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LIMITING FREE SPEECH TO PROTECT RELIGION: THE FUTURE FOR BLASPHEMY AND RELIGIOUS HATE SPEECH LAWS IN NEW ZEALAND

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TABLE OF CONTENTS

I INTRODUCTION

The increasing trend within modern Western democracies towards multi-cultural and multi-faith societies poses a difficult problem for law-making bodies, attempting to accommodate often divergent interests. One particular challenge involves attempting to promote the rights of minorities when they come into conflict with the fundamental right to freedom of expression of others. On the one hand free speech is the very lifeblood of democracy. In a functional democracy ideas must be free to compete in the market-place of ideas so that individuals can autonomously discover 'truth'.[1] However, a difficulty arises when certain forms of expression begin to impinge upon other competing rights and freedoms. In this context it is particularly problematic when the free speech of the majority serves as a basis of discrimination against vulnerable minorities. Although it is widely acknowledged that freedom of speech has little value if only instances of harmless speech are afforded protection, it is equally elementary that no right or freedom can be absolute.[2]

In many Western nations the task of balancing legitimate freedom of speech with the rights of religious minorities has been cast into the spotlight in recent years. The justifiability of two particular legal protections for religious minorities has fuelled fierce controversy. Firstly, the crime of blasphemy, which is essentially "a criminal offence penalising insults directed against religion."[3] Secondly, the prohibition of religious hate speech which outlaws the use of words that are capable of inciting others to hatred of identifiable religious groups.

On one side of the debate, civil libertarians contend that freedom of expression is the most fundamental freedom in a democratic society. They believe that restrictions upon free speech can only be justified when the speech poses a clear and present danger to society through the threat of violence or public disorder.[4] On the other hand, pro-censorship theorists argue that there is no value in maintaining a right to publicly disseminate material which may ultimately undermine the liberty of

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[1] See generally, Eric Barendt *Freedom of Speech* (Oxford University Press, New York, 2005).
[2] Denise Meyerson "The Legitimate Extent of Freedom of Expression" (2002) 52 UTLJ 331, 331.
[3] United Kingdom Law Commission Working Paper No. 145 *Offences Against Religion and Public Worship* (London, 1985) para 2.1.
[4] Ethnic Affairs Commission of New South Wales *Hate Vilification Legislation With Freedom Of Expression: Where Is The Balance?* (Queensland, 1994) 10.

religious minorities. They argue that it is difficult to see how unhindered free speech which perpetuates inequality is elemental to democracy. [5]

In 1981 and again in 1985 the UK Law Commission published papers recommending the abolition of the offence of blasphemy.[6] Since then there has been a steady push by law commissions in various jurisdictions towards the abolition of blasphemy laws. The law is criticised not only on the basis that it unduly restricts freedom of expression in order to prevent the insulting treatment of religion, but also that it is discriminatory as it only applies to the Christian faith.[7] Calls for the abolition of blasphemy laws were partly responsible for the ensuing debates over the necessity of introducing religious hate speech laws to prohibit speech that may have been caught at the outer boundary of the offence of blasphemy.[8]

The purpose of this paper is to consider whether the prohibition of blasphemy or incitement to hatred of religious groups represents a justifiable limitation upon the right to freedom of speech in New Zealand. Although the sole prosecution for blasphemy in New Zealand's history resulted in an acquittal,[9] blasphemy remains a crime in New Zealand under section 123 of the Crimes Act 1961. Blasphemous libel is commonly understood as only covering written words, however, in New Zealand, redress for broadcast blasphemies is provided by way of the complaint process under the Broadcasting Act 1989, which requires broadcasters to observe standards of good taste and decency.[10] In New Zealand, a prosecution for blasphemy can only proceed with the leave of the Attorney-General.[11] In contrast, whilst racial groups are currently afforded specific protection from hate speech under sections 61 and 131 of the Human Rights Act 1993, New Zealand law does not specifically prohibit hate speech directed towards religious groups. However, the necessity of religious hate

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[5] Ibid, 12.
[6] United Kingdom Law Commission Working Paper No. 79 *Offences Against Religion and Public Worship* (London, 1981); United Kingdom Law Commission Working Paper No. 145, above n 3.
[7] See generally, United Kingdom Law Commission, above n 3; New South Wales Law Commission Discussion Paper *Blasphemy* (Sydney, 1994).
[8] Ibid.
[9] *R v Glover* [1922] GLR 185.
[10] Broadcasting Act 1989, s 4; see also, John F Burrows and Ursula Cheer *Media Law in New Zealand* (Oxford University Press, Auckland, 1999).
[11] Crimes Act 1961, s 123(4).

speech laws is a particularly pressing question as the issue has recently reached select committee stage in New Zealand.[12]

The paper begins with a brief survey of the competing protections for freedom of speech and religious liberty in New Zealand and the United Kingdom. The historical development of the offence of blasphemy is then outlined, from the conception of the archaic offence in the early Ecclesiastical Courts in the United Kingdom, to the modern day jurisprudence of the European Court of Human Rights. The most significant arguments for and against retention are traversed, culminating in the conclusion that blasphemy is entirely incompatible with freedom of speech principles and has no legitimate place in New Zealand's modern secular society.

The paper then proceeds to examine the aims of religious hate speech legislation which establish a much more defensible case for limiting free speech. The differences between race and religion are highlighted and further developed through an examination of the difficulties that religious hate speech laws have created in the State of Victoria, Australia. The motivating factors which led to the enactment of the United Kingdom religious hatred provision in the Racial and Religious Hatred Act 2006 (UK) are examined and contrasted with New Zealand's current position. It is concluded that although religious hate speech laws may represent a justifiable limitation upon free speech, they also wield the potential to chill genuine speech and, ironically, may in fact undermine religious liberty in some circumstances. Ultimately it is suggested that there is little social need in New Zealand for religious hate speech laws at present, such that the potential harms threatened by introduction outweigh the potential benefits. Nonetheless, an attempt is made to outline the necessary elements of a workable and justifiable offence for New Zealand if religious intolerance were to become a social problem in the future.

II MODERN LEGISLATIVE PROTECTIONS FOR RELIGION

The New Zealand Bill of Rights Act 1990 ("NZBORA") contains both a guarantee of freedom of expression and the principal protections of religious liberty

[12] Stuart Dye "Backlash on Hate Speech Proposal" (18 March 2005) *The New Zealand Herald* Auckland www.nzherald.co.nz (accessed 6 July 2007).

in New Zealand law. Section 14 "Freedom of Expression" provides the right to "seek, receive, and impart information and opinions of any kind in any form."[13] For present purposes, three important provisions that provide specific religious freedoms must be mentioned.[14] First, section 13, "Freedom of thought, conscience, and religion", provides the right to "freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference."[15] Next, section 15, titled "Manifestation of religion and belief", protects the freedom for everybody to openly express their religious beliefs "in public or in private."[16] Finally, section 19(1), "Freedom from discrimination", states: "Everyone has the right to freedom from discrimination on the ground of… religious belief."[17]

Importantly, section 5, "Justified limitations", represents a legislative confirmation that no rights are absolute. Section 5, is a broad, general, stand alone limitation clause.[18] The standard for justification written into section 5 requires that for a restriction of a right to be deemed "reasonable" it must be capable of being "demonstrably justified in a free and democratic society."[19] It must, therefore, be convincingly established that any restriction of a right is a necessary measure.[20]

In contrast, the Human Rights Act 1998 (UK) adopts the rights and freedoms contained in the European Convention on Human Rights 1950 ("ECHR"), which builds limitations directly into the individual rights. Freedom of expression is provided for in Article 10 whereas the principal protection of religious liberty appears in Article 9. Importantly, both of these rights are subject to "restrictions or penalties as are prescribed by law and are necessary in a democratic society… for the protection of the reputation or rights of others."[21]

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[13] New Zealand Bill Of Rights Act 1990, s 14.
[14] See generally, Rex J Adhar "Religious Liberty in a Temperate Zone: A Report From New Zealand" (2007) 21 Emory Int'l L Rev 205, 214, for a useful analysis of these provisions.
[15] New Zealand Bill Of Rights Act 1990, s 13.
[16] New Zealand Bill of Rights Act 1990, s 15.
[17] New Zealand Bill of Rights Act 1990, s 19(1).
[18] See generally, Andrew Butler "Limiting Rights" (2002) 33 VUWLR 113, 117; *Ministry of Transport v Noort* [1992] 3 NZLR 260.
[19] Ibid, 118; New Zealand Bill Of Rights Act 1990, s 5.
[20] New Zealand Human Rights Commission *Inquiry into Hate Speech* (Submission to Government Administration Select Committee, 2005), para 6.4.
[21] Human Rights Act 1998 (UK), 1st sch, art 10(2); art 9(2).

III THE CRIME OF BLASPHEMY

A Historical Development

In proselytising religions, spreading the word of God is not so much a matter of religious liberty as viewed in the eyes of the modern law. It is a religious duty, rather than a free choice.[22] However, historically attempts to spread the Christian message throughout the Graeco-Roman world were met with contempt, for fear that public disorder would erupt throughout the multi-faith societies.[23]

It is ironic, therefore, that when Christians achieved political ascendancy, the law was used as a tool to suppress free speech in order to prevent dissent and quash unorthodoxy.[24] This was achieved through the crime of blasphemy, which first became a crime in England in the late 17th century when the process of nationalising the English church, resulted in the fusing of Christianity as part of the law of England.[25] This early fusion of law and religion was affirmed in *Taylor's Case* which established Christianity to be "parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law."[26]

Two important consequences flowed from the alliance between the Christian Church and the State. First, as is apparent from the early formulation of blasphemy in *Taylor's Case*, attacks against religions other than the established Christian Church (namely Anglicanism) were not subject to the criminal law. More importantly, however, any criticism of the tenets of the Church of England would constitute the offence, no matter how reasoned or temperate. In other words, the early formulation of blasphemy concerned the "matter and not the manner" of publication.[27] An explicit statement of the law of blasphemy as originally conceptualised by the courts is found in Alderson B's direction to the jury in *Gathercole's Case*. His Honour stated:[28]

> A person may, without being liable to prosecution for it, attack Judaism, or Mahomedanism, or even any sect of the Christian Religion (save the established

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[22] Rex J Ahdar and Ian Leigh *Religious Freedom in the Liberal State* (Oxford, New York, 2005) 360.
[23] Ibid.
[24] Ibid.
[25] James Davis "Comparing Religion Legally" (2006) 63 WLLR 913, 915.
[26] *Taylor's Case* (1676) 1 Vent 293; 86 ER 189.
[27] J F Stephen *A History of the Criminal Law of England* (London, Macmillan, 1883) 471; New South Wales Law Commission, above n 7, para 2.6.
[28] *R v Gathercole* (1838) 2 Lew 237, 254; 168 ER 1140.

> religion of the country); and the only reason why the latter is in a different situation from the others is, because it is the form established by law, and is therefore part of the constitution of the country.

By the mid 19th century a marked change in judicial reasoning regarding the crime blasphemy had become apparent. The focus had shifted to the underlying nature or manner of the attack, the rationale being to prevent insult and ridicule of Christian beliefs.[29] Sober and reasoned criticism that appealed to rational judgment was no longer under threat, rather words which invoked "wild and improper feelings of the human mind."[30] The new formulation was significant as it reflected on the fact that prosecutions for blasphemy had come to take place amidst fears that public disorder would result if the sensitivities of Christian believers were outraged.[31]

B The Crime of Blasphemy Today: Whitehouse v Lemon

No prosecutions for blasphemy were bought in England between 1922 and 1979, leading to a proclamation by Lord Denning in 1949 that the offence was a "dead letter".[32] However, in the 1979 decision of *Whitehouse v Lemon*, the House of Lords breathed new life into the archaic offence.[33] A private prosecution was upheld against the editor and publishing company of Gay News for publishing a poem attributing homosexual acts to Christ, "describing in explicit detail acts of sodomy and fellatio with the body of Christ immediately after the moment of His death."[34]

The trial judge, King-Hamilton QC, held that a subjective intention to attack Christianity was not necessary and the *mens rea* of the offence was fulfilled by a mere intention to publish the impugned material.[35] This was ultimately upheld by the House of Lords on appeal essentially confirming the strict liability nature of the crime.

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[29] See generally, *R v Gott* (1922) 16 Cr App R 87.
[30] *R v Hetherington* (1841) 4 St Tr NS 563, 566.
[31] United Kingdom Law Commission Working Paper No. 79, above n 6, para 2.13.
[32] Adhar, above n 22, 368.
[33] *Whitehouse v Lemon* [1979] AC 617.
[34] Ibid, 618.
[35] See generally, *Whitehouse v Lemon*, above n 33, 620, where the House of Lords outline the important elements of the unreported trial judgment.

The *Whitehouse v Lemon* decision included a number of other striking elements. The public good defence available in the Obscene Publications Act 1959 (UK) was not applied in the context of blasphemy, meaning that the Act could be circumvented to bring prosecutions against serious literature.[36] Furthermore, the overall thrust of the material complained of could be ignored.[37] All that was necessary for the *actus reus* of the offence was to identify a part of the work that crossed the dividing line between moderate and reasoned criticism of Christianity on the one hand and immoderate or offensive treatment of Christianity or sacred subjects on the other.[38] Finally, there was no requirement that the material be likely to arouse resentment against religion, or result in a breach of peace.[39]

On appeal the House of Lords affirmed the trial judge's formulation of the offence. Lord Scarman attempted to propound a definition encapsulating the essence of the modernised offence. His Lordship stated:[40]

> Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language.

C The Satanic Verses

Islam is the second most prevalent religion in the United Kingdom.[41] Nonetheless, in *Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* ("*Choudhury I*")[42] the English High Court upheld a magistrate's refusal of a summons for a writ of blasphemy against the publisher of a book deeply offensive to the Muslim community because Islam was not the established religion of the country.

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[36] Helen Fenwick and Howard Davis *Civil Liberties and Human Rights* (3ed, Cavendish Publishing Ltd, Oregon, 2006) 35.
[37] Ibid.
[38] *Whitehouse v Lemon*, above n 33, 619.
[39] Ibid, 639 Lord Scarman.
[40] Ibid, 642.
[41] Colin Harvey (ed) *Human Rights in the Community: Rights as Agents for Change* (Oxford, Oregon, 2005) 201.
[42] *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] All ER 306.

Watkins LJ stated that even if it was open to the Court to extend the offence to cover other religions he would have declined to do so due to the impossibility of confining an extended offence within sufficiently clear limits.[43] Among His Lordship's concerns was the difficulty of defining religion.[44] Since the mere intention to publish the words complained of would constitute the mental element of the offence, there was a risk that an author could unknowingly outrage a religion, which he or she had no knowledge about.[45] Furthermore, the rights of others exception in Article 10(2) of the ECHR did not provide a justification for limiting the Article 10 right to freedom of expression because there was no pressing social need to suppress the book at the centre of the dispute.[46]

This reasoning applied despite that fact that the book had provoked widespread outrage from the Muslim community through its vilification of sacred objects of the Islamic faith. Demonstrations against the book had taken place abroad where people had died and in the United Kingdom, Muslims of otherwise good character were arrested for public order offences committed during similar emotionally charged demonstrations.[47] The decision was highly controversial and has subsequently been widely described as nothing less than discriminatory in a pluralistic nation such as the United Kingdom.[48]

However, as will be seen in the next sub-section, the European Court of Human Rights has missed a number of opportunities to address this concern.

D A Justifiable Limitation on Free Speech? Decisions of the European Court of Human Rights

Due to the absence of prosecutions for blasphemy the New Zealand courts have not had the opportunity to balance the limitations which blasphemy law places upon freedom of speech against the competing religious rights and freedoms in the NZBORA. The position is similar in the United Kingdom as no prosecutions for

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[43] Ibid, 319.
[44] Ibid.
[45] Ibid.
[46] Ibid, 321.
[47] Ibid, 308.
[48] Javier Garci´a Oliva "The Legal Protection of Believers and Beliefs in the United Kingdom" (2007) 9 Ecc LJ 66, 72.

blasphemy have been bought after the passage of the Human Rights Act 1998 (UK). However, the European Court of Human Rights ("ECtHR") has had more than one occasion to consider the compatibility of blasphemy law with the Article 10 guarantee of freedom of expression and the degree to which freedom of expression may be permissibly restricted by the competing right to freedom of religion in Article 9. The decisions of the ECtHR and the subsequent academic criticism which these decisions have attracted provide a good starting point for a discussion of whether blasphemy can be justifiably retained as a crime in New Zealand.

Following *Whitehouse v Lemon*, the convicted publisher Gay News, applied to the ECtHR, on the basis that the decision was in breach of its Article 10 right to freedom of expression.[49] The application was deemed inadmissible. The ECtHR determined that although, prima facie, freedom of expression had been curtailed, the interference fell within the rights of others exception in Article 10(2).[50] Dealing with the issue of whether the interference was necessary in a democratic society the Court held that the religious feelings of citizens may well require protection from particularly severe attacks.[51]

In *Choudhury v United Kingdom* ("*Choudhury II*")[52] an application was made to the European Commission on Human Rights ("the Commission") alleging that the restricted application of blasphemy to the Church of England under English law was inconsistent with the Article 9 right to freedom of religion. The Commission was of the opinion that the application could not succeed as it was mistaken to interpret Article 9 as establishing a positive obligation on states to protect all religious sensibilities.[53]

Interestingly, following *Choudhury II*, the Commission was criticised for tending to favour the domestic interests of State parties.[54] However, this looked set to

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[49] *X and Y v United Kingdom* (1983) EHRR 123; see Paul Kearns "The Uncultured God: Blasphemy Law's Reprieve and the Art Matrix" (2000) 5 EHRLR 512, for a useful critique of the blasphemy decisions of the European Court of Human Rights.
[50] Ibid, 125.
[51] Ibid, 126.
[52] *Choudhury v United Kingdom* (1991) 12 HRLJ 172.
[53] Ibid, 176.
[54] Kearns, above n 49, 515.

change in the later case of *Otto-Preminger Institut v Austria* ("*Otto-Preminger*").[55] The Austrian authorities had suppressed a film believed to mount an abusive attack on Catholicism for fears that its presentation would amount to the crime of blasphemy. A private association bought an application against Austria alleging that the decision breached its Article 10 right to freedom of expression.

The majority of the Commission supported the application on the basis that the film in question was an artistic work of satire and that recourse to the criminal law in this context was unjustified even if the film dealt with religion. The limitation of free speech was both unnecessary and disproportionate in a democratic society.[56]

The sense of victory for artistic expression was short lived as the ECtHR subsequently disagreed with the opinion of the Commission. The ECtHR found it impossible to expound a uniform conception of the significance of religion applicable to all of the member states. Consequently, the ECtHR afforded a margin of appreciation to the national authorities to allow a decision to be made domestically regarding the degree of permissible interference with freedom of expression necessary to protect religious feelings.[57] Although, the ECtHR did warn that the margin of appreciation was not unlimited, such that the necessity for any restriction on freedom of speech must be convincingly established by the member State.[58] Reaching its conclusion, the ECtHR stated:[59]

> The Court cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans. In seizing the film, the Austrian authorities acted to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner. It is in the first place for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally at a given time.

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[55] *Otto-Preminger Institut v Austria* (1994) 19 EHRR 34; Kearns, above n 49, 516.
[56] Report of the European Commission of Human Rights (14 January, 1993).
[57] *Otto-Preminger Institut v Austria*, above n 55, 56.
[58] Ibid, para 50.
[59] Ibid, para 56.

The most recent consideration of the consistency of national blasphemy law with the ECHR was undertaken by the ECtHR in 1997, in *Wingrove v United Kingdom*.[60] The application was bought by film director Nigel Wingrove, after the British Board of Film Classification refused to grant a distribution certificate for his film Visions of Ecstasy, which the Board considered to be blasphemous. The Board was concerned that the sexual imagery in the film which focused on the figure of the crucified Christ was bound to outrage the Christian faith due to the unacceptable treatment of a sacred subject.[61]

The judgment of the ECtHR largely reiterates the holdings of its previous decisions. The ECtHR held that the crime of blasphemy pursued a legitimate aim, even though it only protected the Christian faith. Also, the protection afforded to Christian groups fell within the rights of others exception in Article 10(2) and was consonant with freedom of religion in Article 9.[62] The ECtHR observed that many member States still operated national blasphemy laws and left the necessity of these laws to be judged within the margin of appreciation previously afforded to individual States. The ECtHR observed:[63]

> Whereas there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest... a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.

The judgments of the ECtHR have been criticised for implicitly elevating freedom of religion above freedom of speech.[64] As highlighted, the ECtHR has achieved this by invoking the rights of others exception to freedom of expression in Article 10(2) of the ECHR, limiting freedom of speech essentially to ensure that members of the established Church of England can enjoy their religion free from any mental suffering caused by offensive attacks upon their beliefs.[65] However, it is

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[60] *Wingrove v United Kingdom* (1997) 24 EHRR 1.
[61] Ibid, 13.
[62] Ibid, 48.
[63] Ibid, 58.
[64] See generally, Adhar, above n 22, 372; Kearns, above n 49, 520.
[65] Fenwick, above n 36, 37.

interesting to note the inconsistency in the application of the rights of others exception, between the opinion of the Commission in *Choudhury II* and the subsequent decisions of the ECtHR. In *Choudhury II* the Commission rejected the suggestion that State parties were under a positive duty to protect the religious sensibilities of *all* religions in order to uphold their Article 9 right to freedom of religion. However, a duty to provide such protections for the established religion was accepted by the ECtHR as falling within the rights of others exception in Article 10(2). Thus, it is hardly surprising that the decisions have been described by commentators as meaningless and discriminatory.[66]

It is suggested that the opinion of the Commission in *Choudhury II* represents the most rational analysis of the competing rights to freedom of speech and freedom of religion. The decisions of the ECtHR have been described as "deeply flawed" insofar as they establish that the State is under a positive obligation to secure for Christians, the peaceful enjoyment of their religious freedoms.[67] Perhaps the only legitimate sphere for the operation of a positive obligation to protect religious liberty by limiting offensive speech is in the extreme cases envisaged by the ECtHR in *Otto-Preminger*. In that case the ECtHR noted that in some extreme cases an attack upon religious beliefs may have the effect of "inhibiting those who hold such beliefs from exercising their freedom to hold them."[68] The same conclusion applies in the context of the NZBORA, where any expression which positively deterred an individual from holding their religious beliefs would pose a substantial limitation on the section 13 right to freedom of religious belief without interference, and likewise the section 15 right to manifest religious beliefs in pubic or private.

If this does represent an acceptable threshold for blasphemy to legitimately encroach upon free speech, it seems unlikely that the threshold would have been met in any of the aforementioned ECtHR decisions, which notably, exclusively involved artistic media.

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[66] See generally, Harvey, above n 41, 207.
[67] Fenwick, above n 36, 37.
[68] *Otto-Preminger Institut v Austria*, above n 55, para 47.

IV THE FUTURE OF BLASPHEMY: ANALYSING THE ARGUMENTS

In 1981 and 1985, the United Kingdom Law Commission ("UK Law Commission") prepared working papers considering the need for the reform of blasphemy laws. The UK Law Commission examined the strongest arguments for both retention and abolition respectively. More recently, in 1994, the New South Wales Law Commission ("NSW Law Commission") undertook a similar exercise in the area of blasphemy law, which provides a valuable analysis of all of the major arguments from a different social perspective. This section will examine the arguments of both Law Commissions with reference to both modern developments and prevailing attitudes in New Zeeland, Australia and the United Kingdom, since the last successful prosecution for blasphemy in *Whitehouse v Lemon*.

A Arguments For the Retention of Blasphemy

The UK Law Commission considered arguments for the retention of blasphemy law under four main categories; the protection of religious sensibilities; the protection of society; the protection of individual feelings, and; the protection of public order.

1 The protection of religious sensibilities

Proponents of this argument suggest that, regardless of offence caused to religious followers, the law should punish blasphemy because it undermines Christian institutions and is an affront to God.[69] Numerous passages in the Bible can be cited as a holy warning against blasphemy. For example, Romans 1:18-32:

> Judgment occurs not only at the end of time but within time. As mankind refuses to glorify God, he gives them over to an increasing spiral of depravation and corruption.

These passages give rise to a fear of Christian fundamentalists that mankind's toleration of blasphemy will lead to anarchy which no nation will survive.[70]

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[69] United Kingdom Law Commission Working Paper No. 79, above n 6, para 7.5.
[70] Michael Schluter (ed) *Christianity in a Changing World: Biblical Insight on Contemporary Issues* (Cambridge Press Ltd, London, 2000) 116.

A public illustration of the Christian conception of blasphemy was observed in the United Kingdom recently when two British artists displayed a picture entitled "Was Jesus Heterosexual?" with the words "God Loves Fucking" displayed in large letters. Although furious that no criminal prosecution was bought against the artists, Member of Parliament Ann Widdecombe condemned the exhibition as "blasphemous in the extreme" and she warned that irrespective of the law the artists would learn of the error of their ways "when they finally stand before the Son of God".[71]

The argument that blasphemy must be retained to preserve the name of God in the interests of the entire community is based on the Christian fundamentalist conception of blasphemy and ignores the fact that the modern secularised legal formulation does not safeguard Christianity from all hostile attacks, only attacks that go beyond the threshold of decency. Furthermore, the UK Law Commission noted that this argument is based upon "the questionable assertion that that the Christian God, but none other, is in need of some kind of legal protection."[72] Clearly, the fear that a wrathful God may unleash His tyranny over a society which undermines His name is not restricted to the Christian faith alone.

2 The protection of society

This argument suggests that blasphemy should result in criminal sanctions because, for a significant number of people, religious beliefs hold a unique place in society. Freedom to insult religion would threaten the stability of society and encourage division between different racial and religious groups.[73] However, as the House of Lords Select Committee on Religious Offences observed, this argument assumes that the threat of prosecution effectively deters artists, comedians and the media from disseminating blasphemous material.[74] Furthermore, the Select Committee stated that if blasphemy was abolished it was unlikely that the floodgates would open to a barrage of offensive attacks against religion. Such an assertion by

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[71] Stephen Drake "Review - Gilbert & George, Sonofagod Pictures "Was Jesus Heterosexual?" (1 February 2006) *The Londonist* www.londonist.com (accessed 14 August 2007).
[72] United Kingdom Law Commission Working Paper No. 145, above n 3, para 2.23.
[73] United Kingdom Law Commission Working Paper No. 79, above n 6, para 7.7.
[74] House of Lords Select Committee "Religious Offences in England and Wales" (10 April 2003) 95-I para 38.

concerned groups failed to take into account that any other religion could already be targeted with impunity.[75]

The NSW Law Commission made a similar observation in 1994, when it recommended the abolition of the crime of blasphemy in New South Wales: "The Commission doubts whether the offence of blasphemy has any existing deterrent effect, given that the offence is so obscure, prosecutions are so rare, and the penalty largely unknown."[76] Both the NSW and the UK Law Commissions were in agreement that the criminal law is neither an appropriate nor effective means of enforcing respect for religious beliefs.[77]

3 The protection of individual feelings

The UK Law Commission suggested that the strongest argument for the retention of blasphemy was to protect the feelings of those people with deeply held religious beliefs. For many people, religious beliefs are often more susceptible to offence than any other sphere of their lives due to the "special reverence for what is deemed sacred".[78] Indeed, psychological studies show that sometimes religious beliefs are intertwined with a believer's sense of self and attacks upon religion have the potential to cause real mental suffering.[79]

Again, both the NSW and the UK Law Commissions had difficultly finding a justification for the special attention of the criminal law in order to protect Christian beliefs alone.[80] The UK Law Commission was concerned that the reverence felt by a religious believer for what they deemed sacred did not truly differ in kind from the reverence felt by other people in society for political institutions, the Monarchy or even the national flag. Thus it is arguable that if free speech is restricted to protect religious sensibilities, similar protections should be available for those who have a

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[75] Ibid.
[76] New South Wales Law Commission, above n 7, para 4.22.
[77] United Kingdom Law Commission Working Paper No. 79, above n 6, para 7.10; United Kingdom Law Commission Working Paper No. 145, above n 3, para 2.24; New South Wales Law Commission, above n 7, para 4.23.
[78] United Kingdom Law Commission Working Paper No. 79, above n 6, para 7.21.
[79] Pamela Ebstynel King "Religion and Identity: The Role of Ideological, Social, and Spiritual Contexts" (2003) 7(3) App Dev Science 197, 198.
[80] United Kingdom Law Commission Working Paper No. 79, above n 6, para 2.40; New South Wales Law Commission, above n 7, para 4.25.

similar unqualified reverence for other deeply held beliefs.[81] However, it is undeniable that extending protections to all of the cases referred to above would involve an intolerable assault upon free speech.

4 The protection of public order

This argument alludes to an inherent danger that insulting attacks directed towards religion and religious beliefs will result in civil disorder. Even where blasphemous speech does not directly incite public disorder there may be a risk of later premeditated action by an offended individual or group.[82]

In the United Kingdom, the threat to the stability of society posed by blasphemous material became an accepted rationale for the suppression of offending material in the middle of the 19th century. However, as noted previously, this rationale for the offence was eroded by Lord Scarman in *Whitehouse v Lemon*, as His Lordship did not think it necessary that the impugned material posed a tendency towards a breach of peace.[83]

Furthermore, in 1991, the civil unrest among the Muslim community in the United Kingdom was more serious following the publication of The Satanic Verses, than has been seen from the Christian community following the publication of allegedly blasphemous material, offensive to Christians.[84] Nonetheless, even though Watkins LJ explicitly mentioned in *Choudhury I* that Muslim demonstrations against the book had resulted in arrests and convictions for public order offences, His Lordship was not prepared to extend the ambit of blasphemy outside of the Church of England.

The futility of the public order justification is further highlighted by the experience in New South Wales where there has only been one prosecution for blasphemy in the last 120 years. In the words of the NSW Law Commission: "The outcry resulting from the penalty imposed upon the convicted blasphemer caused far

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[81] United Kingdom Law Commission Working Paper No. 145, above n 3, para 2.40.
[82] United Kingdom Law Commission Working Paper No. 79, above n 6, para 7.23.
[83] See Part III B *The Crime of Blasphemy Today: Whitehouse v Lemon*.
[84] See generally, Harvey, above n 41, 207.

more civil unrest than the material which the prosecution was intended to suppress."[85] Given the similar position in New Zealand where there has only ever been one prosecution for blasphemy, which was unsuccessful, the public outcry against a modern day prosecution would also be likely to create quite a controversy.

B Arguments Against the Retention of Blasphemy

Both the New South Wales and the UK Law Commissions considered the defects in the existing law of blasphemy persuasive and ultimately recommended its abolition without replacement.[86] In fact, as noted by the NSW Law Commission, every law commission that has considered the reform of blasphemy law worldwide has recommended its abolition.[87] Of the factors examined by the foreign law commissions, the following are the most compelling arguments against the retention of blasphemy law in New Zealand: the uncertainty and strict liability nature of the existing offence; its restriction to the Christian faith, and; the unlikelihood of any successful modern day prosecutions.

1 Uncertainty and strict liability

The chequered development of the crime of blasphemy and the rarity of modern judicial decisions in the area has resulted in widespread disagreement in the academic literature over the necessary elements of the crime. This is confounded in New Zealand given that in the view of Hosking J, who presided over the sole prosecution for blasphemy in *R v Glover*, the basis of the offence is to prevent disorder and violence in the community.[88] Thus, it is unclear whether any future prosecutions in New Zealand would follow the United Kingdom decision in *Whitehouse v Lemon*, which did away with the public order foundation of the offence altogether. However, given that *R v Glover* was decided in 1922, the more recent judgments in the United Kingdom would be highly influential.

When an accused is prosecuted for blasphemy it becomes a matter for a jury to decide whether the material complained about is "scurrilous," "abusive" or

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[85] New South Wales Law Commission, above n 7, para 4.22.
[86] United Kingdom Law Commission Working Paper No. 79, above n 6, para 9.2; United Kingdom Law Commission Working Paper No. 145, above n 3, para 2.57; New South Wales Law Commission, above n 7, para 4.82.
[87] New South Wales Law Commission, above n 7, para 2.2.
[88] *R v Glover*, above n 9, 187 Hosking J.

"offensive" to the Christian religion.[89] The UK Law Commission observed that defining the boundaries of a criminal offence with reference to several adjectives to be applied by a jury is wholly unsatisfactory. "[I]t is hardly an exaggeration to say that whether or not a publication is a blasphemous libel can only be judged *ex post facto*."[90] Although it may be true that many people accused of a crime are routinely at the mercy of a jury and may not be able to judge from the outset whether or not their conduct passes the threshold of liability, the concern is particularly worrying in the realm of blasphemy. Where free speech is at stake the bounds of legitimate expression should be clearly defined, to avoid the risk of chilling genuine public debate or criticism of religion. It is beyond dispute that in a modern democracy, religion must tolerate criticism. An individual exercising their undoubted right to free speech should be able to do so knowing just how far this criticism may reasonably go. This is not possible in the existing offence of blasphemy.[91]

Compounding the problem of uncertainty is the fact that blasphemy is a strict liability crime. The only intention relevant is an intention to publish the impugned material, regardless of whether the defendant intended to offend religious susceptibilities.[92] Thus, the offence could be committed by a Christian with deeply held religious beliefs who would be subsequently unable to bring evidence of an underlying sincere intention in publishing the subject matter of the complaint.[93] The strict liability nature of the crime is also concerning in light of the fact that the most recent prosecutions have almost exclusively centered upon artistic media. For example, Paul Kearns argues that artistic expression in particular should be free from the reach of blasphemy law.[94] However, a legitimate counter-argument is that artists may often set out with the very intention to cause offence to religious groups. Indeed, the publicity surrounding a controversial artwork is an effective way for artists to increase their exposure.

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[89] United Kingdom Law Commission Working Paper No. 79, above n 6, para 6.1.
[90] Ibid.
[91] Ibid.
[92] *Whitehouse v Lemon*, above n 33.
[93] United Kingdom Law Commission Working Paper No. 79, para 6.7.
[94] Kearns, above n 49, 520.

2 *Restriction to the Church of England*

In *Whitehouse v Lemon*, Lord Scarman rejected the proposition that blasphemy was an archaic offence serving no useful purpose in modern law and expressed an obiter opinion that the offence should be extended by legislation to respect the diverse range of beliefs in a modern pluralistic society, by offering protection from offence to all religions.[95] Similarly, Marcus Tregilgas-Davey makes a similar case for the extension of blasphemy laws:[96]

> [E]xtending (or abolishing) the blasphemy laws would not be undermining Christianity, rather it would be a public welcoming to the multi-faith, multi-racial society in which we live, and as such it would be a formal acceptance of all our citizens, no matter what their religion. The existence of a blasphemy law which protects only one religious sect forbids this, thus far from having a cohesive effect on society… it prevents the cohesion of our plural society.

On the other hand, Watkins LJ, in *Choudhury I*, stated that although it was a gross anomaly that blasphemy law only extended to the established Church, extension of the sphere of protection to other religions was not a justifiable option. His Lordship stated:[97]

> The existence of an extended law of blasphemy would encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, Jews or Muslims could then seek to invoke the offence of blasphemy against each other's religion, doctrines, tenets, commandments or practices; for example… for denying the divine inspiration of the Prophet Mohammed.

However, this argument rests largely on the mistaken assumption that one religious group may bring a prosecution claiming that the mere expression of the beliefs of another religious group has caused them offence. This assertion ignores the fact that the modern formulation of blasphemy concerns the manner and not the content of an attack upon religion.

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[95] *Whitehouse v Lemon*, above n 33, 644.
[96] Marcus Tregilgas-Davey "*Ex parte Choudhury*: An Opportunity Missed" (1991) 54 MLR 294, 296.
[97] *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*, above n 42, 320.

In New Zealand, the restriction of blasphemy to the Christian faith also sits uneasily with the fact that New Zealand has never had an established Church. This was confirmed by the Supreme Court at beginning of the twentieth century[98] and again by the Court of Appeal in *Mabon v. Confederation of the Church of New Zealand*, in 1998: "Unlike England and Scotland, New Zealand does not have a national established church."[99] On the other hand, there have traditionally been many indicators which signal the de facto establishment of the Christian Church.[100] Rex Ahdar gives examples such as: the opening prayer recited by the Speaker in the House of Representatives; the swearing of oaths on the Bible, and; public holidays such as Christmas Day, Good Friday, and Easter Monday.[101] However, Adhar argues that from about the 1960's "the wresting of generic Christianity from its position of cultural ascendancy commenced."[102] Indicators include, regular criticism of the Speakers prayer in Parliament; the opening up of the commercial sector to trading on Sundays, which is the traditional day of Christian observance, and; the flouting of the law by many shop owners defiantly opening on Easter weekend.[103]

Julian Rivers argues that it is justifiable that Christianity is awarded special protection in law because Christianity promotes the fundamental societal values of a modern democracy. Rivers contends that instances where free speech is censored to protect Christian values can actually serve to maximise free speech in general, because Christianity is in turn committed to that very freedom.[104] This argument is clearly inconsistent with the historical underpinnings of the law of blasphemy. Recourse to the criminal law was used to establish and maintain the pre-eminence of Christianity as the established faith to the detriment of all others.[105] As the NSW Law Commission insightfully observed:[106]

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[98] *Carrigan v Redwood* [1911] 30 NZLR 244, 252 (SC) ("There is no State Church here. The Anglican Church in New Zealand is in no sense a State Church. . . and, although no doubt it has a very large membership, it stands legally on no higher ground than any of the other religious denominations in New Zealand.").
[99] *Mabon v. Confederation of the Church of New Zealand* [1998] 3 NZLR 513, 523 (CA).
[100] Ahdar, above n 14, 207.
[101] Ibid, 212.
[102] Ibid, 213.
[103] Ibid.
[104] Schluter, above n 70, 121.
[105] New South Wales Law Commission, above n 7, para 4.23.
[106] Ibid.

> It would be perverse indeed if concepts of pluralism and multiculturalism were used to justify the retention and significant expansion of a criminal offence which was developed precisely to enforce the maintenance of a single set of established beliefs by severely punishing expressions of dissent.

3 Impossibility of securing a conviction today

One could be forgiven for arguing that that the crime of blasphemy is legally irrelevant in New Zealand, given that the only prosecution took place over 75 years ago and was ultimately unsuccessful. However, there are compelling arguments which demonstrate that so long as blasphemy continues to remain on the statute books in New Zealand, its relevance will continue to be felt.

Firstly, a number of submissions to the NSW Law Commission expressed a fear that the rarity of prosecutions in modern times may lead to complacency which stifles the need for active reform:[107]

> The lack of successful prosecutions should not be used as a rationale for making no change. Long dormant offences, particularly those restricting freedom of speech, have a habit of being revived when least expected.

The reality of this concern is clear from the experience in the United Kingdom, where, to the disbelief of many, the offence that had lay dormant for more than 50 years and was believed to be a 'dead letter' was resuscitated in *Whitehouse v Lemon*.

However, perhaps more important from New Zealand's perspective is that applications for the Attorney-General's leave to bring a prosecution for blasphemy, still continue today. For example, in 1998, the national museum Te Papa displayed a work by artist Tania Kovats, entitled 'Virgin in a Condom', a seven-centimetre high statute of the Virgin Mary covered by a condom. The display provoked outrage from Christian groups and provoked a Member of Parliament and a Priest to bring an application to the Solicitor-General to prosecute for blasphemous libel.[108]

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[107] New South Wales Law Commission, above n 7, para 4.12.
[108] Burrows, above n 10, 325.

The 1998 application was ultimately unsuccessful. To his credit the Solicitor-General placed some weight on the fact that the complaint involved artistic expression and was incorporated in an exhibition for which a charge was made. Thus, it was a matter of individual choice whether or not to view the artwork.[109] However, the continuing threat of prosecution, even if applications are ultimately unsuccessful, poses a risk of chilling legitimate speech by forcing publishers to undertake editorial decisions to eliminate material that may later be deemed immoderately offensive to Christian beliefs.

On the other hand, it is more likely that in reality artists discount the possibility of a dramatic revival of blasphemy law. Thus, the law of blasphemy can actually benefit artists financially as the controversy stirred up over a threatened prosecution generates far greater exposure than the artist would have secured otherwise. No better illustration of this point can be found than the controversy surrounding the proposed airing of the South Park 'Bloody Mary' episode in New Zealand in 2006. The cartoon, which depicted a menstruating statute of the Virgin Mary was widely condemned by Catholic Church leaders in New Zealand who called for the country's 500,000 Catholics to boycott the television station responsible for airing the cartoon and threatened legal proceedings.[110] However, the threat of legal proceedings did not deter the broadcaster. In fact, a decision was made to screen the episode three months earlier than originally scheduled to cash in on the heightened interest surrounding the controversy. The decision was ultimately a lucrative one, as six times the normal audience tuned in to watch the controversial episode.[111]

Shortly after the episode was broadcast a number of concerned parties acted on the prior threat and joined together to lodge a formal complaint with the Broadcasting Standards Authority ("BSA"), claiming that the broadcast breached a number of the standards in the Free-to-Air Code of Broadcasting Practice.[112]

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[109] Solicitor-General "Virgin in a Condom" (27 March 1998) Press Release.
[110] "Catholics Urge South Park Boycott" (21 February 2006) www.news.bbc.co.uk (accessed 15 July 2007).
[111] "Bloody Mary Show Attracts Six Times Usual Audience" (23 February 2006) NZPA www.stuff.co.nz (accessed 15 July 2007).
[112] The legal authority for a member of the public to lodge a claim with the Broadcasting Standards Authority is found in the Broadcasting Act 1989, s 8(1)(a); Section 21(1)(e) of the same Act empowers the Broadcasting Standards Authority to encourage the development and observance by broadcasters of codes of broadcasting practice.

Two specific arguments raised by the complainants were firstly, that the broadcast breached Standard 2 (maintenance of law and order) because it contravened the blasphemous libel provisions of the Crimes Act 1961, and secondly, that the broadcast breached Standard 6 (fairness) because it discriminated against and denigrated all Catholics and Christians.[113] The BSA rejected the claim based on blasphemous libel as it was a matter for the Attorney-General,[114] however the reasoning in the decision still provides a valuable insight into the scope of blasphemy related claims in New Zealand. First, the BSA held that it was legitimate for broadcasters to satirise religious beliefs. Although the Catholic Church was understandably deeply offended by the cartoon, this ignored the fact that for other people, religious miracles might be seen as folly.[115] Secondly, at different points in the decision, the BSA alluded to the appropriate balance between the protection of the broadcaster's freedom of speech on the one hand, and the protection of religious sensibilities on the other. Striking the balance clearly in favour of free speech, the BSA stated: "penalising a broadcaster simply because it has caused religious offence would, in the Authority's view, be an unreasonable limitation on the broadcaster's right to free expression."[116]

It is noteworthy that in New Zealand the BSA has consistently maintained that the right to satirise religious beliefs is within the scope of legitimate free speech.[117] This is in contrast to the decision of the ECtHR in *Otto-Preminger*, which, as was outlined earlier,[118] held that the censorship of a film satirising religious beliefs by the Austrian authorities was within the legitimate margin of appreciation afforded to individual European States. The New Zealand approach is a good indication that the modern secular society in New Zealand attaches a greater weight to free speech, than to the protection of religious groups from the offensive treatment of their beliefs. Thus, whilst the continuing threat of a prosecution for blasphemy may chill the speech of some publishers, broadcasters and artists, it is more likely that the most

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[113] *CanWest TVWorks and 35 Complainants* (28 June 2006) Broadcasting Standards Authority 2006/022.
[114] Ibid, para 33.
[115] Ibid, para 130.
[116] Ibid, para 136.
[117] See for example, *CanWest TVWorks and New Zealand Catholic Bishops' Conference* (4 May 2006) Broadcasting Standards Authority 2005/112.
[118] See Part III D *A Justifiable Limitation on Free Speech? Decisions of the European Court of Human Rights*.

controversial among them welcome the thought of a media circus surrounding what they perceive as a futile threat.

Indeed, in 2002, the House of Lords Select Committee on Religious Offences stated that a modern day prosecution for blasphemy is bound to fail on one or more of the grounds that it is discriminatory (in only protecting Christians), uncertain and a law of strict liability.[119] A year earlier, in 2001, the then Home Secretary, David Blunkett, declared publicly that it would soon be necessary to confine blasphemy to history. However, the long anticipated abolition of blasphemy law in the United Kingdom, which was expected to coincide with the introduction of measures to outlaw religious hatred in 2006, is yet to eventuate.[120] Nonetheless, Parliament's failure to officially abolish the law has not prevented free speech proponents from taking matters into their own hands to demonstrate that modern day prosecutions are no longer a real threat. On the 25th anniversary of the conviction of Gay News in *Whitehouse v Lemon* for publishing a poem implying that Jesus was a homosexual, several of Britain's leading writers, academics and Members of Parliament publicly read the same poem to a crowd in Trafalgar Square. When the police failed to intervene, Peter Tatchell, one of the human rights campaigners in attendance, exclaimed:[121]

> No one was arrested. The police didn't even take our names and addresses. The blasphemy law is now a dead letter. If the authorities are not prepared to enforce the law, they should abolish it.

V THE WAY FORWARD

The margin of appreciation that the ECtHR has traditionally afforded to member States in striking a balance between free speech and protection of religious liberty reflects the fact that the appropriate balance between these competing rights varies depending upon the changing social and legal climate of each country. In New Zealand the crime of blasphemy is not, and arguably never has been, a necessary part of the legal or social landscape. In light of section 5 of the NZBORA, freedom of speech should only be curtailed where a compelling countervailing right demands

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[119] House of Lords Select Committee, above n 74, para 43.
[120] Olivia, above n 48, 72.
[121] Peter Tatchell "Blasphemy Law is Dead" www.petertatchell.net (accessed 28 July 2007).

priority. Protecting the private feelings of the Christian members of society is not a sufficiently compelling objective. Furthermore, the abolition of blasphemy is important for the symbolic purpose of signalling the equality of all religions under the law.

A necessary part of the reform process is to address any perceived gaps in the law which may be left vulnerable to exploitation if blasphemy is abolished. One perceived gap may be found at the outer limits of the reach of blasphemy law as envisaged in *Otto-Preminger*, where an attack upon an individual's religious beliefs positively deters the individual from holding the belief.[122] However, the fundamental distinction between censorship with the aim of preventing positive discrimination and the current blasphemy law is that the former affords protection to religious *believers* whereas the latter protects religious *beliefs*.[123] Perhaps this distinction demarcates a boundary between legitimate and illegitimate state interference with freedom of expression. Intuitively, we may feel more comfortable about restricting speech, to safeguard a group of people from harm as opposed to their belief system.

One possible reform measure that would be capable of filling this gap, should blasphemy law be abolished in New Zealand, is the introduction of laws criminalising the incitement of hatred towards religious groups. Unlike blasphemy, which serves to enhance feelings of religious discrimination for minority religions outside of the established Church, religious hate speech legislation would extend protection to all religions equally.

VI RELIGIOUS HATE SPEECH

A The Rationale for Prohibiting Hate Speech

In 1966 a Special Committee ("the Cohen Committee") was appointed in Canada to advise the Minister of Justice on the need for measures to be adopted to combat hate propaganda. The subsequent report of the Cohen Committee provides a comprehensive analysis of the potential harms caused by hate speech.[124] Following the enactment of hate speech legislation in Canada the findings of the Cohen

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[122] *Otto-Preminger Institut v Austria*, above n 55, para 47.
[123] Oliva, above n 48, 67.
[124] Andrew Brewin "A Review of The Report of the Special Committee on Hate Propaganda" (1967) 17 U Tor LJ 235, 236.

Committee have been utilised by the Canadian Courts to justify the legislative intrusion upon free speech.[125]

Importantly, in the leading Supreme Court of Canada judgment, *R v Keegstra*, Dickson CJ points out that hate propaganda is not challenged merely on the grounds of offensiveness, but rather due to the real harm it is capable of causing.[126] His Honour goes on to note two distinct types of harm that can result from hateful speech. First, members of a targeted group may suffer serious psychological consequences. They may be humiliated and degraded and experience a loss of self-worth and self-esteem.[127] This painful reaction may pressure individuals to either avoid activities that may bring them into contact with people outside of their immediate group or to renounce their differences and attempt to integrate with the majority.[128]

Secondly, hate messages have the ability to subtly influence other members of society, convincing listeners of the inferiority of the targeted racial or religious group.[129] Richard Delgardo, an influential proponent of hate vilification laws, argues that hate messages perpetuate stereotypes of minorities in the minds of the public.[130] As stereotypes are reinforced, discrimination against minorities increases. For example, landlords may begin to "act on unarticulated feelings in renting an apartment to a white over an equally qualified black or Mexican."[131]

In *R v Keegstra*, Dickson CJ observed that the appropriate balance between freedom of expression and other competing rights will vary between jurisdictions. The varying weight that different countries place on a given value is a reflection upon the unique history underpinning each society.[132] Increasingly, countries which model themselves as modern democracies are finding it necessary to limit the boundaries of free speech in order to protect religious minorities from hate propaganda and the real harm that it can cause.

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[125] See generally, *R v Keegstra* [1990] 3 SCR 697.
[126] Ibid, para 64.
[127] Ibid.
[128] Ibid, para 65.
[129] Ibid, para 66
[130] Richard Delgardo and Jean Stefancic "Ten Arguments Against Hate-Speech Regulation: How Valid?" (1996) 23 N KY L Rev 475, 482.
[131] Ibid.
[132] *R v Keegstra*, above n 25, para 189.

Some notable examples include, section 29B of the Racial and Religious Hatred Act 2006 (UK), which makes it a criminal offence for a person to use threatening words or behaviour if he intends thereby to stir up religious hatred. Similarly, it is an offence under section 319 of the Canadian Criminal Code to incite hatred against an identifiable group, which is defined in section 318(4) as meaning "any section of the public distinguished by colour, race, *religion* or ethnic origin".[133] Finally, the Australian State of Victoria recently passed the Racial and Religious Tolerance Act 2001 (Vic). Section 8 of the Act affords a broad protection to religious believers, prohibiting any person from engaging in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of a person on the ground of their religious belief or activity.[134]

B The Existing Framework in New Zealand

It is an offence in New Zealand under the Crimes Act 1961 to incite another person to commit a criminal offence, including threats of violence directed toward any person, regardless of their racial or religious origins.[135] The Human Rights Act 1993 also specifies a number of areas (for example, in the provision of housing or access to education) where discrimination is unlawful on the grounds of both race and religion. Furthermore, racial groups are afforded specific protection from hateful speech through provisions contained in the Human Rights Act 1993. Section 61 makes it unlawful to make public, words which are threatening, abusive or insulting if the words are likely to excite hostility against any group of persons based on colour, race, or ethnic or national origins.[136] Section 131 of the Human Rights Act makes the same acts a criminal offence if committed with the intent of exciting hostility or ill-will against any such group.[137]

The origins of the domestic racial hatred provisions in sections 61 and 131 of the Human Rights Act 1993 can be traced back to New Zealand's obligations under Article 4(a) of the International Convention on the Elimination of All Forms of Racial

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[133] Criminal Code RS C 1985 c C-46, s 318(4) (emphasis added).
[134] In addition, Racial and Religious Tolerance Act 2001 (Vic), s 25, establishes a criminal offence of serious religious vilification where the offender intentionally engages in conduct which the offender knows is likely to incite hatred towards a class of persons on the grounds of their religion.
[135] Crimes Act 1961, s66(1)(d); s311(2).
[136] Human Rights Act 1993, s 61(1).
[137] Human Rights Act 1993, s 131(1).

Discrimination ("CERD"), which requires State parties to declare incitement to racial discrimination an offence punishable by law. New Zealand is also a party to the International Covenant on Civil and Political Rights ("ICCPR"). Article 20.2 of the ICCPR is stated in similar terms to Article 4(a) of the CERD, however, incitement to religious hatred is specifically included as a ground of prohibited conduct.[138]

In 2005 the Government Administration Select Committee launched an inquiry into whether legislation was needed in New Zealand to place tighter controls upon public broadcast or publication of hate speech. The inquiry followed the decision of the Court of Appeal in *Living Word Distributors Limited v Human Rights Action Group*,[139] which deemed that two Christian videos critical of homosexuality and the homosexual lifestyle were not objectionable for the purposes of the Films, Videos and Publications Classification Act 1993. The 2005 inquiry examined a proposal to extend the protections already afforded to racial groups to include other minority groups, which may be the target of hateful speech, such as homosexuals and religious groups.[140]

On the surface this appears a laudable aim. Why should racial groups be singled out over religious adherents for protection from hateful speech which in both cases has the consequence of marginalising the target group and portraying the members of the group as less valuable members of society? The answer to this difficult question requires a deeper examination of three important issues. Firstly, the conceptual differences between race and religion. Secondly, the real consequences for the application of hate speech laws that these differences entail. Finally, the influence that New Zealand's unique historical record of religious tolerance should have upon the balancing exercise between freedom of expression and religious equality.

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[138] See generally, New Zealand Human Rights Commission, above n 20, for a deeper analysis of New Zealand's obligations under the CERD and the ICCPR.
[139] *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2003] 3 NZLR 570 (CA).
[140] Dye, above n 12.

VII THE DANGERS OF PROHIBITING RELIGIOUS HATE SPEECH

A Race and Religion are Different in Kind

The United Kingdom introduced legislation to criminalise conduct responsible for stirring up racial hatred as early as 1965.[141] Amidst fears that the provision would not apply to incitement against Jews, the Home Secretary offered reassurances that the provision would extend to ethno-religious groups such as Jews, however, expressed opposition to any further widening to cover other religious groups, stating that:[142]

> If we are legislating about stirring up hatred against people for something they cannot help, it is permissible to be rather more drastic in our interference in what may or may not be said than if we were legislating about stirring up hatred on grounds which people can help. People can change their religion… It is utterly different from something which they cannot help, such as the colour of their skin.

The notion that people are free to change their religion may sit uneasily with many people. To devout religious adherents of any faith, the idea of freely changing their beliefs may seem absurd. Recall that one of the strongest arguments for the retention of blasphemy laws is that religious beliefs are often intertwined with a believer's sense of self.[143] However, it is not suggested that if an individual is subjected to hateful speech on the ground of their religion they should simply uproot their belief system and choose to follow another faith. If the only legitimate means of avoiding vilification was for religious adherents to adopt a different faith, their right to manifest their religion provided in section 15 of the NZBORA would be seriously impaired.

What is open to question, however, is the point at which an attack on a group based on their religious beliefs truly crosses the line from genuine and passionate criticism of their belief system and into the realm of vilification. The fact that an individual voluntarily adopts a religion suggests that the threshold between genuine comment and hate vilification must necessarily be drawn at a higher level than with

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[141] Section 6(1) of the Race Relations Act 1965 (UK) inserted an offence of inciting racial hatred into the Public Order Act 1936 (UK), which required "an intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins".

[142] House of Commons, Standing Committee B (Race Relations Act) 27 May 1965, col 82-83, (Sir Frank Soskice).

[143] See Part IV A 3 *Protection of individual feelings.*

regard to race. Consider a hateful attack directed toward a racial group. It is clearly nonsensical to suggest that it is wrong to belong to a particular racial group. It is much more feasible on the other hand to suggest that a particular religious group is wrong to adhere to the belief system, which they choose to follow. A submission by the British Humanist Society to the House of Lords Select Committee on Religious Offences is particularly illuminating. The Society argued that the differences between race and religion impacted upon the degree of restriction which could legitimately be placed on freedom of expression:[144]

> Restrictions are far more easily defended in the case of race (and to a large extent of gender, sexual orientation and other common grounds of unwarranted discrimination and prejudice), since race is in a sense without content: it has no ideology, teachings or dogma; organisations are rarely based on racial or ethnic groups and when that are they exercise little power in the world. What is at issue when people are characterised by or criticised for their race is their irrevocable identity as individuals or groups of persons.

Religion is merely a collection of ideas about the physical and spiritual world, each religion must be free to compete in the marketplace of ideas. If an individual is to make a truly informed choice between radically different faiths they must be exposed to arguments which purport to reveal the folly of a given religious doctrine, even if these arguments cast a negative light over the religion in question.[145] Thus, although many religious groups would not feel that they were free to change their religion, they nonetheless choose to place their faith in one set of religious ideology and doctrine over another. It is in this sense that the ability to choose a religion highlights a pressing need to protect discourse related to religion and demarcates a bright-line dividing religion from race.

Often an individual's initial life choice to follow one particular religion over another is made as a result of the proselytizing efforts of religious groups. Indeed, the

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[144] House of Lords Select Committee, above n 74, para 80; The British Humanist Association is an organisation of the United Kingdom which promotes Humanism. The mission statement on its website reads: "The BHA is committed to secularism, human rights, democracy, equality and mutual respect. It works for an open and inclusive society with freedom of belief and speech, and for an end to the privileged position of religion in law, education, broadcasting and wherever else it occurs." www.humanism.org.uk (accessed 25 August 2007).

[145] Amir Butler "Muzzling the Haters Doesn't Make the Hate Vanish" (4 January 2005) *The Age* Melbourne www.theage.com/au (accessed 6 July 2007).

freedom of a religious adherent to proselytise can be described as a fundamental pillar of religious liberty.[146] Thus, it is ironic that the very laws designed to uphold the rights of believers have the real potential to undermine one of their most significant freedoms by prohibiting some aggressive proselytising efforts as hateful. The reality of this fear among religious groups was demonstrated in a vehement attack upon the Victorian Racial and Religious Tolerance Act 2001 (Vic), by Amir Butler, the executive director of the Australian Muslim Public Affairs Committee. He stated:[147]

> If we believe our religion is the only way to Heaven, then we must also affirm that all other paths lead to Hell. If we believe our religion is true, then it requires us to believe others are false. Yet, this is exactly what this law serves to outlaw and curtail: the right of believers of one faith to passionately argue against or warn against the beliefs of another.

During the debates preceding the introduction of the Racial and Religious Hatred Act 2006 (UK), Christian academics also expressed concerns about the impact of hate speech laws on the religious freedom to proselytise. Ahdar and Leigh were unconvinced by reassurances of the Home Secretary's commitment to legitimate freedom of speech and freedom of religion.[148] The Home Secretary was of the opinion that genuine religious debate, criticism and proselytism could be undertaken without using threatening, abusive or insulting language that is intended to stir up hatred.[149] Although this ideal is attractive, the consequences for the application of religious hate speech laws in reality have often diverged significantly from the ideal. The Attorney-General of India, Mr Soli Sorabjee, recently commented on the impact of religious hate speech laws in India:[150]

> [E]xperience shows that criminal laws prohibiting hate speech and expression will encourage intolerance, divisiveness and unreasonable interference with freedom of expression. Fundamentalist Christians, religious Muslims and devout Hindus would then seek to invoke the criminal machinery against each other's religion, tenets or practices. That is what is increasingly happening today in India. We need

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[146] Olivia, above n 48, 69.
[147] Amir Butler "Why I've Changed My Mind on Victoria's Anti-Vilification Laws" (4 June 2004) *The Age* Melbourne www.theage.com/au (accessed 6 July 2007).
[148] Ahdar, above n 14, 382.
[149] Ibid.
[150] House of Lords Select Committee, above n 74, para 52.

not more repressive laws but free speech to combat bigotry and to promote tolerance.

As the next section shows, Mr Sorabjee's fears have not been overstated. The use of religious hate speech laws by one religious group as a tool to undermine the freedoms of another religious group is not unique to India. The Australian state of Victoria is beginning to grapple with the ramifications of its broadly drafted prohibition of religious hate speech in the Racial and Religious Tolerance Act 2001 (Vic).

B The Victorian Example

The recent experience in Victoria following the decision of the Supreme Court of Victoria in *Catch The Fire Ministries Inc. v Islamic Council of Victoria*[151] ("*Catch The Fire Ministries*") clearly demonstrates the risk that religious hate speech laws may encourage conflict between opposing religious groups. The case involved a complaint by the Islamic Council of Victoria regarding statements made by the third defendant, Pastor Scot, at a seminar presented by Catch the Fire Ministries. The Pastor's main role was to speak at seminars, educating groups of Christians on important issues. In the seminar at the centre of the dispute Pastor Scot had been speaking on the Muslim faith based upon extensive personal study of the Koran. His stated purpose was "to explain to Christian people certain aspects of Islamic teaching and to encourage and equip Christian believers to share their faith with Muslims."[152] In other words, the Pastor was attempting to encourage other Christians to practice proselytism towards Muslims by exposing what he perceived as the folly of the Islamic faith.

The Court was presented with a tape recording of the seminar. The Islamic Council alleged that many of the references in the recording had the effect of inciting hatred against, serious contempt for, or revulsion or severe ridicule of the Islamic faith, in contravention of section 8 of the Racial and Religious Tolerance Act 2001

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[151] *Catch The Fire Ministries Inc. v Islamic Council of Victoria* (2006) VSCA 284.
[152] Ibid, para 90.

(Vic).[153] The Court highlighted some examples of the statements made by Pastor Scot. Some of these examples included:[154]

> (1) That the Qur'an promotes violence and killing, destroying other people for the good of Muslim people;
>
> (2) That the Qur'an teaches that women are of little value, e.g. a woman is like a field to plough, use her as you wish;
>
> (3) People study for six to seven years to become true Muslims. And we call them terrorists, but they are true Muslim; they have read the Qur'an, they have understood it and now they are practising it, that is the connection between the Qur'an and terrorism;
>
> (4) Muslims intend to take over Australia and declare it an Islamic nation; and,
>
> (5) Muslims are demons.

Nettle JA considered these statements in light of the section 11 defence, which applied to conduct undertaken reasonably and in good faith "in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in for any genuine academic, artistic, *religious* or scientific purpose."[155] Nettle JA opined that proselytism plainly fell within the scope of "religious purpose".[156] His Honour accepted that there was room for differences in religious opinion which must be tolerated in a just multicultural society. Criticism by the adherents of one religion of the tenets of another, even where such criticism appeared ill-informed, misconceived, ignorant or hurtful should be tolerated.[157] However, His Honour held that there must necessarily be a point where such speech becomes so unreasonable that it goes beyond the bounds of what tolerance should accommodate.[158] Furthermore, the statements made by Pastor Scot crossed the line of reasonableness. The Seminar was not a balanced discussion. Pastor Scot had taken

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[153] Ibid, para 4.
[154] Ibid, para 25.
[155] Racial and Religious Tolerance Act 2001 (Vic), s 11(1)(b); *Catch The Fire Ministries Inc. v Islamic Council of Victoria*, above n 151, para 82 (emphasis added).
[156] *Catch The Fire Ministries Inc. v Islamic Council of Victoria*, above n 151, para 90.
[157] Ibid, para 94.
[158] Ibid, para 94.

literal translations from the Qur'an, and made no allowance for their applicability to modern day society. Consequently, the ordinary, reasonable reader would feel incited to hatred towards, or serious contempt for, or serious ridicule of a Muslim adherent on the ground of their religion.[159]

Nettle JA concluded his judgment by commenting upon the balance between free speech and hate censorship, which served to promote tolerance within society. His Honour stated:[160]

> In my view one is entitled to assume that a fair and just multicultural society is a moderately intelligent society. Its members allow for the possibility that others may be right. Equally, I think, one is entitled to assume that it is a tolerant society. Its members acknowledge that what appears to some as ignorant, misguided or bigoted may sometimes appear to others as inspired. Above all, however, one is entitled to assume that it is a free society and so, therefore, one which insists upon the right of each of its members to seek to persuade others to his or her point of view, even if it is anathema to them. But of course there are limits. Tolerance cuts both ways. Members of a tolerant society are as much entitled to expect tolerance as they are bound to extend it to each other. And, in the scheme of human affairs, tolerance can extend each way only so far.

Unfortunately, despite the good intention of Nettle JA to impose a limit upon speech which would serve to maximise respect and tolerance in society, what resulted was far from the balance carefully articulated in his judgment.

As a member of the Muslim community, one minority group in particular which religious anti-vilification laws purport to protect, Amir Butler understandably supported the introduction of the 2001 legislation. However, his experience as the executive director of the Australian Muslim Public Affairs Committee, following the judgment against Catch the Fire Ministries, has caused him to change his mind.[161] Butler claims that at every major Islamic lecture he has attended since the litigation small groups of Christians have also been in attendance, taking note of any content that may serve as evidence in future litigation. Although none of the Islamic

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[159] Ibid, para 98.
[160] Ibid, para 100.
[161] Butler, above n 147, 1.

organisations at the centre of this campaign by evangelical Christians were involved in the Islamic Council litigation, these organisations "now suffer the consequences of having their publications and public utterances subjected to a ridiculous level of scrutiny and analysis."[162]

Clearly, some members of the Christian community have not adopted the message of tolerance promoted by Nettle JA. Rather the judgment in *Catch The Fire Ministries* appears to have opened the door to the possibility of vexatious legal actions motivated by revenge. Far from the ideal of promoting equality and tolerance of religious groups, the Victorian experience has shown that the major achievement of religious anti-vilification laws has been to "provide a legalistic weapon by which religious groups can silence their ideological opponents, rather than engaging in debate and discussion."[163]

As the next section shows, the experience in Victoria was taken into account in the United Kingdom and influenced the structure of the religious hatred provision in the Racial and Religious Hatred Act 2006 (UK).

VIII THE PATH TO THE RACIAL AND RELIGIOUS HATRED ACT 2006 (UK)

Upon ratifying the ICCPR, both New Zealand and the United Kingdom had already fulfilled their obligations under the CERD by implementing domestic legislation to prohibit incitement to racial hatred.[164] Consequently, both countries made a reservation to Article 20.2 of ICCPR, stating that the provision should reflect no more than the law as it stood at the time of ratification.[165] The New Zealand reservation was stated in the following terms:[166]

> Having legislated in the areas of advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons, and having regard to

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[162] Ibid.
[163] Ibid, 2.
[164] The United Kingdom ratified the ICCPR in 1976, whereas New Zealand ratified the Convention in 1978; New Zealand Human Rights Commission, above n 20 para 2.4.
[165] See generally, House of Lords Select Committee, above n 74, para 96.
[166] New Zealand Human Rights Commission, above n 20, para 2.4.

> the right to freedom of speech, reserves the right not to introduce further legislation with regard to Art.20.

A The Increasing Threat to the Muslim Community

The United Kingdom reservation against extending existing protections outside of the racial sphere was reaffirmed by the UK Law Commission in its 1981 working paper which recommended the abolition of blasphemy laws and deemed it inappropriate to introduce an offence of incitement to religious hatred to fill the gap. After accepting that public manifestations of racial hatred had obliged the law to intervene in the form of racial hatred legislation, the UK Law Commission went on to state:[167]

> But similar problems seem for the most part to have been avoided in the context of religion... [T]he most important reason is that differences of religion impinge far less on the public eye: although it is possible that the position may change in the future, the practice of a particular faith is, save where religion and politics are inextricably mixed, a private matter giving rise to few opportunities for public friction.

The UK Law Commission went on to warn that the creation of an offence in the absence of a clearly demonstrable need could draw attention to the prohibited conduct and ultimately provoke "unlooked-for trouble."[168] A law which abridges freedom of speech where there is little social need, particularly a law which does so through the imposition of criminal sanction, risks being labelled as discriminatory. This could lead to widespread flouting of the law by those attempting to draw attention to its discriminatory nature or wishing to appear as martyrs in the name of freedom of expression. Ultimately, the law would fall into disrepute due to the impossibility of securing its proper enforcement.[169]

Twenty-four years after these comments were made by the UK Law Commission, the Racial and Religious Hatred Bill 2005 (UK) was introduced in the House of Commons, which proposed that the existing incitement to racial hatred

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[167] United Kingdom Law Commission Working Paper No. 79, above n 6, para 7.20.
[168] Ibid, para 8.5.
[169] Ibid, para 7.17.

offence in the Public Order Act 1986 (UK) be extended to include incitement to hatred on the grounds of religion.

In 2001, the United Nations Human Rights Committee ("UNHRC"), after examining the degree of compliance of State parties which had ratified the ICCPR, recommended that the reservation entered by the United Kingdom be withdrawn.[170] The UNHRC expressed concerns that following recent terrorist attacks people had been the subject of attack and harassment on the basis of their religious beliefs and that religion had been utilized to incite the commission of criminal acts.[171] The UNHRC made the following recommendation:[172]

> The State party should extend its criminal legislation to cover offences motivated by religious hatred and should take other steps to ensure that all persons are protected from discrimination on account of their religious beliefs.

It is only after accounting for the growing hostility in the United Kingdom directed towards members of the Muslim community in response to an increasing terrorist threat both domestically and internationally that one begins to understand the dramatic turn in Government support for a religious hate speech law. The reservation of the Home Secretary, in 1965, against extending racial hate speech protection to religious groups was expressly made against a social climate where there was no evidence of any significant attempts to stir up hatred on the grounds of religion.[173] Numerous examples can be found to demonstrate that concerns regarding discrimination directed towards the Muslim community were a major driving force surrounding the enactment of the Racial and Religious Hatred Act 2006 (UK).[174]

Likewise, the Victorian Racial and Religious Tolerance Act 2001 (Vic) was also enacted against a background of an escalating threat towards the Muslim community. In 2004, the Australian Human Rights and Equal Opportunities

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[170] United Nations Human Rights Committee, 73rd session, CCPR/CO/73/UK;CCPR/CO/73/UKOT 6 December 2001.
[171] Ibid.
[172] Ibid.
[173] House of Commons, above n 142, col 83.
[174] See generally, House of Lords Select Committee, above n 74, para 11, where the Select Committee stated: "Today, it is the Muslim community which feels itself the least protected from hatred and most exposed to hostile attack, both verbal and physical."

Commission issued a report detailing continuing acts of discrimination and outright violence towards the Muslim community in Australia following the September 11 terrorist attacks in America.[175] However, it is also apparent that religious hatred legislation is intended to cut both ways, protecting the Muslim community from discrimination on the one hand and providing a legalistic weapon for silencing scathing attacks upon other religions launched by fundamentalist preachers on the other.[176]

B Closing a Loophole

Another important factor underlining the need for new legislation, was a perceived loophole, whereby ethno-religious groups such as Jews and Sikhs were protected as racial groups under existing racial hatred laws, yet Muslim communities whilst the focus of growing hostility, could not point to racial foundations and were left unprotected.[177] During a debate of the House of Lords, Lord Lester addressed the demands from the Muslim community for the introduction of legislation to close the perceived gap. His Lordship rejected the proposition that Jews and Sikhs were afforded greater protection under the law than Muslims. Attacks upon Jews and Sikhs on the basis of their religious beliefs would equally fall outside of the ambit of the law. Whereas, if an attack upon a Muslim group was truly directed towards their Asian ethnicity, they would be protected under the racial hatred provisions.[178]

The application of this distinction in reality, however, was not as simple as perceived by Lord Lester. For example, although members of the British National Party would make frequent comments, which were undoubtedly racist, they managed to successfully use the loophole in the racial hatred provisions to sidestep convictions for inciting racial hatred.[179] In 2006, whilst the Religious and Racial Hatred Bill was still being debated, Nick Griffin, the leader of the British National Party, was

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[175] Centre for Cultural Research *Report to The Human Rights and Equal Opportunity Commission: The Experience And Reporting By Arab And Muslim Australians Of Discrimination, Abuse And Violence Since 11 September 2001* (Sydney, 2004).
[176] Adhar, above n 22, 381.
[177] Tim Kevan "Hate Laws Under Scrutiny" (2006) 156 NLJ 1857, 1857.
[178] (11 October 2005) 450 HLD col 174.
[179] Dawn Watkins "A State of Uncertainty" (2006) 156 NLJ 660, 661.

acquitted of all charges which had been bought against him under the existing racial hatred provisions.[180] At his trial Griffin testified that:[181]

> His distaste was not for Asians but for Islam, which he considered to be a wicked and vicious faith. He added 'When I criticise Islam, I criticise that religion and the culture that it sets up, certainly not Muslims as a group and most definitely not Asians.'

Griffin was acquitted despite that fact that footage covertly filmed by an undercover journalist was available, which confirmed that he had advised his supporters that it was necessary to focus their attacks upon religion rather than race to avoid prosecution.[182]

C The House of Lords Free Speech Amendments

When the original Racial and Religious Hatred Bill was introduced in the House of Commons, the Government was proposing to amend the Public Order Act 1986 (UK) by simply adding religion to the existing offence of inciting racial hatred.[183] Significantly, unlike its predecessor in the Public Order Act 1936 (UK), the existing offence of incitement to racial hatred in section 18(1) of the 1986 Act does not require that the speaker intended to stir up hatred. Consequently, it represents a particularly intrusive limitation on free speech. Section 18(1) states:[184]

> A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—
>
> (a) he intends thereby to stir up racial hatred, or;
>
> (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

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[180] Ibid, 667.
[181] Ibid.
[182] Ibid.
[183] Ibid, 664.
[184] Public Order Act 1986 (UK), s18(1).

The House of Lords aggressively opposed the original form of the Bill due to concerns that it was overly broad and vague and would likely have a chilling effect on legitimate speech.[185] It is clear that the House of Lords took heed of the warnings from the unexpected impact of religious hate speech laws in Victoria. Baroness Cox specifically noted the conflict and tension that has arisen between religious groups in Victoria.[186] As a consequence, a large majority of the House of Lords voted in favour of significant amendments to the Bill. The most notable proposals were as follows:[187]

> i. The words abusive or insulting were to be removed from the Bill, leaving only threatening words or behaviour as the basis for the offence;
>
> ii. The crime was to be limited to those who possess the requisite intent;
>
> iii. A freedom of expression clause was included in order to protect any discussion, criticism and even ridicule of a particular religion from the effect of the Bill;

The Government was subsequently defeated in the House of Commons as all three of these amendments were favoured by a majority in the Commons.[188] The final religious hatred provision in the Racial and Religious Hatred Act 2006 (UK) only outlaws the use of threatening words or behaviour which are used with the intent of inciting hatred towards a religious group. This reflects the recognition of the House of Lords that race and religion are different in kind and that the wide protections from insult and abuse afforded to ethnic groups could not be legitimately extended to religious groups. Significantly, section 29J of the Act contains a broadly worded protection of free speech, aimed at preventing a general chilling of legitimate criticism of religion:[189]

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or

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[185] See for example, (25 October 2005) 450 HLD col 1074; Olivia, above n 48, 82.
[186] (11 October 2005) 450 HLD col 199.
[187] Dawn Watkins "Racial And Religious Hatred Versus Free Speech" (2005) 18 NLJ 1730, 1737.
[188] Olivia, above n 48, 82.
[189] Racial and Religious Hatred Act 2006 (UK), s 29J.

> urging adherents of a different religion or belief system to cease practising their religion or belief system.

The result of these amendments is that the new incitement to religious hatred law is a much diluted version of the original Bill.[190] Some commentators question whether the Racial and Religious Hatred Act 2006 (UK) will provide any significant impetus for social change in the United Kingdom.[191] The impact of the new religious hatred provisions will likely be restricted to the extremists who set out with the sole intention of encouraging others to hate identifiable religious groups. It would be hard to argue that the speech of these fringe haters should be afforded any protection under the law. However, some people question whether criminalising those on the fringes of reality is the most appropriate response. It will be necessary to attempt to answer this question in due course, as the discussion now moves on to consider whether New Zealand should follow a similar legislative path to the United Kingdom.

IX RELIGIOUS TOLERANCE IN NEW ZEALAND

New Zealand born academic, Rex Ahdar, has written extensively on the relationship between religion and the law. In his writing, Adhar has examined the state of religious liberty in numerous countries around the world. In 2004, Ahdar turned the spotlight on New Zealand:[192]

> If a typical rugby-loving, suburban-dwelling New Zealander was asked by a pushy social scientist or pollster to take an annoying word association test, his or her response to the word 'religion' might be a muffled yawn accompanied by an answer such as 'irrelevant,' 'boring,' or 'outdated.' … In one sense, the widespread cultural disinterest in organized religion that typifies much of our history may be viewed as a positive thing. It can hardly be a cause for regret that, by and large, New Zealand has not witnessed the large-scale, bitter religious turmoil that has beset many nations.

[190] Olivia, above n 48, 83.
[191] Watkins, above n 179, 662.
[192] Ahdar, above n 14, 205.

In the same year the New Zealand Human Rights Commission issued a report assessing New Zealand's performance in protecting human rights.[193] The conclusion in regard to the state of religious liberty was positive: "By world standards, New Zealand is very tolerant of religious diversity within the context of a secular State."[194]

These passages underline a clear contrast between the social climates in New Zealand and both the United Kingdom and Australia respectively, where the treatment of the Muslim community has obliged legislative intervention. Although it would be misleading to claim that the Muslim community in New Zealand has been altogether immune from public backlash in response to the actions of extremist terrorist groups in recent years. Many people will recall the shameful desecration of six Auckland mosques as an immediate response to the 2005 London bombings, which took the lives of more than 50 people.[195] However, since this incident, which was the first attack on the Muslim community in New Zealand to catch the attention of the nation,[196] there has been little indication that Muslims are being subject to public hostility or ill-will. In contrast to the United Kingdom and Australia, there were no reprisals against the Muslim community in New Zealand following the arrest in 2007 of eight Middle Eastern and Indian doctors in connection with unsuccessful bombing attempts in London and Glasgow. Javed Khan, president of the Federation of Islamic Associations of New Zealand noted that whilst he had heard reports that some Muslim doctors living in New Zealand were understandably uncomfortable in the wake of the attacks, media campaigns had successfully dispelled any beliefs of a connection with the New Zealand Muslim community. Mr Khan commented further:[197]

> I think New Zealand has always been a lot more open-minded about these things and a lot more wise in how we react…Our community here is a bit different from America and Britain, they feel much more comfortable here.

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[193] New Zealand Human Rights Commission *Human Rights in New Zealand Today* (1 September 2004).
[194] Ibid, 28.
[195] See generally, "Six Auckland Mosques Vandalised" (11 July 2005) www.tvnz.co.nz (accessed 20 August 2007).
[196] Ibid.
[197] Rebecca Todd "Muslim Doctors in New Zealand Uncomfortable" (9 July 2007) *The Press* Auckland www.stuff.co.nz (accessed 3 August 2007).

Likewise, there was a swell of public outrage following the mindless destruction of a number of Jewish cemeteries in Wellington in 2004.[198] David Zwartz, president of the New Zealand Jewish Council publicly acknowledged the gratitude of the Jewish community for the "offers of support [that] had flooded in to the community."[199] In addition, a poster campaign by the Jewish Student Union at Auckland University calling for all New Zealander's to reject racial and religious hatred was well received by the public.[200]

The response of the New Zealand public to these isolated outbursts of hostility towards religious minorities demonstrates that in New Zealand's prevailing social climate, the counter-speech of the majority is a valuable tool for denouncing the deplorable behaviour of a few individuals. The failure of the fringe haters to gain any recognisable traction with the public of New Zealand raises serious concerns for the introduction of religious hate speech legislation. As Butler argues, "social pressure is a far more effective mechanism for controlling such speech than law suits."[201] Given the apparent lack of a pressing social need, the next sub-section examines whether religious hate speech legislation in New Zealand could stand up to the justified limitation test in section 5 of the NZBORA.

A A Justified Limitation?

In *Solicitor-General v Radio New Zealand Ltd*, the High Court stated that freedom of expression "guarantees everyone [the right] to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community."[202] However, this statement must be read in light of section 5 of the NZBORA, which confirms that no rights are absolute. Even freedom of expression, the fundamental pillar of democracy, can be restricted in limited circumstances.

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[198] Nicola Boyes "Worldwide Dismay at Attacks on Graves" (9 August 2004) www.nzherald.co.nz (accessed 9 July 2007).
[199] Ibid.
[200] Ibid.
[201] Butler, above n 145.
[202] *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 59.

The New Zealand courts have largely adopted the approach of the Supreme Court of Canada in *R v Oakes*[203] ("*Oakes*") as a guide to determining whether a limit on a right is justifiable under section 5.[204] There are two broad limbs to the *Oakes* test. First, the limiting measure must serve a purpose sufficiently important to justify curtailment of the right. Once the objective has been established as sufficiently important, the means adopted to further that objective must meet the test of proportionality. This requires the examination of three further elements. First, the limiting measure must be rationally connected with its purpose. Second, the limiting measure must impair the relevant right as little as possible. Finally, the limit must be in due proportion to the objective.[205]

The Canadian courts have had a number of opportunities to examine the justifiability of Canadian hate speech legislation in regard to the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms.[206] The Canadian courts have had little difficulty in recognising that hate speech legislation pursues the sufficiently important objectives of promoting equality and preventing real harm to minority groups.[207] Likewise, the Canadian courts have had no problem identifying that the prohibition of hate speech is rationally connected to the objective of preventing discrimination of targeted groups.[208] However, some commentators question whether prohibiting hate speech is an effective means of achieving this objective. It is argued that the prosecution of hate mongers generates a huge amount of media attention thereby airing the hateful message to a much wider audience than otherwise possible. Whereas the hate monger may have otherwise been ignored on the fringes of reality they become a martyr for their cause.[209]

In *R v Keegstra*, Dickson CJ rejects this argument on the basis that a criminal trial is also a form of expression, which sends a message to the public that hate propaganda will not be tolerated and highlights the value of equality in a democratic

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[203] *R v Oakes* [1986] 1 SCR 103.
[204] See generally, *R v Hansen*, [2007] NZSC 7.
[205] Ibid, para 43.
[206] See generally, *Citron v Zundel* [2004] 41 CHRR D/274; *Canada v Taylor* [1990] 3 SCR 892; *R v Keegstra*, above n 125.
[207] See generally, *Citron v Zundel*, above n 206, para 234; *Canada v Taylor*, above n 206, para 140; *R v Keegstra*, above n 125, para 85.
[208] *R v Keegstra*, above n 125, para 102.
[209] See generally, Butler, above n 147, 2.

society.[210] From New Zealand's perspective, the argument also ignores the fact that all of the isolated incidents of religious hatred surveyed above[211] were outwardly public events and it is likely that any similar incidents in the future will also catch the attention of the nation given its small population size. Prosecuting the hate mongers in this situation would not afford them a larger stage from which to air there message. Rather, as conceptualised by Dickson CJ, the State would send a message to the public of its condemnation of hate propaganda.

The more serious difficulty for religious hate speech proponents in New Zealand will be demonstrating that the limitation impinges on free speech as little as possible and is in due proportion to the objective to be achieved. The first difficulty is posed by the recognition that society in New Zealand is uniquely tolerant of religious differences. It appears that public counter-speech which condemns incidents of religious bigotry is at present an effective mechanism for suppressing discrimination towards religious groups. The marketplace of ideas is living up to its ideal in New Zealand; the best ideas are winning out. Enacting legislative measures which impinge upon free speech can hardly be justified as the least intrusive means of securing religious equality when free speech is already an effective solution.

On the other hand, accepting that the messages of the fringe hate mongers are not worthy of any protection under the banner of free speech, one may argue that the combination of public counter-speech and criminal prosecution would be an even more effective mechanism for deterring hate propaganda. One may further suggest that although vilification of religious groups is not currently a social problem in New Zealand, there is no harm in enacting legislation as a safeguard for the future. These arguments are seriously flawed for a number of reasons.

Firstly, adopting this path would ignore the fact that in order to meet the test of proportionality, the benefits gained through the introduction of a measure limiting free speech must be sufficient to outweigh the infringement of the right.[212] In *Keegstra*, Dickson CJ stated this principle in the following terms: "[O]ne must ask

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[210] *Keegstra*, above n 125, para 105.
[211] See Part IX *Religious Tolerance in New Zealand*.
[212] See generally, *Canada v Taylor*, above n 206, para 141 McLachlin J.

whether the amount of hate propaganda in Canada causes sufficient harm to justify legislative intervention of some type."[213] Meeting this test would be a very difficult task in New Zealand given the absence of the harm which religious hate speech legislation seeks to remedy. The underwhelming impact of the legislation would also have to be weighed against the chilling effect it may have on legitimate debate and criticism of religion.

More importantly, however, the argument ignores the impact which hate speech legislation may have, above and beyond punishing the fringe hate mongers. As demonstrated by the fallout between opposing religious groups in Victoria following the *Catch The Fire Ministries* litigation, hate speech legislation can serve as a means of undermining religious liberty. Of course, in light of the preceding discussion, one could be forgiven for arguing that there is little risk that religious groups will suddenly turn on each other given the traditional tolerance of religion in New Zealand. However, there is good reason to question this assertion.

Professor Anthony Wood suggests that the remarkable tolerance that has traditionally been extended to non-Christian faiths in New Zealand is largely due to "the overwhelming, unchallenged Christian composition of the population."[214] However, Rex Ahdar observes that this may be set to change as the disestablishment of Christianity as the de facto State religion continues to push New Zealand towards a more heterogeneous society. As a result of the disestablishment, Ahdar warns that New Zealand may observe an increase of religious freedom claims from minority religions in the future.[215] Potentially, as observed in Victoria, the provision of hate speech legislation may be perceived by religious minorities as a means of competing with their ideological opponents and could ultimately serve as the precipitating event that forges religious divisions. Indeed, support for this hypothesis can be found in the following observation by Stephen Braun:

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[213] *R v Keegstra*, above n 125, para 63.
[214] John Stenhouse (ed) *Christianity, Modernity and Culture: New Perspectives on New Zealand History* (ATF Press, Auckland, 2005) 229; cited in, Rex J. Adhar "Reflections on the Path of Religion-State Relations In New Zealand" (2006) BYU L Rev 619, 657.
[215] Adhar, above n 214, 658.

> In a stable, multicultural democracy such as Canada, the more pressing social divisions are more likely to be rooted in the just causes and the multifaceted internecine squabbles of rival minority groups competing for political ascendancy than in the simplistic untruths of transparent, fringe racists.

It would certainly be ironic if a law introduced as a harmless safety mechanism to combat potential hate mongers in the future, was in the meantime to serve as a legal tool to undermine religious liberty.

With these objections in mind one can now begin to understand the cautious legislative pathway in the United Kingdom, proceeding from an early reservation to extending existing racial hatred provisions to religious groups, to the enactment of the Racial and Religious Hatred Act 2006 (UK). It is clear from the debates preceding the introduction of the Act that account was taken of the differences between race and religion. The risk that the proposed legislation would chill genuine debate and criticism of religion was clearly acknowledged as was the threat to religious liberty. However, the point came where the degree of religious hate propaganda in the United Kingdom had reached a level where it posed a real and substantial threat to the equality of religious groups. It is only after this point was reached that the potential benefits to be secured through the introduction of religious hate speech laws could safely outweigh the competing potential harm. Unless religious intolerance in New Zealand society reaches a similar level, the potential harms threatened by the introduction of a religious hate speech prohibition are sufficient to outweigh the potential benefits.

The question that remains to be answered is whether or not the legislative measures adopted in the United Kingdom go far enough in addressing the potential harms of hate propaganda, and, if not, what could New Zealand learn for the future, if a legislative prohibition of religious hate speech does become a necessary measure?

X ADDRESSING THE FUTURE: CONSTRUCTING A JUSTIFIABLE RELIGIOUS HATE SPEECH PROVISION FOR NEW ZEALAND

A Insult and Abuse

The two most notable aspects of the Racial and Religious Hatred Act 2006 (UK) are first, only threatening words used with the intent of stirring up hatred against an identifiable religious group are prohibited,[216] and second, there is a broad protection of free speech, which excludes an array of speech from the ambit of the criminal law.[217] Some examples of protected speech include words that are abusive and insulting toward religion, and words used for the purpose of proselytising.

Whilst the United Kingdom provision is praiseworthy in that it goes a long way to ensure that only the genuine fringe haters are criminalised, it is likely that its restricted nature will fail to address much of the true harm caused by religious hate propaganda. From a public order perspective, silencing threatening words may help religious minorities to feel less vulnerable to violent acts. However, in both the United Kingdom and New Zealand it is already a crime to make threats of violence.[218] Merely extending this existing protection to target hate mongers, who use their threatening words to incite others to hatred of religious minorities, represents a very narrow band of additional liability.[219]

A better balance could be stuck by including insult and abuse under the prohibited grounds of speech. Any genuine comment on religion that may fall under these bands of liability would generally be filtered out by the requirement that the speaker intended to stir up hatred. If full weight is given to the terms hatred and intent, it is unlikely, for example, that a comedian who pokes fun at religion, or a concerned member of the public who aggressively criticises a questionable religious practice, will be criminalised for intending to stir-up hatred. In reality, it will be clear

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[216] Racial and Religious Hatred Act 2001 (UK), s 29B.
[217] Racial and Religious Hatred Act 2001 (UK), s 29J.
[218] Public Order Act 1986 (UK), s 4(1)(a); Crimes Act 1961, s 2, The definition of assault states, "Assault means… threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose."
[219] See generally, Ian Bassett "Is Hate Speech Legislation Necessary or Desirable?" www.hatespeech.co.nz (accessed 28 July 2007) 2.

from the context in the vast majority of cases whether or not words are spoken with an underlying intent to stir-up hatred.

B Proselytism

A more difficult issue concerns the degree of protection that should be afforded to proselytism to prevent religious hate speech laws triggering conflict between religious groups. There is no doubt that following the decision in *Catch The Fire Ministries* in Victoria, the explicit recognition by Muslim leaders of the threat of prosecution from opposing Christian groups will filter down through the lower echelons of the religion. It is here that the 'invisible' effects of the *Catch The Fire Ministries* case take hold, acting to suppress what may be legitimate proselytism, for fear of legal retaliation.

The concern to prevent a chilling of legitimate proselytism, however, must be considered in light of the recognition in the United Kingdom that the introduction of religious hate speech legislation was necessary not only to protect religious groups from discrimination, but also to combat fundamentalist religious preachers responsible for stirring up hatred towards opposing religious groups.[220] Thus, it is important to acknowledge that religious liberty can not be used as a shield from beneath which religious fundamentalists can direct any comments towards other religious groups, no matter how hateful. In this sense, it is arguable that the decision in *Catch the Fire Ministries* strikes an appropriate balance between freedom of speech and religious liberty, despite the religious conflict that later ensued.

One could be excused for defending the comments of Pastor Scot, which attacked some of the controversial practices of Islam. Indeed, members of the United Kingdom Joint Committee on Human Rights were minded to protect this very freedom in the debates surrounding the introduction of the Racial and Religious Hatred Act 2006 (UK). For example, Baroness Turner of Camden was concerned to protect speech critical of Islam on the basis that Islamic fundamentalists are often comfortable to suppress woman's rights in the name of religion.[221] However, it is difficult to suggest that the Pastor's additional comments, which suggested that

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[220] See Part VII A *The Increasing Threat to The Muslim Community*.
[221] (11 Oct 2005) 450 HLD col 202.

Muslims are demons who are trying to take over Australia, served any other purpose but to incite the audience towards hatred of Muslims.[222]

If Pastor Scot's seminar had have been an isolated incident of religious hatred, the potential benefits arising from the introduction of the Racial and Religious Tolerance Act 2001 (Vic) would most likely have been overshadowed by the ensuing conflict between opposing religious groups. However, as highlighted above, this was not an isolated incident in Australia.[223] Legislators in Victoria were faced with an environment of escalating harassment of Muslim groups, which in many instances had culminated in violent assaults. The potential benefits of a law promoting religious equality were clearly capable of outweighing the potential harms.

C Consent of the Attorney-General

Any future religious hate speech legislation in New Zealand should impose the requirement of leave from the Attorney-General before a prosecution can be bought. This is the position provided for in the United Kingdom under section 29L of the Racial and Religious Hatred Act 2006 (UK). In the United Kingdom the requirement for the Attorney-General's consent was described by the House of Lords Select Committee on Religious Offences as "essential in order to exclude vexatious cases."[224] However, there are limits to how far this requirement can protect genuine free speech. Regrettably, the mere threat that religious groups will utilise new found legal avenues to silence their opponents may be sufficient to chill some instances of legitimate debate and criticism of religion.

D A Cause for Concern

Some commentators fear that hate censorship cannot be politically confined within stable limits such that the intrusiveness of the censorship will continue to increase over time.[225] This slippery slope argument against hate censorship arises from a fear that once censorship of one form of hateful speech gains legitimacy, protections may be extended to other groups not currently considered protected

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[222] See Part VIII B *The Victorian Example*.
[223] See Part VIII A *The Increasing Threat to The Muslim Community*.
[224] House of Lords Select Committee, above n 74, para 109.
[225] See generally, Stephan Braun *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (University of Toronto Press, Toronto, 2004) 121-135.

minorities, for example overweight people or people of lower socioeconomic class.[226] However, even more worrying in this context are the parallels between religious and political beliefs. Both religious and political beliefs are merely sets of ideologies that must be free to compete in the marketplace of ideas. And, similar to religion, political confrontation is capable of fuelling intense emotion. However, nobody would question that the right to publicly attack political beliefs is anything other than a fundamental benchmark of a functional democracy.

Recall that the UK Law Commission rejected 'protection of public order' as an unsound basis for the retention of blasphemy law.[227] The Commission opined that to justify an offence penalising attacks on religion that may lead to a breach of peace, it would have to be demonstrated that there is a greater danger from this type of publication than the publication of extremist political material.[228] Implicit in this passage is the notion that political speech is necessarily subject to an absolute protection from state interference.[229] Yet, it is difficult to see how hateful attacks directed towards religious adherents are any more damaging to the believer than hateful attacks on the basis of political beliefs. If this is so, then perhaps in the midst of the calming quiet resulting from religious hate censorship, legislators may be motivated to extend similar protections into the political sphere. The defence of this censorship would read similar to the United Kingdom Home Secretary's defence of religious hate speech legislation.[230] That is, genuine political debate and criticism would not be under threat, only threatening and abusive attacks capable of stirring up hatred.

On the surface, the argument that hate censorship represents a slippery slope that may ultimately lead to the censorship of political speech is a cause for concern. The argument becomes less persuasive when it is considered that political speech is generally regarded as the highest echelon of speech worthy of protection.[231] The

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[226] Ibid, 179.
[227] See Part IV A 4 *Protection of public order*.
[228] United Kingdom Law Commission Working Paper No. 79, above n 6, para 7.23.
[229] Ibid, para 7.16, where the UK Law Commission notes that the most fervent of political beliefs may be subject to any kind of attack without interference from the law save in matters of public order, obscenity and defamation of character.
[230] See Part VII A *Race and Religion are Different in Kind*.
[231] Bardent, above n 1, 37.

judgement of the ECtHR in *Wingrove v United Kingdom* is particularly instructive. Although the ECtHR was prepared to extend a margin of appreciation to State parties which operated blasphemy laws, thus restricting freedom of expression to protect religious sensibilities, the ECtHR was explicit that the same margin was not available in regard to political speech.[232]

XI CONCLUSION

Although New Zealand's track record of religious tolerance is not unblemished, the New Zealand Parliament should be proud of the nation for its comparatively praiseworthy track record of religious tolerance. Although it is unfortunate that the expression of some members of society sometimes deeply offends the beliefs of religious minorities, penalising instances of such expression by recourse to the criminal law of blasphemy imposes an intolerable burden upon freedom of speech. The law is not a legal irrelevance in New Zealand simply because it has largely laid dormant for the length of its statutory existence.

Today it is unclear whether the law is an artist's foe by chilling instances of genuine expression, or an artist's friend by prompting lucrative controversy. What is clear, however, is that blasphemy law is discriminatory and sends a signal to society of the pre-eminence of Christianity over all other religions. The notion that only Christian groups are afforded a legal protection from offence is inconsistent with the fact that there has never been a legally established Church in New Zealand and as a modern democracy which prides itself on principles of equality, the abolition of the law of blasphemy is necessary to signal the equality of all religions under the law.

Religious hate speech laws pursue a much more valuable goal of preventing expression which may positively undermine the fundamental right of a believer to manifest their religion, or encourage others to discriminate against identifiable religious groups. Importantly, a hate vilification law would protect each religion equally. However, prohibiting religious hate speech comes with the potential social costs of preventing genuine debate and criticism of religion and undermining the liberty of the very religious groups the prohibition is designed to protect.

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[232] See Part III D *A Justifiable Limitation on Free Speech? Decisions of the European Court of Human Rights.*

It is unfortunate that in some foreign jurisdictions, the potential harms threatened by the introduction of religious hate speech laws have been outweighed by the hope that the laws will alleviate the very real threat to religious minorities, posed by an escalating environment of religious intolerance. In contrast, the Parliament of New Zealand is by no means compelled to intervene by the prevailing social climate. Thus, if a religious hate speech law was introduced it would largely serve as a safety mechanism for the future. Such a move would be unwise in light of the potential harms that may ensue. The vast majority of the New Zealand public have demonstrated that they are capable of using their fundamental right to free speech responsibly, not simply by refusing to engage in hateful speech, but by using their speech as a weapon to combat sporadic incidences of religious hatred. In this way free speech is used to ensure that it is the haters that are marginalised on the fringes of reality, not the targets of their hatred.

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