70, at 129.

> The direct evidence we heard about people's reactions to the pamphlet and sticker were all of revulsion for their contents and sympathy for those against whom they were directed.
>
> Plainly, the documents would not tend to excite hostility or the other necessary feelings in persons who are already sensitive and perceptive on racial issues. However, we are of the view that there are many New Zealanders who are less perceptive or sensitive on racial issues than others, and susceptible to material of the kind we are concerned with. Mr Hankins gave evidence that he had experienced reactions that reinforced his view that there are a number of white people who are insufficiently sensitive on issues of race and therefore vulnerable to suggestions of the kind contained in the sticker and pamphlet.

[76] Nine years later in *Archer* the Tribunal considered that there were "still a significant number of New Zealanders who are less perceptive or sensitive on racial issues than others and who might be susceptible to the meaning we have found the offending words to have".[70] In a passage, which we do not however consider established by the premise, the Tribunal then immediately went on to say:[71]

> For these reasons we are satisfied that [the publications] are likely to excite hostility against or bring into contempt Chinese and Japanese people …"

[77] The fact that parts of the audience may be susceptible to a particular meaning (in that case identified as being that Chinese were dependent on rickshaws and that Japanese were short and not particularly intelligent) does not of itself mean that they are likely to change their thinking or behaviour as a result of the publication.

[78] We do, however, accept that a focus on the "susceptible" or "persuadable" is useful to the analysis which should be undertaken. It is not a complete answer because it invites a subsidiary inquiry into just who it is among the persuadable that the Tribunal was obliged to focus on – should it for example eliminate the hopelessly persuadable and just focus on those averagely so?[72] However, it is in our view a useful reminder that the lens through which the hypothetical reasonable person makes their assessment of the relevant "likelihood" of the identified outcomes is one focused on the reactions of others in society who are not immune to having, for example, hostility excited in them based on race.

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70 At 129.
71 At 129.
72 In our opinion it should.

On this basis were the cartoons likely to excite hostility or bring into contempt Māori and Pasifika?

[79] At the outset we identify this as an inquiry in respect of which "a question of fact is involved".[73] It was for that reason that a panel was convened to hear the appeal as mandated by the Human Rights Act. As the Supreme Court noted in *Austin Nichols*, although an appellate Court "might rightly hesitate" before concluding that findings of fact or degree made by a Tribunal with specialist expertise are wrong, no deference is required. We approach this appeal on the same basis, despite the obvious quality of the Tribunal panel. We are therefore required to decide whether the Tribunal decision was correct. We consider it was, albeit not by the "substantial margin" the Tribunal identifies. Our reasons follow.

[80] For a start, we are significantly influenced by what we consider to be the key element of context and circumstance – the relevant publications were editorial cartoons. Although accepted by the respondents' cartoon expert as being "quite unsophisticated and unsubtle", they nevertheless form part of a rich tradition by which for centuries cartoonists have expressed views which may differ markedly from those expressed more formally elsewhere in a newspaper. Or, as the following extract from Haydon Manning and Robert Phiddian "Censorship and the Political Cartoonist", cited by the Tribunal at [63.2], suggests:[74]

> … cartoons are a part of opinion-formation in liberal democracies that enjoy (and in our opinion, should enjoy) a special licence to make exaggerated and comic criticisms of public figures and policies.

[81] Mr Nisbet's own defence of the Marlborough Express cartoon, which appeared in the newspaper on 5 June 2013, included a similar observation, to the extent he saw the cartoonist's role as "having a crack at all sides, tickling, provoking, firing debate, pushing the envelope as far as it can go to get a reaction".[75]

[82] Like the Tribunal we regard as useful points of reference the several decisions of the Press Council upholding a cartoonist's right to use hyperbole in the expression

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73 Human Rights Act 1993 s 126(1)(b).

74 Haydon Manning and Robert Phiddian "Censorship and the Political Cartoonist" (paper presented to Australian Political Studies Conference, Adelaide, 29 September 2004–10 October 2004) at 3–4.

75 As recorded in the Tribunal decision at [24].

of strong, unpopular viewpoints even if they cause offence.[76] The response of French courts to challenges by Muslims in respect of a number of Charlie Hebdo cartoons and the public reaction to the subsequent murder of twelve persons (including cartoonists) at the magazine's offices on 7 January 2015 (epitomised by the "Je Suis Charlie" campaign) indicates that this is a view which resonates strongly through many liberal democracies.[77]

[83] We accept also Mr Stewart's submission on behalf of Fairfax that cartoons may operate as a looking glass reflecting back at the reader some of the more intolerant attitudes held in parts of the community with a view to such attitudes being challenged as part of a wider public debate.

[84] We are uncertain whether that was the intention of the cartoonist in this case and, in the context of the objective test which we accept must be applied, we consider his intention irrelevant in any event. But Mr Stewart's point emphasises the care necessary before identifying a cartoon depiction as unlawful. What some may find deeply offensive or insulting may in fact be ridiculing the very views at which offence is taken.

[85] It is in that context that the Canadian Supreme Court has observed that in the normal course of events satire would not likely constitute hate speech.[78]

[86] We consider there to be satirical elements in the Marlborough Express cartoon. The central adult characters are depicted carrying their own breakfast bowls with the

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76 Summarised at [164] of the Tribunal's decision.

77 See Mukul Devichand "How the world was changed by the slogan 'Je Suis Charlie'" *BBC News* (online ed, London, 3 January 2016). A further interesting case is that involving the "Australian's" late cartoonist Mr Bill Leak, who in 2016 drew a cartoon in which an aboriginal policeman presents a wayward aboriginal child to his apparent father with the comment "You'll have to sit down and talk to your son about personal responsibility" to which the response by the adult (who is holding a beer can) is "Yeah righto. What's his name then?" This resulted in a complaint by a Ms Melissa Dinnison to the Australian Human Rights Commission under s 18C of the Racial Discrimination Act 1975. This contentious section imposes a test based on a reasonable likelihood of offence, insult or humiliation. The complaint by Ms Dinnison was withdrawn as was a subsequent complaint relating to the same cartoon. A third complaint was never adjudicated on possibly as a result of Mr Leak's sudden death in March 2017. In submissions made to the Parliamentary Joint Committee on Human Rights into freedom of speech in Australia he spoke at length of the significant stress the complaints had placed on him and the importance of cartoonists being able to highlight topics of debate, such as family dysfunction in indigenous communities through "confronting, hard-hitting and pointed imagery".

78 *Saskatchewan Human Rights Commission v Whatcott*, above n 7, at [53].

evident intention of passing themselves off as children – a manifestly absurd proposition. We are less inclined to consider The Press cartoon as satirical. It is a more obtuse depiction. However, against the tradition we have discussed and focusing as we do on the "susceptibles" among the cartoons' audience, we are not persuaded that they would be excited to hostility or brought to a position of contempt by the depictions when considered in this context.

[87] The position may of course be otherwise where freedom of speech is itself suppressed. We accept, for example, that cartoon representations of Jews, often as physically deformed Shylock-like characters consistently acting against the good of the German people, formed part of the propaganda employed by the Third Reich and with inevitable consequences in terms of shaping public opinion against that particular racial group. But this example is a very considerable distance from the circumstances prevailing in a liberal democracy like New Zealand.

[88] This brings us to the second aspect of context and circumstances. The cartoons were two contributions only to a wide-ranging public debate about an important issue of public policy. In the case of the Marlborough Express cartoon it appeared on the same page as an editorial supportive of the Food in Schools Programme. The Press also dealt at length with issues relating to the programme in a

number of news reports and opinion pieces. What has been referred to as "the marketplace of ideas" was replete with competing views.[79]

[89] We are not suggesting that the fact such a marketplace typically exists in a liberal democracy is in itself an answer to challenges of the type Ms Wall has brought. If that were the case s 61 would incline to the otiose. And we are mindful also that by delegitimising a group, insulting publications can have the potential to limit that group's participation in the "market".[80] But that was clearly not the position in this case. As the Press's editor noted in her evidence before the Tribunal, the effect of the publication was to enliven a very useful debate not only about the effectiveness of the Food in Schools Programme but wider issues about the realities of life in deprived communities and the depiction of Māori and Pasifika in the media. In assessing whether the consequences identified in s 61 are "likely" we consider that the opportunity for intermediate correction (not present in the white nationalist or skinhead example cited earlier) is a relevant aspect of context. And in New Zealand the inevitable and almost immediate "push back" that a cartoon depicting racial stereotypes will generate is exemplified by the reactions in this case. And so we ask, with that in mind, are two negative cartoon depictions of Māori and Pasifika like to excite even persuadable people to hostility or feelings of contempt towards the target group? We do not believe so. Nor did the three experienced Tribunal members.

[90] In this context we accept the Commission's submission that although an assessment of "likely effects" is in its terms forward-looking, the Tribunal (and this Court) can benchmark its assessment against observed effects. Moreover, in this case the Panel has the luxury of an extended period of hindsight with which to conduct that benchmarking exercise.

[91] Ms Kapua relies on a "poll" conducted on Campbell Live shortly after publication of the cartoons in which 77 per cent of respondents apparently answered the question "Do the cartoons depict reality?" in the affirmative.[81]

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79 See *Abrams v United States* 250 US 616 (1919) at 630 where Holmes J refers to the marketplace of ideas.

80 Historically there have also been instances when participation may have exposed disenfranchised groups to severe economic consequences or even criminal sanction, as for example proponents of homosexual rights prior to decriminalisation.

81 The "evidence" in this respect consisted of cross-examination of the Press' editor, who had

[92] We do not consider such a "poll" helpful in assessing the actual effects of the cartoons. For a start, having been conducted on a self-selecting basis it was unscientific. It is impossible to say whether those who apparently thought the cartoons reflected reality were more motivated to respond than those who did not. Nor is it clear what they understood by the "reality depicted", that is whether the cartoons were thought to depict lower socio-economic groupings generally or poor Māori and Pasifika in particular.

[93] Certainly, there was no direct evidence before the Tribunal of any one or more individuals being excited to hostility or brought to a position of contempt by the cartoons. We acknowledge, as the Canadian Supreme Court has, difficulties in an applicant establishing a causal link between particular publications and particular conduct or attitudes in the community. The nature of the statutory test, framed in terms of "likelihood" and the inherently subjective concepts of "hostility" and "contempt", makes a scientific assessment based on evidence difficult, if not impossible. However, in our view the Tribunal was entitled to take into account Ms Norris' evidence about the quality of the debate immediately sparked by the cartoons and to conclude that, in the face of so many articulate views to the contrary, the cartoons had, of themselves, little likelihood of altering attitudes and behaviour in the manner required by the statute.

[94] We accept, as did the Tribunal in reference to the evidence of educationalist Dr Leonie Pihama and psychologist Dr Raymond Nairn, that "negative constructions" of Māori and Pasifika and racial stereotyping could, on a particular set of facts, affect the likelihood of hostility being excited against them or their being brought into contempt. But we adopt also its conclusion that the "space" within which issues can be raised and debated must be kept as broad as possible and that it is not in the wider interests of society to confine publications only to those which do not shock, offend or disturb. Section 61 recognises this position by requiring the Tribunal to consider the effects of material it considers threatening, abusive or insulting. A contextual analysis is necessary. For the reasons we have indicated the Tribunal's conclusion was, in our

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appeared on the programme, about her recollection of a "poll" conducted at the end of it where this was the question, but it is not apparent from the transcript whether counsel was paraphrasing or quoting the question directly.

view, the correct one because it properly recognised that, within the context we have identified, the publications, although offensive, were not likely to excite hostility or contempt at the level of abhorrence, delegitimisation and rejection that we consider could realistically threaten racial disharmony in New Zealand and which is therefore captured by the section.

[95] We accept that having suggested the Tribunal's approach was conclusory some may consider our approach no different. Each of the panel members has looked to our own experience in applying what professor Huscroft describes as an "awkward provision" which gives rise to various "interpretive difficulties".[82] We acknowledge alternative views in respect of what is a difficult issue but we are not ultimately persuaded that the Tribunal erred in its assessment.

Result

[96] We dismiss the appeal.

[97] In so doing, however, we consider it timely to repeat the observations of Thomas J in *Awa v Independent News Auckland Ltd* that:[83]

> The law's limits do not define community standards or civic responsibility. I would be disappointed if anything which this Court might say could be taken as indicative of what people of one race may feel at liberty to say and which people of the other are expected to brook.

[98] The unanimous view of both the Tribunal and this Panel's members that the cartoons were objectively offensive should in our view be a cause for reflection by the respondents and their respective editorial teams.

Costs

[99] The appeal clearly raises important issues of public interest in terms of r 14.7(c) and the Panel considers Ms Wall to have acted entirely reasonably in her prosecution of it.

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82 Grant Huscroft, above n 61, at 204-205.

83 *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 (CA) at 598.

[100] If in light of these observations costs are nevertheless sought against her, memoranda may be filed on the following timetable:

(a) Memoranda by the respondent are to be filed and served by 16 February 2018.

(b) Memoranda by the appellant are to be filed and served by 2 March 2018.

Muir J

Dr H Hickey

B K Neeson

Appendix A

The Marlborough Express 29 May 2013

Appendix B

The Press 30 May 2013