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**“GAY RIGHTS/SPECIAL RIGHTS, INSIDE THE  
HOMOSEXUAL AGENDA”:  
THE DEMISE OF SECTION 3(3)(e) OF THE  
FILMS, VIDEOS, AND PUBLICATIONS  
CLASSIFICATION ACT 1993**

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**ABSTRACT**

*The videos 'Gay Rights/Special Rights, Inside the Homosexual Agenda' and 'AIDS: What You Haven't Been Told' were banned by the Film and Literature Board of Review under section 3 of the Films, Videos, and Publications Classification Act 1993, on the basis that the videos represented the gay and lesbian community and people living with HIV/AIDS as inherently inferior. The Court of Appeal has remitted the videos back to the Board, who has to consider whether it has exceeded its jurisdiction under section 3(1) of the Act. This paper argues that the Film and Literature Board of Review ought to have the ability to consider the videos and that it is open to them under an alternative interpretation of section 3(1) of the Act. The Court of Appeal's interpretation of section 3(1) as a subject matter gateway leads to many unintended results and is contrary to Parliament's intention of providing a flexible and responsive censorship regime. Furthermore, this paper argues freedom of expression protection should not be afforded to expression representing a class of people as inherently inferior where it extends beyond advocacy of mere opinion.*

The text of this paper (excluding contents page, footnotes, and annexures) comprises approximately 15,500 words.

## I INTRODUCTION

On 31 August 2000, the Court of Appeal delivered its judgment deciding the fate of the videos *Gay Rights/Special Rights*, *Inside the Homosexual Agenda* and *AIDS: What You Haven't Been Told* which had been banned by the Film and Literature Board of Review in 1997. About the videos Thomas J said:<sup>1</sup>

The propensity for such presentations to cause harm is apparent: they may mislead the uninformed; they simplify the issues in a manner which is unrealistic; they give credence to false facts and figures; they demean and trivialise homosexual associations which do not fit the popular negative stereotype; they are hurtful and oppressive to the homosexual community; they pose a wounding challenge to the personal belief that sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs; they may psychologically scar homosexual individuals who would not otherwise repress their sexual orientation; and they tend to victimise and alienate a sizeable proportion of the population.

Despite this disturbing recount of the potential harm caused to the gay and lesbian community by the videos, his Honour Thomas J in a separate judgment, concluded that the Film and Literature Board of Review exceeded its jurisdiction in classifying them. The videos have been remitted back to the Film and Literature Board of Review under the directions of the combined judgment of Richardson P, Gault, Keith and Tipping JJ (delivered by Richardson P). It seems unlikely that the Board in reassessing the videos will find they have jurisdiction to classify the videos.

While this may settle the three year battle between Living Word Distributors Limited and the Human Rights Action Group (Wellington), it is only the beginning for the debate on whether the censoring bodies should have the power to restrict publications expressing opinions that represent a class of persons as inherently inferior to the extent that they are likely to be injurious to the public good.<sup>2</sup>

1 *Living Word Distributors Limited v Human Rights Action Group (Wellington)* (31 August 2000) unreported, Court of Appeal, CA 58/00, para [67] (per Thomas J). [*Living Word (CA)*]

2 Films, Videos, and Publications Classification Act 1993, section 3(3)(e). This paper adopts the language found in section 3(3)(e). During the Court of Appeal hearing and in parties submissions the term hate speech, hate literature or hate propaganda (they are all interchangeable) was used as

Expression of opinions about one group of people in society by another group is not a new phenomenon. This expression is part of the never-ending clash between cultural and social boundaries. Such expression represents the freedom to contribute to one's own self-definition and to the social definition of others.<sup>3</sup> There is no denying the importance of freedom of expression in this context, however recognising this freedom comes at a cost. The cost is the harm caused to the group targeted and society as a whole. The Films, Videos, and Publications Classification Act 1993 (the Act) itself is predicated on the proposition that a publication is censorable where the harm is such that its availability is likely to be injurious to the public good.<sup>4</sup>

The Film and Literature Board of Review banned the videos *Gay Rights/Special Rights*, *Inside the Homosexual Agenda* and *AIDS: What You Haven't Been Told* on the basis that the videos depicted homosexuals and individuals living with HIV/AIDS as inherently inferior in such a manner that their availability to the public was likely to be injurious to the public good.<sup>5</sup> The Board interpreted the inclusion of section 3(3)(e) of the Act as an indication that it was Parliament's intention that the representation of a group of people as inherently inferior could be injurious to the public good.<sup>6</sup>

This case is the first time that section 3(3)(e) and its operation within section 3 of the Act has come under scrutiny from a court since its enactment in 1993. The effect of the Court of Appeal's decision is to restrict the operation of section 3 and in particular section 3(3)(e). This has implications not only for the present case and future cases like it, but also for more common classification decisions that the censoring bodies are required to make. This paper is concerned with those

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short hand, for expression that represents a group of people as inherently inferior. However, the term hate propaganda is highly loaded and has its own complexities. While there is no statutory test for hate propaganda in New Zealand, the Indecent Publications Tribunal in *Re Exposing the AIDS Scandal* (1993) 1 HRNZ 170, 174-175 applied a hate literature test which has subsequently been applied in decisions of the Classification Office and the Board (including the present case). Whether the videos amount to hate propaganda is irrelevant for the application of the FVPC Act and this paper deliberately stays away from the term.

<sup>3</sup> Kenneth L Karst "Boundaries and Reasons: Freedom of Expression and the Subordination of Groups" (1990) 1 University of Illinois L Rev 95.

<sup>4</sup> Films, Videos, and Publications Classification Act 1993, section 3(1).

<sup>5</sup> *Re Gay Rights/Special Rights: Inside the Homosexual Agenda* (1997) 4 HRNZ 422. [*Re Gay Rights*]

<sup>6</sup> *Re Gay Rights*, above n 5, 435.

implications and what it means for publications that represent a group of people as inherently inferior. Part II of this paper provides background on the two videos and the decisions of the Classification Office, Film and Literature Board of Review, and High Court. The intention is to facilitate understanding of the substantive arguments raised in the analysis of the Court of Appeal decision.

Part III is concerned with the Court of Appeal's interpretation of section 3(1) of the Act, in particular that the section acts as a jurisdictional subject matter gateway. The interpretation of section 3(1) subsequently affects the operation of section 3(3)(e), and the implications of this are considered. Part IV assesses the conflict between restricting expression that represents a group of people as inherently inferior and protecting expression of opinion. Part V considers the inconsistency in treatment that arises from this decision depending on whether the videos are broadcast on television or shown on a movie screen. Part VI considers the application of the New Zealand Bill of Rights Act 1990 in respect of classification decisions involving section 3(3)(e) of the Act.

## II BACKGROUND

### A *The Videos*

The videos at the centre of the controversy *Gay Rights/Special Rights, Inside the Homosexual Agenda* and *AIDS: What You Haven't Been Told* were imported from the USA in 1994 by Living Word Distributors Limited. The videos are two of many Christian videos produced by California-based producers Jeremiah Films. Describing the content of the videos is not an easy task. Great care is taken not to allow the writer's dislike for the videos distort the description of the videos' message and how that message is conveyed.<sup>7</sup>

<sup>7</sup> The writer has had the opportunity to view both videos pursuant to an exemption granted under section 44 of the Films, Videos, and Publications Act 1993. They were viewed under the supervision of the Office of Film and Literature Classification. The writer also has copies of the transcript for each video, produced for the Human Rights Action Group (Wellington) as part of their submissions to the High Court.



## 1 Content

### (a) 'Gay Rights/Special Rights, Inside the Homosexual Agenda'

*Gay Rights/Special Rights, Inside the Homosexual Agenda* is centred on the 1993 March on Washington for lesbian, gay, bisexual and transgender equal rights. The video expresses the opinion that individuals should not be afforded minority legal protection based on their sexual orientation. The underlying basis for this opinion is that homosexuality, when judged against Christianity and the teachings of the Bible, is wrong and sinful. The video claims that homosexuals have the same rights as anyone else already and that any further rights grounded on sexual orientation amount to 'special rights'. According to the video the gay rights movement threatens to undermine the entire Civil Rights movement of the 1960's.

The video draws a distinction between seeking minority legal protection based on behaviour on the one hand, and inherent characteristics like race and gender on the other. The video presents homosexuality as a behaviour disorder. Time is spent canvassing sexual practices like sadomasochism and the ingestion of excreta, which are imputed exclusively to gays and lesbians and used as evidence in support of this so called behaviour disorder.

The video assesses the impact that minority status based on sexual orientation would have on business, education, the Church and the nuclear family. The concern in relation to business is that people will be forced to employ individuals who are gay or lesbian. Of more concern to the producers is the impact on education. Homosexuals are said to be using public schools to promote their own agenda by teaching children about homosexuality and presenting it as a healthy and normal lifestyle. There is also concern for the Church as it will not be able to dismiss a church employee who announces that they are gay or lesbian. The video also states that recognition of homosexuality strikes at the very root of the family.

### (b) 'AIDS: What You Haven't Been Told'

*AIDS: What You Haven't Been Told* according to the producer Jeremiah Films "unmasks the myths, cover-ups and political manipulations concerning the

world's most deadly killer virus" and "gives hard answers".<sup>8</sup> The major theme is that the public health response to the AIDS epidemic (referred to as 'safe sex propaganda') is inappropriate because it is based on the premise that homosexual activity is morally acceptable. The video postulates that abstinence and changing sexual behaviour are the only ways to protect oneself from the virus.

The video is broken into a number of parts. Part one, "What is AIDS?" explains in medical terms the effects of HIV and AIDS on the body. The information is somewhat dated. Part two, "How is AIDS Transmitted?" looks at the primary modes of transmission. From this point onwards, the focus stays on transmission of AIDS within the gay community. The continuing sexual practices of the "homosexual male"<sup>9</sup> and their failure to get tested for AIDS is seen as the major cause for the spread of HIV/AIDS. The video claims that the 'moderately active homosexual' averages between thirty to fifty different sexual partners a year. The message is that gay men continue to have sex despite the AIDS epidemic because of their unquenchable sexual desire.

Part three, "What Is Safe Sex?" is concerned with the message that condoms are effective in preventing the spread of AIDS. Information promoting the use of condoms and other preventative measures is referred to as 'safe sex propaganda'. The video maintains that the safest measure is not to have sex at all. The gay community is said to have taken control of Government health agencies, diverting millions of taxpayer dollars away from research and hospice care to fund their own interest groups.

Part four, "The Cost of AIDS" looks at the human cost of AIDS and the cost to the taxpayer. The video states that the cost of caring for HIV/AIDS patients will bankrupt the US health care system.

Part five, "The Homosexual Movement" and the remainder of the video has an emphasis similar to *Gay Rights/Special Rights*. It states the primary goal of 'militant homosexuals' is to promote the 'homosexual lifestyle' regardless of the implications to public health. The video criticises the gay and lesbian community

<sup>8</sup> Claims printed on the jacket cover of *AIDS: What You Haven't Been Told*.

<sup>9</sup> The video refers to gay men as the 'homosexual male'.

for turning the AIDS crisis into a civil rights issue. AIDS is described as the first politically protected disease. According to the video the result of this political manipulation is to prevent the normal public health measures imposed for any other communicable disease such as quarantine of those infected. The video accuses the Government of being more concerned with appeasing the gay community than dealing with a public health crisis.

The video takes the opportunity to comment on other aspects of the 'homosexual agenda'. It suggests politicians, celebrities and citizens eager to support the fight against AIDS are unwittingly endorsing demands for acceptance of all kinds of deviant behaviour such as sadomasochism and sex with minors. Gay men involved in organisations such as gay and lesbian PTA's and the Gay Fathers Organisation are linked to NAMBLA (North American Man Boy Love Association) which is an association that promotes sexual relationships between adults and children.

The video concludes with an appeal against protecting a homosexual or promiscuous lifestyle at the expense of millions of lives. It suggests standard epidemic control measures should begin immediately and information that is not influenced by homosexual activists should be circulated to families. Furthermore, people wishing to help AIDS victims are encouraged to do so without promoting the homosexual agenda. The video suggests that churches can make a response by funding various Christian initiatives so that they are continually demonstrating they care.

## 2 *How the message is conveyed*

Both videos present their message in documentary style, to create an impression of being informative and factual. They both use extensive footage from the 1987 and 1993 March on Washington for lesbian, gay, bisexual and transgender equal rights. Many of the scenes used are not dissimilar to what one would expect to see in footage from demonstrations in the seventies during the sexual revolution; people wearing little clothing, dancing and acting provocatively.

In both videos, there are formal interviews with those who support the message of the producer. Titles appear on screen when these people are speaking which

suggest that they are authorities on the subject. In contrast, all interviews with gay, lesbian or bisexual people are off-the-cuff and take place during either the 1987 or 1993 March. It appears that they are not aware of the context in which their remarks will be used. Whenever a person from the gay community is interviewed a title like "homosexual activist" or "homosexual/AIDS patient" appears on screen. People interviewed and labelled "former homosexuals" are given a certain amount of credence. A further special effect used to support the claims being made involves superimposing newspaper headlines and other documents on screen. There is a lot of editing and cutting from scene to scene. Often there will be voice-overs where the images shown on screen have very little relevance to the dialogue. For example in *AIDS*, there is a voice-over explaining how HIV/AIDS can cause neurological problems. At the same time, the camera cuts to a scene of the 1987 March. It then cuts to a male cheerleader who high kicks at the camera as he walks past. Both videos repeatedly use footage of half-naked people, males kissing, hugging and people dancing promiscuously. It is often difficult to see the relevance.

The sound track also plays an important role. The use of sinister music is prevalent in both videos. Often when a gay or lesbian person is talking, or the video is trying to stress the immorality of homosexuality sinister music will be playing in the background.

The distributors contend the videos are aimed at a Christian audience and encourage people to be compassionate. However, there is only one scene at the end of *AIDS: What You Haven't Been Told* which suggests this. The majority of the presentation intends to appeal to a wider audience. The use of sound, editing and visual techniques creates a subtext separate from the message that sexual orientation ought not to be a minority status or that celibacy is the only way to be protected from HIV/AIDS. This subtext is that gay people and their lifestyle are to blame for the spread of AIDS and the horrors that it causes, and that gays and lesbians are inflicted with a behavioural problem and should be encouraged to change.

### 3 *The use of the videos and their impact*

Before their banning, Church groups used the videos regularly. Potter's House Christian Fellowship and the evangelistic organisation "Open Air Campaign" in their submissions in support of the videos described them as a "useful resource tool", presenting "an alternative perspective" of homosexuality.<sup>10</sup> Pastor Trott from Potter's House in relation to *Gay Rights/Special Rights* concluded,<sup>11</sup>

[t]his video is simply a very effective and truthful tool to help us communicate the fact that the homosexual act is wrong, and to warn people of the consequences of their behaviour.

There have been a number of public screenings of the videos in Hamilton, Wellington, Nelson and Christchurch between 1996 and 1998. Controversy surrounded some of the screenings, including protests outside the venues and heckling inside.<sup>12</sup>

There is documentation of the psychological impact of the video *Gay Rights/Special Rights* on gay and lesbian audiences in the United States. Ioannis Mookas describes the impact:<sup>13</sup>

The incendiary rhetoric and images of Gay Rights/Special Rights have traumatised many lesbian and gay men which have viewed it.... It is the cumulative force of having virtually every awful thing straight society has ever said about us – "sick", "guilty", "worthless", "doomed" – amalgamated into one terrific wallop. Apart from the obvious feelings of anger that videos like Gay Rights/ Special Rights and The Gay Agenda provoke, many viewers I have spoken with described the feelings of overwhelming disconsolation or despair after seeing it. The video blends half truths with gross distortions and outright lies so seamlessly that, even for the viewer equipped with critical viewing skills and vocabulary, the cumulative effect is one of inundation or helplessness. One scarcely knows where to begin to refute the claims made in the video. The toxic nuggets lodge tenaciously, like shrapnel, on the unconscious of the queer viewer, where they continue to seethe long afterward.

<sup>10</sup> *Re Gay Rights*, above n 5, 427.

<sup>11</sup> *Re Gay Rights*, above n 5, 426.

<sup>12</sup> "Gay Rights Activists Heckle Second Screening" *The Waikato Times*, Hamilton, New Zealand, 22 July 1996, 3.

<sup>13</sup> Ioannis Mookas *Faultlines: Homophobic Innovation in Gay Rights/Special Rights in Media, Culture and the Religious Right* (University of Minnesota Press, Minneapolis, 1998).

The potential ability these videos have to inflict harm on the gay and lesbian community and individuals living with HIV/AIDS is what prompted the Human Rights Action Group (Wellington) to seek to have the videos banned.

### **B Decisions Prior to the Court of Appeal**

On 30 September 1994 the Film and Video Labelling body classified the videos as "suitable for mature audiences 16 years of age and over".<sup>14</sup> The Human Rights Action Group (Wellington) in February 1995 with the leave of the Chief Censor submitted the two videos to the Classification Office pursuant to section 76 of the Act for classification.

#### *1 Office of film and literature classification decision*

On 18 November 1996, the Classification Office classified each video as "objectionable except if the availability of the publication is restricted to persons who have attained the age of 18 years".<sup>15</sup> It is only worth mentioning a few points about the decisions as the Film and Literature Board of Review decision is de novo.<sup>16</sup> Of interest is that like the Board, the Office was critical of the videos portrayal of the gay and lesbian community. The Office found that *Gay Rights/Special Rights* directly held the gay and lesbian community in contempt through its gross misrepresentation of the facts and by selective interpretation of the material presented. However, the Office concluded that the strength of the gay community was such that it was "strong enough to withstand such a biased onslaught"<sup>17</sup>.

The Human Rights Action Group applied for review by the Film and Literature Board of Review of the decisions of the Classification Office pursuant to section 47(2)(a) of the Act. The Board released its decision on 18 December 1997.

<sup>14</sup> Films, Videos, and Publications Classification Act 1993, ss9-11.

<sup>15</sup> *Gay Rights/Special Rights, Inside the Homosexual Agenda*, unreported, Office of Film and Literature Classification, notice of decision under section 38(1) of the FVPC Act 1993, 8. [Classification Office Decision]; *AIDS: What You Haven't Been Told*, unreported, Office of Film and Literature Classification, notice of decision under section 38(1) of the FVPC Act 1993

<sup>16</sup> Films, Videos, and Publications Classification Act 1993, section 52(2).

<sup>17</sup> Classification Office Decision, above n 15, 12. In saying this, the Office was reiterating what had been said by the Indecent Publications Tribunal in its decision *Re Exposing the AIDS Scandal* (1993) 1 HRNZ 170, 185.

## 2 *Film and Literature Board of Review decision*

The Board classified both videos as 'objectionable *simpliciter*' under section 3 of the Films, Videos, and Publications Classification Act 1993, on the basis that they represent gay and lesbian people and individuals living with HIV/AIDS as inherently inferior, in such a manner that their availability is likely to be injurious to the public good.<sup>18</sup> Section 3(1) of the Act sets out the ultimate test for objectionability. It states:

(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. [emphasis added]

The Board said that the videos strictly speaking did not depict 'matters such as sex, horror, crime, cruelty or violence'. However, it went on to say that the words 'such as' in section 3(1) of the Act meant the definition of objectionable was inclusive. The Board relied on the decision of the Court of Appeal in *Howley v Lawrence Publishing Company Ltd*<sup>19</sup>. Therefore, regardless of whether the videos depict one of the five listed matters, they fall within the definition of objectionable. Although they are still qualified by the final phrase in section 3(1) 'injurious to the public good'. The videos in this case however, deal with a sexually transmitted virus and matters of sexuality and the Board concluded they were matters 'such as' sex and therefore fell within section 3(1) of the Act.<sup>20</sup>

The Board concluded that nothing in the videos fell under section 3(2)<sup>21</sup> of the Act and therefore it was necessary to give 'particular weight' to the matters listed in section 3(3) of the Act, in this case section 3(3)(e). Section 3(3)(e) of the Act states:

(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 –

<sup>18</sup> *Re Gay Rights*, above n 5, 436.

<sup>19</sup> [1986] 1 NZLR 404.

<sup>20</sup> *Re Gay Rights*, above n 5, 428.

<sup>21</sup> See Appendix A

- (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.

The relevant grounds of discrimination in this case were section 21(1)(m), sexual orientation, and section 21(1)(h)(vii) the presence in the body of organisms capable of causing illness.<sup>22</sup>

After assessing the content of the videos, the Board was satisfied that they did represent gays, lesbians, and people living with HIV/AIDS as inherently inferior. The Board said that *Gay Rights/Special Rights* argues that a homosexual orientation is responsible for the spread of HIV and that therefore sexual orientation should not be a legally prohibited ground of discrimination.<sup>23</sup> The most fundamentally injurious aspect of the *AIDS* video according to the Board is the deliberate association of sexual orientation with the spread of the disease. The video is said to make two causal links that do not exist; the link between orientation and the spread of disease and the link between orientation and the presence in the body of organisms capable of causing disease.<sup>24</sup> The Board stated that there is a link between sexual practices and the spread of disease, but that is a link that the video does not make.<sup>25</sup>

The Board as required, considered section 3(4) of the Act, although only generally.<sup>26</sup> The Board concluded that not only was the dominant effect of the videos as a whole to represent the gay community and individuals living with HIV/AIDS as inherently inferior but it also had consequential effects. These consequential effects included reducing confidence in public health measures and the maintenance of negative attitudes. It was the cumulative effects of the videos that led the Board to believe that the availability of the publications was likely to

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<sup>22</sup> *Re Gay Rights*, above n 5, 430.

<sup>23</sup> *Re Gay Rights*, above n 5, 432.

<sup>24</sup> *Re Gay Rights*, above n 5, 431.

<sup>25</sup> With respect, the video does make this link. In discussing the primary modes of transmission the video refers to sexual activity both homosexual and heterosexual. However, this is somewhat overshadowed by the other links and comments that HIV and AIDS are only now becoming a problem for the heterosexual population.

<sup>26</sup> See Appendix A



be injurious to the public good.

The Board felt that it could not determine objectionability under section 3 in isolation of the New Zealand Bill of Rights Act 1990 (the BOR Act) and the Human Rights Act 1993 (the HR Act). They saw their task as finding a way to reconcile or balance two apparently competing interests, freedom of expression<sup>27</sup> and freedom from discrimination<sup>28</sup>. The Board said that although section 6 of the BOR Act requires ambiguities in the FVPC Act to be given a meaning consistent with the rights and freedoms contained in the BOR Act, "it offers no guidance on which of two apparently competing rights in the Bill of Rights Act should be chosen to resolve any such ambiguity"<sup>29</sup>.

The Board concluded that the explicit incorporation of the prohibited grounds of discrimination in the Human Rights Act 1993 as criteria to be given 'particular weight' to in section 3(3)(e) signals Parliament's intention to limit freedom of expression.<sup>30</sup> The reference to the grounds of discrimination was also seen as legislative recognition that it is possible for two rights to come into conflict with each other. When they do, according to the Board, freedom of expression "may be subordinated"<sup>31</sup> and the "right to be free from discrimination should prevail".<sup>32</sup> The Board concluded that the classification of objectionable in this case was a reasonable limit on the freedom of expression consistent with section 5 of the BOR Act.

Living Word Distributors appealed pursuant to section 58 of the FVPC Act to the High Court on the basis that the Film and Literature Board of Review erred in law.

<sup>27</sup> New Zealand Bill of Rights Act 1990, section 14.

<sup>28</sup> New Zealand Bill of Rights Act 1990, section 19(1)

<sup>29</sup> *Re Gay Rights*, above n 5, 434.

<sup>30</sup> *Re Gay Rights*, above n 5, 434.

<sup>31</sup> *Re Gay Rights*, above n 5, 434.

<sup>32</sup> *Re Gay Rights*, above n 5, 434.

### 3 High Court decision

The High Court decision rejected Living Word's five grounds of appeal.<sup>33</sup> The Court dealt with the second ground of appeal first. The second ground raised by the appellant was that the Board did not have jurisdiction to assess the videos under section 3 of the Films, Videos, and Publications Classification Act 1993. The appellant argued that the videos only dealt with sexual matters peripherally, the videos being more to do with "the politics of persons of certain sexual orientations"<sup>34</sup> and accordingly section 3(1) did not apply. The High Court's response was that despite the focus of the videos being on the perceived homosexual agenda, homosexual 'sex' is dealt with. The Court said<sup>35</sup> "[t]he question is not whether this is central or marginal to the overall discourse but whether it forms part". Because the videos dealt with matters 'such as sex,' section 3(1) of the Act was considered to be satisfied.

The High Court took its reasoning a step further. Since the Board's primary concern was with the videos' impact on a class of persons defined by sexual orientation, the more important question was whether the impact of a publication on such a class comes within the purview of section 3(1).<sup>36</sup> The Court concluded that the words 'such as' in section 3(1) were indicative of a general approach and of the possibility of a publication that referred to none of the five listed matters still being the subject of classification under section 3(1) of the Act. The reference to section 21(1) of the Human Rights Act 1993 (the HR Act) in section 3(3)(e) was thought to support that conclusion. The High Court said the matters in section 3(1) could be added to, and the inclusion of section 21(1) of the HR Act more explicitly justified the inclusion of sexual orientation, race and gender.<sup>37</sup>

The first ground of appeal was that the Board had made a legal error in making a classification that was inconsistent with the appellant's right to freedom of expression under section 14 of the New Zealand Bill of Rights Act 1990 (the BOR

<sup>33</sup> *Living Word v Human Rights Action Group (Wellington)* (1 March 2000) unreported, High Court, Wellington Registry, AP 26/98, Heron, Durie JJ. [*Living Word* (HC)]

<sup>34</sup> *Living Word* (HC), above n 33, para [8].

<sup>35</sup> *Living Word* (HC), above n 33, para [8].

<sup>36</sup> *Living Word* (HC), above n 33, para [9].

<sup>37</sup> Presumably, the inclusion of all the other matters in section 21(1) of the Human Rights Act would be justified as well. See Appendix A.

Act). Living Word argued that the imposed censorship in this case went beyond what is a reasonable limit as stated in section 5 of the BOR Act, and said that,<sup>38</sup>

opinions on matters of morality and social policy ought not to be suppressed in a free and democratic society and the two videos were in essence attempting to express such opinion.

The High Court agreed with the appellant saying that the ultimate question for the Board was whether a decision to ban the videos was a reasonable limit on freedom of expression in a free and democratic society.<sup>39</sup> The Court makes comments throughout the judgment of its concern for the inroads into freedom of expression that this case represented.<sup>40</sup> Nevertheless, the Court concluded that the Board had not erred in law for a number of reasons.

The High Court highlighted that rights provided under the BOR Act are not absolute.<sup>41</sup> It also acknowledged that fundamental rights cannot be taken away by the general wording of a statute.<sup>42</sup> The problem for the appellant was that the Court saw its argument for giving paramountcy to section 14, as running straight into the equally important section 19 freedom, the Court making it clear that neither right was to be ranked.<sup>43</sup> Supported by the reference to section 21(1) of the Human Rights Act in section 3(3)(e) of the Act, the Court felt the view taken by the Board with regard to the sting of the videos was one open to them.

Within this ground of appeal, the appellant submitted that the Board's decision was one that no reasonable board could make. This was because in the appellant's view, the videos did not rise to a level of representing homosexuals as inherently inferior.<sup>44</sup> The Court was invited by the appellant to consider the Board's analysis of the videos' content with regard to certain matters the appellant referred to as misdescription. The High Court referred to *Edwards v Bairstow*<sup>45</sup> which sets out the classical test of what is an error of law in the context of an appeal from a tribunal. Only where the decision has proceeded on some "fallacious foundation

<sup>38</sup> *Living Word* (HC), above n 33, para [13].

<sup>39</sup> *Living Word* (HC), above n 33, para [13].

<sup>40</sup> *Living Word* (HC), above n 33, para [19], [31], [32], [37].

<sup>41</sup> *Living Word* (HC), above n 33, para [14].

<sup>42</sup> *Living Word* (HC), above n 33, para [15], [17].

<sup>43</sup> *Living Word* (HC), above n 33, para [17].

<sup>44</sup> *Living Word* (HC), above n 33, para [21].

<sup>45</sup> [1956] AC 14, 36 (HL).

of fact”<sup>46</sup> might the court intervene. The Court considered the appellant’s criticism of the decision and concluded they were views reached as a matter of interpretation. The Court said<sup>47</sup>

[t]o deal with those findings otherwise is to convert this court into a court of general appeal on censorship issues which has long since ceased to be the case.

The Court’s final consideration under the first ground of appeal was the impact of the Court of Appeal decision in *G A Moonen v Film and Literature Board of Review*.<sup>48</sup> This decision came out after the hearing but before the High Court released its judgment. The Court of Appeal in *Moonen* rejected *News Media Limited v Film and Literature Board of Review*.<sup>49</sup> The pivotal concern for the High Court was that the Board in relying on the observations in *News Media* might have erroneously regarded Bill of Rights Act considerations as having no part to play in the particular decision.<sup>50</sup> However, the Court said that on further assessment of the Board’s decision this was not the case.<sup>51</sup>

The third ground of appeal was that the Board failed to determine whether in fact the videos were injurious to the public good.<sup>52</sup> The appellant argued the Board made the assumption that the videos were likely to be injurious to the public good on the basis that the videos represented a class of people as inherently inferior. The Court rejected this saying that whether the videos were injurious to the public good must have been central to the Board’s inquiry.

The fourth ground of appeal concerned whether or not the Board had regard to the extent, degree and manner in which the videos represented persons as inherently inferior. The Court concluded the Board’s analysis of the videos suggested that it was all to do with balance and degree.<sup>53</sup>

<sup>46</sup> *Living Word* (HC), above n 33, para [24].

<sup>47</sup> *Living Word* (HC), above n 33, para [25]. This comment refers to section 4 of the Act, which states that the decision of whether a publication is objectionable is for the expert opinion of the censoring bodies. See Appendix A.

<sup>48</sup> [2000] 2 NZLR 9.

<sup>49</sup> (1997) 4 HRNZ 410.

<sup>50</sup> *Living Word* (HC), above n 33, para [29].

<sup>51</sup> *Living Word* (HC), above n 33, paras [29] – [31].

<sup>52</sup> *Living Word* (HC), above n 33, para [33].

<sup>53</sup> *Living Word* (HC), above n 33, para [36].

The fifth ground of appeal was that the Board failed to consider each individual criterion listed in section 3(4) of the Act. The Court felt that all the matters had been dealt with in various ways, either directly or indirectly.<sup>54</sup>

It is from this decision that Living Word appealed to the Court of Appeal pursuant to section 70 of the Act on the basis that the High Court had erred in law. This paper will now turn to consider the two judgments from the Court of Appeal. It is unclear, whether the combined judgment fully supports Thomas J's separate judgment. The combined judgment does note however, that the Board when re-considering the videos will have take into account the observations made in both judgments.<sup>55</sup>

There is a division of support for this decision. Living Word Distributors and other Christian groups view it as a victory for freedom of expression. This paper contends that the victory is bittersweet. The implications arising from this decision resonate far beyond the parameters of the videos in question. It has the potential to effect many censoring decisions made by the Office of Film and Literature Classification and the Film and Literature Board of Review and not just in relation to publications that represent a class of people as inherently inferior. Consequently, the analysis of the Court of Appeal decision focuses not only on the implications for the Living Word case but also on the ability of the censoring authorities in general to carry out their statutory role.

#### A Court of Appeal's Decision

Both judgments in the Court of Appeal were in agreement as to the operation of section 3(1), rejecting Living Word's 'gateway' approach. Section 3(1) serves two purposes. It defines the reach of obscenity in terms of subject matter and sets out the test of 'injurious to the public good'. The phrase 'such as' has both an

<sup>54</sup> *Living Word* (HC), above n 33, para [37].

<sup>55</sup> *Living Word* (CA), above n 1, para [51].

### III THE SUBJECT MATTER 'GATEWAY'

The main issue considered by both judgments in the Court of Appeal was whether the Film and Literature Board of Review had the jurisdiction to consider the videos *Gay Rights/Special Rights* and *AIDS: What You Haven't Been Told* for classification under section 3 of the Films, Videos and Publications Classification Act 1993 (the Act). This issue turns on the interpretation of the words 'matters such as sex, horror, crime, cruelty, or violence', in section 3(1) of the Act.<sup>56</sup>

The essence of Living Word's submission was that the videos cannot be properly described as dealing with sex or matters such as sex and do not, therefore, come within the meaning of objectionable under section 3(1) of the Act. Living Word submitted the High Court erred in law in holding that the words 'such as' indicate a generality of approach and that a publication, which dealt with none of the listed matters, could still be classified as being objectionable.<sup>57</sup> Counsel submitted two alternative approaches to section 3(1). Either the five categories are exhaustive and self defining, or the words 'such as' require a reading of the categories that means only matters which come within those categories or are of a like kind.

Counsel for the Human Rights Action Group (Wellington) submitted section 3(1) of the Act did not amount to a jurisdictional 'gateway' barring publications that do not deal with one of the five listed matters. The matters listed in section 3(1) were said to be illustrative and not exhaustive. In other words, 'such as' means for example. Counsel argued in the alternative, that the videos describe and deal with sexual behaviour and therefore come within the description "matters such as sex" as stated in section 3(1) of the Act.<sup>58</sup>

#### A Court of Appeal's Decision

Both judgments in the Court of Appeal were in agreement as to the operation of section 3(1), adopting Living Word's 'gateway' approach. Section 3(1) serves two purposes. It defines the reach of censorship in terms of subject matter and sets out the test of 'injurious to the public good'. The phrase 'such as' has both an

<sup>56</sup> See Appendix A.

<sup>57</sup> *Living Word* (CA), above n 1, para [20].

<sup>58</sup> *Living Word* (CA), above n 1, para [21].

“expanding and limiting”<sup>59</sup> effect in the context of the Act. It expands ‘sex, horror, crime, cruelty, or violence’ beyond the bare focus of the words, yet limits the qualifying publications to those that can fairly be described as dealing with matters of the kind listed. To pass through the ‘gateway’ the publication must either deal with one of the matters, or matters that are akin to those matters. The combined judgment viewed the matters as pointing toward “activity rather than to the expression of opinion or attitude”.<sup>60</sup> The separate judgment of Thomas J suggests the same.<sup>61</sup> The subject matter must then be dealt with in such a manner that the availability of the publication is likely to be injurious to the public good before censorship is permissible.

Both judgments consider the interplay between section 3(1) and section 3(3) of the Act, with particular emphasis on section 3(3)(e).<sup>62</sup> Contrary to the decision in the High Court, section 3(1) can not be “ignored or by-passed or added to”<sup>63</sup> by invoking section 3(3). Section 3(3) does not expand the scope of the subject matter that may be classified as objectionable under section 3(1). The reference to section 21(1) of the Human Rights Act in section 3(3)(e) of the 1993 Act does not therefore, justify including sexual orientation, race and gender within section 3(1).<sup>64</sup> Section 21(1) is simply to be a factor weighed in relation to the subject matter<sup>65</sup> within section 3(1), and not as a separate reason for censorship.<sup>66</sup>

Section 3(3)(e) will not be relevant until after a publication that represents members of a particular class as inherently inferior has made it through the jurisdictional gateway. At that point section 3(3)(e) requires that particular weight be given to that feature of the publication. Section 3(3)(e) is therefore not a separate justification for censorship.

Thomas J said it was essential there is a direct connection between the subject matter as defined in section 3(1) and the likelihood of injury to the public good.<sup>67</sup>

<sup>59</sup> *Living Word* (CA), above n 1, para [27].

<sup>60</sup> *Living Word* (CA), above n 1, para [28].

<sup>61</sup> *Living Word* (CA), above n 1, para [87] per Thomas J.

<sup>62</sup> *Living Word* (CA), above n 1, para [32]; paras [73]-[74] per Thomas J

<sup>63</sup> *Living Word* (CA), above n 1, para [30].

<sup>64</sup> *Living Word* (CA), above n 1, para [32]

<sup>65</sup> Films, Videos, and Publications Classification Act 1993, section 3(1).

<sup>66</sup> *Living Word* (CA), above n 1, para [33].

<sup>67</sup> *Living Word* (CA), above n 1, para [84] per Thomas J; para [50].

The words 'in such a manner' are crucial in forging this link. The Board and the High Court failed to link the subject matter at the 'gateway'; in this case, sex or matters such as sex, with likelihood of injury to the public good. His Honour said<sup>68</sup>

it is not acceptable that a publication might deal with sex in an unobjectionable way but the publication is then held to be injurious to the public good for unrelated reasons. Where the alleged harm of the publication is unrelated to matters such as sex, horror, crime, cruelty, or violence, the Board does not have the jurisdiction to go further.

In this case, the alleged injury to the public good was the manner in which the videos depicted gays and lesbians and individuals living with HIV/AIDS. This is said to be unrelated to sex or a matter such as sex, which is what the Board and the High Court used for the purposes of section 3(1).<sup>69</sup> The consequence of not making this link according to his Honour is to expand the subject matter jurisdiction beyond what Parliament contemplated.<sup>70</sup>

It is important to assess the reasoning in both judgments and to consider the impact it has on the Board's jurisdiction generally and where, like in the present case, a publication represents a class of people as inherently inferior.

### **B Interpreting Section 3(1)**

The effect of the Court of Appeal's interpretation of section 3(1) of the Act is to make it a relatively narrow subject matter gateway. However, section 3(1) is capable of an alternative interpretation that does not give rise to the same practical difficulties and is more in keeping with Parliament's intention. Before considering this alternative interpretation, it is important to analyse the reasoning behind the 'gateway' interpretation and the difficulties it creates for the censoring bodies.

<sup>68</sup> *Living Word* (CA), above n 1, para [84] per Thomas J.

<sup>69</sup> *Living Word* (CA), above n 1, para [85] per Thomas J.

<sup>70</sup> *Living Word* (CA), above n 1, para [87] per Thomas J.



1 Parliament's inclusion of matters "such as"

An important influence on the combined judgment's decision was Parliament's intention. Under the previous statutory regime, the Indecent Publications Act 1963, the definition of 'indecent' said "includes ... matters of sex, horror, cruelty, crime or violence"<sup>71</sup>. For years there were disputes, over whether 'includes' was inclusive or exhaustive. The matter was finally determined in 1986 in the Court of Appeal decision of *Howley v Lawrence Publishers Ltd*<sup>72</sup>. Woodhouse P ruled the definition did not mean that other matters could not be indecent, however they would have to be injurious to the public good to justify banning. The effect of this decision was to allow a publication that did not deal with one of the five matters to still come within the censoring body's jurisdiction.

The combined judgment viewed the absence of the word 'includes' in the 1993 Act as significant. Given the similarity in the definition of 'indecent' and 'objectionable', the inclusion of 'such as' and not 'includes' was taken to indicate a "deliberate departure from the unrestricting includes"<sup>73</sup>. This view of Parliament's intention no doubt helped shape the decision that section 3(1) acts as a gateway.

With respect, there is evidence to suggest that the inclusion of the words 'such as' may not have been as deliberate and was intended to provide for a flexible inclusive definition. The initial draft of section 3(1) did not contain a reference to 'such as' or 'includes'.<sup>74</sup> The Department of Justice report to the Internal Affairs and Local Government Select Committee notes that the Indecent Publications Tribunal queried whether section 3(1) as stated created a definition that was too narrow.<sup>75</sup> The Tribunal felt that section 3(1) should contain matters other than sex, horror, crime, cruelty or violence, as in the definition of 'indecent'.<sup>76</sup>

<sup>71</sup> Indecent Publications Act 1963, section 2.

<sup>72</sup> [1986] 1 NZLR 404.

<sup>73</sup> *Living Word* (CA), above n 1, para [27].

<sup>74</sup> Department of Justice Report to Internal Affairs and Local Government Select Committee on the Films, Videos and Publications Classification Bill (Wellington 1993) DJ/3, 7. [Department of Justice Report]

<sup>75</sup> Department of Justice Report, above n 74, 7.

<sup>76</sup> Department of Justice Report, above n 74, 7.

The Department of Justice expressed some reservations with the definition of indecent given the long period of time the definition remained unsettled. In the end, the report suggested that another way to broaden the definition was to add after the words 'sex, horror, crime, cruelty, or violence', "something along the lines of 'or related matters'"<sup>77</sup>. What was meant by 'or related matters' is inferred from other parts of the report. The Act was to proceed on the basis that it is not good policy to attempt a comprehensive and precise definition of all that is 'objectionable', as an exhaustive definition restricts the ability of the law to develop.<sup>78</sup> Therefore, the addition of a term like 'or related matters' was intended to maintain a flexible inclusive definition of what is objectionable.

The adoption of the term 'such as' occurred at the select committee stage. The Minister of Justice during the second reading said the inclusion of the words 'such as'<sup>79</sup>

... ensures that the definition of the matters likely to be considered harmful are not closed off. That is important, because the legislation must have flexibility to accommodate changing social perceptions.

## 2 *What are 'matters such as sex, horror, crime, cruelty, or violence'?*

On the basis that Parliament deliberately departed from the unrestricting 'includes', the Court of Appeal interpreted the term 'such as' in section 3(1) as having both an expanding and limiting effect. It expanded 'sex, horror, crime, cruelty and violence' beyond the bare focus of the words, yet limited the qualifying publications to those that can fairly be described as dealing with matters of the kind listed. The combined judgment said if the term 'matters' in section 3(1) meant "all matters"<sup>80</sup> then there would be no need for the words 'such as'.

The consequence of this interpretation is that a publication must deal, for example, with sex or a matter akin to sex before it will qualify under section 3(1) of the Act. In addition, the publication must also deal with the activity of sex or activity such as sex, the combined judgment indicating that the matters listed

<sup>77</sup> Department of Justice Report, above n 74, 7.

<sup>78</sup> Department of Justice Report, above n 74, 4 - 5.

<sup>79</sup> (29 July 1993) 537 NZPD 17052.

<sup>80</sup> *Living Word (CA)*, above n 1, para [26].

point to activity and not to expression of attitude or opinion on those matters. The effect of this is to further narrow the subject matter gateway.

It is possible that expression of an attitude or opinion about an activity such as sex for example would qualify under section 3(1). In both *Gay Rights/Special Rights* and *AIDS*, there is discussion about extreme sexual activity. The opinion expressed about that activity is that it is abhorrent and only practiced by gays and lesbians. Thomas J said this will “touch on sex,”<sup>81</sup> but not in a manner, which could attract censorship. It would not attract censorship because the publication does not deal with sex in a way that its availability is likely to be injurious to the public good. However, this helps to widen the ambit of section 3(1).

The best way to assess the potential effects of the subject matter gateway generally is to consider a recent classification decision, to determine whether the censoring bodies would still have jurisdiction to consider the publication. The Classification Office classified the New Zealand made film *Savage Honeymoon* under section 3 of the Act, giving it an R18 rating.<sup>82</sup> The decision was appealed to the Film and Literature Board of Review. The Board classified the film as “objectionable unless its availability is restricted to persons 15 years of age and over”, to be accompanied with a descriptive note that the film “contains irresponsible behavior associated with alcohol”.<sup>83</sup> The film contained coarse language and violence, however the Board said that by themselves they would not have warranted restriction. The likely injury to the public good in this film according to the Board, were the various depictions of alcohol and the associated conduct.<sup>84</sup> This includes the excessive consumption of alcohol without any of the normal adverse effects, drunk driving, and general anti-social behaviour including offensive language.

The Board’s approach to section 3(1) in this case was to say that ‘sex, horror, crime, cruelty, or violence’ is not exhaustive and anti-social behaviour would fall

<sup>81</sup> *Living Word* (CA), above n 1, para [82]

<sup>82</sup> *Savage Honeymoon* unreported, Office of Film and Literature Classification, Reference No 9902216.

<sup>83</sup> *Savage Honeymoon*, (21 February 2000) unreported, Film and Literature Board of Review, Decision No 1/2000.

<sup>84</sup> *Savage Honeymoon*, above n 83, 2-3.

within section 3(1) as grounds for classification. They also looked at matters such as crime, and said it would include unlawful behaviour associated with constant consumption of alcohol as depicted in the film.<sup>85</sup> In light of the *Living Word* decision, there are now difficulties with this approach.

Section 3(1) of the Act is no longer interpreted as being exhaustive. Section 3(1) establishes the subject matter gateway and to have jurisdiction the film must deal with activity such as sex, horror, crime, cruelty or violence. Unless anti-social behaviour can come within matters such as crime, it will not qualify as grounds for censorship. Is anti-social behaviour an activity such as crime? The judgments of the Court of Appeal do not consider the scope of the five subject matters except for 'sex', which Thomas J narrowly defines.<sup>86</sup> Presumably, a narrow interpretation of the remaining matters is required.

The word crime indicates criminal acts and it is difficult to see how behaviour (although anti-social) not amounting to a criminal offence could fall within section 3(1) as a matter such as crime. Drunk driving would be a matter such as crime. However, the consumption of alcohol would not be a crime unless it was being consumed by a minor or in a place where it would amount to a criminal offence. The same problem arises in respect of offensive language. Is offensive language a matter such as sex, horror, crime, cruelty, or violence? The closest it would be similar to is violence. Yet violence and matters such as violence are more concerned with physical abuse than verbal abuse.

The Board did say there was some violence in the film and this would qualify under section 3(1). However, even if the publication qualifies under section 3(1) through scenes in the film that depict violence and crime, there is the issue of linking the subject matter under section 3(1) with the injury to the public good. There is immediately a problem with violence. The Board states that the violence itself is not at a level to warrant restriction. Furthermore, if the only criminal act is drunk driving and this makes up a relatively small portion of the film, then proportionality issues arise.<sup>87</sup> The main concern for the Board was the excessive

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<sup>85</sup> *Savage Honeymoon*, above n 83, 3.

<sup>86</sup> *Living Word* (CA), above n 1, para [83] per Thomas J.

<sup>87</sup> *Living Word* (CA), above n 1, para [82] per Thomas J.

consumption of alcohol and anti-social behaviour that goes with it. This is what is seen as likely to be injurious to the public good, yet it is not related in anyway to the subject matter in section 3(1), in this case violence and crime.

The result is that either the Board does not have jurisdiction or if it does, it is unlikely to be able to show a direct enough connection with the injury and the subject matter that provided it with jurisdiction in the first place. If the Board does not have jurisdiction then it cannot classify the film at all. Where the Board does have jurisdiction, but can not make out the direct connection requirement, then the publication is not injurious to the public good, therefore it is not objectionable and it cannot receive a restricted rating.

This result does not appear to accord with Parliament's intention to provide greater consistency and clearer guidelines to the censor and the industry.<sup>88</sup> During the second reading of the Bill the Honourable Jenny Shipley stated,<sup>89</sup>

[t]he Government will not require that a direct link between hard-core material and harm in our community is to be proved before the censor can ban or restrict material. Instead, the Government will instruct the censor to limit material if it is likely to result in harm or cause harm. In other words, the Government will allow the censors to exercise their common sense.

John Carter's sentiments are similar. He states that a clear direction has been given to the censors along with "scope for the censors to use their common sense and to exercise their judgement".<sup>90</sup> Therefore it seems inconceivable that Parliament intended to create the situation where the censor could not restrict a publication because of offensive language or anti-social behaviour alone.<sup>91</sup>

### 3 *An alternative interpretation*

An alternative interpretation of section 3(1) is to give the words 'such as' a much fuller interpretation and to take a more purposive approach to the matters of sex, horror, crime, cruelty and violence. It is accepted that interpreting 'such as' in a

<sup>88</sup> (22 June 1993) 536 NZPD 15987.

<sup>89</sup> (22 June 1993) 536 NZPD 15989.

<sup>90</sup> (22 June 1993) 536 NZPD 15986.

<sup>91</sup> It is interesting to note that under section 10 of the Act, the Film and Video Labelling Body is required to give a rating and in some cases a description of the contents. Section 10(2)(b) states

manner that widens section 3(1) to encompass any subject matter renders the five categories virtually superfluous. However, 'such as' is open to an interpretation that extends the subject matter beyond the five categories, providing for an implied sixth category, without rendering the five categories superfluous.

The *Oxford Concise Dictionary* defines the word 'such' as meaning

"of the kind or degree in question or under consideration..., of the kind or degree already indicated, or implied by the context".

The focus of both judgments appears to have only been on "of a kind" and in a very literal sense. The alternative interpretation is to focus on the fuller definition of the word 'such' that being "of the kind or *degree*".

This wider definition of 'such as' requires taking a more purposive approach to 'sex, horror, crime, cruelty, or violence'. Rather than being a relatively narrow definition of subject matter, it can be seen as setting a tone for the legislation. In a more purposive sense the words sex, horror, cruelty, crime and violence are illustrative of harm. It signals that Parliament is concerned with matters that give rise to the same degree of harm that depictions of sex, horror, crime, cruelty or violence do. After all, the Act represents a major shift in philosophy, away from moral indignation towards a focus on the likelihood of harm.<sup>92</sup> The essential test 'likelihood of injury to the public good' reflects this emphasis on harm. The Department of Justice in its report to the select committee referred to the concept of injury to the public good as a "significant innovation" in New Zealand's censorship law. The Report said,<sup>93</sup>

[i]t encapsulates precisely the idea that, in a democratic society, material should be judged for prohibition on the basis that its availability would be harmful to that society's interests. It is a continually developing concept, inherently sensitive to changes in society and social perceptions.

A purposive approach is also in keeping with the policy that underlies the Act; namely, that it is unwise to attempt a strict and comprehensive definition of what is objectionable. There is an example in Thomas J's judgment of his Honour

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that the body is to be concerned with anti-social behaviour, cruelty, violence, crime, horror, sex or offensive language or behaviour.

<sup>92</sup> (22 June 1993) 536 NZPD 15989.

<sup>93</sup> Department of Justice Report, above n 74, 2.

construing the words of section 3 in this more purposive manner. In determining the scope of the word 'sex' his Honour uses the words, horror, crime, cruelty and violence and subsections (2) and (3) to flavour the definition of sex. His Honour concludes that 'sex' in this context is concerned with unacceptable conduct or activity. Horror, crime, cruelty and violence all being examples of unacceptable behaviour. Subsections (2) and (3) are also seen as referring to socially unacceptable acts.<sup>94</sup>

The end result is to create an implied gateway that is invoked where the publication deals with or depicts a matter that gives rise to the same degree of harm that the matters of sex, horror, crime, cruelty, or violence do. Nevertheless, to be objectionable it is still subject to the requirement that it be injurious to the public good. Under this interpretation, there will not be any need to resort to spurious attempts of trying to extend one of the five matters listed.

Under this alternative approach, the Board would have jurisdiction to consider the film *Savage Honeymoon*. The depiction of excessive consumption of alcohol, anti social behaviour and the use of offensive language in the film would fall within the implied gateway as it all has the potential to engender the same degree of harm as crime or violence, despite it being unlikely to be categorised as crime or violence. This approach also satisfies the direct connection requirement. The jurisdictional subject matter, excessive consumption of alcohol, anti-social behaviour and offensive language is what is likely to be injurious to the public good.

### *C The Impact of the 'Gateway' on Section 3(3)(e)*

Having made it clear that section 3(1) amounts to a jurisdictional gateway the court said that section 3(3)(e) could not be used to add to or by-pass it. Consequently, the Act is only concerned with publications representing a class of people as inherently inferior, where they depict or deal with activities relating to sex, horror, crime, cruelty or violence. This is notwithstanding the intention that section 3(3)(e) is to cover the core types of social bigotry.<sup>95</sup> As a result, the

<sup>94</sup> *Living Word* (CA), above n 1, para [83] per Thomas J.

<sup>95</sup> Department of Justice Report, above n 74, 11.

operation of section 3(3)(e) is substantially restricted, with many publications representing a class of people as inherently inferior falling outside the censoring bodies' jurisdiction. The main reason for this being the nature of many of the publications that represent a class of people as inherently inferior.

### *1 The nature of publications expressing inherent inferiority*

A significant number of the publications that represent a class of people as inherently inferior will not deal with the five categories of sex, horror, crime, cruelty or violence. Take the hypothetical example of a publication that expounds the message that a certain class of people is inept. They do not care for their children properly. They are lazy and they do not want to work, instead they are happy to be unemployed and be on welfare. There is nothing to invoke the five jurisdictional gateways, yet the potential for harm is no less real than a publication that does invoke one of the gateways.

There is much academic writing on the impact of this sort of expression. The effect of this expression whether directly or indirectly is to "distort the message of a group or class of people, to deny their humanity, and to make them objects of ridicule and humiliation".<sup>96</sup> Kathleen Mahoney considers the reaction of people targeted by this kind of expression. She states:<sup>97</sup>

People who are targeted...respond to it by being fearful and withdrawing from full participation in society. They are humiliated and degraded, and their self-worth is undermined.

Critical race theorist Mari Matsuda considers the impact that this expression has on people's lives. She observes:<sup>98</sup>

As much as one may try to resist,... the effect on one's self-esteem and sense of personal security is devastating. To be hated, despised and alone is the ultimate fear of all human beings.

<sup>96</sup> Kathleen E Mahoney "Hate Speech: Affirmation or Contradiction of Freedom of Expression" [1996] U Illinois L Rev 789, 792.

<sup>97</sup> Mahoney, above n 96, 792.

<sup>98</sup> Mari Matsuda "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich L Rev 2320, 2337 - 2338.



An expected retort would be that unless the expression gives rise to a serious threat of actual violence, where is the harm? Yet, this argument fails to appreciate the power of expression. A more imminent fear than violence to the target group is that the expression will arouse or exacerbate distrust towards the particular group in the minds of others. Matsuda best describes how expression representing a class as inherently inferior can work on the subconscious of both the victims and even the most right thinking individuals. She states that,<sup>99</sup>

[a]t some level, no matter how much both victims and well-meaning dominant-group members resist it, ...inferiority is planted in our minds as an idea that may hold some truth. The idea is improbable and abhorrent, but because it is presented repeatedly, it is there before us. "Those people" are lazy, dirty, sexualised, money grubbing, dishonest, inscrutable, we are told. We reject the idea, but the next time we sit next to one of "those people," the dirt message, the sex message, is triggered. We stifle it, reject it as wrong, but it is there, interfering with our perception and interaction with the person next to us....For the victim, similarly, the angry rejection of the message of inferiority is coupled with absorption of the message.

In the *Living Word* case, the Film and Literature Board of Review was aware of this potential for harm, regardless of whether the publication dealt with matters of sex, horror, crime, cruelty, or violence. The Board interpreted the inclusion of section 3(3)(e) as indication from Parliament that it too was acknowledging this potential for harm.<sup>100</sup>

## 2 *The demise of section 3(3)(e)*

In light of the Court's determination of section 3(1) as a subject matter gateway and the nature of many publications representing a group of people as inherently inferior, section 3(3)(e) will often be prevented from operating. This is likely to be the case with *Gay Rights/Special Rights* and *AIDS*. The Board is required to reconsider whether it has jurisdiction to classify the videos. Justice Thomas in his separate judgment did not see the point in holding that the Board has effectively exceeded its jurisdiction and then remitting it back to the Board to confirm that.<sup>101</sup>

<sup>99</sup> Matsuda, above n 98, 2339 - 2340.

<sup>100</sup> *Re Gay Rights*, above n 5, 432.

<sup>101</sup> *Living Word* (CA), above n 1, para [81] per Thomas J.

In his Honour's view, the videos do not fall within the purview of section 3(1) and the Board has assumed jurisdiction that it does not have. As discussed earlier, the issue is whether sexual orientation is a matter such as sex. While the combined judgment did not make a final determination on the point, Thomas J made it very clear that sexual orientation was not literally a matter such as sex.<sup>102</sup>

Sexual orientation cannot be a matter such as sex; otherwise it creates an anomaly. If sexual orientation amounted to a matter such as sex then it would be elevated above all the other grounds of discrimination included in section 3(3)(e) by virtue of section 21(1) of the Human Rights Act 1993. If the videos made the same claims in respect of a class of people identified by race, the publication would not satisfy any of the five jurisdictional gateways based on the section 21(1) characteristic alone. This does not mean the censoring bodies should not have jurisdiction in either of these situations. On the contrary, the potential anomaly is further evidence that Parliament did not intend for section 3(1) to exclude from jurisdiction publications that invoke section 3(3)(e) but do not deal with sex, horror, crime, cruelty or violence.

Section 3(3)(e) will continue to have a limited operation where publications deal with matters such as sex, horror, crime, cruelty or violence, yet the matters are not dealt with at a level that is injurious to the public good. Consider a film about group of skinheads who go around chasing and beating up black people because in their view white people are superior. The film falls within section 3(1) as it deals with matters such as violence, yet the level of violence itself is not enough to make it objectionable under either section 3(2) or section 3(3). However, because the violence targets only black people, the film represents black people as inherently inferior and it does this to such an extent that it is likely to be injurious to the public good. In this situation, section 3(3)(e) will operate to allow classification of this publication where it is shown that the violence is related to the injury to the public good, the representation of black people as inherently inferior. The direct connection requirement is likely to be satisfied as it is the violence towards black people that represents them as inherently inferior, which is of a level injurious to the public good.

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<sup>102</sup> *Living Word* (CA), above n 1, para [83] per Thomas J.

Contrast this with a film about a middle class white supremacist that takes a more rational approach towards communicating their message of superiority. Instead of skinheads with baseball bats, the film follows this person to gatherings where doctrines of white supremacy and segregation are espoused. The film results in the same effect as the skinhead film, the representation of black people as inherently inferior. In fact, the rational approach taken by the middle class white supremacist film and the arguments put forward are far more persuasive and affective. Yet, in this case section 3(3)(e) will not be able to operate because the film does not deal with matters such as sex, horror, crime, cruelty or violence.

The overall effect is to substantially restrict the power of section 3(3)(e). Arguably, some of the more persuasive and potentially dangerous pieces of propaganda will go untouched. The message the legislation now sends, is that as long as the publication does not depict or deal with sex, horror, crime, cruelty, or violence, then no matter how much the publication represents a class of people as inherently inferior, Parliament is not concerned.

#### **IV PROTECTING OPINION**

The interpretation of section 3(1) as a jurisdictional gateway relating to activity and not expression of attitude or opinion is partly due to the Court of Appeal's wish to protect the expression of opinion. Similarly, the basis for preventing section 3(3)(e) from being a separate reason for censorship is also the protection of opinion. This is because expression of an opinion by one class in society that is negative towards another will to some extent represent that class as inherently inferior. Living Word Distributors unswervingly maintained that the videos express opinion on moral and political matters pertaining to the legal recognition of a person's sexual orientation and the politicising of the AIDS epidemic. The implication being that the banning of these videos amounted to the restriction of opinion. Restricting the depiction or dealing of matters in section 3(1) to activity and not expression of attitude or opinion implies that expression of attitude or opinion is not likely to be injurious to the public good. The combined judgment supports this implication by way of reference to freedom of expression justifications.

## A *Justifying the Protection of Opinion*

Free expression of opinion according to the combined judgment is necessary for the democratic process, the market place of ideas and personal fulfilment. The combined judgment does not go into the detail of what these justifications amount to. Very briefly, freedom of expression is often described as the cornerstone of democracy. It has been said that<sup>103</sup>

democracy stands (and some would say, may fall) on the conviction that unpopular ideas should be freely expressed, and that, if they are false or evil, they will ultimately be defeated, not by censorship or prosecution, but by public education and debate.

The underlying premise is that government cannot be trusted.<sup>104</sup> Without freedom of expression, the State may censor ideas and opinions it opposes thereby restricting the functioning of a true democracy.

The market place of ideas concept is closely aligned with the democracy argument. In what is perhaps one of the most famous statements on freedom of expression Justice Holmes states,<sup>105</sup>

[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market.

In this marketplace citizens supposedly meet as equals and no ideas are to be suppressed. The purpose is to enable the making of wise decisions, based on a hearing of all points of view.<sup>106</sup> While success in the market place does not necessarily lead to ascertainment of the truth, for maximum effectiveness all opinions and ideas "including false or pernicious views"<sup>107</sup> must be available for public evaluation.

The last freedom of expression justification mentioned is personal fulfilment. The United States Supreme Court has stated that freedom of expression is a "means of

<sup>103</sup> Juliet Moses, "Hate Speech: Competing Rights to Freedom of Expression" [1996] AULR 185, 190.

<sup>104</sup> 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 Human Rights Act 1993* (Brooker's Ltd, Wellington, 1995) 171, 174.

<sup>105</sup> *Abrams v United States* (1919) 250 US 616,630 per Holmes J dissenting.

<sup>106</sup> Mahoney, above n 96, 794.

<sup>107</sup> Moses, above n 103, 191.

individual fulfilment".<sup>108</sup> Personal fulfilment is said to be dependent upon the "opportunities to form, and communicate beliefs and thoughts to others".<sup>109</sup>

The combined judgment also cites two cases that comment on the importance of protecting freedom of expression where the expression is of a political or social nature. It refers to the European Court of Human Rights decision in *Handyside v UK*<sup>110</sup> for the notion that freedom of expression applies to expression of all offensive opinion even if it shocks or disturbs any sector of the population. This is reminiscent of the United States view on restricting freedom of expression. The United States judiciary will strike down any legislation that attempts to restrict expression unless the expression has the effect of giving rise to "clear and present danger"<sup>111</sup>. The rationale is that unless the expression causes 'clear and present danger' it cannot be harmful.<sup>112</sup> Anything less is merely offensive and cannot be limited because the very point of freedom of expression<sup>113</sup>

...must be to afford protection to those whose expression lacks community approval, for theirs is the only sort of expression which requires protecting.

The result in the present case, is that if in the producer's opinion gay and lesbian people should not be given minority legal protection, the fact that the expression represents these people as inherently inferior is irrelevant. Freedom of expression protects offensive opinion. As disagreeable as this may seem, the State should not interfere with the expression of genuine opinion. This is because freedom of expression is a two-edged sword. While freedom of expression facilitates the subordination of groups in our society, those same groups can use it to their own advantage. The gay rights movement is an oft-cited example of this. The gay rights movement has been able to use the right to freedom of expression to enable the dissemination of its own opinions and gain acceptance. If the State had the power to interfere with the expression of opinion it opposes, then it is not hard to

<sup>108</sup> *Whitney v California* (1927) 274 US 357, 375-376 per Brandeis J, dissenting.

<sup>109</sup> Moses, above 103, 191.

<sup>110</sup> (1976) 1 EHR 737, 754.

<sup>111</sup> *Collin v Smith* (1978) 578 F2d 1197, 1204-05 (7<sup>th</sup> Cir); *Anti-defamation League of B'nai B'rith v FCC* (1968) 403 F2d 169,174 (DC Cir). The Supreme Court of Canada explicitly disagreed with the American approach. See *R v Keegstra* [1990] 3 SCR 697.

<sup>112</sup> Mahoney, above n 96, 801.

<sup>113</sup> Huscroft, above n 104, 192.

imagine a time where pro-gay rights expression itself may have been the subject of restriction.

The main concern however, is that expression representing a class of people as inherently inferior is often likely to be something more than mere opinion, as the Board in this case found. The Board agreed that opinion is to be protected, stating that<sup>114</sup>

[a]dvocacy of an opinion, no matter how offensive the opinion is, ought not to be the subject of censorship.

Nevertheless, the Board did not view the videos in this case as containing mere expressions of opinion. Indeed one member of the Board had it noted that the decision was not to be read as precedent for suppressing mere opinion.<sup>115</sup> Instead, the Board interpreted the videos as going beyond advocacy of opinion, amounting to "opinion plus misinformation".<sup>116</sup>

Where expression goes beyond what is mere advocacy of opinion it will fall outside the sphere of protection afforded to opinion. Freedom of expression justifications cannot be maintained in light of such expression, as there is a much greater potential for injury to the public good. It is necessary to consider why this is, but first, when will expression go beyond what is reasonably opinion?

## ***B When Expression Of An Opinion Is Not Mere Opinion***

Determining whether expression goes beyond mere advocacy of opinion is not likely to be limited to the videos in question. In fact, it is likely to be a problem inherent in many publications that represent a class of people as inherently inferior.

### *1 Categories of opinion*

Expression will go beyond mere opinion when that opinion is presented as fact. This is prevalent in *Gay Rights/Special Rights* and *AIDS*. Both videos are in a documentary format and make use of the video medium to present its views in an

<sup>114</sup> *Re Gay Rights*, above n 5, 432.

<sup>115</sup> *Re Gay Rights*, above n 5, 436.

<sup>116</sup> *Re Gay Rights*, above n 5, 432.

authoritative manner. An example of this is the statements in both videos that a person's sexual orientation is a choice. There is no conclusive answer on this issue, however the predominant scientific view is that a person's sexual orientation is biological.<sup>117</sup> Nevertheless, *Gay Rights/Special Rights* states that it is a myth that homosexuality is genetic or biological and that it is also a myth that homosexuals cannot change and become heterosexual. When this is introduced by the video's commentator a title appears on screen which states

"MYTH #3 PEOPLE ARE BORN HOMOSEXUAL ... NOT TRUE" and  
 "MYTH #4 HOMOSEXUALS CANNOT CHANGE THEIR BEHAVIOUR ...  
 NOT TRUE".

The video then proceeds to interview people who are presented as experts and state authoritatively that a person's sexual orientation is a choice. It is difficult to see how this could be described as an opinion. The video is clearly trying to represent its opinion as fact.

Another situation where expression cannot be categorised as mere opinion is where a misstatement or misuse of fact is used to support an opinion. For example, in *Gay Rights/Special Rights* it states that parents are concerned about the wellbeing of their children who play at a public park where gay men allegedly have sex with one another, and are often seen approaching the children. Before this, the commentator states that according to the British Journal of Sexual Medicine, gay males are eighteen times more likely to have sex with an underage person than heterosexuals are. The video is using this apparent fact to support the opinion that gay men are predisposed to paedophilia. What the video fails to acknowledge is that the age of consent in Britain for gay men is 21.<sup>118</sup> A gay man who has sex with another male who is under 21 is technically having sex with an underage person.

A further consideration is where the opinion stated is factually incorrect. An example of this in *AIDS: What You Haven't Been Told* and relates to some of the information concerning safe sex practices, which it calls safe sex propaganda.

<sup>117</sup> See American Psychological Association at <<http://www.apa.org/pubinfo/orient.html>> (last accessed 26 September 2000).

<sup>118</sup> *Halsbury's Laws of England* (4 ed, Butterworths, London, 1990) vol 11(1), Criminal Law, Evidence and Procedure, para 507, 382.

The overall impression is that condoms are unsafe and do little to limit the spread of HIV. This is the main reason for the AIDS Foundation seeking to intervene in this case. It was concerned that the information on AIDS espoused in the video would undermine public health measures taken in this country to prevent the spread of HIV/AIDS.

These are three situations where expression, while it is still possible to call it opinion, actually goes beyond being mere advocacy of an opinion. When this is the case, the justifications for protecting expression hold very little weight.

## 2 *Questioning freedom of expression justifications*

### (a) Necessary for democracy

Academics writing in this area have challenged the democracy justification in this context. There is criticism of the 'freedom of expression equals democracy' equation as this sets it up as an either/or proposition. It leads to the assumption that any restriction of expression is undemocratic. The lack of a middle ground prevents any inquiry into the harm that disadvantaged or vulnerable members of society may experience as a result of unabridged expression.<sup>119</sup>

It is also argued that this sort of expression can still be prohibited without undermining the 'necessary for democracy' argument. This is because expression representing a class as inherently inferior that goes beyond mere advocacy of opinion subverts democracy by attacking other rights and freedoms fundamental to it.<sup>120</sup> One of those rights is equality. While freedom of expression itself is important for the treatment of persons with equal respect, there are other rights and freedoms, which are also crucial to the promotion of this value.<sup>121</sup> Consequently, freedom of expression has limits imposed where necessary, to promote equality, for what is the point of dialogue without something approaching equality among speakers.<sup>122</sup>

<sup>119</sup> Mahoney, above n 96, 797.

<sup>120</sup> Moses, above n 103, 192.

<sup>121</sup> Ian B McKenna "Canada's Hate Propaganda Laws – A Critique" (1994) 26 *Ottawa L Rev* 159, 170.

<sup>122</sup> Jean Stefanic, Richard Delgado "A Shifting Balance: Freedom of Expression and Hate-Speech Restriction" [1993] *Iowa L Rev* 737, 750.



## (b) Market place of ideas

The 'market place of ideas' justification cannot be maintained in this context, as it operates on the assumption that all people are equal and that everyone can distinguish opinion from fact, and truth from falsehood.<sup>123</sup> Parliament recognised that this is not likely to be the case. The Honourable Peter Tapsell commented that in accepting the definition of 'objectionable'<sup>124</sup>

...we accept that there are many well-balanced people for whom no film or publication is likely to be injurious to their thought or to the public good. There are other less able, less well balanced people, who will be affected.

Mahoney suggests that "the view that the truth will always win out in a free-market place of ideas is, at best, naive, and at worst, dangerous".<sup>125</sup>

This justification also assumes that people have the opportunity to discuss and debate the expression. This may be possible in a live debate, however it is not as easy to question the producers of a video or film. Media like film and video are able to impart vast quantities of information in a short space of time, often leaving people with little opportunity to consider or reflect on what is being said. Furthermore, publications like the ones in question are not intended to create debate, for in the minds of the people producing them there is only one view and that is the view they espouse.

## (c) Personal fulfilment

There is no doubt personal fulfilment is important for the human psyche, however it has never been thought that someone has the right to physically attack another because it will cause them to be personally fulfilled.<sup>126</sup> Moreover, there is no reason why it should give someone the right to verbally attack another either.<sup>127</sup> Another suggestion is that in this context expression does not enhance personal fulfilment or development, rather it stifles it as a person who harbours such views

<sup>123</sup> Moses, above n 103, 193.

<sup>124</sup> (22 June 1993) 536 NZPD 15987.

<sup>125</sup> Mahoney, above n 96, 799.

<sup>126</sup> Moses, above n 103, 193.

<sup>127</sup> Wojciech Sadurski "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 Sydney L R, 163, 175.

is living in a self-limiting world.<sup>128</sup> This justification also denies other members of society the right to their own personal fulfilment.

### 3 *Treatment of opinion*

Neither judgment in the Court of Appeal deals with the distinction between mere opinion and expression going beyond that. Consequently, all expression that falls within the rubric of opinion (which is likely to include expression much worse than in the videos in question) will fall outside section 3(1) of the Act. The exception is where the expression deals with activities of sex, horror, crime, cruelty or violence.

This is an unfortunate and unnecessary result. Section 3(3)(e) of the Act is structured in a manner that protects genuine opinion while enabling the restriction of expression that goes beyond opinion. A genuinely held opinion about another group in society may represent that group as inherently inferior, however this does not mean that it is automatically injurious to the public good. Section 3(3)(e) does not establish an either/or test. Section 3(3) directs the censoring bodies to consider the “extent and degree to which and manner in which” a publication represents a class of people of inherently inferior. Publications that express a genuine opinion only will be unlikely to represent people as inherently inferior to such an extent that it is injurious to the public good.

The Board found that the videos did represent the gay community as inherently inferior to an extent and manner in which their availability is likely to be injurious to the public good. The manner in which the opinion is presented goes beyond what is reasonably advocacy of mere opinion. The misstatement of fact and presentation of opinion as fact had a significant impact, as did the visual cues and sound effects. The manner in which the opinion is expressed has the effect of creating a subtext separate from the opinion. That subtext is that gay people and their lifestyle are to blame for the spread of AIDS and the horrors that it cause, and that homosexuals have a behavioural problem and should be encouraged to change. This is what makes the videos truly injurious to the public good, not the

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<sup>128</sup> Moses, above n 103, 193.

political opinion that sexual orientation should not be a legal ground for protection or the religious opinion that homosexuality is immoral and sinful.

## V BILL OF RIGHTS ANALYSIS - A CLASH OF RIGHTS?

If a publication that represents a class of people as inherently inferior makes it through the section 3(1) gateway, the New Zealand Bill of Rights Act 1990 (the BOR Act) will become a relevant consideration in determining objectionability. The Board in determining whether the videos in question were objectionable, saw its determination as a balancing act between a clash of freedoms. Those freedoms were the freedom of expression<sup>129</sup> and the freedom from discrimination<sup>130</sup>. The High Court affirmed that approach. In fact, where the two rights came into conflict, the Board interpreted Parliament's intention as being that section 19 of the BOR Act would prevail over section 14 of the BOR Act.<sup>131</sup> Living Word argued that the only right to be directly considered was section 14 freedom of expression, as that is the only right the Board is infringing when applying section 3 of the Act.

Both judgments of the Court of Appeal agree there is no clash of rights, the High Court having erred in finding that section 14 and section 19 are in direct opposition.<sup>132</sup> Both judgments refer to *Moonen*<sup>133</sup> for the correct Bill of Rights inquiry. The combined judgment sets out paragraphs [15] and [16] of the *Moonen* decision, which deals with the operation of section 4, 5, and 6 of the BOR Act.<sup>134</sup>

<sup>129</sup> New Zealand Bill of Rights Act 1990, section 14.

<sup>130</sup> New Zealand Bill of Rights Act 1990, section 19(1).

<sup>131</sup> *Re Gay Rights*, above n 5, 434.

<sup>132</sup> *Living Word (CA)*, above n 1, para [41]-[42]; para [77] per Thomas J

<sup>133</sup> *Moonen*, above n 48.

<sup>134</sup> The important parts to note are that censorship of publications to any extent is an abrogation of freedom of expression. Section 5 requires that the extent of that abrogation constitute only such reasonable limitation that can be demonstratively justified in a free and democratic society. However, where there is a breach of section 5 it does not invalidate the legislation by dint of section 4. Section 4 only having relevance and effect where there is an inconsistency between the provision and the Bill of Rights Act. Section 6 requires that where an enactment can be given more than one meaning the one that is most consistent with the Bill of Rights must be adopted. Section 5 when read with section 6 is said to perform a similar role. An enactment which limits the rights and freedoms should be given such tenable meaning and application as constitutes the least possible limitation. Where an unjustified or unreasonable meaning results because no other meaning or application is tenable, it will prevail again by dint of section 4.

There is however, some divergence between the relevance of the various BOR Act rights when applying sections 3(1) and 3(3)(e) of the Act. Given that the combined judgment directs the Board to consider both judgments in its reassessment of the videos it is worth considering the differences.<sup>135</sup>

#### *A The Combined Judgment's Approach to the Bill of Rights Act*

The starting point for the combined judgment is the Board's conduct. In exercising its censorship powers, the Board attracts the application of the Bill of Rights Act 1990 pursuant to section 3 of that Act.<sup>136</sup> The Board by censoring the videos in question is abridging section 14, freedom of expression. Section 19 freedom from discrimination does not apply directly because the Bill of Rights Act is a limit on governmental conduct, not private.

The combined judgment determines what it thinks is a justifiable limit on freedom of expression in accordance with section 5 and 6 of the BOR Act, in the context of section 3 of the Act.<sup>137</sup> The practical effect is that censoring a publication where activity relating to matters such as sex, horror, crime, cruelty, or violence is depicted in a manner that it is injurious to the public good, is a reasonable limit on freedom of expression. However, the expression of an attitude or opinion in relation to the same matters, where it is done in a manner that is likely to be injurious to the public good, will not be a reasonable limit on freedom of expression.

According to the combined judgment, the ultimate inquiry involves<sup>138</sup>

balancing the rights of a speaker and of the members of the public to receive information under s 14 of the Bill of Rights as against the State interest under the 1993 Act in protecting individuals from harm caused by the speech.

The balancing required by section 3 "must be infused by due consideration of the application of the Bill of Rights"<sup>139</sup>. Section 14 is to be given full weight at the point of determining injury to the public good. As for section 19, while it does not apply directly, its underlying values will be a relevant consideration to the

<sup>135</sup> *Living Word* (CA), above n 1, [51].

<sup>136</sup> Section 3 states that the Act only applies to the three branches of government and persons or bodies performing a public function, power or duty.

<sup>137</sup> *Living Word* (CA), above n 1, [39].

<sup>138</sup> *Living Word* (CA), above n 1, para [41].

<sup>139</sup> *Living Word* (CA), above n 1, para [40].

extent that section 3(3)(e) is in application. Section 19 only becomes a consideration because of the reference in section 3(3)(e) to section 21(1) of the HR Act as prohibited grounds of discrimination to which section 19 applies.<sup>140</sup>

The direct reference to section 21(1) of the HR Act in section 3(3)(e) appears to be the reason for allowing section 19 to be an indirect consideration. Therefore, section 19 is the only right that will ever be considered apart from section 14, which will always be relevant. This is in contrast with Thomas J's judgment.

### ***B Thomas J's Approach to the Bill of Rights Act***

The starting point for Thomas J is that by virtue of section 6 of the BOR Act freedom of expression must be considered where the Act is capable of more than one meaning. However, he continues to say that this is the case for all rights contained in the BOR Act that might be applicable to the publication.<sup>141</sup> In his Honour's view a determination of injury to the public good is not restricted to a consideration of the matters specified in sections 3(2), 3(3), and 3(4). The substantive decision is to be made under section 3(1).<sup>142</sup>

Thomas J says that rights to be considered include section 19 if and when appropriate. Section 19 will be appropriate when the publication invokes section 3(3)(e). On this basis, other rights may be appropriate when a publication invokes other section 3(3) categories. For example, the values underlying section 9 of the BOR Act, the right not to be subjected to torture or cruel treatment may be a relevant consideration where section 3(3)(a)(i) is in application.<sup>143</sup> Section 14 will always be relevant by virtue of the fact that the Act deals with censorship.

Thomas J draws a distinction between instances where a right like section 19 could be directly relevant and where it may only be indirectly relevant. However, with respect, the way in which it is expressed is a little confusing. His Honour states that<sup>144</sup>

[w]here s 3 applies, s 19 could be directly relevant, but otherwise the values underlying that section may still be pertinent to the determination whether the

<sup>140</sup> *Living Word* (CA), above n 1, para [40].

<sup>141</sup> *Living Word* (CA), above n 1, para [77] per Thomas J.

<sup>142</sup> *Living Word* (CA), above n 1, para [78] per Thomas J.

<sup>143</sup> See Appendix A

<sup>144</sup> *Living Word* (CA), above n 1, para [78] per Thomas J.

publication of pornographic sex or violence in issue is injurious to the public good.

It is not clear whether his Honour is referring to section 3 of the BOR Act or section 3 of the FVPC Act. However, his honour can only conceivably be interpreted as saying that where section 3(3)(e) is invoked section 19 will be directly relevant and where it is not, the underlying values may still be relevant. This is in contrast to the combined judgment that only sees section 19 as indirectly relevant and only where section 3(3)(e) is applicable.

## VI INCONSISTENCIES WITH SIMILARLY FOCUSED LEGISLATION

The Film and Literature Board of Review drew a parallel between the Films, Videos and Publications Classification Act 1993, the Broadcasting Standards, and the Human Rights Act 1993. While they all have their particular focus, they are manifestations of a more fundamental principle, that some expression is likely to be injurious to the public good.<sup>145</sup> The combined judgment noted the FVPC Act recognises a distinction between censorship legislation with its proper purpose and subject matter and anti-discrimination legislation with its own different purpose and subject matter.<sup>146</sup> While the distinction is undoubtedly correct, it does not change the Board's observation that underlying the different statutory regimes is Parliament's recognition that some expression causes harm and unless restricted is likely to be injurious to the public good.

The effect of narrowing the subject matter that the censoring bodies can consider is to weaken the Films, Videos and Publications Classification Act's ability to prevent expression injuring the public good. The likely result in this case under the FVPC Act is notwithstanding the Board's expert opinion that *Gay Rights/Special Rights* and *AIDS* are injurious to the public good, they will be available unrestricted for viewing. The result under the Broadcasting Standards would be very different.

If *Gay Rights/Special Rights* and *AIDS* were screened on free-to-air television, they would amount to serious breaches of the Free-To-Air Television Programme

<sup>145</sup> *Re Gay Rights*, above n 5, 436.

<sup>146</sup> *Living Word* (CA), above n 1, para [33].

Code.<sup>147</sup> Included in the Code are the General Programme Standards, which broadcasters are required to adhere to in the preparation and presentation of programmes. There are four potential breaches that call for consideration.

*G4 To deal justly and fairly with any person taking part or referred to in any programme.*

The gay and lesbian people interviewed in the videos did not appear to be aware of the context in which their comments would be used, had they known, it is unlikely that many would have been so flippant. To deal justly and fairly with a person taking part in a programme presumably includes informing the person of the context in which their statements will be used. A further failure to deal justly and fairly with some of the people taking part is in the use of on-screen titles. For instance, whenever a gay leader or protester is featured a title such as 'homosexual activist' or 'militant homosexual' appears on screen.

*G6 To show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial nature*

Legal protection on the grounds of sexual orientation is still a controversial issue in New Zealand. The videos and this case are evidence of this. Both videos show a total lack of balance and impartiality. Formal interviews are conducted with people who give support to the producers message. All the interviews with gays and lesbians are informal, off the cuff and are sourced from footage of a gay rights march. The comments made by the gays and lesbians are then attributed to all gay and lesbian people. Thomas J in his judgment referred to the lack of balance in the videos in stating:<sup>148</sup>

Lack of balance is evident in the dogmatic way in which these characteristics are attributed to all homosexuals, and there is no recognition of the diversity of homosexual associations which do not accord with this stereotyped description.

<sup>147</sup> The Free-To-Air Television Programme Code is administered by the Broadcasting Standards Authority, pursuant to section 21(1)(e) of the Broadcasting Act 1989. A copy is available at <<http://www.bsa.govt.nz/g-bsacod.htm>> (last accessed 26 September 2000).

<sup>148</sup> *Living Word* (CA), above n 1, para [67] per Thomas J

*G13 To avoid portraying people in a way which represents as inherently inferior, or is likely to encourage discrimination against, any section of the community on account of sex, race, age, disability, occupational status, sexual orientation or the holding of any religious, cultural or political belief. This requirement is not intended to prevent the broadcast of material which is:*

- (i) factual, or*
- (ii) the expression of genuinely-held opinion in a news or current affairs programme, or*
- (iii) in the legitimate context of a humorous, satirical or dramatic work.*

Category (ii) recognises that the expression of a genuinely held opinion may give rise to a portrayal of inherent inferiority as discussed in part IV.<sup>149</sup> It is therefore not intended to prevent the expression of the opinion that sexual orientation should not be a ground for legal protection or that homosexuality is immoral. However, as discussed earlier the videos go beyond what can be categorised as genuinely held opinion. Instead, a significant portion of the videos amount to a portrayal of the gay and lesbian community as perverted, promiscuous and inflicted with a behaviour disorder, which does not amount to a genuinely-held opinion. The effect is to represent gay people as inherently inferior and is likely to encourage discrimination.

*G20 No set formula can be advanced for the allocation of time to interested parties on controversial public issues. Broadcasters should aim to present all significant sides in as fair a way as possible, and this can be done only by judging every case on its merits.*

Standard G20 relates specifically to news, current affairs and documentaries. If the videos were screened on television, they would amount to a documentary. The videos in question certainly do not present all significant sides, they are one sided and have no intention of presenting a balanced argument.

These are some of the more significant breaches of the broadcasting standards that would occur if the videos were screened on television. They would most definitely be classified as 'adults only'.<sup>150</sup> It is hard to reconcile how the videos can be dealt with in two completely different ways depending on whether they are screened on television or shown at public screenings.

<sup>149</sup> See discussion at 39.

<sup>150</sup> 'Adults only' classifications pertain to programmes containing adult themes or those which, because of the way the material is handled, would be unsuitable for persons under 18 years of age.



## VII CONCLUSION

The Film and Literature Board of Review ought to have the ability to consider publications like *Gay Rights/Special Rights*, *Inside the Homosexual Agenda* and *AIDS: What You Haven't Been Told* for classification. The interpretation of section 3(1) as a subject matter gateway is unduly restrictive on the powers of the censoring bodies and inconsistent with Parliament's desire to create a flexible and responsive censorship regime.

While a perusal of section 3 implies a focus on unacceptable portrayals of pornographic sex and violence, Parliament is ultimately concerned with the likelihood of harm. The rationale for censoring is no longer based on moral indignation alone.<sup>151</sup> Words like 'hurting, degrading, violating, humiliating, actively subordinating, and treating unequally' are used to describe the effect of both pornography and representations of inherent inferiority.<sup>152</sup> One of the perceived strengths of the Act is its ability to adapt with changing social needs and perceptions.<sup>153</sup> To say Parliament intended to restrict the harm caused by pornography and not the harm caused by representations of inherent inferiority is inconsistent with the inclusion of section 3(3)(e).

The wider repercussions of the subject matter gateway indicate Parliament did not intend section 3(1) to be interpreted in such a literal sense. Some of the more common classification decisions the censoring bodies make will now be clouded with questions of whether they actually have jurisdiction. The assessment of the *Savage Honeymoon* decision in light of the section 3(1) gateway is illustrative of this. It seems absurd that a publication can be immune from classification notwithstanding a determination that its availability is likely to be injurious to the public good.

The impact of the subject matter gateway on publications representing a class of people as inherently inferior is a further indication that section 3(1) ought to be interpreted in its more purposive sense. Arbitrary distinctions will be drawn between publications having the same harmful effect on the target group

<sup>151</sup> (22 June 1993) 536 NZPD 15989.

<sup>152</sup> Catharine A MacKinnon *Only Words* (Harper Collins, London, 1994) 16.

<sup>153</sup> Department of Justice Report, above n 74, 2

depending on whether it can be said to deal with sex, horror, crime, cruelty, or violence. The resultant message to producers and writers of this kind of material is do not depict or deal with activity amounting to sex, horror, crime, cruelty or violence and one can offend with impunity.

Protecting expression of opinion played a significant part in the interpretation of section 3(1). Living Word Distributors maintained the videos express legitimate opinion on political and religious matters. Had this been the case it is clear from the Board's decision that they would not have banned the videos. A major concern with section 3(3)(e) was that all opinion targeted at another group in society would represent the group as inherently inferior. However, this fails to acknowledge that section 3(3)(e) is not an either/or test. It is concerned with the extent and manner in which the expression represents inherent inferiority.

Section 3(3)(e) is more concerned with expression that extends beyond mere opinion, such as expression of opinion as if it were fact, and the selective use and misstatement of fact to give further weight to opinion. The justifications for protecting opinion do not ring true where this sort of expression is concerned. This expression subverts democracy as it attacks the foundational principle of equality. It does not compete equally with other expression in the market place of ideas as it is presented as fact so people will not question its truth. Furthermore, this expression erodes the victims' personal fulfilment and self-worth. There is no recognition by the Court of Appeal of this distinction. Instead, the almost blanket ban on restricting any expression that appears to be opinion results in its protection.

The alternative purposive interpretation of section 3(1) does not give rise to the same difficulties. If the subject matter of a publication has the same potential for harm as a publication dealing with sex, horror, crime, cruelty or violence then it will be classifiable. It is still subject to the requirement of injury to the public good. Only in rare instances will a decision made under the alternative approach be challenged on the grounds of jurisdiction. This is where the subject matter cannot conceivably be linked with the five listed matters even in their purposive sense. Instead, the challenge will be on whether the decision was one that no reasonable board could have made.

The appellant in the present case argued in the alternative that the Board made a decision that no reasonable board could have made. However, because of the jurisdiction issue a final determination was not made. This would have been a better approach in this case. A determination that the Board has exceeded its jurisdiction means the videos will be immune from classification under section 3 altogether. While disagreement over whether the videos warrant banning is understandable, the argument that the videos should be available for general viewing is not. The references to certain sexual activity in the videos are certainly not suitable for a young teenage audience. Nevertheless, they are now likely to be viewed by those very people.

The likely result highlights an inconsistency depending on whether the publications are shown on television or in a public hall. Both videos in this case would result in breaches of the Broadcasting Standards. Both regimes are focused on the injury to the public good that certain expression can inflict however, in this case the likely outcomes could not be further apart.

Supporters of the videos see the outcome as a victory for freedom of expression. However, this victory has come at a cost that will continue in to the future. This decision has paved the way for even worse attacks on people living in our community and has left the censoring bodies with a weakened ability to contest it.

## APPENDIX A

### Films, Videos, and Publications Classification Act 1993

**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.

(2) A publication shall be deemed to be objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support,---

- (a) The exploitation of children, or young persons, or both, for sexual purposes; or
- (b) The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
- (c) Sexual conduct with or upon the body of a dead person; or
- (d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or
- (e) Bestiality; or
- (f) Acts of torture or the infliction of extreme violence or extreme cruelty.

(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---

- (a) Describes, depicts, or otherwise deals with---
  - (i) Acts of torture, the infliction of serious physical harm, or acts of significant cruelty:
  - (ii) Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:
  - (iii) Other sexual or physical conduct of a degrading or dehumanising or demeaning nature:
  - (iv) Sexual conduct with or by children, or young persons, or both:
  - (v) Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:
- (b) Exploits the nudity of children, or young persons, or both:
- (c) Degrades or dehumanises or demeans any person:
- (d) Promotes or encourages criminal acts or acts of terrorism:
- (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.

(4) 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, the following matters shall also be considered:

- (a) The dominant effect of the publication as a whole:
- (b) The impact of the medium in which the publication is presented:
- (c) The character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:
- (d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:
- (e) The purpose for which the publication is intended to be used:
- (f) Any other relevant circumstances relating to the intended or likely use of the publication.

#### **4. Whether publication objectionable a matter of expert judgment---(1)**

The question whether or not a publication is objectionable is a matter for the expert judgment of the person or body authorised or required, by or pursuant to this Act, to determine it, and evidence as to, or proof of, any of the matters or particulars that the person or body is required to consider in determining that question is not essential to its determination.

(2) Without limiting subsection (1) of this section, where evidence as to, or proof of, any such matters or particulars is available to the body or person concerned, that body or person shall take that evidence or proof into consideration.

### **Human Rights Act 1993**

**21. Prohibited grounds of discrimination---(1)** For the purposes of this Act, the prohibited grounds of discrimination are---

- (a) Sex, which includes pregnancy and childbirth:
- (b) Marital status, which means the status of being---
  - (i) Single; or
  - (ii) Married; or
  - (iii) Married but separated; or
  - (iv) A party to a marriage now dissolved; or
  - (v) Widowed; or
  - (vi) Living in a relationship in the nature of a marriage:
- (c) Religious belief:
- (d) Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:

- (e) Colour:
- (f) Race:
- (g) Ethnic or national origins, which includes nationality or citizenship:
- (h) Disability, which means---
  - (i) Physical disability or impairment:
  - (ii) Physical illness:
  - (iii) Psychiatric illness:
  - (iv) Intellectual or psychological disability or impairment:
  - (v) Any other loss or abnormality of psychological, physiological, or anatomical structure or function:
  - (vi) Reliance on a guide dog, wheelchair, or other remedial means:
  - (vii) The presence in the body of organisms capable of causing illness:
- (i) Age, which means,---
  - (i) For the purposes of sections 22 to 41 and section 70 of this Act and in relation to any different treatment based on age that occurs in the period beginning with the 1st day of February 1994 and ending with the close of the 31st day of January 1999, any age commencing with the age of 16 years and ending with the date on which persons of the age of the person whose age is in issue qualify for national superannuation under section 3 of the Social Welfare (Transitional Provisions) Act 1990 (irrespective of whether or not the particular person qualifies for national superannuation at that age or any other age):
  - (ii) For the purposes of sections 22 to 41 and section 70 of this Act and in relation to any different treatment based on age that occurs on or after the 1st day of February 1999, any age commencing with the age of 16 years:
  - (iii) For the purposes of any other provision of Part II of this Act, any age commencing with the age of 16 years:
- (j) Political opinion, which includes the lack of a particular political opinion or any political opinion:
- (k) Employment status, which means---
  - (i) Being unemployed; or
  - (ii) Being a recipient of a benefit or compensation under the Social Security Act 1964 or the Accident Rehabilitation and Compensation Insurance Act 1992:
- (l) Family status, which means---
  - (i) Having the responsibility for part-time care or full-time care of children or other dependants; or
  - (ii) Having no responsibility for the care of children or other dependants; or
  - (iii) Being married to, or being in a relationship in the nature of a marriage with, a particular person; or
  - (iv) Being a relative of a particular person:
- (m) Sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

(2) Each of the grounds specified in subsection (1) of this section is a prohibited ground of discrimination, for the purposes of this Act, if---

- (a) It pertains to a person or to a relative or associate of a person;  
and
- (b) It either---
  - (i) Currently exists or has in the past existed; or
  - (ii) Is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.

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