

M172 MACPHERSON, E. Regulating hate speech in New Zealand

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INTRODUCTION

This paper considers the ability for “hate speech” to be regulated in New Zealand. Firstly, the author formulates a definition of hate speech, and evaluates the arguments for and against its regulation. The author proposes that hate speech should be regulated in New Zealand because of the harm it causes to its individual targets and to society generally, and considers what form regulation would take. The paper explores the mechanisms for regulating expression operated under the Films, Videos, and Publications Classification Act 1993, The Human Rights Act 1993, the Broadcasting Act 1989, and the principles of the Press Council. These mechanisms are revealed to inadequately regulate hate speech in New Zealand according to the author’s definition, and accordingly, legislative reform is proposed.

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 16, 800 words.

I INTRODUCTION

Hate speech has been a hot topic in New Zealand since the *Living Word Distributors v Human Rights Action Group (Living Word)*¹ decision came before the Court of Appeal. The case involved two videos, which degraded and denigrated homosexual people by reason of their sexual orientation. The videos were seen to promote the message that homosexual people were inferior. There was outrage from the homosexual community and human rights activists at the videos, which were touted as hate speech; material that should be banned. The Court of Appeal in *Living Word*, although recognising in the judgment of Thomas J that the videos were likely to cause serious harm to their targets and to society generally, found that the videos could not even be considered under New Zealand's censorship regime. The outcome of that case has led the author through the regulatory mechanisms put in place under the Human Rights Act 1993, the Films, Videos, and Publications Classification Act 1993, the Broadcasting Act 1989, and the principles applied by the New Zealand Press Council, in order to uncover whether "hate speech" can be regulated in New Zealand.

The first task of the investigation is to establish exactly what "hate speech" is. I will reach a formal definition of hate speech to be applied throughout the paper. The definition will be considered against the arguments for and against the regulation of hate speech to conclude whether it should be regulated in New Zealand. I will consider the possible alternatives for dealing with hate speech and determine what is the best approach for New Zealand. When those decisions are made, the current legal mechanisms that regulate expression in New Zealand, will be measured against my definition of hate speech.

When the *Living Word* videos were remitted back to the Board of Review for classification, the Board attached to its decision a concern that the Court of Appeal's judgment had highlighted a gap in the law.²

The Board highlighted what it considered to be a gap in New Zealand law. It referred to the distinction between censorship and anti-discrimination legislation and observed

¹ *Living Word Distributors v Human Rights Action Group (Living Word)* [2000] 3 NZLR 570, 582 (CA)

² *Re Gay Rights/Special Rights, Inside the Homosexual Agenda* (8 February and 29 March 2001) Film and Literature Board of Review 3/2001, 2.

that publications such as these which contained a significant element of hate speech do not come within the reach of censorship regulation under the Classification Act; and nor does the Human Rights Act 1993 provide any sanction or remedy for such discriminatory publications.

This paper seeks to determine whether those gaps exist, and if they do, seeks to recommend a way to deal with hate speech in New Zealand.

II *DEFINING HATE SPEECH*

To define the term 'hate speech' is a difficult task. Karl Du Fresne comments,³

[Hate speech] is one of those wondrously loaded phrases, like "social justice", that can mean whatever the user wants it to mean.

There are many academic writings on the topic of hate speech, and the definitions of hate speech applied in them vary from author to author. The following section identifies some features common in the varying definitions, allowing the author to arrive at a workable definition to be used throughout the paper. The definition is a statement about what types of expression should be covered by the term "hate speech". If hate speech were to be regulated, expression that falls within the definition would be subject to regulation.

A *Message*

Hate speech is a message that is communicated to an audience. The first issue to be clarified in the definition, is through which media the message may be communicated. Hate speech is a label liberally applied to messages written or spoken using a variety of media. Hate messages may be spread through anonymous phone calls and letters, posters, books, magazines and pamphlets, radio, television, recorded phone messages, computer networks, text messaging, bulk mail, graffiti, and symbols (such as swastikas or burning crosses).⁴ The recent proliferation of computers and web-based technology has resulted in a marked increase in the

³ Karl Du Fresne "Hate Speech" (2003) *Media Watch* <<http://www.mediawatch.co.nz>> (last accessed 12 July 2003).

amount of hateful expression in circulation, as it may be transmitted across the Internet, reaching a wider audience, in less time, with reduced regulation.⁵

This paper considers the ability of current legal mechanisms in New Zealand to regulate hate speech. Each mechanism is limited in the media that it may regulate. For example, there is no scope to censor spoken messages under New Zealand's censorship regime provided for in the Films, Videos, and Publications Classification Act 1993.⁶

This paper considers the ability to regulate messages in a wide range of media, based on the assumption that the message hate speech conveys may be communicated, and cause harm, regardless of medium.⁷ Hate speech regulation would be ineffective if it did not cover certain media, as expressers of hate speech would favour an exempted medium. The medium used to communicate hate speech changes over time. Today, the Internet is widely used to distribute hate speech. Ten years ago it was not. The definition of hate speech must be flexible enough to cover whatever medium the expresser chooses to spread the message through. If New Zealand recognises the need to regulate hate speech in order to avert the harm it causes, it should regulate hate speech in all its forms.

In order for hate speech regulation to cover all possible media, my definition of hate speech is not media specific. It simply requires a "message". For example, a message may be written in print; spoken in public places, either directly to its target or before a crowd; broadcast on television or radio; communicated through computer networks, telephone, or fax; or communicated through music, film, video, photograph, art, or symbols. Simply referring to hate speech as a "message" leaves open the possibility for it to be found to exist in many forms.

⁴ See Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U Ill L Rev 789, 791.

⁵ Yulia A Timofeeva "Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany" (2003) 12 J Transnat'l L & Pol'y 253, 256.

⁶ Films, Videos, and Publications Classification Act 1993, s 2.

⁷ Kathleen Mahoney, above, 792.

B Form

The next issue to be addressed by the definition is the type of expression that is covered by the term hate speech. Kent Greenawalt's writings on hate speech relate to epithets; insults communicated face-to-face that are derogatory to a class of society.⁸ The derogatory insult is coupled with coarse language, communicating the epithet in a highly emotive and shocking way.⁹ An example of a hateful epithet is, 'fucking faggot'. Including epithets within a definition of hate speech can be problematic, as the level of harm they cause depends upon the intent of the speaker and the context of the epithet. Saying 'fucking faggot' to a homosexual person in a nasty way may be harmful while jokingly calling a friend a 'bloody pom' may not.¹⁰

Other forms of hate speech communicate the message in an organised and calm manner and are sometimes backed up by false facts. It is often difficult to point to one word, or even one sentence, within the message that is degrading or hateful, but when taken as a whole, a message of inferiority is communicated. For example,¹¹

Many concerned citizens and celebrities, anxious to lend their support to the fight against AIDS, unwittingly are endorsing the homosexual agenda, which demands the legalisation and acceptance of all kinds of deviant sexual behaviour; including prostitution and sadomasochism.

This message, although not as obviously shocking as an epithet, has potential to do harm by influencing its audience to believe that homosexuals are inferior. Hate speech can combine both types of expression. Arguably, the above quote combines calm, reasoned expression with the mild epithet "deviant sexual behaviour". My definition addresses both forms of hate speech, separately and in combination.

⁸ See Kent Greenawalt *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press, New Jersey, 1995).

⁹ Kent Greenawalt, above, 47-48.

¹⁰ See *Berriman v Sunday Star-Times* (May 2003) New Zealand Press Council 922 <<http://www.presscouncil.org.nz/>> (last accessed 29 September 2003).

¹¹ Jeremiah Films "Aids: What You Haven't Been Told" video transcript <<http://www.christian-apologetics.org/html/Aids.htm>> (last accessed 1 September 2003).

More recently, the term hate speech has been applied to holocaust denial, material that actively promotes the idea that the Jewish holocaust did not occur or has been exaggerated in history, and hate pornography.¹² These types of expression are generally regulated separately from other forms of hate speech and are likely to be interpreted in their own way through the courts.¹³ My definition of hate speech is not intended to cover hate pornography or holocaust denial, as these forms of expression involve separate issues which may not be addressed by standard hate speech regulation.

C Target Group

In working towards a definition of hate speech, it is important to establish who hate speech may be targeted at. Some definitions require that the expression be directed at a traditionally disadvantaged or minority group, which assumes that those groups are more prone to discrimination and hate speech, and less equipped to speak out against them.¹⁴ According to that requirement, a book that promoted the idea that European New Zealanders were greedy, dishonest, and money hungry would not be covered by the term hate speech, but a similar book about Jewish people would be covered.

The requirement that hate speech be directed against minority or disadvantaged groups causes difficulty, because it may not always be obvious whether a target group has been disadvantaged. Moreover, there may be potential for hate messages to do harm regardless of whether the target group has been traditionally disadvantaged. European New Zealanders have taken offence to being called 'pakeha' although they are not a minority or disadvantaged group.¹⁵ Accordingly, my definition of hate speech is not restricted to expression targeted at traditionally disadvantaged or minority groups.

¹² See generally Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U Ill L Rev 789.

¹³ Austria, Belgium, France, the Czech Republic, Germany, Israel, and Switzerland have specific provisions for holocaust denial. See Canadian Criminal Code German Criminal Code, art 130.

¹⁴ See Mayo Morgan "Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" (1994) Wis L Rev 1425, 1430. See Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story", (1989) Michigan Law Rev 2326, 2357 in relation to racial hate speech.

¹⁵ See *Skelton v Sunday Star-Times* (1996) 3 HRNZ 655.

Another important issue is whether hate speech may be directed at individuals that are members of the target group. For example, during a recent radio broadcast, presenter Paul Holmes referred to United Nations Secretary-General Kofi Annan as a "cheeky darkie" and also said "[w]e are not going to be told how to live by a Ghanaian."¹⁶ This message was targeted directly at Kofi Annan, however it degraded and denigrated him based on his colour, being dark skinned, and his ethnicity, being a Ghanaian. Accordingly it degraded and denigrated dark-skinned people and Ghanaians generally.¹⁷ Such messages do have the ability to promote the idea that Ghanaian and dark-skinned people are inferior, regardless of the fact that they are directed at a single person. The author recognises that messages targeted at a specific member of the target group may come within the definition of hate speech.

D Distinguishing Feature

Hate speech addresses a distinguishing feature or characteristic of the target group such as race, gender, or sexual orientation. The next issue in defining hate speech is what distinguishing features are covered in the definition.

The term hate speech was originally applied to messages about the targets' race.¹⁸ The earliest legal mechanisms adopted by countries to address hate speech, applied to racial hate messages. For example, the remedies provided under the Human Rights Act 1993, originating from 1971, apply only to colour, race, or ethnic or national origins.¹⁹

Critical race theorist Richard Delgado considers hate speech only in the context of racial hate messages. Delgado concentrates on racial hate speech, believing it to be more harmful than other forms of hate expression because targets have no control over their race.²⁰ However, it may be argued that sexual orientation,

¹⁶ Stuart Dye "Outrage at Holmes' darkie jibe" (27 September 2003) *New Zealand Herald* <<http://www.nzherald.co.nz/storydisplay.cfm?storyID=3525780&thesection=news&thesubsection=general>> (last accessed 27 September 2003).

¹⁷ "PM condemns 'darkie' comments by Holmes" (25 September 2003) *Stuff* <<http://www.stuff.co.nz/stuff/0,2106,2669532a10,00.html>>.

¹⁸ See Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 *Harv CR CLL Rev* 133 and Mari Matsuda "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Mich L Rev* 2320.

¹⁹ Race Relations Act 1971, ss 9A and 25.

²⁰ Richard Delgado, above, 159.

gender, disability, and even possibly religion are also attributes that the target has no control over.

In recent years the concept of hate speech has been applied to other distinguishing features that are considered to be grounds of discrimination.²¹ Aligning the grounds of hate speech with the grounds of discrimination recognises that people who are subject to discrimination are often also subject to hate speech. The Human Rights Act 1993 sets out the prohibited grounds of discrimination in New Zealand, which include sex, religious belief, colour, race, ethnic or national origins, disability, and sexual orientation.²² However, the list also extends to a number of other grounds including family status, marital status, and age. These features are acceptable within anti-discrimination law, but should not be instantly reiterated in a definition of hate speech. The opinion that "prohibition of hate propaganda is not seen as synonymous with more general anti-discrimination protections" was recognised by the Court of Appeal in *Living Word*.²³

The author does not restrict hate speech to messages directed at a person's race. However, the definition of hate speech cannot cover messages directed at all of the prohibited grounds of discrimination in the Human Rights Act 1993. Such a broad definition would regulate too many forms of expression. My definition of hate speech specifically relates to expression directed at the targets' sex, religious belief, colour, race, ethnic or national origins, disability, or sexual orientation. It is possible that the definition will expand to cover more grounds over time, if the nature of hate speech changes.

E Effect

Perhaps the most important issue in defining hate speech is the effect the expression must cause before it meets the definition. How must the audience be affected? Must the effect be intended?

²¹ See Films, Videos, and Publications Classification Act 1993, s 3(3)(e).

²² Human Rights Act 1993, s 21(1).

²³ *Living Word Distributors v Human Rights Action Group (Living Word)* [2000] 3 NZLR 570, 588 (CA) 582 Richardson P for the majority.

1 Intention

A requirement for intent in a definition of hate speech is necessary to ensure the term is not applied arbitrarily, broadly, or to situations where the expression is misunderstood and the expresser meant no ill will. An example may be jokingly calling a friend a 'bloody pom'.²⁴

What must the expresser intend to do? Article 319 of the Canadian Criminal Code requires the expresser to wilfully promote hatred.²⁵ But promotion of hatred is difficult to assess. Must the court interview members of the public in order to establish whether expression has promoted hatred? How do you define hatred? The requirement adopted in my definition is for the expresser to intend to degrade or denigrate a target group.²⁶ To "denigrate" means to defame or disparage a reputation.²⁷ To "degrade" means to bring into dishonour or contempt.²⁸

Intent is subjective. However, in order to assess whether the expresser intended to cause the effect an objective test will be utilised. Accordingly, whether the reasonable person would think the expression was intended denigrate or degrade the target group by reason of their distinguishing feature will determine the expresser's intent.

Concern is sometimes expressed that the regulation of hate speech may not allow comments to be made in a legitimately humorous context. My definition deals with humour through the intent requirement. If a message is innocent banter, not intended to degrade any group based on their distinguishing feature, it will not have the requisite intent, and so will not be hate speech.

²⁴ See Human Rights Commission "Use of the word "Pom" <<http://www.hrc.co.nz/index.php?p=13826>> (last accessed 30 September 2003).

²⁵ Canadian Criminal Code, art 319.

²⁶ See Jean Francois and Gaudreault DesBiens "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" 46 McGill LJ 1117, 1118.

²⁷ R E Allen (ed) *The Concise Oxford Dictionary* (8 ed, Oxford University Press, 1990).

²⁸ R E Allen (ed) *The Concise Oxford Dictionary* (8 ed, Oxford University Press, 1990).

If expression is intended to denigrate or degrade the target group based on a distinguishing feature, but its audience is not influenced by it, is it still hate speech? I believe one of the major harms of hate speech is its power to influence its audience into believing and perpetuating its message.²⁹ For this reason, a message should only be defined as hate speech if it is capable of having an effect on its audience. The next issue to be resolved within the definition is what form that effect must take. Must hate speech promote hatred amongst its audience, or incite them to feel hatred toward the target group?

Article 130(2) of the German Criminal Code makes punishable the dissemination of materials that incite hatred against segments of the population.³⁰ Similarly, article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) explicitly requires party states to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".³¹

Incitement may be difficult to prove.³² How could a court ascertain whether hateful expression had invoked hateful ideas in its audience? Further, the ability for a message to incite may depend upon the nature of the message and the nature of its audience.³³ Racial hate speech may incite racism in people who already have racist tendencies, while those without racial prejudices may dismiss it as incorrect and detestable. For these reasons, a requirement for incitement is not included within my definition of hate speech.

The author assumes that a message intended to denigrate or degrade a target group based on a distinguishing feature, is likely to promote the idea that the target group is inferior amongst its audience. Mari Matsuda argues that the message of

²⁹ See Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland ULR 1, 185, 203.

³⁰ German Criminal Code, art 130(2)-130(3).

³¹ International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 20(2).

³² Moses, above, 188.

³³ Moses, above, 189.

hate speech affects its audience whether they agree with it or not.³⁴ For example, to hear that Maori are all "dole-bludgers" may seem detestable at first, but if the message is repeated, it will eventually effect its audience, leaving them to question whether the remark is not in fact correct. When a non-Maori next comes across a Maori person, the "dole-bludger" remark is triggered. It may be rejected, but it still arises and interferes with the audience's perception.³⁵

There is no direct requirement in my definition of hate speech that the expression incite hatred in its audience; rather the expression must have the effect of promoting the idea that the target group is inferior. Promotion of the message of inferiority means that it is possible that the expression will arouse ideas of inferiority in some members of the audience, but that effect is not required. The definition adopted in this paper is similar in its effect element to the provision of the Canadian Criminal Code that prohibits wilfully promoting hatred against an identifiable group.³⁶

F Exceptions

Many who oppose the regulation of hate speech fear the imposition of legal ramifications upon genuinely held religious or political opinions, matters in the public interest, and matters that are actually true. In order for a definition of hate speech to work effectively it must not be overbroad, and must not have a "chilling effect" on legitimate expression. Accordingly, my definition of hate speech includes a number of exceptions. It is possible that expression falling within the exceptions would fail the requirement for intent, however, due to the dangers involved in restricting the following types of expression, the exceptions will be expressly defined within the definition. It should be noted that positioning the exceptions as defences would in practice place a burden upon the expresser to justify its conduct.

³⁴ See Mari Matsuda "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich L Rev 2320, 2339-2340

³⁵ See Mari Matsuda, above, for a similar example that I have modified for this paper.

³⁶ Canadian Criminal Code, art 320(2).

1 *Religious opinion*

The right to manifestation of religion is guaranteed in section 15 of the New Zealand Bill of Rights Act 1990 (Bill of Rights).³⁷

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

There may be situations where a message that meets a prima facie definition of hate speech, would be the manifestation of religion. Consider a Christian organisation that publishes a video intended to express the view that homosexuality is dirty and immoral.³⁸ A court may find that the videos were intended to degrade homosexual people by presenting the message that homosexuals were immoral and dirty. Moreover, the videos may have the effect of promoting the idea that homosexuals are inferior. However, the videos reflect a religious belief genuinely held by some Christians. How can the expression of genuinely held religious beliefs, protected under the Bill of Rights, be prohibited? Consequently, my definition follows the Canadian approach, and makes an exception for the expression of religious opinion.³⁹ The exception only exists for legitimate religious opinion and exception should not be hijacked by expression that has more sinister motives.

2 *Political opinion/public interest*

Grant Huscroft considers that regulating hate speech places a limitation upon the right to communicate political opinions or matters of public interest.⁴⁰ I consider that providing an exception to hate speech merely for the expression of political opinions would not be appropriate, as much harmful expression is considered to be political speech. The Ku Klux Klan may be able to justify their racist and hateful expression based on an exception for political opinion. Similarly, Hitler's persecution of the Jewish people was considered to be a political issue. To provide

³⁷ New Zealand Bill of Rights Act 1990, s 15.

³⁸ Example similar to the videos involved in *Living Word Distributors v Human Rights Action Group (Living Word)* [2000] 3 NZLR 570 (CA).

³⁹ Canadian Criminal Code, art 319(3)(b).

an exception for political expression may excuse the prototype hate speech that we are trying to prevent.

However, there is a valid concern that the prima facie hate speech definition may catch some material that is a matter of public interest. Grant Huscroft provides the example of a message expressing concern that an influx of Asian immigrants is depleting seafood stocks in New Zealand.⁴¹ Such a comment appears to be a stereotype about the dietary habits of Asians. The message may be assumed by the reasonable person as intended to degrade Asians based on their race, and further, may have the effect of promoting the idea that Asians are greedy. Races that are greedy may be seen as inferior. However, Huscroft argues that the depletion of seafood stocks is a serious environmental concern and that its debate is in the public interest.⁴²

Such expression, if established to be a matter of public concern, the discussion of which is in the public interest, would come within an exception to my definition of hate speech. This exception is used in the Canadian offence of wilfully promoting hatred against an identifiable group.⁴³ Such an approach gives people the ability to speak out about matters of public concern.

3 Truth

There should also be an exception for expression that is true.⁴⁴ Huscroft notes that truth is difficult to determine in the case of hate speech, because the expression is often an opinion and it is difficult to prove whether an opinion is true.⁴⁵ This paper assumes that where the message conveyed would prima facie be hate speech according to my definition, but it may be established that the message is based on true facts, the message will not amount to hate speech. Once more, this

⁴⁰ Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 199-202.

⁴¹ Huscroft, above, 199. Huscroft's example was based upon a comment in 1994 by Ngatiawa spokesman Maanu Paul. See NZPA "'Take everything' claim condemned" (19 October 1994) *New Zealand Herald*, 1.

⁴² Huscroft, above, 200.

⁴³ Canadian Criminal Code, art 319(3)(c).

⁴⁴ Wojciech Sadurski *Freedom of Speech and its Limits* (Kluwer Academic Publishers, the Netherlands, 1999) 189.

⁴⁵ Huscroft, above, 206.

exception is based upon an exception to section 319 of the Canadian Criminal Code, wilfully promoting hatred.⁴⁶

The Canadian Criminal Code makes a further exception for where people point out "matters producing or tending to produce feelings of hatred toward an identifiable group" "for the purpose of removal".⁴⁷ This exception is not included within the paper's definition of hate speech, as it would be clear in these cases that there was no intention to degrade or denigrate.

G A Workable Definition

Drawing on the distinctions made during the above discussion, my definition of hate speech follows.⁴⁸

- (1) Hate speech is a message which:
 - (a) is intended to denigrate or degrade a target group by reason of its sex, religious belief, colour, race, ethnic or national origins, disability, or sexual orientation; and
 - (b) promotes the idea that the target group is inferior.
- (2) Material is not hate speech if:
 - (a) it is true; or
 - (b) it expresses a religious opinion; or
 - (c) it concerns subject of public interest, the discussion of which is for the public benefit.

III REGULATING HATE SPEECH

Hate speech, as defined in this paper, should be regulated in New Zealand because of the harm it causes to its targets and to society in general. The following section discusses the harm caused by hate speech and addresses the arguments against its regulation.

⁴⁶ Canadian Criminal Code, art 319(3)(a).

⁴⁷ Canadian Criminal Code, art 319(3)(d).

A *Harm Caused by Hate Speech*

1 *Harm to targets*

Catherine Lane West-Newman believes that most commentaries on hate speech view the harm it causes objectively, as just another legal issue.⁴⁹ She suggests that any analysis of harm must involve a consideration of the targets' story, which requires the analyser to feel empathy for the victims of hate speech.⁵⁰ This paper acknowledges that it is difficult to discuss the harm caused to the targets of hate speech without experiencing its effects. However, that does not remove the need for this paper to describe the harm caused by hate speech in order to justify its regulation.

I accept the argument that hate speech leads to the subordination of its targets, as, according to my definition, hate speech is intended to degrade or denigrate members of the target group and promotes the idea that the target group is inferior.⁵¹ Kathleen Mahoney argues that the above effects of hate speech create an environment where violence or hatred directed at the target group is justified.⁵² Many other writers argue that the degrading and subordinating effects of hate speech promote discrimination in society and lead to unequal opportunities in the workplace, schools, and other public environments.⁵³ Hate speech has been linked to academic underperformance in its targets.⁵⁴ Empirical research conducted by

⁴⁸ Some guidance for this definition was taken from Jean Francois and Gaudreault DesBiens "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" 46 McGill LJ 1117, 1118.

⁴⁹ Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, and Cultural Difference" 9 Waikato LR 231, 250.

⁵⁰ West-Newman, above, 250.

⁵¹ See Kent Greenawalt *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press, New Jersey, 1995) 59-60.

⁵² See Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U Ill L Rev 789, 792. See also Wojciech Sadurski *Freedom of Speech and its Limits* (Kluwer Academic Publishers, the Netherlands, 1999) 195.

⁵³ See Larry Alexander "Banning Hate Speech and the Sticks and Stones Defense" (1996) 13 Const Commentary 71, 74. See Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, and Cultural Difference" 9 Waikato LR 231, 232. See also Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" in *Critical Race Theory: the Cutting Edge* (Temple University Press, Philadelphia, 1995) 159, 161 for the idea that exposure to hate speech damages the career prospects of targets.

⁵⁴ J Aronson, DM Quinn, and S J Spencer "Stereotype Threat and the Academic Underperformance of Minorities and Women" in J K Swim and C Stangor (eds) *Prejudice: the Targets Perspective* (Academic Press, San Diego, 1998).

Laura Beth Nielsen revealed that racist hate speech causes targets to reflect on their subordinate status, fear for their safety, and at times to engage in violent behaviour.⁵⁵

Critical race theorists, such as Mari Matsuda and Richard Delgado, have been analysing the harm caused by racial hate speech and discrimination since the 1980s.⁵⁶ They argue that hate speech inflicts immediate psychological and physical harm upon its targets.⁵⁷ Hate speech is insulting, and the insult wounds its targets causing emotional distress.⁵⁸ Mari Matsuda explains, "To be hated, despised, and alone is the ultimate fear of all human beings".⁵⁹ The Supreme Court of Canada in *R v Keegstra*⁶⁰ accepted the argument that hate speech was a serious attack on the psychological and emotional health of its targets.⁶¹ The potential for videos, which promoted the idea that homosexual people were inferior, to cause emotional harm was recognised by Thomas J in *Living Word*.⁶² Thomas J described the videos as "hurtful" and "oppressive", with the potential to "psychologically scar" or "victimise and alienate a sizeable proportion of the population".⁶³

The targets of hate speech have been said to experience physical reactions to the expression including high blood pressure, sleep disturbance, tremors, and premature death.⁶⁴ Mari Matsuda explains,⁶⁵

⁵⁵ Laura Beth Nielsen "Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech" (2002) 58 *Journal of Social Issues* 2, 265, 278. Research conducted was a combination of field observation and in-depth interviews.

⁵⁶ See Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 *Harv CR CLL Rev* 133 and Mari Matsuda "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Mich L.Rev* 2320.

⁵⁷ For empirical research revealing the psychological harms caused to the targets of anti-homosexual hate speech see Gregory M Herek "Victim Experiences in Hate Crimes Based on Sexual Orientation" (2002) 58 *Journal of Social Issues* 2, 319.

⁵⁸ Larry Alexander "Banning Hate Speech and the Sticks and Stones Defense" (1996) 13 *Const Commentary* 71, 73-74. See Robert J Boeckmann and Jeffrey Liew "Hate Speech: Asian Americans' Justice Judgments and Psychological Responses" (2002) 58 *Journal of Social Issues* 2, 363 for analysis of empirical research relating to the harm of hate speech.

⁵⁹ Matsuda, above, 2338.

⁶⁰ *R v Keegstra* [1990] 3 SCR 697 (Supreme Court of Canada)

⁶¹ *R v Keegstra* above, 746, Dickson CJ for the majority.

⁶² *Living Word Distributors v Human Rights Action Group (Living Word)* [2000] 3 NZLR 570 (CA).

⁶³ *Living Word*, above, 588 (CA).

⁶⁴ Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, and Cultural Difference" 9 *Waikato LR* 231, 250. Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" in *Critical Race Theory: the Cutting Edge* (Temple University Press, Philadelphia, 1995) 159, 161.

⁶⁵ Mari Matsuda "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Mich L Rev* 2320, 2336.

The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.

Because the targets of hate speech are denigrated and degraded they may become unconfident, fearful, and withdrawn.⁶⁶ Richard Delgado explains that the targets of hate speech may begin to believe that the message of inferiority is true; questioning their self worth, rejecting their identity, and effectively hating themselves.⁶⁷ The target may wish to dissociate itself from the negative beliefs held about its culture, gender, or sexual orientation as a result of the hate speech.⁶⁸

Targets with reduced self-worth and reduced confidence may react by withdrawing from social or political activities, leading to further isolation and loneliness.⁶⁹ Larry Alexander notes that, because the targets of hate speech often withdraw from society, hate speech silences its targets, effectively depriving them of their freedom of expression.⁷⁰ Douglas Wells explains that, if society does not regulate hate speech, the message that the expression is justified, or even correct, may be communicated to the targets, increasing their humiliation and lack of self worth.⁷¹

Although the harm caused by hate speech can only truly be assessed by understanding what it is like to be targeted by it, I accept the arguments that hate speech, intended to denigrate and degrade members of the target group, and which promotes the message that the target group is inferior, is harmful to its targets. Targets may suffer physical and psychological harm, and may become depressed and withdrawn.

⁶⁶ Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U Ill L Rev 789, 792. See also Mari Matsuda, above, 2338.

⁶⁷ Richard Delgado, above, 159, 160, 163.

⁶⁸ See Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, and Cultural Difference" 9 Waikato LR 231, 248.

⁶⁹ Mandy Tibbey "Developments in Anti-Vilification Law" (2001) 21 Aust Bar Rev 1, 3.

⁷⁰ Larry Alexander "Banning Hate Speech and the Sticks and Stones Defense" (1996) 13 Const Commentary 71, 74.

Those who support the regulation of hate speech further argue that society itself will suffer if hate speech is permitted, because hate speech undermines core democratic values and creates an environment conducive to discrimination and violence.⁷² Hate speech is detrimental to society because it promotes the message that the target group is inferior, which leads to the opinions and contributions of the target group being undervalued, causing unequal opportunities and discrimination.⁷³ More seriously, Jean Francois and Gaudreault DesBiens consider that hate speech is a step in the progression towards hate crime, xenophobia, and genocide.⁷⁴

Mari Matsuda and Richard Delgado argue that hate speech causes division between targets and non-targets.⁷⁵ Those who condemn hate speech, but are not themselves targeted, feel relief at not being part of the degraded group. Furthermore, members of the target group may view all non-members with suspicion. Wojciech Sadurski argues that the targets of hate speech may react with violence towards its expressers, or towards those not targeted by hate speech generally.⁷⁶

As already discussed, hate speech may silence its targets, causing them to withdraw from social or political activities.⁷⁷ For this reason, hate speech may undermine full participation and debate in society, which has negative ramifications for the administration of democracy.

⁷¹ See Douglas Wells "Whose Community? Whose Rights?: Response to Professor Fiss" (1995) 24 Cap U L Rev 319, 321. See also Mari Matsuda "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich L Rev 2320, 2338.

⁷² Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland U LR no 1, 185, 195.

⁷³ See A Regel "Hate Propaganda: A Reason to Limit Freedom of Expression" (1984-1985) 49 Sask Law Rev 303, 308.

⁷⁴ Jean Francois and Gaudreault DesBiens "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" 46 McGill LJ 1117, 1119.

⁷⁵ Mari Matsuda "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich L Rev 2320, 2338-2339. Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" in *Critical Race Theory: the Cutting Edge* (Temple University Press, Philadelphia, 1995) 159, 160.

⁷⁶ Wojciech Sadurski *Freedom of Speech and its Limits* (Kluwer Academic Publishers, the Netherlands, 1999) 195.

⁷⁷ See Part III A 1 The harm hate speech causes to its targets. Mandy Tibbey "Developments in Anti-Vilification Law" (2001) 21 Aust Bar Rev 1, 3.

I accept that hate speech may reduce inter-group relations between the targeted and the non-targeted, and harm society by promoting the message that the target group is inferior, which may lead to increased hostility, discrimination and violence. Hate speech may even undermine democracy, by silencing the target group.

B Danger of regulating hate speech

Regulating hate speech may be appropriate to combat the harm it causes to its targets and society generally, but there may be dangers involved in regulating expression. The following section addresses the risks involved in regulating hate speech.

1 Importance of freedom of expression

Those who oppose the regulation of hate speech consider that its regulation would threaten freedom of expression, which is the most important democratic and human right, upon which all other human rights depend.⁷⁸ However, I consider that equality is also vital to democracy. A democratic society must be governed by all its people, equally. Juliet Moses explains that hate speech is inherently limiting of the concept of equality because it causes subordination, degradation, and discrimination of a segment of society.⁷⁹ Equality should not be instantly trumped by freedom of expression. Both are important human rights, which must be balanced before either is abrogated.

There are no absolute rights in society. Freedom of expression is often subject to limitations, including limits placed upon it by the laws of "defamation, blasphemy, confidentiality obligations associated with employment, copyright, contempt, incitement, official secrecy, sedition and noise pollution".⁸⁰ Rights and freedoms come with a measure of responsibility. Those exercising freedom of

⁷⁸ Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland ULR 1, 185, 190.

⁷⁹ Juliet Moses, above, 190.

⁸⁰ Mandy Tibbey, above, 4-5.

expression must ensure that they do not infringe upon the rights and freedoms of others.⁸¹

2 Rationales for protecting freedom of expression

Those who oppose the regulation of hate speech believe that the benefits of allowing free expression outweigh the potential harm caused by hate speech.⁸² The rationales for protecting expression are considered below.

(a) The marketplace of ideas

The first and most persuasive rationale for protecting freedom of expression is the marketplace of ideas theory. The theory derives from the writings of John Stuart Mill⁸³ and is based upon the dissenting judgment of Holmes J in *Abrams v United States*⁸⁴. The theory provides that freedom of expression ensures the advancement of knowledge and the discovery of truth. Through freedom of expression a marketplace of ideas is created in which there is free trade in information from which truth or knowledge may be derived.⁸⁵ Free expression within the marketplace of ideas is effectively competition; ensuring people can make informed decisions by weighing up all points of view. The theory provides that the marketplace of ideas would not function as effectively if some of the ideas were removed, regardless of how odious they may be.⁸⁶

The marketplace of ideas rationale provides that freedom of expression is required for the advancement of knowledge and discovery of truth. However, hate speech does not advance society's knowledge but teaches society discrimination, hatred, and ignorance. Hate speech is a means of perpetuating falsehoods to the

⁸¹ See *Proceedings Commissioner v Archer* (1996) 3 HRNZ 123 (CRT) 129, 130.

⁸² See Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, and Cultural Difference" 9 Waikato LR 231, 236.

⁸³ See John Stuart Mill, *On Liberty* (Penguin Books, London, 1968).

⁸⁴ *Abrams v United States*, 250 US 66 R 620 (919), Holmes, J (dissenting).

⁸⁵ See Sionaidh Douglas-Scott "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches" 7 Wm & Mary Bill of Rts J 305, 306.

⁸⁶ See Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 193.

speaker's gain and the target's detriment.⁸⁷ Regulating hate speech according to my definition will not adversely threaten the search for truth, as there is an exception provided for messages that are true.

It may be argued that hate speech regulation is paternalistic, undermining society's ability to decide for itself which views should prevail. However, it is common for the state to intervene into the private sphere in order to do what is best for society.⁸⁸ For example, films that promote the sexual exploitation of children are censored in New Zealand, based on the idea that such expression is harmful to society.⁸⁹

(b) Democracy and self-government

The democracy and self-government theory provides that freedom of expression is required for democracy to work effectively.⁹⁰ A self-governing people must receive all information that may affect their choices in collective decision making.⁹¹ Full participation and debate within a democracy depends upon freedom of information and expression.⁹²

However, democracy and self-government is threatened if we permit hate speech. Hate speech undermines democracy by silencing segments of society, and discouraging full participation and debate.⁹³ Hate speech encourages society to disregard the views of the target group, which limits their ability to be represented in a democracy.⁹⁴ Importantly, my definition of hate speech makes an exception for messages that concern a matter of public interest, the discussion of which is vital to democracy.

⁸⁷ See Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland U LR 1, 185, 193.

⁸⁸ Moses, above, 193.

⁸⁹ Films, Videos, and Publications Act 1993, s 3(2)(a).

⁹⁰ *R v Kopyto* (1987) 47 DLR (4th) 213, 266 Cory J (Ontario Court of Appeal).

⁹¹ See generally Kathleen Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U Ill L Rev 789, 794. The theory originates from Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper, New York, 1948) 104-105.

⁹² Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland U LR 1, 185, 191.

⁹³ See Part III A The Harm Caused by Hate Speech.

⁹⁴ See A Regel "Hate Propaganda: A Reason to Limit Freedom of Expression" (1984-1985) 49 Sask Law Rev 303, 308.

(c) Tolerance

Tolerance of others' opinions, no matter how offensive they may be, is said to restrain the government from unfairly treating its citizens.⁹⁵ Freedom of expression prevents situations where the state controls ideas.

However, the tolerance rationale fails to recognise the targets' subjective experience. Why should conduct that is inherently harmful be tolerated?⁹⁶ Catherine Lane West-Newman argues that tolerance of hate speech is too heavy a burden for oppressed groups to bear.⁹⁷

(d) Personal fulfilment

Finally, it is considered that freedom of expression is required so that we can have personal fulfilment.⁹⁸ This rationale is based upon the idea that "the development of human personality and achievement of self-realisation are dependent on opportunities to form and communicate beliefs and thoughts to others".⁹⁹

The rationale of individual fulfilment is also unsatisfactorily applied to hate speech. Communicating hate speech does not lead to personal fulfilment or self-realisation. Hate speech develops a closed mind in its speaker, encouraging bigotry and prejudice. Richard Delgado comments that hate speech is self-limiting, and denies others' right to develop.¹⁰⁰ Moreover, individual fulfilment cannot always be facilitated by the state. Juliet Moses explains that, although it may be a form of expression to punch someone when they annoy you, the state prohibits that expression.¹⁰¹

⁹⁵ See generally Wojciech Sadurski *Freedom of Speech and its Limits* (Kluwer Academic Publishers, the Netherlands, 1999) 31. The theory originates from Lee Bollinger *The Tolerant Society* (Oxford University Press, 1988).

⁹⁶ Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland ULR 1, 185, 192.

⁹⁷ Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, and Cultural Difference" 9 Waikato LR 231, 241.

⁹⁸ See *Whitney v California* (1925) 274 US 357 Brandeis J.

⁹⁹ See generally Moses, above, 191.

¹⁰⁰ See Moses, above, 193.

¹⁰¹ Moses, above, 193.

The arguments for protecting freedom of expression by allowing hate speech, rest upon the rationales behind free expression. As explained above, regulation of hate speech would not adversely undermine those rationales.

3 *Limiting freedom of expression*

Those who oppose the regulation of hate speech argue that freedom of expression is such an important right that it should only be limited in cases where allowing the expression would pose an immediate danger to society, and where the only way to avert that danger is to suppress the expression.¹⁰² This argument is known as the public order test, or the clear and present danger requirement, which requires a direct causal link between hate speech and tangible harm.¹⁰³ According to the public order test, the possibility of indirect harm in the future is not a valid reason to undermine freedom of expression.¹⁰⁴ However, the public order test is inadequate, as it relies too heavily upon the requirement for tangible harm. It does not recognise long-term or psychological harm, or harm to relationships and employment prospects.

Those opposed to regulation of hate speech also contend that its offensiveness is not a justification to restrict freedom of expression.¹⁰⁵ This view derives from the principle applied in the United States called "viewpoint neutrality"; that expression should not be restricted just because any listener disagrees with it or is offended by it.¹⁰⁶ Viewpoint neutrality has been applied by United States courts to protect flag burning¹⁰⁷ and anti African-American cross burning¹⁰⁸ based on the idea that, although the conduct in those cases was wrong, the constitutional right to freedom of speech should not be undermined just because the state does not agree with the views of the expressers.

¹⁰² Nadine Strossen "Liberty and Equality" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oregon, 2002) 165.

¹⁰³ See Wojciech Sadurski *Freedom of Speech and its Limits* (Kluwer Academic Publishers, the Netherlands, 1999) 180.

¹⁰⁴ Strossen, above, 165.

¹⁰⁵ Larry Alexander "Banning Hate Speech and the Sticks and Stones Defense" (1996) 13 *Const Commentary* 71, 86.

¹⁰⁶ See Strossen, above, 161.

¹⁰⁷ *Texas v Johnson* (1989) 491 US 397, 414.

¹⁰⁸ *RAV v City of St Paul* (1992) 505 US 377.

I accept that there are inherent dangers involved in the state regulating expression that it considers to be disagreeable, especially if that speech is a genuinely held opinion. This danger is tied up with the "slippery slope" argument, which provides that, if freedom of expression is limited for hate speech, other similar restrictions may follow.¹⁰⁹ Nadine Strossen believes that regulating hate speech may have a 'chilling effect' on expression, meaning that people will be deterred from making legitimate speech, perhaps even suppressing the expression of the targets of hate speech.¹¹⁰

However, those dangers may have been overestimated by civil libertarians who base their arguments upon the tyranny of states of the past, and are often writing from the American perspective, where freedom of expression is an entrenched constitutional right. In the New Zealand context, the risk of tyrannical dictatorship is not so real. Moreover, the courts of New Zealand accept that freedom of expression is not an absolute constitutional right.¹¹¹ Freedom of expression may be limited where any limitation is demonstrably justifiable in a free and democratic society.¹¹²

Those who favour regulation of hate speech believe that the limit placed on freedom of expression is justifiable due to its potential harm. Kathleen Mahoney argues that hate speech is inherently harmful and should be prevented like any other harmful activity, particularly because it is low-value expression with little redeeming social value.¹¹³ I favour regulation of hate speech in order to prevent the harms it causes. However, any proposed method of regulation must be balanced against freedom of expression to ensure that it is a justifiable limitation.

¹⁰⁹ See Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 193. See Schauer "Slippery Slopes" (1985) 99 Harv LR 361.

¹¹⁰ Nadine Strossen "Liberty and Equality" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oregon, 2002) 167.

¹¹¹ See generally Grant Huscroft, above, 171.

¹¹² New Zealand Bill of Rights Act 1990, s 5. *Moonen v Film and Literature Board of Review (Moonen)* [2000] 2 NZLR 9, 15-16 (CA) Tipping J for the Court.

¹¹³ See Kathleen Maloney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" (1996) U Ill L Rev 789, 792. "Hate propaganda is not legitimate speech. It is a form of harassment and discrimination that should be deterred and punished just like any other behaviour that harms people."

Those who oppose the regulation of hate speech sometimes argue that its regulation may aggravate its harm. Nadine Strossen argues that the expressers of hate speech, if prevented from voicing their opinions, will receive public attention and sympathy and may be perceived as martyrs.¹¹⁴ However, this argument could be run in respect to many forms of harmful conduct. Do we legalise mass suicide because regulating it may martyr its perpetrators? This risk does not detract from the need to show society's intolerance of hateful expression.

It may also be argued that regulating hate speech will only send the expression underground where it cannot be challenged.¹¹⁵ Does this mean we should not regulate hard drugs due to the risk of black market drug industry? The need to regulate and prevent the harm caused by hate speech outweighs the risk of it going underground. Furthermore, hate speech underground may not have the same potential to do harm as it would not reach as wide an audience.

Nadine Strossen argues that there is little evidence that hate speech regulation is effective, or that it deters hate and rehabilitates expressers.¹¹⁶ Hate speech regulation may not deter hateful thought, but it will discourage the spread of hateful expression that causes harm to its targets and society.

It is sometimes argued that allowing hate speech provides an outlet for its expressers.¹¹⁷ To restrict its expression may frustrate hate-mongers, forcing them to resort to violence. This argument is difficult to assess, and Richard Delgado believes there is little evidence to support it.¹¹⁸ It should be also remembered that allowing hate speech to be communicated may in fact promote violence between the targeted and the non-targeted.

¹¹⁴ Nadine Strossen "Liberty and Equality" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oregon, 2002) 164.

¹¹⁵ See Strossen, above, 164.

¹¹⁶ Strossen, above, 162. See generally Catherine Lane West-Newman "Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, and Cultural Difference" 9 *Waikato LR* 231, 237.

¹¹⁷ See Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" in *Critical Race Theory: the Cutting Edge* (Temple University Press, Philadelphia, 1995) 159, 161. Delgado states that there is little evidence to support this safety valve argument.

¹¹⁸ Delgado, above, 161.

Public funding of education programmes or grants provided to target groups to help fight back against hate speech may be effective.¹¹⁹ Ursula Cheer believes that the most appropriate solution to hate speech is counter-speech.¹²⁰ The targets of hate speech, and other members of society, should use the right to free speech to speak out against the expression, a process that is in itself empowering.¹²¹ However, the concept of counter-speech fails to recognise that targets may not have the means to communicate it, especially if they have been silenced by hate speech. If targets do fight back with counter-speech this may just trigger more hateful expression against them.¹²² Pitting the targeted and non-targeted against each other creates a divided society and may lead to conflict and violence.

Education is an important means to prevent people from forming hateful or bigoted opinions. Education and regulation should be combined to maximise rehabilitative effect.

5 Conclusion

Hate Speech should be regulated in New Zealand to prevent the harms it causes. Hate speech regulation will not aggravate the harms caused by hate speech, but is the most effective way to combat them.

C How to Regulate Hate Speech

After concluding that hate speech should be regulated, the question remains of how this should be done. If the main motivator behind hate speech regulation is the prevention of the harm it causes, a method of regulation should address and minimise that harm.

¹¹⁹ Strossen, above, 167.

¹²⁰ Ursula Cheer "Submission to the Select Committee Inquiry into the operation of the Films, Videos, and Publications Classification Act 1993 and related issues" 8.

¹²¹ Strossen, above, 162.

¹²² Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" in *Critical Race Theory: the Cutting Edge* (Temple University Press, Philadelphia, 1995) 159, 164.

1 *Censorship*

Hate speech may be censored through a classification regime in which distribution of material classified as objectionable is an offence. As part of the censorship regime, censored publications could be confiscated at a country's border.¹²³ New Zealand has such a classification regime under the Films, Videos, and Publications Classification Act 1993. Its ability to censor hate speech is discussed below.¹²⁴

Censorship may enable material amounting to hate speech to be banned, removing their effect to influence society. However, targets may continue to be subjected to hate speech outside the scope of the censorship regime, such as oral speech, and these types of expression must be addressed through other means.¹²⁵

2 *Group defamation*

An action may exist for the targets of hate speech directly against its expressers.¹²⁶ Such actions are referred to as group defamation. Richard Delgado believes targets of hate speech must be given recourse directly against the expresser in order to re-empower targets.¹²⁷

The action could be pursuable at tort law, although the more common source for a right in group defamation is civil legislation. To use tort law to sue an expresser is not a viable option for New Zealand as, although the use of tort to regulate hate speech would enjoy flexibility in the way it was applied by the courts, tort law takes time to develop through precedent. Existing torts, such as intentional infliction of emotional distress, could not adequately deal with hate speech and new precedents applying to hate speech would take time to generate. Moreover, many of the targets of hate speech will not have the time, money, or knowledge to apply to the ordinary courts for a remedy.

¹²³ See Canada Customs Tariff 9956, which gives Canada's Customs and Excise Division of the Department of Prohibited Importations the power to detain hate speech imported into the country.

¹²⁴ See Part IV C Hate Speech and the Films, Videos and Publications Classification Act 1993.

¹²⁵ There is no power to classify or censor oral speech under the Films, Videos, and Publications Classification Act 1993, s 2.

¹²⁶ Richard Delgado "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" in *Critical Race Theory: the Cutting Edge* (Temple University Press, Philadelphia, 1995) 159, 164. Note that Delgado is referring only to racist hate speech.

Legislation may be enacted making communication of hate speech unlawful and providing civil or complaints based remedies. This form of recourse would provide targets with the ability to complain about hate speech and seek a remedy directly from the expresser for the harm caused. Providing complaints mechanisms to the targets of hate speech makes it easier for them to fight back against the expression. Providing government and industry funded tribunals means targets can have better access to justice against hate speech. However, the onus is still upon the targets of hate speech to make complaints, which will take time and may require legal advice. Targets who have been degraded and dehumanised by hate speech may not have the confidence to complain about it.

3 *Criminal legislation*

Hate speech may be prohibited by the criminal law. For example article 137 of the Netherlands Criminal Code makes it an offence to 'deliberately give public expression to views insulting to a group of persons on account of their race, religion or conviction or sexual preference'.¹²⁸

Criminal prohibition of hate speech recognises the serious harm it may cause and represents society's condemnation of such expression. Criminal prohibition of racial hate speech is required under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹²⁹

Criminal legislation shifts the cost and responsibility of punishing hate speech upon the state. Standard criminal legislation would not provide direct compensation to the individual targets of the hate speech. However, hate speech has a negative effect for all members of the target group so it may be unjust for complaining members to receive compensation while others cannot. In the situation of epithets, or hate speech directed at specific individual targets such as Paul Holmes' "cheeky darkie" comment about Kofi Annan, it is possible that legislation could provide that an apology or monetary compensation be given to the target by the expresser.

¹²⁷ Delgado, above, 164.

¹²⁸ Netherlands Criminal Code, art 137.

Criminal legislation is also in line with overseas approaches. Leading hate speech regulators Germany, Canada, and Australia have all enacted and applied criminal hate speech legislation.¹³⁰

4 *Conclusion*

This paper proposes that the most appropriate way to regulate hate speech, and avert the harm it causes, is a mixture of criminal legislation and censorship. Making the expression of hate speech, as defined in this paper, a criminal offence is likely to deter hate speech more effectively than a group defamation action, which may or may not be pursued due to financial or time constraints. It is also important to remove hate speech from public circulation so that it cannot continue to promote the idea that the target group is inferior.

Before the precise way in which hate speech should be regulated in New Zealand is considered, this paper explores the ability of current mechanisms in New Zealand to deal with it.

IV EXISTING MECHANISMS FOR DEALING WITH HATE SPEECH

A Introduction

The following section addresses the ability of various existing mechanisms in New Zealand to regulate hate speech. Each mechanism is measured against my definition of hate speech to see if it adequately covers the expression covered by the definition. The definition of hate speech is once more set out below.

- (1) Hate speech is a message which:
 - (a) is intended to denigrate or degrade a target group by reason of its sex, religious belief, colour, race, ethnic or national origins, disability, or sexual orientation; and
 - (b) promotes the idea that the target group is inferior.
- (2) Material is not hate speech if:

¹²⁹ International Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969) 660 UNTS 195, art 4(a).

¹³⁰ German Criminal Code art 130, Canadian Criminal Code art 318-320, Racial Hatred Act 1995 (Aust Cth). There is also legislation enacted in Australia at state level.

- (d) it is true; or
- (e) it expresses a religious opinion; or
- (f) it concerns subject of public interest, the discussion of which is for the public benefit.

Each mechanism is considered in terms of the media it applies to; the intent required of the expresser; the possible distinguishing features that are included; the effect the expression is required to have; and the applicable defences. I will conclude on whether each mechanism has the ability to regulate hate speech.

B Hate Speech and the Human Rights Act 1993

1 The criminal offence

(a) Section 131

Section 131 of the Human Rights Act 1993 (HRA) sets out the criminal offence of excitement of racial hostility.¹³¹

131(1) [Offence to incite hostility] Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—

- (a) Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or
- (b) Uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—

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

¹³¹ Human Rights Act 1993, s 131.

The criminal provision originates from section 25 of the repealed Race Relations Act 1971, enacted to comply with New Zealand's international obligations under the ICERD.¹³²

(b) Remedies and resolution

The penalty for the offence under section 131 is imprisonment for a term not exceeding 3 months or a fine of up to \$7,000. Grant Huscroft has noted that the pecuniary penalty is proportionately small when compared to fines in other criminal offences.¹³³ He believes the low level of the fine actually undermines the purpose of using of a criminal provision to recognise the seriousness of the offence.

It should also be noted that the Attorney-General's permission is required for prosecution under section 131.¹³⁴ This requirement recognises the Attorney-General's role in ensuring legislation does not infringe rights contained in the New Zealand Bill of Rights Act 1990 including the right to freedom of expression.¹³⁵

2 *The civil action*

(a) Section 61

Section 61 of the HRA makes unlawful the excitement of racial hostility.¹³⁶ Section 61 provides,

61(1) [Inflammatory words] It shall be unlawful for any person—

(a) To publish or distribute¹³⁷ written matter¹³⁸ which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting; or

¹³² International Convention on the Elimination of All Forms of Racial Discrimination, above, art 4(a).

¹³³ Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 210.

¹³⁴ Human Rights Act 1993, s 132.

¹³⁵ New Zealand Bill of Rights Act 1990, ss 7, 14.

¹³⁶ Section 61 originates from the repealed Race Relations Act 1971, s 9A.

¹³⁷ Human Rights Act 1993 s 61(3) "'Publishes' or 'distributes' means publishes or distributes to the public at large or to any member or members of the public".

¹³⁸ Human Rights Act 1993, s 61(3) "'Written matter' includes any writing, sign, visible representation, or sound recording".

(b) To use in any public place as defined in section 2(1) of the Summary Offences Act 1981¹³⁹, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or

(c) To use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—

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

Section 61(2) provides an exception for the media. It is not unlawful for the media to publish or broadcast material that would fall foul of section 61(1), if the report accurately conveys the intention of the person who expressed the material.¹⁴⁰

(b) Remedies and resolution

Complaints about a breach of section 61 may be made to the Human Rights Commission.¹⁴¹ The Human Rights Commission deals with such complaints through a dispute resolution process consisting of investigation, mediation, and settlement.¹⁴² If the parties cannot settle, the matter may go to the Human Rights Review Tribunal.¹⁴³ In some cases, the Human Rights Review Tribunal will provide representation to the claimant at its own cost.¹⁴⁴ Otherwise, cases may be brought in person or by a barrister at the claimant's cost, although legal aid may be available.¹⁴⁵ If the Human Rights Review Tribunal is satisfied on the balance of probabilities that

¹³⁹ Summary Offences Act 1981, s 2(1). "The definition of "public place" means a place that, at any material time, is open to the public, whether free or on payment of a charge, and whether any owner or occupier of the place is lawfully entitled to exclude or eject any person from that place; the definition includes any aircraft, hovercraft, ship, or ferry, or other vessel, train, or vehicle carrying or available to carry passengers for reward".

¹⁴⁰ Human Rights Act 1993, s 61(2).

¹⁴¹ Human Rights Act 1993, s 76(1)(a). See generally Ursula Cheer "Submission to the Select Committee Inquiry into the operation of the Films, Videos, and Publications Classification Act 1993 and related issues" 9.

¹⁴² Human Rights Commission "Fact Sheet: What is the Process for Dealing with Disputes" <<http://www.hrc.co.nz/index.php?p=13855&format=text>> (last accessed 15 September 2003)

¹⁴³ Human Rights Act 1993, s 92B. Formerly known as the Complaints Review Tribunal while early complaints went to the Equal Opportunities Tribunal. The use of "Tribunal" in this paper may be used to refer to all three tribunals.

¹⁴⁴ Human Rights Act 1993, s 92C(1)(b).

¹⁴⁵ Human Rights Act 1993, s 92C(1)(a).

the defendant has committed a breach of section 61, it may award a number of remedies including declaratory relief, a restraining order, or damages.¹⁴⁶

3 *The ability of the HRA to regulate hate speech*

(a) Media

Neither sections 61 nor 131 of the HRA have the ability to address messages communicated through all of the media anticipated in my definition of hate speech. The provisions cover expression written, or broadcast by means of radio or television, or spoken in public. The provisions may not extend to expression communicated through computer networks, telephone, or fax and do not apply to messages communicated through music, film, or video that is not broadcast. Also, the provisions may not apply to photographs, art, or symbols. However, the Human Rights Commission considers that the display of the swastika, a nazi symbol, is likely to contravene both provisions.¹⁴⁷

(b) Intent

Similarly to this paper's definition of hate speech, section 131 contains a requirement for intent. The offender must intend to "excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons".¹⁴⁸ The same offence under the repealed Race Relations Act 1971 was criticised because the requirement for intent to excite hostility, ill-will, contempt, or ridicule was too broad; a low standard which would be more appropriate in defamation law than in the criminal law.¹⁴⁹ However, I consider that the requirement for intent in section 131 is not such a low standard, requiring proof that the offender intended to make others feel hostility, ill-will, contempt, or ridicule towards the target group. It is different from, and perhaps more onerous than, my definition of hate speech, which merely requires that the expresser intends to denigrate or degrade the target group.

¹⁴⁶ Human Rights Act 1993; s 92I.

¹⁴⁷ Human Rights Commission "Race and Ethnic Relations: Information sheet: The Swastika" <<http://www.hrc.co.nz/index.php?p=13824>> (last accessed 15 September 2003).

¹⁴⁸ Human Rights Act 1993, s 131(1).

The civil provision, contained in section 61, does not contain a requirement for intent. It is important for the intent of the expresser to be an element in the definition of hate speech to avoid situations where legitimate expression is proscribed.¹⁵⁰ Accordingly, the absence of an intent element in section 61 is unsatisfactory.

(c) Distinguishing feature

Sections 61 and 131 only apply to expression aimed at a group's "colour, race, or ethnic or national origins". The provisions do not provide for messages that excite racial hostility by reason of sex, religious belief, disability, or sexual orientation. Accordingly the provisions in the HRA do not adequately meet my definition of hate speech.

(d) Effect

The expression under section 61 and 131 must have the effect of being "threatening, abusive, or insulting". There is no comparable element in my definition. This requirement must be subjective, as expression could only be threatening or insulting to the targets of the expression. Subjective elements are difficult to prove and may be inconsistent, as some people will be more sensitive than others and may find material threatening, insulting, or abusive where others would not.¹⁵¹ The Complaints Review Tribunal in *Skelton v Sunday-Star Times*¹⁵² commented that, "[t]he views of the very sensitive are not the appropriate yardstick by which to measure whether something is insulting".¹⁵³ Accordingly, the Tribunal must ascertain whether the ordinary sensible citizen would find the material threatening, abusive, or insulting.¹⁵⁴

¹⁴⁹ Keith "the Race Relations Bill" in W A McKean *Essays on Race Relations and the Law in New Zealand* (Sweet and Maxwell, Wellington, 1971). See generally Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland U LR 1, 185, 188.

¹⁵⁰ See Part II E 1 Intention.

¹⁵¹ See Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 204.

¹⁵² *Skelton v Sunday-StarTimes* (1996) 3 HRNZ 655 (CRT).

¹⁵³ *Skelton v Sunday-StarTimes*, above, 660.

¹⁵⁴ *Proceedings Commissioner v Archer* (1996) 3 HRNZ 123, 128 (CRT).

My definition of hate speech requires that the expression promote the idea that the target group is inferior. In contrast, sections 131 and 61 require that the expression incite hostility amongst its audience. These effect requirements represent the concern that the danger of hateful expression is its ability to influence its audience and facilitate the spread of hateful ideas.¹⁵⁵ Under section 131, the expression must be "likely to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons" while section 61 does not include ill-will or ridicule. As already discussed, incitement is a subjective element which is difficult to prove, and the ability for material to excite hostility depends upon the potential for its audience to be influenced.¹⁵⁶ In *Proceedings Commissioner v Archer*¹⁵⁷ the Tribunal held that a significant number of New Zealanders are not perceptive or sensitive to racial issues.¹⁵⁸ Accordingly, the requirement for the material to excite racial hostility, relates to the ability for the material to incite hostility in those insensitive people.¹⁵⁹

(e) Defences

Nether section 131 nor section 61 contain any express defences. Grant Huscroft points out that this is particularly problematic in relation to the criminal provision.¹⁶⁰

Criminalization is the most extreme form of legislative response to a perceived problem, and as such demands the most stringent justification where the exercise of fundamental rights is concerned. The need for defences under this section is great.

Neither provision includes the exceptions contained in my definition, that material does not amount to hate speech where it involves a genuine matter of truth, religious opinion, or public interest. Grant Huscroft believes the absence of defences

¹⁵⁵ See Grant Huscroft "Defamation, Racial Disharmony, and Freedom of Expression" in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995) 205.

¹⁵⁶ See also Huscroft, above, 205.

¹⁵⁷ *Proceedings Commissioner v Archer* (1996) 3 HRNZ 123 (CRT).

¹⁵⁸ *Proceedings Commissioner v Archer*, above, 128.

¹⁵⁹ Huscroft, above, 129.

¹⁶⁰ Huscroft, above, 209.

in these situations makes the provisions overbroad in application, and is chilling of legitimate speech.¹⁶¹

However the Tribunal has in practice made exceptions for expression it considers to be humorous, or a matter of widespread practice.¹⁶² The Tribunal has adopted the test, whether the ordinary sensible citizen would find the material humorous.¹⁶³ For example, in *Neal v Sunday Newspaper Publications Ltd*¹⁶⁴ the Equal Opportunities Tribunal did not uphold a complaint about an article that referred to Australians as "our loud-mouthed neighbours across the Tasman".¹⁶⁵ The Equal Opportunities Tribunal found that the article was insulting, but because it was humorous, it was not likely to excite hostility or ill-will against Australians in New Zealand or bring them into contempt or ridicule.¹⁶⁶ As explained earlier, I believe humour is best dealt through an intent requirement.

4 Practical difficulties

The only reported prosecution under the criminal provision was decided under section 25 of the Race Relations Act 1971 in the case *King-Ansell v Police*¹⁶⁷ in which the defendant had been distributing Nazi propaganda. The Court was restricted to considering whether ethnic origin would extend to Jewish people, and so gave little guidance on the general application of the criminal provision.¹⁶⁸ Since *King-Ansell v Police* the police have refused to enforce section 131. Considering that this provision was passed to comply with the requirement in the ICERD that New Zealand criminalise racial hatred, it is inadequate that the provision is not enforced.¹⁶⁹

¹⁶¹ Huscroft, above, 205-208. Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland U LR 1, 185, 201.

¹⁶² See *Skelton v Sunday-Star Times* (1996) 3 HRNZ 655 (CRT). The Complaints Review Tribunal held that the use of the word "Pakeha" with a lower case "p" was common usage and would not be likely to excite hostility against European New Zealanders.

¹⁶³ *Proceedings Commissioner v Archer* (1996) 3 HRNZ 123 (CRT) 129.

¹⁶⁴ *Neal v Sunday Newspaper Publications Ltd* (1985) 5 NZAR 234 (EOT).

¹⁶⁵ *Neal v Sunday Newspaper Publications Ltd*, above, 235.

¹⁶⁶ *Neal v Sunday Newspaper Publications Ltd*, above, 241.

¹⁶⁷ *King-Ansell v Police* [1979] 2 NZLR 531 (CA).

¹⁶⁸ See generally Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996) 8 Auckland U LR 1, 185, 187.

¹⁶⁹ International Convention on the Elimination of All Forms of Racial Discrimination, (4 January 1969) 660 UNTS 195, art 4(a).

According to the Human Rights Commission's Annual Report for the year ended 2001, racial hostility accounts for twelve percent of complaints it receives.¹⁷⁰ Of that twelve percent, over half of the complaints are made by Pakeha New Zealanders.¹⁷¹ The Human Rights Commission has noted that complaints under section 61 have mostly involved trivial matters such as inappropriate jokes or insensitive comments.¹⁷²

5 Conclusion

The provisions of exciting racial hostility in the HRA do not sufficiently regulate hate speech in New Zealand. The provisions do not apply to all media used to communicate hate speech and do not address hate speech based on the targets' sex, religious belief, disability, or sexual orientation. The provisions are broad and ambiguous. The civil provision contains no intent requirement. The provisions contain subjective elements, such as the requirement that the expression be "insulting", which are difficult to prove. The requirement that the expression be "likely" to excite hostility against or bring into contempt a group of persons is ambiguous and broad. These ambiguities, coupled with an absence of defences give judges a wide scope to interpret the provision arbitrarily.

The provisions do not operate effectively in practice as the criminal provision is not enforced, and the Human Rights Commission is swamped with trivial complaints under the civil provision.

C Hate Speech and the Films, Videos, and Publications Classification Act 1993

1 Objectionable publications

(a) Section 3(1)

The Films, Videos, and Publications Classification Act 1993 (the FVPCA) provides for classification of publications, including any film, book, sound

¹⁷⁰ Office of the Race Relations Conciliator "Annual Report for the period ending 1 December 2001" <<http://www.hrc.co.nz/hrc/pdfdocs/RRO%20Annual%20Report%202001.pdf>> (last accessed 1 October 2003) Figure 1, 15.

¹⁷¹ Office of the Race Relations Conciliator, above, table 1, 15.

recording, picture, newspaper, photograph, any print or writing, and any paper or other thing that has a representation shown on it, or information stored on it by means of a computer or electronic device.¹⁷³ Section 3(1) of the FVPCA sets out a general test for where publications may be classified as objectionable.¹⁷⁴

3. Meaning of "objectionable"— (1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

The publication must deal with subject matter that can fairly be described as "matters such as sex, horror, crime, cruelty, or violence".¹⁷⁵ The Court in *Living Word* held that material could not be brought within section 3(1) merely because it was likely to be injurious to the public good and further held that the words "sex, horror, crime, cruelty, or violence" pointed to activity rather than opinion or attitude.¹⁷⁶ Secondly, the way the publication deals with the subject matter must mean that availability of the publication is likely to result in discernible injury to the public good.¹⁷⁷

(b) Remedies and resolution

Publications may be submitted to the Office of Film and Literature Classification by government censorship organisations,¹⁷⁸ the New Zealand Customs Service, the Police, or members of the public.¹⁷⁹ Where publications are classified

¹⁷² Office of the Race Relations Conciliator, above, 8.

¹⁷³ Films, Videos, and Publications Classification Act 1993, s 2.

¹⁷⁴ See also the Films, Videos and Publications Classification Act 1993, s 3(2)(a) - (f), which set out the circumstances in which a publication will be deemed to be objectionable.

¹⁷⁵ *Living Word Distributors v Human Rights Action Group (Living Word)* [2000] 3 NZLR 570, 581 (CA) Richardson P for the majority. The Court of Appeal considered that the expression "such as" in section 3(1) is narrower than "includes", which was the term used to define "indecent" in the repealed Indecent Publications Act 1963.

¹⁷⁶ *Living Word*, above, 581 Richardson P for the majority. The Court of Appeal considered that sexual orientation did not come within section 3(1).

¹⁷⁷ See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 11 (CA) Tipping J for the Court. See also *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, 408 Woodhouse P (Indecent Publications Tribunal).

¹⁷⁸ The Film and Video Labelling Body and the Censorship Compliance Unit of the Department of Internal Affairs.

¹⁷⁹ Films, Videos, and Publications Classification Act 1993, ss 12-13. Members of the public must have the permission of the Chief Censor.

as objectionable it is an offence to possess, make, copy, supply, possess for the purposes of supply, distribute, display, advertise or exhibit that publication.¹⁸⁰

2 Representation of inherent inferiority

(a) Section 3(3)(e)

Section 3(3)(e) of the FVPCA requires the censor, when considering whether any publication is objectionable, to give weight to the extent to which the publication represents that a class of persons are inherently inferior by reason of one of the prohibited grounds of discrimination in section 21(1) of the Human Rights Act 1993.¹⁸¹

(3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication—

(e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

Section 21(1) of the Human Rights Act 1993 sets out the prohibited grounds of discrimination. They include sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, illness, age, political opinion, employment status, family status, or sexual orientation.¹⁸²

The operation of section 3(3)(e) was considered by the Court of Appeal in *Living Word*. The Court of Appeal held that weight could be given to the extent to which a publication represented that a class of persons was inherently inferior, but only if that publication also dealt with "matters such as sex, horror, crime, cruelty, or

¹⁸⁰ Films, Videos, and Publications Classification Act 1993, ss 123, 124, and 13. The penalty is a fine, which ranges from \$2,000 to \$50,000 depending on whether the offender has knowledge that the publication is objectionable and whether the offender is a body corporate.

¹⁸¹ The weighting factors do not apply to publications deemed objectionable under the Films, Videos, and Publications Classification Act, s 3(2)

¹⁸² See Human Rights Act 1993, s 21(1) for the full list of prohibited grounds of discrimination.

violence".¹⁸³ For example, in a mildly pornographic video presenting the view that Jewish people are dishonest, greedy, and dirty, the extent to which the video represents Jews as inferior may weigh in favour of censorship under the FVPCA. However, in a documentary style video containing the same message about Jews without any sexual content, the extent to which the video presented Jews as inferior would not be considered, regardless of the potential harm of such a publication.

(b) Living Word

The Court of Appeal in *Living Word* interpreted the FVPCA in the discussed way in order to overrule a decision of the Board of Review that the videos were objectionable. The following section considers whether the Court of Appeal reached the correct result, by considering whether the videos would constitute hate speech for the purposes of this paper.

Living Word concerned the ability of two videos to be censored under the FVPCA, one of which opposed the pursuit of equal rights by gay, lesbian, bisexual and transgender people, while the other presented the view that homosexuality was the cause of HIV and AIDS.¹⁸⁴

The medium used to communicate the message in *Living Word* would satisfy my definition of hate speech. The message was communicated through video. The target group of the message was homosexual people by reason of their sexual orientation.

The issue of whether the videos were intended to denigrate or degrade homosexual people by reason of their sexual orientation is more difficult. Thomas J in his dissenting judgment in *Living Word* commented, "both videos reveal an abhorrence of what is called the 'homosexual lifestyle'".¹⁸⁵ The videos strongly communicate the message that the homosexual lifestyle is wrong while the

¹⁸³ *Living Word Distributors v Human Rights Action Group (Living Word)* [2000] 3 NZLR 570, 582 (CA) Richardson P for the majority.

¹⁸⁴ See Ursula Cheer "More Censorship, Discrimination and Bill of Rights" (2000) Dec NZLJ 472. The Film and Video Labelling Body labelled the videos as restricted to persons over 16, The Classification Office classified the videos as R18, the Board of Review classified the videos as objectionable, and the full court of the High Court upheld the Board's decision.

¹⁸⁵ *Living Word*, above, 588 Richardson P for the majority.

heterosexual lifestyle is right.¹⁸⁶ The *AIDs: What You Haven't Been Told*¹⁸⁷ video set out to prove that, what it considered to be the sexually promiscuous and deviant lifestyle of homosexual people, is responsible for the spread of AIDs. A quote from the transcript of the video follows,¹⁸⁸

Many concerned citizens and celebrities, anxious to lend their support to the fight against AIDS, unwittingly are endorsing the homosexual agenda, which demands the legalisation and acceptance of all kinds of deviant sexual behaviour; including prostitution and sadomasochism."

AIDs: What You Haven't Been Told communicated the message that homosexuals were deviant, dirty, and the spreaders of disease. It is likely that the expressers of this message intended to degrade homosexual people through it. The purpose of the *Gay Rights/Special Rights: Inside the Homosexual Agenda*¹⁸⁹ video was to encourage its audience to oppose the pursuit of equal rights by homosexual people.¹⁹⁰ It was obviously intended to degrade homosexual people because its argument was that homosexual people are not equal. A reasonable person would consider that both videos intended to denigrate and degrade homosexual people.

Further because the homosexual lifestyle is presented as inherently wrong and dangerous, and homosexual peoples' quest for equal rights is opposed through the videos, the videos have the effect of promoting the idea that homosexual people are inferior. Prima facie, the videos meet my definition of hate speech.

(c) Religious expression

My definition provides certain exceptions to hate speech, including an exception for the expression a religious opinion. Arguably, the *Living Word* videos are the expression of a religious opinion. It is based upon the ideas of Christianity

¹⁸⁶ Jeremiah Films "Aids: What You Haven't Been Told" video transcript <<http://www.christian-apologetics.org/html/Aids.htm>> (last accessed 1 September 2003). Jeremiah Films "Gay Rights/Special Rights: Inside the Homosexual Agenda" <http://www.christian-apologetics.org/html/Gay_rights_Special_rights.htm> (last accessed 1 September 2003).

¹⁸⁷ Jeremiah Films "Aids: What You Haven't Been Told", above.

¹⁸⁸ Jeremiah Films "Aids: What You Haven't Been Told", above.

¹⁸⁹ Jeremiah Films "Gay Rights/Special Rights: Inside the Homosexual Agenda", above.

that the videos promote the idea that homosexuality is wrong and homosexual people are inferior. But is the idea that homosexuals cause AIDs, or the idea that homosexuals should not enjoy equal rights, based on Christianity? A definition of hate speech should not allow expressers to easily justify their conduct in the name of religion, if they may have other more sinister reasons for the expression. Both Hitler and the Ku Klu Klan have justified their conduct in the name of Christianity. However, the videos were religious publications, produced by a Christian organisation to be distributed within the Christian community.¹⁹¹ They may have involved other political or social objects, but overall they were religious expression. Accordingly the videos were not hate speech. Thomas J explains, "[t]he videotapes portray the beliefs and prejudices of religious fundamentalism".¹⁹²

The Court of Appeal in *Living Word* reached the correct result by not classifying the videos as objectionable, however, it reached that result based upon the wrong reasoning. One gets the impression, from the judgment, that the Court of Appeal intuitively felt that the videos should not be censored, perhaps because it considered that the videos were merely religious, moral, or political opinions, but there was no available exception within section 3(3)(e). This appears to be the point the Court was getting at when it stated that the words "sex, horror, crime, cruelty, or violence" pointed to activity rather than opinion or attitude.¹⁹³

To avoid taking into account the fact that the videos represent homosexual people as inherently inferior, the Court of Appeal held that there was no jurisdiction to classify the videos. The Court stated that sexual orientation would not come within "matters such as sex, horror, crime, cruelty, or violence".

The Court's reasoning may not have been appropriate. In *Re "Exposing the Aids Scandal"*¹⁹⁴ the Indecent Publications Tribunal held that sexual orientation and sexual health could come within the gateway in the repealed Indecent Publications

¹⁹⁰ Jeremiah Films "Gay Rights/Special Rights: Inside the Homosexual Agenda", above.

¹⁹¹ See Haley Walls "Gay Rights/Special Rights, Inside the Homosexual Agenda": the Demise of Section 3(3)(e) of the films, videos, and publications Classification Act 1993" (LLB(Hons) Research Paper, Victoria University of Wellington, 2000) 5.

¹⁹² *Living Word Distributors v Human Rights Action Group (Living Word)* [2000] 3 NZLR 570, 588 (CA) Thomas J dissenting.

¹⁹³ *Living Word*, above, 581 Richardson P for the majority.

¹⁹⁴ *Re "Exposing the Aids Scandal"* 1 HRNZ 170, 182 (Indecent Publications Tribunal)

Act 1963 "matters *including* sex, horror, crime, cruelty of violence". "Including" may be a slightly broader concept than "such as", however, the Tribunal held that there was jurisdiction to censor the book merely because it was injurious to the public good.¹⁹⁵ The *Living Word* videos also dealt with sexual orientation and sexual health. They similarly should have been held to come within "matters such as sex, horror, crime, cruelty, or violence". Importantly, when the FVPCA was passed the legislature did not intend that section 3(1) would admit only "sex, horror, crime, cruelty, or violence" to be considered under it.¹⁹⁶

The strict interpretation of "matters such as sex, horror, crime, cruelty, or violence" by the Court of Appeal has created side effects. The *Select Committee Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and Related Issues*¹⁹⁷ expressed concern that, as a result of the *Living Word* decision, the classification office has no jurisdiction to consider matters such as nudity or offensive language.¹⁹⁸

I believe that the Court of Appeal reached its result partly because there was no exception to section 3(3)(e) for religious expression. To ban the videos would be the incorrect result according to my definition of hate speech. To avoid banning the videos, the Court of Appeal interpreted sections 3(1) and 3(3)(e) in a considerably narrow way.

3 The ability of the FVPCA to regulate hate speech

(a) Media

Section 3(3)(e) applies to expression communicated through publications, including any film, book, sound recording, picture, newspaper, photograph, any print

¹⁹⁵ See also *Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, 410 (Indecent Publications Tribunal). Woodhouse P stated that the definition of indecency in the Indecent Publications Act 1963 included things other than matters of "sex, horror, crime, cruelty and violence", but that those other things had to be injurious to the public good in order to be banned. But see *Living Word*, above, 581 Richardson P for the Majority. The Court of Appeal held that "such as" is narrower than "includes".

¹⁹⁶ See Department of Justice Report to Internal Affairs and Local Government Select Committee of the Films, Videos, and Publications Classification Bill (Wellington 1993) DJ/3, 7.

¹⁹⁷ Government Administration Select Committee "Inquiry into the operation of the Films, Videos, and Publications Classifications Bill" (March 2003).

¹⁹⁸ Government Administration Select Committee "Inquiry into the operation of the Films, Videos, and Publications Classifications Bill" (March 2003) 23

or writing, and any paper or other thing that has a representation shown on it, or information stored on it by means of a computer or electronic device.¹⁹⁹ The provision does not address expression spoken in public places, or broadcast on television or radio as provided for under my definition of hate speech.

(b) Intent

Section 3(3)(e) does not require that the expresser intend to denigrate or degrade the target class. This means that, according to section 3(3)(e), weight could be given to the extent to which a publication represented that a target group were inherently inferior regardless of whether the expresser intended it to have that effect. The absence of an intent requirement is inadequate according to my definition of hate speech, and gives section 3(3)(e) considerable breadth.

(c) Distinguishing feature

Under section 3(3)(e), the message may relate to a large number of possible distinguishing features of the target group. The possible features include all of the distinguishing features in my definition of hate speech. However, they also extend to further features such as marital status, age, employment status, and family status.²⁰⁰ These features extend the potential application of section 3(3)(e) to distinguishing features not commonly denigrated by hate speech. For example, pursuant section 3(3)(e), weight could be given to the extent to which a publication represented that married people are inherently inferior.

(d) Effect

Section 3(3)(e) addresses expression that represents that members of any particular class of the public are inherently inferior to other members of the public. This requirement is similar to the requirement in my definition that the expression must promote the message that the target group is inferior. However, the requirement in section 3(3)(e) is merely that the publication represents people in a particular way, and does not require the publication to have any effect on its audience. This standard is lower than my definition, which requires the message to

¹⁹⁹ Films, Videos, and Publications Classification Act 1993, s 2.

²⁰⁰ Human Rights Act 1993, s 21(1).

have some possible effect on its audience by promoting or encouraging the idea that the target group is inferior.

(e) Defences

There are no express exceptions to the broad requirement set out in section 3(3)(e). In *Living Word* the absence of an exception for religious expression caused difficulty. Further cases are likely to arise where the absence of a defence for truth, or matters in the public interest cause difficulty.

4 Conclusion

Section 3(3)(e) of the FVPCA does not adequately regulate hate speech as defined in this paper. The FVPCA cannot be used to censor expression communicated through all of the media within the definition. Secondly, section 3(3)(e) is too broad. As discussed, the test for representing a class as inherently inferior is relatively easily met. Section 3(3)(e) extends the number of distinguishing features to far, may be satisfied regardless of the expresser's intent, and does not require the expression to have any active influence on its audience.

Due to the absence of defences in such a broad provision it is not surprising that the Court of Appeal decided to interpret the FVPCA so narrowly. However, the interpretation of the Court of Appeal in *Living Word* has made section 3(3)(e) almost redundant. The extent to which a publication represents that a class of society is inherently inferior can only be taken into account by the censor where "sex, horror, crime, cruelty, or violence" accompany it.

Further, section 3(3)(e) is only a weighting factor and is not a separate ground for censorship.²⁰¹ The censor may use its discretion to apply or not apply the provision.

The *Select Committee Inquiry* has recommended that section 3(1) require simply that the availability of the publication be likely to be injurious to the public

²⁰¹ *Living Word*, above, 582.

good.²⁰² This would mean section 3(3)(e) could be a weighting factor regardless of whether the publication dealt with "sex, horror, crime, cruelty, or violence". However, this proposal would not solve the problems of the breadth and inadequacy of section 3(3)(e) itself, or the inadequacy of section 3(3)(e) being merely a weighting factor to be applied at the censor's discretion. If the Committee believed that the extent to which publications represent people as inherently inferior was an important concern, it should have recommended an alternative to section 3(3)(e). Such an issue did not enter into the Select Committees short discussion of hate speech.

Similarly a private members Bill currently before the house proposes to amend section 3(1) to provide "matters including, but not limited to sex..."²⁰³ Likewise the amendment, proposed by Marc Alexander, will not improve the ability to censor hate speech under the FVPCA.

D HATE SPEECH AND THE BROADCASTING ACT 1989

1 The Broadcasting Standards Authority

(a) The denigration and discrimination principle

The Broadcasting Standards Authority (BSA) is responsible for encouraging the development and observance by broadcasters of Codes of Broadcasting Practice (Codes) in relation to a number of factors including in section 21(1)(e)(iv),

Safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs:

²⁰² Government Administration Select Committee "Inquiry into the operation of the Films, Videos, and Publications Classifications Bill" (March 2003) 24

²⁰³ the Films, Videos, and Publications Classification (Meaning of Objectionable) Amendment Bill, no 21-1

The *Free to Air Television Code of Broadcasting Practice (Free to Air Code)*²⁰⁴, the *Radio Code of Broadcasting Practice (Radio Code)*,²⁰⁵ and the *Subscription Television Code of Broadcasting Practice (Subscription Code)*,²⁰⁶ all contain a principle that seeks to safeguard against the concern expressed in section 21(1)(e)(iv).²⁰⁷ Principle 7(a) of the *Radio Code* follows.²⁰⁸

Broadcasters will not portray people in a manner which encourages denigration of or discrimination against any section of the community on account of gender, race, age, disability, occupational status, sexual orientation; or as the consequence of legitimate expression of religious, cultural or political beliefs.

This requirement does not extend to prevent the broadcast of material which is:

- i) factual; or
- ii) a genuine expression of serious comment, analysis or opinion, or
- iii) is by way of legitimate humour or satire.

There are a few differences in the denigration principles of the three codes. The two television Codes merely require that broadcasters "should avoid" portraying persons in the specified manner rather than stating that broadcasters "will not" portray persons in the specified manner.²⁰⁹ Both television Codes also provide an additional exception for material in the legitimate context of a dramatic work.²¹⁰ The *Subscription Code* is worded differently from the other two Codes in that it requires that broadcasters "avoid portraying people in a way which represents them as inherently inferior, or is likely to encourage discrimination against, any section of the community".²¹¹

²⁰⁴ "Free to Air Television Code of Broadcasting Practice" <<http://www.bsa.govt.nz/g-bsacod.htm>> (last accessed 30 September 2003).

²⁰⁵ "Radio Code of Broadcasting Practice" <<http://www.bsa.govt.nz/r-bsacod.htm>> (last accessed 30 September 2003).

²⁰⁶ "Subscription Television code of Broadcasting Practice" <<http://www.bsa.govt.nz/p-bsacod.htm>> (last accessed 30 September 2003).

²⁰⁷ The principles are collectively referred to in this paper as "the denigration principle".

²⁰⁸ "Radio Code of Broadcasting Practice", above, 7(a).

²⁰⁹ "Subscription Television code of Broadcasting Practice", above, 12. "Free to Air Television Code of Broadcasting Practice", above, 6g.

²¹⁰ "Subscription Television code of Broadcasting Practice", above, 12(iii). "Free to Air Television Code of Broadcasting Practice", above, 6g(iii).

²¹¹ "Subscription Television code of Broadcasting Practice", above, 12.

(b) Remedies and resolution

Failure to comply with the Codes may not be dealt with by a civil action in the ordinary courts.²¹² Where members of the public believe that the denigration principle has been breached by a television or radio programme, they may complain in the first instance to the broadcaster, and if dissatisfied with the outcome of that complaint, to the BSA.²¹³

If the BSA decides that the complaint is justified, in whole or in part, it may order the broadcaster to publish a statement which relates to the complaint,²¹⁴ order the broadcaster to refrain from broadcasting for a period not exceeding 24 hours,²¹⁵ or refer the complaint back to the broadcaster.²¹⁶ The BSA may also order the broadcaster to pay costs of the proceedings to the Crown or to the complaining party.²¹⁷ Failure to comply with an order of the BSA is an offence subject to a fine of up to \$100,000.²¹⁸

2 *The ability of the Broadcasting Act 1989 to regulate hate speech*

(a) Media

The BSA has jurisdiction only to consider expression made through television or radio.²¹⁹ It has no power to regulate expression made through other media which would be caught by my definition of hate speech, such as messages spoken in public, written material, or messages communicated through computer networks, telephone, or fax; or communicated through music, film, video, photograph, art, or symbols.

²¹² Broadcasting Act 1989, s 4(3).

²¹³ See Broadcasting Act 1989, ss 5(b), 5(d), 21(1)(a). See also Broadcasting Act 1989, s 18. There is a further right of appeal to the High Court.

²¹⁴ Broadcasting Act 1989, s 13(1)(a).

²¹⁵ Broadcasting Act 1989, s 13(1)(b)(i).

²¹⁶ Broadcasting Act 1989, s 13(1)(c).

²¹⁷ Broadcasting Act 1989, s 16(4) 16(1).

²¹⁸ Broadcasting Act 1989, s 14.

²¹⁹ The BSA has jurisdiction over broadcasts. The BSA does not consider "Broadcasts" to cover the Internet under the Broadcasting Act 1989.

(b) Intent

There is no requirement for intent in the denigration principle. I believe it is important for the intent of the expresser to be an element in the definition of hate speech, to restrict the application of regulation. Accordingly, the absence of an intent element in the denigration principle is unsatisfactory.

(c) Distinguishing feature

The denigration principle relates to denigration of, or discrimination against, sections of the community based on "sex, sexual orientation, race, age, disability, or occupational status" and "legitimate expression of religious, cultural or political beliefs". The grounds include all of the distinguishing features contained in my definition of hate speech except "colour" and "ethnic or national origins", however, those grounds may be implied within "race". But the Codes also include as grounds "age", "occupational status" and cultural or political beliefs, which are not included in my definition and give the provision wider application. The grounds included within the denigration principle seem to be a simple reiteration of the prohibited grounds of discrimination.²²⁰

(d) Effect

The *Radio Code* and *Free to Air Code*, contain an objective requirement that the broadcaster encourage denigration of, or discrimination against, the target group, which is similar to the requirement in my definition that the message must promote the idea that the target group is inferior.²²¹ It is likely that any message which has the effect of encouraging the denigration of, or discrimination against, sections of the community would also have the effect of promoting the idea that the target group is inferior.

However, the effect requirement in the *Subscription Code* is, "portraying people in a way which represents as inherently inferior, or is likely to encourage

²²⁰ Human Rights Act 1993, s 21(1). See Part III D Distinguishing feature.

²²¹ "Radio Code of Broadcasting Practice" <<http://www.bsa.govt.nz/r-bsacod.htm>> (last accessed 30 September 2003) 7(a). "Free to Air Television Code of Broadcasting Practice" <<http://www.bsa.govt.nz/g-bsacod.htm>> (last accessed 30 September 2003) 6g.

discrimination against, any section of the community".²²² The denigration provision in the *Subscription Code* is of a lesser standard than the other Codes, and also of my definition of hate speech, because the portrayal must only be "likely" to encourage discrimination.²²³ Moreover, the *Subscription Code* accepts another possible effect, that the portrayal represents a section of the community as inherently inferior.²²⁴ This effect requirement is similar to my definition of hate speech. However, the principle only requires that the portrayal "represent" the section as inferior, which may be a lower and broader standard than the requirement in my definition, that the message actually "promote" the idea that the group is inferior.

(e) Exceptions

The exception in the denigration principle for factual material is similar to the exceptions in my definition of hate speech for messages that are true. Truth can genuinely be established by fact. This exception is an important exception for the broad principle.

The denigration principle makes an exception for a humorous, satirical, and in the case of television dramatic, work. For example, in *Sylvia Shepherd v The Radio Network Ltd*²²⁵ The Broadcasting Standards Authority considered a complaint about a radio broadcast which contained jokes about the plight of the French during World War Two. The Authority declined to uphold the complaint, finding that the broadcast was populist and humorous, thereby falling within the exception for "dramatic, humorous or satirical work". I do not accept that exceptions to hate speech should be made in the name of humour, satire, or drama because hateful messages may be spread in the guise of humour. In many cases an expresser combines humour with an intent to degrade or denigrate. A neo-nazi may find it humorous to make jokes about "niggers". Humour is better dealt with, as in the paper's definition, by an intent requirement. Expression that was purely intended to

²²² "Subscription Television code of Broadcasting Practice" <<http://www.bsa.govt.nz/p-bsacod.htm>> (last accessed 30 September 2003) 12.

²²³ See John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 447.

²²⁴ "Subscription Television code of Broadcasting Practice", above, 12.

²²⁵ *Sylvia Shepherd v The Radio Network Ltd* (15 May 2003) Broadcasting Standards Authority 2003-037 <<http://www.bsa.govt.nz/data/2003/2003-037.html>> (last accessed 30 September 2003).

be humorous, and was not intended to denigrate or degrade would not amount to hate speech according to my definition.

Finally, the denigration principle also contains an exception for the communication of opinion. In *Stephen Cotterall v The Radioworks Ltd*²²⁶ the BSA declined to uphold a complaint relating to a statement that "Maori is not a culture" because it was a statement of the radio host's opinion. This exception is perhaps too wide, as many opinions may be hateful and harmful. In contrast, my definition makes an exception for religious opinion, while important political opinion may be covered by the exception for expression on subjects in the public interest, the discussion of which is for the public benefit.

3 *The denigration provision in practice*

Perhaps due to the breadth of the denigration provisions and the absence of a requirement for intent, the BSA has set a high threshold to be met before a broadcast contravenes the denigration provision. The BSA requires what it calls a "high level of denigration" in the sense of "blackening" of the reputation of the group.²²⁷ However, the BSA tends to make a decision without explaining how or why that standard is met.²²⁸

Ursula Cheer and John Burrows point out that even where the BSA finds that standards have been breached, it will often not impose an order, especially if the complaint appears trivial, or if it is the first complaint against the broadcaster. Even if the BSA does decide to make an order, the complainant is not given an adequate remedy. Financial compensation is at most an award of costs and it is more common for complainants to receive an apology. Further, the broadcaster is not punished seriously for an upheld complaint. Publication of the BSA's decision and payment of court costs is not likely to be a serious deterrent for broadcasters.

²²⁶ *Stephen Cotterall v The Radioworks Ltd* (14 February 2000) Broadcasting Standards Authority 2000-015 <<http://www.bsa.govt.nz/data/2000/2000-015.html>> (last accessed 30 September 2003).

²²⁷ *Credo Society Inc v 95 bFM* (13 February 1997) Broadcasting Standards Authority 1997-008 <<http://www.bsa.govt.nz/data/1997/1997-008.html>> (last accessed 30 September 2003).

²²⁸ In *Credo Society Inc v 95 bFM*, above, calling a mayor and councillors "arseholes" did not meet the test.

4 *Conclusion*

The complaints mechanism provided for under the Broadcasting Act 1989 has minimal ability to deal with hate speech as defined in this paper. The BSA can only consider expression made through television or radio. The denigration principle is worded broadly. It contains no requirement for intent, contains many grounds, and in relation to subscription television, is broad in the effect it requires the expression to have. Due to the breadth of the principle, the BSA has arbitrarily imposed a high standard before the principle is applied. Finally, the BSA does not provide an adequate remedy to complainants.

E HATE SPEECH AND THE PRESS COUNCIL

1 The New Zealand Press Council

(a) The discrimination principle

The New Zealand Press Council (the Press Council) is a privately funded voluntary organisation that provides the public with an independent forum for resolution of complaints against the press about the editorial content of newspapers, magazines or periodicals published in New Zealand (including their websites).²²⁹ The Press Council sets out a number of ethical principles to be complied with by the press. Principle 8, entitled "discrimination", provides,²³⁰

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

²²⁹ New Zealand Press Council <<http://www.presscouncil.org.nz/>> (last accessed 19 September 2003).

²³⁰ New Zealand Press Council <<http://www.presscouncil.org.nz/principles>> (last accessed 19 September 2003).

(b) Remedies and resolution

If a member of the public believes that a publication is in breach of principle 8, the complainant must first seek redress with the publication concerned.²³¹ If the outcome of the complaint to the publication is unsatisfactory, it may be referred to the Press Council.²³²

If the Press Council finds that the publication has breached a principle it may require the offending publication to publish the essence of any decision which goes against that newspaper or magazine, giving it fair prominence, although it has no power to enforce this sanction. It cannot seek monetary recompense for complainants.²³³

1 Ability of the Press Council to regulate hate speech

(a) Media

The Press Council accepts complaints about published articles, pictures, cartoons, advertisements, and billboards.²³⁴ However, the Press Council may only regulate expression communicated in newspapers, magazines, and periodicals. It cannot consider messages spoken in public, written in books or academic articles, communicated through computer networks, telephone, or fax, broadcast on television or radio or communicated through music, film, video, photograph, art, or symbols.

(b) Intent

There is no requirement in principle 8 that the author of the offending publication intend to "denigrate or degrade a target group".

²³¹ See John Burrows and Ursula Cheer *Media Law in New Zealand* (4 ed, Oxford University Press, Auckland, 1999) 453.

²³² John Burrows and Ursula Cheer, above, 453.

²³³ New Zealand Press Council <<http://www.presscouncil.org.nz/>> (last accessed 19 September 2003).

²³⁴ John Burrows and Ursula Cheer, above, 453.

(c) Distinguishing feature

Publications must not place gratuitous emphasis on "gender, religion, minority groups, sexual orientation, age, race, colour or physical or mental disability". Principle 8 includes all of the grounds contained in my definition of hate speech except for ethnic or national origins. Ethnic or national origins are likely to be implied within race or colour. Principle 8 also includes minority status and age. These provisions are not included within my definition of hate speech.

(d) Effect

Although the principle is entitled "discrimination" it fails to mention the required effect of the expression. The principle does not require that the publication "promote the message that the target group is inferior". The inclusion of a promoting effect is important because the harm of hate speech is related to its ability to disseminate hateful ideas. Principle 8 merely states that the publication must not place gratuitous emphasis on characteristics of the target class.

(e) Defences

To aggravate the breadth of the discrimination principle, there are no express defences for truth, religious opinion, or public interest. However, the Press Council applies a defence for humour in practice. For example, in *Roehl v The Dominion Post*²³⁵ the Press Council considered a complaint about an article which criticised Winston Peters' anti-Asian immigration stance, and stated that Peters might as well blame homosexuality for reducing the population of New Zealand. The Press Council did not uphold the complaint on the basis that it was humorous stating, "From the first eye-catching sentence to the end, the column was unquestionably written in a heavily satirical style and was not intended to be taken literally."²³⁶

Whether expression is humorous is not a consideration in my definition of hate speech. There will be instances of hate speech where the expresser intends to denigrate or degrade the target group while portraying the message as humour. The

²³⁵ *Roehl v The Dominion Post* (February 2003) Press Council 915
<<http://www.presscouncil.org.nz/>> (last accessed 28 September 2003).

focus should instead be on the effect of the expression. If the expression has the effect of promoting the message that the target group is inferior it is irrelevant whether the expression adopts a humorous tone. As discussed earlier, humorous messages will not come within my definition of hate speech if they are not intended to denigrate or degrade.²³⁷

4 The discrimination principle in practice

Few complaints are made to the Press Council. According to John Burrows and Ursula Cheer the Press Council receives around 80 complaints a year and of those only around a half come to adjudication.²³⁸ Of those adjudicated, around one seventh are upheld in whole or in part.²³⁹ Obviously, the discrimination principle is not often used to prevent discriminatory expression by the press. The Press Council places a limitation period of three months after publication in which it will accept complaints.²⁴⁰ This short limitation period may explain the low number of complaints received.

It is also important to note that the Press Council requires complainants to give a written undertaking that, having referred the matter to the Press Council, they will not take or continue proceedings against the publication or journalist concerned.²⁴¹ This approach is based on the idea that the Press Council should not be a trial run for litigation.²⁴² This requirement is unsatisfactory, as those who complain to the Press Council will not receive an effective remedy, which they may have been able to seek in other forums.

²³⁶ *Roehl v The Dominion Post*, above.

²³⁷ See Part II E 1 Intention.

²³⁸ John Burrows and Ursula Cheer, above, 453.

²³⁹ John Burrows and Ursula Cheer, above, 453.

²⁴⁰ New Zealand Press Council <<http://www.presscouncil.org.nz/complain.htm>> (last accessed 19 September 2003).

²⁴¹ New Zealand Press Council <<http://www.presscouncil.org.nz/complain.htm>> (last accessed 19 September 2003).

²⁴² New Zealand Press Council <<http://www.presscouncil.org.nz/complain.htm>> (last accessed 19 September 2003).

5 *Conclusion*

The Press Council does not effectively regulate hate speech in New Zealand. It may only consider print media, and applies a very broadly worded principle, which is subject to the discretion of Council members in its application. There is no requirement that the author of the publication intended to denigrate or degrade the target group, and no requirement that the publication promotes the message that the target group is inferior. The complaints mechanism run by the Press Council has no "teeth", as it fails to provide complainants with an effective remedy.

V *RECOMMENDATIONS*

A *The Ability for Hate Speech to be Regulated in New Zealand*

1 *Gaps in the law*

This paper has explained the harm caused by hate speech, and has recommended that it be regulated in New Zealand. Further, this paper has demonstrated the inability of current legal mechanisms to regulate hate speech.

Each mechanism applies to different media, while some of the media covered overlap between mechanisms. For example, complaints about television or radio broadcasts may be made to the BSA and the Human Rights Review Tribunal.

The current mechanisms are limited in the distinguishing features the denigration or degradation may be based upon. The HRA is only concerned with colour, race, or ethnic or national origins, and may not be used to regulate expression based on the targets' sex, religious belief, disability, or sexual orientation. Conversely, the relevant provisions of the Broadcasting Act 1989 and the FVPCA include too many features to be workable. The only mechanism with the correct approach to distinguishing features is the Press Council, which has no power to remedy the harm caused by the expression.

Neither section 61 of the HRA, section 3(3)(e) of the FVPCA, the denigration principle applied by the BSA, nor the discrimination principle applied by

the Press Council contain a requirement that the expresser intend to cause a negative effect through its expression. The criminal offence contained in section 131 of the HRA does include a requirement for intent, however, the section is not enforced.

The absence of a requirement for intent is compounded by the broad requirement for effect in the each relevant provision. The provisions are broad and ambiguous, sometimes involving subjective elements. The HRA utilises the test "likely" to excite hostility. It is impossible to measure how "likely" would be applied. The FVPCA and discrimination principle applied by the Press Council do not require the expression to have any harmful effect. The expression must merely represent an idea. The problem of overbreadth is sealed by a failure to provide express defences in all but the denigration principle applied by the BSA.

The existing mechanisms do not operate effectively in practice. As noted above, section 131 of the HRA is not enforced. The Human Rights Commission has been inundated with trivial complaints under section 61. Section 3(3)(e) of the FVPCA is only a weighting factor subject to the censor's discretion. Section 3(3)(e) will not often be applied in practice because, as the Court in *Living Word* clarified, it is only a consideration where "matters such as sex, horror, crime, cruelty, or violence" accompany it. Neither the recommendations of the Select Committee Inquiry nor Marc Alexander's Members Bill will improve the inadequacy of section 3(3)(e). Due to the breadth of the denigration principle provided under the Broadcasting Act 1989, the BSA has arbitrarily imposed a high standard to be met before the principle is applied.

The ability for any of the mechanisms to provide an adequate remedy to targets, or punish expressers is also limited. Notably, the BSA and Press Council may not award financial compensation. The Press Council may only require the publication of its decision, a remedy it has no power to enforce.

2 An illustrative problem

The following example, invented by the author, demonstrates the inadequate approach to hate speech in New Zealand at present. Imagine a magazine published in New Zealand about women entitled "Wench". "Wench" is intended to explain

that women have lower intelligence than men, and are too emotional and irrational to operate in the workforce. It advocates that the only place for women is in the home, where they can service the needs of men, and be restricted from sexual promiscuity. "Wench" promotes the idea that women do not have the intelligence to take part in decisions pertaining to society, and should not be allowed to maintain positions of political power. It even suggests that it was a bad idea to give women the vote.

"Wench" is obviously intended to denigrate and degrade women based upon their sex. The magazine actively seeks to promote the idea that women are inferior to men. The magazine has a strong following of men who are influenced by its message.

"Wench" deals with material that discriminates on the basis of women's sex, so could not be considered under section 61 or 131 of the HRA which only deal with race, colour, or ethnic or national origins. "Wench" is a publication within the meaning of the FVPCA, however, because it does not strictly deal with "matters such as sex, horror, crime, cruelty, or violence" it would not attract the weighting provision in section 3(3)(e) and could not be censored. Likewise, "Wench" could not be dealt with under the Broadcasting Act 1989 because it was not broadcast on television or radio. A member of the public could complain about "Wench" to the Press Council. However, even if the Press Council decided to exercise its broad discretion in the complainant's favour, the only remedy it could award would be to require "Wench" to publish a summary of the Council's decision, and it has no power to enforce this sanction. The Press Council has no power to fine the magazine, or award damages or an apology, and has no power to require "Wench" to be removed from circulation.

"Wench" has developed a wide readership of men who are discouraging their wives and partners from working, and advocating a new role for women in New Zealand society. Women's refuge also records an increase in the amount of domestic abuse against women in New Zealand.

This example may seem far-fetched, but it effectively demonstrates an obvious gap in New Zealand law. I have explained the harm caused by hate speech, and the reasons that it must be regulated. Hate speech cannot be effectively

regulated in New Zealand at present. Consequently, this paper recommends legislative reform.

B Proposed Legislative Reform

1 Criminal provision

When discussing the possible ways to deal with hate speech, I concluded that the most appropriate method of dealing with hate speech is a mixture of criminal legislation and censorship. This approach recognises the seriousness of hate speech, would punish the expressers of hate speech and enable hate publications to be banned, and places the cost and burden of combating hate speech upon the state.

The following criminal provision should be entered into the Human Rights Act 1993, repealing and replacing sections 61 and 131.

131A. Hate Speech -

(1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$10,000 who communicates a message which:

- (a) is intended to denigrate or degrade a target group by reason of its sex, religious belief, colour, race, ethnic or national origins, disability, or sexual orientation; and
- (b) promotes the idea that the target group is inferior.

(2) No person will be liable for an offence under subsection (1) of this section if the message communicated:

- (a) is true; or
- (b) expresses a religious opinion; or
- (c) concerns subject of public interest, the discussion of which is for the public benefit.

The maximum sentence imposed upon people who commit the offence has been taken directly from the existing section 131 of the HRA, although the fine has been increased to reflect the gravity of the offence, and the time passed since section

131 was enacted.²⁴³ This paper does not consider the issue of sentencing in depth. It would need to be considered more extensively before such a provision was enacted.

The option remains of further defining terms mentioned in the provision. For example, the word "message" could be defined in relation to the media it covers if the legislature was not comfortable with leaving that term undefined for the reasons stated at the beginning of this paper.²⁴⁴

2 *Censorship*

This paper recognised that aside from punishing the expressers of hate speech, New Zealand needs to remove hate speech from public circulation so that it cannot continue to cause harm. How hate speech should be censored is a difficult issue. Under the Canadian Criminal Code, a court may order the seizure and forfeiture of physical hate propaganda material kept on any premises for distribution or sale, or order publicly available hate propaganda to be deleted from computer systems.²⁴⁵ This is a viable option for New Zealand, however, New Zealand already has an effective censorship regime provided for under the FVPCA, so using the censorship system to ban material amounting to hate speech may be a preferable approach. A provision could be entered into the FVPCA which makes hate speech objectionable. The provision could be a deeming provision, entered after the existing section 3(2) of the FVPCA.

3. Meaning of "objectionable" -

(2A) A publication shall be deemed to be objectionable for the purposes of this Act if:

- (a) It has been found to communicate a message that is illegal under section 131A of the Human Rights Act 1993

To enter the above provision into the FVPCA would make the possession, distribution, and supply of hate speech an offence.²⁴⁶ The New Zealand Police and the Censorship Compliance Unit could work together to enable prosecution of expressers of hate speech, and censorship of publications amounting to hate speech.

²⁴³ See Human Rights Act 1993, s 131(1). See Part IV B 1 (b) above.

²⁴⁴ See Part II B 1 Message.

²⁴⁵ Canadian Criminal Code, art 320.

²⁴⁶ Films, Videos, and Publications Classification Act 1993, ss 123, 124, and 13.

C *Impact on Freedom of Expression*

1 *The right to freedom of expression*

The right to freedom of expression is contained in section 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights).²⁴⁷

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

The right to freedom of expression under the Bill of Rights would be limited if the legislation were passed. Individuals could not seek, receive, or impart information or opinions amounting to hate speech as to do so would be a punishable offence. The right to seek, receive, or impart information or opinions amounting to hate speech through publications coming within the jurisdiction of the FVPCA would also be restricted.

2 *Reasonable limit on freedom of expression?*

Section 5 of the Bill of Rights provides that any limitation its rights and freedoms must constitute “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.²⁴⁸ It should be noted that the Bill of Rights is not supreme law, so if section 14 is limited by the proposed legislation, Parliament still has the power to enact the legislation and the courts have no power strike the legislation down for inconsistency with the Bill of Rights.²⁴⁹

If the proposed legislation came before the house, it is likely that the Attorney-General would report to Parliament on whether the bill was inconsistent with rights contained in the Bill of Rights, specifically article 14. To do so would involve a consideration of whether any limitation created was demonstrably justified in a free and democratic society.²⁵⁰

²⁴⁷ New Zealand Bill of Rights Act 1990, s 14.

²⁴⁸ New Zealand Bill of Rights Act 1990, s 5.

²⁴⁹ New Zealand Bill of Rights Act 1990, s 4.

²⁵⁰ New Zealand Bill of Rights Act 1990, s 5.

The Court of Appeal in *Moonen v Film and Literature Board of Review (Moonen)*²⁵¹ set out an approach for determining whether limitations are demonstrably justified in a free and democratic society. The *Moonen* approach may be seen as a restatement of the test set out by the Supreme Court of Canada in *R v Oakes*²⁵². *R v Oakes* dealt with the Canadian provision upon which section 5 was based, which also requires limitations of rights contained in the Canadian Charter of Rights and Freedoms to be "demonstrably justified in a free and democratic society".²⁵³

(a) Importance of objective

The objective the proposed legislation is to protect society from the dissemination of hateful messages in New Zealand. The Supreme Court of Canada in *R v Oakes* held that "an objective relates to concerns which are pressing and substantial in a free and democratic society".²⁵⁴ This paper has demonstrated that the need to protect targets and society generally from hate speech is a pressing issue because of the harm hate speech causes.²⁵⁵ The targets of hate speech may suffer physical and psychological harm, and may become depressed and withdrawn as they are degraded and denigrated and made to feel inferior. Hate speech may reduce inter-group relations between the targeted and the non-targeted, and harm society by promoting the message that the target group is inferior, which may lead to increased hostility, discrimination and violence.

(b) Reasonable proportionality

The Court of Appeal in *Moonen* directed that "[t]he way in which the objective is statutorily achieved must be in reasonable proportion to the importance of the objective. A sledgehammer should not be used to crack a nut".²⁵⁶ I have contended that hate speech causes serious harm. It is an emotional assault upon its

²⁵¹ *Moonen v Film and Literature Board of Review (Moonen)* [2000] 2 NZLR 9, 16-17 (CA) Tipping J for the Court.

²⁵² *R v Oakes* [1986] 1 SCR 103, 138-9 (Supreme Court of Canada) Dickson CJC.

²⁵³ Canadian Charter of Rights and Freedoms, s 1.

²⁵⁴ *R v Oakes*, above, 138 Dickson CJC.

²⁵⁵ See Part III A The Harm Caused by Hate Speech.

²⁵⁶ *Moonen v Film and Literature Board of Review (Moonen)* [2000] 2 NZLR 9, 16 (CA) Tipping J for the Court.

targets, which may manifest in physical and psychological symptoms. It causes inequality and discrimination within society, and may encourage violence.

Prohibiting hate speech places a limitation on the right to freedom of expression. However, that limitation is greatly outweighed by the harm resulting from allowing hate speech to exist. The limit on freedom of expression posed for New Zealand through the proposed legislation would not affect legitimate expression, which was not intended to denigrate or degrade, or true expression, religious expression, and expression of public interest.

(c) Rational connection

The Court in *R v Oakes* held that limitations on rights must be "carefully designed" to achieve the objective and should not be "[a]rbitrary, unfair, or based on irrational considerations".²⁵⁷ The proposed criminal legislation has been carefully formulated to ensure the offence is narrowly tailored to protecting against the dissemination of hate speech. The offence includes a requirement for intent to prevent it being applied either too broadly, or to situations where the expresser did not mean their message to denigrate or degrade. The offence includes express defences for true speech, religious speech and speech in the public interest. The defences ensure that the offence is not applied to prevent or chill legitimate speech. Similarly, the censorship provision will only apply once the criminal offence has been satisfied. Accordingly, the way in which the proposed legislation has been worded, and the way it will operate in practice, is reasonably in proportion to the objective of protecting society from the dissemination of hate speech, and will not extend to cover situations beyond its objective.

(d) Little interference with the right

The proposed legislation limits the right to freedom of expression as little as possible in order to meet the objective of protecting society from the dissemination of hate speech. This is done through the requirement for intent and the provision of defences for legitimate speech.

²⁵⁷ *R v Oakes*, above, 139 Dickson CJC.

I believe that the proposed legislation is a reasonable limit prescribed by law to the right to freedom of expression, which is demonstrably justified in a free and democratic society.²⁵⁸ The Court in *Moonen* explained that determining whether legislation constitutes a reasonable limit on a right contained in the Bill of Rights is a value judgement.²⁵⁹ This paper recommends that that value judgement should be exercised in favour of passing such legislation to protect New Zealand society and New Zealand individuals from the harms caused by hate speech.

VI CONCLUSION

Regulation of hate speech is imperative to protect individual targets, and New Zealand society, from its real and serious harms. Those interested in hate speech regulation in New Zealand have, to date, concerned themselves with the ability of existing mechanisms to deal with it. I believe they are focusing on the wrong issue.

As I have demonstrated, the ability for existing mechanisms to regulate hate speech in New Zealand is deeply inadequate. Not only do the mechanisms fail to address the harms caused by hate speech, they are operated under broad and ambiguous provisions that threaten freedom of expression. New Zealand should not concern itself with making an inadequate, gap-ridden regulation work. The issue of hate speech regulation in New Zealand requires a paradigm shift. We must ask, what type of hateful speech requires regulation? How should this be done?

I have considered and concluded upon the nature of expression to be regulated, and have proposed a new, unified, and comprehensive regime for regulating hate speech in New Zealand. Not only do I consider the limit my proposal places on freedom of expression to be demonstrably justified in a free and democratic society, I believe the proposal vital to ensure and promote the equality and dignity of all people in New Zealand.

²⁵⁸ Note that the Supreme Court of Canada in *R v Keegstra* found that the Canadian Criminal Codes offence of wilfully promoting hatred was constituted a limit on the right to freedom of expression contained in the Canadian Charter of Rights and Freedoms, which was demonstrably justified in a free and democratic society.

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