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Rocks Can Turn to Sand and be Washed Away but Words Last Forever: A Policy Recommendation for New Zealand's Vilification Legislation

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Abstract

Free speech and free expression are values that are highly prized in western society. The mention of removing or altering that right creates great debate. In 2004 a Select Committee was set up to inquire into what New Zealand's stance on Hate Speech should be. The submissions to that committee made it clear that free expression was a highly held right in New Zealand. While the submitters were overwhelming opposed to any legislation, it was clear that many had no understanding of what hate speech was, and why people would want to restrict it**.** The select Committee needed to provide the public with more information about what was intended and what the international situation is. If nothing else this thesis should provide that comprehensive background information to ground any further debate.

This thesis makes a policy recommendation for the New Zealand Government. The policy that is examined and contrasted with international experiences is that of hate speech legislation. What should New Zealand do in regards to hate speech?

The general debate is examined and the free expression versus legislation debate is analysed to provide a comprehensive background

to the topic. The reasons why free expression is important to society and democracy are examined. Alongside free expression, the harms of hate speech are also analysed in order to demonstrate what harm occurs and if such harms should be legislated against.

The international situation is contrasted with the New Zealand experience. The legislation of the United States, Canada and Australia, is analysed in order to compare and contrast with New Zealand's legislation. These three countries are closely aligned with New Zealand in terms of language, politics and culture. These countries provide equivalent characteristics and are therefore the most useful for comparison.

The United States is especially important as it has no hate speech legislation and provides a valuable baseline from which the effects of legislation can be compared against.

The New Zealand situation is then examined to point out its strengths and weaknesses. Where there are weaknesses this thesis recommends changes that could be made in varying political circumstances.

Hate speech and free speech issues are not largely discussed in New Zealand literature and scholarly work. This thesis follows some work that has been previously done on the topic in New Zealand. The bulk of the work written about hate speech and free speech issues has been completed internationally and needs to be adjusted to fit the New Zealand situation. This recommendation has gone some way to doing that.

An area of particular interest in this paper is the categories of people that deserve protection. Historically just 'race' has been provided

protection from hate speech in New Zealand and this thesis examines why. Central to this investigation is why other categories are not protected.

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Rocks Can Turn to Sand and be Washed Away but Words Last Forever:[1] A Policy Recommendation for New Zealand's Vilification Legislation.

Chapter One

To be hated, despised, and alone is the
ultimate fear of all human beings.[2]

The Policy Problem

New Zealand has legislation protecting its citizens from hate speech or vilification in a narrowly defined field. Citizens are only protected from hate speech or vilification if it is targeted at them because of their colour, race, nationality, or ethnicity. This policy recommendation analysed legislation internationally to ascertain if New Zealand's legislation is effective and useful, and also if the legislation should be altered in any way.

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[1] A Samoan proverb (ua pala le ma'a ae le pala le upu). The proverb means that actions are unimportant and soon forgotten but that words last forever. In Catherine Lane West-Newman, *Reading Hate Speech From The Bottom In Aotearoa: Subjectivity, Empathy, Cultural Difference* [2001] Waikato Law Review vol 9 258.

[2] Kathleen Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression* (U. Ill. L. Rev. 789: 1996) p. 8.

Hate speech and vilification need to be prevented because they cause harm to society. The government has a responsibility to protect its weakest and most vulnerable citizens from harm. “The most fundamental purpose of any system of law is to protect humanity's basic existence. If it cannot or will not, then it too, is likely on the path of extinction.”[3]

There are two recommendations, first what should be done, and secondly what recommendations are likely to be achieved in the current political climate (2007).

1.1 Recommendation One, What Should be Done

1.1 Section 131 of the Human Rights Act 1993 (HRA) should be extended to cover all groups provided protection by the HRA from discrimination.

1.2 Section 61 of the HRA should be amended to include all protected groups under section 21 of the HRA that are not voluntary. These groups should include; sex, disability, age and sexual orientation. Section 61 should retain its high threshold.

1.3 The scope of the HRA should be extended to cover all means of communicating hate messages.

1.4 The Human Rights Commission should be given the directive to track hate crimes so that analysts will have the data necessary to see if the legislation is effective or not.

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[3] Kathleen Mahoney, *Hate Vilification legislation With Freedom of Expression: Where is the Balance?* (Ethnic Affairs Commission of New South Wales, Australia: 1994) p. 3.

1.5 Aspects of the framework surrounding the complaints process of the Human Rights Commission should be altered to create a transparent process and also to aid complainants understanding of what constitutes an appropriate complaint.

1.2 Recommendation Two, What Can be Done

The current make-up of the government is not conducive to passing any legislation to give more scope to the HRA. Therefore the following actions would ensure that the current system runs more efficiently, while gathering information to strengthen arguments for expanding the legislation in the future.

2.1 The government should give the directive for the HRA to become a monitoring agency. The HRA should track hate crimes and gather statistics so that the raw data is available to future analysts. With the raw data it would be easier to show that enlarging the scope of hate speech would fit into the Oakes test demonstrating a substantial and pressing need. Without the raw data and with only anecdotal evidence[4] to convince detractors demonstrating a pressing need is unnecessarily difficult.

2.2 All other options as highlighted in recommendation one, should be implemented if possible. If not, then the changes should be prepared in case there is a policy failure. A policy failure could be anything from a mass rally out rightly calling for the death of all homosexuals in New Zealand, to groups encouraging vilification on a large scale and violence then being committed against a group in substantial numbers. “In today’s climate of ‘Political Correctness’ and ‘PC Backlash’ laws and

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[4] See Chapter 4.

programs enacted for seemingly good reason will only be taken seriously if there is a critical mass with access to those good reasons"[5]. As there is currently no critical mass the legislation would again be difficult to convince to those opposed to any government.

2.3 The structure surrounding the HRA should become more transparent. The results of complaints, conciliation, and court cases should be made public, and readily available. The public need to be aware that they can complain under the HRA. More importantly however, is that the public be made aware of the fact that they can complain to the police if they are vilified in anyway. This means the police may need more training to be sensitive to hate speech issues.

1.3 Definitions

Hate speech is a communication via speech, or any other communicative medium, that conveys a derogatory, insulting, and offensive message. The message must be expressed to an audience, and must offend not only a person but a specific group that the person belongs to. The message also encourages others to hate that group. There are other definitions. In fact Karl Du Fresne claims that: [Hate speech] is one of those wondrously loaded phrases, like 'social justice', that can mean whatever the user wants it to mean."[6] The fluid nature of any definition has caused problems in some instances and certain New Zealand reports have avoided defining hate speech altogether. Further definitions will be provided within the legislation discussed in Chapters Three and Four. This paper will use the phrases 'hate speech' and 'vilification' interchangeably unless otherwise stated.

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[5] Submission to the Government Administration Select Committee on the Inquiry Into Hate Speech 2004, Submission 111W by CCS. p. 5.
[6] Karl Du Fresne "Hate Speech" (2003) *Lost in the Matrix* http://www.investigatemagazine.com/jun03matrix.htm (last accessed 26 February 2007).

To understand the entire issue, this paper will examine the debate surrounding the limitations governments may place on speech. The international experience will be studied. New Zealand's current legislation will also be critically analyzed, in order to demonstrate why these recommendations are necessary.

Chapter Two

How Free is Free Speech? An Overview of the Free Speech Versus Vilification Law Debate.

Freedom of expression or free speech is a fundamental human right. Article 19 of the Universal Declaration of human rights states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[7] Free speech must exist in a democratic society in order for the political landscape to be fair. In the United States free speech is protected under the first amendment of the bill of rights it states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[8] The bill of rights was a founding document in the United States created in 1789. In New

[7] Universal Declaration of Human Rights 1948.
[8] The United States Constitution 1787.

Zealand free speech is protected under the New Zealand Bill of Rights Act 1990. Section 14 of the New Zealand Bill of Rights Act 1990 declares, “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”[9]

> When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it.[10]

2.1 Why do we Need Free Speech?

Before it can be argued that any limitations on free speech can be justified one needs to understand why free speech is necessary to society. No freedoms or rights are absolute, laws are required to prescribe to society what one may or may not do, and what others may or may not do. Our freedoms should extend so much that individuals can do as much as possible without infringing on another. Gaining this balance is the job of legislature. “The optimal level of freedom is attained when the freedom of each individual is consistent with that of every other individual.”[11] Freedoms can be thought of as belonging to two categories, ‘freedom from’ and ‘freedom to’. The freedom to do something must not infringe on someone else’s freedom from that

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[9] New Zealand Bill of Rights Act 1990.
[10] John Stuart Mill in Alan Harworth, *Free Speech* (Routledge, New York: 1998). p. 72.
[11] Alan R. Regel, "Hate Propaganda: A Reason to Limit Freedom of Speech" (1984-85), 49 Sask. L. Rev. 303 p. 304.

activity. For example we are free to move about, but we have freedom from restriction of movement by others movements.

Freedom is linked to responsibility; when enjoying a freedom one bears the burden of responsibility not to infringe on another's freedom. It is obvious that certain rights can come into conflict. In the case of hate speech or hateful expression, a common way of describing this clash of rights is that of balance. Two conflicting rights need to be weighed against each other in order to achieve the optimal balance that which allows the greatest amount of freedom.

There are two kinds of arguments for free speech. Consequentialist arguments are when the reason for protecting speech is that it will result in a positive outcome, while limiting speech will result in a negative outcome. Nonconsequentialist arguments are those where autonomy is generally put forward as the reason to protect free speech. Autonomy being defined as that "which maintains that not to honour an individual's choice to speak – or to receive others speech – would violate that persons right to autonomy"[12]. Autonomy is the individuals right to be free of governmental interference.

The most common argument for free speech is based on the ideals of democracy. In a democracy, people vote for their leaders. In order to vote the people need to know all they can about the candidates and the only way they can learn everything about them and their platforms is if there is free speech. Without free expression and the dissemination of ideas, people will not be able to obtain an accurate picture of a party and their votes will be ill-informed. Therefore any restrictions on free speech would alter the democratic process. From this argument it has been suggested that free speech is the 'cornerstone of democracy',

[12] Susan J. Brisson, The Autonomy Defense of Free Speech, p. 322.

meaning that "since free speech is part of the legislative process itself, any restrictions upon it would alter the democratic process".[13] Free speech is the only way that contenders are able to fully express their platforms and as such is an essential aspect of democracy.

Free speech also offers citizens a way to help prevent the state from subverting other rights and freedoms. If for example it is illegal to criticise a government, such restrictions would make it easier for that government to impose limitations on other freedoms. [14]

This political reasoning is based partly on John Stuart Mill's 'On Liberty'. Mill is the prominent figure in free speech debates, his works and ideas are consistently referenced in all texts discussing hate speech. Mill's argument against restricting speech can be broken down into three premises.

1. The suppressed opinion may be true, and the accepted beliefs in error.
2. Even if true, accepted beliefs become mere prejudices if unchallenged and untested.
3. There is likely to be some basis for all opinion. (Mill, *On Liberty*, 1858)[15]

Analysts of Mill coined the phrase 'the marketplace of ideas'. The marketplace of ideas is essentially that with free speech all ideas and opinions are presented and because people are rational calculating

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[13] Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada, (Cohen Committee).Queen's Printer, Ottawa, 1966.

[14] R. V. Keegstra [1990] 3 S.C.R. 697; reversing (1988) 60 Alta.L.R. (2d) 1; reversing (1984) 19 C.C.C. (3d) 254.

[15] In, Tim McBride, *New Zealand Civil Rights Handbook: A Guide to your Civil Rights Under New Zealand Law* (Legal Information Services Inc, Auckland: 2001) p. 9/1.

beings the truth will come out and society will benefit. Without the free exchange of ideas, the truth may not be as easily discovered, or as Mill's puts it "if the opinion is right, they are deprived of the opportunity for exchanging error for truth: if wrong they lose what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collusion with error."[16] So, if free expression is limited the marketplace may miss out on truths and as such the marketplace will keep believing errors, but more importantly, false ideas or erroneous ideas make the truth more vivid and obvious. This concept is also seen in the writings of John Milton where he says, "Let [truth] and falsehood grapple, who ever knew [t]ruth put to the worse, in a free and open encounter"[17]. This statement is popular amongst those who are in opposition to hate speech laws.[18] The statement taken out of context is quite direct and convincing.

Unfortunately most people are not rational calculating beings. In the marketplace of ideas the truth does not always rise to the surface, and not everyone has the same access to the marketplace. Regel discussing Mills marketplace of ideas says,

> This position is based on the dubious assumption that the public are essentially rational calculating beings – that the majority will sift through the rhetoric to the logical skeleton of the argument in order to examine it on its merits – that they will reject the position if

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[16] John Stuart Mill, "The tyranny of the Majority" in Philosophy for a new generation

[17] J. Milton, Areopagitica (1644) *reprinted in* II Complete Prose Works of John Milton 485, 561 (E. Sirluck ed. 1959) (modern spelling used).

[18] Submission to the Parliamentary Select Committee Inquiry Into Hate Speech, Submission 5W by J. N. Biriss.

> the argument is unsound, and accept it if
> sound.[19]

Psychologists contend that people often do not make optimal decisions and they also often do not reason logically either.[20] People use mental shortcuts to get things done quickly and efficiently. Experiments have shown that we know logically how to make optimal decisions people just do not take the time to do that. Emotions over ride logic and people's upbringing, environment and experiences effect their thought patterns.[21] For example if people think that Asians are bad drivers, they see one Asian person driving badly and it confirms their suspicions. The amount of bad drivers of differing races they encounter has no effect on this belief if it is held strongly, that one bad Asian driver fulfils their own prophecy.

A common example of erroneous belief instilled in the public is the German populace during WWII, the Germans were rational people, but accepted irrational propositions as the truth

People will search for and interpret information which reinforces their own beliefs. This is called 'Confirmation Bias' closely related to 'cognitive dissonance'. Cognitive dissonance was proposed by Leon Festinger. Festinger theorises that, "It is psychologically uncomfortable to hold contradictory cognitions."[22] People do not involve themselves fully in the marketplace of ideas. Confirmation Bias is where people search for information that affirms already set beliefs, any contradictory information is not rationalised is simply discarded or interpreted in a

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[19] Regel, p. 307.
[20] Daniel T. Willingham, *Cognition the Thinking Animal, Second Edition* (Pearson Education Inc, New Jersey, USA: 2004) p. 366.
[21] *Ibid*, p. 366
[22] Graham M. Vaughan and Michael a. Hogg, *Introduction to Social Psychology* (Pearson Education, Australia: 2005) p. 146-54.

different way. So psychologically people are not able to participate in the exchange of ideas in a way that Mill would have wanted. This means that the marketplace is not the best way to alter or change already preconceived ideas.

If free speech is essential for democracy then one can logically conclude that political speech should not be restricted. Canada for example decided this in *Switzman v. Ebling and A.G. of Quebec*. In this decision a law banning communist activities was overturned.[23] It does not follow from the argument that free speech is important to democracy, that non-political speech is also exempt from restrictions.

Thomas Emerson put forward three arguments for free speech.

1. Attainment of truth – suppression of information or discussion …blocks the generation of new ideas, and tends to perpetrate error.
2. Individual self fulfillment – thought and communication are the fountainhead of all expression of the individual personality.
3. Balance between stability and change – suppression of expression conceals the real problems confronting society and diverts public attention from the critical issues. (The system of freedom of expression, 1970)[24]

The argument for free speech from individual self fulfilment for is that it offers "the value of individual autonomy experienced in self-actualization through speech."[25] The arguments from autonomy are nonconsequentialist where autonomy is ultimately 'good' and if the

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[23] *Switzman* v. *Elbling* [1957] S.C.R. 285.
[24] McBride, p. 9/1.
[25] Catherine Lane West-Newman, 'Reading Hate Speech From the Bottom in Aotearoa: Subjectivity, Empathy, Cultural Difference' *Waikato Law Review* [2001] vol 9 231-264 p. 236.

government acts to remove autonomy that is ‘bad’. Justifications from autonomy are put forward for; the right to vote, the right to be free from taxation, the right to contraception, abortion, the right to freedom of religion, and of course the right to free speech. In America, Justice Thurgood Marshall said “the First Amendment (free speech) serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression.”[26]

Not being able to express ones self means that that person may not be able to fully develop their personal identity. People need to discuss and transfer ideas in order to create an opinion on differing subjects. When these opinions are then expressed, part of the expression illustrates that person’s character.

While being persuasive, arguments that free speech is ultimately good for the public is no reason that limits cannot be placed on free speech, even under autonomous justification for free speech.[27] This is because, hate speech would violate the victims’ rights to equality and equality can also be argued for through autonomy.

Free speech is important to democracy for individual fulfillment, and for the attainment of truth. Without it society is handicapped. Societies in the modern world who do not have free speech suffer from a lack of development in technology, academia and socially. A brief comparison is that of the Arab states, they are all run by dictators, and they are extremely unproductive countries with restrictive laws on freedom of

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[26] Procunier v. Martinez, 416 U.S. 396 (1974).
[27] For a complete overview of the arguments for autonomy and reasons limits can be placed on free speech see Suan J. Brisson, “The Autonomy Defense of Free Speech”, *Ethics*, Vol. 108, No. 2 (Jan., 1998), 312-339.

expression. [28] To maintain a productive society free speech is very important and should only be restricted if the need is great.

2.2 Limits on Free Speech:

"...the very simple principle' that 'the only purpose for which power can be rightfully exercised, against his will, is to prevent harm to others'".[29]

No nation state offers its citizens absolute freedom of expression. Even in the United States, which has the most liberal of speech laws, there are still restrictions on speech, including obscenity, fighting words, commercial speech, and incitement and libel/slander. In Australia, legislation restricts speech on "public defamation, blasphemy, confidentiality obligations associated with employment, copyright, contempt, incitement, official secrecy, sedition and noise pollution."[30]

Legislation restricting free speech is required to maintain the balance between being free to and being free from. So while not being absolute (very few if any people want it to be absolute), it is still a vitally important right that should not be infringed upon unless absolutely necessary.

The rationale put forward for legislating against hate speech or vilification, is harm. Mill supported the argument that if speech causes

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[28] See Bernard Lewis, *The crisis of Islam* (Modern library, New York: 2003).
[29] John Sturat Mill *On Liberty* in Haworth p. 30.
[30] Mandy Tibbey, "Developments on Anti-Vilification Law", Australian Bar Review, 8 August 2001, 1-40. p. 2.

harm it should be prevented. Governments have a requirement to prevent harm where possible. Governments also have the responsibility of promoting, protecting, and providing for the general welfare of all the people. It is accepted generally by both sides of the debate that hate speech does cause harm to its victims. The main discussion revolves around if such harm needs to be legislated against. For example David Goldberger who was the lead counsel in the American Civil Liberties Union case defended neo-Nazis who marched in Skokie, Illinois. Goldberger compared the harm of hate speech to the harm of a long term partner leaving a relationship for their partner's best friend. He describes it as a crippling harm, which causes mental anguish, but is not legislated against.[31] The level or degree of harm is what is under debate. Should mental anguish and degradation be legislature worthy harm? Many different types of harm are legislated against already in terms of speech. Even though both sides of the debate internationally concede that harm is caused it is not widely accepted that hate speech causes harm amongst the general population in New Zealand.[32]

Kathleen Mahoney believes that the reason Canada has enacted hate speech legislation while America has not, is because Canadians place an emphasis on collective human rights, while the United States places an emphasis on individual rights.[33] Mahoney says "Increasing recognition of the right of everyone to free and equal treatment is apparent in legislation and case law, and there is growing acceptance of the view that an egalitarian society may be impossible to achieve when the dissemination of racist ideas is permitted."[34] Mahoney also questions how something can be seen as a freedom "when it is simultaneously experienced by another as violence, oppression,

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[31] Symposium, "Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation", (1988-89), 37 *Buffalo Law Review*, No. 2, p. 366.
[32] Based on the Submissions to the Parliamentary Select Committee Inquiry Into Hate Speech.
[33] Symposium, p. 345.
[34] *Ibid* p. 345.

containment, or some other variation of non-freedom."[35] Ironically it is through free speech that these minority groups have been able to point out that this specific freedom is what is degrading and humiliating them.

Free expression is important for democracy. However, hate speech causes groups of people to withdraw from society and therefore conflicts with the ideals of democracy.

The preamble for the Racial and Religious Tolerance Act 2001 (Vic) in describing the harm of racial vilification states:

> Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.[36]

Within the Racial and Religious Tolerance Act it can be seen that hate speech is contrary to democratic values. Such speech reduces the victims' participation within society, whereas free speech is supposed to allow everyone to access the political world. Diminishing a person's sense of worth, dignity and belonging to a community are seen as harms by this act. Such harm is not passed off as merely taking offence,

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[35] *Ibid* p. 346.
[36] Racial and Religious Tolerance Act 2001 (Vic)

but as real tangible harm. The act also recognises that hate speech reduces a person or groups participation is society, reducing the benefit that diversity can bring.

2.3 The Harms of Vilification

The direct harms and societal harms of hate speech can be viewed through personal testimonies and through the high rates of suicide, depression, drug abuse, domestic violence, and anti-social behaviour present in many minority groups. "Cultural alienation is frequently given as an explanation for indigenous populations having higher rates of drug and alcohol abuse and mental health problems including depression and suicide."[37] Queer teens also have higher suicide rates than their heterosexual contemporaries.[38] Drug use is higher than the norm amongst minority groups; racism and vilification contribute to minorities feeling separated, dejected and alone.

Wojciech Sadurski submits that there are three main types of harm as a result of racial vilification or hate speech. First is harm as a result of a violent reaction to what was said. Second is violence from those who hear the vilification and therefore attack the people being vilified. Third is the harm that results from just the words themselves. Sadurski

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[37] Teiho - Disparities In Maori Mental Health http://www.teiho.org/Epidemiology/DisparitiesInMaoriMentalHealth.aspx (last accessed 14 March 2007).

[38] D. M. Fergusson, J. Horwood, A. L. Beatrais, *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?* (1999) 56 Arch Gen Psychiatry p. 876.

recognises other types of harm. She mentions societal harm, meaning that the utterance of hate speech damages society as well as the victim of the speech. The speech “degrades the standards of everyday life, of civility, of ‘the quality of public discourse’. Further it threatens social peace and harmony, and the society as a whole suffers as a result.”[39]

Mari Matsuda suggests that vilification and racism change the whole social dynamic. Matsuda provides an example of visiting Perth in the 1980s when right wing groups went on sustained graffiti and poster campaigns. These posters said “Asians Out or Racial War”. Matsuda found all of her interactions with people were coloured by these posters. She says “I found myself being super polite, using educated inflection so that people wouldn’t confuse me with those “other” Asians. If people were rude to me, I had to stop and think, now is this plain old ordinary rudeness or is this racism?”[40] The overt racism portrayed by the graffiti and posters changed the way she behaved, she felt that she needed to try and be something more and better, to please the racists. That is an example of not being free. The posters would also have had an effect on the non-Asian residents of the area as well. They might try to be extra nice, extra polite and welcoming towards Asians, or other vilified groups so the vilified group they come into contact with will know that they are not like that, they are not like the people who put the posters up. The cliché defence that people have when accused of being a racist/bigot is ‘I’m not a racist/bigot I have an Asian (or other minority group) friend’. The association that the person has that one friend demonstrates that they are not racist or bigoted. This feeling that non-minority people have that they need to be extra sensitive towards minorities may come when people from a dominant group hear racist jokes or other vilifying

[39] Wojciech Sadurski, ‘Offending with Impunity: Racial Vilification and Freedom of Speech’, *Sydney Law Review* 14 (1992), 163-196, p. 179.
[40] Symposium, p. 360.

language, and the first thought that comes to mind is, ‘thank goodness that’s not me’.[41]

Another social cost is that once this idea has been planted in the minds of people it is hard to remove. The thought needs constant rejection. When interactions between people take place those thoughts rise to the surface immediately, for example the Asian driver. Matsuda gives the example of when she was studying hate speech she read some literature from a group named ‘dot busters’. This group was anti-Indian, and the next time she saw an Indian woman she immediately thought of ‘dot busters’, not that the lady had a nice sari, or smile, but of ‘dot busters’.[42]

Internationally the harm caused by hate speech has been recognised and a number of charters have been put forward by the UN for member states to sign. These include the International Convention on Civil and Political Rights, of which article 20(2) states, “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” This convention has been ratified by New Zealand, including a reservation that they had already legislated against racial or religious hatred. New Zealand is also a signatory of the International Convention on the Elimination of All Forms of Racial Discrimination, of which article 4(a) states that state parties:

> shall declare an offence punishable by law all dissemination of ideas based on racial

[41] *Ibid*, p. 360.
[42] Mari J. Matsuda, et. al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, USA: 1993) p. 26.

> superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof. [43]

The fact that New Zealand has ratified both these charters and passed legislation shows that they believe that harm can be caused through hate speech towards racial and religious groups. As New Zealand already has such legislation this means the government appreciates that speech can cause harm and as such an expansion of the current legislation to make it more coherent and practical should pose no great debate. The debate should revolve around where exactly to draw the line between acceptable use of free speech and speech that causes harm.

2.4 Arguments Against Vilification Legislation

> The doctrine of freedom of expression is generally thought to single out a class of 'protected acts' which it holds to be immune from restrictions to which other acts are subject. In particular, on any strong version of the doctrine there will be cases where protected acts are held to be immune from restriction *despite the fact that they have as consequences harms which would normally be*

[43] International Convention on Civil and Political Rights, article 20(2).

sufficient to justify the imposition of legal sanctions.[44]

2.5 The Slippery Slope

There are several widely popular but easily dismissible arguments presented against hate speech legislation. Perhaps the most popular is that of a slippery slope. A basic overview of the argument is, if we allow this legislation to pass, eventually the definition of what constitutes vilification or hate speech will grow so broad that all speech will be stifled and we will end up living in a totalitarian state. This view came through strongly in the submissions to the select committee on hate speech 2004.

Simon Lee does not think much of the slippery slope argument saying, "The slippery slope argument is used as a trump card in so many debates on free speech issues that it is often assumed to be a clinching move when it is in fact far from convincing".[45] An analogy used is that if we have free speech we will be at the top of a mountain. To take away part of that freedom will move us to the slope where free speech will eventually slide to the bottom. One quickly realises that we are never at the top of the mountain. In every country there are restrictions on what may be said in public. So we are already part way down the slope, and

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[44] Thomas Scanlon, "A Theory of Freedom of Expression", *Philosophy and Public Affairs*, Vol. 1, No. 2 (Winter, 1972), pp. 204 (emphasis added).
[45] Simon Lee, *The Cost of Free Speech* (Faber and Faber Ltd, London: 1990) p. 55

yet we have failed to slide to the bottom. Lee also describes the argument as the 'horrible results' claim. To prevent hate speech, will, no matter how good your intentions, eventually lead to a horrible result. Or there is the 'arbitrary results' claim, which was very popular in the submissions to the select committee. This argument states that the issue of speech is so complex that it will be too hard to draw a line defining what is allowed and what is not, which leads again to the slippery slope and once again this argument is easily refuted.[46] Lines are drawn all the time in legislature. Laws decide what speeds are appropriate while driving, at what age one may do something, even though someone is one day short of doing something, we can still draw the line.

A counter against the slippery slope stance is the international situation. Canada has had tough hate speech legislation for over 20 years. Before the law was enacted the Canadian Civil Liberties Association also thought that the laws would lead to abuse and the slippery slope. That has not happened.[47] Barry Brown believes the mentality that hate speech laws are out to get you is unfounded and that if one takes a fresh look at the problem they can see why it is so. In Canada, Brown submits that the legislation is there to "uphold society's commitment to tolerance."[48] In essence the legislation is there to support a principle, not to restrict one, he sees the legislation as upholding, section 15 (the right to equality), and 27 (judicial responsibility to enhance multiculturalism) of Canada's Charter of Rights and Freedom.[49]

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[46] *Ibid,* p. 55-58.
[47] Symposium, p. 370
[48] *Ibid* p. 371
[49] *Ibid* p. 368

A final argument against the slippery slope argument can be seen in parallels with previous legislation. For example here in New Zealand we have many laws restricting freedom of expression. None of those have spread out and become all encompassing. The laws have remained there for the purpose they were enacted for. For example the law against defamation has not spread out until society can no longer say anything bad about anyone else. There is still a robust media who can parody and satire anyone they like. The slippery slope argument just does not hold up to scrutiny.

Society does need to be careful when constructing hate speech legislation. The boundaries will be tested and the scope of such laws should be kept narrow. In the next chapter I will discuss some problems Canada has had with limiting the scope of their law, and discuss how New Zealand can avoid such broadness. However, none of what has happened in Canada has resulted in a 'horrible result'.

2.6 Tolerance

The second commonly submitted argument against Hate Speech legislation is from the basis of tolerance and holds that tolerating multiple viewpoints is a vital aspect of a healthy society. This argument generally submits that hate speech is obnoxious or offensive, but not harmful as such. For example, "We need freedom to talk and debate on theological issues, and we all need to be big enough to handle an opposing point of view even if it offends."[50] This argument and David Goldberger's argument that hate speech is the same harm as a lover leaving you, miss the point. Hate speech is not offensive or obnoxious; it

[50] Submission 22W by Glenn Frauenstein.

is not synonymous with mental anguish over having a lover leave you. Hate, racism and bigotry are everyday events for minorities. People of these groups already know that society views them differently and every time they are exposed to hate speech it reinforces their second class status in society. Psychologist Kenneth Clark says, "Human beings … whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth".[51] "Members of minority groups may come to believe the stereotypes about them, that they are lazy, dirty, stupid, etc". "The accumulation of negative images … present[s] them with one massive and destructive choice: either hate one's self, as culture so systematically demand[s], or have no self at all, to be nothing."[52] Clearly from such descriptions these people should not have to bear the burden of tolerance, and this harm is much more than a single event like a partner leaving you.

A third argument against legislation is that such legislation would give bigots a soapbox on which they can reach a greater audience than if we left them alone. However, the victims of hate speech see a system where it is acceptable to demean and degrade them through speech. Opponents to hate speech legislation claim that by prosecuting people who use hate speech society is giving them a soapbox where they can disseminate their message to a far wider audience. An example of this was the Zundel case in Canada. Zundel was charged with disseminating Holocaust denial literature. As Zundel was charged under section 181, an offence of spreading false news, he was able to try and prove that his theories were not false and as such used the court as a soapbox to publicly disseminate Holocaust denial ideas.[53]

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[51] Matsuda, p. 91.
[52] *Ibid*, p.91.
[53] *R. v. Zundel* [1992] 2 S.C.R. 731

The Zundel trial was extensively covered by the media. After the trial research was conducted to see how Zundel's ideas had affected Canadians. The research concluded that as a result of Zundel's trial sympathy for Zundel had not increased. Anti-Semitism had also not increased in Canada.[54]

Opponents of legislation on the other hand present a John Stuart Mill claim that when the audience (society) hears hate speech or ideas that are clearly wrong, those ideas help illuminate the correct ideas. However in the case of hate speech, by allowing these ideas to help illuminate the truth, they are at the same time causing harm and causing rifts in society. For all the defamed group sees is that the speaker is free to attack them, and they are powerless to respond. Perhaps legislation provides us with a solution to this problem. By prosecuting bigots who use hateful speech we are giving them a soapbox to present their ideas. These ideas help illuminate the truth so that society can see how ridiculous these ideas are, while at the same time the defamed group is aware that society respects them and are punishing the parties who use hate speech. Observers can see the illuminated idea, the truth, being contrasted with a false idea (hate speech) which is being punished. This is the optimal result. Due to the fact that racists and bigots already use the internet to distribute information it is unlikely that by prosecuting hate speech society is giving these people a larger soapbox to people already receptive to their ideas.

A large number of the submissions to the select committee on hate speech felt there was no need for such legislation. The submissions proclaimed that New Zealand is a vibrant tolerant society and such things (hate speech) do not happen here. Mari Matsuda sees this as a

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[54] Weiman and Winn *Hate on Trial: The Zundel Affair, the Media and Public Opinion in Canada* (Oakulle: Mosaic Press, 1986)

typical response in America as well. The dominant group sees hate speech as harmless but obnoxious, the product of sick but harmless minds, not like theirs. Matsuda believes this to be a defensive reaction “a refusal to believe that real people, people just like us, are racists. This dissociation leads logically to the claim that there is no institutional or state responsibility to respond to the incident. It is not the kind of real and persuasive threat that requires the states power to quell”[55]. This attitude was plainly obvious in the select committee submissions, hate speech legislation was attacked and considered to be “social engineering”[56], or that “The tools of the state are powerful and heavy, but are not suitable for the fine distinctions or[of] social surgery.”[57] Others commented that society would censor itself “We can identify and reject hate language without bureaucrats to do this for us, especially politically correct bureaucrats”.[58] None of the submissions making these claims attempted to describe how society would identify and reject hate language. If legislation is needed for society to be protected from false advertising it stands to reason that society can not always determine fact from fiction.

2.7 Where is the Balance?

The main issue is that of balance. There are two conflicting values, Freedom of expression, and the right to equality.

> There are only individual people, different
> individual people, with their own individual lives.
> Using one of these people for the benefit of others,
> uses him and benefits the others. Nothing more.

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[55] Matsuda p. 20.
[56] Submission 3W by Kevin Marshall.
[57] Submission 7W by Paul Clarke.
[58] Submission 5W by J.N. Biriss.

> What happens is that something is done to him for the sake of others. Talk of an overall social good covers this up. (Intentionally?) To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has. He does not get some overbalancing good from his sacrifice, and no one is entitled to force this upon him.[59]

Forcing minorities to be degraded, to allow a greater social good, free speech, is wrong. Sir Isaiah Berlin describes the dilemma.

> Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes them is unjust and immoral. But if I curtail or lose my freedom, in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs. This may be compensated for by a gain in justice or in happiness or in peace, but the loss remains.[60]

This passage accurately describes why hate speech legislation is necessary while at the same time illustrating the fears opponents of such legislation have.

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[59] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books Inc, USA: 1974) p. 33.
[60] Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, Oxford: 1969) p. 125.

“If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes them is unjust.” Therefore if a system advocates free speech above all else, minorities suffer. For example Phelps is a prominent anti-homosexual campaigner, he and his groups picket gay funerals. Such activities cause misery and hurt, but are covered by the first amendment in the United States. When anti-war activists picketed military funerals in the United States a law was quickly passed to prevent such activity, gay people are unfortunately not provided the same protection. The excerpt maintains that using one liberty to harm another is wrong.

In the next sentence Berlin describes the possible ‘horrible result’ that such restrictions could bring. “But if I curtail or lose my freedom, in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs.” If hate speech legislation is enacted and society’s speech is overly chilled without minorities gaining any sort of equality in society then nothing has been achieved except a loss of liberty.

The last sentence describes that society may be happier or more peaceful, but its citizens do not have liberty. So Berlin has encapsulated the free speech problem, where do we draw the line, and if we draw the line, will it help or harm society?

Chapter Three

Comparing Apples to Oranges: An Examination of Relevant International Legislation.

In order to properly analyse New Zealand's hate speech legislation, including what should happen to it, if anything, it is necessary to examine similar legislation, or lack of, internationally from countries that closely resemble New Zealand. For this purpose I have selected three countries that are typically associated with New Zealand, The United States, Australia and Canada. All three are Pacific Anglo European countries with related legal systems and contain comparable cultural values.

The United States has the most stringent free speech values of any country. Its Bill of Rights is part of its constitution. Within the Bill of Rights freedom of expression is the supreme right and the first amendment. A possible reason that the right to free speech is held so highly could be that the United States government was formed from violence where as the nation states of New Zealand, Australia and Canada were not**.** Roslyn Atkinson comments that for countries which

had to free themselves violently from oppressive regimes, liberty and the rights of men are held to high importance. For example, France and the United States both had violent beginnings to their democracies. As such they had idealist views and created their founding documents to maintain what they had fought so hard to achieve.[61] This is most obvious in the case of the United States and their constitution. Freedom of expression was considered the backbone of a democratic society and so became the first amendment of the constitution.

By the end of the nineteenth century countries achieving their independence from, for example Great Britain, were not obliged to go to war or engage in bloody revolution to achieve that independence. Consequently, their constitutions such as those of Canada, Australia and New Zealand, revealed a more complacent view of the need to protect human rights constitutionally or by legislation and a greater belief in the power of the common law. This complacent view was eventually shattered by the two world wars. The wars proved that seemingly intelligent people could discriminate against specific groups of people based on their race and religion and then set out to systematically destroy those people.

The Holocaust was certainly a catalyst for the Universal Declaration of Human Rights adopted by the United Nations in 1948. Article two of which states, "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"[62]. The article reinforces the idea that all people are equal in rights, hopefully to help prevent an atrocity like the Holocaust occurring again.

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[61] Rosyln Atkinson, *Are Anti-Discrimination Statutes a Model for a Bill of Rights?* Australian Bar Review 1999 p. 1.
[62] Universal Declaration of Human Rights 1948.

New Zealand and Canada have only recently implemented a Bill of Rights. Canada did so within its Charter of Rights and Freedoms 1984 and New Zealand implemented a Bill of Rights in 1990 with the creation of its Bill of Rights Act, which is not entrenched.[63] These documents are important because any legislation concerning racial vilification and hate speech needs to be aware of the competition of rights, and needs to ensure that any infringement on rights is minimal. As I will show, racial vilification legislation needs to be able to stand up to claims that vilification legislation is unconstitutional or that it violates rights. The stance of the courts on the balance of vilification versus free speech is very important. The first country to be examined is the United States where the balance is still in favour of free speech over any cost that hate speech may produce.

3.1 The United States

The *R.A.V. v. City of St. Paul* case is important because it highlights the difficulties the courts have with free speech issues.

The first amendment of the constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances." There are in fact restrictions on speech in the United States, as previously mentioned. Typically speech laws in the United States are liberal.

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[63] Grant Huscroft and Paul Rishworth, *Rights and Freedoms: The New Zealand Bill of Rights Act and The Human Rights Act 1993* (Brookers Ltd, Wellington: 1995) p. 173.

R.A.V. v. City of St. Paul is an example of the libertarian nature of American speech legislation. The Supreme Court decided on the issue of cross burning, whether it constituted a legitimate expression of free speech or if it was unprotected speech. The details of the case were as follows: "In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street."[64] Cross burning is highly offensive to African Americans. The very action of burning a cross invokes memories of slavery, the Klu Klux Klan and lynching. Cross burning is an unmistakably racist act. The result of this case was that the city of St. Paul had previously enacted a Bias-motivated Crime Ordinance 1990. This ordinance stated,

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others, on the basis of race, color, creed, religion or gender, commits disorderly conduct and shall be guilty of a misdemeanor.[65]

The ordinance was later found to be unconstitutional upon appeal at the Court of Appeal, which stated that the statute was too ambiguous.

[64] R.A.V. v. City of St. Paul 505 U.S. 377.
[65] St. Paul Bias-motivated Crime Ordinance, Section 292.02 Minn. Legis. Code (1990).

The Court of Appeal decision was subsequently overturned by the State Supreme Court, which found that the cross burning constituted ‘fighting words’.

The defense had argued along the lines of ‘fighting words’.

> We ask the court to reflect on the ‘content’ the ‘expressive conduct’ represented by a ‘burning cross’. It is no less than the first step in an act of racial violence. It was and unfortunately still is the equivalent of [the] waving of a knife before the thrust, the pointing of a gun before it’s fired, the lighting of a match before arson, the hanging of the noose before the lynching. It is not a political statement, or even a cowardly statement of hatred. It is the first step in an act of assault. It can be no more protected than holding a gun to a victim[‘s] head. It is perhaps the ultimate expression of ‘fighting words’.[66]

Fighting words were first considered to be a form of speech unprotected by the first amendment via *Chaplinksky v. New Hampshire*. This case held that there are certain classes of speech, including “…the lewd, the obscene, the profane, the libelous, and the insulting or “fighting” words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”[67]. The decision also stated that such speech was not part of the “exposition of ideas”[68] and no benefit could be derived from them.

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[66] R.A.V. v. City of St. Paul 505 U.S. 377.
[67] Chaplinksy v. New Hampshire 315 U.S. 568, 572.
[68] *Ibid* .

R.A.V. v. City of St. Paul appears to fall under the category created by the Chaplinksky case of fighting words. The Supreme Court overturned the State Supreme Court decision in 1992. The Supreme court determined that cross burning did not constitute 'fighting words' but was in fact a valid viewpoint in the marketplace of ideas, thus cross burning was speech protected by the first amendment. The Chaplinsky case was decided in 1942 and the R.A.V. decision in 1990, the differing point of view between the two courts demonstrated that the United States has become increasingly more noninterventionist in terms of its speech laws. The R.A.V. decision has limited the scope of the 'fighting words' doctrine. 'Fighting words' must be delivered face to face and that does not happen in the case of cross burnings.

More recently a similar case also sided with the speaker's right to hateful expression. On April 7, 2003 the Supreme Court in Virginia v. Black struck down a Virginia law that prohibited cross burning, following the lines of R.A.V. v City of St. Paul, the law prohibited burning a cross with the, "intent to intimidate a person or group of persons"[69]. The Virginia case shows that laws can be created to prevent hateful expressions like cross burning, yet the law can then be struck down as unconstitutional. This necessary dilemma is there to prevent overly broad legislation, showing that laws need to be carefully drafted, narrow, and designed to target the problem. For example the Virginia law attempted to ban cross burning by using an intent clause, meaning that the intent of the cross burning would be to intimidate. Justice Clarence Thomas in a dissenting view said:

> Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point

[69] *Virginia v. Black*, 538 U.S. 343 (2003).

> and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

Justice Thomas is attempting to separate the issue into speech and action, claiming that the action of cross burning is not speech and therefore no speech tests should be done to ascertain if a violation of free speech rights has occurred. While I would agree with his dissenting opinion it would be on different grounds. Cross burning is speech, it is hateful speech as discussed above. Justice Thomas it seems would agree, and puts forward several interesting examples. Justice Thomas seems willing to accept the fact that speech does not trump all other rights, “That the First Amendment gives way to other interests is not a remarkable proposition.” He uses an example of several laws passed that revolve around abortion clinics to show that legislation understands that there are vulnerable people who are vulnerable to specific speech actions. The decision to which he refers[70] upheld a law that prevented protestors from coming within eight feet of a prospective abortion clinic patient. “[E]xplaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments ‘from unwanted advice’ and ‘unwanted communication’.”[71] So, Justice Thomas has agreed with the state upholding a law that prevented abortion protesters from coming within eight feet of a patient and providing them with unwanted speech, which is an infringement on free speech. Yet for some reason cross burning

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[70] *Hill v. Colorado* (98-1856) 530 U.S. 703 (2000).
[71] *Ibid*.

which causes extreme distress to many people, is deemed acceptable by the state.

> That cross burning subjects its targets, and, sometimes, an unintended audience … to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

Justice Thomas also refutes the chilling effect aspect of the legislation. The claim being that if cross burning that is intended to cause intimidation is banned, then there will be a chilling effect on legitimate cross burnings**.** Any legislation that prohibits an action or activity has the potential to cause a chilling effect. The chilling effect is where people are fearful of performing legitimate actions or activities because of the legislation affecting the prohibited action. I cannot see a reason for a legitimate cross burning it seems to me and also to Justice Thomas to serve no other purpose than to be “a symbol of hate” and “a symbol of white supremacy”.[72]To refute that a chilling effect occurs Justice Thomas references several pornography cases:

> Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable, ultimately results in dismissed charges. A regulation of pornography is one such example. While

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[72] *Virginia v. Black*, 538 U.S. 343 (2003).

> possession of child pornography is illegal, *Ferber* v. *New York*, 458 U.S. 747, 764 (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller* v. *California*, 413 U. S. 15 (1973). As a result, those pornographers trafficking in images of adults who look like minors, may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This "chilling" effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the members of this Court.[73]

The chilling effect feared by the cross burning legislation does not take place or has not caused great concern in other areas such as pornography so why, points out Justice Thomas, should it in the case of cross burning? Justice Thomas' arguments appear to me to be sound, pointing out what appears to be double standards and with time perhaps changes will occur to the make up of the Supreme Court allowing legislation that prevents hate speech.

3.2 Speech Codes

The main arena for hate speech discussion in the United States has been in Academia. Universities across the United States have attempted to implement speech codes in order to give them some power over students who may use hate speech against students from minority groups.

[73] *Ibid.*

In the absence of governmental protection from hate speech many academic institutions in the United States have implemented Speech Codes to protect students from injurious speech. These codes are designed to prevent hate speech and encourage equality. However because of first amendment concerns many Speech Codes have been struck down as unconstitutional.[74] The University of Michigan's famous speech code attempts to prevent,

> Verbal or physical behaviour . . . that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status. . . and that creates an intimidating, hostile or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.[75]

This code and others like it have been challenged in the courts. Such codes are commonplace in the United States now even without legal backing. The speech codes have been a great catalyst for debate on free speech issues.[76]

The United States shows no interest in passing legislation to ban hate speech. A First Amendment ideology has been created in the United

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[74] The Foundation for Individual Rights in Education (FIRE) is strongly opposed to Speech Codes for more information on Speech Codes and protest against them see FIRE's website Speechcodes.org.

[75] Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) In, John B. Gould, *Speak No Evil* (University of Chicago Press, Chicago: 2005) p. 13.

[76] For an in depth overview of Speech Codes on Campuses see Jon B. Gould's book, *Speak No Evil: The Triumph of Hate Speech Regulation* (University of Chicago Press, Chicago: 2005).

States that will prevent any legislation that would restrict hate speech. Stanley Fish believes this is because people do not wish to face the alternative which is that people, instead of doctrine, make decisions about speech.[77] Or, as Gerald Rosenberg said, the "First Amendment is not a substantive force in itself, but instead a forum for substantive arguments about the cultural definitions of liberty".[78] There is a belief that any legislation on hate speech would erode Freedom of Speech, but yet "death threats, child pornography, fraud, defamation, and invasion of privacy are exempt"[79] why is this so? Anthony Cortese believes it is because the United States has "a history of xenophobia, ethnocentrism, and racism."[80] As the harms of Hate Speech become recognized perhaps changes in the United States will come, it is not foreseeable in the near future that the United States will change its stance on hate speech.

3.3 Hate Groups

As the United States has a lack of any legislation to prevent hate groups, many such groups exist. A famous example of such groups effecting society is the Skokie march (mentioned in Chapter Two), where a group of neo-Nazis marched through the predominantly Jewish neighborhood of Skokie Illinois. In 2000, The Southern Poverty Law Centre identified 602 hate groups operating in the US.[81] All of these groups can publicly spread their ideas which, as stated before, can be very influential and counter speech can be useless due to 'confirmation bias'. Groups in other countries need to cloak their hate speech in a specific terminology in order to circumvent legislation. For example, hate

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[77] John B. Gould , *Speak No Evil* (University of Chicago Press, Chicago: 2005) p. 48.
[78] *Ibid*, p. 48.
[79] Anthony Cortese, *Opposing Hate Speech* (Praeger Publishers, Westport, Connecticut: 2006) p. 10.
[80] *Ibid*, p. 10
[81] SPLCenter.org: The Year In Hate, http://SPLcenter.org/intel/intelreport/article.jsp?aid=233 (last accessed 26 February 2007).

groups need to redefine themselves as anti-immigration or portray themselves as fighting for white equality as opposed to superiority. Yet, none of this is necessary in the United States.

3.4 Canada

Canada's laws on hate speech are robust. As Canada was created on a foundation of multiculturalism it has attempted to protect its more vulnerable citizens. As I will show Canada's legislation has some good points. It has been backed up in the courts and has the support of Canadians. I will also point out some flaws in the legislation that New Zealand should avoid.

Canada established the Canadian Charter of Rights in Freedoms in 1982; the Charter is part of the constitution of Canada. This piece of legislation is entrenched and acts as a Bill of Rights protecting political and civil rights. One aim of the charter is to unify the Canadian people. Section 2 of the charter guarantees 'Fundamental Freedoms' which state, "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association. The inclusion of these rights shows that Canada values individual rights.

The Canadian charter is different from the United States model of rights because it contains limitations within the document. Section one set forward the reasonable limits clause or limitation clause. Section one is what allows Canada to limit hate speech while still maintaining freedom of expression as an important right. Section one states, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set

out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society." This limitation has been implemented because Canada has seen that the fundamental rights are not absolute, there is room around the fringe where those fundamental rights are often curtailed.

Canada has legislated against hate speech in its criminal code. Sections 318 and 319 entitled 'Hate Propaganda' create an offense for advocating genocide 318, public incitement of hatred 319(1), and willful promotion of hatred 319(2). Section 318(1) "Every one who advocates or promotes genocide is guilty of an indictable offense and liable to imprisonment for a term not exceeding five years." Section 319(1) "Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of,

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or,

(b) an offence punishable on summary conviction.

Section two of 319 states "(2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of,

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or,

(b) an offence punishable on summary conviction."

In both sections an 'identifiable group is "any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation."

In 2004 bill c-250 was passed by the Canadian government which added sexual orientation to the list of identifiable groups.

An important aspect of the Canadian legislation is the inclusion of defenses for section 319(2). Section 319(1) refers to statements that would lead to direct violence or public disturbance. The equivalent of this under United States legislation would be fighting words. The speech covered under 319(1) is generally accepted to be harmful speech, as it leads to physical harm to property or person. Section 319(2) however, is the speech that does not cause violence immediately; it is speech that promotes hatred, and is the type of speech that this thesis is concerned with. The existence of defenses for such speech demonstrates that the legislation is intended to be narrow, to avoid a chilling effect on regular speech.

There are four defenses to willful promotion of hatred; truth, faith, public interest, and a defense for the press. They are as follows, 319(3) No person shall be convicted of an offence under subsection (2),

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Just like with defamation or libel, an absolute defense is truth. The second defense allows religious people freedom of religion. However, it must be in good faith. This means that Christians for example can express their dissatisfaction with a queer lifestyle, but that expression must be in good faith. Due to some recent developments in Canada this defense could be made more specific, but that shall be discussed separately. The third defense could be used to prevent government suppression of speech through these sections of the legislation. It also allows people some room for error; if an opinion is reasonably believed to be true it is defensible. The fourth defense allows the media or other people to repeat or say what would otherwise be considered hate speech for the purpose of removing such speech. For example, a news story could cover a racist group and publish what the group believes or disseminates for the intention of demonstrating how ridiculous it is, or a comedian could use such speech in order to satirise a hate group like the KKK.

Subsequent sections of the legislation allow the government to seize any property related to the offense. Also both sections 318 and 319(2) require the attorney generals consent to prosecute presumably to prevent frivolous cases.

3.5 The Oakes Test

The Oakes test is how courts decide if a violation of a fundamental right is justified. The test was written by Chief Justice Dickson in R. v. Oakes. The test is used when the claimant has proven that a fundamental right has been violated and it is up to the crown to prove that the violation of the right is in the best interests of society. Briefly the test is as follows.

1. There must be a pressing and substantial objective
2. The means must be proportional
    1. The means must be rationally connected to the objective
    2. There must be minimal impairment of rights
    3. There must be proportionality between the infringement and objective

If legislation fails one of the branches of the test it is unconstitutional.

The Oakes test has been applied to some hate speech cases. In R. v. Keegstra the test was applied. James Keegstra was a high school teacher who taught his students that Jews had evil qualities describing them as “treacherous”, “subversive”, “sadistic”, “money-loving”, “power hungry”, and “child killers”.[82] He also taught that Jews are trying to destroy Christianity and they made up the Holocaust to gain sympathy.[83] He expected his students to answer tests and write essays expressing these views about Jews, if they failed to follow his teachings they would not obtain a passing grade.[84] The Crown prosecuted Keegstra under section 282.2(2) [now section 319(2)]. The first court found Keegstra guilty. On appeal the conviction was quashed on the basis that the section 319(2) violated section 2(b) of the Charter, the right to freedom of expression. The Crown appealed to the Supreme

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[82] R. V. Keegstra [1990] 3 S.C.R. 697; reversing (1988) 60 Alta.L.R. (2d) 1; reversing (1984) 19 C.C.C. (3d) 254.

[83] Sandra Coliver eds, *Striking a Balance : Hate Speech, Freedom of Expression, and Non-Discrimination* (Article 19, International Centre Against Censorship, Human Rights Centre, University of Essex, London: 1992) p. 112.

[84] *Ibid,* p. 112.

Court and the Supreme Court upheld the conviction in a divided decision. Justice Dickson in applying the test concluded that hate speech is a substantial and pressing concern, and that it causes harm. In making this decision Justice Dickson drew from some of the arguments for harm, in that hate speech is of little value, unlikely to be true and that it is a detriment to democratic values as it silences people. Justice Dickson decided that, “there is a rational connection between 319(2) and the objective of suppressing hate propaganda.”[85] That this connection cannot be measured is to him unproblematic, because the legislation is likely to reduce harm. 319(2) was also drafted narrowly and this is what allows it to pass 2(2) of the Oakes test. The legislation is not overly broad, and so will have a limited chilling effect. Finally he concludes that the infringement on the defendants rights was not extremely serious, but “the objective of promoting equality and dignity was of substantial importance”[86].

The Keegstra decision was a 4-3 split. The dissenting Justices decided the opposite of Justice Dickson. That the harm done by hate speech was not serious and therefore there was no pressing and substantive need for the legislation. They agreed however, that the legislation was rationally connected. Nevertheless the dissenting Justice’s concluded that the legislation was too broad, and that it would create a chilling effect on acceptable speech.

The Canadian experience has been on the whole very successful. The legislation has gained popular support, in large part due to Keegstra and Zundel whose speech was reprehensible. The areas that New Zealand should avoid will be discussed in Chapter Five.

3.6 Australia

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[85] Coliver, p. 114.
[86] *Ibid*, p. 114.

Australia does not have a Charter or a Bill of rights, as a signatory to the Universal Declaration of Human Rights (UDHR), Australian Citizens are granted those fundamental rights. Like in Canada the UDHR recognizes that there are limits to free speech and restrictions may be placed upon it. Australian legislation operates at state and federal levels; this work will focus on the federal legislation. The different states have different kinds of racial vilification legislation and to discuss them all would become unwieldy. An overview of several cases should provide a relevant context with which to compare the situation in New Zealand. Obviously this work will be a brief overview of the Australian situation as it is quite complex. This section will cover the legislation, several cases and demonstrate some areas that any future New Zealand legislation should avoid.

The Racial Hatred Act 1995 (Cth) ("RHA 1995") is the modern version of legislation that was initiated in 1974. Australia has had a long debate covering much of the ground already covered in Chapter Two. The Australian debate concluded that:

- Free speech is not absolute.

- The proposed legislation's infringement of free speech was necessary and justifiable; and

- The degree of infringement was minor and posed no threat to Australian democracy.[87]

New Zealand later mirrored much of this legislation, enacting its own legislation. However, Australia's legislation has been updated and is used to punish hate speech. New Zealand on the other hand appears to have symbolic legislation.

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[87] Luke McNamara, *Regulating Racism*: *Racial Vilification Laws in Australia* (The Institute of Criminology: Sydney, Australia: 2002) p. 43.

The section of the RHA 1995 relevant to vilification is section 18C:

18C (1) It is unlawful for a person to do an act, otherwise than in private if:
the act is reasonably likely, in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people;
and
the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

This legislation has a low threshold by making conduct that is likely to offend, insult, humiliate or intimidate prohibited. Such a threshold is a low standard compared to the Canadian example where one must be proven to have willfully promoted hatred. The Australian legislation has many defenses, yet this does not change the fact that the legislation can be interpreted very broadly. The RHA punishes speech that is on the low end of the scale. Speech that is likely to insult a person is less serious than speech that encourages others to hate a certain group.

Section 18C(2)-(3) states:

(2) For the purpose of subsection (1), an act is taken not to be done in private if it:
(a) causes words, sounds, images or writing to be communicated to the public; or
(b) is done in a public place; or
(c) is done in the sight or hearing of people who are in a public place.
(3) In this section:
'public place' includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

These sections show that not only have concerns about free speech shaped the legislation, but also concerns of privacy have had an influence. Such restrictions on hate speech legislation are useful as it allows people to freely discuss anything without fear of any legislation. So a chilling effect if indeed one does occur would not occur everywhere, it would just impinge on public speech.

There are defenses to the act which are covered in section 18D:

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

(a) in the performance, exhibition or distribution of an artistic work; or
(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest or
(c) in making or publishing
    (i) a fair and accurate report of any event or matter of public interest; or
    (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

So artistic, academic, scientific, and issues relating to the public interest are exempt, so is the media reporting accurately on matters of public interest.

These defenses help sidestep an issue put up by opponents of hate speech legislation. The issue is that by enacting hate speech legislation a state may actually ban literature that most people would not consider to be hate speech, examples of such works include, Mein Kampf, the Protocols of Zion, the Satanic Verses, Phillip Pullmans Dark Materials trilogy, The Chronicles of Narnia, Canterbury Tales, the Merchant of

Venice and even religious texts could become attacked for promoting hatred.[88] So the Australian legislation neatly sidesteps any such problems by making sure their legislation is tight and not overly broad.

The problem with these defenses is that the action which is legislated against is no less harmful if it is done under the protection of a defense. This argument was put forward by the Australian Arabic Council during the original debates over the bill which said "Exemptions under section 18D present many problems, as the effects of the actions exempted are no less serious than the racist actions, and the grounds for exemptions do not mitigate the effect that the bill is ostensibly trying to address." This argument has merit. The only reason to add such defenses is to satisfy free speech/constitutional issues.

Another criticism of the defenses is that especially the exemption of academics, artists and scientists mean that the elite continue to have unfettered free speech, while the general populace is constrained. While once again a valid argument such defenses help narrow the legislation so that it becomes constitutionally valid.

Racial vilification complaints are governed by the Human Rights and Equal Opportunity Commission (HREOC). The Australian legislation imposes civil penalties on anyone who breaks section 18C and there are no federal criminal sanctions in regards to racial vilification. While criminal sanctions were included in the draft legislation they were removed before the legislation was passed into law. This was because of free speech sensitivity. The members debating the legislation decided to remove the criminal aspect with Senator Charmarette arguing that, "If

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[88] Joel Harrison, *Truth Civility and Religious Battlegrounds: The Contest between Religious Vilification Laws and Freedom of Expression* (University of Auckland, Auckland: 2006). These issues were raied in R. v. Keegstra and in a court case striking down a city ordinance in Skokie, Collins v Smith 578 F. 2d 1197 (7th Cir), cert denied, 439 U.S. 916 (1978).

this legislation is passed it will create a crime of words. This will take the legislation across a certain threshold into the realm of thought police --- the most commonly voiced concern in the community and one which I share."[89] On the other side of the argument Senator Spindler said that:

> This parliament will actually be saying to the community that we place greater value on protecting the free speech of those, who, on racial grounds, were threatened personal violence, damage to property and incitement to hatred, rather than those who are likely to be the victims of those actions. I think that is rather regrettable.[90]

The bill was passed with the exclusion as I said of custodial punishments and Senator Spindler saw the bill as a "gutted ruin"[91] Spindler obviously saw the the threat of custodial sentences to be the 'guts' or the core of the issue. While the threat of prison time is a good deterrent it is easy to see how the opposition can use the inclusion of prison time to connect the legislation to the illusion of a draconian government out to stifle the voice of the public. To see how the legislation has worked it is necessary to examine some cases.

3.7 Cases

In order to understand how the legislation works it is necessary to see the results of the courts. From 13 October 1995 when the racial vilification amendment came into force to 30 June 2001 there were 618 complaints under section 18C. The main reasons for complaint have

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[89] Cth Hansard (S), 24 August 1995, p. 315.
[90] *Ibid,* p. 360.
[91] *Ibid,* p. 360.

been the media and neighborhood disputes making up 52% of the complaints.[92] A large number of the complaints were declined annually 30% and many complainants dropped their complaints quickly 26%. There is an emphasis on conciliation in the Australian legislation with 23% proceeding to conciliation. A relatively low number 14.5% have proceeded through to trial or public inquiry or hearing. The importance the legislation has on resolution as opposed to resorting to litigation is a good sign. Of the 618 complaints only 18 were subject to a final HREOC public inquiry determination and a further seven cases were referred to the Federal Court of Australia or the Federal Magistrates Court.

The Australian legislation could do with a truth defense and perhaps some requirement that a complaint first be approved by a governing body such the Attorney General to prevent frivolous complaints. Although the large number of rejected complaints because they do not fall within the scope of the act does seem to be working to some degree however a number of frivolous complaints that do fall within the broad structure of section 18C have no way of being rejected. An example is *Shron v Telstra* where a complainant claimed that phone cards issued by Telstra vilified Jews. The phone card showed a World War II German Fighter plane that had a Nazi Swastika on its tail. It was obvious from the outset that this complaint would not succeed for even if it was decided that the picture did constitute the vilification of Jews, which I doubt. The image would be excluded from prosecution under section 18D that it was in good faith.

Of the cases were the courts ruled that racial vilification had occurred the punishments were either monetary or the courts ordered apologies be published and presented to the complainant. Unlike the Canadian

[92] McNamara, p, 62-63.

system there is no prison time for racial vilification in Australia, however some hefty sums of money have been paid to complainants. The largest amount was $55,000, however the complaint was part racial vilification and part racial discrimination. The complainant was of French National Origin and Ugandan ancestry was subjected to racial abuse at work being called a “fucking black cunt”, “a fucking black lazy bastard” and was subjected to “monkey” gestures.[93]

The second largest sum awarded was for $50,000 for just racial vilification and involved a radio station and its callers vilifying the Nyungar people and the Waugyl a cultural and spiritual figure for Nyunger communities. The HREOC found in favour of the complainants.[94]

The third highest was $12,500 in connection with a sexual harassment and discrimination complaint[95], then the decisions drop down to $1500, and $1000 and then to apologies. Of the 618 complaints nine were upheld in court and damages or apologies awarded. So this either means that there are a lot of frivolous complaints or that some racial vilification is going unpunished. Many complainants may be happy that their complaints were heard and accepted,[96] many would have been settled at conciliation, and the low number of court cases show that freedom of expression is not being trampled.

3.8 Free Speech Versus Hate Speech Law

The legality of racial vilification law has been sidestepped a little by the Australian courts. In Jones and Executive Council of Australian *Jewry v*

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[93] *Rugema v J Gadsten Pty Ltd and Derkes* [1997] HREOCA 34 (26 June 1997).
[94] *Wanjurri and others v Southern Cross Broadcasting (Aus) Ltd and Sattler* Unreported 7 May 2001.
[95] *Horman v Distribution Group* [2001] FMA 52 (15 August 2001).
[96] McNamara, p. 65

Toben Commissioner McEvoy sidestepped the issue by stating that the Commision had no judicial powers and therefore no authority to asses the validity of commonwealth legislation, stating “It is appropriate that I assume the constitutional validity of the legislation which I am required to apply”[97]. However the commissioner went on the state that in light of the Section 18D exceptions the legislation would be consistent with the implied freedom (of expression) because the law was “reasonably appropriate and adapted to serve the legitimate ends of preventing the form of racial discrimination sought to be proscribed by this part.”[98] So while failing to make a stand on the validity of the legislation the Commissioner made it clear that he considers the legislation to be valid. Australia seems to have avoided the constitutionality debates that have occurred in the United States and Canada. Perhaps because racial vilification legislation in Australia creates only civil sanctions as the criminal part of the legislation was removed before it was passed into law.

The lesson to be learned from what these countries have been through is that hate speech legislation has not led to a horrible result. This result does not give a government free reign to create oppressive legislation however. Free speech and free speech sensitivities go a long way to shaping the type of legislation that will be permitted. As such New Zealand need to be aware that any legislation will face free speech challenges and any legislation drafted needs to be carefully constructed so that it will not unfairly infringe on free speech.

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[97] *Ibid*, p. 74
[98] *Ibid,* p. 75

Chapter Four

The New Zealand Situation: An Examination of New Zealand's Speech Legislation.

New Zealand, along with Canada and the United States, has its own Bill of Rights. New Zealand's Bill of Rights is the most recent having been enacted in 1990. The important distinction between the New Zealand Bill of Rights Act 1990 (NZBoRA), the Canadian Charter and the United States Bill of Rights is that New Zealand's NZBoRA is not entrenched. This means that while new legislation must take into account the freedoms guaranteed under the NZBoRA, courts cannot strike down legislation that violates the NZBoRA. This distinction means that challenges to Vilification law need to take place in different forms than those in Canada and the United States.

4.1 The HRA

New Zealand’s foremost Hate speech legislation is contained within the Human Rights Act 1993 (HRA). It is currently a criminal offence to incite racial disharmony. Section 131 of the HRA states:

131(1)[99] Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,---

(a) Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or

(b) Uses in any public place (as defined in section 2 (1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,---

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

Prosecutions under section 131 must gain the approval of the Attorney-General[100], presumably to prevent frivolous cases. This is mirrored in Canadian legislature.

[99] Human Rights Act 1993, s 131.
[100] Human Rights Act 1993, s 132.

The legislation appears to take a tough stance on hate speech. Section 131 prohibits hate speech that is published or propagated in a public place, or expressions that can be viewed or heard in a public place. Prior to the HRA New Zealand had the Race Relations Act 1971. Section 25 of the Race Relations Act 1971 became section 131 of the HRA. Section 25 was invoked once in *King-Ansell v. Police.* The King-Ansell case involved pro Nazi and anti Semitic pamphlets. The pamphlets were distributed around Auckland by Durward Colin King-Ansell. The flyers contained a picture of Jesus next to a picture of Hitler with the captions:

Jesus said to the Jews: 'Ye are of your father the devil, and the lusts of your father ye will do. He was a murderer from the beginning, and abode not in the truth, because there is no truth in him. When he speaketh a lie, he speaketh of his own: for he is a liar, and the father of it.' (John 8:44)

This was followed by a quote from Mein Kampf "[b]y defending myself against the Jew, I am fighting for the work of the Lord". The pamphlet was promoting the National Socialist Party of New Zealand of which King-Ansell was a member and had stood in the general election in 1978 gaining 22 votes out of a total of18,804 votes. William C. Hodge argued that because King-Ansell and his party were so insignificant, the prosecution should not have gone ahead. Instead he should have been charged under the Post Office Act 1959 which prohibits the placing of “noxious” material in letter boxes.[101] However, two complaints had been made so the police had investigated, gained the approval of the attorney general, and charged King-Ansell with inciting racial disharmony. King-

[101] William C. Hodge, “Incitement to Racial Hatred in New Zealand*”, International and Comparative law Quarterly* Vol. 30, No. 4, 918-926. Oct., 1981 p. 919.

Ansell was convicted and sentenced to three months imprisonment. On appeal the charge was upheld but the sentence reduced to a $400 fine because there was no threat of actual violence in the pamphlet. What was most important about this case was that the courts decided that Jews belonged to an ethnic as well as religious group.[102] This decision meant that subsequent prosecutions involving the vilification of Jewish people could take place under the HRA however none ever did under section 131.[103]

The King-Ansell case has been the only one of its kind in New Zealand. No other cases involving criminal vilification have been brought before the courts. There are a number of possible reasons for this; The Attorney-General may not have approved any more prosecutions, there may not have been any complaints that passed the threshold to be accepted by the Human Rights Commission, or the police may be unwilling to prosecute. There are also large sections of the public that are unaware of this legislation.[104] Successive governments have been less likely to allow prosecutions under the section 131 due to fear of being accused of stifling free speech. In a submission to the select committee in 2004 the Human Rights Commission believes the reason there have been so few prosecutions under section 131 is because the legislation is too "…narrowly framed in order to allow no more than what was strictly necessary to implement Article 4 of CERD"[105] (International Convention on the Elimination of All Forms of Racial Discrimination)

To recap, criminal section of the HRA has been used only once in 36 years. The King-Ansell case was not an extreme case of racism. The more recent mailings of letters containing pork to Muslims in Wellington

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[102] *King-Ansell v Police* [1979] 2 NZLR 535.
[103] *Ibid,* p. 918-921.
[104] This opinion is based on Submissions to the Parliamentary Select Committee Inquiry Into Hate Speech 2004.
[105] Submission by The Human Rights Commission p. 7.

were on the same degree of transgression however, religion is not covered under the HRA.

That New Zealand has only prosecuted one person under its criminal vilification law means that New Zealand either has exceptional race relations or the legislation is not being used. It should be noted that section 131 is not the type of legislation that should be invoked often; it is reserved for extreme expressions of hate.

The HRA also contains a civil proceeding in section 61, Racial Disharmony:

61(1)[106] It shall be unlawful for any person---

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

(b) To use in any public place as defined in section 2 (1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or

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

[106] Human Rights Act 1993, s 61.

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

(2) It shall not be a breach of subsection (1) of this section to publish in a newspaper, magazine, or periodical or broadcast by means of radio or television a report relating to the publication or distribution of matter by any person or the broadcast or use of words by any person, if the report of the matter or words accurately conveys the intention of the person who published or distributed the matter or broadcast or used the words.

Section 61 is the civil arm of the HRA which enables victims of hate speech to gain some power back by making a complaint and (hopefully) seeing it through to fruition.

A significant difference between sections 61 and 131 is intent. The criminal arm section 131 clearly defines that the action must have the intent to excite hostility, ill-will, or bring into contempt or ridicule. The motivation requirement is unusual for the police who will be investigating the crime.[107] The police are not normally focused on the intention of the crime; they focus on the *actus reus* requirements, or elements of the offence.[108] The civil arm section 61 has no intent requirement. That intent is difficult to prove and the police are not used to gathering

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[107] Tessa May Bromwich, *Balancing Freedoms: A critique of New Zealand's Hate Speech legislation in Light of the New South Wales and Victorian Experience*, (Research paper LL.B. (Hons),Victoria University of Wellington: 2005) p. 13.

[108] Race Hate Crimes – Example of Prosecution , Police Memo (New Zealand Police: 2006) p. 1.

evidence on intent, is all the more reason that section 131 is not often invoked.

A second difference between section 61 and 131 is that section 61 has a defense. It is not prohibited to report on a story about vilification or hate speech. This allows the media and other commentators to comment on a situation where hate speech has been used without becoming liable for prosecution themselves. Providing a defense for the media ensures freedom of the press. It is also difficult to use this provision as a loophole because to be exempt from prosecution one must be reporting on vilification not creating it themselves.

It is important to understand the history of this legislation in order to understand why the HRA is under utilised. New Zealand signed the International Convention on the Elimination of all forms of Racial Discrimination in October 1966. 1971 was the international year to combat racial discrimination and so the Race Relations Act 1971 was rushed through parliament.[109] It would appear that the legislation was created for the sole purpose of fulfilling an international obligation rather than to protect New Zealanders. It is conceivable that the government wanted the legislation enacted in preparation for possible racial tension. The legislation would be useful if racial tension ever developed and thankfully that has never happened

4.2 The Complaints Process

The Human Rights Commission has a process to follow for making a complaint under section 61. When a complaint is received the complaint is judged and the commission decides if it will take action. If so, the

[109] Hodge, p. 920.

disputes resolution phase is instigated. To give the proper weight to free speech the commission has a high threshold for complaints.

> In order to balance the right to express opinions that may be unpopular or controversial against material that is likely to expose people to hatred or contempt, the Commission has adopted the practice of requiring some evidence that the material or comment will increase the risk of manifestation of hostility or contemptuous behaviour.[110]

These thresholds of evidence mean that a large proportion of complaints are rejected in practice and none were accepted over a two year period. “In 2002 the Commission received 70 complaints alleging racial disharmony. In 2003, there were 210. The Commission did not pursue any as formal complaints[111].

If a complaint is accepted it moves into the conciliation phase. Regrettably the conciliation phase is not made public and so it is unknown how the cases are settled if at all. If the disputes resolution phase is unsatisfactory the director of human rights proceedings can take the complaint to the Human Rights Review Tribunal. The case may then be appealed to the High Court and then to the Court of Appeal.[112] Due to the high threshold there have been few cases in New Zealand to compare internationally.

4.3 Cases

[110] Submission by The Human Rights Commission p. 8.
[111] Submission by The Human Rights Commission p. 9.
[112] Human Rights Commission handout, ‘Process for making a complaint under section 61, Human Rights Act 1993.

King- Ansell, as previously mentioned, has been the only case to have proceeded under section 131 or what was its predecessor.

Under section 61 there have been a few cases. *Proceedings Commissioner v Archer* is an important case. A Wellington radio announcer made a number of comments about Chinese and Japanese people, including that people in Tokyo were "…about this high…and not that bright in the first place."[113] The announcer also said:

> We've got to pick on somebody haven't we. I'm allowed to pick on the Chinese. Wasn't it the Chinese—the Chinese were gonna nuke us on our arse about, about 5 years ago weren't they. Oh good, where are they now. All moved to Christchurch. It's a hell of a lot easier to pull a bloody rickshaw in Christchurch. It's flat like a billiard table. You try pulling a rickshaw in Wellington. I think we should throw them all out of the bloody country.[114]

The case was upheld as it was decided that the comments were reasonably offensive. The court also decided here that the test of a reasonable person is inappropriate because "…he or she is unlikely to be excited to feelings of hostility for groups who are racially different".[115]

Proceedings Commissioner v Archer is in contrast to *Neal v Sunday News.* In *Neal v Sunday News* a complainant contended that anti-

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[113] Proceedings Commissioner v Archer (1996) (3HRNZ 123).
[114] *Ibid.*
[115] Proceedings Commissioner v Archer (1996) (3HRNZ 123). In T.M Balancing Freedoms p. 17.

Australian jibes breached the Race Relations Act 1971 (The predecessor of the HRA). The plaintiff drew attention to the two paths the court could take. The court could examine the effects of the publication “either on the average New Zealander or, alternatively, on that group of New Zealanders who might be less tolerant or have a lower threshold of sensitivity than the majority”.[116] Instead of following either path the court focused on the likely response of the people who would read the newspaper. In the end the complaint was dismissed. It appeared that the court was searching for a way to make a subjective decision in an objective framework. Creating a subjective framework is one possible change that could be made to the system. This possibility is discussed in Chapter Five.

Skelton v Sunday Star Times illustrates the problem with not being able to stop frivolous complaints if the complainant wishes to take the matter directly to court. “His objection was to the policy of a local newspaper to capitalize the names of all ethnic groups except ‘pakeha,’ which he thought insulted himself and this group as a whole.”[117] The court decided that the ““‘views of the very sensitive are not the appropriate yardstick by which to measure whether something is insulting.”[118] This case illustrates that the courts could decide between legitimate complaints and frivolous ones. This discounts some of the fears of the opponents of vilification legislation that the courts will not be able to decide between opinion and hate speech.

4.4 Summary Offences Act 1981 (SOA)

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[116] Neal v Sunday News Auckland Newspaper Publications [1985] 5 NZAR 234, 239 Decision of the Tribunal.
[117] Catherine Lane West-Newman, *Feeling for Justice? Rights, Laws, and Cultural Contexts*, *Law and Social Inquiry*, volume 30 (2005) p. 321.
[118] Neal v Sunday News Auckland Newspaper Publications [1985] 5 NZAR 234, 239 Decision of the Tribunal.

Currently in New Zealand Hate Speech is prosecuted under the Summary Offences Act 1981 (SOA). If the offender is convicted they can be sentenced under the Sentencing Act 2002.[119]

While not having the same level of punishment as the HRA sections, the SOA is fair to all members of society. The SOA is only suitable for offending done in person. The following sections of the SOA are used to prosecute hate speech.

Section 3: Disorderly Behavior likely to cause violence (punishable by 3 months imprisonment and $2,000 fine).

Section 4: of the Summary Offences Act 1981, Offensive behavior or language allows for the police to prosecute people for certain types of vilification of racist speech. It is as follows;

(1) Every person is liable to a fine not exceeding [$1,000] who,--
(a) In or within view of any public place, behaves in an offensive or disorderly manner; or
(b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
(c) In or within hearing of a public place,--
  (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or
  (ii) Addresses any indecent or obscene words to any person.

[119] Internal Police Memo, p. 1.

(2) Every person is liable to a fine not exceeding [$500] who, in or within hearing of any public place, uses any indecent or obscene words.

(3) In determining for the purposes of a prosecution under this section whether any words were indecent or obscene, the court shall have regard to all the circumstances pertaining at the material time, including whether the defendant had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended.

(4) It is a defense in a prosecution under subsection (2) of this section if the defendant proves that he had reasonable grounds for believing that his words would not be overheard.

(5) Nothing in this section shall apply with respect to any publication within the meaning of the Films, Videos, and Publications Classifications Act 1993, whether the publication is objectionable within the meaning of that Act or not.

Section 21: Intimidation or speaking threateningly (punishable by 3 months imprisonment and a $2,000 fine).

Section 37: Disturbing Public Worship (punishable by 3 months imprisonment and a $2,000 fine)

The Summary Offences are under the jurisdiction of the New Zealand Police and as such, the complaints are pursued independently of the complainant. The HRA is complainant driven which requires them to be aware that a law has been broken when they are harassed or abused. In

contrast, the SOA offence is investigated by the police and the complaint is Police driven.

The SOA and the HRA As only protect public expressions. This is due to privacy concerns and is as far as the legislation should extend. The SOA covers what is considered is a weakness in some hate speech legislation, The weakness is how to deal with people using words that have no derogatory impact within a specific social group. For example within Black American culture, some members fondly refer to each other as a 'nigger', but if someone outside that culture was to refer to them as a 'nigger', they would perceive that as an insult. Section 4 sidesteps this issue via subsection (3) which explains that if the defendant "…had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended."[120]

This Act is also fair; it covers everyone regardless of ethnicity, gender, or religion. If someone feels offended or insulted by what is said to them, they can make a complaint to the police.

4.5 Sentencing Act 2002

When the SOA and the Sentencing Act are combined we can see how effective this combination can be in prosecuting vilification in some instances. The Sentencing Act allows the court to take into account aggravating and mitigating factors when sentencing offenders.

[120] Summary Offences Act 1981, s 4(3).

9(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case[121]:

(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

(i) the hostility is because of the common characteristic; and
(ii) the offender believed that the victim has that characteristic.[122]

This combination means that while the HRA criminal offence is never used, hate speech can be prosecuted. As the conviction relies on other matters than just the hate speech action it is difficult to use the New Zealand cases in direct comparison to international cases. Cases using the SOA and just involving speech are few.

An example of the SOA in practice: a man verbally abused a Muslim woman wearing a *burqa*. The woman was called a terrorist and told that she should leave the country. The woman's husband was also told to send his wife back home. The incident occurred on street busy with pedestrians. The man was convicted of disorderly behavior and sentenced to 120 hours community service.[123]

The sentencing Act is also combined with other criminal codes to create a hate crime conviction. As the Sentencing Act contains many protected groups its scope is far wider than the current HRA Hate Speech

[121] Sentencing Act 2002, s 9(1).
[122] Sentencing Act 2002, s 9(1)(h).
[123] These examples come from an internal police memo, Race Hate Crimes – Example of Prosecution. I gained permission to use the memo but was asked not to disclose the cities where the offences occurred.

legislation. The Sentencing Act is used for all crimes and the aggravating factor sub section (h) is most commonly invoked when convicting someone of violence based on a person's race or other protected category. So the way that hate crime is punished in New Zealand is to gain a conviction from the SOA, the crimes act 1961 or even the Harassment Act 1997. Then the hate crime section of the sentencing act is invoked to gain a harsher penalty against those who target their victims because of the group they belong to or are perceived to belong to.

4.6 Harassment Act 1997

The Harassment Act 1997 was used in Wellington to convict a man who sent abusive letters containing pork to Muslims.[124] The incident gained widespread publicity, being broadcast on the major television news shows, and also making it into the international media with the Taipei Times reporting on the story[125]. The offender was convicted of criminal harassment under section 8 of the Harassment Act 1997.[126] The police in prosecuting showed strong support towards punishing this type of crime. Detective Inspector Quinn said. "We hope the outcome of this investigation is that people will see that intolerant behaviour is unacceptable; that they will become more tolerant and respectful of the diversity of ethnic and faith based groups and welcome their contribution to our communities."[127] The defendant was a Christian and claimed that he was attempting to attack the victim's religion not them personally. This could have been a valid defense had a charge been brought under the HRA as religion is not a protected category in New Zealand. The

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[124] Internal Police Memo*,* p. 5.
[125] Taipei Times – archives http://www.taipeitimes.com/News/world/archives/2004/09/29/2003204831 (last accessed 27 February 2001).
[126] Internal Police Memo, p. 5.
[127] NZ Police website http://www.police.govt.nz/district/wellington/release/2113.html.

simplicity of combining the Sentencing Act with other legislation is that convictions can be readily gained against people without the need for lengthy drawn out rights based court battles such as have occurred in the USA, Canada and Australia. The defendant was subsequently convicted and punished with six months imprisonment and reparations of $500 to each victim.[128] The defendant was also charged with one count of unlawful possession of a pistol[129] which makes it difficult to make comparisons to punishments for similar crimes internationally.

The New Zealand situation is rather unique, as the hate speech legislation as contained in the HRA, was created to meet international guidelines and has been rarely used. Instead, the existing law has changed to restrict direct 'fighting words' through the Sentencing Act 2002. So New Zealand is restricting hate speech while many New Zealanders do not even know that hate speech legislation exists.[130] This is an unsatisfactory situation. If hate speech is bad for society and New Zealand has decided that it is, then it should be punished in all its forms, not just through other legislation.

Different media is governed by different legislation. The way hate messages are conveyed affects if it is covered by the HRA. Expressions of hate that are covered under the HRA include "messages written, or broadcast by means of radio or television, or spoken in public."[131] Methods of distributing messages that are not covered include telephone, fax, and computer networks. The HRA does not cover media that is not broadcast. Examples of media that is not broadcast include music, film, video, art, and photographs.[132] Although certain symbols

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[128] Internal Police Memo p. 5.
[129] NZ Police website http://www.police.govt.nz/district/wellington/release/2113.html.
[130] Personal experience through conversations about my thesis.
[131] Elizabeth Macpherson, *Regulating Hate Speech in New Zealand* (University of Wellington, Wellington: 2003) p. 37.
[132] *Ibid*, p. 37.

are covered, displaying the swastika for example could open up the responsible person to prosecution under both sections 61 and 131 of the HRA.[133]

4.7 Media

Because of the limited scope of the HRA, in relation to media, as technology improves and more information is passed over the internet, hate speech may escape the examination of the HRA. This would create a double standard as hate messages propagated on the internet would be untouchable by hate speech legislation. The internet is already the communication tool of choice for New Zealand's racist groups. Racist groups internationally can escape their own countries vilification legislation by hosting their websites in the United States. A recent New Zealand example of a racist website was 'RedWatch NZ", run by Nic Miller. This site posted pictures of anti-racist activists along with their personal information including phone numbers and private addresses. Miller came to the attention of media when he also posted the pictures and personal information of four Jewish families, including the information of Professor Peter Muntz, 85, a German born holocaust survivor. Miller was also reported in the press as saying "I do not like the Jews, not one bit. They should have been exterminated … Jews being in New Zealand is harassment to me. They do not belong here."[134] The Sunday News reported that Miller was under investigation by the New Zealand police[135] but nothing has been heard since. The internet will be the future haven for racists unless something can be done about it.

[133] Human Rights Commission "Race and Ethnic Relations: Information sheet: The Swastika" http://www.hrc.co.nz/index.php?p=13824 (last accessed 21 February 2007).
[134] Kiwi cops to charge avowed anti-semite http://www.fightdemback.org/2006/08/22/miller-likely-to-be-charged/ attributed to the Australian Jewish News August 2006, unconfirmed. (last accessed 27 August 2007).
[135] 13 August 2006, Sunday News, NZ Race-Hate Website being Investigated.

Films are another problem area for the HRA legislation. The Films, Videos, and Publications Classification Act 1993 (FVPCA) is legislation setting out how the Office of Film and Literature Classification may censor items. Section 3(3)(e) of the FVPCA requires the censor, when taking into consideration if a publication is objectionable, to give credence to the extent to which the publication characterizes that a group of persons as inherently inferior by reason of one of the prohibited grounds of discrimination in section 21(1) of the HRA.

> Section 3(3)(e) – [A publication shall be objectionable if it-] 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.[136]

The prohibited grounds as described in the HRA are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, illness, age, political opinion, employment status, family status, or sexual orientation.[137] The legislation appeared solid until 2000 when the *Living World*[138] case defined how the act would work. The *Living World* case revolved around two videos which were censored by the Office of Film and Literature Classification because they were believed to have vilified homosexuals, or in the context of the FVPCA, the videos represented homosexuals as inherently inferior to other

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[136] Films, Videos, and Publications Classification Act 1993 s3(3)(e).
[137] Human Rights Act 1993 s21(1).
[138] *Living World Distributors v Human Rights Action Group* (Living Word) [2000] 3 NZLR 570, 582 (CA) Richardson P for the majority. See also Ursula Cheer 'More Censorship, Discrimination and Bill of Rights" (December 2000) *New Zealand Law Journal* 472.

members of the public.[139] The distributors of the videos in New Zealand appealed the censor's decision. On appeal the videos were deemed to not be objectionable because of the definition of objectionable under the act.[140] The definition of objectionable under the FVPCA section 3(1) is"

> 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.[141]

The court said that this definition sets up five gateways; sex, horror, crime, cruelty and violence.[142] If the protected group is represented as inferior within one of the five gateways then the publication may be deemed objectionable. In the *Living World* tapes there was no sex, horror, crime, cruelty or violence, and therefore even though the tapes vilify homosexuals they cannot be made objectionable. The appeal court ruling makes section 3(3)(e) redundant unless it is accompanied by one of the five gateways. The court viewed freedom of expression highly stating "[T]he ultimate inquiry under s 3 involves balancing the rights of a speaker and of the members of 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".[143]

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[139] The Film and Video Labeling Body labeled the videos as restricted to persons over 16, the Classification Office classified the videos as restricted to persons over 18, the Board of Review classified the videos as objectionable, and the full court of the High Court upheld the Board's decision.

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

[141] Films, Videos, and Publications Classification Act 1993, s 3(1).

[142] *Living World*, Richardson P. for the majority 581and Thomas J dissenting 592.

[143] *Living World* Richardson P. for the majority 584.

The Office of Film and Literature Classification wanted the power to censor a video because of the message it portrayed, not the actions, just the message. In New Zealand the courts have decided that it is ok for a video to vilify homosexuals[144], but that same vilification cannot be done in a face to face encounter[145]. This seems cogent enough. A face to face encounter is unavoidable in most circumstances as people do not typically go out in public with the intention of being harassed and insulted. Conversely, one must actively seek out these videos to see the message and remain watching in order to see the full impact. The issue is not that these films would be offensive to queer people, the issue is that these films entrench a false preconceived notion. This notion that homosexuals are inferior and immoral is strongly held in some religious circles, these groups believe that God sent AIDS to punish the homosexuals.[146] These films perpetuate homophobia and that cannot be good for our society. Therefore it must be injurious to the public good. Another clash of rights occurs here. Through 'Freedom of Religion' people are free to believe in what they like, unfortunately some people believe that being heterosexual is the only way to live your life. If these films were racist in nature there would have been less debate. The interpretation of the legislation currently seems to promote a loophole for racist material. The HRA needs to be empowered to cover media that is not broadcast, such as films and videos, or the censor's office needs to be given the power to restrict hate speech when it occurs under its jurisdiction.

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[144] *Living World Distributors v Human Rights Action Group* (Living Word) [2000] 3 NZLR 570, 582 (CA) 570.
[145] Summary Offences Act 1981. s 4.
[146] For example Fred Phelps. For more on Phelps and his church see Michael Cobb, *God Hates Fags: The Rhetorics of Religious Violence* (New York University Press, New York: 2006).

Chapter Five

Putting the Options on the Table: An Analysis of the Possible Policy Options.

5.1 Problems With the Current Situation

The New Zealand system has many different ways of dealing with hate speech. The HRA provisions are somewhat complex and less likely to be used by those really in need. In fact the Human Rights Commissioner has said that the largest numbers of complaints under section 61 are made by Pakeha males who complain about Maori.[147] Perhaps it is not the legislation that is letting us down, but the structure surrounding that system. Or, as West-Newman says, "[I]t might reasonably be assumed

[147] Catherine Lane West-Newman, *Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, Cultural Difference* Waikato Law Review [2001] vol 9 p. 263.

that the practical problems of framing truly effective legislation and an institutional infrastructure for hearing complaints and providing remedies have not yet been solved". It is hard to tell without an in depth study. West-Newman sums up what could easily be changed within the New Zealand system. The process needs to be simplified for those most in need, taking the burden off their hands and allowing them to see the system working for them, instead of against them. Most minorities already feel that everyone is against them, the last thing they need is to feel that they have no recourse through the HRA, because it is either too complex, or to unwieldy for them to use. We should not however go to the extreme of creating legislation that only works for minorities. The law needs to protect all of its citizens. Racism is more harmful when perpetrated by a dominant group, but it is no less reprehensible for a minority group to practice racism or other bigotry against a majority group.

The system surrounding the HRA does not let spectators see the results of conciliation or of the Human Rights Review Tribunal. What would be enlightening to observe, would be the cases reported, and which cases were accepted and rejected. Obviously a large amount of the complaints rejected would fall outside the scope of the HRA as it is limited to race, ethnicity, national origin and colour.

Presently people from the groups mentioned in the Sentencing Act have some protection from hate speech through tougher sentencing of direct criminal confrontations. However, incitement to hatred is not being enforced. There have been few instances of this occurring, the most recent being the website 'redwatch' published by Nicholas Miller and his public comments regarding Jews. The police stated that they were

investigating, although no prosecution or result has yet been announced.[148]

There are still people who disagree with vilification law. Such people see more speech as the only answer. A significant publication which is referenced by many on this matter is a book by Grant Huscroft and Paul Rishworth, called 'Rights and Freedoms'. In the book they attack New Zealand's legislation, in that it impinges on expression too much. "My argument here is a simple one: sections 61 and 131 cannot be justified as reasonable limitations on freedom of expression because they are overbroad in their application. They allow no exceptions, and thus limit expression far more than can be justified."[149] Other authors have attacked Huscroft and Rishworth's book it is a rehash of the arguments for free speech in Chapter Two.[150] A view that the legislation is unnecessary is prominent amongst the public who believe they should have unfettered free speech. This view is an impediment to anyone attempting to alter the legislation. If a government attempts to add to the legislation the opposing parties merely have to cry 'free speech' and a large proportion of the population will feel their rights are being eroded and that they are on a slippery slope, even though New Zealand has had vilification legislation for 36 years. These attitudes were plain to see in the submissions to the select committee.[151]

The law also sees groups other than race as vulnerable and needing protection. This can be seen by their inclusion in the Sentencing Act.

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[148] Kiwi cops to charge avowed anti-semite http://www.fightdemback.org/2006/08/22/miller-likely-to-be-charged/ attributed to the Australian Jewish News August 2006, unconfirmed. (last accessed 27 August 2007). No announcement of prosecution as of 18/03/2007.
[149] Grant Huscroft and Paul Rishworth, p. 204.
[150] See, Catherine Lane West-Newman, *Reading Hate Speech From The Bottom In Aotearoa: Subjectivity, Empathy, Cultural Difference* [2001] Waikato Law Review vol 9 231-264.
[151] The majority of submissions to the Select Committee Inquiry into Hate Speech were opposed to legislation because of Free Speech issues.

Yet, the HRA still only protects incitement to racial disharmony.[152] Religion, gender identity, sexual orientation, age, or disability are all absent from the hate speech legislation within the HRA. The HRA provides all the different groups protection from discrimination, but not from hate speech. There is no good reason why. A less than satisfactory answer is because there have been no international charters for New Zealand to sign that would protect people from other categories from vilification.

Presently within New Zealand the impact of vilification legislation cannot be quantified. There are no systems in place to track hate crimes. The statistics that could support either side of the argument for and against hate speech laws are unavailable. This is a real problem in deciding if there is a pressing and substantial need for legislation.

5.2 Policy Options

5.3 Do Nothing

The simplest option is to leave the legislation alone. A government is going to have a hard time passing any new legislation on this issue unless there is a policy failure, such as a public event demonstrating how harmful hate speech can be. The reason it would be so hard to pass any legislation is because it is an issue with emotive words that any opposition can press. For example the opposition would just have to claim that 'free speech' is under attack and they would gain a large number of supporters who do not fully understand the issue. Also the legislation is working to some degree[153] although it is hard to measure

[152] Human Rights Act 1993, s 61, s 131.
[153] See the HRA cases in Chapter 3.

its successes or failures as there are no mechanisms that track such events.

5.4 Monitor the Situation

Currently in New Zealand there is no system set up to assess the prevalence of hate crimes or hate speech. The European Union has established a centre to monitor racism and xenophobia. This allows them to gain data to track any impacts legislation may have. The United States has the Hate Crime Statistics Act 1990. This Act requires the justice department to collect statistics about hate crimes.[154] While establishing a whole centre to track hate crime data in New Zealand would be unfeasible, the preferred option would be to provide the Human Rights Commission a directive to track incidents of hate crimes, and hate speech. This would allow the effectiveness of legislation to be seen. Without an overview of the situation it is difficult to see if Sir Isaiah Berlin's 'absolute loss of liberty'[155] is occurring.

5.5 Alter the Current Human Rights Act Legislation

There are a number of ways the HRA could be altered. Sections 61 and 131 could be repealed and New Zealand would then rely on other statutes such as the Crimes Act and the Sentencing Act to punish hate speech/crimes. This option comes about because neither section 61 nor 131 are used today. This is not preferred because even though New Zealand has comparatively good race relations, "New Zealand is not immune from global patterns of migration, religious intolerance and xenophobia, or from border defying high and low technologies and

[154] Hate Crime Statistics Act 1990.
[155] See Chapter 1 p. 25.

market driven media."[156] The legislation is there to protect New Zealanders' from a potential collapse in race relations.

Lowering the threshold of sections 61 and 131 is also an option. This would prosecute more people. Lowering the threshold would also mean that many frivolous complaints would find their way through the system. The Human Rights Commissions stance of requiring some evidence of harm is the right approach.[157] This approach respects the value of free speech while not trivializing genuine grievances. The high threshold of section 61 and 131 should be maintained. Such legislation is not designed to be used often; instead it should be reserved for extreme speech, in this way the HRA would cover extreme speech and lower level offending would be covered under other legislation. This would minimize any impacts on free expression.

Subjectivity should play a role in the courts decisions about vilification. Currently in New Zealand when the Human Rights Commission receives a complaint, it must first decide whether the material complained of is threatening, abusive or insulting. To do this, the Commission employs an objective "reasonable person" test[158]. The Commission then decides if offense is all that has taken place or if the offending material is also likely to "excite hostility" against a particular group or "bring them into contempt" on the identified grounds.[159] If what was said or published was simply offensive the complaint is not pursued. If what was said or published was likely to "excite hostility" the complaint will then be investigated.

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[156] Submission by The Human Rights Commission, p. 9-10.
[157] Submission by The Human Rights Commission, p. 8.
[158] Following cases such as *Proceedings Commissioner v. Archer* CRT 10/95 and *Human Rights Commission v. McCarthy* (1983) 3 NZAR 450.
[159] Submission by The Human Rights Commission, p. 8.

The courts could use a two stage framework for assessing complaints, this framework has been created in Canada, and it is as follows:

Stage one - "A communication or comment, viewed objectively, must be hateful or contemptuous and, assessed in its context, likely to have the effect of making it more acceptable for others to manifest hatred or contempt against the person or group concerned."[160]

But when viewing the comments the court must keep the comments in context. Therefore a second stage is required. The Canadian judiciary made it clear that the framework is not a "rigid test to be applied mechanistically but rather as an analytical framework for assessing content and effect of material."[161] And stage two would take into account that:

> …context is critical in understanding the meaning of a message. The meaning conveyed by an expression may vary depending on its context. An expression that appears neutral or innocuous out of context may take on a very different meaning when put in its proper context. Context for this purpose includes not only the publication context but also the social and historical context. The "reasonable person" is not a purely abstract entity. The person is someone of this place and this time, with knowledge of the past and present. The reasonable person brings with him or her a set

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[160] *Canadian Jewish Congress v North Shore Free Press Ltd* (No. 7) (1997), 30 C.H.R.R. D/5 (B.C. Trib.).
[161] *Ibid.*

> of social and personal characteristics (albeit characteristics that are unknown). What a reasonable person will understand will depend on the extent to which they are informed of the context of the message. Accordingly, the context must be a consideration of this part of the test.[162]

This variation of the reasonable man would allow courts to properly place complaints in context and evaluate the harm caused by speech appropriately. This context explains why for example holocaust denial is so harmful to Jews and others affected by the holocaust, yet similar citizens may not find it disturbing at all.

New Zealand judges understand that subjectivity is important when dealing with hate speech. *Zdrahal v Wellington City Council* was a case where Mr. Zdrahal painted two Swastikas' on his house. Mr. Zdrahal was then given an abatement notice under the Resource Management Act. On appeal Mr. Zdrahal claimed his freedom of expression had been infringed.[163] Justice Greig J said when dismissing the appeal:

> In a sense the decision in matters such as this is and must be subjective because it is what is perceived by the ears or the eyes and its effect on the individual and his personal wellbeing. Offensiveness or objectionability cannot be measured by a machine or by some standard

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[162] *Canadian Jewish Congress v North Shore Free Press Ltd* (No. 7) (1997), 30 C.H.R.R. D/5 (B.C. Trib.).
[163] *Zdrahal v Wellington City Council* W10/93 [1993] 2 NZRMA 342 (PT).

> with arithmetical gradations. It is a matter of perception in the mind.[164]

Such a two stage framework for analyzing complaints would mean that the many frivolous complaints the Commission deals with could be avoided and low level complaints would also not get through as they would have to pass an objective test, and then a subjective test. When a complaint makes it to court the Justices would have a clear directive that the 'reasonable man' test needs to be subjective.

The scope of sections 61 and 131 could be increased in a number of ways. More groups could be added under the protection of the law. New Zealand could follow other countries in giving protection to religion and homosexuals. It could even go to the scope of Canada and provide protection for everyone ascribed protection from discrimination. Another option is to give the protection of section 131 to everyone. It could be amended to "…an offence of "inciting serious vilification" in the appropriate criminal legislation ensuring vilification directed at an individual, or individuals, motivated by their membership of a particular group is subject to criminal sanction."[165] This is the recommendation of the Human Rights Commission stating that protection from serious vilification may need to be proscribed to groups that have not been thought of yet.[166] However, with such broad language may protect groups that would not have been thought of. Perhaps a person could be vilified for being a rapist, and because he belongs to a specific group (rapists), the person vilifying an evil action and group of people would be punished. The range of protection that section 131 can offer should be as broad as possible, without providing protection to groups who should not be provided protection for example pedophiles. It could be

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[164] *Ibid, p. 708.*
[165] Submission by The Human Rights Commission, p. 12.
[166] *Ibid*, p. 11.

seen that without defining what groups are allowed protection, and merely ascribing protections to any group, then pedophiles, rapists, murderers would be exempt from vilification. It should be permissible to criticize criminal groups using strong language. The most beneficial range may be all of the groups protected by the HRA from discrimination. This would provide broad coverage, and because the threshold is high, section 131 would not prevent, for example, debates amongst religious groups. This would be proactive legislation in terms that any likely offences that it would prosecute have not yet happened in New Zealand and hopefully with such legislation they will not happen in New Zealand. Cases like Keegstra, in Canada, need tough legislation in order to prevent such activity.

Section 61 could be amended to include all the protected categories, while maintaining a high threshold in order to prevent any serious infringements on free expression. Ascribing protection to all groups in section 61 would mean a massive influx of inadequate complaints.

The scope of the HRA should also be amended to include all communications, regardless of media. While new technology such as the internet may hold new challenges for vilification legislation, it is important that the scope of the legislation extend into cyberspace. The internet is the new home of racist and bigoted groups and New Zealand needs to ensure that it has the proper legislative structures in place to prevent the spread of extremely harmful ideas such as Nicholas Millers Website that advocates removing Jews form New Zealand. This would create a double up of legislation as other Acts govern other media, however as the HRA has a high threshold it is appropriate that it acts as a governing body over the other gatekeepers of media.

Defenses could also be added to the legislation. At present section 61 of the HRA has a defense that covers the media and others reporting on hate speech. New Zealand could follow Canada which has four defenses, truth, faith, public interest, and a defense for the press. Australia on the other hand has artistic, academic, scientific, public interest, and media exemptions. All of these defenses except truth and the media create loopholes. These defenses are couched in a good faith clause, which means that if hate speech is used it must be in good faith. Each defense has its drawbacks and as was argued in Australia if an academic or an artist is using hate speech it is no less offensive than a layperson using hate speech. It is possible to add defenses to the HRA, however section 131 needs no defenses as it has an intent clause and it is unlikely that anything said in an artistic or academic work is going to intentionally vilify a group. If one of the defended categories is intentionally vilifying a group, it should not be granted an exemption anyway. Due to the high thresholds already in place and no previous record of prosecutions that could have been protected by a defense, there does not appear to be any reason to provide any more defenses.

Other legislation could be amended to provide protection from hate speech. This option was recommended by the select committee examining the Films, Videos and Publications Classification Act. The committee recommended giving more power to the chief censor by removing the gateways. Removal of the gateways would allow the censor to decide if material constituted hate speech.[167] The censor would have to ascertain if the material was injurious to the public good to censor any material.[168] If an amendment is made to the Films, Videos and Publications Classification Act 1993 vilification issues should be differed by the Human Rights Commission. Or, if the censor wishes to

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[167] Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and related issues Report of the Government Administration Committee [2003] p. 5.
[168] *Ibid,* p. 27.

rate the material as objectionable the author or distributor of the material should have recourse to appeal to the Human Rights Commission in order to determine if the material is in fact injurious to the public good. This deferral would be implemented because the Human Rights Commission is most often dealing with such issues, therefore they would be best equipped to deal with matters of free expression. For example if the other governing bodies wish to defer matters of serious vilification that does not come under their control they should be able to defer such cases to the Human Rights Commission. Under the HRA both sides can properly argue through the courts.

5.6 The problem of Religion

The discussion over religion as a protected category has been debated in previous theses[169]. Joel Harrison argued that religion should not be a protected category as religious groups all use rhetoric against other religions frequently. Rhetoric and discussing other religions in a less than favorable light have long been part of religious debates. The reason this should not concern lawmakers is because society has not come to a consensus about what religion, if any, is true and we should therefore leave religion alone in terms of legislation. Harrison cites the Catch the Fire Ministries case in Australia as evidence that creating a punishment for vilifying religions will only make religious groups attempt to assert their religion and superiority over other religions through the courts. The Catch the Fire Ministries v Islamic Council of Australia is one example of this.[170]

[169] Joel Harrison, *Truth Civility and Religious Battlegrounds: The Contest between Religious Vilification Laws and Freedom of Expression* (University of Auckland, Auckland: 2006) and Elizabeth Macpherson, *Regulating Hate Speech in New Zealand* (Victoria University of Wellington, Wellington: 2003).
[170] *Islamic Council of Victoria v Catch the Fire Ministries Inc* (Final) [2004] VCAT 2510

A brief overview will be provided as the case was not examined earlier, because the case falls under state legislation. The case was brought under the Racial and Religious Tolerance Act 2001 (Victoria). The case involved three publications, a website, a newsletter and a seminar. The Islamic Council sent some of its members to a seminar conducted by two Christian preachers. The seminar did not present a balanced view of Islam and so the Islamic Council made a complaint that they had been vilified by the two preachers. Eventually the case was dismissed in the Court of Appeal.[171]

There is another example in Canada *R v Harding.* Mr. Harding published two pamphlets and a recorded telephone message.[172] In his publications Mr. Harding denounced Islam as a wicked religion stating that Muslims "…sound peaceful and try to act peaceful, but underneath their false sheep's clothing, are raging wolves".[173] Mr. Harding was misguided and no doubt his pamphlets are offensive to some readers. However, it does not reach the same level as other forms of vilification. Mr. Harding's response to this was to call for a rejection of Muslim immigrants and to have more Christianity in schools. While Mr. Harding's views are disagreeable, they would not constitute extreme vilification.

The problem with this legislation is that religious groups are bound to use speech that puts down other religions. Religious groups wish to gain the most followers of their particular religion; no one agrees on what religion is correct so heated debate will ensue. These debates should be left alone as debates. New Zealand would be covered from serious vilification against religion if section 131 was amended; however any other limitations on religious speech should be avoided. One

[171] Harrison, p. 3.
[172] *R v Harding* 160 C.C.C. (3d) 225, 229 (2002).
[173] *Ibid.*

particular problem when discussing religion is that an author may attack a religion, and its followers will perceive that as an attack on them and thus lay vilification charges. However, the author has a genuine belief that if these people hear how horrible their religion is and how great the author's religion is, then they will change faiths. When viewing the other categories for example race or sexuality, an attack on the category cannot be separated from an attack on the person. Religion is after all a voluntary association, a highly held association but voluntary.

That is not to say that people are not vilified are verbally assaulted because of their religion. New Zealand however, has demonstrated that it is willing to protect its more vulnerable citizen's religious ideals. In recent years there have been many attacks on Muslims. Even without protection from the HRA the offenders have been caught in most instances and prosecuted under other legislation.[174]
The courts in *Tariq v Young*[175] and *Khan v Commissioner*[176]*, Department of Corrections Services* have decided that Muslims do not comprise an ethnic group, and therefore do not gain any protection currently from the HRA.

Elizabeth Macpherson argues about the problem of religion from a different angle, contesting that religion should be free from prosecution under vilification legislation. Macpherson cites section 15 of the New Zealand Bill of Rights Act 1990 that states "[e]very person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or private."[177]

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[174] Refer to the Harassment Act subsection in Chapter 3.
[175] *Tariq v Young* (Employment Appeals Tribunal 247738/88, EOR Discrimination Case Law Digest No2).
[176] *Khan v Commissioner, Department of Corrections Services* [2002] NSWADT 131.
[177] New Zealand Bill of Rights Act 1990, s 15.

An example of religious vilification and the law comes from Sweden. Rev. Ake Green was convicted under Sweden's hate speech laws. Green, in his sermon equated homosexuality with pedophilia and bestiality.[178] He said that "homosexuals were 'a deep cancer tumour on all of society' and that gays were more likely than other people to rape children and animals."[179] Green was however found not guilty on appeal and that ruling was held up in the Supreme Court.[180] In the courts decision they decided that the law was not meant to impact upon religion and sermons.[181] The court said that he had a "right to preach 'the Bible's categorical condemnation of homosexual relations as a sin,' the court said, even if that position was 'alien to most citizens' and if Green's views could be 'strongly questioned'".[182] This example shows that the courts can make decisions differentiating between what they see as an infringement on free speech, and what is vilification. If Greens comments had been in a public place the conviction would have stood, but because they were said in a sermon in a church the courts decided that it was Greens right to free speech that made is sermon acceptable in that setting. The same reasoning would be applied in New Zealand.

Giving religion a free pass in terms of hate speech makes no sense. Macpherson agrees that vilification legislation should trump the right to free speech in specific circumstances[183], yet seems unwilling to budge on the stance that vilification should not trump religion in certain circumstances.[184] Racial hate speech or hate speech against queers should not be accepted. Governing bodies however, should be

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[178] BBC News Europe: Swedish Anti Gay Pastor Acquitted http://news.bbc.co.uk/2/hi/europe/4477502.stm (last accessed 23 February 2007).
[179] *Ibid.*
[180] I*bid.*
[181] Swedish Hate Speech Verdict Reversed (Washingtonpost.com) http://www.washingtonpost.com/wp-dyn/articles/A17496-2005Feb11.html (last accessed 24 February 2007).
[182] *Ibid.*
[183] Macpherson, p. 23.
[184] *Ibid*, p. 16.

prepared to accept that religious groups may promote hate within their religious places as not to intrude into private life. Religious groups should not be given a free pass to publicly espouse hatred. Religions need to fit their beliefs around what is acceptable within a society at the present time, while being given as much freedom to practice their religion as possible. Unfortunately for certain religions society has decided that it will not accept the promotion of hatred, be it secular or religious.

5.7 The Oakes Test for New protected groups

There needs to be a substantial and pressing need in order for more legislation to be enacted. In respect to extending the scope of the HRA to cover more media and to protect extra groups there is a substantial and pressing need to prevent harm. Studies have exposed that gays, lesbians and bisexuals suffer more verbal abuse than heterosexual people. A survey ascertained that queer people, 77 percent of men and 64 percent of woman had been subjected to verbal abuse at least once.[185] "A Christchurch Health and Development study discovered that queer couples at age 21 were six times more likely to have attempted suicide than heterosexuals.[186] Clearly these studies do not prove that hate speech had anything to do with the abuse or suicide attempts, but it would not be unreasonable to conclude that it was a material contributing factor.[187] Naturally the more data the better, which is why the Human Rights Commission should be given the directive to gather statistics on hate speech, and hate crime. From the information available it is clear that there is a substantial and pressing need, for

[185] In Megan Winton, *Hate Speech in New Zealand: Freedom of Expression and Racial Disharmony* (Faculty of law, University of Otago: 2005) p.56.
[186] D. M. Fergusson, p. 876.
[187] Winton, p. 57.

clearly queer people are not advantaged with the same equality as the dominant hegemony.

In Human Rights Commission complaints, people with disabilities are the predominant group making complaints. In 2001 people with disabilities were the highest group comprising of between 30 and 50 percent of the complaints.[188] Yet again there is a lack of statistics relevant to hate speech for people with disabilities. It is once again safe to assume that if people with disabilities are making a high number of complaints that are being accepted in other areas, then they would also face hate speech issues. Raw data would allow a complete picture and provide a more persuasive argument to those detractors who do not see a pressing need for legislation.

For the second arm of the Oakes test the means must be proportional. If it is accepted that the means for preventing hate speech in the context of race are acceptable, then the same means should be accepted for the other categories that would gain protection. It appears that the added categories would pass the Oakes test if you accept the data provided, and the common sense approach that if Race, Disability, Sexuality, and Age all need protection from discrimination, then it is a fair conclusion that they should be granted protection from hate speech. With the high threshold currently being provided by the Human Rights Commission, there should be a minimal infringement on freedom of expression.

5.8 The Way Forward

It has been submitted in this recommendation that the harms caused by hate speech are sufficient enough to warrant legislation prohibiting such

[188] The Human Rights Commission http://www.hrc.co.nz/index.php?p=13797&format=text (last accessed 27 February 2007) See Tirohia April 2001 - Tirohia February 2002.

speech. However, that legislation should be carefully drafted in order to protect, as much as possible, the freedoms guaranteed under the Bill of Rights. As it presently stands New Zealand has a healthy system of dealing with racism and bigotry. Open vilification is not accepted in many places within New Zealand and the multiple ways of dealing with hate speech give more options to those who have been the victims of direct face to face confrontational racist hate speech. They can make a complaint, in the first instance, to the police. If the offender is not prosecuted through that avenue they can also complain to the Human Rights Commission. If a radio or television program maligns a person and their race, they can complain again to the police, and secondly to the station or channel broadcasting. Subsequently complainants can complain to the appropriate authority which is the Broadcasting Standards Authority. If all of that fails the victim still has recourse to complain to the Human Rights Commission. What this has illustrated is that the victims of hate speech in New Zealand have options. They have the ability to take some power back and have recourse through the appropriate channels. The problem begins when a person is vilified for something other than their race. Again, they have some avenues, but if they fail there is no ultimate recourse of action. The system could be made more coherent and manageable by altering a few things. For example why is race the only category given protection from vilification? The harms are equal when being vilified no matter what minority group one belongs to, whether it is a group based on race, ethnicity, gender, sexual orientation, disability, or some other minority group. For this reason the scope of the HRA in terms of who it protects should be increased.

All means of communicating hateful messages should be subject to the authority of the HRA. The Human Rights Commission should be treated as an overarching authority. The HRA should be given the authority to investigate and prosecute hate speech regardless of the medium. There

will be difficulties with this approach, especially in regards to the internet. However, hate speech on the internet is an international problem and international solutions are being worked on.[189]

The recommendations made in this paper are not overbearing, and will not infringe unfairly on reasonable citizens rights. It must be remembered that hate speech laws will not stop racism; they are not a fix-all. For "[r]acist speech is a mere symptom of racism."[190] Public education of diverse values, tolerance and acceptance are also important. The international experience has demonstrated that hate speech legislation has had a minimal effect on speech as there has been no obvious chilling effect. The governments have not used such laws to restrict negative speech about the government as was feared in the submissions to the select committee.[191][192] There has been no 'horrible result', in the international experience. The fears raised in many of the Select Committee submissions that objected to new hate speech legislation have simply not materialized where such laws have been enacted. The recommendations contained herein would round out New Zealand's current legislation and make it more logical and coherent.

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[189] Yulia. A. Timofeeva, "Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany", *Journal of Transnational Law & Policy,* Volume 12 Spring 2003 Number 2 p. 285.
[190] William G. Ortner, Note, Jews, African-Americans, and the Crown Heights Riots: Applying Matsuda's Proposal to Restrict Hate Speech, 73 B. U. L. REV. 897 (1993) 918.
[191] Submission, 88W by Neil Walker.
[192].Submission, 164W by K E Clayton.

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