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BALANCING FREEDOMS: A CRITIQUE OF NEW
ZEALAND'S HATE SPEECH LEGISLATION IN
LIGHT OF THE NEW SOUTH WALES AND
VICTORIAN EXPERIENCE

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I	INTRODUCTION	3
II	THE LEGISLATION	6
III	GENERAL APPROACH	10
IV	WHAT SHOULD IT MEAN TO EXCITE HATRED?	12
	A Should Intention to Excite be Necessary?	13
	B Should Actual Excitement be Required?	15
	C Who Should the Legislation Require is Excited to Hate?	16
	D Summary	19
V	EXCEPTIONS TO LIABILITY	20
	A Should the Civil Provision be Amended to Include a Public Conduct Exception?	21
	B How Should the Public Conduct Exception be Phrased?	23
	1 Where should the burden of proof lie?	23
	2 For what purposes should the conduct be performed in order to come within the public conduct exception?	24
	3 In what manner should the conduct be performed in order to come within the public conduct exception?	26
	C Summary	30
VI	DRAFT LEGISLATION	31
VII	CONCLUSION	33
VIII	BIBLIOGRAPHY	34

I INTRODUCTION

In the week after the July 2005 London bombings, seven mosques around Auckland were vandalised. Windows were smashed, and variations of the message "RIP London" inscribed on the walls.¹ One year earlier, Jewish graveyards in several Wellington cemeteries were desecrated. In one incident, ninety-two gravestones were knocked over, a swastika gouged into the grass, and a small chapel reduced to a smouldering shell. A Holocaust survivor whose husband's grave had been attacked was shocked by the act, commenting that it brought back childhood memories of Nazi horrors.² From 2001 to 2004, several Muslim people in the Wellington region received letters insulting their faith. The letters contained cartoons likening Muslims to pigs, used violent and threatening language, and sometimes included slices of ham or pork. Recipients of the letters reported that they feared for their safety, with one woman too scared to let her children play outside.³

These and other incidents have ensured that hate speech has featured prominently in the public eye over recent years.⁴ In August 2004, the Government Administration Committee instigated an inquiry into the issue,⁵ with

¹ Angela Gregory "Police seek to charge teen with inciting racial tension" (16 July 2005) *The New Zealand Herald* Auckland <<http://io.knowledge-basket.co.nz>> (last accessed 29 August 2005). It is to be noted that the decision to charge the perpetrator of attacks against mosques with exciting *racial* tension is not a neat fit. While the NZCA has held that Jews in New Zealand constitute a group of people with ethnic origins (*King-Ansell* [1979] 2 NZLR 531 (CA)), these cases would fit much better under a provision that prohibits the inciting of religious hatred.

² Hayden Dewes "Vandals wreak havoc in Jewish cemetery" (7 August 2004) *The Dominion Post* Wellington <<http://io.knowledge-basket.co.nz>> (last accessed 29 August 2005).

³ "Sender of Muslim hate mail convicted" (21 July 2005) *The Dominion Post* Wellington 5. The author of the letters was convicted of harassing their recipients. Not all incidents of hate speech, however, could be dealt with under the Harassment Act 1997, which requires that the defendant has engaged in a "pattern of behaviour" directed at another person, "being a pattern of behaviour that includes doing any specified act to the other person on at least 2 separate occasions within a 12 month period" (Harassment Act 1997, section 3(1)).

⁴ Hate speech was an issue in the 2005 election campaign, with United Future listing as one of its two "bottom lines" the goal of "stopping hate speech laws" ("Labour churns out more election promises" (21 August 2005) *The New Zealand Herald* Auckland <<http://io.knowledge-basket.co.nz>> (last accessed 29 August 2005)). It is unclear whether United Future wishes to abolish New Zealand's current hate speech provisions or simply prevent their extension.

⁵ Government Administration Committee "Inquiry into Hate Speech" (5 August 2004) Press Release. The reform of hate speech legislation was initially raised in the Government Administration Committee's examination of the Films, Videos, and Publications Classifications Amendment Bill (Government Administration Committee "Films, Videos and Publications Classifications Amendment Bill" (30 August 2004) Select Committee Report 3). During the submissions process, several contributors recommended that the scope of censorship law be

Justice Minister Phil Goff expressing the wish that the committee focus on the possible reform of the Human Rights Act 1993 (hereinafter the HRA).⁶ At present, this legislation proscribes only written matter and words that excite certain feelings of hate on the grounds of race.⁷ If the HRA's hate speech provisions are to be reformed, however, the grounds on which hate speech is prohibited may be extended to incorporate those listed in section 21(1), including religion, sexuality, gender, and soon, perhaps, gender identification.⁸ The structure and phrasing of any new or modified hate speech provisions will require careful thought.

Across the Tasman, too, the issue of hate speech has been a focus of public debate. In March 2002, a pastor of a Christian ministry conducted a seminar that ridiculed and demonised the Muslim religion. Muslim people were said to be inherently deceitful, and posters featuring the words "Rise Up Australia" were displayed.⁹ In October 1999, a Sydney man was repeatedly harassed by a neighbour who disapproved of his sexuality. In one incident, the words "fag lives here, faggots should die" were inscribed on the man's door, together with a drawing of a large penis.¹⁰ On 28 November 1995, a Sydney talk-back radio host painted an unattractive caricature of a notional Aboriginal person, referring to him as "looking like a skunk and smelling like a skunk, with a

extended to include hate speech. Justice Minister Phil Goff, however, has indicated that he does not consider censorship law the appropriate means by which to regulate hate speech, placing the issue firmly within the discourse of human rights (see note 6).

⁶ Hon Phil Goff "Goff welcomes hate speech inquiry" (6 August 2004) News Release. The Justice Minister notes:

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.

⁷ Human Rights Act 1993 sections 61, 131. For a more detailed account of the provisions, refer Part II *Legislation*.

⁸ Georgina Beyer's Human Rights (Gender Identification) Amendment Bill provides for "gender identity" to be included as one of the prohibited grounds of discrimination in section 21 of the HRA. The first reading of the Bill has been delayed until after the 2005 election ("Taking brave stand in world that labels them freaks" (24 March 2005) *The New Zealand Herald* Auckland <<http://io.knowledge-basket.co.nz>> (last accessed 29 August 2005)).

⁹ *Islamic Council of Victoria v Catch The Fire Ministries Inc (Final)* [2004] VCAT 2510 para 10 <www.austlii.edu.au> (last accessed 29 August 2005).

¹⁰ *Burns v Dye* [2002] NSWADT 32 para 34 <www.austlii.edu.au> (last accessed 29 August 2005).

sardine can on one foot and sandshoe on the other, and a half drunk bottle of beer under the arm".¹¹

The perpetrators of these Australian instances of hate speech were all called to account under the civil provisions of the New South Wales or Victorian hate speech legislation.¹² As the mixed response of the Australian public to these decisions indicates,¹³ the question of whether hate speech legislation is justified raises broad legal issues, including the fundamental right in a democracy to freedom of expression. While some argue that the proscription of hate speech constitutes an unjustified limitation on free speech, it must be remembered that hate speech can have the effect of alienating already marginalised members of society – a state of affairs that is itself detrimental to a healthy democracy. Australian cases demonstrate that the legislative proscription of hate speech can have a positive, cathartic effect on its victims, reaffirming their place within society.¹⁴ Finding the right balance between freedom of expression and freedom from vilification is challenging, but the Australian experience indicates that it is possible.¹⁵

¹¹ *Western Aboriginal Legal Service Limited v Jones & anor* [2000] NSWADT 102 para 6 Silva J and N Rees <www.austlii.edu.au> (last accessed 29 August 2005). While the defendant did not directly state the skunk-like, tin-can-wearing man he described to be Aboriginal, the NSW Administrative Decisions Tribunal held that the ordinary, reasonable listener would understand him to be referring to an Aboriginal person (para 139).

¹² *Islamic Council of Victoria v Catch The Fire Ministries*, above, was brought under the Victorian legislation, the Racial and Religious Tolerance Act 2001. *Burns v Dye*, above, and *Western Aboriginal Legal Service v Jones & anor*, above, were both brought under the NSW counterpart, the Anti-Discrimination Act 1977. For a more detailed account of the provisions, see Part II *Legislation*.

¹³ The recent decision of *Islamic Council of Victoria v Catch the Fire Ministries*, above, in particular, aroused much public debate. For an example of an opinion against the outcome, see Amir Butler "Muzzling the haters doesn't make hate vanish" (4 January 2005) *The Age* Melbourne <www.theage.com.au> (last accessed 29 August 2005). For an example of an opinion in favour of the outcome, see Waleed Aly "There is free speech, and then there is hate-inducing vilification" (23 December 2004) On Line Opinion <<http://www.onlineopinion.com.au>> (last accessed 24 August 2005).

¹⁴ The majority of plaintiffs in the New South Wales and Victorian jurisprudence have emphasised that the remedy they are most eager to attain is a public statement of apology or, alternatively, a public statement that the defendant has breached the legislation. This emphasis demonstrates that the acknowledgement that the defendant's vilifying conduct was unlawful is important to plaintiffs. See, for example, *Western Aboriginal Legal Service Limited v Jones & anor* [2000] NSWADT 102 para 163 Silva J and N Rees <www.austlii.edu.au> (last accessed 29 August 2005).

¹⁵ For a more extensive discussion of the competing principles involved in the proscription of hate speech, see Human Rights Commission "Submission to the Government Administration Committee into the Inquiry into Hate Speech" paras 1.7 to 1.15.

This paper attempts to identify any modifications that the structure and phrasing of the HRA hate speech provisions require in order to achieve such a balance. Envisaging a future in which hate speech law is accorded a more prominent role within our legislative framework, the paper investigates the mechanics of how the current HRA formula, and especially the civil provision, can be modified to best protect the rights and freedoms at stake. Looking to the provisions' treatment by the courts, it will identify the questions raised by the New Zealand experience to date. In order to begin the process of answering these questions, the paper will turn to the jurisprudence of the Australian states of New South Wales and Victoria. While Australia boasts an extensive range of hate speech law, the similarity of the New South Wales and Victorian legislation both to each other and the New Zealand's HRA formula renders it best placed to provide a cohesive body of case-law from which lessons for New Zealand can be drawn.

II THE LEGISLATION

New Zealand has had hate speech legislation since 1971.¹⁶ As noted above, however, it is limited to the proscription of conduct likely to excite racial disharmony. The sister provisions of sections 61 and 131 constitute respectively the civil and criminal provisions of the HRA.¹⁷ Section 61 provides that it is unlawful for any person to publish, distribute, broadcast, or use in any public place, words that are "threatening, abusive or insulting" and which are "likely to excite hostility against or bring into contempt any group of persons" in New Zealand on the ground of their race.¹⁸ Section 131 has the same elements, except

¹⁶ Race Relations Act 1971. See note 17.

¹⁷ The Race Relations Act 1971, the precursor of the HRA provisions, originally contained only a criminal provision (section 25). In 1979, a civil provision was inserted (section 9A), only to be repealed ten years later. In light of public controversy about its impact upon freedom of speech and freedom of the media it appeared that, without an intent requirement, the threshold test that the words have the capacity to excite hostility, ill-will, contempt or ridicule was too low. While the HRA reintroduces the civil provision, a comparison of section 61 with its precursor makes clear that the legislature has decided to raise the threshold test. Under the new civil provision, words that excite the less serious feelings of ill-will and ridicule are not prohibited. See Juliet Moses "Hate speech: competing rights to freedom of expression" (1996) 8 Auk U LR 185, 186-187.

¹⁸ Section 61 of the HRA provides:

(1) It shall be unlawful for any person—

that the level of requisite excited feelings is lowered to include ill-will and ridicule. Further, there is a mens rea requirement of intent to excite these feelings.¹⁹ Any prosecution under section 131 requires the consent of the Attorney-General.²⁰

The New South Wales and Victorian provisions are in many ways closely comparable to their New Zealand counterparts. While the Victorian provisions are the subject of separate legislation (the Racial and Religious Tolerance Act 2001, hereinafter the RRTA), New South Wales, like New Zealand, has placed the provisions within broad human rights legislation (the Anti-Discrimination Act 1977, hereinafter the ADA). A further difference between the two Australian jurisdictions is the period of time for which they have been in force. Whereas New South Wales was the first Australian state to enact hate speech legislation,

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- (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 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 to 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 their colour, race, or ethnic or national origins of that group of persons.

- (2) It shall not be a breach of subsection (1) of this section to publish in a newspaper, magazine, or periodical or broadcast by means of radio or television 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.

¹⁹ Section 131 of the HRA provides:

- (1) Every person commits an offence and is liable on summary conviction for 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 their 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 by section 2(1) of the Summary Offences Act 1981), or within the hearing of any persons in any such public place, or at a meeting to which the public are invited to 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.

²⁰ HRA section 132.

Victoria is, at this point, the last.²¹ Despite the twenty-four years between the enactment of the two legislative schemes, however, none of the divergences between the RRTA and the ADA are significant for the purposes of this paper, with the structure and phrasing of the RRTA closely modelled on that of the ADA.²²

Turning first to the civil provisions, the ADA and the RRTA both provide that it is unlawful for any person to publicly "incite hatred towards, serious contempt for, or severe ridicule of" a person or group of persons on the grounds of specified characteristics of that other person or class of persons.²³ Thus far, the

²¹ The ADA was preceded only by the federal Racial Discrimination Act 1975. Only the Northern Territory is yet to enact hate speech legislation.

²² Mr Bracks (Premier of Victoria) (17 May 2001) VicHansard 1285 Parliament of Victoria <<http://tex.parliament.vic.gov.au>> (last accessed 29 August 2005).

²³ Section 20C of the ADA provides:

- (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.
- (2) Nothing in this section renders unlawful:
 - (a) a fair report of a public act referred to in subsection (1), or
 - (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the Defamation Act 1974 or which is otherwise subject to a defence of absolute privilege in proceedings for defamation, or
 - (c) a public act, done reasonable and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about the expositions of any act or matter.

Section 7 of the RRTA provides:

- (1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
- (2) For the purposes of sub-section (1), conduct—
 - (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
 - (b) may occur in or outside Victoria.

Section 8 of the RRTA is identical to section 7, with the phrase "religious belief" substituted for the word "race".

Section 11 of the RRTA provides:

- (1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith—
 - (a) in the performance, exhibition or distribution of an artistic work; or
 - (b) in the course of any statement, publication, discussion or debate made or held, or in any other conduct engaged in, for—
 - (i) any genuine academic, artistic, religious or scientific purpose; or
 - (ii) any purpose that is in the public interest; or
 - (c) in making or publishing a fair and accurate report of any event or matter of public interest.

Section 12 of the RRTA provides:

- (1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.

Australian approach is not radically different from that of New Zealand. Where the ADA and the RRTA depart from the HRA, however, is in their provision of exceptions that, if met, preclude liability. Even if conduct is objectively capable of inciting hatred, it does not contravene the civil provisions if it was carried out reasonably and in good faith in the public interest, or in a fair report of someone else's conduct.

Turning to the criminal provisions, both the New South Wales and the Victorian legislature introduce requirements of intent and knowledge.²⁴ As in New Zealand, it is an offence in both jurisdictions for any person, on the grounds of the specified characteristics of another person or class of persons, to intentionally engage in conduct that the offender knows is likely to incite the requisite feelings of hostility. Unlike New Zealand, the two Australian jurisdictions introduce the concept that the conduct may threaten physical harm against that other person or class of persons.²⁵ Whereas the RRTA requires that physical harm is threatened, the ADA provides that it is only one way in which the incitement can occur. The criminal provisions do not include exceptions to liability.

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- (2) Sub-section (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

²⁴ Whereas the RRTA explicitly requires intention to engage in conduct that the offender knows is likely to incite the requisite feelings, the ADA does not (see note 23). The New South Wales courts have held, however, that the legislature intended these requirements, and have read them into the Act. See *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* [1995] EOC 78-260, 265 Decision of the Tribunal.

²⁵ Section 20D of the ADA provides:

- (1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:
- (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
 - (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Section 24 of the RRTA provides:

- (1) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely—
- (a) to incite hatred against that other person or class of persons; and
 - (b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.
- (2) A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

It can be seen, then, that while the legislation of the two Australian jurisdictions is broadly similar to that of New Zealand, significant differences do exist. This paper will focus on the civil provisions, examining both the legislative differences and the differing approaches of the New Zealand and Australian courts in order to identify the means by which New Zealand's hate speech legislation may better achieve a balance between the rights and freedoms at stake.

III GENERAL APPROACH

Once the difficult decision to legislate against or extend laws proscribing hate speech has been made, the equally difficult matter of defining the prohibited conduct must be addressed. New Zealand's HRA provisions require both that the written matter or words are "threatening, abusive or insulting" and that they are "likely to excite hostility against or bring into contempt" the requisite people.²⁶ That is, the provisions focus both on the effect of the hateful words or matter on their subject *and* on the response of those who may be excited to hate. By contrast, the New South Wales and Victorian provisions concentrate the enquiry exclusively on the matter of whether the conduct has the capacity to incite hatred in others. This approach is explained in the New South Wales case of *Wagga Wagga Aboriginal Action Group v Eldridge*:²⁷

Section 20C [of the ADA] does not make unlawful the use of words that convey hatred towards a person or group of persons on the grounds of the race of that particular person, or members of the group... The dividing line arises when by a public act a person *incites others* to have hatred towards, serious contempt for, or to severely ridicule a particular person or group of persons on the ground of race.

From the outset, then, the direct harm caused to the subject of the hateful conduct is irrelevant to the enquiry of whether the New South Wales and Victorian legislation has been breached.

While, at first glance, New Zealand's approach appears to differ significantly from that of New South Wales and Victoria, a closer analysis

²⁶ See notes 18 and 19.

²⁷ *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* [1995] EOC 78-260, 266 Decision of the Tribunal (my emphasis).

reveals that the HRA essentially follows an "incitement" model similar to that of the two Australian states. If, as the New Zealand legislation requires, conduct is capable of exciting hatred or contempt, then it will almost certainly follow that the further requirement that the conduct is threatening, abusive or insulting is also satisfied. In New Zealand, then, like in New South Wales and Victoria, the primary focus of the legislation is on the ability of the conduct to excite hatred.

An alternative approach is demonstrated by the Australian federal Racial Discrimination Act 1975, which prohibits conduct likely "to offend, insult, humiliate or intimidate another person or a group of people" on the ground of their race.²⁸ Under the federal legislation, the capacity of the conduct to incite others to hatred is unlikely to be relevant.²⁹ Interestingly, the Model Bill that formed the basis of the Victorian public consultation process followed a similar approach to that of the Racial Discrimination Act. The public's response, however, was not positive, leading to the large-scale redrafting of the Bill. "[A]lmost to a person", the respondents thought that the Model Bill's focus on the likelihood of the conduct to cause offence was "a bit silly".³⁰

Despite the distaste of the Victorian public for the prohibition of conduct that conveys hatred towards a person on the grounds of their race or religion, this alternative approach ought to be considered if New Zealand is to modify the hate speech provisions of the HRA.³¹ If one of the objects of hate speech legislation is to promote the full and equal participation of every person in society,³² then

²⁸ Section 18C(1) of the Racial Discrimination Act 1975 (Cth) provides that:

It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

²⁹ The capacity of the conduct to incite others is arguably relevant to whether the subject of the conduct is humiliated or intimidated. The effect on the victim of the conduct is, however, the primary enquiry.

³⁰ Hon C A Furletti (13 June 2001) VicHansard 1403 Parliament of Victoria <<http://tex.parliament.vic.gov.au>> (last accessed 29 August 2005).

³¹ Section 63 of the HRA proscribes conduct that is "hurtful or offensive" to a person on the ground of their race. The scope of the section is limited, however, by the requirement that the conduct is "either repeated, or of such a significant nature, that it has a detrimental effect on that other person in respect of" certain specified areas, including employment, education and housing.

³² Section 4(1)(a) of the RRTA provides that one of the Act is "to promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy..."

legislative drafting that focuses on the victims of hate speech may be the best way to achieve it.³³ While the HRA's current approach protects the subjects of hate speech from its capacity to excite further hatred against them, it does not protect the Muslim people who received letters insulting their faith.³⁴ As long as it is lawful to convey hatred to others on the ground of specified characteristics, hate speech remains lawful in New Zealand.

IV WHAT SHOULD IT MEAN TO EXCITE HATRED?

In light of the fact that the hate speech provisions of the HRA effectively focus on the capacity of the words or written matter to excite hatred, it is necessary to carry out a detailed analysis of what that excitement entails. While the issue is touched upon in several cases,³⁵ the majority of the admittedly limited New Zealand hate speech jurisprudence is notable for its propensity to eschew the issue.³⁶ Beyond the face of the HRA itself, then, it is necessary to look to the New South Wales and Victorian jurisprudence to assess what it ought to mean to excite hatred in New Zealand.

³³ Sometimes, hate speech is highly insulting to a group of people but unlikely to excite feelings of hostility against that group. *Jones v Scully*, a case brought under the Racial Discrimination Act 1975 (Cth), involved the distribution of a number of anti-Semitic pamphlets, including "Russian Jews Control Pornography" and "The Inadvertent Confession of a Jew". The material was held to breach the Act, as it was likely to offend or insult the "Jew in Australia" (*Jones v Scully* [2002] FCA 1080 Hely J paras 108, 197, 224 <www.austlii.edu.au> (last accessed 29 August 2005)). Under a provision that focuses on the capacity of material to excite hatred in others, however, the same result would not be assured. While it could be argued that the material is likely to excite the requisite feelings of hostility, it is possible that it would be found so ridiculous as to be unlikely to excite these feelings, leaving the victims of the hate speech with no legal recourse. See *Burns v Dye* [2002] NSWADT 32 paras 54-94 Decision of the Tribunal <www.austlii.edu.au> (last accessed 29 August 2005), *Veloskey & Anor v Karagiannakis & Ors* [2002] NSWADTAP 18 para 43 Decision of the Tribunal <www.austlii.edu.au> (last accessed 29 August 2005).

³⁴ See note 3.

³⁵ *Neal v Sunday News* (1985) EOC 92 Decision of the Tribunal, *Skelton v Sunday Star Times* (29 April 1996) Complaints Review Tribunal CRT 24/95 Decision of the Tribunal. See Part IV C Who Should the Legislation Require is Excited to Hate?

³⁶ In *King-Ansell v Police* [1979] 2 NZLR 531, 535 Richmond P, the Court of Appeal decided against addressing what it means to excite the requisite feelings, contenting itself with the observation that the Magistrate's finding that the anti-Semitic document was calculated to incite ill-will against Jews in New Zealand was "quite inevitable". In *Skelton v Sunday Star Times*, above, the matter of whether the newspaper's editorial policy of using a capital letter for the first letter of the names of all ethnic groups except for that group known as Pakeha excited the requisite feelings against Pakeha was not considered, as it was held that the practice was not insulting or offensive.

While the HRA's wording that the hate speech must "excite" the requisite feelings of hostility is different to the New South Wales and Victorian provisions, which focus on the capacity of conduct to "incite" these feelings, this variation is not significant. As defined by the Oxford English Dictionary, "excite" and "incite" share a common meaning – namely, to stir up, rouse, or urge to action.³⁷ This natural meaning fails, however, to clarify the evidential and legal requirements that conduct should be required to meet in order to constitute excitement: first, whether the HRA should require intention to excite; secondly, whether actual excitement should be necessary; and thirdly, the identity of those who the legislation should require are excited to hate. This paper will address each issue in turn.

A Should Intention to Excite be Necessary?

The criminal arm of the HRA is unambiguous in its requirement of intent. As provided in section 131, a person must not publish, distribute or broadcast spoken or written matter which is threatening, abusive or insulting "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 their ... race".³⁸ Without doubt, then, the crime of exciting racial hatred has the mens rea requirement of intent.

By contrast, the civil arm of the HRA does not specify whether intent to excite the requisite feelings is required. Contrasting sections 61 and 131, however, the rules of statutory interpretation suggest that the legislature's decision to specify the requirement of intent in the latter and not the former indicates that the former does not require intent.³⁹ Moreover, the word "excite" ought not to be interpreted in the same manner in the civil law as in the criminal

³⁷ J A Simpson, E S C Weiner (eds) *Oxford English Dictionary* (2 ed, Clarendon Press, Oxford, 1989) V 506, VII 796.

³⁸ See note 19.

³⁹ This approach is suggested by the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another). See Francis Bennion *Statutory Interpretation* (3 ed, Butterworths, 1997) 969, 976-979.

law. Whereas the criminal provision has a mens rea requirement, the civil provision ought not.⁴⁰

This reasoning is supported by the New South Wales and Victorian jurisprudence. While defendants have attempted to argue that the civil arms of the New South Wales and Victorian legislation include a requisite mental element, this approach has been consistently rejected by the respective Tribunals in the last five years.⁴¹ As the New South Wales Administrative Decisions Tribunal has argued, to impose a subjective intent requirement in the civil provision would defeat one of its primary goals – namely, to ensure that all members of society “can have a dignified and peaceful existence free from racist harassment and vilification”.⁴² Instead of focusing on the defendant’s state of mind, this goal is best met by assessing the capacity of the words or written matter to excite hatred in others.⁴³ While New Zealand courts have already taken this approach, any remaining ambiguity can be clarified by modifying section 61 of the HRA to specify that intent to excite the requisite feelings is not required.

⁴⁰ The distinction between the civil and criminal provisions is bolstered by the approaches of other jurisdictions. In particular, the Supreme Court of Canada held in *Canada v Taylor* that the objectives of hate speech legislation “can only be achieved by ignoring intent”, as the purpose of the legislation is not to punish wrongdoing but prevent harm (*Canada v Taylor* [1990] 3 SCR 892 para 68 (SCC) Dickson CJ).

⁴¹ See *Burns v Dye* [2002] NSWADT 32 para 19 Decision of the Tribunal <www.austlii.edu.au> (last accessed 29 August 2005), *Kazak v John Fairfax Publications* [2000] NSWADT 77 paras 25-29 Decision of the Tribunal <www.austlii.edu.au> (last accessed 29 August 2005), *Veloskey & Anor v Karagiannakis & Ors* [2002] NSWADTAP 18 paras 22-24 Decision of the Tribunal <www.austlii.edu.au> (last accessed 29 August 2005), *Western Aboriginal Legal Service Limited v Jones & anor* [2000] NSWADT 102 paras 83-92 Silva J and N Rees <www.austlii.edu.au> (last accessed 29 August 2005), and *Islamic Council of Victoria v Catch The Fire Ministries Inc (Final)* [2004] VCAT 2510 paras 13-14 Higgins J <www.austlii.edu.au> (last accessed 29 August 2005). As the New South Wales Administrative Tribunal notes in *Veloskey & Anor v Karagiannakis & Ors*, however, the approach of the New South Wales jurisprudence has not always been consistent. In *Hellenic Council of NSW v Apoleski and the Macedonian Youth Association* [1997] NSWEOOT, the Equal Opportunity Tribunal accepted the defendant’s submission that the incitement must be intended or foreseen. *Malco & Ors v Massaris & Ors* [1998] NSWEOOT 102, too, can be read to imply that the defendant’s state of mind is relevant, with the Tribunal commenting that there was no evidence to suggest that an inciting word was deliberately chosen by the defendant. As the Tribunal argues in *Veloskey v Karagiannakis*, however, these cases are not persuasive. Neither undertakes an exercise of statutory construction, and the Tribunal’s comment in *Malco* appears to have been made in passing (*Veloskey & Anor v Karagiannakis & Ors*, above, paras 22-24).

⁴² *Kazak v John Fairfax Publications*, above, para 15.

⁴³ *Veloskey v Karagiannakis*, above, para 23.

B Should Actual Excitement be Required?

Both the civil and the criminal provisions of the HRA require that the written matter or words are “likely to excite” the requisite feelings of hostility against any group of persons on the ground of their race.⁴⁴ New Zealand’s hate speech law is thus explicit in its direction that actual excitement is not required in order for it to be breached. Instead, courts are to assess the objective likelihood that the words or written matter will excite the requisite feelings.

The New South Wales and Victorian jurisprudence indicates that New Zealand has taken the better approach. Neither of the Australian jurisdictions’ provisions expressly indicate whether actual incitement is required, leaving the matter to be addressed by the courts. In the first case to be taken under the RRTA, the Victorian Civil and Administrative Tribunal analysed the policy issues at stake. While the task of determining the objective likelihood of the prohibited consequences occurring can be subjective and politically speculative, the Tribunal concludes that actual incitement ought not to be required. “If it were otherwise,” the Deputy President states, “the effect of this section would be left to the vagaries of individual sensibilities.”⁴⁵ Requiring proof of actual incitement would impose heavy evidentiary burdens on complainants. “It would have to be established after the event that someone had experienced these strong feelings because of the conduct.”⁴⁶ This task would require evidence from those exposed to the words or written matter and may lengthen trials.⁴⁷

Of course, the fact that actual excitement is not required does not mean that the response of those exposed to the words or written matter in question is irrelevant. In *Islamic Council of Victoria v Catch The Fire Ministries*, the

⁴⁴ HRA sections 61, 131. See notes 18 and 19 (my emphasis).

⁴⁵ *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254, para 38 McKenzie J <www.austlii.edu.au> (last accessed 29 August 2005).

⁴⁶ *Judeh v Jewish National Fund of Australia Inc*, above, para 38.

⁴⁷ The Victorian Civil and Administrative Tribunal’s approach is supported by the RRT Bill’s second reading speech. With regard to the civil provisions, the Premier states that they proscribe “conduct that, objectively, promotes the strong emotions of hate, revulsion or contempt against a person or group on the basis of their race or religion” ((17 May 2001) VicHansard 1285 Parliament of Victoria <<http://tex.parliament.vic.gov.au>> (last accessed 29 August 2005)). By introducing an objective test to the assessment of the conduct, the Premier indicates that the provisions are directed to the conduct itself and not to the nature of the reactions to it.

Victorian Tribunal had to decide whether a Christian pastor's seminar on Islam had breached the RRTA's civil provision of inciting religious hatred.⁴⁸ Throughout the judgment, the Tribunal is at pains to ascertain the precise nature of the audience's response to the seminar, seeking detailed testimony from the witnesses and listening to the tape of the presentation. The finding that the pastor's conduct "produces a response from the audience at various times in the form of laughter" can be seen to contribute to the decision that the seminar was objectively likely to incite severe ridicule of the Muslim religion.⁴⁹ Thus, while actual incitement is not required in order for the Victorian provisions to be breached, it is relevant. New Zealand courts are likely to take a similar approach.

C Who Should the Legislation Require is Excited to Hate?

The objective focus on whether the conduct is likely to excite the requisite feelings raises what is perhaps the most difficult of the three questions: *Whose* likely response is the court to assess? With neither section 61 nor section 131 of the HRA providing any indication of the legislature's intent, the matter is entirely in the hands of the judiciary. In the past twenty years, New Zealand courts have considered the issue in two cases.

The question of who must be excited to the requisite feelings of hostility was first considered by the Equal Opportunities Tribunal in *Neal v Sunday News*. In that case, the plaintiff contended that the newspaper's publication of anti-Australian jibes breached the civil provision of the Race Relations Act 1971, the precursor of the HRA.⁵⁰ While the plaintiff drew attention to two of the potential paths that the Tribunal could take, suggesting it assess the likely effect of the publication "either on the average New Zealander or, alternatively, on that group of New Zealanders who might be less tolerant or have a lower threshold of

⁴⁸ *Islamic Council of Victoria v Catch The Fire Ministries Inc (Final)* [2004] VCAT 2510.

⁴⁹ *Islamic Council of Victoria v Catch the Fire Ministries*, above, para 383. The judgment does not state explicitly that it treats the audience's response as an evidentiary matter. This explanation of the decision is, however, the most likely. While no other Victorian or New South Wales case examined refers to the actual response of the audience as an evidentiary matter, this state of affairs is most likely because *Islamic Council of Victoria v Catch The Fire Ministries* is the only case in which actual incitement has occurred.

⁵⁰ See note 157.

sensitivity than the majority”, the Tribunal appears to have ignored these possibilities.⁵¹ Instead, it opted to focus on the likely response of “the group which includes the 200,000 purchasers of the paper and the 700,000 odd who would read the same”.⁵² With respect, it seems that the Tribunal has missed the point. As the plaintiff’s submissions indicate, the issue is not the identity of the audience but rather the characteristics of the audience members whose likely response is to be assessed.

The Complaints Review Tribunal addresses the issue more satisfactorily in *Proceedings Commissioner v Archer*.⁵³ Drawing on the plaintiff’s submissions, the Tribunal notes that, in the context of assessing the capacity of the written material to excite hostility, the test of the reasonable person is inappropriate because he or she is unlikely to be excited to feeling hostility for groups who are racially different.⁵⁴ Instead, the Tribunal opts to assess the likely response of people who are less perceptive or sensitive on racial issues than others and therefore vulnerable to being excited to hostility.⁵⁵ In that case it was held that comments that Japanese people are short, dull and blind and ought to be thrown out of the country are capable of exciting racially insensitive people to hostility towards Japanese people living in New Zealand.

The New South Wales and Victorian jurisprudence has taken a different approach. Faced with a dearth of authority, the courts have relied on tests developed under defamation law. This approach involves discounting the likely responses of people “who are at either end of the scale” – that is, “either

⁵¹ *Neal v Sunday News Auckland Newspaper Publications* [1985] 5 NZAR 234, 239 Decision of the Tribunal.

⁵² *Neal v Sunday News Auckland Newspaper Publications*, above, 240.

⁵³ *Proceedings Commissioner v Archer* [1996] 3 HRNZ 123 Decision of the Tribunal.

⁵⁴ *Proceedings Commissioner v Archer*, above, 127.

⁵⁵ A similar approach is taken by the Canadian Human Rights Tribunal. In *Nealy v Johnston*, the Tribunal rejected the “ordinary reasonable person” test, contending that the assessment of the conduct should extend to the response of the less reasonable, and even of the downright malevolent (*Nealy v Johnston* (25 July 1989) Canadian Human Rights Tribunal 10/89 para 64 Decision of the Tribunal). The case was brought under section 13(1) of the Canadian Human Rights Act 1985, which prohibits specified conduct “that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination”.

malevolently inclined or free from susceptibility to prejudice".⁵⁶ In the middle remains the "ordinary reasonable person", and it is this specimen whose likely response the New South Wales and Victorian courts have determined they must estimate.⁵⁷

Contrasting the Australian jurisdictions' "ordinary reasonable person" test with New Zealand's "less perceptive or sensitive person" counterpart, it is clear that the Australian approach has several drawbacks. At a superficial level, it is unattractive and unconvincing for the courts to assert that the "ordinary reasonable person" would be incited to hate by a defendant's conduct. In *Burns v Dye*, for instance, the New South Wales Tribunal held that the defendant's inscription on the plaintiff's door that "fag lives here, faggots should die" is capable of inciting the ordinary, reasonable person to "hatred of, or at the very least serious contempt for," the plaintiff.⁵⁸ One would hope and expect that the ordinary person is a little more reasonable. Under New Zealand's "less perceptive or sensitive person" approach, the courts are able to condemn hate speech without depicting hatred on the grounds of the specified characteristics as "ordinary" and, even more unattractive, "reasonable".

What is more, the decision of the New South Wales and Victorian courts to import defamation law concepts is itself contentious. While the Victorian Civil and Administrative Tribunal contends that its application is "logical in the context of the use by the legislature of the words hatred, ridicule and contempt",⁵⁹ there are significant differences between defamation and hate speech law.⁶⁰ Whereas defamation law primarily operates to protect the

⁵⁶ *Kazak v John Fairfax Publications* [2000] NSWADT 77 para 38 Decision of the Tribunal <www.austlii.edu.au> (last accessed 29 August 2005).

⁵⁷ *Kazak v John Fairfax Publications*, above, para 71.

⁵⁸ *Burns v Dye* [2002] NSWADT 32 para 88 Decision of the Tribunal <www.austlii.edu.au> (last accessed 29 August 2005). Similarly, in *Western Aboriginal Legal Service v Jones*, the Tribunal assessed that a radio announcer's reference to a notional Aboriginal person as an unattractive drunken skunk would most likely have incited the ordinary reasonable listener to severe contempt and severe ridicule of Aboriginal people (*Western Aboriginal Legal Service Ltd v Jones & anor* [2000] NSWADT 102 para 143 Silva J and N Rees <www.austlii.edu.au> (last accessed 29 August 2005)).

⁵⁹ *Islamic Council of Victoria v Catch The Fire Ministries Inc (Final)* [2004] VCAT 2510 para 14 Higgins J <www.austlii.edu.au> (last accessed 29 August 2005).

⁶⁰ In *Judeh v Jewish National Fund of Australia*, the Victorian Civil and Administrative Tribunal notes that it is best to "be cautious before importing into the provisions of the [RRTA] concepts

individual, hate speech legislation is enacted to protect collective groups. Inherent in this difference is the potential of hate speech law to prevent a greater scale of harm than defamation law – a circumstance that can be argued to justify that the bar for the breach of hate speech legislation is set lower than that for defamation law.

Thus, the New Zealand courts' "less perceptive or sensitive person" test appears to be the better approach. While at first glance it could be perceived that the breadth of the test places it in danger of unjustifiably impinging on freedom of speech, it must be remembered that, in order for spoken or written matter to have breached the HRA, it must be *likely* to excite people to the requisite feelings of hostility. The application of the New Zealand approach to the New South Wales decision of *Burns v Dye*, for instance, would be unlikely to alter the Tribunal's decision that the incident in which the defendant yelled homophobic abuse outside the plaintiff's door did not breach the civil provision of the ADA.⁶¹ No matter how unreasonable and malevolent the potential audience, the sight of a drunken and possibly mentally ill individual hollering crude expletives would be unlikely to excite anyone to the requisite feelings of hostility towards the plaintiff. The "less perceptive or sensitive person" test, then, does not represent too low a threshold.⁶²

D Summary

A critique of the phrasing and interpretation of New Zealand's "excitement" provisions in light of the New South Wales and Victorian

taken from defamation law (*Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254, para 36 McKenzie J <www.austlii.edu.au> (last accessed 29 August 2005)).

⁶¹ In *Burns v Dye*, the defendant's act of inscribing the message "fag lives here, faggots should die" together with a drawing of a large penis on the plaintiff's door was found to have breached the ADA. However, the defendant's act of yelling "cock sucker", "faggot cunt" and other terms of abuse was not, as it was not thought to be capable of inciting others to the requisite feelings of hostility. The defendant's act of smearing faeces and urine was also held not to breach the ADA for the same reason. (*Burns v Dye* [2002] NSWADT 32 paras 54-94 Decision of the Court <www.austlii.edu.au> (last accessed 29 August 2005).)

⁶² The "less perceptive or sensitive person" test is not precluded by the New Zealand Bill of Rights Act 1990. While the approach does impose a limitation on freedom of expression, as protected by section 14 of the Bill of Rights, this limit is "reasonable and demonstrably justified in a free and democratic society", as required by section 5 of the Bill of Rights, and as such is consistent with the rights and freedoms therein. See Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, 2003) 138.

experience indicates that New Zealand is on the right track. While section 61 of the HRA ought to be amended in order to render unambiguous that intent to incite the requisite feelings is not required in order for it to be breached, this alteration would probably not change the law as it stands. What is more, instead of following the New South Wales and Victorian approach of assessing the capacity of the words or written matter to excite the requisite feelings in the "ordinary, reasonable person", New Zealand courts ought to build upon their own approach of assessing the likely response of the "less perceptive or sensitive person". While the New Zealand jurisprudence on what it means to excite hatred is only in its developing stages, it shows great potential to achieve an appropriate balance between freedom of expression and freedom from vilification.

V EXCEPTIONS TO LIABILITY

In New Zealand, once it is established that the spoken or written matter is both threatening, abusive or insulting and likely to excite the required feelings in the less perceptive or sensitive members of its audience, the HRA has been breached. While section 61 of the HRA makes provision for the fair report of prohibited words and written matter in the media,⁶³ neither the civil nor the criminal provisions include any means by which the original communicator of the hate speech may be excepted from liability.⁶⁴

By contrast, in New South Wales and Victoria, the establishment that the conduct incites the required feelings is only half the story. In addition to the fair report exception, the civil provisions of both the ADA and the RRTA exclude the

⁶³ HRA section 61(2). See note 18.

⁶⁴ By requiring that the spoken or written matter is published or distributed (section 61(1)(a)), or used in a public place (section 61(1)(b)), the HRA can also be seen to contain a private conduct exception, in that written matter or words do not breach the Act if they are spoken or written in circumstances in which they do not reach the public ear. The ADA adopts a similar approach, precluding conduct that incites hatred "by a public act" (see note 23). By contrast, the RRTA is not limited to public conduct. Instead, conduct is precluded from liability if it is performed "in circumstances that may reasonably be taken to indicate that the parties to the conduct desire to be heard or seen only by themselves" (see note 23). No case brought under the RRTA thus far raises the private conduct exception, and there is no evidence to suggest that New Zealand would be better off framing the private conduct proviso as an exception. For a detailed discussion of the operation of the public and private realms in Australian hate speech legislation, see Anna Chapman, Kathleen Kelly "Australian Anti-Vilification Law: A discussion of the Public/Private Divide and the Work Relations Context" (2005) 27 Sydney LR 203.

original communicators of hate speech from liability if their conduct is performed for certain nominated purposes and in the specified manner. Even if conduct is objectively capable of inciting hatred, it does not contravene the civil provisions if it is engaged in reasonably and in good faith for the purposes of art, academia, religion, science, or any other purpose that is in the public interest.⁶⁵

Neither this public conduct exception nor the fair report exception applies to the criminal provisions of the New South Wales and Victorian legislation. While at first glance this approach appears anomalous, a closer consideration of the issue demonstrates that the requirement of intent to incite the requisite feelings and outcomes precludes the relevance of the exceptions. If an offender has the intention of inciting hatred towards, serious contempt for or severe ridicule of a group of people on the ground of one of the specified characteristics, then his or her conduct cannot be performed in good faith. Similarly, an intention to bring about the requisite feelings in others precludes the possibility that the published matter constitutes a fair report of the hate speech. It is appropriate, then, that the criminal provision does not include exceptions.

The question of whether the fair report exception ought to be joined by its public conduct counterpart in the civil provision is more contentious. This section first examines the Victorian and New South Wales experience with regard to the public conduct exception in order to determine whether section 61 of the HRA could benefit from its inclusion. Having determined that it could, the section then turns to the phrasing of the exception, discerning the lessons New Zealand can draw from the two Australian states' legislature and judiciary.

A Should the Civil Provision be Amended to Include a Public Conduct Exception?

In the New South Wales and Victorian cases examined, nearly all the defendants whose conduct was found to incite the requisite feelings of hostility

⁶⁵ See note 23.

attempted to rely on the public conduct exception.⁶⁶ None, however, successfully made out the exception on the facts.⁶⁷ It could be argued, then, that New Zealand is unlikely to benefit from the amendment of section 61 of the HRA to include exceptions to liability.

While the exception clause is yet to prove useful to New South Wales and Victorian defendants, however, the factual situations of several cases demonstrate that it has the potential to be so. In *Western Aboriginal Legal Service v Jones*, for instance, the defendant talk-back radio host's description of the notional Aboriginal person was held "to raise a significantly wider subject for public discussion – namely, the right of a landlord to discriminate against unsatisfactory tenants".⁶⁸ The conduct was thus held to be in the "public interest".⁶⁹ The defendant only failed to fulfil the requirements of the exception because he did not prove that the conduct was carried out "reasonably and in good faith".⁷⁰

While this case was undoubtedly correctly decided, a similar situation in which the defendant did perform the conduct reasonably and in good faith is easily imagined. The fact that such a defendant is not protected from liability under New Zealand's law is a matter of concern. Section 61 of the HRA ought to be amended to include a public conduct exception for the original communicator

⁶⁶ It does not appear from the judgement that the defendant in *Burns v Dye* attempted to rely on the public conduct exception (*Burns v Dye* [2002] NSWADT 32 <www.austlii.edu.au> (last accessed 29 August 2005)).

⁶⁷ In *John Fairfax Publications Ltd v Kazak* and *Veloskey & Anor v Karagiannakis & Ors* the New South Wales Administrative Decisions Tribunal Appeal Panel overturned the Administrative Decisions Tribunal's findings that the defendants had breached the two Acts, partly on the basis of the lower Tribunal's application of the exception clauses. However, the Appeal Panel's decision in each case was based on the absence of a clear indication from the lower Tribunal that it had properly considered the relevant factual matters as required by law (*John Fairfax Publications v Kazak* [2002] NSWADTAP 35 para 26 <www.austlii.edu.au> (last accessed 29 August 2005), *Veloskey & Anor v Karagiannakis & Ors* [2002] NSWADTAP 18 paras 14-17 <www.austlii.edu.au> (last accessed 29 August 2005)).

⁶⁸ *Western Aboriginal Legal Service Limited v Jones & anor* [2000] NSWADT 102 para 147 Silva J and N Rees <www.austlii.edu.au> (last accessed 29 August 2005).

⁶⁹ Similarly, in *Kazak v John Fairfax Publications*, the defendant's publication of an article that stated Palestinians to "remain vicious thugs who show no serious willingness to comply with agreements" was also held to be in the public interest, addressing the important public issue of the peace process in the Middle East (*Kazak v John Fairfax Publications*, above, paras 7, 86).

⁷⁰ *Western Aboriginal Legal Service Limited v Jones & anor*, above, para 149.

of the hate speech so as to ensure that the right of freedom of expression is not too severely trampled by that of freedom from vilification.⁷¹

B How Should the Public Conduct Exception be Phrased?

Just as the New South Wales and Victorian experience demonstrates that the inclusion of the public conduct exceptions within the civil provision is of potential benefit, it also indicates that the phrasing and interpretation of the exceptions can require legislative and judicial decisions that are highly significant in terms of the operation of the provision as a whole. In particular, New South Wales and Victorian courts have addressed the issues of where the burden of proof should lie, how the nominated purposes should be interpreted, and what it means for conduct to be carried out "reasonably and in good faith". This section will examine each issue in turn.

1 Where should the burden of proof lie?

Both the New South Wales and the Victorian legislatures provide that the defendant has the onus of proving that the public conduct and fair report exceptions apply, with the RRTA stating that a person does not contravene the civil provisions "if the person establishes that" she engaged in the conduct in a manner consistent with one of the exceptions.⁷² As the New South Wales case of *Western Aboriginal Service v Jones* notes, this approach is contrary to that of the common law, where "it has long been accepted in cases involving allegations of unlawful discrimination that the complainant bears the burden of proof".⁷³

⁷¹ The amendment of section 61 of the HRA would go some way to alleviating the concern of Grant Huscroft that it "cannot be justified as [a] reasonable limitation[n] on freedom of expression". See Grant Huscroft, Paul Rishworth *Rights and freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 202-209.

⁷² RRTA sections 11, 12. Section 104 of the ADA provides:

Where by any provision of this Act or the regulations conduct is excepted from conduct that is unlawful under this Act or the regulations or that is a contravention of this Act or the regulations, the onus of proving the exception in any proceedings before the Tribunal relating to a complaint lies on the respondent.

⁷³ *Western Aboriginal Legal Service Limited v Jones & anor*, above, para 125.

In light of the subjective nature of the exception, however, the New South Wales and Victorian legislatures' reversal of the burden of proof is appropriate. Rather than requiring complainants to bring evidence as to why the defendant's conduct was *not* performed with the requisite good faith, it is more appropriate to oblige defendants to demonstrate the applicability of the exceptions to them. The defendant is in a better position to give evidence of her – the defendant's – state of mind than is the plaintiff. If New Zealand is to modify the approach to the HRA to include the public conduct exceptions, the legislature ought to follow New South Wales and Victoria's lead to specify that the defendant has the onus of proving that the exception applies.

2 *For what purposes should the conduct be performed in order to come within the public conduct exception?*

In order for the conduct to come within the public conduct exception, both the ADA and the RRTA require that it is performed for certain nominated purposes. While the wording of the two Acts differs slightly, they both specify the purposes of academia, art, science, and any other purpose that is in the public interest. The RRTA also specifies religion as a nominated purpose, although the ADA's silence on the issue does not constitute a significant difference, as conduct performed for religious purposes will be caught by the public interest net.

Some critics of the legislation fear that the specification of purposes for which public conduct can be excepted constitutes a form of elitism, creating "a special, privileged class that is exempt from the sanctions of the law".⁷⁴ While such a bias would be concerning, a close reading of the Acts demonstrates the criticism is ill-founded. The specification of the nominated purposes does not confine the exception to discussion by artists, academics, scientists, or religious leaders. Rather, it is open to any defendant to prove that her conduct was carried out reasonably and in good faith for one of the nominated purposes. What is more, both the New South Wales and Victorian legislature indicate that the public interest net incorporates a broad range of conduct, with the ADA

⁷⁴ Hon C A Strong (13 June 2001) VicHansard 1424 Parliament of Victoria <<http://tex.parliament.vic.gov.au>> (last accessed 29 August 2005).

specifying that it includes “discussion or debate about the expositions of any act or matter”.⁷⁵

Just as the nominated purposes are not only of benefit to an elite class of people, not all the conduct of that supposedly elite class is protected by the provisions. That is, the conduct of artists, academics, scientists and religious leaders is not automatically exempted from liability by virtue of their position. Rather, as the Victorian Civil and Administrative Tribunal observes in *Islamic Council of Victoria v Catch the Fire Ministries*, in order for conduct to fall within the nominated purposes it must genuinely be performed for those reasons.⁷⁶ As noted above, that case involved a Christian pastor’s seminar teaching Christians how to “witness” to Muslims. While the defendant’s conduct was held to come within the nominated purpose of “religion”, the defendant’s position as a pastor would not have shielded him from liability were he to have vilified Muslim people on the ground of their race. It was only because the pastor’s statements were “made because of the religious beliefs and activities of Muslims who adhere to the religion of Islam” that they were held to have been performed for a religious purpose.⁷⁷

If New Zealand is to adopt the public conduct exceptions, the nominated purposes formula appears to constitute a useful approach. While the ADA and the RRTA specify a number of purposes for which conduct may be excepted, it seems that the over-riding connection between them is that they have the potential to operate for the betterment of society – in the “public interest”. With this emphasis in mind, the limitation that the nominated purposes impose on the exception appears justified. In light of the fact that, in order for the exception to be relevant, the conduct must, by definition, be capable of causing harm, it is only appropriate for it to be exempted from liability if it has the potential to do good as well. The nominated purposes formula provides a sound example for

⁷⁵ ADA section 20C(2)(c).

⁷⁶ *Islamic Council of Victoria v Catch The Fire Ministries Inc (Final)* [2004] VCAT 2510 para 12 Higgins J <www.austlii.edu.au> (last accessed 29 August 2005).

⁷⁷ *Islamic Council of Victoria v Catch The Fire Ministries Inc*, above para 13. While the defendant’s comments were held to come within a nominated purpose, the exception was not made out as they were not held to be performed “reasonably and in good faith”.

New Zealand to follow if section 61 of the HRA is to be amended to include a public conduct exception.

3 In what manner should the conduct be performed in order to come within the public conduct exception?

In addition to the requirement that the conduct is performed for one of the nominated purposes, the public conduct exceptions of the ADA and the RRTA also require that the conduct is carried out “reasonably and in good faith”.⁷⁸ Just as the nominated purposes operate to place a limit on the type of conduct that can be excepted from liability, the “reasonably and in good faith” requirement serves to limit the manner in which that conduct can be performed. While the factual evidence as to whether the conduct is performed reasonably and in good faith will often overlap, “reasonableness” and “good faith” are two separate concepts, and have been interpreted as such by the courts. This section will examine each requirement in turn.

Turning first to the requirement of good faith, it is evident that, due to the plethora of contexts in which the concept appears, there is a wide range of interpretative approaches available for the courts to consider. The Victorian Civil and Administrative Tribunal draws upon the approach of the Federal Court of Australia’s analysis in *Bropho v Human Rights & Equal Opportunity Commission*, in which it is argued that, in the context of racial vilification provisions, both subjective and objective good faith is required.⁷⁹ That is, in

⁷⁸ ADA section s20C(2)(c), RRTA section 11.

⁷⁹ *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 para 102 <www.austlii.edu.au> (last accessed 29 August 2005). While *Bropho v Human Rights & Equal Opportunity Commission* concerns a complaint under the Racial Discrimination Act (Cth), which looks to the capacity of the conduct to offend and humiliate rather than to incite the requisite feelings of hostility, its approach is relevant in this case as the exception clauses are closely comparable. Section 18D of the Racial Discrimination Act (Cth) provides that:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or

order to bring themselves within the exception, defendants must both honestly have performed the conduct in good faith and have satisfied certain (unspecified) objective standards of conscientiousness. While the Court is clearly concerned that the breadth of the nominated purposes for which conduct can be excepted tilts the balance of the legislation too heavily in favour of free speech, it is difficult to ascertain, without further indication from the Court, exactly what standard of conscientiousness is required.

By contrast, the New South Wales jurisprudence only requires proof of subjective good faith. As the New South Wales Administrative Decisions Tribunal has held, good faith “appears to be a state of mind and the crucial factor in determining the presence of good faith would seem to be whether the commentator honestly believed in the truth of what is said”.⁸⁰ In light of the fact that the objective criteria are incorporated by the reasonableness requirement, the interpretation of good faith as an entirely subjective state of mind seems appropriate. What is more, the focus of the New South Wales jurisprudence on subjective good faith does not mean that there is no room for objectivity in assessing whether the state of mind was present. In some cases, objective circumstances may make it difficult to believe a defendant’s assertion of her subjective good faith. In *Islamic Council of Victoria v Catch the Fire Ministries*, for instance, the circumstance of the ridiculing nature with which the pastor dismissed the Muslim faith could be seen to objectively undermine his claim that the seminar was delivered in good faith for the purpose of teaching Christians how to “witness” to Muslims.⁸¹

The New South Wales and Victorian jurisprudence demonstrates that the public conduct exception ought to include a subjective state of mind element. If defendants do not honestly believe the truth of their inciting messages, then they ought not to be excepted from liability. In order to avoid the confusion of the Victorian jurisprudence, however, the phrase “good faith” should be replaced

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

⁸⁰ *Western Aboriginal Legal Service Limited v Jones & anor* [2000] NSWADT 102 para 122 Silva J and N Rees <www.austlii.edu.au> (last accessed 29 August 2005).

⁸¹ *Islamic Council of Victoria v Catch The Fire Ministries Inc (Final)* [2004] VCAT 2510 para 383 <www.austlii.edu.au> (last accessed 29 August 2005).

with the word “honestly”, an unambiguously subjective state of mind. If New Zealand amends section 61 of the HRA to include a public conduct exception, it ought to require that the spoken or published matter is “honestly” communicated in the public interest.

The New South Wales and Victorian experience demonstrates the test of whether the conduct is engaged in “reasonably” to be equally contentious. Contrasting the test of “reasonableness” with the common law defamation defence of “fair comment”, the New South Wales Administrative Decisions Tribunal concludes that the hate speech legislation’s exceptions require a more narrow interpretation than their common law defamation counterpart:⁸²

For a comment or statement to be “reasonable”, as opposed to “fair”, it must be one which the ordinary, reasonable person would consider to be reasonable in the circumstances of the case. In contrast ... a comment which is fair need not be reasonable ... it may be exaggerated, obstinate or prejudiced, provided it is honestly held. It follows that a comment or statement which is exaggerated, obstinate or prejudiced is unlikely to be reasonable.

While the Tribunal has attempted to ensure that the exception provision does not operate as a “shield for unrestrained abuse”,⁸³ it can be seen to have gone too far. All conduct that is likely to incite its audience to the requisite feelings of hostility on the ground of race, religion or sexuality is almost guaranteed to be “exaggerated, obstinate or prejudiced”. The approach of the New South Wales jurisprudence, then, renders the exception provision all but redundant.

It could be argued, of course, that an objective requirement within the public conduct exception is itself futile. If people honestly believe that their inciting conduct is reasonable, then legislating against this mistakenly held belief is unlikely to prevent any harm. Despite the harshness on defendants, however, an objective requirement is necessary in order to provide the subjects of hate speech with legal recourse in the face of conduct that incites feelings of hatred or contempt towards them. While the New South Wales approach intrudes too severely on freedom of expression, a wholly subjective public exception clause

⁸² *Western Aboriginal Legal Service Limited v Jones & anor*, above, para 121.

⁸³ *Mr Brack (Premier of Victoria) (17 May 2001) VicHansard 1285*.

would undermine hate speech legislation's role in upholding the right to freedom from vilification.

The balance struck by the Victorian jurisprudence is more promising. Again following the Federal Court, the Civil and Administrative Tribunal ties the requirement of reasonableness to the nominated purposes for which conduct must be performed in order to come within the public conduct exception. An act is performed "reasonably", it is explained, if it bears a rational relationship to the protected activity and is proportionate to what is necessary to carry it out.⁸⁴ In *Islamic Council of Victoria v Catch the Fire Ministries*, the Tribunal held that the pastor's seminar was not proportionate to the religious purpose of instructing Christians how to "witness" to Muslims, as it presented an "excessive" and "one-sided" view of Muslims' beliefs.⁸⁵ Hence, the reasonableness requirement was not fulfilled.

If faced with the reasonableness requirement of the two Australian jurisdictions' public conduct exceptions, New Zealand courts would be likely to take a similar approach to that of Victoria. Indeed, in interpreting the reasonableness requirement in section 5 of the Bill of Rights Act, which provides that, in order to be consistent with the Act, any limit on a protected right must be "reasonable" and "demonstrably justified in a free and democratic society", New Zealand courts have required a proportional and rational connection between the limit and its objective.⁸⁶ Although probable that a public conduct exception to section 61 of the HRA would be interpreted in a similar way, however, this approach is by no means guaranteed. If, taking into account section 5 of the Bill of Rights Act, the courts find that a more restrictive interpretation of the word "reasonably" is demonstrably justifiable in a free and democratic society, then the Bill of Rights Act would not preclude this approach.⁸⁷ That is, if New Zealand courts found that it is demonstrably justified to require defendants to prove that their conduct was not exaggerated, obstinate or prejudiced, then this

⁸⁴ *Islamic Council of Victoria v Catch The Fire Ministries Inc (Final)*, above, para 388, quoting *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 para 79 French J <www.austlii.edu.au> (last accessed 29 August 2005).

⁸⁵ *Islamic Council of Victoria v Catch The Fire Ministries*, above, para 389.

⁸⁶ *Hopkinson v Police* [2004] 3 NZLR 70 para 52 (HC) France J.

⁸⁷ Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, 2003) 138.

significant limitation on freedom of speech would be held to be consistent with the Bill of Rights.

In order to avoid this potential volatility, the New Zealand legislature ought to specify that, in order to make out the public conduct exception, a defendant need only prove a relatively low standard of reasonableness. If section 61 of the HRA is amended to include a public conduct exception along the lines of the New South Wales and Victorian legislation, the requirement that the conduct is performed "reasonably" should be replaced by the requirement that it is performed "not manifestly unreasonably".

C Summary

The New South Wales and Victorian experience demonstrates that the enactment of a public conduct exception is necessary in order to appropriately balance the rights and freedoms at stake. In order to limit the impact of the HRA on freedom of expression, then, New Zealand ought to seriously consider amending section 61 to include a public conduct exception to liability. Far from adopting the New South Wales or Victorian models in their exact form, however, the judicial experience of the two jurisdictions provides valuable lessons for the New Zealand legislature. While the nominated purposes formula of the ADA and RRTA provide a sound basis, the requirement that the conduct is performed "reasonably and in good faith" introduces a volatility to the provisions that would not be alleviated by New Zealand's Bill of Rights obligations. In order to avoid the confusion over subjectivity and objectivity, the ambiguous requirement of good faith should be replaced with the unambiguously subjective requirement that the conduct is performed "honestly". Further, the word "reasonably" should be replaced by the phrase "not manifestly unreasonably". In this way, while not acting as a shield for abuse, the public conduct exception ensures that free speech is not too severely limited.

VI DRAFT LEGISLATION

The lessons that New Zealand can draw from the New South Wales and Victorian jurisprudence can be seen to culminate in the following tentative revision of section 61 of the HRA. Retaining the present content of the section in almost identical form, the draft legislation demonstrates that the simple addition of several clauses can more successfully balance the rights of freedom of expression and freedom from vilification.⁸⁸

Section 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 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 to 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

⁸⁸ If the legislature proposed to amend section 61 of the HRA in accordance with the draft legislation, the Bill would almost be guaranteed to survive a section 7 Bill of Rights Act vet. The draft legislation serves to soften the current provision's impact on freedom of expression, a right protected by section 14 of the Bill of Rights.

Zealand on the grounds of any of the characteristics listed in section 21(1) of this Act.⁸⁹

(2) In determining whether a person has contravened subsection (1), the person's intention in publishing, distributing or using the written matter or words is irrelevant.

(3) Nothing in this section renders unlawful—

(a) The publication, distribution, or use of written matter or words, honestly and not manifestly unreasonably, for academic, artistic, religious or scientific purposes, or any other purpose that is of public concern; or

(b) A fair report of the publication, distribution, or use of written matter or words referred to in subsection (1).⁹⁰

(4) In determining whether the requirements in subsection (3) are met, the burden of proof is on the defendant.

(5) 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;

⁸⁹ Section 61(1) of the draft legislation is identical to section 61(1) of the HRA in its present form. As argued in Part III General Approach, however, the requirement that the communicated matter is “threatening, abusive or insulting” is possibly redundant, as if conduct is capable of inciting the requisite feelings of hostility in others it will almost definitely be threatening, abusive or insulting to its subject. If the “threatening, abusive or insulting” requirement is abandoned, an alternative section 61(1) could take the following form:

It shall be unlawful for any person to publish, distribute, broadcast or use in any public place 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 grounds of any of the characteristics listed in section 21(1) of this Act.

⁹⁰ Section 61(3)(b) of the draft legislation is not intended to alter the meaning of section 61(2) of the HRA (its corresponding provision). The wordiness of the present section 61(2), however, is not felt to impart any meaning that the slimmer suggested alternative does not.

“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.

VII CONCLUSION

The present select committee inquiry into hate speech indicates that there is a possibility that New Zealand’s hate speech provisions will soon be reformed. In comparison to the approach of many other Commonwealth jurisdictions, New Zealand’s hate speech legislation is somewhat limited in scope, applying only to vilification on the ground of race. Any reform of the provisions is likely to extend their applicability to a greater number of grounds.

In contemplating the manner in which this expansion should best be effected, full consideration ought to be given to the different approaches that can be taken to legislate against hate speech. If the current HRA formula is retained, however, the New South Wales and Victorian jurisprudence demonstrates that it can be modified to more successfully balance the rights and freedoms at stake. In particular, section 61, in its current form, may have the potential to impinge too severely on the right of freedom of expression. By amending the civil provision to include a public conduct exception, this danger can be guarded against. While the New South Wales and Victorian jurisprudence indicates that the addition of exceptions can bring a degree of volatility to the provisions, careful legislative drafting can ensure that an appropriate balance is achieved.

The New South Wales and Victorian jurisprudence demonstrates that New Zealand need not be afraid of creating a more prominent role for hate speech law within our legislative framework. By imposing only a minimal limit on freedom of speech, hate speech legislation has the potential to constitute a valuable tool in the construction of a more tolerant society.

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