Sound Off?

Legal Checks on Religious Noise in New Zealand

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours) at the University of Otago, Dunedin, New Zealand

October 2010

Acknowledgements

Special thanks to Rex Ahdar who has been far more than a great supervisor during my university years.

Thanks also go to my family.
To Mum, Dad, and Rach; your support in its many forms has meant a lot to me.

To the Norwood Street team; Tim, Ike, and Ry. Cheers for being top flatmates during an epic 2010!

Thank you to Tom Cleary for his proof-reading skills, and to Allan Brent for his sterling advice.

A final thank you to all the friends and lecturers who made my time at law school such an enjoyable experience.

Audere est facere

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Introduction: To Situate the Investigation

I. The Tension between Law and Religion

In the year 2000, the Constitutional Court of South Africa was presented with the following legal question:[1]

> [W]hen Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?

In delivering the judgment of the Court, Sachs J characterised the broader tension bound up in that question as follows:[2]

> The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey

[1] *Christian Education South Africa v Minister of Education* (2000) (4) SA 757 at [16].
[2] Ibid, at [16].

> and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.

The crux of this statement is that in grappling with the factual dispute before it, the Court was also engaging with the deeper question of whether the law should accommodate religion, or whether religion should defer to the law. Cumulatively weighing the different legal and factual variables, the Constitutional Court held that, "...the scales come down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled [religious] exemption."[3]

Whilst the law could not support a religious exception in that case, it is arguable that the New Zealand District Court in *Police v Razamjoo*[4] was more sympathetic to such an exception. In *Razamjoo*, the two Muslim plaintiffs wished to wear a burqa while giving evidence for the prosecution in a criminal trial. In an interlocutory hearing deciding this matter, it was contended that allowing the witnesses to cover their faces would jeopardise the defence's ability to cross-examine them. Whilst no law prohibiting the wearing of a burqa existed, the defence argued that this detriment to their cross-examination would breach the defendant's fair trial rights under s25 of the New Zealand Bill of Rights Act 1991 (NZBORA), and likewise, the 'open court' presumption of Rule 495 of the District Court Rules. For their part, the two witnesses relied on several other NZBORA provisions: s13, the right to freedom of thought, conscience and belief, and ss15 and 20, the right to manifest their religion in practice and in public. The decision reached by the Court resembled something of a compromise between the conflicting rights. Though the women were required to remove their burqas, they would be screened from the public and the defendant. Only the judge and prosecution counsel would be

[3] Ibid, at [52].
[4] [2005] DCR 408.

allowed to observe the witnesses' faces. Peter Griffiths favours this reconciliatory approach to resolving tension between law and religion:[5]

> *Razamjoo* is therefore a clear example of…integration.., whereby adjustments by the host society to its laws alongside a preparedness on the part of immigrant cultures to modify their cultural or religious practices can reach a result that is satisfactory to all concerned.

These two cases show differing judicial responses to the overarching conundrum of the companionability of law and religion described by Sachs J. Whilst the Constitutional Court in *Christian Education* held that the purported religiously-motivated consent to corporal punishment did not warrant exemption from the statute prohibiting such punishment, the Court in *Razamjoo* were arguably able to reconcile the Islamic doctrine that a woman hide her face in public, with the defendant's right to a fair trial.

However, despite the divergent outcomes on this deeper comparative point, the different jurisdictions and constitutional treatment of rights by New Zealand and South Africa, coupled with the distinct religious rights in question, militate against drawing broad conclusions about the relationship between law and religion from these two cases.[6] Simply put, differences between the legal and factual variables of a given issue decrease the credibility of summary statements on that issue. Daniel Parish comments on the efforts of the American judiciary to demarcate the boundaries of the relationship between law and religion:[7]

> In two key cases in the 1980s, the Supreme Court attempted to define what kinds of religious displays in what kinds of locations do and do not violate the Establishment Clause. These attempts left courts, litigants, and scholars confused. As one attorney for the City of Burlington begged a judge during the 1990 rendition of the menorah dispute, '[just t] ell us what's constitutional and we'll act accordingly.'

Further muddying the waters of this relationship, it is arguable that particular care must be taken with respect to generalising on the fundamentally personal and divisive arena of religion. As the UN Special Rapporteur on Freedom of Religion once said, "[f]reedom of religion and

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[5] P. Griffiths "Pluralism and the Law: New Zealand Accommodates the Burqa" [2006] 11 Otago L Rev 281 at 302.

[6] See generally M. Tushnet "How (and how not) to use comparative constitutional law in basic constitutional law courses" (2004-2005) 49 St. Louis U L J 671.

[7] D. Parish "Private Religious Displays in Public Fora" [1994] 61 U Chi L Rev 253 at 254.

belief is not black and white. It deals with people and their faith. It is in the emotional realm rather than cut and dry rules and regulations."[8]

II. Narrowing the focus: 'Religious Noise' in New Zealand

With these comparative difficulties in mind, this dissertation narrows the examination of this tension between law and religion to a discrete jurisdictional and factual context. To this extent, discussion will centre on the established and potential legal checks on religious noise in New Zealand. It is important to note that in lieu of the relatively unlitigated nature of religious freedom disputes in New Zealand, this investigation takes on a visionary edge. Paul Rishworth offers several explanations for the sparse nature of religious freedom jurisprudence in New Zealand:[9]

> In New Zealand, the pattern is that [religious freedom disputes] come and go without authoritative resolution - not, at least, by courts. The explanation for this is not simply that the BORA cannot invalidate primary legislation... The absence of [such] litigation in New Zealand must have other explanations as well. [Notably,] the absence of a litigious culture; a differing legal aid regime from the United States; ...a legal profession that is not trained to identify matters of religious freedom; a lack of willing plaintiffs; and a sense that litigation would not be productive in light of the relative novelty of these issues for judges. In some cases, the explanation may be that potential litigants are advised that the state of affairs about which they wish to complain is not unlawful.

The chief implication of Rishworth's analysis for this investigation is that there may well exist legal restraints on religious freedom in New Zealand, but such restraints might not yet have been the subject of judicial examination in New Zealand courts. In canvassing these potential restrictions, this dissertation will enter this unchartered territory, and suggest outcomes to hypothetical legal challenges to them.

III. Fitting 'Religious Noise' within Religious Freedom

A further preliminary point requiring explanation concerns the factual parameters of this investigation. As has been said, to preserve the integrity of factual comparisons and conclusions, this dissertation confines its focus to a discrete aspect of religious freedom –

[8] F. Ahamed "UN: Asma Jahangir Special, UN Rapporteur on Religious Freedom or Belief" (2007) Women Living Under Muslim Laws <www.wluml.org>.
[9] P. Rishworth "The Religious Clauses of the New Zealand Bill of Rights" [2007] NZLR 631 at 636.

religious noise. However, to understand the sub-field of religious noise, it is important to first contextualise it within the wider field of religious freedom itself. A precursory aspect of any legal protection of religious freedom is that to have any normative force, it must extend beyond safeguarding intangible belief and thought, to tangible religious deed. This substantive requirement was emphasised by the House of Lords in their consideration of such a provision in *R v Secretary of State for Education and Employment, ex p Williamson*:[10]

> This [religious] freedom is not confined to freedom to hold a religious belief. It includes the right to express and practice one's beliefs. Without this, freedom of religion would be emasculated. Invariably religious faiths call for more than belief.

At face value this might then suggest that practical religious freedom is limited to ritual, worship, or devotion.

However, Rex Ahdar proffers his conception of the breadth of religious freedom:[11]

> The right to 'manifest' one's religion or belief is not confined to explicitly religious ritual, acts of personal piety and devotion and the like. It embraces a huge variety of activity if you subscribe to the devout believer's stance that all of life is informed by faith. The devout Muslim or Jew is practicing her religion when she eats, drinks, works, plays, cooks and gardens, as much as when she reads scripture, prays or meditates. On this view, there is no activity that is not generated or directed by one's obedience (or disobedience) to God

Whilst not central to this investigation, it is arguable that courts are proving amenable to this wider view of what constitutes religious activity. The Constitutional Court of South Africa in *Christian Education* particularly emphasised the inextricability of religion from a believer's daily activities:[12]

> [R]eligious and secular activities are...frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain

[10] [2005] UKHL 15 at [16] per Nicholls LJ.
[11] R. Ahdar "Slow Train Coming In: Religious Liberty in the Last Days" [2009] 12 Otago L Rev 37 at 39.
[12] *Christian Education*, above n 1, at [34].

> aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two.

In what is perhaps the high water mark of judicial recognition of religious activity, the New York Court of Claims in *Friedman v New York*[13] accepted a Jewish woman's jumping from a chairlift as consistent with adherence to the Hebraic law requirement that an unmarried woman not be alone with a man in a place inaccessible to the public. Though the New Zealand District Court in *Razamjoo* restated the substance of another American precedent expressing preference against the judiciary entering the 'theological thicket' to decide whether an act was a religious act,[14] the Court did accept the defendant expert witnesses' testimonies substantiating the Islamic law requirement that women wear the burqa in public. As the Court recognised, if it could not be established that the women's wearing of the burqa had a religious foundation, the women would not be able to avail themselves of the religious freedom protections of the BORA.[15] For the purposes of this investigation, it is sufficient to note that cases such as *Razamjoo* and *Freidman*, demonstrate first the breadth of purportedly religious acts, and second, the corresponding challenge faced by a secular court as the ultimate arbiter of this issue.

IV. A functional definition of 'Religious Noise'

Religious noise in this investigation will be confined to religiously-motivated sounds emanating from fixed geographical locations such as churches, shrines, or minarets. Limiting the investigation to such immovable entities will still allow for human-generated noise occurring within these locations such as singing or chanting, but will exclude ambulatory sources of noise such as street preachers or door-knocking evangelists. Religious noise disputes involving such ambulatory sources can differ widely in fact and circumstance; ranging from the legality of arresting a Christian street evangelist who preaches against homosexuality in public,[16] and the propriety of police directing Christian preachers away from a populous Muslim suburb to

[13](1967) 282 N Y S 2d 858.
[14] *McMillan aka Olugbala v State of Maryland* (1970) 258 Md 147, cited in *Razamjoo*, above n 4, at [66].
[15] *Razamjoo*, above n 4, at [65]-[66].
[16] H. Blake "Christian preacher arrested for saying homosexuality is a sin" (2 May 2010) *Daily Telegraph* <www.telegraph.co.uk>.

preserve harmony,[17] to whether street preachers preaching loudly to the masses constitutes public disorder.[18] The broad array of rights in question such as freedom of association, movement, speech, and religion, coupled with the variety of legal solutions that hinge uniquely on the facts of each such case, make the ambulatory cases difficult to harmonise with the fixed-location cases that do share similar characteristics.[19] Confining the investigation to the select arena of fixed-location religious noise disputes allays these difficulties, but will still provide an insight into the status of religious freedom in New Zealand.

V. 'Religious Noise' in New Zealand's Constitutional Framework

In order to investigate legal controls on religious noise, it is first necessary to delineate what legal standing religious noise has in New Zealand. Broadly, religion in New Zealand is legislatively protected in four NZBORA provisions, and in one Human Rights Act 1993 (HRA) provision: s13 protects freedom of belief, s19(1) and s21(1) of the HRA prohibit religious discrimination, and s20 protects religious minorities. With the focus here being on the outward expression of religion, the pertinent NZBORA provision is s15. Titled "Manifestation of religion and belief", s15 provides that:

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

Despite this legislative endorsement of religious freedom, it is crucial to note that unlike the United States Constitution and the Canadian Charter of Rights and Freedoms 1982, the NZBORA is not a supreme law instrument. Section 4 of the NZBORA itself explicitly prevents courts from

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[17] D. Harrison "Christian preachers face arrest in Birmingham" (31 May 2008) *Daily Telegraph* <www.telegraph.co.uk>.

[18] *Beaufort v Baker* (S C 1993) 432 S E 2d 470 (No. 23874).

[19] An international example demonstrating the contrast between the two sources of religious noise disputes is found looking at the legislative prohibition on the construction of Islamic Minarets in Switzerland ("Minaret ban approved by 57% of voters" (29 Nov 2009) Swissinfo.ch <www.swissinfo.ch/eng>). Such a wide-sweeping, statutory check on the creation of fixed-location sources of religious noise, coupled with the potentially broad European Court of Human Rights enquiry that could ensue, is entirely distinct from litigation concerning a group of roving street preachers who sought judicial invalidation of an ordinance that would require them to decrease the volume of their preaching in a lone Carolina town (see *Beaufort*, above n 18.).

not applying legislation for the reason that the legislation is inconsistent with a NZBORA provision.

The constitutional pedestal on which Parliament sits is well-recognised by the New Zealand Courts in turn; "[t]he constitutional position in NZ...is clear and unambiguous. Parliament is supreme and the function of the Courts is to interpret the law as laid down by Parliament."[20]

Hence, in what Jeremy Waldron describes as a 'weak' judicial review system such as exists in New Zealand,[21] the normative force of rights provisions derives from the interpretive powers of the Court under ss 5 and 6 of the NZBORA. The practical ramifications of these provisions for potential religious freedom litigation, and the judicial formula governing their interplay with s4, will come to the fore later in this dissertation. For present purposes, it is sufficient to note that these provisions form the core of substantive protection of religious freedom in New Zealand.

VI. Substantive Structure

In lieu of the minimal nature of New Zealand's religious freedom jurisprudence, the investigation of legal checks on religious noise in New Zealand will largely resemble a legal opinion answering two core hypothetical questions:

1) What might happen if complaints were made about noise emitting from a local church?
2) What might happen if complaints were made about a local mosque's implementation of a loud-speaker daily call to prayer?

To this extent, Chapters One and Two of the dissertation will respectively canvass the public and private law to which the hypothetical complainants might have resort. For practical

[20] *Rothmans of Pall Mall (NZ) v AG* [1991] 2 NZLR 323 at 330.
[21] J. Waldron "The Core of the Case Against Judicial Review" (2006) 115 YALE L J 1346 at 1354: "In a system of weak judicial review…courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it (or moderate its application) simply because rights would otherwise be violated."

purposes, Chapters One and Two will be divided according to the orthodox distinction between private law and public law as endorsed by Harry Woolf:[22]

> The critical distinction [between private law and public law] arises out of the fact that it is the public as a whole, who are the beneficiaries of what is protected by public law and it is the individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law.

Chapter Three will seek to answer the two core hypothetical questions by setting the relevant public and private law checks against the religious entities' NZBORA s15 rights. To provide some perspective, answers to these inquiries will be compared to answers that might have emerged if the noise and defendant were secular in nature. Finally, Chapter Four will harness these answers to examine the future of religious freedom in New Zealand.

Chapter One: Public Law Checks

To put this side of the investigation into focus, it is worth providing some preliminary indication as to where public law complaints about religious noise are likely to come from. Hence, pursuant to Woolf's 'protection-based' classification,[23] who are some of the intended beneficiaries envisaged by public law controls on legal noise? At first thought, it is likely that neighbours, streets, suburbs, and local councils representing their town, would be the intended recipients of protection afforded by both primary and delegated legislation. To this effect,

[22] H. Woolf "Public Law – Private Law: Why the Divide? A. Personal View" [1986] PL 220 at 221.
[23] Ibid.

examination of New Zealand's resource management law is at the core of this side of the investigation. On a different scale, the potential for direct democracy to quell religious noise as shown in Switzerland, will also be discussed.

I. The Resource Management Act 1991

A. Legislative Setting and Purpose

Environmental and Resource Management Law provides a useful introductory assessment of the important role of the Resource Management Act 1991(RMA) in the general field of noise control:[24]

> [T]he RMA is now the means by which most noise will be controlled in the community... While common law actions to prevent noise remain available in certain circumstances, and although noise is also controlled by some other legislation, the RMA is by far the most important source of control over noise.

To properly understand the centrality of the RMA to noise control in New Zealand, some background is required.

Geoffrey Palmer, one of the prime movers of the RMA, explains:[25]

> [Prior to the inception of the RMA] New Zealand's resource-use laws...had grown up statute by statute. They bore the marks of the country's history – gold mining, soil erosion..., harbour development, zoning laws for urban development, and a whole host of one-off regimes for regulating particular problems such as noise, air pollution, petroleum exploration and geothermal energy.

This fragmented development of resource management law did ensure that the law stayed in step with economic and demographic changes in society, but this was achieved in a piece-meal

[24] Derek Nolan (ed) *Environmental and Resource Management Law* (online looseleaf ed, LexisNexis) at [13.7].
[25] Geoffrey Palmer *Environment: the international challenge* (Victoria University Press, Wellington, 1995) at 150.

manner akin to the growth of individual layers on an onion.[26] Residential noise itself was controlled by up to three statutes at one time.[27]

In repealing these different statutes and instituting a new, unified approach, the RMA in the words of Palmer, "restructured New Zealand's domestic environmental law by creating a single system which [pursuant to the Part 2, Section 5 purpose] promotes 'the sustainable management of all natural and human resources'."[28]

The Part 2 purpose provisions of the RMA form the focal point of the Act.[29]

Section 5(2) fleshes what is meant by 'sustainable management':

> ...means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[26] Ibid, at 150, states: "[T]here was no golden thread running through the statutes of the standards to be applied or the outcomes to be achieved. The mechanisms for settling disputes contained no uniformity. The institutional structures were almost infinitely various. It would be fair to characterise New Zealand's resource management laws as an uncoordinated, unintegrated hotch-potch involving more than 50 statutes passed at different times in response to different problems."

[27] Notably, the Town and Country Planning Act 1977, Local Government Act 1974, and Noise Control Act 1982.

[28] Palmer, above n 25, at 145.

[29] The High Court in *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 at [47], elaborates; "[p]art 2 is the engine room of the RMA and is intended to infuse the approach to its interpretation and implementation throughout, except where Part 2 is clearly excluded or limited in application by other specific provisions of the RMA."

Hence in a dispute concerning either the existence of, or proposed development of religious noise, the statutory balance engendered by the sustainable management purpose under s5(2) will bear if not directly, then indirectly, on the deliberations of the adjudicative body. In the religious noise context, the competing considerations of s5(2) will likely be allowing for the 'use, development or protection of physical resources in a way which enables both the religious entity, and surrounding neighbourhood to provide for their respective social, economic, and cultural well-being, and likewise, 'avoiding, remedying, or mitigating any adverse effects of religious noise emission on the surrounding neighbourhood.'[30]

In an appeal involving considerations not dissimilar to those that might arise in a religious noise dispute, the Planning Tribunal gave a showcase example of how s5 operates.[31] The appellants, who operated a community centre used by the local Cook Island community, argued that a local council grant of a permit to build a Maori funeral parlour opposite the centre, would impede the Cook Island people in their activities.[32]

In considering these conflicting usages, the Court stated:[33]

> Applying [the considerations of s5(2)(c) to this situation] it can be stated that the proposed use of the zoned area encompassing the appeal site does not accord with the main purpose of the Act in that the provision of land…for funeral parlours does not fit within the principles of s5 when assessed against existing permitted activities. Essentially land has been made available for [the Cook Island Community] to provide for their social, economic and cultural wellbeing…[P]rovision for the funeral service is in conflict with the protection which the district plan should accord to the Cook Island community [in this regard]. We do not find this to be within the concept of the Act. Indeed it is the antithesis of the matter the Act seeks to harmonise.

[30] RMA, s5(2)(c).
[31] *Cook Islands Community Centre v Hastings District Council* [1994] NZRMA 375 (PT).
[32] Cook Island culture has an ingrained reverence for the dead. A funeral parlour would thus stilt their activities (see ibid, at 379-380).
[33] Ibid, at 381-382.

Though not all control mechanisms in the RMA weave s5 into their application, many do, and it is thus important to canvass how it works in order to set a platform for the hypothetical enquiries later in this dissertation.

B. The Section 9 'Gateway' Provision and Ministerial Powers

Section 7 of the Resource Management (Simplifying and Streamlining) Amendment Act 2009 rewords Section 9 of the RMA, but maintains Section 9's standing as the chief gateway through which all usage of land in New Zealand must pass through:

> (1) No person may use land in a manner that contravenes a national environmental standard unless the use -
>
> (a) is expressly allowed by a resource consent; or
> (b) is allowed by section 10 [as a use validly existing prior to the national environmental standard]; or
> (c) is an activity allowed by section 10A [as an activity validly existing prior to the district rule]; or
> (d) is an activity allowed by section 20A.
>
> (2) No person may use land in a manner that contravenes a regional rule unless the use -
>
> (a) is expressly allowed by a resource consent; or
> (b) is an activity allowed by section 20A.
>
> (3) No person may use land in a manner that contravenes a district rule unless the use -
>
> (a) is expressly allowed by a resource consent; or
> (b) is allowed by section 10 [as a use validly existing prior to the district rule]; or
> (c) is an activity allowed by section 10A [as an activity validly existing prior to the district rule].

Section 9 therefore ensures that any noise-generation usage of land must either adhere to one of the regulatory instruments such as a regional or district rule, or fall under one of the subsection's exceptions, such as express allowance via resource consent. This part of the dissertation will consider first those legal controls deriving from the standard regulatory framework – the regional and district rules, and the national environmental standards.

Part IV and V of the RMA map out the jurisdictional breadth and capacities of the regulators of the RMA. These Parts describe the functions, powers, and duties of the Minister for the Environment, regional councils, and territorial authorities. Section 43(1)(b) empowers the Minister for the Environment to recommend that the Governor-General, "make regulations, to be known as national environmental standards, that prescribe...standards for noise."

Sections 43(2) and 43A flesh out what prescribing standards for noise might encompass.

Under 43(2), the regulations may include:

> (a) qualitative or quantitative standards:
> (b) standards for any discharge or the ambient environment:
> (c) methods for classifying a natural or physical resource:
> (d) methods, processes, or technology to implement standards:
> (e) exemptions from standards:

Likewise, pursuant to s43A(1) National environmental standards may—

> (a) prohibit an activity:
> (b) allow an activity:
> (c) restrict the making of a rule or the granting of a resource consent to matters specified in a national environmental standard:
> (d) require a person to obtain a certificate from a specified person stating that an activity complies with a term or condition imposed by a national environmental standard:
>
> (e) specify, in relation to a rule made before the commencement of a national environmental standard –
>
> (i) the extent to which any matter to which the standard applies continues to have effect; or
> (ii) the time period during which any matter to which the standard applies continues to have effect[.]

The firsthand effect of these two sections for present purposes, is to furnish the Minister for the Environment with a wide discretion to legislatively regulate religious noise. Powers spanning the implementation of standards, exemptions, allowances, and prohibitions of an activity would appear to be germane not only to the manner of noise generation, but to the actual existence of religious noise.

However, s44(2) stipulates several steps that under s44(1) the Minister for the Environment must follow in promulgating regulations:

> (2) The steps are—
>
> (a) to notify the public and iwi authorities of—
>
> (i) the proposed subject matter of the standard; and
>
> (ii) the Minister's reasons for considering that the standard is consistent with the purpose of the Act; and
>
> (b) to establish a process that—
>
> (i) the Minister considers gives the public and iwi authorities adequate time and opportunity to comment on the proposed subject matter of the standard; and
>
> (ii) requires a report and recommendation to be made to the Minister on those comments and the proposed subject matter of the standard; and
>
> (c) to publicly notify the report and recommendation.

Further, although s43B to s43E generally subordinate other regulatory instruments to national environmental standards, the fact that different RMA regulators oversee different domains minimises the frequency of overlap between instruments. [34]

Two overarching points emerge from inspection of these ministerial powers. First, though a delegated legislative power that permits not only parameter-setting but full prohibition might appear wholly determinative of generation of religious noise, this power is subject to both corresponding RMA limiting provisions such as s44, and other public law considerations. Notably, delegated legislation must both cohere with the empowering provision, and promote the general purposes of the Act.[35] The second point to note is that whilst ss43B to 43E purportedly prioritise national environmental standards, thus theoretically categorising them as

[34] This was recognised by the Court of Appeal in *Canterbury Regional Council v Banks Peninsula District Council* [1995] 3 NZLR 189 at 196: "The structure [of the Act is a] hierarchical one, the instruments in descending order being the legislative purpose of the Act (s5), followed by national environmental standards (s43), national policy statements…(s 45)…, regional policy statements (s62), regional plans (s67) and finally district plans (s75). This [does] not create a hierarchy as between Government agencies, regional councils and territorial authorities, as each was given its own area of authority, but it provided a hierarchy of instruments."

[35] *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA); *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

the primary legal tools to control religious noise, the deliberate allocation of different legislative powers to different regulatory bodies means this is unlikely to be the case in practice.

C. Territorial Authorities

The RMA segregates day-to-day control of noise on a geographical basis; allocating regulatory responsibility in coastal marine areas to regional councils, and handing equivalent control on land to territorial authorities. In lieu of the improbability of a fixed-location religious noise dispute arising in the coastal marine domain,[36] attention will be given only to the regulatory capacities of territorial authorities.

Pursuant to s31(1)(d), noise control is an explicit function of territorial authorities. Section 72 prescribes the chief mechanism by which this function, amongst others, is carried out; "the purpose of the preparation, implementation, and administration of district plans is to assist territorial authorities to carry out their functions in order to achieve the purpose of this Act."

Section 75, which stipulates guidelines as to the content of district plans, indicates the scope of an authority's discretion to impose noise controls:

(1) A district plan must state
(a) the objectives for the district; and
(b) the policies to implement the objectives; and
(c) the rules (if any) to implement the policies.

(2) A district plan may state...

(b) the methods, other than rules, for implementing the policies for the district;
(d) the environmental results expected from the policies and methods; and
(e) the procedures for monitoring the efficiency and effectiveness of the policies and methods; and
(g) the information to be included with an application for a resource consent; and
(h) any other information required for the purpose of the territorial authority's functions, powers, and duties under this Act.

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[36] The Environment Court in *Careys Bay Association Inc v Dunedin City Council* ENC Christchurch C165/02, 10 December 2002, held the jurisdiction of 'coastal marine' to be so minimal to the extent that it did not include the constructed area of a Port.

Hence, whilst a plan's objectives and policies inform the content of the rules,[37] it is the rules themselves that set noise limits. Section 76(2) expounds the legal force of these rules: "Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail."

As well as being subordinate to pre-existing regulations per s76(2), s74(1) provides that district plan rules should harmonise with the purposive provisions of Part 2 of the Act, and any modifications recommended by the Minister of the Environment under s25A(2).

Rule 21.5.1(i)(b) of the Dunedin City District Plan exemplifies the explicit nature of such noise limits: "Between 9:00pm on any night and 7:00am the following day no noise shall exceed a [maximum] of 75 [decibels] measured at the boundary of the site or within any other site."

D. Section 16: Unreasonable Noise

Alongside the ministerial and local body capacities to legislatively implement noise controls, is a separate RMA provision which bears directly on religious noise. Titled the "[d]uty to avoid unreasonable noise", s16(1) provides: "Every occupier of land (including any premises…)…shall adopt the best practicable option to ensure that the emission of noise from that land…does not exceed a reasonable level."

Three points need to be made to clarify how s16 operates in conjunction with district plan rules that might stipulate noise limits. First, s16(2) indicates that if, for one reason or another, a national environmental standard, district plan, or resource consent mandates a tougher standard than s16(1)'s unreasonableness threshold, that tougher standard is to apply. Second, the Planning Tribunal in *Ngataringa Bay 2000 Inc v Attorney-General* held that s16(1) was not circumvented merely because an activity complied with the noise levels in a district plan.[38] For this dissertation, the implication of *Ngataringa Bay* is that the fact of a district plan noise limit being adhered to does not necessarily mean that that noise will be reasonable pursuant to

[37] Section 76(1) of the RMA dictates that rules may be made solely to carry out an authority's statutory functions and to achieve the objectives and policies of its district plan.
[38] PT A 16/94, 13 March 1994.

s16(1). The third point to note is that unlike district plan noise limits,[39] s16(1) applies to usages or activities pre-dating its existence.[40] Consequently, whilst the age of a religious noise emission might exempt it from a district plan rule, the religious noise must still comply with s16(1). Further, in elucidating the reasonableness test, the Planning Tribunal in *Auckland Kart Club Incorporated v Auckland City* held that the surrounding noise limits set in a district plan could be a guide in deciding what was reasonable.[41] In the absence of such guidance, the Tribunal held a s16(1) reasonable level to be:[42]

> [C]learly what is most reasonable to the receiver, set in the context of what the [occupier or person carrying out the activity] can achieve as the best practicable option…[I]t is a question of fact and degree.

Further clarifying the reasonableness test, the High Court in *Zhadral v Wellington City Council* held that the assessment was an objective one, and that the subjective sensitivities of a recipient were not relevant to the exercise.[43] In sum, s16 provides the RMA's simplest and most flexible check on religious noise emissions; handing discretion to the adjudicative body to examine the facts and circumstances to decide what is objectively reasonable.

E. Resource Consent

Potential noise emissions and effects are relevant considerations fettering a consent authority's discretion to grant resource consent to an applicant. Sections 104 and 105 provide a list of factors that a consent authority must have regard to in this process. As well as mandating consideration of purposive provisions of Part 2, s104(1)(a) states that a consent authority must have regard for: [A]ny actual and potential effects on the environment of allowing the activity.

Noise emissions are most likely to fall under this provision, but it is important to note that in an application for consent, as would be required by a hypothetical Islamic community seeking to

[39] Pursuant to ss 10, 10A, 10B, 20 and 20A of the RMA, usages and activities operating prior to a national environmental standard, regional rule, or district plan rule, are not subject to that standard or rule.
[40] *Central Hawkes Bay District Council v Balfour* ENC Wellington W007/06, 20 January 2006.
[41] PT A 124/92, 22 October 1992.
[42] Ibid, at 13.
[43] [1995] NZRMA 289.

implement a call-to-prayer speaker system, s104(1)(c) allows the consent authority to factor in: [A]ny other matter the consent authority considers relevant and reasonably necessary to determine the application.

The Planning Tribunal in *Re an Application by Petralgas Chemicals NZ Ltd* provide an example of a court bringing this wide discretion to bear on proposed noise emissions in an application:[44]

> Noise from an industrial plant is a pollution and is an environmental consideration just as water and air pollution are. But it has problems of its own. Awareness of noise can be very subjective; noise at night is more significant than noise during the day; noise in an industrial area is less significant than noise in a residential or rural area. And even though noise may be generated at a steady level, the effect of it can fluctuate according to changing atmospheric conditions and other variable factors.

Whilst this case arose under the repealed Town and Country Planning Act 1977, it provides an enduring example of the seriousness with which courts treat noise in resource consent applications.

F. Enforcement

The enforcement measures detailed in Part 12 of the Act provide the remedial teeth in the RMA's noise regulation regime. Four of the measures under Part 12 are pertinent to enforcing noise control: declarations (ss310-313), enforcement orders as well as interim enforcement orders (ss314- 321), abatement notices (ss322- 325), and excessive noise directions (ss326-328). Like the statutory controls they underpin, these measures are flexible and predominantly interchangeable depending on the facts of the situation. Considering the enforcement of the s16 general duty to avoid unreasonable noise, the District Court in *Tauranga District Council v Groot* discussed the nature of the different measures and the line between the local body and Environment Court jurisdictions.[45] The general distinction drawn by the Court was that where a local body played a day-to-day, executive role in enforcement, the Environment Court played a more formal, adjudicative role.[46] This formulation becomes clearer on closer examination of

[44] (1981) 8 NZTPA 106 at 116.
[45] DC Tauranga NP 380/92, 19 October 1992.
[46] Ibid, at 3: "The [Environment Court] has the primary and broader power to resolve such issues upon the application of any party [under RMA s309(1)]. The local authority has a more limited role as enforcement agency. It may take direct action by the issue of an abatement notice or excessive noise

the mechanics of the enforcement measures. Sections 310 and 311 place the important role of declaring the legality or illegality of noise emissions in the realm of the Environment Court. Similarly, the broad enforcement order jurisdiction that under s314, can encompass prohibiting or mandating certain acts, entails a complex consideration process that the RMA appropriately allocates to the judiciary. In contrast, the urgent response capacity of the ss326-328 excessive noise directions, and the ss-322-325 abatement notice powers, do not require such poise and are readily administrable by local bodies.

Sections 338 and 339 which state respectively the offences and corresponding penalties, complete the enforcement side of the Act. Section 338 makes it an offence to contravene any enforcement order, excessive noise direction, or any abatement notice for unreasonable noise under s322(1)(c). Under s339, contravention of a court enforcement order carries a sentence of up to 2 years imprisonment or a $300,000 fine, while contravention of the less serious abatement notice or excessive noise direction results in a fine of up to $10,000.

In sum, the RMA provides a comprehensive but coherent noise control regime, sharing administration and application duties between the local authorities, the executive, and the judiciary. How this regime might practically interface with the religious freedom protection provisions of the NZBORA, will be examined in due course.

II. The Citizens Initiated Referendum Act 1993

If the RMA, as an instrument of an elected, representative legislature, might be termed an indirect democratic check on religious noise in New Zealand, is there scope for direct democracy to play a similar role? European experience exemplifies one answer to this question.

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direction. It may prefer, however, to take less direct action by making application to the [Environment Court]. Under the former, it effects its own direct enforcement action; under the latter it seeks to achieve the same end by acting under the authority of the [Environment Court]. These enforcement procedures are not mutually exclusive. All may be employed to enforce the general duty under s16 to ensure the avoidance of unreasonable noise. Usually it will be appropriate for the local authority to act without the need for application to the [Environment Court] and simply to act by way of abatement notices or excessive noise directions. Where unusual circumstances or peculiar difficulties arise, however, it may be appropriate to use the authority of the [Environment Court] to help it with enforcement."

In May 2007 the Egerkinger Committee, a group of right-wing Swiss politicians, launched a federal popular initiative that sought an amendment to Article 72 of the Swiss Constitution to prohibit the construction of Islamic minarets which serve to call Muslims to prayer. The Committee was able to collect the 100, 000 signatures required to initiate a referendum inside the 18 month time limit, and in a referendum on 29 November 2009, the amendment was approved by 57.5% of the voters and by 19½ cantons out of 23.[47] In a discussion of the amendment prior to the referendum Marcel Stüssi, concluded, "a law that bans minarets is very likely to interfere with the right to freedom of thought, conscience and religion under Article 18; the right to non-discrimination under Articles 2(1), 3, and 26; and the rights of minorities under Article 27 of the [International Covenant on Civil and Political Rights]."[48]

Could direct democracy engineer such a result in New Zealand? In a constitutional framework that places a premium on Parliamentary Sovereignty, this is thought to be unlikely. The Citizens Initiated Referendum Act 1993 (CIRA) is the principal vehicle for direct democracy in New Zealand, and s3 provides the material difference militating against the sort of outcome that transpired in Switzerland: "A petition seeking the holding of an indicative referendum may, in accordance with this Act, be presented to the House of Representatives."

That CIRA referenda are not binding on the House of Representatives has led certain New Zealand legal academics to describe the CIRA as "little more than an expensive (and dubious) public opinion poll."[49] Indeed, the only action required of the House of Representatives following a referendum, is that it hear the numerical results of that referendum from the Minister of Justice.[50] Consequently, even if a proponent of a CIRA referendum was able to collect the proportionately much higher signature threshold,[51] a hypothetical referendum

[47] Swissinfo.ch and agencies, above n 19.
[48] M. Stüssi "Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative" (2008) Religion and Human Rights 3 135 at 144.
[49] A. Geddis and B. Fenton "Citizens Initiated Referenda" [2009] NZLJ 333 at 337.
[50] Pursuant to CIRA s40(3). This action is required whether the referendum is successful or not.
[51] In contrast with the Swiss requirement of 100, 000 signatures, the CIRA s19(1) stipulates that signatures from 10 percent of the voting population (approximately 300, 000 of current electoral roll) are required to trigger a referendum. Section 15(3) also confines the signature collection period to 12 months compared to the 18 month period in Switzerland.

asking whether New Zealand should ban minaret construction would, at most, produce a numerical result that the House of Representatives would be obliged to hear.

Apart from the purely indicative nature of a CIRA referendum, there are almost no limits on the subject matter of CIRA referenda.[52] As such, it is arguably conceivable that direct democracy might act as a de facto check on religious noise in New Zealand in terms of serving as both a sounding board, and a trigger for Parliamentary legislative circumscription of the right. A referendum indicating favour for tightening controls on religious noise could arguably give a democratic and political green light to a Parliament contemplating such a move. It certainly could not be said that such a legislative step would be out of touch with the manifest majority desires of the people.

[52] Pursuant to CIRA s11(2)(b), issues that have been subject of a referendum held within five years prior to the receipt of the petition cannot be the subject of a new referendum, and under CIRA s4 propositions that call for an inquiry into the way a previous referendum was conducted also constitute prohibited subject matter. The High Court in *Egg Producers Federation v The Clerk of the House of Representatives* HC Wellington CP 128/94, 20 June 1994 at 6, described this lack of subject limits as 'extraordinary'.

Chapter Two: Private Law Checks

The intended beneficiaries of private law checks on religious noise are self-evidently those complainants who autonomously initiate legal proceedings seeking personal remedies against a

noisemaker. Here the emphasis shifts predominantly from statute to common law. Amidst a wealth of civil actions protecting private interests, the focus of discussion will be on the tort of nuisance. The House of Lords in *Hunter v Canary Wharf Ltd* isolated the tort's intrinsic value to the noise control context:[53]

> [I]t is right...to regard the typical cases of private nuisance as being those concerned with interference with the enjoyment of land... Characteristic examples of cases of this kind are those concerned with noise, vibrations, noxious smells and the like.

The competing interests in nuisance very much resemble the dichotomous sustainable management values in the Part 2 principles, and the s16 prohibition on unreasonable noise in the RMA. The New Zealand Court of Appeal in *Morgan v Kyatt* elaborate, "[Nuisance strikes] a balance between the right of an occupier to use and enjoy his own property and the right of his neighbour to be protected from interference or injury."[54]

The question of whether the multifaceted RMA noise control regime has diminished the scope of nuisance as a check on religious noise will be examined later. Some discussion of the mechanics of nuisance is required first.

I. Elements of the Tort

It is well accepted that noise alone might constitute an actionable nuisance.[55] Whilst there is no difference in legal principle between nuisance by noise and nuisance by other means, courts have recognised that the facts of noise cases require careful treatment. Selbourne LJ in *Gaunt v Fynney*[56] particularly counselled the need for judicial caution in the noise context. Callen J, in the leading New Zealand noise nuisance case of *Bloodworth v Cormack* reiterated this caution, "...from their intrinsic nature, 'noise' cases are more difficult than those 'nuisance' cases which are concerned with something tangible, such as waters fouled by sewage." [57]

[53] [1997] AC 655 at 662.
[54] [1962] NZLR 791 at 794.

[55] *R v Smith* (1726) 93 ER 795.
[56] (1872) LR 8 Ch App 8.
[57] [1949] NZLR 1058 at 1062.

It is convenient that *Bloodworth* also prescribes a contemporarily accurate statement of the legal elements of nuisance. A plaintiff must establish:[58]

> (i) a serious interference with his comfort...according to the ordinary notions prevalent among reasonable persons (this excludes reference to standards demanded merely by the supersensitive, or according merely to the 'elegant or dainty modes and habits of living' spoken of by Sir James Knight Bruce V-C, in *Walter v Selfe*.[59]) [and,]
> (ii) one must look at the defendant's operations, not in the abstract, but in connection with all the circumstances of the locality.

Bloodworth demonstrates that the reasonableness of an activity is a distinctly objective test that disregards subjective hyper-sensitivities. The activity is measured against the character and discrete circumstances of the locality within which it operates. The Court in *Horne v Speedy Demolition Ltd*[60] added to this that, though generic standards governing all localities are not relevant, noise controls pertinent to that locality's district plan may be a useful guide as to what reasonable people should expect to be carried on in this area. A final point colouring the reasonableness test is that though expert evidence of decibel recordings can be a factor establishing nuisance,[61] a claim does not necessarily sink or swim on such evidence.[62]

II. Applying the Tort...

The analysis in *Bloodworth* exemplifies a straightforward application of this law to the relevant facts. The plaintiffs lived in Remuera; a quiet residential suburb of Auckland. A quarter of a mile from their home was a park where, pursuant to a licence, the defendant had constructed a speedway suitable for motorcycle racing. One evening every week for a period of six months, the defendant conducted these races at the park. Each meeting would run from 8pm for approximately three hours, and would encompass incessant noise from the motorcycles and the accompanying loudspeaker commentary. The plaintiffs sought damages and an injunction,

[58] Ibid, at 1063.
[59] (1851) 4 De G & Sm 315 at 322.
[60] SC Auckland A 408/69, 20 July 1970.
[61] The Court in *Tetley v Chitty* [1986] 1 All ER 663, harnessed both acoustic evidence and subjective neighbour testimony in holding a certain noise to be a nuisance.
[62] *Sampson v Hodson-Pressinger* [1981] 3 All ER 710.

arguing that the weekly noise had diminished both the monetary value and enjoyment of their property, and constituted a nuisance.

Having stated the need for the activity to be viewed against the locality, the Court proceeded with its analysis. It found that:[63]

> (a) the locality, though a quiet suburb, [was] a suburb of a large city; and that
> (b) [motorcycle racing had] become a sport for which large cities cater in some place or places reasonably accessible to those who desire to take part in the sport, or to witness it;
> (c) [motorcycle racing was] a noisy sport;
> (d) that this is a mechanical age, in which motor-engines abound.

Despite the contemporary view that such a public entertainment enterprise was not repugnant to the modern residential suburb of a large city, the Court looked closer at the nature of the noise emanating from the park:[64]

> [The plaintiff's witnesses] did not appear to be supersensitive persons...Yet I have no doubt that all of them have suffered serious interference in the enjoyment of their homes from noises from Sarawai Park…Complaints that reading or intellectual concentration of any kind became impossible were frequent. Some complain that sleep was interfered with. Although the noise occurred in summertime, there was much closing of doors and windows in an unsuccessful effort to keep it out.

The Court thus held: [65]

> [The plaintiffs] establish against the defendant a serious, and not merely trifling, interference with the comfort of their home… To be annoyed once a week for nearly half the year in the manner in which the plaintiffs were annoyed last summer is...a serious, and not a trifling, matter. The annoyance was increased by some uncertainty as to the evening on which it would occur, which increased the difficulty of arranging to escape from it. [Further] it is hardly a trifling matter that persons who prefer to stay at home on an evening should be driven out.

Consistent with the discretionary nature of remedies in tort, the Court imposed both damages, and an injunction prohibiting recurrence of the nuisance.

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[63] *Bloodworth*, above n 57, at 1063.
[64] Ibid, at 1064.
[65] Ibid, at 1072.

Whether the orthodox approach in *Bloodworth* which relied heavily on English noise cases, is the approach a New Zealand court might apply to an alleged religious noise nuisance, remains unanswered. It is thus pertinent that English courts themselves, and two other common law jurisdictions, have gone some way to addressing this question.

III. ...in the Religious Noise Context

It is established in England and Australia, that the ringing of church bells can constitute a nuisance. The leading English case in the church bell jurisprudence,[66] is that of *Soltau v De Held*.[67] The plaintiff, Mr Soltau, had leased half of a mansion house in Clapham from 1817 to the date of litigation. In 1948 a Roman Catholic order acquired the other half of the house and converted it into a chapel, consecrating the defendant as chaplain. Early morning bell-ringing occurred for a time until the defendant agreed to shift the daily event from 5am to 6am. This remained the status-quo until the defendant erected a new church with a steeple immediately adjacent to the mansion. The steeple contained six bells which, in concert with the chapel bell, the defendant incorporated into a daily ringing routine at 5, 6:45, and 8:45 in the morning, and in the evening at 6:45 and 7:15. Full peals rang out on a more frequent basis in the weekends. After several months, the defendant initiated a successful action in nuisance culminating in the Court awarding damages. Two months later the bell-ringing recommenced, and the defendant filed a claim in the Chancery Court averring that the noise prevented him and his family from conversing, reading, or writing, and that they would be forced to vacate if the noise continued, as well as having to sell the house at a reduced price. The Court accepted this submission and held that that the disturbance was neither trivial nor negligible, but materially interfered with ordinary, reasonable living standards. An injunction preventing the nuisance, but not the activity in its entirety, was thus granted.

[66] The earliest case of *Martin v Nutkin* (1724) 2 P Wms 266, did not strictly concern nuisance but rather, the enforcement against a new churchwarden of an agreement between the plaintiffs and the previous warden, prohibiting the tolling of the local church bell at 5am. The Court upheld the continuance of the agreement.

[67] (1851) 2 Sim NS 133.

The later case of *Hardman v Holberton*[68] involved the less intrinsically religious context of a church clock which sounded not to mark morning or evening worship, but rather to simply note the time of day. However, the plaintiff's complaint centred on the subjective effect that the noise had on his wife who was ill and highly nervous. Applying the objective approach integral to the tort, the Court held that the quarter-hour chiming did not amount to a nuisance. The Supreme Court of Victoria in the Australian case of *Haddon v Lynch*[69] were less tolerant in consideration of a bell that rang several times between 7 and 8am on a Sunday. It was no defence that the plaintiffs came into the nuisance in building their house only 40 metres away, and the Court held that it was entirely reasonable to wish to lie in bed undisturbed at 7:30am on a Sunday. The church was thus enjoined from ringing the bell before 9am. Thomas Watkin and Sarah Thomas question whether, in the face of neighbour's complaint, there might be any circumstances where such noise might not be a nuisance. This question follows from the dicta of the *Haddon* trial judge, who stated:[70]

> [N]oises caused by church bells enjoy no immunity from restraint as nuisances...[T]he plaintiffs cannot be required to submit to the early bell-ringing as a necessary function. It is no part of the church service, no incentive to attend. It merely announces the time for attendance in a manner uncalled for in these days of cheap clocks and watches.

The implication of this is that no religious law or duty requiring the ringing of bells could provide a defence if the noise constituted a nuisance. Watkin and Thomas show that such a holding would be incorrect in England:[71]

> It is trite law that if statute has authorised a particular activity, there can be no liability for a nuisance caused thereby...[T]he Church of England (Worship and Doctrine) Measure 1974, has provided in Canon B 11 of Morning and Evening Prayer in Parish Churches that, '[licensed ministers] shall resort to the church morning and evening, and, warning being given to the people by the tolling of the bell, say or sing the Common Prayers and on the appointed days the Litany.'

Thus, in England at least, pursuant to the Church of England (Worship and Doctrine) Measure 1974, bell-ringing maintains a nexus in statute that prima facie protects it from nuisance claims.

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[68] [1866] W N 379.
[69] [1911] V L R 5.
[70] Ibid, at 10-11.
[71] T. Watkin and S. Thomas "Oh, noisy bells, be dumb: church bells, statutory nuisance and ecclesiastical duties" (1995) J P L 1097 at 1101-1102.

It is noted however, that the Courts' holdings in *Soltau* and *Martin* are reflected in Watkin and Thomas's qualification of this point:

> Statutory authority should not be taken to mean that the activity may be prosecuted with complete disregard for the comfort of others, for if the activity could be prosecuted in a manner which avoided causing the nuisance, to prosecute it in a way which does so affect others might well be actionable, particularly if it were not unreasonable to expect the activity to be performed in a less offensive or completely inoffensive manner.[72]

In sum, the bell-ringing nuisance jurisprudence shows courts taking a relatively traditional, empirical approach to religiously-motivated noise generation. That is, whether or not the activity has a foothold in law, courts have tended to focus on the reasonableness of the effects of the activity focussing on the noise level, number of bells, the hour of the tolling, and the proximity of the defendant to the noise, rather than the nature of the activity itself. In spite of this approach, Watkin and Thomas conclude that if a complainant did attempt to bring a hypothetical action in England to completely prohibit the ringing of a bell, "it would appear to be impermissible [in lieu of the statutory duty] to attempt to ban a cleric of the Church of England from ringing a bell for morning and evening prayer altogether[.]" [73]

The two commentators emphasise however that, "while the established Church of England would appear to have [this] defence…other denominations and other faiths cannot pretend to any such privilege." [74] Whether the NZBORA religious freedom provisions serve to mimic such a defence on a broader scale in New Zealand, will be discussed shortly. Two religious noise disputes arising in the contemporary milieu, need to be examined first.

The Queen's Bench in *R (on the application of the London Borough of Hackney) v Rottenberg*[75] considered an appeal against conviction pursuant to s80(4) of the Environmental Protection Act 1990, for failure without reasonable excuse to comply with an abatement notice.[76] The

[72] R.A. Buckley *The Law of Nuisance* (Butterworths, London, 1981) at 87, cited by ibid at 1102.
[73] Watkin and Thomas, above n 71, at 1103.
[74] Ibid, at 1103.
[75] [2007] EWHC 166 (Admin).
[76] The Court in *A. Lambert Flat Management Ltd v. Lomas* [1981] 2 All E.R. 280, noted that the level of disturbance required to ground a statutory nuisance is identical to that required by common law nuisance.

appellant was a Rabbi who utilised one half of a semi-detached house as a school and Synagogue. The appellant's half was occupied solely as a residence. Following complaints of chanting, shouting and banging on floors, local environmental health officers who had visited the residence formed the view that the noise amounted to a statutory nuisance. The abatement notice that was subsequently issued was ignored, and the appellant was convicted. An argument raised on appeal was that the finding of statutory nuisance constituted a disproportionate interference with the appellant's right to religious freedom.[77] Though the appeal was ultimately dismissed on another interrelated point that the Court regarded as obviating the need for substantive discussion of this discrete argument, the Court did state in obiter that, "the fact that the noise is created in the course of religious worship, in premises registered and with planning permission for that use, would inevitably be a relevant consideration, both in considering whether noise constitutes a nuisance and whether there is reasonable excuse for it."[78]

As would be the case in New Zealand, the English weak-form judicial review system[79] prevented the Court from invalidating rights-inconsistent legislation,[80] but did require the Court to interpret the legislation as far as possible consistently with the right in question.[81] In classifying the religious origins of the noise as a consideration that would influence the questions of nuisance and reasonable excuse, the Court arguably recognised this duty of rights-friendly interpretation in the nuisance context. Nevertheless, the applicability of *Rottenberg* to an equivalent nuisance claim in New Zealand is dubious. The non-statutory nature of the tort in New Zealand arguably rules out any recourse to the rights-friendly interpretive capacity of NZBORA s6.[82] However, there is a distinct similarity in the language of statutory nuisance under s79(1)(g) of the Environmental Protection Act and the RMA s16 prohibition on unreasonable

[77] European Convention on Human Rights, Art. 9 (incorporated into the Human Rights Act 1998 via s1(2)).
[78] *Rottenberg*, above n 75, at 539.
[79] Waldron, above n 21, at 1354.
[80] Human Rights Act 1998 (English), s3(2).
[81] Ibid, s3(1).
[82] Like s3(1) of the English Human Rights Act 1998, s6 of the NZBORA applies only to legislation.

noise. This similarity coupled with the analogous constitutional treatment of rights between New Zealand and England, could make *Rottenberg* good authority for NZBORA s6 to apply at least to s16 of the RMA.

The second case of *Hotel Millenia v Worship Centre Christian Church*[83] comes from the Supreme Court of Samoa and concerns the efforts of a plaintiff Hotel to obtain a restraining order on the neighbouring defendant Church whose services involved:[84]

> Large amplifiers, speakers, subwoofers and a sophisticated 48 channel sound system with an output of many thousands of watts...used to amplify and increase the raw power of the defendant's message and devotions. The affidavit of [the defendant's] sound technician...indicates a total power output in the vicinity of some 12,000 watts, the sort of level you would expect at an outdoor rock concert.

The plaintiff had complained to the relevant local authority who had then run tests and found the noise levels to exceed the limits prescribed for the area. Despite efforts to mitigate noise levels as statutorily required, subsequent tests showed the defendant to still be in breach, whereupon the plaintiff sought judicial enforcement. It is interesting to note that amidst other references to New Zealand nuisance cases, the Court literally decide the question of nuisance in the language of *Bloodworth*; holding that the noise nuisance was substantial, and unreasonable.[85]

In consideration of the defendant's right to religious freedom, the Court held this finding to be a reasonable restriction on this right:[86]

> While the defendants have a constitutional right...to freedom of religion...they must exercise this right within the boundaries of the law...The exercise of the right can be curtailed [by] reasonable restrictions on the right.

[83] [2009] WSSC 76.
[84] Ibid, at 77.
[85] Ibid, at 83.
[86] Ibid, at 83.

As was the case with *Rottenberg*, the statutory nature of the nuisance litigation here would confine *Hotel Millennia* to potentially applying to the statutory noise controls of the RMA. Despite this, it is worth noting the similarity between the reasonable restriction mechanism in the Samoan Constitution and s5 of the NZBORA which allows demonstrably justifiable limitations on rights in New Zealand. To this extent a New Zealand court could construe *Hotel Millennia* as authority for what point a noisy rights-exercise ought to be limited.

IV. Nuisance Erosion?

The last point requiring clarification concerns the compatibility of the tort of nuisance with the substantial jurisdiction of the RMA. Section 23(1) of the RMA provides that, "[c]ompliance with [the RMA] does not remove the need to comply with all other applicable…rules of law."

From this it would appear that the RMA and nuisance the two legal instruments are to co-exist in harmony as potential checks on religious noise emission. However, as the twentieth anniversary of the RMA approaches, both established practice and academic opinion are at odds with this position. In particular consideration of the noise context, *Environmental and Resource Management Law* states, "[n]otwithstanding this availability of nuisance actions to control noise, as a matter of practice such actions are rare in New Zealand nowadays and likely to be a matter of last resort."[87]

This diminution of nuisance is predominantly attributed to the creation and enlargement of the local authority enforcement regime by the Noise Control Act 1982, and the RMA respectively.[88] The RMA not only maintained the abatement notice and excessive noise jurisdiction under the previous legislation, but afforded the public with direct rights to seek enforcement orders from the Environment Court. Courts in turn have recognised the shift away from private law noise

[87] Nolan (ed), above n 24, at [13.22].
[88] See generally A. Bezier "Leaving it all to the Resource Management Act 1991: The Demise of the Tort of Private Nuisance" (2004) 35 VUWLR 563. See also, Nolan, above n 24, at [13.22].

regulation.[89] The significance of the breadth of the RMA regime is also resonant in Antoinette Besier's examination of the erosion of nuisance:[90]

> The tort is largely redundant for two main reasons. First, the expansive application of the statutory environmental management framework in New Zealand provided by the Resource Management Act 1991 (RMA) has denied private nuisance a residual support role. Secondly, the tort's own internal developments have served to constrain its application.

The constraining developments of nuisance in New Zealand that Besier refers to, come to the fore in the recent High Court case of *Hawke's Bay Protein Ltd v Davidson*.[91] The action, which concerned the emission of odours from the defendant's fish and meat processing plant, encompassed circumstances resolvable only by recourse to nuisance.[92] Whilst the damages award for decrease of property value was upheld, the Court held that, "nuisance of the kind that concerns interference of enjoyment of property through noise and noxious smells and the like, the primary remedy in most cases is an injunction."[93]

The plaintiffs' failure to seek an injunction constituted a failure to mitigate their loss, and the Court diminished the damages award accordingly. Besier sees this holding as jeopardizing any attraction nuisance had as a legal tool in such cases; "[n]ot only are damages likely to be meagre if an injunction is not sought, but also seeking an injunction presents a great risk to a potential plaintiff as he or she must give an undertaking for damages to the defendant if the

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[89] The District Court in *Canterbury Regional Council v Newman* DC Christchurch CRN9003003500, 9 December 1999 at [69], stated, "[b]y enacting the RMA the (NZ) Parliament has directed that in some areas of 'nuisance' the adverse effects of 'nuisances' can be dealt with in quasi-criminal proceedings [such as enforcement and abatement]— including the possibility of damages in the form of enforcement orders under section 314 of the RMA."

[90] Besier, above n 88, at 563.

[91] [2003] 1 NZLR 536.

[92] The plaintiffs had had to relocate after the Regional Council had failed to control the odours, and the plaintiffs sought damages for distress and loss that fell outside the s314 ambit of damages under the RMA.

[93] *Davidson*, above n 91, at [32].

action fails."[94] Besier thus concludes that instead of affirming a support role for nuisance alongside the RMA, the Court in *Davidson* confined the tort. [95]

For the purposes of this dissertation, whilst it is unlikely that a defendant religious entity would seek indemnification from a plaintiff who unsuccessfully sought an injunction for the period the entity could not produce noise, the constraints *Davidson* places on nuisance – particularly on quantum of damages– in lieu of the already outlined jurisdictional encroachments of the RMA, suggest that the RMA regime would be a better option for a religious noise complainant.

[94] Besier, above n 88, at 584-585.
[95] Ibid, at 590.

Chapter Three: What Might Happen?

Recalling Sachs J's concise articulation of the underlying tension between law and religion,[96] discussion thus far has sought to canvass briefly the legal protections of religious freedom in New Zealand, and in more substance, the potential legal checks on the discrete context of religious noise. The outcomes of two hypothetical collisions between these two societal norms will form the focus of this part of the dissertation. It is important to note that while the English bell-ringing jurisprudence in particular demonstrates how different facts can render different outcomes in religious noise disputes, this investigation centres on how the law might reconcile two conflicting legal positions. The emphasis is thus on working through the legal mechanics of such a conflict, and not on manipulating factual variables to engineer different results. I seek to illustrate how the New Zealand legal system might handle a challenge to religious freedom in a relatively unchartered context. Broad hypothetical scenarios that permit both vertical and horizontal rights challenges,[97] have thus been selected to facilitate this purpose.

I. What might happen if complaints were made about noise emitting from a local church?

A. Presuppositions

Several presuppositions that underpin this scenario need to be clarified. First, the source of the impugned noise – be it a very vocal choir and congregation, noisy bell, or highly-amplified worship system – is not crucial provided it emanates from the fixed location of the church. What is important is that the noise is a bona fide act done out of a genuinely held religious belief.[98] Second, it is assumed that whilst the impact of the noise – either owing to volume,

[96] *Christian Education*, above n 1, at [16].

[97] The vertical application of the NZBORA refers to the application of the NZBORA between the state and the private individual. Horizontal application of the NZBORA refers to the application of the NZBORA between private individuals (see generally A. Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in Hosking v Runting" [2004] NZLR 681 at 682-683.).

[98] The District Court in *Razamjoo* adopted the reasoning of the American case of *McMillan v State of Maryland* (1970) 258 Md 147, which warned against courts entering 'theological thickets' to decide between different doctrinal views on practices. The Court thus limited itself to inquiring as to the genuineness of the defendants' beliefs. Similarly, in their rigourous mechanism for handling religious

hour, duration, or repetition - on the complainant and his or her enjoyment of her property is not negligible, it is also not deafening. Finally, whilst the noise does marginally surpass levels of local district plan rules, it is not subject to those rules, being either a land usage with resource consent pursuant to s9(3)(a), or a land usage or activity existing validly prior to the rules under s9(3)(b) and (c) of the RMA.[99] On these simple facts, what legal recourse might a complainant seek?

B. Complainant Legal Options

Despite the inapplicability of the RMA s9(3) prohibition on land usage breaching district plan rules, the hypothetical complainant has several public law tools to combat the noise. Whilst the RMA s16 duty to avoid unreasonable noise operates independently of district plan rules, the Court in *Auckland Kart Club* held that noise levels set by such rules could colour what constitutes 'unreasonable noise'. That the noise here exceeds such levels and is a regular, albeit weekly occurrence, could be a solid platform for the complainant to seek a local body abatement notice under s322(1)(c) to enforce a purported breach of s16. Alternatively, the complainant might apply under s316 directly to the Environment Court for an enforcement order. In lieu of the wider remedial jurisdiction of enforcement orders under s314,[100] and the

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liberty claims, Ahdar and Leigh reference the House of Lords judgement in *R v Secretary of State for Education and Employment, ex p Williamson*, above n..., in stating that: "While the court has no jurisdiction to substitute its own view of what constitutes valid belief or practice within a religion, it is not compelled to simply defer to and accept A's account in the face of more compelling contrary evidence about A's religious beliefs and practice." [R. Ahdar and I. Leigh *Religious Freedom in the Liberal State* (Oxford, Oxford University Press, 2005, Oxford Scholarship Online, Oxford University Press, <http://dx.doi.org>) at 185].

[99] Under s338(1)(a) of the RMA, breach of the s9(3) prohibition on land usage contravening a district plan rule, is an offence. It is unlikely that a religious defendant would have any defence to a breach of a plan noise limit. An explicit numerical decibel limit in a district plan is incapable of a rights-friendly interpretation via s6 of the NZBORA, and under s4 of NZBORA, must be applied. Conversely, if the noise was substantially under a plan's noise limit, the religious defendant would have a defence entirely independent of their religious freedom rights. Consequently, taking the s338(1) breach of rules offence out of the equation centres the argument on the religious freedom provisions of the NZBORA, and how they bear on the dispute.

[100] Section 314(1)(a) and (b) respectively allow the Environment to make negative and positive orders regarding an activity and its compliance with the RMA, (d) allows the Court to order reimbursement to a plaintiff for costs incurred in attempting to avoid the impugned activity, and (e) permits the Court to alter an existing resource consent.

high likelihood of the church appealing an abatement notice to the Environment Court anyway,[101] the most viable option for the complainant may be to seek an enforcement order in the first place. Should this less circuitous option be taken, it will place the complainant in the driving seat of the subsequent litigation as opposed to deferring the matter to the local authority. Further, though this option might entail greater personal time and resource consumption, it is possible that having a private citizen rather than a public body as the plaintiff might decrease the influence of the NZBORA religious freedom provisions. The High Court in *Ransfield v Radio Network Ltd* considered this threshold question in depth:[102]

> It is axiomatic that the NZBORA has no direct application unless the acts in question fall within paras (a) [acts done by legislative, executive, or judicial branches of the government…] or (b) [by any person or body in the performance of any public function, or duty conferred or imposed on that person or body by or pursuant to law] of s3. I use the word "direct" deliberately because, by s6, the NZBORA has [indirect] application when interpreting enactments and also informs the development of the general law.

Andrew Geddis elucidates this 'direct-indirect' conception of the influence of the NZBORA:[103]

> This issue is often framed by inquiring whether the relevant human rights instrument *requires* that the outcome of the case be consistent with the rights contained therein [direct], or merely *informs* the courts' deliberation as to the correct legal outcome [indirect].

Applying this conception to the present scenario, it is evident that if the local authority drives the dispute, the NZBORA can apply both directly to the acts of issuing an abatement notice,[104] and indirectly in the subsequent adjudication of the s325 appeal of the notice. In contrast, if our private complainant seeks an enforcement order from the Environment Court, the NZBORA can apply only in an indirect manner by influencing the Court's deliberation as to the correct legal outcome. However, given that both RMA mechanisms culminate in a decision from the Environment Court that falls under s3(a) of the NZBORA, the indirect or direct nature of

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[101] Under RMA s325 a recipient of an abatement notice may appeal to the Environment Court.
[102] [2005] 1 NZLR 233 at [46].
[103] Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in Hosking v Runting", above n 97, at 692.
[104] Both the High Court in *Zhadral v Wellington City Council*, above n 43, at 710, and the District Court in *Auckland City Council v Finau* [2002] DCR 839 at [47], confirmed that acts of a local authority fall within s3(b) of the NZBORA.

NZBORA influence might only have a procedural, rather than substantive difference on judicial deliberations. Geddis cites *Harrison v Tuckers Wool Processors*[105] which addressed a dispute between two private persons similarly governed by statute. There, the Court considered whether an employment contract mandating employee-drug testing was 'harsh and oppressive' pursuant to s57 of the Employment Contracts Act 1991. Accepting that the term unjustifiably breached the employees' NZBORA s10 right not to be subjected to medical or scientific experimentation, the Court held that the wording of s57 should be interpreted through NZBORA s6 to exclude the employer's legal right to demand such a condition. Significantly, the private nature of the dispute and consequent indirect nature of NZBORA application, arguably made little difference to the substantive influence of the NZBORA. I contend that the analogous composition of the present dispute between the complainant and the church,[106] might engender a similarly indistinguishable impact of the NZBORA as compared to the direct scenario involving the local authority.

The viability of local authority recourse to an excessive noise direction under s327 of the RMA subsequent to a complaint, is doubtful. In lieu of the potent search and seizure power, the 72 hour enforceability limit, and the unappealable nature of a ss327-328 direction, the District Court in *Jacques v Kapiti Coast District Council* classified this power as specifically catering for situations requiring 'immediate action'.[107] The weekly noise here is not an isolated event conducive to such a discrete remedy, and it is unfeasible to suggest that a failure to comply with a direction should necessarily result in search and confiscation of the source of the noise. Impracticality and controversy would eventuate if this source was human, creating difficulties that are absent in the abatement notice and enforcement order jurisdiction.

Similarly, whilst the Swiss direct democracy ban on prospective minaret construction evolved from an individual dispute literally involving a local proposal to construct an Islamic minaret,[108] the complainant here would have to frame a referenda proposal seeking the retrospective

[105] [1998] 3 ERNZ 418, cited in Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in Hosking v Runting", above n 97, at 692.
[106] In terms of a statutory framework governing a relationship between private persons.
[107] [2003] NZRMA 237 at [4].
[108] Swissinfo.ch and agencies, above n 19.

redress of an inconvenience already incurred by him. It seems unlikely that the public would endorse such a proposal to the requisite extent. Likewise, the hitherto mentioned attributes of the CIRA, particularly the lack of binding force, point away from a direct democratic initiative here.

In minimising the availability of damages in a nuisance action over the enjoyment of land,[109] the Court in *Davidson* arguably removed any incentive for the hypothetical complainant here to choose this legal route over the RMA mechanisms.[110] Further, though the church's breach of district plan levels can influence the determination of the reasonableness of the noise against the relevant locality,[111] recent New Zealand authority might allow the NZBORA background of this noise to act as a countervailing consideration for a court in this determination. Recall that the Court in *Harrison* substantially utilised the NZBORA in a dispute centring on a statute that governed the relationship between two private persons. Owing to the innately private nature of the domain, the horizontality of the NZBORA in relation to a common law action between two private persons is a more controversial question that has seen recent judicial attention. Geddis describes the Court of Appeal decision in *Hosking v Runting*[112] as '[the] most comprehensive grappling to date with the issue of the NZBORA's horizontal effect.'[113] Though the majority of the Court of Appeal did not wish to "[address] the complex question of the extent to which the Courts are to give effect to the rights and freedoms affirmed in the Bill of Rights Act in disputes

[109] Recall that the Court in *Davidson*, both prioritised injunction as the primary remedy for "[nuisance actions involving] interference of enjoyment of property through noise...", and diminished the plaintiff's damages award for failing to seek an injunction (*Davidson*, above n 91, at [32]).

[110] An RMA abatement notice or enforcement order carries the same consequence for the defendant as an injunction, and does not engender the legal and personal costs that private law nuisance litigation would. Besier (at 586) cites practicing RMA Lawyer Trevor Daya-Winterbottom; "'[the RMA] will often be a cheaper and more expeditious' way of obtaining redress when compared to bringing a common law action."(T. Daya-Winterbottom "Common Law Remedies and Environmental Liability" (1999) 7(2) Resource Management Bulletin 24 at 29).

[111] *Horne*, above n 60.

[112] [2005] 1 NZLR 1 (CA).

[113] Geddis "The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in Hosking v Runting", above n 97, at 704.

between private litigants",[114] it did hold that, "developments in the common law must be consistent with the rights and freedoms contained in the [NZBORA]..".[115]

Whilst the exact ramifications of the NZBORA's horizontal capacity for a speculative nuisance action here remain unknown, the jurisprudence that has emerged from the privacy tort founded in *Hosking* itself has provided several possible answers. In a discussion of this jurisprudence,[116] University of Canterbury Ursula Cheer considers several such horizontal constructions,[117] and concludes in favour of Tipping J's approach in *Hosking*:[118]

> [I]n every privacy case, at the very least, some sort of application of s 5 of the New Zealand Bill of Rights Act should be openly articulated to balance freedom of expression and privacy and the relative public interests which exist in both.

Given the apparent similarity in the conflicting privacy and expression interests in our context, it is arguably foreseeable that a court could adopt and apply an equivalent balancing role for NZBORA s5 in the nuisance context. For our complainant, it may be sufficient to note that even if a court took such a step, a private nuisance action is unlikely to attract the same degree of NZBORA influence as the statutory equivalents under the RMA.

C. Adjudication: Balancing Two Rights?

The discussion of the complainant's legal options has demonstrated the varying reach of the NZBORA; the premise being that the greater the normative ambit of the church's NZBORA rights of religious freedom, the greater the detriment to the complainant's case will be. However, as we arrive at the adjudicative phase of the investigation, it may be that a

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[114] *Hosking*, above n 112, at [114] per Gault and Blanchard JJ.
[115] Ibid, at [111] per Gault and Blanchard JJ, and at [229] per Tipping J.

[116] Notably *Hosking*, above n 112, at [229]; *Television New Zealand v Rogers* [2007] 1 NZLR 156 at [114] per William Young J; *Von Hannover v Germany* [2004] ECHR 294; *The Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776
[117] U. Cheer "The future of privacy. Recent legal developments in New Zealand" (2007) 13 Canterbury L R 169 at 187-189.
[118] Ibid, at 188.

competing, non-NZBORA right enters the equation.[119] In their decision on a conceptually analogous dispute,[120] the Supreme Court in *Brooker v Police* considered the status of this proffered right:[121]

> The competing value is that of privacy; a person's interest in being let alone in the seclusion of the home. But what is the status of this value or interest? Is it a right, or a value, or a limitation on a right? This question is not unimportant for it determines what is to be balanced: a right against a right; a right against a value; or a right against a limitation. A different outcome is possible depending on how privacy is classified.

Whilst only a minority of the Court felt that this competing value should be put on the same prima facie footing as the opposing NZBORA s14 right to freedom of expression,[122] it is arguable that the minority's efforts both "expand[ed] the judicially recognised ambit of privacy as a concept, [and also] put privacy on a much firmer jurisprudential footing as an individual 'right'."[123] Consequently, whilst the complainant might not start on a level playing field,[124] he or she might strongly assert that though not a right, privacy as a competing interest has attained growing precedential force.[125]

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[119] Section 28 of the NZBORA explicitly states that an existing right is not abrogated merely because it is not included in the NZBORA.

[120] [2007] 3 NZLR 91 (SCNZ), involved the disorderly behaviour prosecution of the appellant for disturbing the respondent's enjoyment of the peace and quiet of her home.

[121] Ibid, at [163] per Thomas J.

[122] Only McGrath J at [129], and Thomas J at [213]-[226] accorded equal status to privacy as to NZBORA s14 freedom of expression, and in subsequent balancing, found privacy to weigh more in the case. As Elias J expressed no view on the matter, it is arguable that McGrath and Thomas JJ's position has equal force to Tipping J at [91]-[92], and Blanchard J at [69], who attributed higher prima facie value to a right over an interest.

[123] A. Geddis "Brooker v. Police" (2008) 8.1 Oxford University Commonwealth L J 117 at [1].

[124] *Brooker*, above n 120, at [164] per Thomas J: "[P]rivacy has not yet been judicially accorded the status of a right...".

[125] In recognising the existence of a tort of privacy in New Zealand, the Court of Appeal in *Hosking* noted the contemporary legal importance of privacy per Keith J at [184]; Tipping J at [224] and [237]-[241]; and Anderson J at [265]. That the Supreme Court in *Brooker*, unanimously used the same language of privacy in a very different factual scenario has attracted some academic criticism. Geddis in "Brooker v Police" above n 123, states at [19], "[w]hether the enjoyment of mental peace and quiet in the home really needs to be bundled into some generic 'privacy right' is debateable; it is enough that it is a social value important enough to outweigh expressive rights in particular cases."

In a substantial discussion on resolving conflicting rights under the NZBORA, Selene Mize forcefully argues for formal recognition that rights have a prima facie primacy (albeit displaceable) over interests:[126]

> Superseding rights requires a higher justification than that which is sufficient to supersede non-right interests. Interests can be sufficient to override rights, but the special status of right means that a strong case must be made. When rights are balanced against rights, however, neither can claim a higher status than the other. It should be easier to limit or override a right in order to protect another right than in order to protect a societal interest. The level playing field between competing rights means that neither has an advantage, and they must be balanced with no presumption on either side.

Whether or not application of this primacy presumption is now predominant judicial practice, it is trite that an interest can outweigh a NZBORA right.[127] Further, in step with Mize's second argument, it is fairly well-established that the mechanism under which such a weighing decision is made is an ad-hoc balancing test under s5 of the NZBORA.[128]

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[126] S. Mize "Resolving cases of conflicting rights under the New Zealand Bill of Rights Act" (2006) 22.1 NZULR 50 at 57. Mize cites Tipping J's judgement in *Hosking*, above n 112, at [234], as judicial support for this prima facie primacy: "When the expression in issue provides little public benefit, except in theory, but significant individual or public harm in concrete terms, the theory must give way. Thus, in the particular instance society's pragmatic needs or the welfare of its individual members can outweigh the general benefits supported by the theory of liberty. The theory, however, has a head start." Tipping and Blanchard JJ in *Brooker*, above n 120, also support this position.

[127] Ibid, at 59, cites *Feau v DSW* (1995) 2 HRNZ 528, as an example of competing interests justifying the restriction of NZBORA s15 religious freedom rights. Considering the appeal against a sentence requiring a Seventh Day Adventist to attend a periodic detention induction programme on Saturday morning, Elias J concluded that the sentence was a reasonable limit under s5 of the NZBORA on the offender's religious freedom. There was only a very minimal and uncertain impact on the convicted man's religious observance (it was a one-off meeting, he would not be required to work on his Sabbath, and he might be able to avoid the Saturday meeting by offering to read written materials on his own), and the administrative burden of creating a separate induction programme for him would have been significant. Further, the alternative would have been a custodial sentence which would have had a greater impact on his ability to attend religious services on Saturdays.

[128] *Hosking*, above n 112, at [116] per Gault J, and at [230] per Tipping J. See also Tipping J in *R v Hansen* [2007] 3 NZLR 1 (SC) at [119], and Tipping and Blanchard JJ in *Brooker*, above n 120, at [91] and [59]. Ahdar and Leigh also support an ad-hoc balancing over the alternative definitional balancing in resolving religious freedom disputes: "The ad hoc balancing approach interprets the right quite broadly, then requires the [complainant] to justify the limitation; rather than the courts paring back the breadth of the right to begin with (the definitional balancing approach). The ad hoc methodology allows for a sophisticated interplay of burdens of proof between the [religious defendant] and the [complainant],

D. The Balance and the Checks

Discussion will first consider the litigation of the church's RMA s16 duty to avoid unreasonable noise.[129]

Applying Tipping J's construction of the balancing test in *Brooker* to fit the present dispute, "[t]he application of the [RMA s16 duty] requires the court to balance the competing interests of those exercising their right to freedom of [religion]... against the legitimate interests and expectations of those affected by that exercise."[130]

Factoring in the prima facie imbalance that arises in when a right is initially placed alongside a non-right,[131] we can continue to harness Tipping J's analysis:[132]

> Where...the behaviour concerned involves a genuine exercise of the right to freedom of [religion], the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case. This may be necessary to prevent an unjustified limitation of the freedom and is consistent with the purpose of s6 of the Bill of Rights. There must, however, come a point at which the manner or some other facet of the exercise of the freedom will create such a level of anxiety or disturbance that the behaviour involved becomes [unreasonable under RMA s16] and, correspondingly, the limit thereby imposed on the freedom becomes justified under s5.

Blanchard J in *Brooker* frames the crux of the inquiry in the simplest terms:[133]

> The value protected by the [NZBORA] must be specifically considered and weighed against the value of [privacy]. The court must ask itself whether treating the particular [noise emissions] in the particular circumstances as [unreasonable noise] constitutes a justified limitation on the defendant's exercise of the right in question… The manner in which the defendant chose to exercise the right and the time and place are of course relevant to that inquiry.

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whereas under the definitional approach, the [complainant] is effectively exempted from the requirement to justify restrictions on liberty (Ahdar and Leigh, above n 98, at 184)."

[129] Recall our conclusion that there is unlikely to be any difference in the substantive impact of the NZBORA in terms of whether litigation derives from the church appealing a local authority's s322 abatement notice, or whether our complainant directly seeks an Environment Court s317 enforcement order.

[130] *Brooker*, above n 120, at [91] per Tipping J.

[131] See above n 126.

[132] Ibid, at [92].

[133] Ibid, at [59] per Blanchard J, applied in *R v Morse* [2010] 2 NZLR 625 at 640.

As Blanchard J indicates, the focus at this point turns to the specific facts and circumstances of the dispute. Notably, the 3-2 split nature of the Supreme Court decision in *Brooker* itself demonstrates the significant impact that minor factual details can have on the s5 balance.[134]

In the present factually malleable scenario, this means that if the church's noise commences at an uncivilised hour, is repeated several times, spans a lengthy time period, incessantly stays above district plan levels, or manifests a combination of these attributes, the Court might well favour the complainant's privacy interest in the s5 balance. Such a weighting would legitimise a finding of unreasonable noise as a justified limitation of the church's religious freedom right per s5, thus ending the inquiry. Applying s16 of the RMA, the church would have to adopt the best practical option to mitigate their noise levels.

Conversely, if the noise only occasionally exceeds prescribed district plan levels, and is not overbearing in other regards, the Court might attribute greater weight to the church's s15 right in the s5 analysis. Immanent within such a finding could well be the fact that the involvement of a NZBORA Part 2 right requires the Court under s6 of the NZBORA to apply an interpretation of the statute that is consistent with that right.[135]Crucially, on these more contentious facts, it will be harder for the complainant to show RMA s16 to be a justifiable limitation on this less obtrusive exercise of the NZBORA right. Hence, when filtered through this s6 interpretive lens, it may be that RMA s16 'unreasonable' noise in substance becomes, s16 'highly unreasonable' noise. The church's less-overt noise in this situation circumstances is unlikely to meet this elevated threshold.

It is the influence of this s6 interpretive filter that potentially differentiates the judicial application of s16 of the RMA to religious noise defendants, from equivalent application to secular noise defendants. *Auckland Kart Club Incorporated* and *Speedy v Rodney District*

[134] Ibid, at [70] per Blanchard J: "Had Mr Brooker's behaviour been repetitive or continued for a rather longer period, or involved the noisy participation of other people or amplification, a different view might legitimately have been taken by the trial Judge."

[135] Ibid, at [92] per Tipping J: "[The involvement of a Part 2 right means that] the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case. This may be necessary to prevent an unjustified limitation of the freedom and is consistent with the purpose of s 6 of the Bill of Rights."

Council[136] are archetypal non-religious noise RMA s16 cases where no NZBORA rights defence is raised, and consequently no room is left for the Court to add interpretive gloss to the s16 objective test. However, it is arguably quite foreseeable that a fixed-location *Brooker* scenario could arise where the application of s16 circumscribes a genuine exercise of the NZBORA s14 right to freedom of expression.[137] Should a monthly indoor demonstration or an annual amplified protest rally trigger such a s14 right, s6 of the NZBORA could engineer a rights-preferential application of the law that mirrors the religious example. That such a possibility exists is significant because it both entails consistency in application of the NZBORA, and indicates that a religious entity is no different from a non-religious entity if NZBORA s6 is applied.

From the judicial equivocation over the impact of the NZBORA on the common law in *Hosking* it is questionable whether the defendant church's s15 right will render any practical advantage over a non-religious defendant, if the complainant launches a nuisance action. The NZBORA s6 rights-friendly interpretive requirement applies only to legislation. For lower courts that are bound by precedent to apply traditional, objective nuisance standards,[138] this would seem to deny any room for the church's s15 right to interpretively ratchet-up the threshold of the tort. In such circumstances, it is foreseeable that the district plan noise levels could shape the reasonableness of the noise in the locality to a greater extent than the NZBORA.[139] However, whilst s6 of the NZBORA cannot bear on such litigation, neither can s4. Though lower courts might be bound by precedent to apply traditional nuisance standards, there is nothing to stop appellate courts from harnessing the NZBORA in the development of the common law.[140] I thus contend that if the facts were sufficiently contentious,[141] an appellate court's recourse to the NZBORA could tip the scales in favour of the church's s15 right. The Court in considering the

[136] PT A 134/93, 8 December 1993.
[137] Noise emission from a fixed-location would accord with the parameters of our hypothetical scenarios.
[138] *Bloodworth*, above n 57.
[139] Recall that *Horne*, above n 60, allows Courts to use district plan levels as a guide in a noise nuisance test, and likewise, that our church (albeit legitimately) marginally exceeds those levels.
[140] *Hosking*, above n 112.
[141] If the facts were lopsided insofar as our church's noise was consistently higher than district plan levels, and well out of character with the locality, it is unlikely that an appellate court would choose such circumstances to develop the common law via the NZBORA.

reasonableness of the church's noise in the locality, could adopt Tipping J's reasoning in *Hosking*,[142] and perform a NZBORA s5 balance of the complainant's privacy interest, against the church's substantive right. In tight circumstances, it could well be open to the court to find that the prima facie primacy of a right over an interest has not been displaced, and thus the exercise of the right was reasonable. Conversely, it may be that if the facts are more favourable to the complainant, the Court could take the same view as the minority in *Brooker* and find the privacy interest to prevail. In this event, the complainant's nuisance action is likely to succeed, and the quantum of damages will hinge on the facts, and whether the complainant has first sought an injunction.[143]

II. What might happen if complaints were made about a local mosque's implementation of a loud-speaker daily call to prayer?

A. Presuppositions

This scenario is based on an equivalent proposal from an Oxford mosque that later shelved its plan under weight of public outcry. Undergirding the scenario is the question phrased by a columnist at the time, of:[144]

> If bells should ring out from Oxford's numerous colleges and churches, how can we object if this splendid new mosque - one of whose chief supporters, incidentally, is Prince Charles - should broadcast its call to prayer for a mere six minutes a day?

The columnist then attempts to answer this question, and rationalise the substantial public opposition:[145]

> Which reasonable Christian would expect church bells to ring out in a Muslim city? Throughout the Muslim world, mosques can broadcast the call to prayer exactly as they deem fit. But surely not amid the dreaming spires Oxford that still proclaim a Christian heritage. Oxford is the home of many Muslims, but it is not a Muslim city.

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[142] *Hosking*, above n 112, at [229] per Tipping J.
[143] *Davidson*, above n 91.
[144] "Insensitive and unduly provocative? A mosque's call to prayer amid Oxford's spires" (24 January 2008) *Daily Mail* <www.dailymail.co.uk>.
[145] Ibid.

The focus here will be on how the NZBORA, which expressly protects religious freedom and religious minorities,[146] might influence the adjudication of such a proposal in New Zealand. Three presuppositions operate in this scenario. First, the mosque has previously existed in harmony with a predominantly non-Muslim suburban community. Secondly, the proposed call-to-prayer would not exceed district plan noise levels. Finally, as with the church's noise, the mosque's call-to-prayer is a genuine act of religious freedom.

B. Complainant Legal Options

The anticipatory nature of this scenario militates against a private nuisance action as a solution for the complainant. Retrospective analysis of the reasonableness of an activity against the locality self-evidently requires empirical evidence of past events. Likewise, though the RMA enforcement jurisdiction caters for anticipatory breaches of RMA s16,[147] the Act's specific tool to contest a proposed land usage is the resource consent jurisdiction under Part 6. As a person affected by the proposed land usage,[148] the complainant may make a submission opposing the consent application.[149] While s104(1)(a) requires the consent authority to consider a proposal's effects on the environment, s104(2) permits the authority to disregard a purported effect if it does not conflict with a district plan. Given the mosque's adherence to plan noise limits, a consent authority could thus potentially ignore the proposed noise levels as being a legitimate effect. However, the reasonableness of noise under RMA s16, does not turn solely on the noise level, but encompasses the noise's duration, frequency, and nature.[150] As in *Cox v Kapiti Coast District Council*,[151] the status of the mosque's proposed noise in the eyes of s16 could thus be determinative in the resource consent authority's deliberations. In considering the ambit of the NZBORA, it is important to note that while the complainant here can promote his privacy

[146] NZBORA ss 15 and 21.
[147] RMA s314(1)(a) allows the Environment Court to make an order if it is likely that an activity will contravene the Act, a regulation, or a district plan rule. RMA s322(1)(a) provides the same prospective power to local authorities in respect of abatement notices.
[148] RMA s95E requires that person be affected at the very least in a minor way in order to make a submission.
[149] RMA s96 allows affected persons to make submissions.
[150] *Balfour v Central Hawkes Bay District Council* HC Wellington CIV 2005-485-1448, 29 May 2006 at [44].
[151] [1994] NZRMA 282. Considering s16 of the RMA in the context of a resource consent application, the Planning Tribunal at 288 held that, "[s16] will make it extremely difficult to import potentially noisy activities into a quiet residential environment".

interest via a submission, the application falls to be decided in a non-judicial proceeding by the consent authority under RMA s104. This decision will be directly subject to the NZBORA as an act of a local authority.[152] In the likely event that the decision is appealed,[153] this would pit either the complainant or the mosque against the local authority with the Environment Court as the adjudicator. The NZBORA would have a similar bearing in this appellate context in terms of the Court deciding the local authority's defence of its RMA s104 finding.

In contrast with the church's longstanding noise in the first inquiry, the prospective nature of this dispute better lends itself to being the subject matter of a CIRA proposal. The public would be voicing their opinion on a novel, proposed activity that could become a community norm, rather than an isolated matter that hinges on its facts. If the CIRA proposal is sufficiently endorsed by the public within the time constraints,[154] it is unlikely that the mosque's NZBORA s15 right will be able to impede the subsequent referendum. As the CIRA deliberately prescribes no substantive fetters on proposal subject matter,[155] and the activity itself is inherently legislative in nature, a CIRA initiative is unlikely to be subject to the NZBORA via s3(b).[156] These factors are also likely to severely restrict the NZBORA's indirect influence on a court via s3(a) if the mosque does contest the CIRA proposal.[157] If the ensuing referendum did return a result favouring the general outlawing of call-to-prayer speaker systems, this would not bind Parliament to legislate such a ban,[158] but would arguably constitute democratic justification for such legislation in the future.

C. The Balance and the Checks

From a rights perspective, the undergirding question for the local authority will be whether denying resource consent is a demonstrably justifiable limitation of the mosque's NZBORA s15

[152] Under RMA s2 a consent authority can be a regional council, a territorial authority, or a local authority. Recall that according to *Zhadral* the NZBORA applies to acts of these entities via s3(b).
[153] RMA s120 allows either the applicant or the person who made the submission to appeal the consent authority's decision to the Environment Court.
[154] See above n 50.
[155] *Egg Producers Federation,* above n 52.
[156] *Ransfield*, above n 102.
[157] *Egg Producers Federation*, above n 52; *Hosking* above n 112.
[158] CIRA s3.

right.[159] If the complainant's privacy interest outweighs the mosque's s15 right in an s5 balance, and the noise is held unreasonable pursuant to RMA s16,[160] the undergirding question above will be answered in the affirmative.

Though the mosque's noise will not breach plan levels, and is arguably not of a trying duration,[161] it is an out-of-character noise to a suburban, non-Muslim community. Likewise, a routine, 2 minute sounding of such nature is neither negligible, nor comparable to a school bell or church bell, which is more commonplace in this context. However, ss15 and 20 of the NZBORA exist to protect such minority religious practices. To deny consent, the local authority must thus reconcile the prima facie imbalance when a right is squared against a non-right.[162] Further, though the RMA Part 2 purposes mandate consideration of the maintenance of amenity values,[163] and avoidance of adverse effects on the community,[164] the purposes also require consideration of the mosque's wish to provide for its social and cultural wellbeing.[165] In such balanced circumstances, a consent authority could well err on the side of caution and hold the mosque's proposed exercise of its NZBORA s15 right to be reasonable under RMA s16. In recognition of the likely majority opposition to the proposal in this non-Muslim community, the authority could employ its wide discretion under RMA s108 to impose certain conditions on consent. Such conditions could clarify the times, duration, and precise volume at which the call-to-prayer could sound.

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[159] Despite according different prima facie statuses to the conflicting interests, and reaching different final results, this was the approach applied by Blanchard, Tipping, McGrath, and Thomas JJ in *Brooker*.

[160] Recall that the central inquiry of a consent authority under RMA s104(1) is on the effects of the proposal on the environment. If the noise is unreasonable this is likely to be determinative of this inquiry.

[161] Our mosque's system will mirror that proposed in Oxford by sounding for 2 minutes, three times a day.

[162] See above n 126. It is worth noting that while such explicit s5 rights analysis is far more likely to emerge in the appellate context in the Environment Court, our original consent authority can and should factor our mosque's NZBORA s15 right in its RMA s104 decision as a "matter…relevant and reasonably necessary to determine the application" under s104(1)(c).

[163] RMA s104(1) provides that the consent authority must consider the RMA Part 2 purposes. Maintenance of amenity values is a part of these purposes pursuant to RMA s7(c).

[164] RMA s5(2)(c).

[165] Pursuant to RMA s5(1). See also *Cook Islands Community Centre*, above n 31, for a good example of this purposive balance.

Overall, this condition-based consent outcome is arguably an egalitarian result that mirrors the compromise reached in *Razamjoo*. An outcome that places a premium on NZBORA rights, but recognises the need for their reasonable exercise in an uncomprehending environment caters for both disputants. Whilst not always achievable, it is suggested that this inclusive approach best fits the increasingly pluralistic, multicultural nature of contemporary New Zealand society. This is shown by the fact that if a secular entity sought such consent,[166] the authority's wide discretion regarding consent and conditions would likely engineer a similar result that reflects the reasonableness of the noise in the community.

[166] On identical factual presuppositions in terms of noise level.

Chapter Four: The Future of Religious Freedom in New Zealand

I. In Healthy Condition?

In a report on religious liberty in New Zealand, Ahdar concludes that, "[o]verall, religious liberty might be said to be in a healthy condition."[167] This sentiment is echoed by Rishworth who states that, "the resolution of [religious freedom disputes] may still be contentious and difficult, but New Zealand's egalitarian and pragmatic tradition has worked tolerably well so far. There is no reason why this cannot continue."[168]

The findings that emerge from the two religious noise disputes predominantly support this position. For the religious entities, the judicial expansion of both the reach,[169] and the normative effect,[170] of the NZBORA has given teeth to their rights to religious freedom.[171] In both disputes it has been shown that in finely-balanced circumstances, the fact that the impugned noise embodied the genuine exercise of an NZBORA right, might tip the scales in favour of the right-exerciser. In a statutory context such as under RMA s16, the religious entity's NZBORA right was balanced against the complainant's privacy interest under NZBORA s5. Where the right outweighed the interest, and a rights-consistent construction of the statute

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[167] Ahdar "Religious Liberty in a Temperate Zone: A Report From New Zealand" (2007) 21 Emory International LR 205 at 238.

[168] Rishworth, above n 9, at 631.

[169] *Hosking*, above n 112, and *Harrison*, above n 105, particularly demonstrate the increasing horizontal ambit of the NZBORA.

[170] *Brooker*, above n 120, exemplifies the effect on a civil dispute when a right enters the equation, and also demonstrates a court's willingness to interpretively protect a right in appropriate circumstances. Note also the judicial expansion of potential remedies for a breach of an NZBORA Part 2 right, such as the creation of NZBORA damages (*Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667), and exclusion of evidence obtained in breach of the NZBORA (*R v Shaheed* [2002] 2 NZLR 377).

[171] James Allan cites Cooke P in *Ministry of Transport v Noort* [1992] 3 NZLR 260 at 271, and Hardie Boys J in *Baigent's Case*, above n 170, at 702, and states, "New Zealand judges, can travel a remarkable distance in the name of 'keep[ing] pace with civilisation', not least because they see 'basic human rights ... [as] inherent in and essential to the structure of society ... [and as] not depend[ing] on the legal or constitutional form in which they are declared'" (J. Allan "Oh That I Were Made Judge in the Land" [2002] FedLRev 20 at 24).

was available to the Court,[172] that construction was applied. In the lesser-known horizontal common law context, the requirement that the common law be developed in a manner consistent with the NZBORA,[173] was contended to allow an appellate court to balance the right in question, and perhaps subsequently found a nuisance test that recognised the extra latitude that a genuine rights-exercise might legitimate.

Consequently, in both the statutory and common law domains, the influence of the NZBORA produced a result that might not have transpired in the absence of a NZBORA Part 2 rights-exercise. However, in both disputes, where the NZBORA s15 right was exercised in an excessively invasive manner, the balance logically favoured the complainant, and the right was subsequently limited.

If one were to extrapolate this spectrum of results to the whole field of religious liberty in New Zealand, I would contend that the relationship between law and religion in New Zealand is in a reasonably healthy state. In appropriate circumstances, the law bends to accommodate an exercise of religious freedom. Conversely, when that exercise becomes too intrusive, it must bend to the generality of the law.[174]

II. The Outlook

Will this flexible, pragmatic approach continue into the future? Edward Eberle notes that, "[c]onscience is the fulcrum on which religion as a human activity and a basic freedom rests."[175] Like any freedom, religious liberty will inevitably be proportionate to the status it holds in the public conscience.[176] In a system where the legislature is relatively unchecked, the status of prevailing attitudes towards religion is arguably even more pertinent. Indeed, it is the bare

[172] Pursuant to s6 of the NZBORA.
[173] *Hosking*, above n 112.
[174] NZBORA s4.
[175] E. Eberle "Roger Williams on Liberty of Conscience" (2005) 10 Roger Williams U L Rev 289 at 292.
[176] See generally, M. Perry "A Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture" (2005) 10 Roger Williams U L Rev 385.

majority attitude that will ultimately become law in such a system.[177] Ahdar examines the potential impact of the expanding secular, liberal worldview on religious liberty in New Zealand.[178] He concludes:[179]

> An expanding bureaucratic state that seeks to mould its citizens into its own open-minded, liberal image will continue to jostle with both conservative, truth-affirming, traditional believers, as well as the comparatively newer and smaller, but similarly countercultural and unpopular, religions.

United States federal judge and former academic, Michael McConnell describes the nub of this tension:[180]

> [To the prevailing pluralistic, secular, liberal mentality] it is not enough that the government should be neutral, tolerant, and egalitarian, but so should all of us, and so should our private associations... Open-mindedness, not conviction, is the mark of the good liberal citizen. Indeed, there is something suspect in those who are sure that they are right, since it might imply that someone else is wrong.

The consequence of adopting this mentality is that, "[t]o the extent that the state pursues this new vision of the liberal citizen and enforces its vision by force, religious freedom is gravely endangered."[181]

In the New Zealand context, it is possible that the scope for such an agenda to encroach on religious freedom is exacerbated not only by the lack of supreme law checks on the unicameral legislature, but also by the current manner in which legislation is enacted. Two constitutional characteristics enforce this point.

First, s7 of the NZBORA requires the Attorney-General to notify the House of Representatives if a proposed Bill engenders an inconsistency with a Part 2 right. However, it is questionable whether this provision has had the 'warning bell' effect envisaged at inception.[182] Of the

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[177] With several exceptions that do not bare on our focus, the New Zealand Parliament can pass legislation with a bare 51% majority of House of Representatives support.
[178] Ahdar "Slow Train Coming In: Religious Liberty in the Last Days", above n 11, at 44-57.
[179] Ibid, at 58.
[180] M. McConnell "Why is Religious Liberty the 'First Freedom?" (2000) 21 Cardozo L Rev 1243 at 1259, cited from ibid, at 46.
[181] Ibid, at 1259, cited from Ahdar, above n 11, at 46.
[182] G. Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (McIndoe, Dunedin, 1992) at 59.

twenty-two government Bills to receive s7 notifications thus far, twenty have become law without any change to the apparently NZBORA inconsistent measure.[183] Accordingly, Geddis concludes that, "these raw numbers inevitably call into question any expectation that the NZBORA will operate as a significant check on Parliament's legislative behaviour."[184]

Second, though New Zealand may no longer be the 'fastest law-maker in the west',[185] both the speed and volume at which the unicameral Parliament produces legislation is arguably still cause for concern.[186] Ryan Malone particularly notes that, though the proportion of hours sat under legislative urgency,[187] to total parliamentary sitting hours appears to be generally decreasing,[188] the latest figure of 21.3% is still relatively high.[189] Likewise, while the quantity of legislation is decreasing numerically, the greater variation in the size of contemporary bills somewhat muddies this trend.[190]

[183] Geddis notes that only two government Bills receiving s7 reports have been amended to remove the reported NZBORA inconsistency (A. Geddis "The comparative irrelevance of the New Zealand Bill of Rights Act to legislative practice" (2009) 23(4) NZULR 465 at 477).
[184] Ibid, at 479.
[185] The term 'fastest law-maker in the west' originates from G. Palmer *Unbridled Power: An interpretation of New Zealand's constitution and government* (OUP, Wellington, 1979) at 77. The prevailing view that this tag is outdated is that of G. Palmer and M. Palmer *Unbridled Power: An interpretation of New Zealand's constitution and government* (4th ed, OUP, Melbourne, 2004) at 183-186; G. Tanner *Confronting the process of statute-making* in Rick Bigwood (ed), *The Statute: Making and meaning* (LexisNexis, Wellington, 2004) 49 at 105-106; J. Burrows (ed) *Statute Law in New Zealand*, (3rd ed, LexisNexis, Wellington, 2003) at 63-64; A. Stockley "What difference does proportional representation make?" (2004) 15 P L R 121 at 131; and Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-making under MMP* (Institute of Policy Studies, Wellington, 2008) at 223.
[186] See particularly D. McGee "Concerning legislative process" (2007) 11 Otago L Rev 417.
[187] Legislative urgency allows all stages of a bill to be taken in the same sitting day, when ordinarily Standing Orders would require those stages to be taken on different days (Malone, above n 185, at 206 cites D. McGee *Parliamentary Practice in New Zealand* (3rd ed, Dunmore Publishing, Wellington 2005) at 153-157).
[188] From 1996-1999 the proportion of urgency hours as a percentage of the total sitting hours was 30.7%. From 1999-2002 this proportion was 13.1%, and from 2002-2005 this proportion was 21.3% (Malone, above n 185, at 211-212).
[189] 2002-2005 proportion of 21.3% in ibid, at 212.
[190] Ibid, at 203-204.

In sum, when the secular, liberal agenda is combined with such an emphasis on legislative efficiency and apparent unconcern for NZBORA inconsistencies,[191] it is thought that the vulnerability of religious freedom to Parliamentary circumscription is increased. Place this vulnerability in a unicameral and weak-form judicial review context,[192] and the outlook for religious freedom in New Zealand appears tenuous.

However, if New Zealand's sparse religious freedom jurisprudence is anything to go by, having the institutional and attitudinal ingredients does not necessarily precipitate encroachment of substantive rights. Rishworth highlights several aspects of New Zealand culture that explain this placid status quo:[193]

> [A] majority's safely entrenched secularism tends to lower the stakes: religious belief is more readily tolerated by those who think its manifestation by others is harmless, or declining, or not important enough to really matter…. The prevailing egalitarianism of New Zealanders, emphasizing equality over liberty, [also] lowers the stakes…Confrontation is avoided, [and] accommodations are negotiated..

In the author's opinion, if this pragmatic, 'live and let live' ethos remains firmly embedded in New Zealand culture, then the theoretical institutional susceptibility to rights encroachment of rights is likely to remain just that – theoretical.

[191] Albeit in a different factual paradigm, Geddis observes this combination in practice; "the recent government Bill to receive a s7 notice, the Parole (Extended Supervision Orders) Amendment Bill 2009, was introduced, debated under urgency, and passed by the House in a single day!" (Geddis "The comparative irrelevance of the New Zealand Bill of Rights Act to legislative practice", above n 183, at 477).
[192] Waldron, above n 21, at 1354.
[193] Rishworth, above n 9, at 633.

Conclusion

This dissertation has shown that the regulation of religious noise in New Zealand is far from a 'black and white' matter.[194] The future of a church's habitual noisiness or a mosque's call-to-prayer proposal, or indeed, a complainant's countervailing referendum initiative, hinges not only on the legal infrastructure available to the respective protagonists, but also on the cultural background in which it exists. For religious noise as it is for religious freedom, what is reasonable, what will be supported, and what will not, will be defined by these criteria. In the current New Zealand context, these criteria generally produce an equitable, pragmatic response to such questions. It is the author's perhaps optimistic belief, that this will remain the status quo for the future.

[194] Ahamed, above n 8.

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