maxim institute
POLICY PAPER Law and Human Rights | June 2004

Hate Speech:
Balancing expresssion, religion, discrimination and harm

I INTRODUCTION

In 1869, John Stuart Mill considered that the question of a legislature or executive prescribing what opinions were and were not allowed to be spoken had been so "triumphantly enforced" that as a writer, he need not pay any attention to the topic:[1]

> It is not in constitutional countries, to be apprehended, that the government, whether completely responsible to the people or not, will attempt to control the expression of opinion, except when in doing so it makes itself the organ of the general intolerance of the public.

Mill would be disappointed to know that many constitutional and other western countries are debating the limits of expression with renewed enthusiasm and many writers are indeed paying close attention to the topic.

New Zealand is such a country. On 5 August 2004, the New Zealand Government Administration Committee ("**Committee**") announced that it was to hold an inquiry into "hate speech". In announcing the inquiry, Justice Minister Phil Goff stated that "Parliament's responsibility is to balance freedom of speech as a fundamental right in a democratic society with the protection of individuals from direct harm..."[2]

Whilst his formulation of the competing rights can be debated, it is clear that the legislature will be required to balance a number of competing rights and freedoms in its consideration of "hate speech" legislation.

This policy paper identifies those competing rights as being: freedom of expression; freedom of religion and the right to manifest that religion; freedom from discrimination; and the desire (some would say the right) to be free from differing forms of harm.

It will begin by outlining the background to the government inquiry, which has its genesis in censorship law. It then follows the terms of the Committee's inquiry and addresses the legislative framework in New Zealand (which already restricts speech), the application of the New Zealand Bill of Rights Act 1990 and provides a brief overview of "hate speech" laws in the international community.

This policy paper is necessarily broad in its scope, so as to highlight the number and range of issues involved and provide an accurate background to the issue. Ultimately this paper aims to determine whether legislative intervention is required in the area of "hate speech" by focusing on the rights and freedoms that compete for priority.

The paper finds that restricting the fundamental and protected right to manifest religion and have free expression must be balanced with a similarly fundamental and important right and concludes that there is no such fundamental right in law or policy that outweighs these rights. The paper concludes that laws against "hate speech" are unwarranted in New Zealand's social and legal context.

II BACKGROUND TO THE GOVERNMENT INQUIRY

A Brief Overview of Framework and Key Developments

1. Censorship framework in New Zealand

In 1993, the Films, Videos and Publications Classification Act 1993 ("**1993 Act**") was passed to create a single regime for the classification and censorship of films, videos and other publications in New Zealand.[3] Prior to this, censorship in New Zealand had been covered by three separate Acts: the 1993 Act, the Video Recordings Act 1987 and the Indecent Publications Act 1963 ("**1963 Act**").

The key section of the 1993 Act for the purposes of this paper is the definition of "objectionable" which is set out in s3. Section 3(1) sets out that a publication is "objectionable" if it "describes, depicts, expresses, or otherwise deals with matters *such as* sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is

likely to be injurious to the public good" [emphasis added]. The words "such as" replaced the words "including" in the definition of "objectionable" in the 1963 Act. Section 3(2) states that a publication "shall be deemed to be objectionable for the purposes of this Act, if the publication promotes, or supports, or tends to promote or support" any one of the factors listed in s 3(2)(a)-(f), for example the exploitation of children, torture and bestiality.

Section 3(3) sets out that in determining whether a publication is objectionable (other than under s3(2)), particular weight shall be given to various factors. These factors include "the extent and degree to which, and the manner in which, the publication represents... that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class being a characteristic that is a prohibited ground of discrimination specified in s 21(1) of the Human Rights Act 1993."

The 1993 Act establishes a number of important bodies involved in the classification process. The Film and Labelling Body ("**Labelling Body**") is the official labelling body and all films and videos must be labelled by the Labelling Body before they are supplied or shown to the public.

The Office of Film and Literature Classification ("**Classification Office**") can classify publications that are submitted to it by a number of authorised bodies[4] or the Classification Office can initiate a classification itself. A decision of the Classification Office can be reviewed by the Film and Literature Board of Review ("**Board**") and decisions of the Board can be appealed to the High Court on a point of law and then to the Court of Appeal on a point of law.

2. Important developments

In November 1999, the Court of Appeal delivered its decision in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 ("**Moonen**"). The case concerned the classification of a book and various photographs as objectionable by the Board. The books and photographs contained images of naked children and described stories of sexual activity between young boys (under 16) and men.

The Court held that in considering the interpretation of the words in the 1993 Act, the Court must take an approach consistent with the New Zealand Bill of Rights Act 1990 ("**Bill of Rights**"). Therefore the words "promotes or supports" in s 3(2) must be interpreted in such a way as to impinge as little as possible on the freedom of expression. The Court held that the Board had not given proper consideration to the provisions of the Bill of Rights in interpreting the 1993 Act and the Board was directed to reconsider the publications. This occurred and the publications were still deemed "objectionable".

In August 2000, the Court of Appeal's decision in *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 ("**Living Word**") further defined the extent of censorship law in New Zealand.

The case concerned two videos which discussed homosexuality in the United States. One video opposed the addition of sexual orientation to the list of prohibited grounds of discrimination in the federal civil rights code. The other video discussed the spread of HIV and AIDS and presented an opinion that one of the causes is homosexuality.

The videos were initially rated by the Labelling Body as "suitable for mature audiences 16 years of age and over". The Human Rights Action Group Inc, submitted the videos to the Classification Office who then classified them as objectionable, except if restricted to people over the age of 18.

The videos were referred to the Board for a review of the decision of the Classification Office on application by the Human Rights Action Group who sought a complete ban of the videos. The Board subsequently classified both videos as objectionable and it became an offence under the Act to show or even possess the videos. The decision of the Board was appealed to the High Court on points of law and then to the Court of Appeal on points of law.

The Court of Appeal considered two main issues. Firstly the Court considered whether material other than that which described or depicted "matters such as sex, horror, crime, cruelty or violence" could be classified as objectionable, if availability of the publication is likely to be injurious to the public good and/or fell within one of the descriptions of material set out in s3(3). This issue centred on the words "such as" in s 3(1) of the Act and the meaning of those words. The High Court had held that because of the generality of approach indicated by the words "such as" in s3(1), a publication

could be objectionable even it referred to none of the five specific items.

The Court of Appeal disagreed and held that for material to be "objectionable" it must come within one of the five gateways set out in s 3(1) of the 1993 Act (sex, horror, crime, cruelty or violence) or be an activity closely related to those matters. If material did not come within these five gateways, then it was not relevant to consider whether the material was likely to be injurious to the public good, or whether the material was within one of the categories in s3(3)(a) – (f). In reaching this conclusion, the Court held that the words "such as" in the definition of "objectionable" s 3(1) were "both expanding and limiting" and noted that "such as" is narrower than "includes" which was used in the 1963 in the definition of 'indecent'. To qualify then, publications must "fairly be described as dealing with matters of the kinds listed".[5]

At paragraph 30 of its decision, the Court held that:[6]

> ...the presence of the subject-matter requirement of s3(1) cannot be ignored or bypassed or added to by invoking s 3(3)(e). The subject-matter provision is obviously designed as imposing an immediate limitation on the reach of the censorship laws. Parliament could never have intended that a simple test of "injurious of the public good" could be used to ban discussion of any subject. [Emphasis added]

The Court subsequently found that the High Court had erred in its interpretation of s 3(1). However, because the videos did deal with sexual practices and may come within the expression "matters such as sex" the Court continued to consider the second issue.

The second issue was whether the High Court had correctly applied the Bill of Rights to the 1993 Act, in particular whether the High Court was right in considering s19 of the Bill of Rights (dealing with the right to be free from discrimination) as well as s 14 (freedom of expression).

The Court of Appeal held that s 19 of the Bill of Rights did not apply directly in this instance (although it may have if s3(3) had been in issue). The Court of Appeal found that the expression of the subject matter in s 3(1) points to activity rather than expression of opinion or attitude and that to construe likely injury to the public good in s 3(1) in terms of activity would provide a reasonable limit on freedom of expression that can be demonstrably justified in a free and democratic society.[7]

The Court of Appeal held that the High Court (and the Board) had erred in law regarding the application of the Bill of Rights Act.

The result was that the videos were remitted to the Board to be reconsidered having regard to the observations made in the judgement. After reconsidering the videos, the Board held that the videos were not able to be censored for the reasons give by the Court of Appeal. This decision may have been given reluctantly on the part of the Board as it took nine months to release it and then simultaneously releasing a statement calling for law changes to ensure that "hate propaganda" such as this could be banned.[8]

There appeared to be confusion about the practical effect of the *Moonen* decision on the ability to censor certain material, and this led to a Private Members Bill being introduced by the National Party MP, Anne Tolley. The Films, Videos, and Publications Classifications (Prohibition of Child Pornography) Amendment Bill (**"Prohibition of Child Pornography Bill"**) aimed to address the issues raised in the *Moonen* decision to ensure that child pornography was less freely available.

The Government Administration Committee (**"Committee"**) considered the issue of amending the 1993 Act to deem child pornography an exception to the freedom of expression under the Bill of Rights. The Prohibition of Child Pornography Bill passed its first reading and the Committee sought public submissions on it. The Committee received one submission that argued the jurisdictional gateway found in s 3(1) of the 1993 Act should be extended to include "hate speech".[9] It is questionable whether the issue of "hate speech" had any relevance to a Bill on child pornography but surprisingly the submission still received attention from the Committee.

The Prohibition of Child Pornography Bill had its second reading on 14 March 2001 and was rejected by Parliament (on the basis of the Attorney-General's report on consistency with the Bill of Rights and the perceived lack of effectiveness of the Bill).

The next day, the Committee resolved to conduct a general inquiry into the operation of the 1993 Act and related issues and set broad terms of reference. The Committee's terms of reference included a consideration of the definition of "objectionable" under the 1993 Act, whether s 3(3)(e) should be part

of the jurisdictional gateway and whether to include a "hate speech" provision in the Act. The Committee sought public submissions and received 37 submissions plus advice, reports and background information from government departments.

In July 2002 there was a change of government and change of Committee members. In September 2002, the new Committee decided to reinstate the inquiry into the operation of the 1993 Act and received a further three submissions (although it did not seek further submissions from the public).

In March 2003 the Committee presented its report on the inquiry to the House of Representatives.

B Inquiry on the Operation of the Films, Videos and Publications Classification Act 1993

1. Background and purpose

The Committee inquired into whether the issues raised by the *Living Word* decision and the *Moonen* decision could be accommodated by s 3 of the Act. In addition, the scope of inquiry included whether the Act "still has the capacity to carry out the legislative intent of Parliament to censor and classify publications likely to be injurious to the public good, and where necessary ban any objectionable publication."[10]

There were other aspects of the inquiry but these are the relevant aspects for the purposes of a discussion on hate speech.[11]

2. Response to *Living Word Distributors Ltd v Human Rights Action Group*

The Committee considered the *Living Word* decision under the heading "legal challenges to the operation of the Act" and noted that the decision raised several issues that challenged the effective operation of the Act. In particular, the Committee did not accept that the Court's interpretation of "matters to do with sex" as excluding matters of sexual orientation, transmission of disease by sex or hate speech related to them, was the original intent of the legislation.

According to the Committee, the Act, interpreted in accordance with the *Living Word* decision, no longer provided a "contemporary focus on the types of representations of most concern to the public". In addition, the Committee was concerned that s 3(1) of the 1993 Act could not be used to censor publications "on the basis that they contain discriminatory or derogatory opinions about particular groups within the community...regardless of whether such publications may cause harm." [12]

In light of the concerns about harm, injury to the public good and lack of contemporary focus, the Committee recommend that the definition of "objectionable" in s 3 be amended.

The amended definition would include any publication that "describes, depicts, expresses, or otherwise deals with matters in such a manner that the availability of the publication is likely to be injurious to the public good".

This amendment would have focused on the element of being "injurious to the public good" rather than defined categories and aimed to capture matters "other than explicit activities of a sexual nature, such as nudity, offensive language, invasion of privacy, mental illness, suicide, sexual orientation and the sexual transmission of HIV, contained in publications".[13]

The Committee also included an alternative amendment should the first recommendation be unacceptable to Parliament. The alternative was to replace the words "such as" with "including" in s 3(1) which establishes the "jurisdictional gateway". This would give Courts the express ability and perhaps even requirement to treat the list of five issues listed in s 3(1) as being inclusive and not exhaustive of the issues that the censor can consider to be "objectionable" under s 3(1).

The Committee considered that the proposed amendments would negate the need for the inclusion of a specific "hate speech" section in the Act and that the test of "injury to the public good" would be sufficient to catch material that vilifies certain groups.

3. Response to *Moonen v Film and Literature Board of Review*

The Committee also considered the decision of the Court of Appeal in *Moonen.* The case raised the question to the Committee of whether the Bill of Rights Act should apply to all matters listed in s 3(2) of the Act (for example exploitation of children, acts of torture), or whether the Act should state that publications tending to promote these matters will be

objectionable, "notwithstanding anything in the Bill of Rights Act".[14]

The Committee's inquiry centred on:[15]

> ...whether the requirement, now placed on censors by the *Moonen* decision to consider the freedom of expression provisions of the Bill of Rights Act before deeming a publication to be objectionable, may have complicated the classification process and perhaps negated the intent of Parliament to deem such publications, like those involved in the *Moonen* case, as objectionable.

The Committee considered that in light of the further decision of the Court of Appeal (outlining that the review board had correctly applied the law as directed by the Court in *Moonen*)[16] that s 3(2) of the Act was robust enough to deal with any publications that exploit children. The Committee did not propose any amendment to this section as a result of the *Moonen* case.

4. Comment on Committee's report

There are a number of conclusions in the Committee's report that are worthy of consideration; for example the focus on harm as a reason for amending the definition of "objectionable", the understanding of the effect of the *Moonen* case, the lack of focus on the intention of the legislation and the lack of consideration of advice from the Ministry of Justice.

In considering the *Living Word* decision, the Committee was deeply concerned with the notion of harm or injury to the public good and mentioned this a number of times throughout the section on the *Living Word* decision. This is in stark contrast to the Court of Appeal who emphasised that the decision was not about *harm* but was about the interpretation of the 1993 Act in accordance with s14 of the Bill of Rights.[17]

The Committee proposed that the overarching test when classifying material should be whether the availability of the publication is likely to cause "harm" and that the Act should be amended to regain its focus of preventing "harm" and to acknowledge the changing social values in our society.

To change the definition of objectionable in the way the Committee suggested would be a large restriction on the freedom of expression. The focus on harm from hearing ideas and opinions (rather than activity) is at odds with a censorship regime and the freedom of expression affirmed in the Bill of Rights Act. It is argued below that harm is not a sufficient justification for the restriction on expression, both from a policy and legal point of view.

In addition, the Committee seemed to consider that prior to the *Moonen* case, there was doubt as to whether censors had to consider the freedom of expression provision of the Bill of Rights Act before deeming a publication to be objectionable. This cannot be correct.

The Bill of Rights Act was enacted in 1990, nine years before the *Moonen* judgement. Section 6 sets out that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other meaning.

Earlier decisions by the Indecent Publications Tribunal in *Re "Exposing the Aids Scandal"* 1 HRNZ 170 and *Re "Penthouse (US)" Vol 19, No5 and others* [1990-1992] 1 NZBORR 429; [1991] NZAR 289 (**"Penthouse"**) have held that so long as a publication conveys a meaning and does so in non-violent way,[18] s 14 of the Bill of Rights Act applies and must be considered.

The Court in *Moonen* was using the same approach the Court must take in interpreting any piece of legislation where there is a conflict with a right or freedom affirmed in the Bill of Rights. The Court of Appeal merely corrected the High Court ruling which held that the 1993 Act could over-ride freedom of expression, set out in s 14 of the Bill of Rights.

Therefore the Committee was simply incorrect if it considered that the *Moonen* case made it more difficult to restrict child pornography. This was the same misunderstanding that lead to the Prohibition of Child Pornography Bill. The *Moonen* decision did not require an amendment to the 1993 Act. In fact it would have been constitutionally improper if the Committee had recommended this.

In addition, the Committee did not analyse the advice that the Department of Justice gave to the Internal Affairs and Local Government Committee cautioning against an unqualified inclusive definition on the basis that this opened up the possibility of the Bill being used as a means to restrict political expression.

Although the Committee was sure that the Court of Appeal's interpretation of the 1993 Act could not have

been what Parliament intended,[19] it did not provide an analysis of what Parliament may have intended. It also did not provide an analysis of the reasons the legislature had changed the definition of "objectionable" and replaced the word "includes" with the words "such as" or any statutory interpretation analysis. Without this information and with a much less precise focus on 'harm' and 'social change', it is difficult to conclude that the Court of Appeal was so wrong in these two regards and that the Committee was correct.

C Films, Videos and Publications Classification Amendment Bill

1. Objectives, background, purpose

Following the initial inquiry into the operation of the Act, the Government introduced the Films, Videos and Publications Classification Amendment Bill ("**Amendment Bill**"). One of the stated objectives of the Amendment Bill was to deal with the changes that the previous ten years had brought, particularly with respect to changes in technology leading to child pornography being freely available overt the internet.

The Amendment Bill had its first reading on 2 March 2004 and was referred to the Committee to hear public submission. The Committee received 30 submissions from a diverse range of groups and individuals such as Sky Network Television Limited, UNICEF New Zealand, Telecom Corporation of New Zealand, Calum Bennachie (Respondent in *Living Word*), the Libertarianz, the New Zealand Law Society, National Council of Women in New Zealand, the New Zealand Police Association, the Human Rights Commission and more. After the Committee received submissions it reported back to the House of Representatives on 30 August 2004.

2. Recommendation of Committee

The Amendment Bill as reported back by the Committee did not adopt either of the recommendations of the previous inquiry relating to the definition of "objectionable" or the inclusion of "hate speech". Instead the Committee reported that the scope of what may be classified as objectionable under the Act should not be widened relative to the original intent of Parliament. Although the previous inquiry had stated that the original intent of Parliament could not have been to exclude such matters as privacy, sexual orientation or mental illness from the gateway of what could be considered objectionable, the Committee appeared to have changed its mind on what the intent of Parliament was.

By not changing the definition of "objectionable" the Bill confirmed the *Living Word* decision that the gateway for material to enter through to be considered objectionable is "matters such as sex, horror, crime, cruelty or violence." In its previous inquiry the Committee had thought this definition to be unacceptable and not what the legislature had intended.

In addressing the consideration of whether to widen the meaning of "objectionable" in s 3 of the Act to include hate speech, the Committee:[20]

> ...considered that the matter of hate speech raised wider legal issues, including the fundamental right in a democracy to freedom of expression, than what was contained in the bill. The committee was mindful of the need to be cautious in placing further limitations on freedom of expression, however well meaning, without very careful scrutiny to ensure that any limitation is reasonable and not open to exploitation.

Rather than widen the scope of censorship law generally, the Committee recommended specific amendments to specific problem areas, such as child nudity and offensive language, and did not address hate speech. This approach is to be commended as it responds to the specific concerns, whilst remaining with the intention of censorship legislation.

D Further Developments

1. Inquiry into "hate speech"

However, the issue of "hate speech" had not been laid to rest and the Committee announced an inquiry into "hate speech" on 5 August 2004. The Committee sought public submissions on the inquiry and the closing date for submissions was 1 October 2004.

2. Terms of inquiry

The terms of reference of the inquiry into "hate speech" were to consider:

- Whether or not further legislation to prohibit

or restrain hate speech is warranted.

- Whether censorship of material that vilifies certain groups would be a justified limitation on the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990.
- An appropriate threshold test for prohibition or restraint of hate speech.
- Whether any prohibition or restraint of hate speech or hateful expression would be a justified limitation on the rights and freedoms outlined in the New Zealand Bill of Rights Act 1990.
- The steps taken by the international community to control hate speech and hateful expression.

Each of these terms is considered in the following section although the second and fourth terms of reference are considered together as they both relate to the application of the Bill of Rights.

III IS FURTHER LEGISLATION TO PROHIBIT OR RESTRAIN HATE SPEECH WARRANTED?

(A) Summary

One of the important issues that must be answered is what "gap" in our legal system hate speech would be legislation filling. New Zealand already has a considerable body of law that restricts what people may say in public. Laws govern defamation, privacy, race relations and broadcasting. In addition, New Zealand is a party to International Treaties which set out principles by which public speech should be governed and restricted.[21]

(B) Human Rights Legislation

1. Background to legislation

The Race Relations Act 1971 created the offence of inciting racial disharmony (s 25) and in 1979 it was amended to include a racial disharmony provision (s9A) which made it unlawful to use words where were considered likely to cause racial disharmony, regardless of the intention of the person who used the words. This section was repealed in 1989 and the Race Relations Office recommended to the Government that legislation should be passed to allow complaints of racial harassment and incitement of racial disharmony.

The Government accepted these suggestions and in 1993 when the Race Relations Act was repealed by the Human Rights Act 1993, both provisions were included. Sections 61 and 131 of the Human Rights Act address issues of racially motivated speech. Section 61 restricts speech against a group, similar to the former s 9A:

> **Section 61**
> **Racial disharmony –**
>
> 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 words which are threatening, abusive, or insulting; or
>
> (b) to use in any public place...or within 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 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.

Section 131 continues the offence established in the Race Relations Act 1971 of inciting racial disharmony. The offence can carry a term of up to three months in prison or a fine of up to $7,000. It requires a mental element so that a person must have intended to excite hostility or ill-will or bring a group of people into contempt or ridicule.

The Human Rights Act 1993 also makes sexually harassing speech unlawful under s 62.

2. Relevant cases

The Courts have had few opportunities to consider these sections or their predecessors. In *King-Ansell v Police* [1979] 2 NZLR 531 (CA) the Court of Appeal considered the application of s 25 of the Race Relations Act to a publication of the New Zealand National Socialist Party which was allegedly insulting to Jewish people.

The Court of Appeal considered a narrow question of law – whether Jews were a group of persons of

"colour, race or ethnic or national origins". The Court of Appeal confirmed the decision of the High Court, that Jews were of "ethnic origins" and that the words were insulting. The Court of Appeal did not require proof of the objective likelihood that hostility, ill-will, contempt or ridicule towards Jews would be created.

This decision was criticised on the basis that the Court should have required a factual possibility of a recipient of the pamphlet being actively encouraged to take action in accordance with the pamphlet.[22] It has also been noted that because s 6 of the Bill of Rights requires interpretation consistent with the rights and freedoms embodied in it, the *King-Ansell* decision would probably not be acceptable any longer.[23]

In *Neal v Sunday News Auckland Newspaper Publication* (1985) 5 NZAR 234, the Equal Opportunities Tribunal considered what the element of "ridicule" required in an offence against s 25 or 9A of the Race Relations Act 1971. The decision concerned an article that contained a number of jokes about Australians. The Tribunal considered that ridicule meant "belittling or denigrating in circumstances where the humorous aspect took second place."[24] It considered the probable audience and the history of good-natured and friendly rivalry between Australian and New Zealand and found on the balance that the article would not be likely to excite ill-will of contempt against Australians.

More recently the Complaints Review Tribunal considered a radio broadcast pursuant to s 61 of the Human Rights Act.[25] The radio announcer had made a number of comments about Chinese and Japanese people including that people in Tokyo were "..about this high...not that bright in the first place. The majority of them can't see..." and describing Chinese as dependent on rickshaws. He also made comments threatening a repeat of the bombing of Japan at the end of the second World War.

In considering whether the words used were threatening, abusive or insulting, the Tribunal adopted the test of the "reasonable person" in the position of the person or group alleged to be discriminated against (i.e. Chinese and Japanese people). The Tribunal relied on evidence of the complainant and a lecturer in Asian Studies to determine that the ordinary sensible citizen would find the broadcast insulting and whether the words were likely to excite hostility against or bring into contempt the Japanese or Chinese in New Zealand. The Tribunal noted their opinion that some New Zealanders would be less perceptive or sensitive on racial issues and susceptible to that kind of broadcast.[26] On this basis the Tribunal held that the words were likely to excite hostility against or bring into contempt Chinese and Japanese people in New Zealand on the grounds of their colour, race or ethnic or national origins.

The Tribunal also briefly considered the impact of the Bill of Rights on the Human Rights Act and held that the Human Rights Act and the offence provisions within it, was a justified limitation in terms of s 5 Bill of Rights, similar to the laws of defamation.

Subsequently, the defendant was found to be in breach of s 61 of the Human Rights Act, was ordered to pay costs and was restrained from making similar broadcasts in the future.

(D) Other Legislative Prohibitions

New Zealand has a considerable body of law that restricts what may be said in public and the likely effect of any "hate speech" restriction must be considered against this legislative background.

1. Summary Offences Act 1981

Speech is already restricted if it is likely to cause violence or if it is spoken in a public place with the intention of offending a person. Section 3 of the Summary Offences Act 1981 deals with disorderly behaviour and penalises any person who is in a public place, or in view of a public place who:

> ...behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely...to cause violence against persons or property to start or continue.

Section 4 of the Summary Offences Act penalises offensive behaviour or language in or close to a public place and penalises any person who –

> (a)...behaves in an offensive or disorderly manner; or
>
> (b)...addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
>
> (c) ...(i) uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or (ii) addresses any indecent or obscene words to any person.

2. Crimes Act 1961

Section 66 of the Crimes Act 1961 sets out that every one is a party to and guilty to an offence who "incites, counsels, or procures any person to commit the offence." This covers words spoken and material published that "incite, counsel or procure" a person to commit a crime such as assault against any person, regardless of whether they belong to a "group" in society.

Although rarely used, "sedition" is also prohibited and punishable under s 81-84 of the Crimes Act. The crime of "sedition" includes inciting disorder and exciting hostility or ill will between different classes of persons as may endanger the public safety.

3. Broadcasting Act 1989

The Broadcasting Act 1989 provides for the maintenance of programme standards in broadcasting in New Zealand. Section 4 of this Act provides that every broadcaster is responsible for maintaining their programmes in accordance with certain standards. These standards include good taste and decency, maintenance of law and order, privacy of the individual and balanced broadcasting on controversial issues of public importance as well as any approved code of practice.

The Broadcasting Act establishes the Broadcasting Standards Authority ("**Authority**") whose role is to receive and determine complaints and encourage the development and observance of codes of broadcasting practice (amongst other things).

The Authority has released Codes of Broadcasting Practice in relation to free-to-air television, pay television, radio, election programmes and promotion of liquor. Each Code has a series of standards or principles which are supported by guidelines such as accuracy, fairness, balance, good taste and decency, privacy, law and order and social responsibility.

A member of the public can make a complaint to the Authority where a broadcast may have breached one of these standards or principles.

It is clear from recent decisions of the Authority that the Codes of practice are equipped to prohibit what the Authority considers to be "hate speech" and on wider grounds than just race.[27]

A recent decision of the Authority considered whether Triangle Television had breached broadcasting standards in a lecture it broadcast entitled "Challenges Facing Muslims in the New Millennium". The contents of the broadcast consisted of a Mullah of the Islamic faith expressing views about homosexuality. In summary (and according to the Authority) he said that the Islamic position on homosexuality is "death" and that homosexuals are "sick" and "not natural".

A complaint was made to the broadcaster which was not upheld and the matter came before the Authority to decide whether Standard 6 (Fairness) and in particular Guideline 6(g) had been breached:

> **Standard 6 Fairness**
>
> In the preparation and presentation of programmes, broadcasters are required to deal justly and fairly with any person of organisation taking part or referred to...
>
> Guideline
>
> 6g broadcasters should avoid portraying persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, sexual orientation, race, age, disability, or occupational status, or as a consequence of legitimate expression of religious, cultural or political beliefs. The requirement is not intended to prevent the broadcast of material which is:
>
> (i) factual; or
>
> (ii) the expression of genuinely held opinion in news, current affairs or other factual programmes, or
>
> (iii) in the legitimate context of a dramatic, humours or satirical work.

The Authority held that for a breach to have occurred, the broadcast had to actually encourage denigration or discrimination and that in this instance the threshold was clearly crossed.

The Authority concluded that the broadcast was not a "factual programme" but was a "sermon which expressed the speaker's opinions and was based on his religious ideology". The complaint was upheld and the broadcaster had to air an apology.

In another successful complaint against a broadcaster under guideline 6(g), the Authority agreed that comments about homosexuality in the context of a religious teaching programme "specifically denigrated and discriminated against those living "the gay lifestyle".[28]

The programme in question was *Destiny Television: Homosexuality, Religion and God* in which Pastor Tamaki

characterised the homosexual community in terms of the word "perversion". Although the broadcaster had apologised to the complainants and advised Destiny Television that the series of programmes would not be repeated, the Authority held that this was insufficient action considering the "serious nature of the comments, their cumulative effect and the context in which they were made..."

The Authority referred the complaints about the insufficient action it had taken back to the broadcaster and directed that the broadcaster review its policy and processes for appraising programmes such as *Destiny Television* prior to broadcast and advise the Authority and the complainants of these revisions. No apology was required.

Whether these outcomes are desirable in a free and democratic society is a separate question; what they show is that comments of opinion on certain groups within New Zealand are already restricted through broadcasting. It is unlikely that either of the above respondents will broadcast similar material again so in effect they have been censored. A "hate speech" law may not add to this current legislative environment.

In addition, New Zealand has a national Press Council body which was established in 1972 by newspaper publishers and journalists to provide the public with an independent forum for resolution of complaints against the press. The Press Council has adopted a *Statement of Principles* which the public can use in their complaints. A number of these principles are relevant in a discussion on 'hate speech' including Principle 8:

> **8. Discrimination**
>
> Publications should not place gratuitous emphasis on gender, religion, sexual orientation, age, race, colour or physical or mental disability. Nevertheless, where it is relevant and in the public interest, publications may report and express opinions in these areas.

4. Other legislation

In addition, the Harassment Act 1997 and the Defamation Act 1992 provide for restrictions on the freedom of expression to provide greater protection to victims of harassment or to protect a person against personal libel and slander directly against them where the comments are not true or do not form an honest and genuine opinion.

When the legislative and social context of New Zealand is considered, "hate speech" starts to look like an answer looking for a problem.

IV JUSTIFIED LIMITATION ON RIGHTS AND FREEDOMS AFFIRMED BY THE NEW ZEALAND BILL OF RIGHTS ACT 1990

The terms of the inquiry ask for submissions on whether *censorship of material* that vilifies certain groups or *hate speech* restrictions would be a justified limitation on the rights and freedoms affirmed by the Bill of Rights.

To answer this question, it is helpful to begin by setting out those rights and freedoms and a brief description of how they operate in the New Zealand context. It is also important to understand how any *hate speech* legislation, whether through censorship or human rights legislation would be interpreted and whether such legislation would be a justified limitation on the rights and freedoms under the Bill of Rights, both from a policy and legal perspective.

A Protected Rights and Freedoms

1. Freedom of expression

Few commentators deny that "hate speech" legislation whether through censorship or human rights law restricts the right to freedom of expression to some degree. The starting point for an analysis of freedom of expression is s 14 of the Bill of Rights:

> **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.

The Court of Appeal has described the right is being "as wide as human thought and imagination"[29] and it is this freedom that is at the heart of the balancing act of "hate speech" legislation and this is considered in more detail below.

In the *Penthouse* decision the Tribunal adopted the test set out by the Supreme Court of Canada in *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 58 DLR (4th) 577; [1989] 1 SCR 927 as to what is covered by the protection of freedom of expression. The Tribunal cited the Court of Appeal in Canada:[30]

> Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression is

not within the protected sphere of conduct.

2. Freedom of Religion

In addition, it can reasonably be predicted by examining the operation of "hate speech" prohibitions in overseas jurisdictions that hate speech will not only be a restriction on the freedom of expression, but also on the freedom of religion and freedom to manifest religion and belief as set out under s 13 and s 15 of the Bill of Rights Act:

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

Many overseas instances of the operation of hate speech provisions have concentrated on exactly this – the manifestation of a religion in teaching in public.[31] In addition, the two recent decisions of the Broadcasting Standards Authority in New Zealand regarding objectionable speech have both related to a religious teaching session.[32] In neither case did the Authority consider whether by upholding the complaint and effectively prohibiting the broadcasters from broadcasting similar material in the future, there was a limitation on the freedom to manifest one's religion.

3. Freedom from discrimination

Another right affirmed in the Bill of Rights and often quoted in the debate on "hate speech" is freedom from discrimination. Section 19 of the Bill of Rights sets out this freedom:

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

The Court of Appeal in the *Living Word* decision discussed the impact of s 19 of the Bill of Rights in determining whether a restriction on freedom of speech can be justified. Where the High Court had applied s19 of the Bill of Rights (dealing with the right to be free from discrimination) as well as s 14 (freedom of expression) to the 1993 Act, the Court of Appeal held that s 19 was not directly applicable.

The Court of Appeal commented that the Bill of Rights is a limitation on governmental, not private conduct and that the balancing exercise was between the rights of speakers and the public to receive and impart information under s14 of the Bill of Rights and the state interest under the 1993 Act in protecting the public from injury caused by the information.[33] The Court of Appeal held that the High Court (and the Board) had erred in law regarding the application of the Bill of Rights Act.

However, it is an important competing right to consider in a discussion on "hate speech" as it is often used (albeit under different names such as "equality").

B Approach to Interpretation with the Bill of Rights

In *Moonen* the court set out an approach which it thought would be "helpful when it is said that the provisions of another Act abrogate or limit the rights and freedoms affirmed by the Bill of Rights". This discussion is relevant to consider how a Court may interpret any "hate speech" legislation, whether in censorship law or human rights law. It also provides a guide for Parliament when considering whether to pass legislation or not and will need to be addressed by the Attorney-General in the report.

The five-step approach advocated by the Court of Appeal in this case can be paraphrased as follows:[34]

1. After determining the scope of the relevant right or freedom, identify the different interpretations of the words of the other Act (in this instance the hypothetical "hate speech" law).

2. If only one meaning is open that meaning must be adopted. If more than one meaning is available, identify the meaning which constitutes the least possible limitation on the right or freedom in question.

3. Having adopted this meaning, identify the extent to which that meaning limits the relevant right or freedom.

4. Consider whether the extent of such limitation

can be demonstrably justified in a free and democratic society. If it cannot be justified, there is an inconsistency with the Bill of Rights but the provision must be given effect.

5. The final step is for the Court to indicate whether the limitation is or is not justified and declare accordingly.

The above analysis is helpful for considering how a "hate speech" law would be approach by the Courts, and provides a helpful framework for considering whether "hate speech" is a justified limitation on the freedom of expression.

C Is the Limitation Justified?

In discussing the "hate speech" inquiry, it is almost always acknowledged that hate speech legislation will restrict the freedom of expression affirmed in the Bill of Rights Act. So the question then becomes whether the limitations are demonstrably justifiable in a free and democratic society, pursuant to s 5 of the Bill of Rights.

In *Melser v Police* [1967] NZLR 437, McCarthy J described these limitations as "the limitations which society, for its social health, puts on freedoms."[35] These limitations are commonly arrived at through a utilitarian calculus as to "where the balance of public welfare lies—between unrestricted enjoyment of a right or freedom and any limitations placed upon it."[36] The leading New Zealand case on what is a "justified limitation" in terms of s 5 is *Ministry of Transport v Noort* [1992] 3 NZLR 260, where the court decided (and later confirmed in *Moonen*) that a s 5 inquiry "will properly involve consideration of all economic, administrative, and social implications."[37] Some of these implications are considered below.

The argument presented is that "hate speech" law whether by way of human rights legislation or censorship law cannot be justified as a reasonable limitation on freedom of expression (or freedom to manifest religion) in law or in policy.

1. Policy considerations against restricting freedom of expression

1.1 The market place of ideas

The most common argument advocating that restricting freedom of expression is not justified is the "marketplace" argument. The argument is that by restricting expression we restrict the advancement of knowledge and the discovery of truth is also restricted.*38* By allowing freedom in the "market place of ideas", new ideas are tested and truth discovered. Ultimately, "bad" ideas will be defeated, not by government intervention but by allowing the ideas to be debated and show themselves for what they are. In order to allow the "market place" theory to work, all ideas, whether false, hurtful or distasteful, must be allowed to be heard.

In addition, if s61 Human Rights Act 1993 was amended to include "hate speech" provisions protecting all people that fall within one of the prohibited grounds of discrimination, it would not matter whether the statement made was in fact true. The intention of the statement would not be important in the imposition of sanction.

1.2 Full participation in democracy

A social consideration put forward when considering whether the restriction on freedom of expression is justified is based in democratic participation. When expression is restricted, the ability of every person to participate in democracy and have a right to dissent is also restricted and this is not justified in a free and democratic society.[39] Cory J in the Ontario Court of Appeal emphasised the importance of putting forward opinions about the functioning of public institutions.[40]

Not only is participation in democracy threatened but democracy itself is turned upside down if the government becomes the arbiter of what thoughts can and can not be expressed. Instead of citizens influencing the governments thoughts, speech and actions, the government influences the citizens' thoughts, speech and actions.

Many complaints to the Race Relations Office regarding racist speech have concerned the discussion of matters of public interest and according to Huscroft show how limitations on freedom of expression adversely affect the quality of public discourse.[41]

Although the response might be to allow speech only on political issues, Huscroft rightly points out that it is hard to discern when the line between political

and racial issues is drawn, plus non-political issues can have a huge influence in a democracy. In relation to s61 and s131 of the Human Rights Act, Huscroft notes that there are a number of race-related issues which are important for both the public and politicians to discuss.[42]

The same observation regarding "hate speech" can be made concerning a greater number of groups of protected people. It is difficult if not impossible to understand how political discussion will survive if speech that is insulting to diverse groups of people such as the unemployed, pregnant women, people with responsibility for dependents and those with a psychological impairment[43] is restricted.

If legal sanctions are relied upon instead of public and political sanctions, the quality of political discourse and the participation in democracy will be severely limited.

1.3 "Hate speech" and humanity

Another reason the restriction on freedom of expression by "hate speech" is not considered to be justified is that freedom of expression lies at the essence of what it means to be human. Amongst other writers, Huscroft makes a convincing link between freedom of thought and freedom of speech. If a person can think whatever they like in their own head but are prohibited from speaking that thought out, Huscroft contends that freedom of thought itself restricted and this is unacceptable.[44]

Bernard Darnton, a libertarian, considers the link between freedom of thought and speech like this:[45]

> The public face of that private freedom [thought] is freedom of expression, the freedom to sculpt our private thoughts into public words, to compare ideas and transmit our thoughts to others. Freedom of expression is the public acknowledgement of the freedom of thought that defines what it is to be human.

This argument sees freedom of expression as a good in itself and not just as a means to an ends.

1.4 "Hate Speech" and civil society

The role of social stigma is also important when considering restrictions on speech in the New Zealand context. Sometimes the threat of social pressure or stigmatisation can be a much more powerful predictor of behaviour than the threat of prosecution under a piece of legislation.

A recent example of social stigma operating as a powerful restraint can be found in broadcaster Paul Holmes' infamous comments about UN Secretary General Kofi Annan on his current affairs radio programme.[46] Mr Holmes was roundly and publicly criticised for the statement he made and the incident led to the withdrawal of one of the major commercial sponsors of Mr Holmes' television programme.

In addition, Mr Holmes made two public apologies, wrote a letter of apology to Mr Annan, met with the leaders of the Ghanaian community in New Zealand[47] and the Race Relations Conciliator. The broadcaster, TRN, took internal disciplinary action, also wrote and apologised to Mr Annan, held a training seminar on racism run by the Race Relations Conciliator and made a donation to charity.

The Broadcasting Standards Authority received ten complaints on this matter and agreed that the comments went well beyond the limits and were a serious breach of broadcast standard. However, the Authority determined that the broadcaster and Mr Holmes had taken sufficient action and the complaints were not upheld in any manner.

This scenario illustrates the role of social stigma apart from the law in prohibiting or restricting speech. Mr Holmes and TRN took action because of the threat of harm to their reputation, support, respect and commercial opportunities as voiced through the strong disapproval of the community. If all the broadcaster had to fear was a possible "slap on the wrist" under "hate speech" law, it would be difficult to see the result would have happened and how his behaviour and that of other broadcasters would change in the future. However, it is very easy to see how this incident will affect the way broadcasters throughout New Zealand broadcast and consider their statements, even if they are in jest.

By creating a new legal category of hate speech, we may actually weaken normative moral disapproval and turn what should be a social moral problem into a legal one.

Legislating against "hate speech" either in censorship or human rights law is a crude method to inhibit what people say and may simply have the effect of transferring more power away from the individual citizen to the state, reducing the citizen's responsibility and role in civil society. Hate speech legislation may

mean that the government of the day determines what can and can't be said and becomes the arbiter of acceptable speech, in place of society.

2. The protection of religious freedoms

It is clear from overseas examples that "hate speech" may operate as a limitation on the freedom of religion and the freedom to manifest religion. Whilst this whole paper could be devoted to the question of why it is important to protect freedom of religion in an increasingly irreligious society, a few comments will have to suffice. Religion is all about ideas, beliefs and philosophies. Religion (and irreligion) governs the choices people make between doctrinal, philosophical or moral alternatives. Religious controversy is widespread and, for the most part, entirely peaceful, even if voices get raised from time to time. But "hate speech" raises the prospect that what currently passes for argument may become regarded as inciting religious hatred. Even ordinary religious teaching may fall foul of the law.

3. Policy considerations in favour of restricting freedom of expression

3.1 The notion of "harm"

In discussing the "hate speech" inquiry, it is almost always acknowledged that hate speech legislation will restrict the freedom of expression affirmed in the Bill of Rights Act. The justification for this restriction in both policy and law is located in varying notions of "harm".

The justification for this restriction by our politicians has focused on "harm towards the group"[48] and "whether what you say will be injurious to someone in society".[49] The Select Committee in its report back on the Inquiry into the Operation of the 1993 Act focused very much on "harm" and "injury to the public" in its justification for amending the definition of "objectionable" in s 3 and further restricting freedom of expression:

The legal justification is a set of "egalitarian" arguments which prioritises the rights of human equality, dignity and racial harmony and advocates limits on freedom of expression to protect these rights that are seen as fundamental. This can be seen in critical legal theory[50] and in critical race theory.[51]

This harm has been described as an affront to the target group's dignity, which causes it to suffer detrimental effects.[52] Such effects have been described as "self abasement, lack of group pride, disassociation from the group" and even provocation towards acts of violence. [53]

Critical race theorists such as Mari Matsuda and Richard Delgado claim that hate speech causes psychological harm to individuals, and that its presence in society reinforces the racist status quo.[54] They advocate reorienting the American First Amendment doctrine in order to permit greater restrictions on various forms of hate speech.[55] They argue that "hate speech" is defined by the fact that it strips its victims of their dignity.

However, it could be argued that disagreement about a person's behaviour, for example their practice of religion or choice in sexual partner, is not necessarily an attack on their dignity as a human being. In the real world, there will always be disagreement about right and wrong, about what constitutes good and bad behaviour. It is quite possible – in fact, it is a daily occurrence – to oppose behaviour and still maintain the dignity of the person opposed. Teachers do it every day in the classroom. The law constantly opposes certain behaviours but does not strip a person of his dignity in the process. However, the notion of harm in its varying forms, must be considered when undertaking the balanced exercise required in the "hate speech" debate.

Of course any speech that results in, or could result in physical harm must be prohibited and this currently occurs under s 3 and s 4 of the Summary Offences Act 1981. Speech is already restricted if it is likely to cause violence or if it is spoken in a public place with the intention of offending a person.

The focus on harm in these arguments reflects a society that has embraced the post-modern critique of the world. New Zealand culture has moved from a place where the worst thing one could do was obscure truth and consequences of actions to one where the worst thing one can do is to cause "harm". If one gives up the notion of objective truth, then the obliteration of truth is not so important and the focus shifts to the present and personal circumstance of each individual, i.e. harm. This is seen not just in "hate speech" but in the proliferation of similar legislation for example occupational heath and safety legislation, playground

legislation and preventative measures.

3.2 The promotion of tolerance

Proponents of "hate speech" legislation believe that such laws will increase tolerance in our society and reduce inter-group conflict[56], when in fact "hate speech" laws may well have the opposite effect. A law that prohibits some speech and not other can not be said to be based on the true meaning of the word 'tolerance'.[57]

Writers from mainstream media have drawn comparisons with the Holocaust and genocidal regimes in Rwanda and the former Yugoslavia[58] and argue that by prohibiting "hate speech" we will reduce the likelihood of such tragedies occurring. However, historically there has been no link between extreme racial intolerance of minorities (such as Jews in Germany) and freedom of expression. In fact these atrocities have occurred in countries such as the former Yugoslavia, Nazi Germany and other Eastern Bloc countries, where freedom of expression was greatly limited and democracy has not existed.[59] These examples also highlight the risk that once "hate speech" laws are passed to restrict freedom of expression, there is no control of who invokes these laws and the kind of speech they invoke them against. There is also the possibility that "hate speech" laws may create a festering resentment among those who believe they are being targeted,[60] and attempts to administer them may inevitably create lengthy court proceedings, with judges placed in the impossible situation of trying to adjudicate the indefinable.

4. Legal Analysis of the "justified limitation" question

Apart from policy arguments which can be used to illustrate that "hate speech" may not be a justified limitation on rights and freedoms, there is also a body of case law in New Zealand which indicates when a Court will find that freedom of expression has been justifiably limited.

4.1 Balancing other affirmed rights

The right to freedom of expression guaranteed by s 14 of the Bill of Rights must be balanced against all other affirmed rights and freedoms. As Thomas J stated in *O'Connor v Police* [1990-2] 1 NZBORR 259, 275 "[F]reedom of expression is restricted only in so far as is necessary to protect some countervailing right or interest".

In *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48; (1993) 10 CRNZ 641, the High Court held that the right to freedom of expression guaranteed in the Bill of Rights Act 1990 must be balanced against all other freedoms and rights including the right to a fair and impartial trial where the accused is presumed innocent until proved guilty.

The Court of Appeal in *Moonen* applied similar reasoning and stated that the rationale for an abrogation of an affirmed right is that other values are seen as predominating over freedom of expression. [61]

The question to be considered is what countervailing or fundamental right or interest does hate speech seek to protect? Other examples of fundamental rights that have given rise to a restriction on freedom of expression include the right to a fair trial[62], contempt of court,[63] and the right of the media to be independent.[64] Is there a countervailing and fundamental right equal to these rights that will be protected by "hate speech"?

It has already been considered that the desire to be free from "harm" in varying degrees is not an affirmed or fundamental right in New Zealand and in a balancing act between the affirmed rights of expression and manifestation of religion, it should surely be outweighed.

A recent decision of the High Court in Auckland provides interesting comment on the balancing act involved with "hate speech". The Judge considered freedom of expression in relation to the burning of the New Zealand flag at a protest.[65] In determining that the legislative prohibition on the appellant's conduct was not a justified limit on his free speech under the Bill of Rights, the Judge observed:[66]

> The matter also needs to be considered against my perception that New Zealand has reached a level of maturity in which staunch criticism is regard as acceptable. There may well be strong reactions to such criticism but there is an acceptance of the ability to make it.

Whether the Judge was correct in her analysis of New Zealand may yet to be seen in the outcome of the "hate speech" inquiry.

Other instances where the Courts have held freedom of expression to be in priority to other competing

rights including the right to privacy[67] and disorderly behaviour. [68]

The closest freedom that hate speech could be balanced against is freedom from discrimination as set out in s 19(1) of the Bill of Rights Act but already as discussed, the Court of Appeal has held that this does not directly impact the question of censorship of "hate speech".

The Attorney-General has previously reported back on inconsistency with s 14 of the Bill of Rights in relation to the Films, Videos, and Publications Classifications (Prohibition of Child Pornography) Bill[69]. In this instance the Attorney-General found that the restriction against freedom of expression did not appear to be justified in terms of s 5 of the Bill of Rights and this was important in the decision of the Committee to reject the Bill and deal with these issues in another way.

4.2 "Hate speech" and the rule of law

One of the foundational principles of the rule of law is that all people are treated as equal before the law. People are treated as individuals, not as members of a particular group. "Hate speech" (like hate crime introduced into the Sentencing Act 2002, again on the basis of one submission) introduces the concept to our legal system that if someone is identified or self-identifies as a member of a group, he or she may be treated differently.

Members of the Committee specifically commented on this issue in their Inquiry into the operation of the 1993 Act and sought an amendment that would catch material that vilifies certain groups without having to list certain groups and elevate their importance over another.

The notion of hate speech introduces into the legal system a legal notion that has bias and, ironically, discrimination built into it as certain groups may be placed in priority over others.

5. Practical considerations of "hate speech" law

5.1 Will "hate speech" law achieve its goals?

One of the difficulties when considering the aims of "hate speech" is that by involving the law and Courts, more attention is brought to the "hateful" statement and more profile given to the person who made the statement, than if the law had not intervened. In addition, by prohibiting public "hate speech", legislation may simply encourage it in situations out of the public, where it cannot be argued against.

5.2 The operation of "hate speech"

The Court of Appeal in *Living Word* pointed out that censorship laws should be concerned with depictions of activity, such as sex and violence, rather than with expressions of opinion. This same distinction should be observed in matters relating to so-called "hate speech".

Actions carried out on people are easily defined — in an assault, someone is hit; with theft, the victim is deprived of something. These are objective and easily defined and verifiable, and remedies can be provided in law. The laws, in fact, already exist. *Beliefs and opinions*, even those that may lead to action, are much harder to define.

5.3 Manipulation of "hate speech"

"Hate speech" laws could easily be turned against those who thought they would benefit most from them. It has been demonstrated that s 61 of the Human Rights Act 1993 can be hijacked by the majority, rather than the minority groups it was intended to protect. In 1998-99, for example, complaints from the "white majority" dominated complaints to the Human Rights Commission on the basis of racial disharmony.[70]

6. Comment and conclusion

"Hate speech" restricts the freedom of expression and will be likely to restrict the right to manifest religion and belief with no corresponding fundamental right or freedom which it protects.

Of course there are no completely untrammelled rights and freedoms in New Zealand, but the line must be drawn where offensive or disorderly behaviour or language actually encourages a person to violence, as set out under the Summary Offences Act.

Hate speech operates not to protect a fundamental right such as the right to a fair trial, but to protect certain groups of people from harm. Harm is a fact of life and freedom from harm is not an affirmed freedom

in New Zealand. It is dangerous to begin to erode fundamental rights and freedoms which have been affirmed in our Bill of Rights on such a shaky legal basis.

V AN APPROPRIATE THRESHOLD TEST FOR PROHIBITION OR RESTRAINT OF HATE SPEECH?

If the legislature is determined to introduce "hate speech" laws into New Zealand, then the establishment of the appropriate threshold will be critical.

(A) Censorship or Human Rights

In *Living Word*, the Court of Appeal drew the distinction between anti-discrimination legislation and censorship legislation:[71]

> In short, the 1993 Act recognises an obvious distinction between censorship legislation with its proper purpose and subject matter and anti-discrimination legislation with its own (different) purpose and subject matter. As well, each has its own remedies and sanctions.

Whilst censorship would prohibit the publication but not punish the person who seeks to "publish" the material, human rights law would punish the speaker sometimes by a fine and in extreme examples with time in prison. The sanctions and remedies are indeed different. The lesser of these two outcomes would appear to be found in censorship law, where the liberty of the person in question is not touched.

However, the obvious difficulty with restricting "hate speech" through censorship is that the material is never seen and never open to the public. It is as if the material never existed. This means that material could be censored on unlawful grounds which are inconsistent with the Bill of Rights Act, and unless someone is willing to undertake an expensive and lengthy appeal process, then the unlawfulness of the decision will never be exposed and the material will remain unseen. This is quite a different matter and in this regard a more serious matter, than allowing material to be seen in and then penalising the speaker after the event.

It appears at this stage that censorship law is no longer being considered as a means to restrict "hate speech".

(B) Possible Thresholds

The policy and legal considerations set out above make any change to our laws undesirable and unnecessary. In some ways then, it is redundant to consider what an appropriate threshold for "hate speech" would be in New Zealand. However, for the sake of completeness, the threshold question is considered as it was one of the terms of reference for the inquiry.

It appears that there are three broad possibilities for a threshold test for prohibition or restraint of "hate speech" in New Zealand. The most commonly discussed possibility is to amend s 61 and s 131 of the Human Rights Act 1993 either in its current wording or with an amendment to "inciting to hatred or harm".[72] Another proposal is to pass a separate statue with the threshold of "hate speech" being publications that vilify. In addition, when discussing the censorship of "hate speech", the proposed threshold appears to be material which causes "harm" and is "injurious to the public good".

1. Amendments to Human Rights Act 1993

In response to parliamentary questions on 15 October 2003, the Hon. Phil Goff, Minister of Justice, stated that hate speech (and covert filming) "were important matters but...did not belong in censorship legislation... hate speech needs to be considered in the context of the Human Rights Act, alongside current provisions dealing with comments provoking racial hatred".

In his press release of 6 August 2004, the Minister of Justice appears to have confirmed this as the preferable option:[73]

> Currently the Human Rights Act 1993 deals with inciting racial disharmony. I hope the committee, and public submissions to it, will address how that legislation has worked in practice and whether changes are needed. The committee and the public might also address the arguments over whether this law should be extended to cover inciting hatred against people on the grounds of their religion, gender or sexual orientation.

The Committee made it clear in their inquiry into the operation of the 1993 Act that there should be a legal mechanism to prohibit material that shows "hate speech" regarding mental illness, sexual orientation, the transmission of HIV and others in such a way as is injurious to the public good.[74]

Although there has been little comment on what other characteristics would be included, it is likely

that the sections would extend to all the prohibited grounds of discrimination set out in s 21 of the Human Rights Act.

Extending the grounds of s61 and s131 to include all categories of discrimination would be contrary to comments made by the majority in the *Living Word* decision. Quoting the written submissions for the Attorney-General, the Court notes that:[75]

> Whereas international anti-discrimination principles have gradually extended their reach to protect wider classes of vulnerable persons, the international prohibitions of hate propaganda have remained confined to the categories of race and religion; and that hate propaganda is not seen as synonymous with more general anti-discrimination protections.

It would be a huge encroachment on the freedom of expression if the legislature adopted the list of prohibited grounds of discrimination set out in s 21 of the Human Rights Act 1993 as the characteristic of the target group against which one cannot speak so as to create hostility, ill-will, contempt or ridicule. These grounds would include marital status, religious belief, ethical belief, disability, age, political opinion, employment status, family status and sexual orientation.

Sections 61 and 131 currently require that the words *be likely to create hostility, ill-will, contempt or ridicule* towards the target group, and it is this threshold that needs to be examined if other target groups are also to be covered under the Act. Sections 61 and 131 and their predecessors have been criticised for being too broad and thereby restricting the freedom of expression too greatly.[76] The words contempt and ridicule have been thought to be too subjective.[77] A "public order element" has been suggested as an alternative threshold because it provides a level of certainty and objectivity into an otherwise subjective and uncertain test and it limits the restriction placed on freedom of speech.[78]

2. Vilification

Another indication of where the legislature may place the threshold has come from Dianne Yates, the Chairperson of the Committee. Yates spoke of "material that vilifies certain groups" when announcing the inquiry by the Committee into hate speech.

There is no statutory definition of "vilify" and the Court has not had opportunity to define this word either. Dictionary definitions of the word "vilify" range from "to make vile, to disgrace",[79] "to revile with abusive language, malign"[80] down to "to say or write unpleasant things about someone or something, in order to cause other people to have a bad opinion of them".[81] The latter is a very low threshold indeed, and if incorporated into legislation could be used to justify curtailing almost any discussion on a controversial issue.

The High Court recently considered the meaning of *vilify* in relation to the meaning of *dishonour* in a decision on the burning of the New Zealand flag.[82] The Judge held that the word "dishonouring" in s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981 could be read to "allow the *narrower meaning* of vilify".

Vilify then requires more than "to treat without honour or disrespect" and comes closer to "imputing a lively sense of shaming…". Subsequently the appellant's actions in burning the New Zealand flag did not come within the sense of vilifying, "that would have required some additional action on the appellant's part beyond a symbolic burning of the flag".[83]

Apart from the difficulties with definition, there is also no established precedent to follow in deciding what vilifies one person.

3. Injurious to the public good

As has already been witnessed, the discussion regarding what censorship, if any, should apply to "hate speech" centres around the idea of "harm" and "injury to the public good".

The decision by the Indecent Publications Tribunal in *Re "Exposing the Aids Scandal"* 1 HRNZ 170 commented on the required elements for a publication to be considered "injurious to the public good".

The principles of equality and non-discrimination were found to be important to a finding of injury to the public good. The Tribunal accepted Crown counsel's definition of injury to the public good as[84]

> Anything which interferes with the social contract in a way that upsets the harmony, or equality and mutual respect for others, or the sanctity of life, or physical or mental freedom or health.

Certain elements of the definition of hatred in *R v Keegstra* [1990] 3 SCR 697 could indicate that the

publication was injurious to the public good. These elements were identified as the likelihood of creating or inciting extreme feelings of hatred or opprobrium towards a minority amongst a publication of readership. These elements could be said to be corruption of readers. The Tribunal added that hate literature requires that the vitriol must be concentrated.

4. Other questions of threshold

Another question that must be considered, regardless of the threshold adopted, is whether hate speech that advocates certain actions depending on the audience falls into a different category. For example, a prison may be an audience, where certain words are more likely to incite or cause hostility and the risk of the action being carried out may be higher.

Or even more problematic are the questions that were raised by the *Neal* case[85] where the Tribunal held that an article that made jokes about Australians did not incite racial disharmony under s 9A of the Race Relations Act, but may well have, had it been directed at a difference race or ethnic group.[86]

In questions of threshold, legislators will also need to consider whether "hate speech" laws should be applied to artistic works, for example rap musician Eminem, who claims artistic license for vitriol about "fags" and "bitches" in the context of his work.

VI CONCLUSION

The consideration of "hate speech" has always been described as a balancing exercise. The right to freedom of expression guaranteed by s 14 of the Bill of Rights must be balanced against all other affirmed rights and freedoms. Likewise, the right to manifest religion in public teaching is also affirmed in the Bill of Rights and must be balanced against other competing rights and interests.

New Zealand already restricts expression in a number of ways and in broadcasting particularly it appears we are moving towards a more general "hate speech" restriction. When the wealth of laws and codes are considered, "hate speech" does begin to look like an answer looking for a problem.

Restricting the fundamental and protected right to manifest religion and have free expression must be balanced with a similarly fundamental and important right. There is no such fundamental right in law or policy that outweighs these rights. Personal incidences of harm suffered by "hate speech" other than on the basis of race, although not witnessed a lot in New Zealand, are often unthinkable and devastating on the people and groups involved.

However, prohibition against "harm" is not affirmed in our legislation or our case law as such a fundamental right as to balance freedom of expression and freedom to manifest religion. "Harm" is not easily definable and is subject to political interference which then weakens the role of society and stigma. The protection from "harm" even the most severe harm is a dangerous idea to elevate and even prioritise over expression and religion.

Once a legislature begins to restrict fundamental freedoms on legally undefined and unsupported principles, it puts itself in a dangerous position. A legislature can not claw those rights and freedoms back once they are restricted and they will face difficulty in resisting further restrictions on other freedoms on a similarly weak basis.

It is now time to consider very carefully whether the right, not just to freedom of expression, but also to manifest religion are worth protecting in New Zealand or whether they can be restricted by notions of "harm".

ENDNOTES

1 John Stuart Mill *On Liberty* (Penguin Books, London 1956) Chapter II, para 1.

2 Hon Phil Goff, Minister of Justice "Goff welcomes hate speech inquiry" (Media Release, 6 August 2004).

3 Stanish G "The Films, Videos, and Publications Classification Act 1993" (1994) 7(3) AULR 719.

4 Sections 12 and 13 of the 1993 Act set out that publications can be submitted to the Office for classification by the approved labelling body, the Comptroller of Customs, the Secretary for Internal Affairs, or with the leave of the Chief Censor, any other person.

5 [2000] 3 NZLR 570, 581.

6 *Ibid.*

7 [2000] 3 NZLR 570, 580.

8 Josie Clarke "Anti-gay hate rights under review" *New Zealand Herald* (Auckland, New Zealand, 22 June 2001).

9 Calum Bennachie *Submission on Films, Videos, and Publications Classifications (Prohibition of Child Pornography) Amendment Bill to*

the Government Administration Committee (New Zealand)

10 Government Administration Committee *Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and related issues* (March 2003) 11.

11 The other aspects of the inquiry included the impact of new technologies, the submission of publications for classification and the "display" provisions contained in the Act.

12 Government Administration Committee, above n 8, 16.

13 *Ibid* 5.

14 *Ibid* 11.

15 *Ibid* 25.

16 [2000] 2 NZLR 9.

17 [2000] 3 NZLR 570, para 40.

18 As opposed to a violent way of conveying meaning, for example through a violent march or protest or action.

19 Government Administration Committee, above n 8, 19.

20 Government Administration Committee *Films, Videos, and Publications Classification Amendment Bill as reported back from the Government Administration Committee* (30 August 2004) 3.

21 New Zealand is a party to the International Convention of the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights both of which prohibit hate speech on the ground of race, colour or ethnic origin.

22 William Hodge "Incitement to Racial Disharmony: King-Ansell v Police" [1980] NZLJ 187, 189.

23 Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996-9) 8 AULR 185, 201.

24 (1985) 5 NZAR 234, 238.

25 *Proceedings Commissioner v Archer* 3 HRNZ 123.

26 Adopting the reasoning of the Equal Opportunities Tribunal in *Proceedings Commissioner v Zandbergen* unreported, 13 July 1987, Equal Opportunities Tribunal EOT1/86.

27 *In the matter of the Broadcasting Act 1989 and in the matter of a complaint by Doug Clayton and Triangle Television Ltd* Decision no: 2004 – 001, 26 February 2004.

28 *the matter of the Broadcasting Act 1989 and in the matter of a complaints Christopher Banks, the New Zealand Aids Foundation, Calum Bennachie and Broadaster Television New Zealand Ltd* Decision No. 2003-141-146, 2003-147-152 and 2003-153-158 (heard together), 15 December 2003.

29 [2002] 2 NZLR 9, 15.

30 [1991] NZAR 289, 291.

31 See the description of Swedish and Australian "hate speech" provisions described in more detail below.

32 *In the matter of a complaint by Doug Clayton and Triangle Television Ltd* Decision no: 2004 – 001, 26 February 2004. *In the matter of complaints by Christopher Banks, the New Zealand Aids Foundation, Calum Bennachie and Broadaster Television New Zealand Ltd* Decision No. 2003-141-146, 2003-147-152 and 2003-153-158 (heard together), 15 December 2003.

33 [2000] 2 NZLR 9, 16.

34 [1967] NZLR 437 at 445-446.

35 Joseph, P. A. *Constitutional and Administrative Law in New Zealand* (Wellington: Brookers, 2001)

36 1992] 3 NZLR 260, 283 per Richardson J.

37 John Stuart Mill *On Liberty* (Penguin Books, London 1956).

38 Moses, above n 22, 189.

39 R v Kopyto *(1987) 47 DLR (4th)* 213, 226.

40 G Huscroft and P Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) 199.

41 *Ibid* 200.

42 All of these are prohibited ground of discrimination set out under s 21 of the Human Rights Act

43 Huscroft and Rishworth, above n 41, 204.

44 Bernard Darnton (Libertarianz) "How free should speech be?" (Media Release, 11 August 2004).

45 Mr Holmes twice referred to the Secretary General of the United Nations as a "cheeky darky" in his radio broadcast on Newstalk ZB in September 2003.

46 Interestingly, Mr Holmes was invited as a guest of honour to the National Day Festival, Auckland, March 7 2004. It is doubtful whether this outcome would have occurred had he been prosecuted under "hate speech" laws.

47 New Zealand Government "Inquiry into Hate Speech" (Media Release, 5 August 2004).

48 Government Administration Committee "Films, Videos, and Publications Classification Amendment Bill" (Media Release, 30 August 2004).

49 As seen in Kairys, D (ed) *The Politics of Law A Progressive Critique* (1990).

50 For example, Mari Matsuda and Richard Delgado. Seen in the New Zealand context in Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy and Cultural Difference" (2001) 9 WLR 231.

51 Moses, above n 22, 195.

52 *Ibid.*

53 Lederere L and Delgado R (eds) The Price we Pay: the case against racist speech, hate propaganda, and pornography (Hill and Wong, New York, 1995).

54 *Ibid.*

55 *Ibid* 240.

56 Sadurski, W "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 Syd LR, 163, 176.

57 Peter Saxton "Where to draw the line on hate-speech law" New Zealand Herald (New Zealand) 22 October 2004.

58 Weinstein, J in Hate Speech, Pornography, and the Radical Attach on Free Speech Doctrine (Westview Press, Boulder, Colorado, 1999) 72.

59 West-Newman, above n 54, 255.

60 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15.

61 *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48.

62 *Solicitor General v Smith* [2004] 2 NZLR 540.

63 *Ransfield v Radio Network Ltd* [11 June 2004] HC, Auckland, CIV-2003-404-00569.

64 *Hopkinson v New Zealand Police* Judgment 23 July 2004, CRI-2004-485-23

65 *Ibid* 19.

66 *Hosking v Runting & Ors* (2004) 7 HRNZ 301.

67 *Stemson v Police* [2002] NZAR 278.

68 *Films, Videos, and Publications Classifications (Prohibition of Child Pornography) Amendment Bil.*

69 Human Rights Commission www.hrc.govt.nz

70 [2000] 3 NZLR 570, 582.

71 Phil Goff, Minister of Justice "Goff welcomes hate speech inquiry" (Media Release, 6 August 2004).

72 *Ibid.*

73 Government Administration Committee, above n 8, 16.

74 [2000] 3 NZLR 570, 581.

75 Moses above n 22, 188.

76 *Ibid.*

77 *Ibid.*

78 Webster's Dictionary (4th ed) (Ballantine Books, 2001).

79 Collins Concise Dictionary (Harper Collins, Glasgow, 2001).

80 Cambridge Advanced Dictionary (Cambridge University Press, Cambridge, 2003).

81 *Hopkinson v New Zealand Police*, above n 63. The offence under section 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981 is to display, destroy or damage the New Zealand flag in any manner with the intention of dishonouring it.

82 *Hopkinson v Police* above n 63, 21.

83 1 HRNZ 170, 174.

84 *Neal v Sunday News Auckland Newspaper Publication* (1985) 5 NZAR 234.

85 *Ibid* 241.

FURTHER READING

Books

Christoffel, P *Censored – A short history of censorship in New Zealand* (Research Unit, Department of Internal Affairs, Wellington, 1989).

Huscroft G and Rishworth P (eds) *Rights and Freedoms* (Brooker's, Wellington, 1995).

Mill, JS *On Liberty* (Penguin Books, London, 1956).

Phillips, O Hood, Jackson, P and Leopold, P *Constitutional and Administrative Law* (8th edition, Sweet & Maxwell, London, 2001).

Palmer, G *A Bill of Rights for New Zealand – a white paper* (Government Printer, Wellington, 1985).

Rishworth P et al *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003).

Walker, S *Hate Speech: The History of an American Controversy* (University of Nebraska Press, Lincoln, NE, 1996.

Weinstein, J *Hate Speech, Pornography, and the Radical Attach on Free Speech Doctrine* (Westview Press, Boulder, Colorado, 1999).

Journal Articles

Brugger, W "Public Law The Treatment of Hate Speech in German Constitutional Law (Part I)" (2002) 3 German Law Journal No. 12.

Carter D and Palmer M "Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson" (2003) v 33 425.

Cheer, U "A State's Increasing Role in Monitoring Expression: New Zealand's new censorship regime" (1996) 6(2) Canterbury Law Review 333.

Cheer U "Censorship Update" [2003] NZLJ 29.

Cheer, U "More Censorship, Discrimination and Bill of Rights" [2000] NZLJ 472.

Harris, B "Viewpoint Neutrality and Freedom of Expression in New Zealand" (1996) 8(4) Otago LR 515.

Hodge, W "Incitement to Racial Disharmony: King-Ansell v Police" [1980] NZLJ 187.

Lawerence, F M "Why punish hate?" (1999) Amicus Curiae, 4.

Moses, J "Hate Speech: Competing Rights to Freedom of Expression" (1996-9) 8 AULR 185.

Murphey, D "Conceptual Issues in Prohibiting 'Hate Speech'" (2003) 3 The Mankind Quarterly, 53.

Sadurski, W "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 Syd LR, 163.

Stanish G "The Films, Videos, and Publications Classification Act 1993" (1994) 7(3) AULR 719.

Stein E "History Against Free Speech: The New German law Against 'Auschwitz' – and other lies" (1986) 85 Mich. L. Rev., 277.

West-Newman Catherine Lane "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy and Cultural Difference" (2001) 9 Waikato LR 231.

Reports

Government Administration Committee *Films, Videos, and Publications Classification Amendment Bill as reported back from the Government Administration Committee* (30 August 2004) 3.

Government Administration Committee *Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and related* issues (March 2003) 11.

Gilmour G, *Hate-Motivated Violence* (Department of Justice, Canada, May 1994).

Ministry of Justice *Response to Inquiry into the Operation of the Films, Videos, and Publications Classifications Act and related issues* (2003) 2.