IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 17**

	Reference No. HRRT 017/2013
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**LOUISA HARERUIA WALL**
	Plaintiff
AND	**FAIRFAX NEW ZEALAND LIMITED**
	First Defendant
AND	**THE MARLBOROUGH EXPRESS**
	Second Defendant
AND	**THE CHRISTCHURCH PRESS**
	Third Defendant

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr MJM Keefe JP, Member

REPRESENTATION:
Ms PJ Kapua for plaintiff
Mr RKP Stewart for defendants
Ms SA Bell and Mr MJV White for Human Rights Commission as intervener

DATE OF HEARING:	**21, 22, 23 and 24 July 2014**
DATE OF LAST SUBMISSIONS:	**29 March 2017 (Human Rights Commission)** **13 April 2017 (Plaintiff)** **28 April 2017 (Defendants)**
DATE OF DECISION:	**12 May 2017**

DECISION OF TRIBUNAL[1]

[1] [This decision is to be cited as: *Wall v Fairfax New Zealand Ltd* [2017] NZHRRT 17.]

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INTRODUCTION

Overview

[1] For some years child poverty has been a significant issue in New Zealand. In 2012 it was estimated as many as twenty-five percent of children – about 270,000 – lived in poverty. See the Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (Children's Commissioner, Wellington, December 2012) at 1 and 3 to 10. The latest *2016 Child Poverty Monitor* (reporting on 2015) found that 295,000, or 28 percent of New Zealand children live in relative income poverty and 155,000, or 14 percent, experience material hardship. About 8% of New Zealand children live in households experiencing both income poverty and material hardship (severe poverty).

[2] As a State party to the Convention on the Rights of the Child, 1989 New Zealand has had to address child poverty in its most recent periodic report to the United Nations Committee on the Rights of the Child. See New Zealand's *Fifth Periodic Report* CRC/C/NZL/5, 11 January 2016 for the period February 2011 to March 2015 at paras 142 to 146. At para 142 it was noted that in the reporting period there had been "considerable recent parliamentary, political, media and community interest in the issue of child hardship".

[3] The present proceedings before the Tribunal relate to a cartoon which appeared on the Opinion page of *The Marlborough Express* on 29 May 2013 and to a similar cartoon which appeared on the Opinion page of *The Press* the following day, 30 May 2013. Both newspapers are published by the first defendant, Fairfax New Zealand Limited (Fairfax). The subject of both cartoons was the food in schools programme, a measure intended to mitigate some of the worst consequences of child poverty.

[4] The plaintiff, Ms Louisa Wall, has been the Member of Parliament for Manurewa since 2011. In these proceedings she alleges the cartoons breached s 61 of the Human Rights Act 1993 (HRA) by promoting racial disharmony. Fairfax denies such breach and says s 61 is to be interpreted in a manner consistent with s 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) which provides that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. Fairfax also relies on s 5 of the Bill of Rights which provides that the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[5] In this decision we give our reasons for concluding neither of the two cartoons breached s 61 of the HRA.

The Human Rights Commission

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

[7] On 19 August 2013 the Commission gave formal notice of its intention to appear and be heard on the grounds the proceedings raised issues of general and public importance that will have an impact on the development of human rights jurisprudence in New Zealand. The Commission also noted s 61 of the HRA has seldom been the subject of judicial examination, that the case would involve significant issues of interpretation about

the application of the Act, its relationship with the Bill of Rights and the role of the Commission's disputes resolution process.

[8] Through Ms Bell and Mr White the Commission has provided helpful and appropriately objective submissions. The Tribunal acknowledges their substantial assistance.

Delay

[9] These proceedings were heard over four days towards the end of July 2014. Since then the substantial increase in the Tribunal's case load has made it difficult for an early decision to be delivered. The circumstances are more fully set out in the Chairperson's *Minute* issued on 10 March 2017 and published as *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8.

Opportunity to file further submissions

[10] In the course of preparing this decision the Tribunal has had regard not only to the submissions made by the parties in July 2014 but also to additional relevant cases and material found in the course of the Tribunal's own research. That additional material was disclosed to counsel by way of *Minute* dated 17 March 2017 and opportunity given for written submissions to be filed. The *Minute* also allowed the parties to update their earlier submissions if they believed this was necessary. All the new submissions have been taken into account in the preparation of this decision.

BACKGROUND – CHILD POVERTY

[11] As the subject of the cartoons is child poverty in the context of the food in schools programme, it is necessary some background information be provided. The analysis and discussion of the two cartoons which follow later in this decision are thereby contextualised.

Child poverty

[12] In March 2012, the then Children's Commissioner, having identified child poverty as a key priority during his five-year term, established the Expert Advisory Group on Solutions to Child Poverty. After public consultation that group published the report *Solutions to Child Poverty in New Zealand: Evidence for Action*. The following key points which have been taken from the Executive Summary are of relevance to the present case:

> **[12.1]** Child poverty is costly. It imposes costs on the children involved and on society. For individual children, the short-term impacts include having insufficient nutritious food, going to school hungry and living in a cold, damp house. It often means missing out on important childhood opportunities like school outings and sports activities. The impacts also include lower educational achievement, worse health outcomes and social exclusion. Child poverty can lead to reduced employment prospects, lower earnings, poorer health and higher rates of criminal offending in adulthood.
>
> **[12.2]** As at the reporting date (December 2012) the economic costs of child poverty were in the range of $6-8 billion per year and considerable sums of public money are spent annually on remedial interventions. Failure to alleviate child poverty will damage the nation's long-term prosperity and undermine the

achievement of other important policy priorities, such as reducing child abuse, lifting educational attainment and improving skill levels.

[12.3] Child poverty can be reduced but the achievement of significant and durable reduction in child poverty will take time and money. It thus requires political vision, courage and determination. While the government has an important leadership role to play there are also important roles for business, non-government service providers, communities and families.

[12.4] There is no simple solution to addressing the causes and consequences of child poverty. A range of mutually reinforcing actions are required. These need to give specific attention to overcoming inequalities for Māori and Pacifika, and be sensitive to the particular issues facing children in sole parent families.

[12.5] The Expert Advisory Group recommended not only initial priorities for immediate attention at relatively low cost but also a more ambitious package of policy measures designed to reduce child poverty over time to a much lower rate. These included significant reforms to social assistance programmes. Included in the initial priorities for immediate attention was the implementation of a collaborative food-in-schools programmes.

Māori and Pacifika children

[13] The Expert Advisory Group at pp 50 and 52 emphasised that both Māori and Pacifika children are over-represented in child poverty statistics:

[13.1] In relation to Māori children it stated:

> **5.6 Māori children**
>
> While Māori are found in all socioeconomic sectors of New Zealand society, Māori children are over-represented in child poverty statistics. There are particular issues about Māori child poverty that pose distinctive policy challenges and require distinctive responses, including being mindful of whānau dynamics.
>
> It is important to recognise the impact of the experience of colonisation on Māori. The alienation of land and resources has seen the loss of a cultural and spiritual base and the loss of an economic base (Cram, 2011). Any analysis of the financial and material deprivation of whānau today is incomplete without understanding this context (Baker K., et. al., 2012). While mindful of the past, Māori whānau recognise the importance of investing in outcomes that will serve future generations and support strong, healthy and vibrant communities.

[13.2] In relation to Pacifika children it stated:

> **5.7 Pasifika children**
>
> 'Pasifika' is a collective term used by the EAG [Expert Advisory Group] to refer to children and adults of Pacific heritage or ancestry who have been born in or migrated to New Zealand. There are more than 20 different Pasifika communities in New Zealand, each with a distinctive culture, language, history and health status. Most children of Pacific heritage in New Zealand have been born here, which means that Pasifika children are no longer considered an immigrant population. Growing up with Pacific heritage for New Zealand-born and/or raised children is not a homogeneous experience. The contemporary Pasifika social milieu is cross-cultural and culturally changing.
>
> Pasifika New Zealanders are a young and growing population. In less than 20 years, one in five New Zealand children will be Pasifika. However, up to 40 percent of Pasifika children live in poverty on some measures. The rates of severe and persistent poverty amongst Pasifika children are at least double those of Pākehā children (Imlach

> Gunasekara & Carter, 2012). Unemployment figures show that 40 percent of Pasifika 15-19 year olds are without work (MPIA, 2011). For New Zealand to do well, Pasifika children must do well.
>
> Our vision is of Pasifika children living as successful Pasifika people where there is family and community strength, and higher income and living standards through advancements in education and skills, health, employment and business.

Discussion

[14] Material to the Tribunal's assessment of the two cartoons in question is the fact that at the political level there was no immediate consensus as to which of the 78 recommendations made by the Expert Advisory Group should be accepted and, if so, how they should be responded to.

[15] For present purposes useful reference can be made to the material in the additional bundle of documents produced by Fairfax. There mention is made of the fact that both the (then) Leader of the Labour Party, Hon David Shearer and the Leader of the Mana Party (Hone Harawira) promoted separate Bills which would facilitate breakfasts and lunches being provided in low decile schools. At the beginning of May 2013 a group of more than 20 community organisations launched a campaign urging all political parties to support the proposed legislation. The then Prime Minister, Hon John Key, is reported as saying (as at the beginning of May 2013) that the government was still considering the Expert Advisory Group report.

[16] In recording these developments the documents in the additional bundle make reference to political dividing lines over such questions as whether the food in schools programme was only a sticking plaster over a wider child poverty issue, whether the programme would let bad parents off the hook, whether the programme was charity and whether it would encourage more welfare dependency.

[17] On 28 May 2013 Prime Minister Key announced government funding would be made available to expand the KickStart Breakfast Programme supported by Fonterra and Sanitarium, funding which would increase the programme from two to five mornings a week in decile one to four schools. The government would pay 50 percent of the costs with the other half being matched in value by Fonterra and Sanitarium who would continue to distribute the breakfasts to schools. The total cost to the government was up to $9.5 million over five years. In making the announcement Mr Key emphasised that the government believed parents had the primary responsibility for providing their children with the basics, including a decent breakfast and a pair of shoes. This announcement was additional to Budget 2013 which made provision for other initiatives targeted to lower income families. Those initiatives included $100 million to extend the home insulation programme, $24 million for rheumatic fever prevention, $41 million for early childhood education for vulnerable children and $35 million for carers of children.

[18] It was against this background that the two cartoons appeared in *The Marlborough Express* and *The Press* on 29 May 2013 and 30 May 2013 respectively.

THE TWO CARTOONS

[19] The two cartoons the subject of the present proceedings were drawn by Al Nisbet. Copies are attached to this decision as Appendix A (*The Marlborough Express*) and Appendix B (*The Press*). A brief description of each follows.

The Marlborough Express cartoon

[20] The cartoon published by *The Marlborough Express* on 29 May 2013 appeared on the Opinion page. It depicts a group of four adults and four children. All are dressed in school uniform heading to school with bowls in hand. In the background is a direction sign pointing the way to "Free school meals". Two of the adults are thin, plainly elderly and well above the New Zealand superannuation age of 65. The other two adults are much younger and obese. The female has a cigarette hanging from her mouth while the male has a tattoo on his left arm and left leg. The male says to the woman "Psst! … If we can get away with this, the more cash left for booze, smokes and pokies!" The three primary or intermediate school children who are just in front of the adults are shown reacting to this comment by raising their eyebrows. The flesh tone of all eight characters is pink and their hair colour is variously ginger, blonde, red and grey (the children) white (the elderly woman) and blue (the younger female adult). The elderly man is bald while the male adult is wearing a cap (backwards).

The Press cartoon

[21] The cartoon which was published on the Opinion page of *The Press* on 30 May 2013 depicts a group of two adults, five children and a dog sitting at or standing around a table. All seven characters are overweight, if not obese, including the large baby seen sucking on a pacifier. Four of the children are of school age and are in school uniform. In the background is a television together with associated electronic appliances. The father is portrayed sitting at the table simultaneously holding the baby and a can of beer. On the table is a second can (lying on its side) together with several lotto tickets, a packet of cigarettes (a cigarette hangs from the mouth of the adult woman) and a cell phone. Addressing his family, the male adult says "Free school food is great! Eases our poverty, and puts something in you kids' bellies!" One child burps while the other members of the family react approvingly to the father's sentiments. The flesh tone of all seven characters is again pink. Hair colour is variously grey, ginger, black and red. The male adult is wearing a cap (backwards).

The race issue

[22] The case for Ms Wall depends, in part, on the contention both cartoons depict Māori and/or Pacifika.

[23] The issue was the subject of dispute and debate when witnesses were cross-examined and in the course of submissions. We are of the view that to a New Zealand reader the central adult characters in both cartoons would reasonably be taken as depicting Māori, Pacifika and Pakeha.

[24] Although the intention of the artist is not determinative, it is not without significance Mr Nisbet initially intended drawing as all white the characters in *The Marlborough Express* cartoon. But at the eleventh hour he darkened the two central characters skin and lips. *The Press* cartoon was intended to depict a mixed-race family. See Mr Nisbet's own explanation published as "White or brown, it is what's recognisable" published in *The Marlborough Express* on 5 June 2013:

> I've lived most of my life in white Christchurch. My cartoons predominantly feature white folk, often ugly, fat, lesbian, boof-headed, rugby-playing, skinny, sullen, angry, hoodie-wearing, boy-racer white folk.
>
> I'm often asked why I draw so ugly. It's because that's what I see. The human race is ugly and does ugly things. Maybe I'm jaundiced.

> Cartooning should be like playing practical jokes and annoying people, having a crack at all sides, tickling, provoking, firing debate, pushing the envelope as far as it can go to get a reaction.
>
> …
>
> I actually intended to draw the characters as all white, but while working on the cartoon, I saw on telly that a lot of the school breakfast programme was to be undertaken by schools in Northland. At the eleventh hour I darkened the two central characters' skin and lips to balance the ledger. The others were white.
>
> The Christchurch version depicted a mixed-race family, hopefully encompassing a bit of everything, hence the ginger hair.

[25] He went on to say:

> When I discovered the critics had focused on the race card and ignored the dorky Pakehas and gingas, I was surprised. The whole point was overlooked … that being of a system that gave something for nothing which could be exploited by a few – how that some could plead poverty while surrounded by the unnecessary luxuries of life like booze, gambling and fags, comfortably ensconced within an obesity epidemic, while their children starved. I was having a go at the stereotype of bludgers. Race had nothing to do with it.

[26] While Mr Nisbet no doubt sincerely believed race had "nothing to do it" it is nevertheless the case that *The Marlborough Express* cartoon was intended by him to portray the central adult male and female characters as Māori or Pacifika. The family in *The Press* cartoon can be reasonably (and readily) identified also as Māori or Pacifika. We intend determining the case on that basis.

[27] The issue for determination is whether so read, the cartoons breached the racial disharmony provisions of s 61 of the HRA.

THE PLAINTIFF'S CASE

[28] The provisions of s 61 of the HRA applicable to the circumstances of the present case make it unlawful for any person to (inter alia) publish or distribute written matter which is "threatening, abusive or insulting", being matter "likely to excite hostility against or bring into contempt any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons".

[29] In her statement of claim Ms Wall has elected to allege the two cartoons were "insulting and likely to bring into contempt" Māori and Pacifika people. We determine the case on that basis. Two of the central allegations are:

> **[29.1]** In both cartoons adults of Māori or Pacifika origin are depicted as supporting the food in schools programme so that they would have money to spend on alcohol, cigarettes and gambling rather than on food for their children. Although the cartoons differ, the message portrayed by them is essentially the same. In both instances the words are spoken by Māori or Pacifika persons.
>
> **[29.2]** The depiction of Māori and Pacifika people in this manner has resulted in some Māori and Pacifika people feeling that they are perceived as using their money for cigarettes, alcohol and gambling rather than for food for their children and are accordingly regarded as despicable and worthless as well as negligent as parents. Such a depiction also has the effect of stereotyping a group of people on the basis of race, colour and national and ethnic origin in a manner that is negative. This detrimentally affects all members of the group.

[30] In addition to giving evidence on her own behalf Ms Wall called five witnesses. It is neither practical nor necessary that that evidence be recited at length. A short summary follows.

Louisa Wall

[31] As mentioned Ms Wall has been the Member of Parliament for Manurewa since 2011. She is Māori of Ngāti Tūwharetoa and Waikato descent and Irish.

[32] Manurewa is an electorate which has a relatively young population in that nineteen percent of the population are aged between 5 and 14 years and the median age is 28 years. Some 32% identify as Pacifika and 28% identify as Māori.

[33] Within the electorate there are 30 schools, of which 13 are decile 1, ten are decile 2 and three are decile 3. Some 37.3% of school pupils are Pacifika and 35.7% are Māori. In total, 92.3% of school pupils in Manurewa attend decile 1 to 4 schools to which the breakfast in schools extension was targeted when it was announced in May 2013. Virtually all of the decile 1 to 4 schools in the electorate participate in some form of a food in schools programme.

[34] Ms Wall told the Tribunal she felt the cartoons were insulting and brought Māori and Pacifika people into contempt. The portrayal of the parents considering the expansion of the breakfast in schools programme as absolving them of their parental responsibilities and leaving them free to spend their money on alcohol, cigarettes and gambling was in her view insulting, ignorant and a put down of Māori and Pacifika. Furthermore, it provided negative stereotypes at the expense of vulnerable Māori and Pacifika families and contributed to a negative sense of self-worth.

[35] Given the prevalence of child poverty in New Zealand and its particular impact on Māori and Pacifika children we observe that the views expressed by Ms Wall (and by her witnesses) are entirely understandable.

[36] Ms Wall also expressed her disappointment that her complaint was dismissed by the Human Rights Commission. This aspect of the case is addressed separately under the heading "The Human Rights Commission Evidence".

William Tamarua and Akanesi Ngata

[37] Mr William Tamarua is Ngāti Whatua, Ngapuhi and Cook Island Māori. Ms Ngata is a Tongan New Zealander. Both Mr Tamarua and Ms Ngata live in Manurewa and are members of the Warriors of Change which was set up in about 2011 as a leadership programme. Mr Tamarua spoke of his annoyance that Māori and Pacifika were being disgraced and put down. He believed the message of the cartoons was that Māori and Pacifika were useless and using their children to access government resources.

[38] Ms Ngata said she found the cartoons an insult, a mockery and a put down. The message was that Islanders were overweight, only ate junk food, smoked, drank, gambled and lived off the benefit. Only Māori and Islanders were targets. Her experience as a person involved in programmes focused on young people in Manurewa was that they were caught in a poverty cycle:

> They were limited, they were broken, they knew they had to work hard to get better but they were constantly fighting an uphill battle. Everywhere they turned they were labelled as poor, lazy Islanders who just live off the benefit. This is the reality for our young people whose parents are often caught in difficult situations. Young people had to suffer for their parents'

> downfalls. Cartoons like these are read by people of all ages and are said by some to be just a joke. We young people should not be joke.

Dr Leonie Pihama

[39] Dr Pihama is Te Atiawa, Ngā Māhanga ā Taira and Ngāti Māhanga. She has a BA, MA (Hons) and Ph.D from the University of Auckland and is Director of Waikato University's Te Mata Punenga o Te Kotahi – Te Kotahi Research Institute. She is also director of an independent Māori research company and Associate Professor at Te Puna Wānanga, School of Māori Education at the University of Auckland.

[40] Dr Pihama said the representation of Māori plays a significant role in the construction of dominant understandings about Māori people. Representations are not neutral or objective. They maintain certain social positions. Where dominant groups control processes and vehicles of representation (eg media), minority groups can find themselves in a constant struggle to have their images and selves presented in ways that reflect what they consider to be their spiritual, cultural, intellectual and material realities. Representation is influenced by the intersection of race, colonisation and gender. Representations contribute to both the construction and marginalisation of Māori people.

[41] Dr Pihama also spoke of "symbolic violence" (forms of violence imposed through symbolic mechanisms such as systems of classification, including representations which maintain stereotyped discourses) and of the link between racism and ill-health including psychological distress, depression and anxiety. In this context reference was made to the concept of "micro-aggressions" which involves acts of discrimination and racism against specific ethnic and racial groups. Micro-aggressions can take the form of explicit racial derogation characterised by a verbal or non-verbal attack meant to hurt the intended victim. This can happen through name-calling or discriminatory actions. For Indigenous Peoples, such as Māori, micro-aggressive acts affect the pysche of the individual or group against whom they are perpetuated and deliver persistent, inaccurate messages about the group, replacing it with a stereotype.

[42] In relation to the cartoons in question, Dr Pihama expressed the view that they are based on racial stereotyping constructed through deficit thinking in respect of Māori and Pacifika. They are images and representations which are both insulting and abusive. They rely on racist stereotypes of Māori and Pacifika people as lazy, neglectful, alcoholic, excessive smokers and gluttonous. These stereotypes serve to demean and reproduce a context within which Māori and Pacifika are treated with distain and contempt. Such racist portrayals within mainstream newspapers contribute to demeaning views of Māori and Pacifika which incite further negative, hostile and racist views against those communities.

[43] In cross-examination Dr Pihama expressed the view that causing stress or causing psychological harm satisfied the phrases "excite hostility against" and "bring into contempt" used in s 61 of the HRA. She would regard as such "harm" Mr Tamarua's evidence that he was "really annoyed and felt that my people were being disgraced and put down".

[44] Whether the assessment required by s 61 is to be made by the group of persons who are the subject of the written matter or words is an issue addressed later in this decision as is the question whether the assessment is subjective or objective.

Richard Pamatatau

[45] For over twenty years Mr Pamatatau worked as a print journalist and as the Pacific Islands correspondent for Radio New Zealand. Since 2011 he has been the programme leader for the Graduate Diploma of Pacific Journalism at AUT University in Auckland. He is of Cook Islands, Niuean, German, English and Australian ancestry.

[46] Mr Pamatatau stated that in his view the right to freedom of speech comes with an expectation of very high standards when it comes to content and the evidence to support it. In the present case the cartoons could not be supported by evidence. They were not works of a high standard. Instead "we have been presented with an imbedded nastiness, and predictably dumb defence couched under the ambit of free speech". The cartoons also took a view directed by the majority lens of (white people) which was able to shape and continue existing stereotypes which were damaging and did not in any way try to sort out problematic issues that disadvantaged population groups face on a daily basis. In his view the cartoons were deeply insulting and likely to bring into contempt a group of people on the basis of their colour, race or ethnic or national origin.

[47] Although Mr Pamatatau was introduced as an expert witness who had read and agreed to observe the Code of Conduct for Expert Witnesses he was in cross-examination challenged on this point. It was put to him that he was, in reality, an advocate for the plaintiff's case, not an expert witness assisting the Tribunal impartially. Other challenges in cross-examination related to Mr Pamatatau's evidence that only material of the highest quality should be published in a newspaper and that part of his opinion evidence was based on conclusions reached by his students. All of these criticisms have been taken into account in our assessment of the weight to be given to the challenged evidence.

Dr Raymond Nairn

[48] Dr Nairn is a Pākehā New Zealander of Scots and English descent. He is a psychologist who published his doctorate in 2004 and has been an anti-racism educator and theorist since the 1960's and a Tiriti educator from the mid-1980's. He is currently an Honorary Research Fellow with the SHORE and Whāriki Research Centre at Massey University. In preparing his evidence for the Tribunal Dr Nairn drew on research compiled by a team (of which he was a member) which looked at media depictions of Māori and made reference to the conclusions which had been reached about the impact of those depictions.

[49] Dr Nairn said that the media are an influential and pervasive forum where audiences get to "know" themselves and others. Evidence suggests that media representations of Māori health and Māori experiences have powerful effects on attitudes, beliefs and behaviours, influencing expectations, confidence in positive change, optimism, pessimism and fatalism. How people are positioned, described, represented and experienced at both individual and population levels have considerable impact on human life experience, development, health behaviours and outcomes. A number of studies show that while socio-economic status is an important determinant of health, Māori are still over-represented in a wide range of negative health outcomes. When decontextualised from historical processes such findings are easily reproduced in populist ideology as Māori failure.

[50] The persistence of deficit forms of media representations, including the construction of Māori failure, contribute to the undermining of Māori identity and well-being by reinforcing stereotypes with major implications for identity, social cohesion and cross-

cultural relationships. Conversely, positive and/or alternative representations can make significant contributions to individuals, communities and national life.

[51] The research identified media patterns and themes of anti-Māori discourse. A number of anti-Māori themes emerged including Good Māori/Bad Māori where Bad Māori are represented as poor, sick, lazy, bludgers and dishonest. The frequency and pervasiveness of these themes reflects and reproduces the generic discursive resources from which society builds and elaborates the discourses and narratives that are used to explain and understand everyday experiences. Media plays a role in producing and perpetuating dominant stereotypes.

[52] In the view of Dr Nairn the cartoons the subject of the present proceedings are examples of dominant negative constructions of Māori and Pacifika. Based on his research he believed the cartoon representations were likely to reinforce "multiple manifestations of hostility and contemptuous behaviour towards and Māori and Pacific, including the day-to-day experiences of racism".

[53] Dr Nairn's assessment of the cartoons is that they come out of a vocabulary of disparagement. The negative representations offer many people a real sense of confirmation that this is how Māori are.

[54] As will be seen, we have taken into account all of the evidence given by the plaintiff's witnesses (and the evidence given by the defendants' witnesses) in arriving at our own objective assessment of the s 61(1) criteria.

THE DEFENDANTS' CASE

[55] Publication of the two cartoons by *The Marlborough Express* and *The Press* respectively is admitted and Fairfax accepts it is the legal entity responsible for the publication of both newspapers. The primary points of contention relate to the proper interpretation of s 61 of the HRA and the application of the Bill of Rights. Fairfax contends that properly interpreted s 61 does not apply to the cartoons and in any event the provision is to be given a meaning consistent with the right to freedom of expression secured by s 14 of the Bill of Rights.

Sinead Boucher

[56] Ms Boucher is the Executive Group Editor at Fairfax Media. She told the Tribunal there is a clear division between the commercial and editorial decision-making processes within the company. Editorial decisions are completely separate from commercial decisions and are based on journalistic rather than commercial imperatives. The decision to publish each of the cartoons was made by the editorial teams at *The Marlborough Express* and *The Press* respectively. A key to Fairfax as a media organisation is its independence.

[57] Fairfax holds itself to the highest standards of accuracy, fairness and honesty. There is an internal code of ethics that all journalists must accept and agree to before joining Fairfax. The company is also a member of the Press Council and strongly supports the Council's mandate and principles.

[58] A decision to publish a story or cartoon about a particular event or development is based on news judgment and news value. Newspapers have a long and distinguished history of publishing cartoons that put a sharp focus and perspective on the issues of the day for readers. They are often designed to be thought-provoking and to arrest the attention of the reader to make them look at a certain issue in a particular way. They are

a form of opinion, in the same way that a letter to the editor or an opinion piece or a column is. That is, they are the opinion and perspective of the cartoonist rather than the newspaper editor. Cartoonists are usually the ones who select the topic and approach for their cartoons themselves.

[59] Every editor decides their own editorial line in their editorial columns, what opinions to publish and what prominence to give them. It is the individual editor of each publication who decides these questions, not the Group Editor, not the Executive Group Editor, not the Executive Management Team and not the Board.

Ian Grant

[60] Mr Grant was called as an expert witness to give his opinion on several questions concerning the role of editorial cartoons. Mr Grant researched and wrote the first cartoon history of New Zealand in 1980 and founded the New Zealand Cartoon Archive at the Alexander Turnbull Library in 1992. He has continued to research and write about historical and contemporary political cartoons. He has judged the cartoonist-of-the-year category at the Cannon Media Awards for several years. He holds a BA (Political Science) from Victoria University of Wellington.

[61] The focus of Mr Grant's evidence was editorial or political cartoons, not cartoons generally. He said that editorial or political cartoons are important for several reasons. We mention here only his opinion that such cartoons are a largely uncensored view of current thinking about issues, great and small. They are a barometer of at-the-moment public attitudes; valuable at the time and decades later because of this.

[62] The main reason for editorial cartoons being so valuable is that there is a long established convention that such cartoons are not required to mirror or parrot the editorial line of a newspaper or the current "official" line. Mr Grant said:

> As David English, a former editor of Britain's *Daily Mail* put it: "The cartoonist, given that special licence granted over the centuries, can say things others only dare whisper".

[63] He also referred the Tribunal to:

> **[63.1]** A speech given by Nicholas Garland, said by Mr Grant to be one of Britain's leading twentieth century cartoonists (Nicholas Garland *Daily Express* Cartoonist, National Library, Wellington, 1998):
>
> > Why is it that political cartoons, these ephemeral, inevitably quickly conceived and executed comic drawings, are so highly valued … Part of the answer may be in the tradition … that the views of the cartoonist may differ wildly from those expressed more formally elsewhere in the newspaper. From this particular freedom given to, or seized by, the cartoonist, cartoons derive a large part of their strength.
>
> **[63.2]** An extract from Haydon Manning and Robert Phiddian "Censorship and the Political Cartoonist", Australasian Political Studies Association Conference, Adelaide, 29 September 2004 – 1 October 2004:
>
> > … cartoons are 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.

[64] In the opinion of Mr Grant the conventions associated with editorial cartoons is as strong in New Zealand as elsewhere in the English-speaking world and notes there have been very few attempts to take cartoonists to court and even fewer successful actions.

[65] A further point made by Mr Grant is that political cartoons make an important, distinctive and even unique contribution to the editorial pages of a newspaper. They epitomise, particularly when they differ from the editorial opinions appearing a column or two away, the freedom of the press, a vital cornerstone of a democratic society. He added that even in countries like New Zealand freedom of the press cannot be taken for granted. It is constantly under threat from ideologies, organisations and individuals who for a range of reasons would like to inhibit or prohibit some aspect or other of a newspaper's right and obligation to report facts and present a wide range of opinion.

[66] Editors are well aware of the special role of the cartoonist and the pressures that result from this. For this reason they are generally wary about interfering with their cartoonist's work, even if they may personally dislike the views or ideas being expressed, which may well represent opinions held in the community. Cartoonists may be reflecting their own views or views they know to be held by at least some sections of the community.

[67] Mr Grant expressed the view that if editors or outside sources begin to censor views expressed in cartoons because they might offend some people or because they are not "politically correct", a dangerous precedent would be created. If one view or opinion were to be banned, why not another? Some views and opinions might cause offence (as do the often pointed attacks on the integrity and personalities of politicians) but the ability of society to listen to, read about and look at a wide range of views is, in the opinion of Mr Grant, central to the effective functioning of a democratic society.

[68] Mr Grant told the Tribunal that in preparation for giving his evidence he had looked through several hundred of Mr Nisbet's cartoons and noted the people shown in them are invariably fat and ugly irrespective of their nationality or sex. There was very little difference between the cartoons the subject of the present proceedings and cartoons by Mr Nisbet generally about whatever subject. He described Mr Nisbet's cartoons as "quite unsophisticated and unsubtle".

[69] Regarding the depiction of Māori and Pacifika in cartoons Mr Grant observed that having studied a large number of cartoons held in the New Zealand Cartoon Archive at the Alexander Turnbull Library it was possible to observe that from the 19th century to about the early 1950's there was a high level of racism in New Zealand cartoons. This was followed by a period from about the 1950's to the 1960's in which race was not discussed or was not mentioned in editorial cartoons. It became a taboo subject. However, from the 1990's cartoonists have addressed Māori issues and it was not possible to say that Māori have been represented as having stereotypical characteristics such as welfare bludgers and indifferent parents, preoccupied with smoking, drinking and gambling.

Stephen Mason

[70] Mr Mason was at the relevant time Editor of *The Marlborough Express* and gave evidence of his belief that freedom of expression is an important right to uphold in a democratic and free society. Without that right it would be impossible for anyone to express a differing view or to question the actions of those in power. It was a basic necessity of democracy.

[71] The cartoon in question was sent by Mr Nisbet to Mr Mason by email on 28 May 2013. There was no greeting, expression of opinion or explanation in the email, as was the norm with cartoonists Mr Mason has dealt with. Without opening the jpeg

attachment Mr Mason sent the email to the news editor to process for publication the following morning on the editorial page.

[72] On the morning of 29 May 2013 the news editor called Mr Mason to his desk and suggested he (Mr Mason) might want to look at the cartoon as intended to be placed on the editorial page. Looking at the cartoon on the screen Mr Mason observed the two central figures who appeared to him to be either Māori or Pacifika. The two other adult figures were elderly. He interpreted the cartoon as suggesting that some people would use the government's Breakfast in Schools programme as a way to save money which they could then spend on gambling, smoking and alcohol. He saw that some of the people were Māori and Pacifika but others were not. He felt the cartoon was "raw" and, as some Al Nesbit cartoons can be, blunt, cynical and stereotyped. Believing it was an important subject at the time and that it presented an alternate opinion, Mr Mason decided the cartoon was suitable to be published. He did not regard it as racist or abusive.

[73] The cartoon was published on the Opinion page, clearly marked as such. The editorial sitting beside the cartoon was also about the Breakfast in Schools scheme. It stated:

> Some families are genuinely struggling on basic wages and need a top-up to feed and clothe their children.
>
> Others cannot succeed on what the system provides, either through lack of ability or lack of effort. That will include the typecast drunks, druggies and losers who will "care" for their kids only as a means to a benefit. Social service providers are on a hiding to nothing dealing with them.
>
> Hungry children can't learn. No argument there.
>
> A catch-all programme is not needed.
>
> …
>
> Schools are often left to pick up the pieces when a family, or the wider "village", fails in its care of a child. Charity groups and businesses are already helping in schools with the greatest need. They will welcome the extra help from this plan.
>
> The breakfast scheme is an answer, not a solution, at least not until there is a generational change, and let's not hold our breath waiting for that.
>
> It is best to see this scheme as striking a good balance – providing help where it is needed so children are in a fit state to learn. At the same time, the Government needs to do a lot more work on making wayward parents accountable.

[74] The editorial does not mention race or ethnicity.

[75] At the time the editorial and cartoon were published on 29 May 2013 *The Marlborough Express* had already published nine news stories and two features on the need for and value of a national Breakfast in Schools programme during the public debate leading up to the government's decision.

[76] Soon after publication of the cartoon Mr Mason's email inbox began filling with messages of both complaint and support and *The Marlborough Express* website and Facebook pages were loaded with many comments along similar lines. An online poll run during the day showed 2,600 people felt offended by the cartoon and 7,500 did not. The newspaper's usual response rate for an online poll is up to 300. Significant events can generate responses of around 1,000. Mr Mason said that to have over 10,000 responses was quite extraordinary. During the following week the public opinion section

of the Opinion page was virtually devoted to running letters in reaction to the cartoon, most of complaint and a few of support.

[77] The newspaper also published opinion pieces by Dame Susan Devoy, Race Relations Commissioner and other human rights advocates.

[78] Mr Mason is of the view *The Marlborough Express* acted responsibly on the subject. The cartoonist had the opportunity to express an opinion on an important subject as he saw the situation, with the usual expectation that it would stimulate a response and discussion on the subject. The newspaper published all comments submitted, both criticising and supporting the cartoon, and invited others with a recognised interest in the area to give a wider perspective. Mr Mason is not aware of any complaint having been made to the Press Council. He observed the Council has been clear in its rulings that cartoonists are not required to be fair and balanced and have the right to express their views, which can provoke or upset.

[79] Mr Mason regrets the cartoon has been seen by some as offensive or racist, as that was not his intention when he made the decision to publish it. That intention was to stimulate debate on a controversial subject, Breakfast in Schools, and to bring out opinions that could give a wider public understanding of the problem of children going to school hungry and unfit to learn. That debate, or any other debate in the public interest, could not take place without freedom of expression.

[80] At the time he made the decision to publish the cartoon Mr Mason was not aware *The Press* had received a similar cartoon and that it too would be published the following day.

Joanna Norris

[81] Ms Norris has been editor of *The Press* since October 2012. She too believes freedom of the press is fundamental to a fair and free society. She also believes media organisations, acting within the law and adhering to the Press Council principles, must have the confidence to publish material including news stories, features and opinion pieces that include a diversity of views without fear of legal action. While working as a journalist in the Middle East between 2007 and 2009 she observed firsthand the chilling effect of the threat of prosecution in relation to publication of material in the media. In some cases the fear of prosecution resulted in self-censorship by media organisations. Issues likely to cause offence, disorder or a moral hazard were often avoided. These experiences support her long held view that freedom of the press is fundamental to a free society, even when this means the publication of some material may upset or offend some, or indeed many, people.

[82] On the evening of 29 May 2013, as is her normal practice, she viewed the intended cartoon on a high resolution print out prior to publication on the Opinion page. She was not then aware of *The Marlborough Express* cartoon published earlier in the day.

[83] The cartoon submitted to *The Press* by Mr Nesbit was interpreted by Ms Norris as suggesting that some people would use the Breakfast in Schools programme to free up money to spend on discretionary items such as cigarettes, alcohol and lotto. She viewed this to be a cynical and simplistic view likely to provoke some people but believed it to be relevant to the debate surrounding initiatives totalling $100 million provided for in Budget 2013 and the additional funding announced by the government a day or so earlier increasing government funding for breakfasts in schools.

[84] While she was of the opinion the cartoon was a crude observation (that some people in deprived communities, some of whom are Māori or Pacific Island New Zealanders, spend money on alcohol and cigarettes) Ms Norris was of the view the cartoonist was entitled to make that observation given the deprivation measures then available. She had in mind deprivation index scores which show that higher proportions of Māori live in areas with the most deprived deciles. People identifying with Māori and Pacific ethnic groups as well as people who reside in areas of greater deprivation, who are on low incomes, and who are unemployed, have the highest rates of smoking, according to health researchers and policy advisors published in the New Zealand Medical Journal. In relation to alcohol use in deprived communities, the Ministry of Health has found hazardous drinking disproportionately affects Māori and Pacific peoples and those living in the most socio-economically deprived areas.

[85] Ms Norris told the Tribunal the Nesbit cartoon was only one of a number of pieces on the Food in Schools programme published in *The Press* print edition in May 2013. Among those pieces was an op-ed cartoon published the day prior to the Nesbit cartoon by the other regular cartoonist (Malcolm Evans) used by *The Press*. The Evans cartoon depicted the then Prime Minister, Hon John Key, holding Weetbix and milk while standing between two signs which read "Hungry Kids" and "Their Poorly Paid Parents". The implication of that cartoon was that Food in Schools would feed children while their parents remained poorly paid. The majority of the other content published during May 2013 was news stories outlining the policy and reactions to it from politicians, educationalists and other experts. The Evans cartoon, run in the same position as the Nesbit cartoon, was clearly a differing view to that depicted by Nesbit and, so far as Ms Norris is aware, generated no discussion of the Food in Schools policy. By contrast, reaction to *The Press* publication of the Nesbit cartoon generated a very strong reaction from readers that involved considerable discussion in relation to the utility and effectiveness of such a policy as well as the wider issues of deprivation and poverty.

[86] Though the Nesbit cartoon did prove provocative (and Ms Norris readily accepts it caused offence to some people), she believes it also brought visibility to important social issues and sparked valuable public debate. In the context of that debate issues subsequently discussed in *The Press* included the potential effectiveness of the programme, societal perceptions of low-income New Zealanders and those receiving benefits, the reality of life in deprived homes and communities and representations of Māori and Pacifika within the media. In her view the episode serves to underline the value of freedom of expression and a free press and the harmful and self-defeating chilling effect that would result if publication of such material was suppressed by law or the threat of legal action.

[87] Ms Norris supports the Human Rights Commission view that it is important to prevent the trivialisation of racial disharmony when considering s 61 of the HRA. The lowering of the threshold could serve to reduce freedom of expression to the extent that it would be difficult to depict, or even refer to, specific demographics in any adverse context, and notably in the context of a debate on important social issues.

[88] Ms Norris emphasised *The Press* did not set out to deliberately offend people. However, there are occasions when the editor will allow publication of provocative material in the context of a wider debate. This was the case with the Nesbit cartoon. In the opinion of Ms Norris a diversity of view is both inevitable and important in a strong and free society. A requirement to only publish material that offends no one is unrealistic and would be deeply damaging to the public interest.

Professor Grant Huscroft

[89] Professor Grant Huscroft, then a tenured professor of law at the University of Western Ontario in London, Ontario, Canada, but now of the Ontario Court of Appeal, gave expert opinion evidence by AVL on five issues relating to s 61 of the HRA and its interaction with the New Zealand Bill of Rights Act 1990. Those issues, as formulated by the solicitors for Fairfax were:

> **[89.1]** What does the right to freedom of expression as set out in s 14 of the Bill of Rights mean?
>
> **[89.2]** How does this right interact with the law relating to race relations, particularly in the sphere of public discourse and political debate?
>
> **[89.3]** Is s 61 of the HRA a justified limitation on s 14 of the Bill of Rights? If not, why not?
>
> **[89.4]** How have the Canadian courts and legislature approached the issue?
>
> **[89.5]** In your view, does the approach by the Human Rights Commission to s 61 of the HRA (as set out on its website) strike the appropriate balance between racial disharmony and freedom of expression?

[90] At the time Mr Huscroft was Full Professor of Law, with tenure, at the University of Western Ontario. His teaching and research had focused on Public Law, specifically, Constitutional and Administrative Law. He was a member of the Faculty of Law at the University of Auckland from 1992 to 2001. During that time he taught courses on the New Zealand Bill of Rights Act 1990 and the HRA. He has visited and taught courses at Auckland on three occasions since 2001, most recently a Master of Laws course on Proportionality in Human Rights Law (2012). He has an extensive list of published articles on human rights, constitutional law and judicial review in law journals in Canada, New Zealand, Australia and the United States. He was co-editor with Professor Paul Rishworth of *Rights and Freedoms, the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) and together with Professor Rishworth, Scott Optican and Richard Mahoney he co-authored *The New Zealand Bill of Rights* (Oxford, Melbourne, 2003).

[91] It is not intended to attempt a summary of the detailed evidence given by Professor Huscroft in his written statement of evidence and during the course of his oral evidence. It is sufficient to say we accepted him as an expert witness and have been assisted by his evidence.

[92] Finally there was the evidence called by the Human Rights Commission.

THE HUMAN RIGHTS COMMISSION EVIDENCE

[93] By letter of complaint dated 4 June 2013 Ms Wall lodged with the Human Rights Commission a complaint in relation to the two cartoons, referring specifically to s 61 of the HRA. In a response dated 20 June 2013 the then acting Chief Mediator (Ms Pele Walker) set out the Commission's understanding of the requirements of s 61 of the HRA and explained why the Commission had decided it would take no action under the unlawful discrimination provisions of the Act. Ms Walker did, however, note that the Commission agreed the cartoons were insulting and derogatory in the extreme and abhorred the portrayal of Māori and Pacifika as the butt of attempted humour. As previously mentioned, Ms Wall has expressed disappointment at this decision and at the

fact the Commission provided no opportunity for her to meet with the editors of *The Marlborough Express* and of *The Press* in the context of a Human Rights Commission facilitated mediation.

[94] In light of these criticisms the Commission called Ms Walker to give evidence about the Commission's complaints handling process, the Commission's broader functions and the reasons why the specific complaint by Ms Wall was dealt with as it was.

[95] Ms Walker is the Practice Leader in the Enquiries and Complaints Team. On 20 June 2013 she was acting Chief Mediator and signed the letter in response to Ms Wall's complaint of 4 June 2013. Ms Walker is not a lawyer and has no role in providing advice or analysis on the interpretation of New Zealand's human rights law. As stated the purpose of her evidence to the Tribunal was to provide information on the process the Commission adopts in assessing and dealing with complaints under s 61 of the HRA.

Complaints handling process

[96] As is made clear by the HRA, the Human Rights Commission is mandated by the statute to receive complaints. The process to be followed on receipt of a complaint is prescribed by Part 3 of the HRA.

[97] For present purposes the key provisions are s 75 (the object of Part 3), s 76 (the functions of the Commission under Part 3), s 77 (the provision by the Commission of dispute resolution services), s 78 (method of providing services), s 79 (how complaints to be treated) and s 80 (taking action or further action in relation to a complaint). A brief overview of these 2001 amendments is to be found in *Attorney-General v Human Rights Review Tribunal [Judicial review]* (2006) 18 PRNZ 295 at [42] to [47]. For present purposes only s 76 is reproduced here:

> **76 Functions of Commission under this Part**
>
> (1) The primary functions of the Commission under this Part are—
> (a) to provide information to members of the public who have questions about discrimination; and
> (b) to facilitate the resolution of disputes about compliance with Part 1A or Part 2, by the parties concerned, in the most efficient, informal, and cost-effective manner possible.
> (2) The Commission has, in order to carry out its function under subsection (1)(b), the following functions:
> (a) to receive and assess a complaint alleging that there has been a breach of Part 1A or Part 2, or both:
> (b) to gather information in relation to a complaint of that kind (including one referred back to it by the Director under section 90(1)(b), or the Tribunal under section 92D) for the purposes of paragraphs (c) and (d):
> (c) to offer services designed to facilitate resolution of the complaint, including information, expert problem-solving support, mediation, and other assistance:
> (d) to take action or further action under this Part in relation to the complaint, if the complainant or aggrieved person wishes to proceed with it, unless section 80(2) or (3) applies:
> (e) to provide information gathered in relation to a complaint to the parties concerned.

[98] Ms Walker explained that in relation to a complaint under s 61 of the HRA the functions of the Commission under s 76(2) can be summarised as follows:

[98.1] to receive the complaint.

[98.2] to assess whether the complaint prima facie falls within s 61.

[98.3] if the complaint does prima facie fall within s 61 it is then "triaged" and a decision made how to progress it. The triage process includes an assessment of

whether in all the circumstances the Commission should progress the complaint and if so the most appropriate way of doing so.

[99] Ms Walker emphasised that the Commission's dispute resolution functions under s 76 are not limited to mediation. She referred to s 78(c) which clearly anticipates an assessment by the Commission's mediators as to the type of services which will best support the objects of Part 3. The services that can be provided are those that facilitate resolution of a dispute. She also pointed out that the Commission has no mandate under Part 3 to make a determination as to whether the HRA has been breached.

[100] If a complaint falls within the ambit of s 61 and one or both parties request mediation then this service must be offered (s 77(2)(c)(ii)). If the complaint falls outside the parameters of s 61, or where there has been no request for mediation, then it is at the discretion of the Commission which services, if any, are to be provided.

[101] The Commission may also decline to take any further action on a complaint if in all the circumstances of the case it is unnecessary to take such action (s 80(3)). Ms Walker pointed out that it was important to be clear that this decision is a decision for the Commission alone to take. Where the Commission determines that it will take no further action on a complaint, it is nevertheless required, under s 80(4) to inform the complainant of his or her right to bring proceedings before the Tribunal.

Broader functions

[102] Ms Walker pointed out that under s 5 of the HRA the Commission may use a variety of means to advance the protection of human rights and to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society. Those means include education, advocacy and in some cases meeting with and receiving information from members of the public on matters of concern. Those functions become relevant where an informal approach is made to the Commission or where a complaint is considered to fall outside the ambit of s 61. The Commission exercises its s 5 functions independently from its dispute resolution functions.

The specific complaint

[103] As previously mentioned, by letter dated 14 June 2013 Ms Wall made complaint to the Human Rights Commission regarding the two cartoons and requested that the matter be dealt with under s 79(5) of the HRA which provides:

> (5) If the complaint or relevant part of it concerns a breach of Part 2, and none of subsections (2) to (4) applies to the complaint or relevant part of it, the complaint or relevant part of it must be treated only as a complaint that there has been a breach of the relevant provision or provisions of Part 2.

[104] By interim response dated 11 June 2013 Ms Wall was advised the complaint would be dealt with independently by the Chief Mediator and her staff in the Enquiries and Complaints Team, not by the Commissioners.

[105] An assessment was then made by the Enquiries and Complaints Team as to whether the complaint prima facie fell within the scope of s 61. That process involved obtaining legal advice. It was concluded that although the first limb of s 61(1)(a) (that the cartoons were insulting) could be made out, the second limb of the test could not [be satisfied]. The Commission did not believe that the cartoons could reasonably be considered to reach the threshold of "exciting hostility against" or "bringing into

contempt" any group of persons on the ground of the colour, race or ethnic or national origins of that group of persons.

[106] Even though the Commission considered there was no prima facie breach of s 61 it still considered whether, in the circumstances of the case, it could provide any assistance or guidance to resolve the complaint. The decision made was that it could not because Ms Wall's complaint had made it clear she wanted a determination from the Commission that the cartoons had breached s 61, a determination not within the jurisdiction of the Commission to make.

[107] The Commission also gave consideration to suggesting that Ms Wall approach other bodies such as the Broadcasting Standards Authority or the Press Council and to providing assistance under its broader s 5 functions. However, it concluded none of those steps would provide the resolution sought, namely a determination there had been a breach of the HRA.

[108] For these reasons the Commission decided not to take any further action and by letter dated 20 June 2013 advised Ms Wall of this fact. In this letter the Commission reminded Ms Wall of her right to bring proceedings before the Tribunal.

THE CARTOONS – FINDING AS TO CONTENT

[109] It can be seen from the narrative of the evidence that publication of the cartoons is not in dispute and we have found in the case of *The Marlborough Express* the central adult male and female characters in the cartoon were intended to portray Māori or Pacifika. In the case of *The Press*, the family in the cartoon can be reasonably (and readily) identified as Māori or Pacifika. The case is to be determined on that basis.

[110] The relevance and weight to be given to the expert evidence called by the parties, particularly the plaintiff, is to be determined in the light of our interpretation of s 61 of the HRA. That interpretation exercise is now addressed.

THE INTERPRETATION EXERCISE

[111] The primary principle of interpretation is contained in s 5 of the Interpretation Act 1999. The focus is on text, context and purpose:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[112] In relation to this provision the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] stated that the meaning of the text must always be cross-checked against purpose and in determining purpose regard must be had to the immediate and general legislative context:

> **[22]** It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court

must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment. [Footnote citations omitted]

[113] This is also a case in which account must be taken of New Zealand's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (ICERD) and the International Covenant on Civil and Political Rights, 1966 (ICCPR). The link between s 61 and Article 4 of ICERD will shortly be explained. It is also to be noted that the freedom of expression provision in the Bill of Rights (s 14) on which the outcome of this case largely turns, is derived from Article 19 of the ICCPR.

[114] As noted in Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 512 there is a presumption, which is gaining strength, that Parliament does not intend to legislate contrary to New Zealand's international obligations. A plethora of dicta is cited in support of this proposition. Additional reference can be made to RI Carter and J McHerron "Statutory Interpretation Update" (New Zealand Law Society Seminar, June 2016) at 146. For the purpose of determining the present case we are guided by the following statement in *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289 per Keith J:

> We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations … That presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text … In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates … The application of the presumption depends on both the international text and the related national statute.

SECTION 61 HUMAN RIGHTS ACT 1993

[115] The reason why ICERD must be taken into account in the interpretation exercise is made clear by the history of s 61 of the HRA and its criminal law counterpart in s 131. The discussion accordingly begins with the present day text of ss 61 and 131 followed by a brief history of the antecedents to s 61.

[116] Sections 61 and 131 of the HRA presently provide:

Other forms of discrimination

61 Racial disharmony

(1) It shall be unlawful for any person—
   (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
   (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
   (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—

   being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

(2) It shall not be a breach of subsection (1) to publish in a newspaper, magazine, or periodical or broadcast by means of radio or television or other electronic communication a report relating to the publication or distribution of matter by any person or the broadcast or use of words by any person, if the report of the matter or words accurately conveys the

intention of the person who published or distributed the matter or broadcast or used the words.

(3) For the purposes of this section,—

newspaper means a paper containing public news or observations on public news, or consisting wholly or mainly of advertisements, being a newspaper that is published periodically at intervals not exceeding 3 months

publishes or *distributes* means publishes or distributes to the public at large or to any member or members of the public

written matter includes any writing, sign, visible representation, or sound recording.

Part 6
Inciting racial disharmony

131 Inciting racial disharmony

(1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—

(a) publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or

(b) uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—

being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

(2) For the purposes of this section, *publishes* or *distributes* and *written matter* have the meaning given to them in section 61.

[117] It can be seen that in its current form, the HRA provides both civil and criminal remedies for what in shorthand is sometimes (and not always helpfully) referred to as "hate speech". The civil remedy in the form of a complaint to the Human Rights Commission followed (potentially) by proceedings before the Tribunal is provided for by s 61. Under this provision racist hate speech is conceived of as a form of discrimination in the public sphere directed against a group of persons, not a specific individual. It is unlawful (inter alia) to publish written matter which is threatening, abusive or insulting if such publication is likely to excite hostility against or bring into contempt any group of persons. Section 131, on the other hand, makes it a criminal offence to excite hostility or ill-will or bring into contempt or ridicule a group of persons on the ground of their race.

Section 61 HRA – a brief history

[118] Section 131 first appeared in the New Zealand statute books as s 25 of the Race Relations Act 1971 which, according to its long title, was an Act to affirm and promote racial equality in New Zealand and to implement ICERD which was ratified by New Zealand in 1966. To date there has been only one prosecution under s 25 and its successors. See *King-Ansell v Police* [1979] 2 NZLR 531 (CA). In that decision Woodhouse J at 537 and Richardson J at 542 noted that s 25 of the 1971 Act referred to discrimination against a **group**, not an individual. Both the "new" ss 61 and 131 of the HRA share this same linguistic feature.

[119] The predecessor to s 61 of the HRA first appeared in 1977 when the Race Relations Act was amended by the Human Rights Commission Act 1977. A new s 9A was inserted into the former Act. During the second reading of the Bill the then Minister of Justice, Hon David Thomson, described the proposed s 9A as importing "the milder processes of conciliation and the civil law to deal with cases where the language used was not sufficiently flagrant to lend itself readily to a criminal prosecution". It was

believed this would be a useful additional power for the Race Relations Conciliator to have when combating manifestations of racial prejudice. See (20 July 1977) 411 NZPD 1477. Notwithstanding these sentiments s 9A was repealed in 1989. The explanation given in Bell (ed) *Brookers Human Rights Law* (loose leaf ed, Thomson Reuters) at HR61.01 is that the wording allowed the media to be prosecuted for reporting material leading to the exciting of racial disharmony but exempted those who made the comment if they did so in a private place (such as a marae). However, when the Human Rights Commission Act 1977 was replaced by the Human Rights Act 1993, s 9A was revived as s 61 (s 25 became s 131) but without the reference to "exciting ill-will" or bringing people into "ridicule". The media exemption in s 61(2) was also added.

[120] See also Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Huscroft and Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 171 at 194. Both in this essay and in his later "Freedom of Expression" in Rishworth and others *The New Zealand Bill of Rights* (Oxford, Melbourne, 2003) 308 at 324 the author is highly critical of ss 61 and 131, contending both provisions facilitate the suppression of expression based on conjecture that they may cause others to adopt racist attitudes.

[121] A brief discussion of the relevant provisions of ICERD and of the ICCPR necessarily follow. A more extended examination is not required given that while the interpretation of s 61 must take into account New Zealand's obligations under the two 1966 conventions, it will be seen the outcome of the case will be determined by the application of the "domestic" provisions in ss 4, 5, 6 and 14 of the Bill of Rights.

THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, 1965

[122] Hate speech is addressed in more than one international human rights treaty. The treaties relevant to the present case are ICERD and the ICCPR. As stated by Andrew Butler and Petra Butler in *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [13.20.2]:

> Hate speech, a term which we use as being synonymous with expressions of racial hatred and racism, has a destabilising and divisive effect on society. It encourages discrimination between groups which may lead to violence and a breakdown in public order. Hate speech does not necessarily further hostility between individuals, but rather targets groups or the individual's membership of a racial, ethnic, gender or religious group. The impact hate speech can have on society is recognised in art 20 of the ICCPR, which requires states parties to prohibit "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". [Footnote citations omitted]

The text of Article 4 and Article 5

[123] Article 4 of ICERD has functioned as the principal vehicle within ICERD for combating racial hate speech. The eradication of such speech is, however, not an end pursued at all costs. The "due regard" clause in the *chapeau* to Article 4 explicitly links the article to the Universal Declaration of Human Rights, 1948 (UDHR) and (inter alia) the right to freedom of opinion and expression. Article 4 of ICERD is thereby qualified by Article 19 of the UDHR which provides:

> **Article 19**
>
> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[124] Article 5 of ICERD, in guaranteeing the right to equality before the law without racial discrimination in the enjoyment of certain UDHR rights, also makes specific reference to the right to freedom of opinion and expression.

[125] Articles 4 and 5 provide:

> ***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:
>
> (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.
>
> ***Article 5***
>
> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
>
> (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
>
> (d) Other civil rights, in particular:
>
> (i) The right to freedom of movement and residence within the border of the State;
>
> (ii) The right to leave any country, including one's own, and to return to one's country;
>
> (iii) The right to nationality;
>
> (iv) The right to marriage and choice of spouse;
>
> (v) The right to own property alone as well as in association with others;
>
> (vi) The right to inherit;
>
> (vii) The right to freedom of thought, conscience and religion;
>
> (viii) The right to freedom of opinion and expression;
>
> (ix) The right to freedom of peaceful assembly and association;
>
> (e) Economic, social and cultural rights, in particular:
>
> (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
>
> (ii) The right to form and join trade unions;
>
> (iii) The right to housing;
>
> (iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Criminal and civil measures

[126] As Article 4 is not self-executing States parties are required by its terms to adopt legislation to combat racist hate speech within its scope. But while Article 4 requires certain forms of conduct to be declared offences punishable by law it does not supply detailed guidance as to the forms of conduct which are to be treated as criminal offences. It is clear, however, that the specific speech forms referred to in the article must be directed against any "race or group of persons", being the phrase used both in the *chapeau* and in para (a).

[127] It has been said by Theodor Meron in "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 AJIL 283 at 298 that the drafting and application of laws giving effect to Article 4 will be difficult, since the provision requires criminalisation not only of acts and incitement to acts of racial discrimination and violence, but of the promulgation of racist theories and thought:

> With a few exceptions, traditional concepts of criminal liability require the commission of an act, or the failure to act when the law imposes a duty to do so, or incitement to action. But Article 4 also requires states to impose criminal liability for the dissemination of ideas (freedom of expression) alone.

[128] In its *General Recommendation No. 35* (CERD/C/GC/35, 26 September 2013) (*GR 35*) adopted in 2013 the Committee on the Elimination of Racial Discrimination (CERD) at para 13 provides some assistance in identifying what conduct is to qualify as criminal conduct under Article 4. It recommends that States parties declare and sanction as offences punishable by law the following:

(a) All dissemination of ideas based on racial or ethnic superiority or hatred, by whatever means;

(b) Incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin;

(c) Threats or incitement to violence against persons or groups on the grounds in (b) above;

(d) Expression of insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination on the grounds in (b) above, when it clearly amounts to incitement to hatred or discrimination;

(e) Participation in organizations and activities which promote and incite racial discrimination.

[129] But as observed in Patrick Thornberry *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, Oxford, 2016) at 290, the list of offences which incorporate terms such as "insults", "ridicule", "slander", and "contempt" are not mentioned as such in Article 4. The *General Recommendation* would, therefore, appear to graft elements of subsequent practice and understandings to the skeleton of the Article. The result is to widen the scope of Article 4, unless the refreshed terminology is understood as derived from the text and is not simply innovative.

[130] The Committee itself recommended at *GR 35* para 12 that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond

reasonable doubt, while less serious cases should be addressed by means other than the criminal law, a point perhaps anticipated by the 1977 introduction of s 9A of the Race Relations Act. The Committee explicitly acknowledged that the application of criminal sanctions should be governed by principles of legality, proportionality and necessity:

> 12. The Committee recommends that the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity. [Footnote citation omitted]

[131] As the present case is not concerned with criminal sanctions the question is whether there is anything in Article 4 which requires or permits "civil" sanctions of the kind first enacted as s 9A of the Race Relations Act but now found in s 61 of the HRA. There is an argument that the penal nature of the measures in Article 4(a) and 4(b) does not necessarily exhaust the range of "immediate and positive measures" referred to in the *chapeau*, leaving open the question of what further measures might be required. See Thornberry op cit at 287. If this interpretation is correct and civil sanctions are permitted, it is not clear whether the non-criminal provisions anticipated by Article 4 are limited to the circumstances explicitly referred to in the *chapeau* or whether the proscription of a broader range of racist expression is permissible. Certainly the phrase "racial hatred and discrimination in any form" as used in the *chapeau* is broad. But it is not a phrase employed in s 61.

[132] In our view whether the range of racist expression is limited or broad, the overarching point is that reading (as one must) the *chapeau* and Article 4(a), 4(b) and 4(c) together, it is plain from the text and context that both the criminal and civil conduct caught by this provision is conduct at the serious end of the spectrum, a point to which we return. In addition the subject of the conduct is not an identifiable victim, but any "race or group of persons". The "group" focus of Article 4 is reinforced by the seventh paragraph to the Preamble which sets racial discrimination in the context of international relations and relations among peoples in the same state, underlining its force as an obstacle to peaceful and friendly relations and "harmony". It is the latter word which is used in the marginal note to both s 9A of the Race Relations Act and the present s 61 of the HRA.

[133] These issues will be returned to when discussing the meaning of s 61 of the HRA.

Article 4 and the right to freedom of expression

[134] It is also necessary to address the right to freedom of expression in the context of ICERD and Article 4 in particular.

[135] The "due regard" clause in the *chapeau* acts as a restraint on the obligations in Article 4 as it requires any action under the Article to take into account the rights enumerated in the UDHR. This necessarily includes the right to freedom of opinion and expression.

[136] The question is whether this clause creates a conflict between Article 4 and the right to freedom of expression. Meron in op cit 299 expresses the view that the clause reflects an effort to avoid such a conflict. In our view this must be correct because it can be seen that without the clause the requirement in Article 4(a) that States parties declare an offence punishable by law all dissemination of ideas based on racial superiority or

hatred would be too sweeping and could give rise to difficulties with other human rights, in particular the right to freedom of opinion and expression.

[137] The right to freedom of expression has featured significantly in reservations and declarations regarding ICERD. The following account is given in Thornberry op cit at 279:

> … such reservations effectively subtract from the Article 4 requirement to adopt "immediate and positive measures". Most of the reserving States make reference to the principles of freedom of expression which were not to be jeopardized by Article 4, and repeatedly refer to the Universal Declaration of Human Rights, Articles 19 and 20, Article 5 of the Convention, and Articles 19 and 21 of the ICCPR. The essence of these reservations is that measures to implement Article 4 will only be adopted to the extent they are, in the view of the reserving States, compatible with principles of freedom of expression, assembly, and association.

[138] Addressing the relationship between ICERD and the UDHR, the CERD Committee properly does not assert ascendency of ICERD over the UDHR. Rather it has spoken of the need for the rights to be "integrated". See GC 35 at para 4. This is but recognition of the principle most clearly enunciated in the Vienna Declaration and Programme of Action, 1993 that all human rights are universal, indivisible, interdependent and interrelated. In *GR 35* the point is expressed in the following terms at paras 19 and 45:

> 19. Article 4 requires that measures to eliminate incitement and discrimination must be made with due regard to the principles of the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of the Convention. The phrase due regard implies that, in the creation and application of offences, as well as fulfilling the other requirements of article 4, the principles of the Universal Declaration of Human Rights and the rights in article 5 must be given appropriate weight in decision-making processes. The due regard clause has been interpreted by the Committee to apply to human rights and freedoms as a whole, and not simply to freedom of opinion and expression, which should however be borne in mind as the most pertinent reference principle when calibrating the legitimacy of speech restrictions. [Footnote citation omitted]
>
> …
>
> 45. The relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.

[139] The Committee has expressly recognised the legitimacy of freedom of expression in the context of race even when the ideas expressed are controversial. It accepts any restriction must be measured against the principles of legality, proportionality and necessity. See *GR 35* at paras 25 and 26:

> 25. The Committee considers 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.
>
> 26. In addition to its inclusion in article 5, freedom of opinion and expression is recognized as a fundamental right in a broad range of international instruments, including the Universal Declaration of Human Rights, which affirm that everyone has the right to hold opinions and to seek, receive and impart information and ideas of all kinds through any media and regardless of frontiers. The right to freedom of expression is not unlimited but carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but only if they are provided by law and are necessary for protection of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals. Freedom of expression should not aim at the destruction of the rights and freedoms of others, including the right to equality and non-discrimination. [Footnote citations omitted]

Whether general conclusions can be drawn from ICERD

[140] It is difficult to draw more than general conclusions from ICERD and the non-binding but persuasive recommendations of the Committee. For present purposes it is sufficient to note the following:

> **[140.1]** ICERD requires that when regulating racist hate speech "due regard" be given to the principles embodied in the UDHR which include the right to freedom of expression. The circumstances in which hate speech are prohibited are thereby not all-encompassing; other rights are not automatically terminated. However, ICERD does not expressly articulate how the prohibition on hate speech is to be integrated with other human rights, particularly freedom of expression.
>
> **[140.2]** Criminal sanctions imposed by the law for racist hate speech should be governed by the principles of legality, proportionality and necessity. In principle civil sanctions should be similarly governed.
>
> **[140.3]** Article 4 imposes a mandatory obligation to declare and sanction certain offences punishable by law. The Committee in GC 35 at para 12 recommends such criminalization be reserved for serious cases, to be proven beyond reasonable doubt, while "less serious cases" should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. In our view lowering of the standard of proof to the (civil) balance of probabilities standard does not mean that activity sanctioned by civil provisions is or should thereby be regarded as being at the minor or trivial end of the spectrum. The language of the *chapeau* in Article 4 emphasises the gravity of the targeted conduct in question irrespective whether the sanction is criminal or civil:
>
> > ***Article 4***
> >
> > … propaganda … based on ideas or theories of superiority of one race or group of persons … which attempt to justify or promote racial hatred and discrimination in any form … and undertake to adopt … measures designed to eradicate all incitement to, or acts of, such discrimination …
>
> The balance of the text of Article 4 ie paras (a), (b) and (c) emphasises that in both its civil and criminal contexts Article 4 is confined to serious conduct. In our view, without such limitation the justification for an international treaty preventing and combating racial doctrines and practices would otherwise lose force as would the opprobrium attaching to conduct of the kind identified in Article 4.
>
> **[140.4]** The proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary, not the expression of a zero sum game where any priority given to one necessitates diminution of the other. The rights are mutually supportive.

[141] It is now necessary to address briefly New Zealand's obligations under the ICCPR.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

[142] Because ICERD predates by one year both the ICCPR and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), ICERD necessarily makes reference to the UDHR, not to the two 1966 covenants. This does not weaken ICERD but it is necessary to briefly explain why, in this decision, reference will be made

to the right to freedom of expression as provided for in Article 19 of the ICCPR, rather than Article 19 of the UDHR.

[143] First, the UDHR is a non-binding declaration of the United Nations General Assembly. It is not a treaty. In its time it was seen as an aspirational declaration of the General Assembly of no binding effect. It was intended that it be the precursor to a binding treaty. For reasons which do not need elaboration here, it was not until 1966 that the UDHR was translated into the treaty forms now known as the ICCPR and the ICESCR. See generally Manfred Nowak *Introduction to the International Human Rights Regime* (Martinus Nijhoff, Leiden, 2003) at 73-86. Nor is it necessary in the context of the present case to address the question whether the UDHR is now part of customary international law as to which see Bruno Simma and Philip Alston "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988-1989) 12 Aust.YBIL 82.

[144] Second and most importantly, New Zealand is a party to the ICCPR and the Bill of Rights (on which the defendants rely) explicitly affirms New Zealand's commitment to that treaty. The ICCPR is accordingly the appropriate point of reference.

[145] Article 19 of the ICCPR provides:

> ***Article 19***
>
> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The importance of the right to freedom of expression

[146] There is no shortage of authority as to the importance of the right to freedom of expression. It is a right to which a high value is attached. In Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel, Kehl, 2005) at 438 the author refers to the fact that freedom of opinion and expression is not infrequently termed the core of the ICCPR and the touchstone for all other rights guaranteed therein:

> Freedom of opinion and expression is not infrequently termed the core of the Covenant and the touchstone for all other rights guaranteed therein. It symbolizes more than any other right the interdependence of the two large categories of human rights of the "first generation" that lend the Covenant its name. It unites civil and political rights into a harmonious whole. Behind these two terms are *two different conceptions of freedom*, whose dialectical relationship formed the classic human rights concept of the Enlightenment; the interplay between the collective "liberté-participation" stemming from classical antiquity and the individual "liberté-autonomie" of modern times, between political (democratic) freedom of access "to the State" and liberal freedom "from the State" and also in a broader sense, between democracy and rule of law … Above all, as a (liberal) human right, it lies at the heart of the individual's emancipation during the age of Rationalism from the throes of the religiously legitimated social order of the Middle Ages, whereas as a (democratic) right of the citizen, it symbolizes political empowerment from vassal to responsible citizen. [Emphasis in original. Footnote citations omitted].

[147] The Human Rights Committee in its non-binding but nevertheless relevant *General Comment No. 34 (Article 19: Freedoms of opinion and expression)* (12 September 2011) at paras 2 to 4 describes the principle in similar terms:

> 2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.
>
> 3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.
>
> 4. Among the other articles that contain guarantees for freedom of opinion and/or expression, are articles 18, 17, 25 and 27. The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote. [Footnote citation omitted]

[148] At para 11 the *General Comment* acknowledges 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.

[149] Addressing specifically freedom of expression and the media, the *General Comment* at para 13 acknowledges 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:

> 13. 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 Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output. [Footnote citations omitted]

The permissible restrictions on Article 19

[150] Article 19(3) expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two restrictions are permitted if they are provided by law and if they are "necessary":

> **[150.1]** For respect of the rights or reputations of others.
>
> **[150.2]** For protection of national security or of public order (*ordre public*) or of public health or morals.

[151] In his *UN Covenant on Civil and Political Rights: CCPR Commentary* at 462 to 467 Manfred Nowak also emphasises the need for the principle of proportionality to be strictly observed to prevent the stripping away of the fundamental importance of the right to freedom of expression and the need to prevent the rule being swallowed by the exception:

> … the principle of proportionality must be strictly observed in this area since there is otherwise the danger that freedom of expression could be undermined. Particularly in the political arena, not every attack on the good reputation of others must be sanctioned, since freedom of expression and information (especially freedom of the media) would otherwise be stripped of their fundamental importance for the process of formation of political opinion.
>
> …

> Since *ordre public* may otherwise lead to a complete undermining of freedom of expression and information – or to a reversal of rule and exception – particularly strict requirements must be placed on the necessity (proportionality) of a given statutory restriction. Furthermore, the *minimum requirements* flowing from a common *international standard* for this human right, which is so essential to the maintenance of democracy, may not be set too low. [Emphasis in original]

[152] To the same effect see the *General Comment* at para 22. Not only must any restriction conform to the strict tests of necessity and proportionality, the right itself cannot be put in jeopardy and the relation between right and restriction and between norm and exception must not be reversed. Addressing the principle of proportionality the *General Comment* provides at para 34:

> 34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain. [Footnote citations omitted]

[153] Before attempting to draw conclusions from the ICCPR we intend referring to other relevant material.

The European Convention on Human Rights

[154] Article 10 of the European Convention on Human Rights 1950 (ECHR) is not dissimilar to Article 19 of the UDHR and Article 19 of the ICCPR. The interpretation of the ECHR provision by the European Court of Human Rights is therefore relevant. Article 10 provides:

> **ARTICLE 10**
> **Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[155] The Court has repeatedly observed that the Convention protects not only those opinions that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb. See *Handyside v United Kingdom* (5493/72) ECHR 7 December 1976 at p 18.

[156] The Court has also recognised that it is precisely when ideas shock and offend that freedom of expression is most precious. See *Women on Waves et autres c Portugal* (31276/05) Deuxième Section, ECHR 3 May 2009 at [42].

> 42. La Cour ne sous-estime pas l'importance accordée par l'Etat portugais à la protection de la législation en matière d'interruption de grossesse telle qu'applicable à l'époque ainsi qu'aux principes et valeurs qui la sous-tendent. Elle se doit cependant de souligner encore que c'est

justement lorsqu'on présente des idées qui heurtent, choquent et contestent l'ordre établi que la liberté d'expression est la plus précieuse.[2]

[157] In that case Women on Waves, a Dutch foundation, chartered the ship *Borndiep* and sailed towards Portugal after being invited by two NGOs in that country to campaign in favour of the decriminalisation of abortion. Meetings on the prevention of sexually transmitted diseases, family planning and the decriminalisation of abortion were scheduled to take place on board. The ship was banned from entering Portuguese territorial waters by a ministerial order on the basis of maritime law and Portuguese health laws, and its entry was blocked by a Portuguese warship. The European Court of Human Rights concluded there had been a violation of Article 10 as the interference by the authorities had been disproportionate to the aims pursued. The Court noted:

> 43. Enfin, la Cour estime que les Etats contractants ne sauraient prendre, au nom de la protection de « la sûreté publique », n'importe quelle mesure jugée par eux appropriée (voir *Izmir Savaş Karşıtları Derneği et autres c. Turquie*, no 46257/99, § 36, 2 mars 2006). En l'espèce, l'Etat disposait assurément d'autres moyens pour atteindre les buts légitimes de la défense de l'ordre et de la protection de la santé que le recours à une interdiction totale d'entrée du *Borndiep* dans ses eaux territoriales, qui plus est moyennant l'envoi d'un bâtiment de guerre contre un navire civil. Une mesure aussi radicale produit immanquablement un effet dissuasif non seulement à l'égard des requérantes mais également à l'égard d'autres personnes souhaitant communiquer des informations et des idées contestant l'ordre établi (*Bączkowski et autres c. Pologne*, no 1543/06, § 67, CEDH 2007-...). L'ingérence en question ne répondait donc pas à un « besoin social impérieux » et ne saurait passer pour « nécessaire dans une société démocratique ».[3]

[158] The following summary of European Court of Human Rights jurisprudence is given in *Palomo Sánchez and Others v Spain* (28955/06, 28957/06, 28959/06 and 28964/06) Grand Chamber, ECHR 12 September 2011 at [53].

> 53. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Lindon, Otchakovsky-Laurens and July*, cited above). Moreover, Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 48, *Reports* 1997-I).

[159] The Court has routinely recognised that expression, publication and caricature can be of a satirical nature. See for example *Ukrainian Media Group v Ukraine* (No. 72713/01) Former Second Section, ECHR 12 October 2005. In that case the Court at

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[2] Unofficial translation:
42. The Court does not underestimate the importance accorded by the Portuguese State to the protection of pregnancy termination legislation as it applied at the time and to the principles and values underlying it. It must, however, underline the fact that it is precisely when ideas are presented that clash, shock and challenge the established order that freedom of expression is most precious.

[3] Unofficial translation:
43. Lastly, the Court considers that the Contracting States can not, in the name of the protection of "public safety", take any measure deemed appropriate by them (see *Izmir Savaş Karşıtları Derneği and Others v. Turkey*, No. 46257 / 99, § 36, 2 March 2006). In the present case the State certainly had other means to attain the legitimate aims of the defense of order and health protection than the use of a total ban on the entry of *Borndiep* into its territorial waters by sending a ship of war against a civilian ship. Such a radical measure would inevitably have a deterrent effect not only on the applicants but also on other persons wishing to communicate information and ideas challenging the established order (*Bączkowski and Others v. Poland*, no. 1543 / 06, § 67, ECHR 2007 -...). The interference in question therefore did not meet a "pressing social need" and could not be regarded as "necessary in a democratic society".

[38] confirmed that the press plays an essential role in a democratic society and although it must not overstep certain bounds, particularly in respect of the reputation and rights of others, its duty is nevertheless to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest. The Court made reference to earlier case law which establishes there is little scope under Article 10(2) of the Convention for restrictions on political speech or debates on questions of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. There is no requirement to prove the truth of a value judgment. To require such proof would infringe freedom of opinion itself.

[160] Speaking in the context of the ECHR and of the common law, Lord Steyn in *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 (HL) at 125 and 126 described the right of freedom of expression in a democracy as "the primary right: without it an effective rule of law is not possible". While it must sometimes yield to "other cogent social interests" it is intrinsically important, valued for its own sake:

> Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v. United States* (1919) 250 U.S. 616, 630, per Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country …

[161] This passage was referred to with approval by the majority in *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at [45] together with the passage from *Handyside v United Kingdom* to which reference has already been made.

New Zealand dicta

[162] Statements by New Zealand courts regarding Article 14 of the Bill of Rights and Article 19 of the ICCPR are in accord with the foregoing survey. In *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15] (*Moonen*) it was said that "expression" in s 14 of the Bill of Rights has a very broad meaning; the right "is as wide as human thought and imagination". In *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [114] McGrath J described freedom of expression as a right basic to the New Zealand democratic system. He drew on the decision of the Supreme Court of Canada in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at para [32] in which that court said:

> The core values which free expression promotes include self-fulfillment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

[163] For a recent decision of the Court of Appeal in which the decision in *Ex parte Simms* was cited with approval see *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [64] to [70].

New Zealand Press Council and cartoons

[164] To conclude this general survey of principles which have been applied in the context of freedom of expression we note rulings have been given by the Press Council of New Zealand in respect of cartoons. Under the Press Council *Principle* relating to Columns, Blogs, Opinion and Letters, cartoons are understood to be opinion. While the rulings are not binding, they are nevertheless a useful point of reference. A selection follows in reverse date order.

[164.1] Case No. 2558 (January 2017)

> … With comment and opinion, balance is not essential …
>
> In previous complaints the Press Council has noted that cartoonists may express their own opinions and in doing so may cause disquiet, or offend individuals and groups. The complainant has a right to have concerns, and a different view from the cartoonist. The cartoonist also has a right to express his opinion. The Council must balance the complainant's concerns with the freedom of expression necessary in a democracy.

[164.2] Case No. 2514 (June 2016)

> … cartoons are regarded as opinion and are given wide licence to challenge and confront.
>
> … The Press Council principles give scope to cartoonists to express viewpoints which may, at times, cause offence.

[164.3] Case No. 2446 (June 2015)

> … The Council has strongly supported the right to cartoonists to express their views … Although it [the cartoon] has clearly offended the complainant, the complaint does not have the right not to be offended.

[164.4] Case No. 2421 (February 2015)

> The Council accepts that cartoons can be provocative, thought-provoking, amusing, unkind or indeed offensive. Cartoonists frequently use hyperbole to make the point of the cartoon.

[164.5] Case No. 2406 (November 2014)

> … The Council has consistently upheld the rights of cartoonists to be provocative and noted they should enjoy considerable freedom in their role. That may even extend to causing offence to some people …
>
> Satire often includes elements of caricature, exaggeration and implication and can draw on simplified views of people and organisations … all of the billboards, including the subject of this complaint, are an expression of free speech, within the bounds of robust political debate and opinion in a satirical context.

[164.6] Case No. 2269 (June 2012)

> The Council's principles give scope to cartoonists to express very strong, even unpopular viewpoints.

[165] These rulings are in general accord with the Human Rights Committee *General Comment* and with the jurisprudence of the European Court of Human Rights.

Whether general conclusions can be drawn from the ICCPR

[166] As in the case of ICERD, it is difficult to draw more than general conclusions from the ICCPR and the related material to which reference has been made. Nevertheless it is important to recall that the case law, academic comment and the Human Rights Committee *General Comment No. 34* all emphasise:

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

[167] While the present case has as its focus the hate speech provisions in s 61 of the HRA, the principle at issue (the restrictions which can legitimately be imposed on freedom of expression) is of wider contemporary importance. We refer in particular to the emergence of strategies designed to undermine democratic processes. Such strategies include the relatively new phenomenon of creating and circulating "fake news" (named Word of the Year for 2016 by Macquarie Dictionary) and the Orwellian characterisation of false information as "alternative facts". Last year Oxford Dictionaries chose as Word of the Year 2016 the adjective "post-truth", defined as "relating or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief".

[168] Contemporary forms of attacks on and challenges to the functioning of democratic institutions and the free communication of information and ideas highlight the critical need for a vigilant free press and on occasion the publication of that which may offend, shock or disturb. It is important the press continue to speak truth to power, a function recently affirmed in *Electoral Commission v Watson* [2016] NZCA 512, [2017] 2 NZLR 63 at [58]. It should also be remembered that in the aftermath of the murder of twelve persons (including cartoonists) in the attack on the Paris offices of the magazine *Charlie Hebdo* on 7 January 2015 it was appropriately observed by Salman Rushdie that the art of satire has always been a force for liberty and against tyranny, dishonesty and stupidity. See Roy Greenslade "Stand up for press freedom by wearing a 'Je suis Charlie' T-shirt" *The Guardian*, 8 January 2015.

[169] It is against this brief survey of relevant international human rights law that the New Zealand domestic provisions can now be addressed.

[170] It is not intended to examine earlier Tribunal decisions as none are of material assistance. The decision in *Neal v Sunday News Auckland Newspaper Publications Ltd* [1985] 5 NZAR 234 (EOT) focused principally on what was meant by the term "ridicule" which is no longer in s 61, having been deleted from the Act when s 61 was reintroduced in 1993. In *Proceedings Commissioner v Archer* (1996) 3 HRNZ 123 (CRT) the defendant elected not to appear or to provide evidence. The implications of the right to freedom of expression, though mentioned, were not fully explored, the assumption being that the enactment of s 61 in itself provided the necessary balance. That is not an approach which can be taken in the contemporary setting of human rights in New Zealand. As to *Bissett v Peters* [2004] NZHRRT 33, the proceedings were struck out for

want of jurisdiction after the Human Rights Commission was asked to comment on how, and why, it approached the interpretation of s 61 as it did.

THE ANALYTICAL FRAMEWORK

Introduction

[171] The overarching conclusion to be drawn from ICERD and the ICCPR is that neither the right to be free from hate speech nor the right to freedom of expression is an absolute right. The "due regard" clause in Article 4 of ICERD and the qualifications in the third paragraph of Article 19 of the ICCPR are explicit in this regard. At treaty level, conflict between these rights is to be resolved by the principles of legality, proportionality and necessity.

[172] But when rights conflict in New Zealand domestic law, such conflict must be resolved within the analytical framework prescribed by domestic law. That framework is different to the international one not least because whereas Article 4 of ICERD and Article 19 of the ICCPR contain their own limitation clauses, there is none in s 14 of the Bill of Rights. The limitations are to be found elsewhere, that is in ss 4, 5 and 6 of the Bill of Rights. It is these provisions which, read together, provide the domestic framework of analysis. See further the discussion in Butler and Butler op cit [6.11.20].

Not a conflict of rights case

[173] 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 Pacifika. 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.

The Bill of Rights provisions

[174] Sections 4, 5, 6 and 14 of the Bill of Rights follow:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) decline to apply any provision of the enactment—
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6 Interpretation consistent with Bill of Rights to be preferred

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

14 Freedom of expression

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Selecting the framework: *Moonen* or *Hansen*?

[175] The approach taken by the courts to ss 4, 5 and 6 of the Bill of Rights has not been uniform. This is primarily due to the fact that differing statutory settings call for different frameworks of analysis.

[176] In *Moonen* the question was whether certain publications should be classified as objectionable under the Films, Videos, and Publications Classification Act 1993 (the Classification Act). The term "objectionable" was defined in the Act in such a way as to require an assessment by the decision-maker whether the publication was "likely to be injurious to the public good". A deeming provision operated if the publication promoted or supported certain subject matter. Mr Moonen submitted the definition of "objectionable" violated the freedoms of thought and expression in ss 13 and 14 of the Bill of Rights. In the High Court it was held the Classification Act prevailed over the Bill of Rights. That holding was reversed by the Court of Appeal.

[177] In so ruling the Court at [17] to [19] suggested the following methodology when it is contended the provisions of an Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights:

> **[17]** Although other approaches will probably lead to the same result, those concerned with the necessary analysis and application of ss 4, 5 and 6 of the Bill of Rights may in practice find the following approach helpful when it is said that the provisions of another Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights. After determining the scope of the relevant right or freedom, the first step is to identify the different interpretations of the words of the other Act which are properly open. If only one meaning is properly open that meaning must be adopted. If more than one meaning is available, the second step is to identify the meaning which constitutes the least possible limitation on the right or freedom in question. It is that meaning which s 6 of the Bill of Rights, aided by s 5, requires the Court to adopt. Having adopted the appropriate meaning, the third step is to identify the extent, if any, to which that meaning limits the relevant right or freedom.
>
> **[18]** The fourth step is to 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. In determining whether an abrogation or limitation of a right or freedom can be justified in terms of s 5, it is desirable first to identify the objective which the legislature was endeavouring to achieve by the provision in question. The importance and significance of that objective must then be assessed. The way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut. The means used must also have a rational relationship with the objective, and in achieving the objective there must be as little interference as possible with the right or freedom affected. Furthermore, the limitation involved must be justifiable in the light of the objective. Of necessity value judgments will be involved. In this case it is the value to society of freedom of expression, against the value society places on protecting children and young persons from exploitation for sexual purposes, and on protecting society generally, or sections of it, from being exposed to the various kinds of

> conduct referred to in s 3 of the Act. Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.
>
> **[19]** The fifth and final step which arises after the Court has made the necessary determination under s 5, is for the Court 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.

[178] In *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 the statutory provision in question was s 6(6) of the Misuse of Drugs Act 1975 which provides that those who are in possession of controlled drugs above specified quantities are deemed "until the contrary is proved" to possess the drug for the purpose of supply or sale. Mr Hansen contended this provision was inconsistent with the Bill of Rights right to be presumed innocent until proved guilty. The majority of the Supreme Court held the phrase under challenge was well-established and clearly reversed the burden of proof. This was inconsistent with the presumption of innocence and was not a justified limitation.

[179] The approach set out by Tipping J at [92] is most frequently cited as the appropriate framework for the ss 4, 5 and 6 analysis:

> Step 1. Ascertain Parliament's intended meaning.
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.

[180] However, in *Hansen* there was explicit acknowledgement that the Bill of Rights does not mandate any one method or sequence of application. See Blanchard J at [61] where it is explained that in *Moonen* the language of the Classification Act was ambiguous in contrast to the reverse onus provision in the Misuse of Drugs Act:

> **[61]** It may be said that this approach to ss 4 – 6 is not the one taken in *Moonen*, but in that case there was no meaning that, from the language and history of the Act and the circumstances at the time of its enactment, was obviously the one intended by the legislature. Moreover, it was indicated in *Moonen* itself that other approaches could be open which would probably lead to the same result in the case. The Bill of Rights does not mandate any one method or sequence of application for applying and reconciling ss 4 – 6 in a given case. Those sections are broadly complementary but not necessarily always harmonious. When new situations arise it is necessary to approach them in a way which is best suited in the circumstances to give effect to what appears to be the overall parliamentary intention. This intention must be taken to be a compound one, involving the specific intention to be discerned from the provision in issue read in light of the general overriding directions in ss 4 – 6. In situations like the present, where the specific intention relating to an issue plainly within the contemplation of the legislators is clear, it is particularly important for that intention to be respected. Section 6 can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is genuinely open in light of both its text and its purpose. [Footnote citations omitted]

[181] To the same effect see the explanation given by Tipping J at [93] and [94]:

> **[93]** It is appropriate to say something about the way this approach fits with what was said by the Court of Appeal on this subject in *Moonen v Film and Literature Board of Review*. In that case a rather differently arranged and constructed sequence was suggested as being helpful, albeit the Court recognised that other approaches would probably lead to the same result. The *Moonen* approach was not intended to be mandatory. In any event that sequence was suggested in a case which involved words that were in themselves conceptually elastic and therefore intrinsically capable of having a meaning which impinged more or less on freedom of expression. It was not a case like the present in which the words "until the contrary is proved" are said to be capable of having two conceptually distinct meanings, one involving inconsistency with the presumption of innocence contained in s 25(c) of the Bill of Rights and the other involving no or at least less inconsistency. It is important to note that in view of the way the case was argued for the appellant, the Crown was not required to address argument to the proposition that the presumption of innocence is incapable of justified limitation.
>
> **[94]** There is a difference between a case in which there are two conceptually distinct meanings and a case in which the issue concerns the point at which, on a possible continuum of meaning, the appropriate meaning should be found. In the continuum type of case, there may be good reason to adopt the approach set out in *Moonen*, if only because it will usually be difficult to determine where Parliament intended the meaning to fall on the continuum. The point at which a tenable meaning ceases to limit or least limits the right or freedom may well represent the appropriate point at which to fix the meaning. But in a case like the present, where the two potential meanings are conceptually quite different and distinct and, as I shall shortly indicate, there is only one candidate for Parliament's intended meaning, I consider that the approach earlier outlined is the one which will best serve the relationship between ss 4, 5 and 6.
>
> [Footnote citations omitted]

The *Moonen* approach preferred

[182] We are of the view the inquiry in the present case will be best assisted by the *Moonen* framework as the words in s 61 of the HRA are, to borrow from Tipping J in *Hansen*, "conceptually elastic and therefore intrinsically capable of having a meaning which [impinges] more or less on freedom of expression". His observations at [94] are directly in point. This is not a case in which there are two conceptually distinct meanings to the statutory provision. Rather this case concerns the point at which, on a possible continuum of meaning, the appropriate meaning should be found. The *Moonen* approach will help determine where Parliament intended that meaning to fall on the continuum. The point at which a tenable meaning ceases to limit or least limits the right or freedom may well represent the appropriate point at which to fix the meaning.

[183] We intend applying the following steps:

Step 1. Determine the scope of the relevant right or freedom.

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.

THE ANALYTICAL FRAMEWORK APPLIED

MOONEN STEP 1 – DETERMINING THE SCOPE OF THE RELEVANT RIGHT OR FREEDOM

[184] The relevant right is the s 14 Bill of Rights right to freedom of expression. As noted in Butler and Butler at op cit [13.1.2] to [13.2.1], freedom of expression is a central fundamental political right. It has also given rise to one of the most highly developed fields of human rights jurisprudence in the world and is probably one of the most challenging rights to comment on. The authors therefore found it impossible in the space of a single chapter to detail fully all aspects of the right to freedom of expression and its limitations.

[185] For the same reasons we confine ourselves to determining on the facts of the present case those limits to freedom of the press which apply in the context of hate speech. We will not address s 61(2) as it has no application on the facts of the case.

[186] While the right to freedom of expression is one of the most essential elements in a democratic society we accept the principle that 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. As stated by the European Court of Human Rights in *Vona v Hungary* (35943/10) Second Section, ECHR 9 July 2013 at [57]:

> 57. In the Court's view, the State is also entitled to take preventive measures to protect democracy *vis-à-vis* such non-party entities if a sufficiently imminent prejudice to the rights of others threatens to undermine the fundamental values on the basis of which a democratic society exists and functions. One such value is the coexistence of members of society free from racial segregation, without which a democratic society is inconceivable.

[187] The principle is perhaps best expressed by Article 19(3) of the ICCPR on which s 14 of the Bill of Rights is based. The exercise of the right to freedom of expression:

> … carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[188] It is plainly evident from the earlier analysis of treaty law binding on New Zealand that freedom of expression is not an absolute right under the ICCPR or under ICERD and in New Zealand domestic law it is a right which is subject to a large range of measures, a survey of which is to be found in Butler and Butler op cit Chapter 13. It is

also subject, to one degree or another, to the limitations contained in ss 61 and 131 of the HRA. In that respect the intended purpose of s 61 is to make clear that in certain circumstances hate speech is unlawful. The degree to which the s 14 Bill of Rights right to freedom of expression is legitimately limited by s 61 of the HRA is the issue in these proceedings.

MOONEN STEP 2 – IDENTIFYING THE MEANING OF THE WORDS IN S 61 HRA

Two cumulative requirements

[189] The prohibition in s 61(1) on the publication of written matter or the use of words applies only where a two part test is satisfied. The first requirement is that the written matter or words must be "threatening, abusive, or insulting" and the second requirement is that the written matter or words must be "likely to excite hostility against or bring into contempt any group of persons" in New Zealand on the ground of the colour, race, or ethnic or national origins of that group. That is, the written matter or words must:

> **[189.1]** Be threatening, abusive or insulting; **and**
>
> **[189.2]** Be likely to excite hostility against or bring into contempt any group of persons on one of the specified grounds.

Causation must be established

[190] It is not sufficient that the written matter or words are threatening, abusive or insulting alone. The prohibition operates only if the threatening, abusive or insulting written matter or words are likely to excite hostility against or to bring into contempt any group of persons. The two-part test recognises there is no necessary connection between the use of threatening, abusive or insulting language and the likelihood of exciting hostility against or bringing into contempt the group of persons about whom the language is used. The requirement of a causal link between the two parts of the test underlines the restricted ambit of the provision. It is also insufficient for the threats, abuse or insults to be likely to excite hostility against or bring into contempt one particular individual on one of the prohibited grounds. The racial disharmony provisions in s 61(1) operate only in relation to "any group of persons".

Section 61 – further points

[191] In his essay "Defamation, Racial Disharmony, and Freedom of Expression" in Huscroft and Rishworth *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* 171 Professor Huscroft at 204-207 makes the additional points in relation to s 61:

> **[191.1]** Not all written matter or words likely to cause hostility or contempt are unlawful; only those words which are "threatening", "abusive" or "insulting" may be found to lead to hostility or contempt.
>
> **[191.2]** Although these words seem to suggest a requirement of intention, it is clear that written matter or words may be considered threatening, abusive, or insulting regardless of the intention with which they are spoken. So, for example, there is scope for insulting words to be uttered unintentionally; they may be spoken despite the best of intentions, if the speaker is insensitive to the insult given. But insult can also occur despite the absence of any objective insult. The person who perceives insult might be overly sensitive as in *Neal v Sunday News Auckland Newspaper Publications Ltd* at 240.

[191.3] It is important to focus on the second aspect of the test as the purpose of s 61 is to render words unlawful when they have a negative effect on others – not those who are the subject of the words, or to whom the words are directed. The provision is directed at those who may read or hear the words and subsequently form racist opinions as a result. In other words, the harm at which the legislation is directed is not the expression itself, but the presumed effect of that expression on the minds of third parties.

[191.4] Given the purpose of s 61, the interpretation of the second aspect of the test is likely to determine the interpretation of the first. That is, written matter or words considered likely to cause the harm of exciting hostility or causing contempt are likely to be found to be threatening, abusive or insulting.

[191.5] As to the requirement that the written material or words be considered "likely" to excite hostility or cause contempt, determination of this issue would seem to depend on the extent to which others are racist, or are considered capable of being influenced by racist expression. In addition "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 the racist expression was persuasive.

[191.6] The truth of a matter asserted is irrelevant to whether s 61 has been violated. Regardless of the intention with which they are spoken, or indeed in the absence of any particular intention, the speaking of the truth may result in civil consequences. Human rights legislation can in this way have a chilling effect on freedom of expression in the same way as the law of defamation.

[191.7] Regardless of whether the written material or words are true or false, s 61 may be violated by a person who in good faith attempts to discuss a matter of public concern. See p 207:

> The importance of this problem becomes more apparent when the variety of contexts in which expression may be unlawful is considered: teaching and public political debate are just two examples in this regard. Again, once it is acknowledged that there are good reasons to discuss issues affecting race, the possibility that civil sanctions may attach to expression is difficult to justify.
>
> The force of this objection is implicitly recognised by the partial exemption from liability provided to the media under s 61(2) … But the same rationale which justifies a press exemption should equally require exemptions for others who may wish to discuss controversial matters.

[191.8] The problem with s 61 is that it has the potential to render the discussion of many issues unlawful, well beyond the racist invective at which it is aimed.

[192] This critique is compelling and we are in agreement with Professor Huscroft's conclusion that an overbroad interpretation of s 61(1) could well unreasonably limit freedom of expression. The question is whether such overbroad application is the appropriate interpretation of the provision when assessed in accordance with s 5 of the Interpretation Act 1999 and in accordance with the Bill of Rights. We begin the interpretation exercise by ascertaining whether ICERD is of assistance. Thereafter we turn to the text and purpose of s 61(1) itself.

ICERD in the interpretation exercise

[193] Given the presumption Parliament does not intend to legislate contrary to New Zealand's international obligations *King-Ansell v Police* requires account be taken of the text of ICERD. However, for the reasons earlier explained we have found ICERD of little assistance beyond the general conclusion that the language of the *chapeau* in Article 4 emphasises the degree of gravity the conduct in question must reach irrespective whether the sanction is criminal or civil. The text shows Article 4 is confined to serious conduct. Without such limitation the justification for an international treaty preventing and combating racial doctrines and practices would otherwise lose force as would the opprobrium attaching to conduct of the kind identified in Article 4.

[194] There is also the point that s 61 employs little of the language used in Article 4 of ICERD beyond deployment of the term "disharmony" in the marginal note and the term "group" in s 61(1) itself. In these circumstances we have concluded the language of Article 4, on its own, is of little help. Similarly the only commonality with CERD *General Recommendation No. 35* appears to be the sharing of the terms "contempt" and "insults". We are accordingly left with our earlier conclusion that the text, object and purpose of Article 4 emphasise that in both its civil and criminal contexts Article 4 is confined to conduct of serious kind. This conclusion is of significance when it comes to ascertaining the legislatively intended meaning of words capable of more than one interpretation.

The meaning of "insult" and "contempt"

[195] It is now necessary to turn to the text of s 61(1). It is to be remembered the plaintiff alleges the two cartoons were "insulting and likely to bring into contempt" Māori and Pacifika people. In the absence of a statutory definition of "insulting" and of "bring into contempt" it is helpful to explore their dictionary meaning.

[196] According to the *Oxford English Dictionary* (online) the verb "insult" in its transitive form means:

> To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage.

[197] Other meanings include "to triumph over contemptuously" and "to make an attack or assault".

[198] The noun "contempt" is defined as (inter alia):

> The condition of being contemned or despised; dishonour, disgrace.

[199] An alternative definition is:

> The action of contemning or despising; the holding or treating as of little account, or as vile and worthless; the mental attitude in which a thing is so considered.

[200] While it is accepted the dictionary or "ordinary meaning" of a word is not an infallible guide to how that word is to be understood in a particular statutory setting (see Carter op cit 308 to 309), the dictionary definitions referred to do confirm that the actions sanctioned by s 61(1) are of a serious kind, reinforcing the view that the behaviour targeted by s 61(1) is at the serious end of the continuum of meaning. This accords with our conclusion in respect of Article 4 of ICERD.

[201] Additional assistance is to be gained from the decision of the Supreme Court of Canada in *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11, [2013] 1 SCR 467 (*Whatcott*) in which consideration was given to the hate speech provisions in the Saskatchewan Human Rights Code, s 14 which relevantly provided that no person publish or display any representation:

> … that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

[202] The Supreme Court at [40] and [57] held that the term "hatred" or "hatred or contempt" as used in the Code and in the Canadian Human Rights Act 1976-77 was to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.

[203] While the descriptions of the prohibited conduct in the Canadian and New Zealand provisions are not the same, we believe our approach to the interpretation of s 61 of the HRA is supported by the fact that the Supreme Court of Canada has also held the prohibition applies to conduct at the upper end of the scale.

[204] Applying the term "insulting" as understood above, we conclude both cartoons were insulting. The plaintiff accordingly satisfies the first limb of s 61(1)(a). The real issue is whether the second limb is also satisfied. This, in turn, raises the question of who is the relevant decision-maker.

An objective test

[205] The *Whatcott* decision is also of significance to the question whether the s 61(1) phrase "likely to excite hostility against or bring into contempt any group of persons" prescribes an objective test or a test governed by the subjective perception or feelings of the publisher of the words or of the persons in the group affected. The Supreme Court formulated an objective "reasonable person" test. That is, a reasonable person aware of the context and circumstances:

> [35] In the present context, the courts have confirmed that when applying a prohibition based on hatred, the outcome does not depend on the subjective views of the publisher or of the victim of the alleged hate publication, but rather on an objective application of the test: see *Owens (C.A.)*, at paras. 58-59; *Kane v. Alberta Report*, 2001 ABQB 570 (CanLII), 291 A.R. 71, at para. 125; *Elmasry v. Rogers Publishing Ltd. (No. 4)*, 2008 BCHRT 378 (CanLII), 64 C.H.R.R. D/509, at paras. 79-80; and *Whatcott (C.A.)*, at para. 55. The courts pose the question of whether, "when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred": *Owens (C.A.)*, at para. 60. In the course of this assessment, a judge or adjudicator is expected to put his or her personal views aside and to base the determination on what he or she perceives to be the rational views of an informed member of society, viewing the matter realistically and practically.
>
> …
>
> [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.
>
> …

> [56] First, courts are directed to apply the hate speech prohibitions *objectively*. In my view, the reference in *Taylor* to "unusually strong and deep-felt emotions" (at p. 928) should not be interpreted as imposing a subjective test or limiting the analysis to the intensity with which the author of the expression feels the emotion. The question courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.
>
> …
>
> [58] Third, tribunals must focus their analysis on the effect of the expression at issue. Is the expression likely to expose the targeted person or group to hatred by others? The repugnancy of the ideas being expressed is not, in itself, sufficient to justify restricting the expression. The prohibition of hate speech is not designed to censor ideas or to compel anyone to think "correctly". Similarly, it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

[206] Against this background we address now the test to be applied in New Zealand and note first the purpose of s 61 of the HRA. That purpose is not to suppress the ideas expressed, but rather, the likely effect of the expression on others outside the group of persons in question. The second part of the statutory test underlines that there is no necessary connection between the use of threatening, abusive or insulting language and the exciting of hostility against or the bringing into contempt of the group about whom the written matter or words are published or spoken. The likelihood of exciting hostility or bringing into contempt must be assessed and determined on the particular facts of each case.

[207] As stated in *Whatcott* at [51] and [52], the distinction between the expression of repugnant ideas and expression which exposes groups to hatred [in the New Zealand context hostility or contempt] is crucial to understanding the proper application of such hate speech prohibitions:

> [51] The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper 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.

[208] The Supreme Court of Canada went on to state at [52] that an assessment whether expression exposes a protected group to hatred must therefore include an evaluation of the likely effects of the expression on its audience. The same observation is true of s 61(1) of the HRA where the relevant audience is persons outside the subject "group of persons". The issue for determination is who is to make that evaluation.

[209] As presently worded, s 61(1) of the HRA does not allow the evaluation to be made by the group which is the target of the threatening, abusive or insulting written matter or words. Contrast the very different language used in s 18C(1) of the Racial Discrimination Act 1975 (Cth). The commentary by Ronald Sackville in "Anti-Semitism, hate speech and Pt IIA of the Racial Discrimination Act" (2016) 90 ALJ 631 helpfully highlights the difficulties inherent in a test framed in terms which make the subjective reaction of the targeted group determinative of the characterisation of the publication or words as "hate speech". The subjective element in the Australian provision has been severely criticised and it is understood that in March 2017 the Federal government proposed amending the Act by substituting a "reasonable person" test. See "Turnbull locks in 18C race-hate law reform" *The Australian* (online ed, Sydney, 22 March 2017). However, the proposed change failed in the Federal Senate. See Katharine Murphy

"Senate blocks government's changes to section 18C of Racial Discrimination Act" *The Guardian* (online ed, 30 March 2017).

[210] In decisive language the New Zealand section unambiguously shifts the focus away from the targeted group to the external audience. That is, to those who may read or hear the material or words and subsequently become hostile towards the targeted group or hold them in contempt. The subjective perceptions of the group (and its members) are irrelevant. Indeed members of the group are not even required to be aware the written matter or words have been published, distributed or used about the group.

The objective test formulated

[211] In our view the language of s 61(1) requires that the assessment of the likely impact of the written matter or words is necessarily an objective one. That assessment is to be made by the decision-maker. The proper test is that formulated in *Whatcott* at [35], [56] and [59] suitably adapted to the specific New Zealand context. That is, the question to be asked in relation to s 61(1) is whether a reasonable person, aware of the context and circumstances surrounding the publication or distribution of the written matter or the use of words which are threatening, abusive or insulting would conclude that such matter or words are likely to excite hostility against or bring into contempt any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group.

The meaning of "likely"

[212] The "reasonable person" test requires such person to properly direct him or herself as to the meaning of the term "likely". As to this, there is a well established line of New Zealand authority which holds that the term is usually accepted as connoting a real and substantial risk that the stated consequence will happen. See for example *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 and *R v Atkins* [2000] 2 NZLR 46 (CA) at [15] and [16]. We see no reason why the same meaning should not be given in the context of s 61 bearing in mind the balance of the terms used in the section indicate conduct of a serious kind.

Factors relevant to the objective assessment

[213] Applying the reasonable person test as formulated we find such person would take into account the following as "context and circumstances":

> **[213.1]** Child poverty in New Zealand, the overrepresentation of Māori and Pacifika children in child poverty statistics and the political context in which the food in schools programme was debated and came to be the subject of the cartoons.
>
> **[213.2]** The terms relied on by the plaintiff ie "insulting" and "bring into contempt" are to be properly understood as having a meaning which is at the upper end of the continuum of meaning, thereby avoiding an overbroad capture of types of behaviour which s 61 seeks to prohibit.
>
> **[213.3]** The cartoons were crude and some outside the subject "group of persons" would find them insulting by reason of their stereotyped depiction of Māori and Pacifika as welfare bludgers, poor parents and preoccupied with smoking, drinking and gambling.

[213.4] Nevertheless, such satirical depiction by cartoon on the editorial or opinion page of the two newspapers was in the context of a contentious social and political issue of the day (the merits of a food in schools programme) and the underlying causes of chronic child poverty in New Zealand.

[213.5] The question is not whether Māori or Pacifika (who on the present facts constitute the subject group referred to by s 61(1)) felt threatened, abused or insulted or brought into contempt, but whether the cartoons were insulting to the degree they were likely to excite hostility against or bring into contempt Māori or Pacifika in the eyes of persons outside those two racial or ethnic groups.

[213.6] As the test posed by s 61(1) is fundamentally an objective one the views expressed by the plaintiff's witnesses as to the subjective effect of the cartoons on Māori and Pacifika is largely irrelevant as is the evidence of the defendants relating to the intentions of the two editorial teams. More relevant was the evidence of the effects of racial stereotyping spoken of by Dr Pihama and what Dr Nairn described as the dominant negative constructions of Māori and Pacifika. In our view it is conceivable such constructions (and stereotyping) could, on a particular set of facts, affect the likelihood of hostility being excited against Māori or Pacifika or of their being brought into contempt. However, in the context in which the two cartoons in question were published we are of the view a reasonable person would conclude such constructions had little or no impact on the risks to which s 61(1) is directed.

[213.7] In *Whatcott* at [53] the Supreme Court of Canada stated that in the normal course of events, expression that targets a protected group in the context of satire would not likely constitute hate speech.

The objective assessment – conclusions

[214] In the circumstances the reasonable person would conclude that insulting and offensive though the cartoons may have been to some (both outside and inside "the group"), there was no real and substantial risk that they would excite hostility against or bring Māori and Pacifika into contempt.

[215] It must again be emphasised s 61 makes it clear that threatening, abusing or insulting a protected group of persons is not a violation of the racial disharmony provisions. It is only when such conduct is also likely to excite hostility against the protected group or likely to bring the group into contempt that the written material or words become unlawful. As earlier stressed, s 61(1) has as its focus the **likely effects** of the written matter published or words used; it does not prohibit the communication of repugnant ideas as such. Or as articulated in *Whatcott* at [51], the distinction is between the expression of repugnant ideas and expression which exposes groups to hatred. This distinction is crucial to an understanding of the proper application of the hate speech prohibitions in the HRA. If Parliament had intended to lower the threshold to the operation of s 61 it could have easily removed the second limb of s 61(1), namely the requirement of the likelihood that others be excited to hostility or that the protected group be brought into contempt.

[216] To repeat, s 61(1) of the HRA requires the written matter or words to:

[216.1] Be threatening, abusive or insulting; **and**

[216.2] Be likely to excite hostility against or bring into contempt any group of persons on one of the specified grounds.

While we have held the cartoons were insulting, we have further held the plaintiff has not established they were likely to excite hostility against or bring into contempt Māori or Pacifika.

Conclusion on *Moonen* Step 2

[217] It follows the plaintiff's case must be dismissed on the grounds the complaint in the statement of claim (that the two cartoons were "insulting and likely to bring into contempt" Māori and Pacifika people) has not been established. Viewed objectively, the "likely" threshold has not, by a substantial margin, been established.

[218] Although unnecessary to do so, out of an abundance of caution we now address *Moonen* Step 3.

MOONEN STEP 3 – THE SS 5 AND 6 ANALYSIS

[219] If, contrary to our earlier conclusion, s 61(1) of the HRA is capable of being interpreted as setting the low threshold contended for by the plaintiff, the third step mandated by *Moonen* is to identify whether there is an alternative interpretation which constitutes the least possible limitation on the right or freedom in question. It is that meaning s 6 of the Bill of Rights, aided by s 5, requires the Tribunal to adopt. See further *Moonen* at [23] and [27].

[220] We believe it is clear that the interpretation of s 61 which we have adopted in the context of *Moonen* Step 2 is the meaning which is, in terms of s 6 of the Bill of Rights, consistent with the right to freedom of expression in s 14. By virtue of that interpretation the threshold at which s 61(1) engages is kept sufficiently high to avoid an over-broad and over-inclusive reading of the provision. It protects written matter or words from being characterised as hate speech simply because it is threatening, abusive or insulting.

[221] The reading of s 61 claimed by the plaintiff would mean that if the written material is threatening, abusive or insulting, the protected group is thereby at risk of facing hostility or of being brought into contempt. In our view this interpretation is unsustainable for the following reasons:

[221.1] It reads out of s 61 the causation requirement stipulated by the phrase "likely to excite hostility against" or "likely to bring into contempt". It is not possible to contend that because the written material was insulting the protected group was therefore brought into contempt or faces hostility.

[221.2] No meaningful recognition is given to the importance of freedom of expression notwithstanding such importance is explicitly recognised by 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.

[221.3] The plaintiff's reading would strip away the fundamental importance of the right to freedom of expression. The relation between right and restriction and between norm and exception would be reversed. As stated by the European Court of Human Rights in *Palomo Sánchez and Others v Spain* at [53], while the right to freedom of expression is subject to exceptions, those exceptions must be construed strictly.

[221.4] The insertion of the "press" exemption in s 61(2) emphasises that Parliament intended that s 61 be interpreted and applied in a manner sensitive to the importance of freedom of the press.

[221.5] The plaintiff's interpretation would mean that only inoffensive written matter or words could be published about Māori and Pacifika (or about any group defined by race) and that no group of persons defined by their colour, race or ethnic or national origins could be insulted. This is an interpretation which reverses a long line of settled authority on the importance of freedom of expression. As stated in *Handyside v United Kingdom* at p 18, freedom of expression protects not only those opinions that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb. Or, as observed in *Women on Waves*, it is precisely when ideas shock and offend that freedom of expression is most precious.

[221.6] In the present case the cartoons were unquestionably about a subject of public interest; they were also provocative. That Māori and Pacifika were offended and insulted is not the point. Section 61 is directed not to the effect on them, but on the effect on non-Māori and non-Pacifika and the likelihood of their being excited to hostility against Māori and Pacifika or their holding Māori and Pacifika in contempt. In our view the cartoons were insulting but fell well short of bringing Māori and Pacifika into contempt.

[221.7] In a free and democratic society it is essential that the "space" within which issues (including race) can be raised and debated must be kept as broad as possible. The interests of pluralism, tolerance and broadmindedness demand nothing less. It is not in the interests of society that publication of written matter and words be confined to that which will not offend, shock or disturb.

[221.8] As a matter of principle instances in which values are deemed to predominate over the right to freedom of expression must be limited, and legislation prima facie infringing upon expressive conduct or speech must be interpreted narrowly and afforded a contextual analysis. See Butler and Butler op cit at [13.7.6].

[222] In these circumstances we are of the view that the interpretation of s 61 contended for by the plaintiff is a strained interpretation which offends basic tenets of statutory

interpretation. By comparison the Tribunal's interpretation is sound in principle and based on the text and purpose of s 61. It is also the interpretation which is consistent with the right to freedom of expression. In these circumstances s 6 of the Bill of Rights requires that it is the Tribunal's interpretation which is to be preferred.

Freedom of expression – comparisons from the criminal law

[223] Such interpretation is consistent with that taken by the Supreme Court of New Zealand in recent times where freedom of expression has been considered in the context of the criminal law. That court has emphasised the need for tolerance. A tendency to annoy others, even seriously, is insufficient to justify the intervention of the criminal law.

[224] In *Brooker v Police* Mr Brooker successfully appealed against conviction for disorderly conduct following a protest outside the private home of a police constable. Elias CJ at [12] made reference to the fact that unpopular expression will often be unsettling and annoying to those who do not agree with it and quoted with approval the statement that a function of free speech is to invite dispute:

> **[12]** Secondly, I am of the view that the Courts below were wrong to accept the *Melser* test for disorderly behaviour of seriousness measured against the tendency of behaviour to cause annoyance to those present. Unpopular expression will often be unsettling and annoying to those who do not agree with it. As Douglas J pointed out in speaking of the First Amendment to the United States Constitution, "a function of free speech under our system of government is to invite dispute":
>
> > "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest."
>
> A tendency to annoy others, even seriously, is insufficient to constitute the disruption to public order which may make restrictions upon freedom of expression necessary.
>
> [Footnote citations omitted]

[225] In the more recent decision of *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 (burning of New Zealand flags in the context of an ANZAC Day Dawn Parade held at the Cenotaph situated in central Wellington) Elias CJ made two further observations of relevance to the present case:

> **[225.1]** The more vague the purpose and meaning of an enactment, the less protection for human rights. That is why the interpretive responsibility is the first responsibility. See [16].
>
> **[225.2]** Tolerance of the expressive behaviour of others is expected of other members of the public resorting to public space because of the value our society places on freedom of expression. See [40].

[226] Other members of the Court also emphasised the need for tolerance in the face of the exercise of the right to freedom of expression. Blanchard J at [64] stated:

> … A reasonable person, in a context involving freedom of expression or another right guaranteed by the New Zealand Bill of Rights Act, must surely be a person who is sensitive to such values and displays tolerance for the rights of the person whose behaviour is in question. In other words, the hypothetical reasonable person (of the kind affected) is one who takes a

> balanced, rights-sensitive view, conscious of the requirements of s 5 of that Act, and therefore is not unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage, particularly when confronted by a protester. [Footnote citations omitted]

[227] Tipping J at [70] stated that those affected by the behaviour alleged to be "offensive":

> … must be prepared to tolerate some degree of offence on account of the rights and freedoms being exercised by those responsible for the behaviour.

[228] McGrath J at [106] stated that in order to be a limit on freedom of expression compliant with s 5 of the Bill of Rights, the behaviour "must be confined to sufficiently serious and reprehensible interferences with the rights of others".

[229] The decisions in *Hopkinson v Police* [2004] 3 NZLR 704 at [76] and *Schubert v Wanganui District Council* [2011] NZAR 233 add little to the foregoing and will not be separately addressed.

[230] While these cases were decided in the context of the criminal law, the wider principle remains. Freedom of expression does not trump everything but it is necessary for democratic societies to tolerate expressive behaviour of others even if such expression is unpopular, unsettling and annoying.

***Moonen*: Overall conclusions**

[231] From the foregoing we conclude:

> **[231.1]** On the facts, while some may have been offended, insulted or even angered, the cartoons were not likely to excite hostility against or bring into contempt any group of persons in New Zealand on the ground of their colour, race, or ethnic or national origins.
>
> **[231.2]** In terms of s 5 of the Bill of Rights the limits to the right to freedom of expression in s 14 of that Act contended for by the plaintiff cannot be demonstrably justified in a free and democratic society.
>
> **[231.3]** In terms of s 6 of the Bill of Rights, s 61 of the HRA can be given a meaning that is consistent with the right to freedom of expression in s 14 of the Bill of Rights. It follows that that meaning must be preferred to any other meaning.

[232] In view of these findings we do not find it necessary to address the balance of the *Moonen* steps.

CONCLUSION

[233] For the reasons given it was not unlawful for the defendants to publish the two cartoons which are the subject of the present proceedings. The provisions of s 61 of the Human Rights Act 1993 were not breached. This is because the cartoons were not likely to excite hostility against or bring into contempt Māori and Pacifika.

[234] It would be wrong to characterise this decision as a ruling that there is a "right to insult". There is no such right. Our holding is that Parliament has framed the s 61 racial disharmony provision in appropriately narrow terms. It prohibits the publication of written matter or the use of words only if two preconditions are satisfied. The written matter or words must:

[234.1] Be threatening, abusive or insulting; **and**

[234.2] Be likely to excite hostility against or bring into contempt any group of persons on the ground of their colour, race, or ethnic or national origins of that group of persons.

[235] The requirements are cumulative and the test is an objective one. The question to be asked is whether a reasonable person, aware of the context and circumstances surrounding the publication or distribution of the written matter or the use of the words which are threatening, abusive or insulting would conclude that such matter or words are likely to excite hostility against or bring into contempt any group of persons in New Zealand on the ground of their colour, race, or ethnic or national origins. If this objective test is not satisfied the written matter or words do not contravene s 61(1) of the HRA.

[236] Applying the reasonable person test to the present case we have, for the reasons set out in our decision, concluded that while the cartoons were insulting they were not likely to excite hostility against or to bring into contempt Māori and Pacifika on the ground of their colour, race, or ethnic or national origins.

[237] The second essential precondition to the operation of s 61(1) of the Human Rights Act not having been established the plaintiff's claim must be dismissed.

Costs

[238] The subject of costs was referred to briefly on the last day of the hearing. See the Transcript at pp 386 to 390. Nevertheless costs are reserved. Unless the parties have come to an arrangement on costs the following timetable is to apply:

[238.1] The defendants are to file their submissions within 14 days after the date of this decision. The submissions for the plaintiff are to be filed within the 14 days which follow with the submissions for the Human Rights Commission to be filed within 14 days thereafter. The defendants are to have a right of reply within 7 days after that.

[238.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[238.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....	.....	.....
Mr RPG Haines QC	**Ms GJ Goodwin**	**Mr MJM Keefe JP**
Chairperson	**Member**	**Member**

Appendix A

The Marlborough Express 29 May 2013

Appendix B

The Press 30 May 2013