

# What Makes Race So Special?

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Should hate speech provisions under the Human Rights Act 1993 be extended to cover target groups other than race?

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## Introduction

In March 2009, the United Nations Human Rights Council accepted Resolution A/HRC/4/L.12 that shelters religion from criticism, and therefore condemns religious hate speech.<sup>1</sup> While New Zealand expressly rejected this resolution,<sup>2</sup> it raises the question, which target groups should be protected from hate propaganda. My dissertation will attempt to answer this question.

Part A of my dissertation will assess whether New Zealand's current law is warranted. First, chapter one will consider the arguments for and against the regulation of hate speech, both inside and outside the classical liberal framework. In particular, I will outline the rationales for freedom of speech because those against the regulation of hate propaganda presume it undermines these principles. However, advocates of hate speech legislation assert that hate speech does not further classical liberal rationales for freedom of speech. The persuasiveness of their arguments will be analysed.

In chapter two, I will explicitly consider New Zealand's legislative approach to hate speech. There are numerous statutory provisions with the capacity to deal with hate speech. Yet, each is limited to a specific context. While the media are subject to relatively extensive regulation, statute only prohibits public expressions of hatred if targeting a person's race. Thus, there is a gap in the law. Under ss61 and 131 Human Rights Act 1993, hate speech is prohibited when directed at a group of people based on their "colour, race, ethnic or

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<sup>1</sup> Ian Harris, "It is individuals who have human rights, not religions", *Otago Daily Times*, 14<sup>th</sup> August 2009, p9.

<sup>2</sup> Ibid.

national origin". I will argue if racist hate speech can be regulated, then other social groups should also be protected from such expression. In doing so, I will consider whether New Zealand's current hate speech legislation is justifiable. This will amalgamate the general rationales for freedom of speech and hate speech legislation, as well as a more in depth analysis of New Zealand's social climate to measure the necessity of ss61 and 131.

Similarly, the Government Administration Committee's proposal to extend hate speech provisions in this way was vehemently opposed by the public.<sup>3</sup> This has led some to argue that New Zealand simply adheres to its international obligations. Yet, as discussed in chapter three, international treaties seem to require more of New Zealand. Accordingly, resisting the extension of hate speech provisions on this basis seems flawed.

Part B of my dissertation will address the possibility of expanding those protected by ss131 and 61 Human Rights Act, as the primary mechanisms regulating hate speech. I will confine my discussion to three target groups. The main contenders for protection are religious groups; gay, lesbian, bisexual and transgender people (GLBT); and the disabled. Religious groups have gained notable support of the international community.<sup>4</sup> Similarly, the Government Administration Committee suggested GLBT are worthy of protection from hate speech.<sup>5</sup> Finally, the disabled have come into focus with initiatives such as the Convention for the Rights of Disabled People. All are protected from discrimination under s21 Human Rights Act.

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<sup>3</sup> New Zealand's 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Consolidated Report to the Committee on the Elimination of Racial Discrimination, Jan 2000- Dec 2005, p52.

<sup>4</sup> Most obviously, the Article 20 International Covenant on Civil and Political Rights prohibits hate speech based on religion.

<sup>5</sup> New Zealand's 15<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Consolidated Report to the Committee on the Elimination of Racial Discrimination, Jan 2000- Dec 2005, p52.

I will also consider other jurisdictions' approach to hate speech. The attitudes of legislatures in the United Kingdom, Canada and Australia will be explained. These provide potential templates for New Zealand. The United States' position on hate speech will not feature. The primacy afforded to free speech under the First Amendment of the Constitution ensures hate speech debates exist in a very different context than in New Zealand.

I will consider each target group in turn. First, I will identify whether empirical evidence suggests there is a real and substantial need for hate speech legislation to protect these individuals. Second, I will address any features of the discrete target group that would distinguish them from racial minorities. If these distinctions are valid, it may prevent the straight application of ss61 or 131 to religious groups, GLBT, or the disabled.



## **Chapter 1: The Rationales for Freedom of Speech and**

### **Arguments for the Regulation of Hate Speech**

The United Nations General Assembly recognises “freedom of information is a fundamental human right and provides the touchstone of all freedoms to which the UN is consecrated”.<sup>6</sup> The right to freedom of expression is intrinsic to the acquisition of information. Accordingly, it has become one of the world’s most widely recognised rights.<sup>7</sup> Classical Liberal discourse provides numerous rationales for freedom of speech: that it is essential for democracy, guarantees the marketplace of ideas and promotes individual autonomy. These ideas can be viewed cumulatively and together provide a strong justification for the recognition of this basic human right.

Yet, these rationales contain implied limitations. If expression does not further these fundamental principles, surely it can be regulated. In many ways, hate speech undermines the justifications for freedom of speech. Hence, hate speech legislation may represent a justifiable limitation on freedom of speech.

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<sup>6</sup> United Nations Resolution 56(1).

<sup>7</sup> D. McGoldrick and T. O'Donnell, "Hate-Speech Laws: Consistency with National and International Human Rights Law" (1998) 18 *Legal Studies (Society of Public Teachers of Law)*, 454.

## 1.1 Essential for democracy

Freedom of speech is vital to democracy.<sup>8</sup> Provided the law protects the right to express one's views, public debate over the recognition of rights can occur. Voters are also likely to be better informed, allowing state officials to be held accountable for their actions should they threaten other rights.<sup>9</sup>

Freedom of expression is also essential for a representative government. By facilitating public discussion on controversial issues, the government can recognise and combat social problems more effectively. Moreover, individual freedom to speak allows the democratically accountable to gauge majority opinion on contentious matters more readily. Hence, those elected into Parliament are able to better represent their constituents once they ascertain majority will through public debate.<sup>10</sup> Thus, freedom of expression can be valued for its ability to create and preserve democracy.

However, this rationale implies hate speech can be regulated when it does not influence the democratic process. At this point, critics of the orthodox approach espouse different views. Some argue hate speech is irrelevant to the casting of votes and self-government. Hate speech is said to constitute "low value" expression making no meaningful contribution to the public discourse.<sup>11</sup> While Meiklejohn asserts that the application of free speech principles

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<sup>8</sup> Rex Ahdar, "The Right to Protection of Religious Freedom" (2008) *OLR* 363.

<sup>9</sup> Christopher Jones, "Rocks can Turn to Sand and Wash Away But Words Last Forever: A Policy Recommendation for New Zealand's Vilification Legislation", (2002) *University of Waikato, Faculty of Law*, p. 90.

<sup>10</sup> *Ibid.*

<sup>11</sup> G. Huscroft and P. Rishworth, *Rights and Freedoms* (Wellington: Brookers, 1995), 194.

to racial intolerance is beyond the limits of his inquiry,<sup>12</sup> he seemingly agrees with Holmes that the conveyance of hostile opinions can be justifiably suppressed.<sup>13</sup> Incitement to hatred is private expression that can be regulated.<sup>14</sup>

Conversely, others argue hate speech should be limited because it influences democracy by silencing its targets while perpetuating racism and oppression.<sup>15</sup> According to Mari Matsuda, those subject to hatred automatically retract from society, and remain as silent and invisible as possible.<sup>16</sup> Silencing suppresses some views and therefore compromises the public debate forum. The media further threatens equal participation in public debate by promoting some beliefs over others.<sup>17</sup> Popular opinions endorsed by the media become favoured over alternatives.

## 1.2 Marketplace of ideas

John Stuart Mill presents another consequentialist justification for freedom of speech. It allows the truth to emerge out of a contest of ideas.<sup>18</sup> In *On Liberty*, the “thoroughly reconstructed liberal” explains the social value of sharing opinions:<sup>19</sup>

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<sup>12</sup> Meiklejohn, *Free Speech and its Relation to Self-Government* (Port Washington, New York: Kennikat Press, 1948) 99.

<sup>13</sup> Ibid, 87.

<sup>14</sup> Ibid, 99.

<sup>15</sup> Elizabeth MacPherson, "Regulating Hate Speech in New Zealand" (Wellington 2003). *Victoria University of Wellington Faculty of Law*, 25.

<sup>16</sup> Mari Matsuda, et al, *Words that Wound* (Boulder, Colorado: Westview Press, 1993), 50.

<sup>17</sup> Kathleen Mahoney, "Hate Vilification Legislation With Freedom of Expression: Where is the Balance?" (1994) *University of Western Australia Faculty of Law*, p 14.

<sup>18</sup> Rishworth, et. al, *The New Zealand Bill of Rights* (Oxford: Oxford University Press, 2003), 309.

<sup>19</sup> John Gray and G.W. Smith, *J.S. Mill On Liberty: In Focus*, (London and New York: Routledge, 1991) 1.

“But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”<sup>20</sup>

This presumes truth is an autonomous and fundamental good.<sup>21</sup> Society will be enriched by pitting ideas against each another, even if one idea is later deemed false.<sup>22</sup> Oliver Wendell Holmes coined the ‘marketplace of ideas’ to encapsulate this notion.<sup>23</sup>

The ability to ascertain truth depends upon the weighing up of alternatives. However, facts accepted at any one time vary according to the social and political context. Therefore, truth is susceptible to change.<sup>24</sup> Hence, it is imperative that competing ideas remain available for consideration. The accepted belief may well be false, yet only freedom of speech can reveal this.<sup>25</sup> Guaranteeing freedom of speech for a limited time, until public consensus is achieved, is not enough. The state must continually guard the expression of controversial and unpopular ideas to allow society’s opinions to evolve.

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<sup>20</sup> John Stuart Mill, *On Liberty* (London: Longman, Roberts and Green, 1869) cited in *ibid*, 37.

<sup>21</sup> K. M. McKillop, “A Comparison in Where the Limits are Drawn on Freedom of Expression in Germany and New Zealand: A Dissertation Submitted in Partial Fulfilment of the Requirement of the Degree of Bachelor of Laws (Hons)”, (Dunedin 2001) *University of Otago Faculty of Law*, vol. Bachelor of Law with Honours, 10.

<sup>22</sup> *Abrams v US* 250 US 616, at page 630.

<sup>23</sup> *Ibid*.

<sup>24</sup> Rishworth, n. 19, above, 309.

<sup>25</sup> Jones, n.10 above, 90.

However, if hate speech causes its targets to retract their opinions from public consumption, Mill's marketplace of ideas will be compromised. The quest for truth will be thwarted if some views are automatically excluded. As a result, Mahoney labels the notion that a contest of ideas will allow the truth to prevail as "naïve and dangerous".<sup>26</sup> While counter speech may be the most effective solution to hate speech,<sup>27</sup> it presumes expression is received on equal terms. But, hate speech ensures majority opinions are more accessible than those of the minority.

Such problems are compounded because the marketplace of ideas cannot be viewed neutrally. People cannot set aside their pre-convictions when analysing the strength of competing arguments.<sup>28</sup> Instead, confirmation bias means people prefer information that affirms their established beliefs. This contests the liberal assumption that people are rational and calculating beings.<sup>29</sup>

Fish also contests the idea that speech exists neutrally in the marketplace. He argues free speech does not exist for three reasons.<sup>30</sup> First, speech is always constrained because the decision to express an opinion always pursues a selfish agenda. Second, no speech is free from consequence. Third, if speech always endorses one opinion, it automatically undermines another. Hence, ideas can cause injury. Fish relies on the landmark case of *American Booksellers Association Inc. v Hudnut* to support his assertion.<sup>31</sup> In that case, the Court

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<sup>26</sup> Ibid, 13.

<sup>27</sup> Mahoney, n.18 above, 30.

<sup>28</sup> Jones, n.10 above, 10.

<sup>29</sup> Ibid, 15.

<sup>30</sup> Stanley Fish, *The Trouble with Principle*, (London: Harvard University Press, 1999), 93.

<sup>31</sup> 475 US 1001 (1986).

recognised that the ideas of Nazis and the Klu Klux Klan have led to the death and repression of millions.<sup>32</sup>

If speech can cause harm, the word/action distinction that justifies the regulation of action alone is flawed. Since *Abrams v US*, civil libertarians have adopted a “clear and present danger” test to establish whether words can constitute action.<sup>33</sup> Speech should not be limited simply because it is offensive or hurts people’s feelings.<sup>34</sup> Justice Holmes used the hypothetical example of the chaos resulting from falsely shouting “fire” in a crowded cinema, as typifying the type of speech that is so closely related to action that it should be limited.<sup>35</sup> Under the traditional approach, hate speech does not satisfy the clear and present danger test. Following the American Supreme Court’s example, words constituting action tend to be those inciting violence, not mere hatred.<sup>36</sup>

Yet, under Fish’s analysis, speech invoking action deserves no special status than other speech. Instead, “speech is either action with consequences, or action without immediate worldly consequences”.<sup>37</sup> Therefore, the word/action distinction undermines the views of minorities, rather than objectively regulating expression. Limitations are ideologically predetermined to reinforce the authority of the dominant members of society by undermining the ideas of their subordinates. Accordingly, Fish labels the reliance on the word/action distinction illusory. Further, surrendering to a theory that relies on an ultimate verdict of truth at the end of time achieves nothing because the apocalypse will never come.

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<sup>32</sup> *Ibid.*

<sup>33</sup> Catherine Lane West Newman, “Reading Hate Speech from the Bottom on Aotearoa: Subjectivity, Empathy, Cultural Difference” (2001) *Waikato Law Review* 9, 93.

<sup>34</sup> Ahdar, n.9 above, 636.

<sup>35</sup> *Schenck v. United States* 249 US 49 (1918), at page 52.

<sup>36</sup> *Ibid.*

<sup>37</sup> Fish, n. 31 above, 93.

In the meantime, the law is “sacrificing the needs of men and women suffering documentable harm to a bodiless hope”.<sup>38</sup>

Advocates of hate speech laws also heavily criticise the word/action distinction, alleging it fails to recognise the harm caused by hate speech. Absence of an immediate danger to society does not mean expressions of hatred are harmless.<sup>39</sup> Rather than categorising speech based on its ability to induce violence, it is best viewed on a continuum whereby hate speech will inevitably lead to violence.<sup>40</sup> It is the incremental effect of hate speech that is harmful.<sup>41</sup> As Jean Francois and Gaudreault DesBiens argue, such speech constitutes a step towards hate crime, xenophobia and genocide.<sup>42</sup> Victims also suffer from psychological and emotional pain as a result.<sup>43</sup>

Moreover, the already disadvantaged and subordinate need not tolerate hatred expressed towards them.<sup>44</sup> While free speech advocates employ tolerance as a tool to argue against hate speech legislation, the focus should be on who can best exercise tolerance. Surely, it is the dominant members of society, and speakers of hatred, who should tolerate minority groups.

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<sup>38</sup> Fish, n. 31 above, 93.

<sup>39</sup> Juliet Moses, "Hate Speech: Competing Rights to Freedom of Expression" (Annual 1996) 8 *Auckland University Law Review* 189.

<sup>40</sup> Mahoney, n.18 above, 9.

<sup>41</sup> Human Rights Commission, "Submission to the Government Administration Committee into the Inquiry into Hate Speech",

<http://www.hrc.co.nz/home/hrc/newsandissues/submissiontotheinquiryintohatespeech.php>, 05.05.09.

<sup>42</sup> Jean Francois and Gaudreault DesBeins, *From Syphus's Dilemma to Syphus's Duty? A Mediation in the Regulation of Hate Propaganda in Relation to Hate Crime and Genocide*, (2000) 46 *McGill LJ* 121 cited in MacPherson, n. 16 above, 22.

<sup>43</sup> *Ibid*, 20.

<sup>44</sup> Worjeich Sadurski, "Racial Vilification: Psychic Harm and Affirmative Action" in T Cambell and W Sadurski, *Freedom of Communication* (Dartmouth, 1994), 79. cited in Anne Frahvin, "Can Legislation Prohibiting Hate Speech be Justified in Light of Freedom of Speech Principles?" (1995) 18 *UNSW Law Journal*, 333.

Otherwise, the harm caused by hate speech is not “borne by the community at large, rather it is a psychic tax imposed on those least able to pay it.”<sup>45</sup>

### 1.3 Personal autonomy

A final justification for freedom of speech is that tolerating seemingly abhorrent speech also allows the state to remain content-neutral. The government should avoid favouring one view over others because the state derives its authority from the universal consensus of its citizens. While policy decisions may necessitate the adoption of a particular viewpoint, speech should remain unregulated wherever possible to guarantee personal liberty.

This personal autonomy argument values freedom of speech in a way that does not depend on the outcome it produces.<sup>46</sup> It allows individuals to weigh up competing ideas and develop a sense of self when preferring one view over others.<sup>47</sup> Traditionally, promoting personal autonomy is the state’s primary function.

The subjugation resulting from hate speech affects the individual autonomy justification for free speech. By creating a climate of discrimination, hate speech undermines self-worth and causes targets to reflect on their subordinate status.<sup>48</sup> This runs counter to the self-development rationale on which traditionalists rely. When the opinions of the majority

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<sup>45</sup> Office of Film and Literature Classification Submission to the Government Administration Committee into the Inquiry into Hate Speech, 29.10.04, <http://www.censorship.govt.nz/pdfword/Hate%20Speech%20Inquiry%20Submission.pdf>.

<sup>46</sup> Jones, n.10 above, 90.

<sup>47</sup> Ibid.

<sup>48</sup> MacPherson, n.16 above, 20.



dominate the marketplace, minority groups will feel alienated from society.<sup>49</sup> Abstract notions of the marketplace of ideas and personal autonomy do not reflect the experiences of those subject to hate speech.<sup>50</sup> As opposed to merely offensive speech, hate speech perpetuates existing unjust social norms.

#### 1.4 Further arguments for the regulation of hate speech

Failure to regulate hate speech implies that such expression is acceptable. Yet, if criminalised, hate speech legislation would validate the target groups' role in society. Whilst hate speech laws may provide bigots with a wider audience,<sup>51</sup> at least it would be in the context of disapproval and condemnation.

However, free speech proponents suggest legislating against hate speech would shift the focus away from whether the expression is morally abhorrent. Instead, arguments would centre on legality. This may unduly equate law with morality. The minority group would also be portrayed as a portion of society immune from criticism,<sup>52</sup> which would further alienate them from the general population. Essentially, social sanctions are preferable to legal ones.

Yet, experience suggests we cannot rely on social morality to regulate people's behaviour. Legal sanctions are necessary to protect vulnerable groups in our society. Therefore, the fundamental premise of hate speech is not to render some groups immune from criticism, but to afford special protection to those who are particularly vulnerable. This is not a new

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<sup>49</sup> Jones, n.10 above, 26.

<sup>50</sup> Mahoney, n.18 above, 18.

<sup>51</sup> Jones, n.10 above, 26.

<sup>52</sup> Moses, n. 40 above, 194.

concept. The doctrine of unconscionable bargain considers inequality of bargaining power between contracting parties, and seeks to protect the vulnerable. Furthermore, the Residential Tenancies Act 1986 imposes numerous covenants on landlords to prevent abuses of power.<sup>53</sup> Moreover, hate speech legislation does not confer absolute immunity from hate speech. Rather, only extreme expressions of hatred meet the necessary threshold.

### 1.5 Right to equality

For those already suffering from inequality, the burden of hate speech becomes unbearable. It compounds divergence in socio-economic status to the extent that it thwarts the pursuit of equality. Accordingly, freedom of speech competes with the right to equality in the context of hate speech.<sup>54</sup> When speech undermines equality, it becomes more difficult to empathise with the victims of hatred because they are seen as increasingly different from the norm.<sup>55</sup> In these circumstances, hate speech may be justifiably regulated.<sup>56</sup> Given equality is a fundamental right in a democratic society, perhaps hate speech should be prohibited to preserve it.<sup>57</sup>

Yet, this rationale presumes expressions of hatred promote the inferiority of the target group.<sup>58</sup> This has implications for the definition of hate speech. If it affirms existing social bias by subjugating target groups, the position of majorities becomes unclear. In New Zealand's democracy, majority views dominate. Any expression that undermines majority

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<sup>53</sup> Residential Tenancies Act 1986, Part 2.

<sup>54</sup> Human Rights Commission, n.42 above.

<sup>55</sup> Delgado, "Rodrigo's Eleventh Chronicle: Empathy and False Empathy (1996) 84 *California L R* 61, 77 cited in Newman, n.34 above, 255.

<sup>56</sup> Rishworth, n.19 above, 324.

<sup>57</sup> Mahoney, n. 18 above, 8.

<sup>58</sup> MacPherson, n.16 above, 15.

opinion therefore undermines existing social norms. In fact, hate speech aimed at majorities may actually promote equality by detracting from their social dominance and elevating the status of minorities. In this context, free speech and equality do not come into conflict. Therefore, minority groups should be the focus of any discussion of the contest between freedom of speech and the right to equality.

For this reason, Frahvin suggests hate speech should only be prohibited against those who have traditionally faced discrimination.<sup>59</sup> Only in this context does such expression become harmful. Yet, if the law focused on protecting those already facing social bias, discrimination may inadvertently manifest itself towards other groups in the process. In this way, prejudice will continue to permeate social relations. Moreover, if some forms of discrimination is categorised as non-traditional, and therefore unworthy of protection, it becomes impossible to prohibit hate speech against some disadvantaged groups.

#### 1.6 Further arguments against regulating hate speech

Circumscribing a hate speech provision runs into further problems. If the definition of hatred is subjective, it may be hard to prove at least one member of the audience was encouraged to hate. Alternatively, an objective test would require the reasonable person to be incited to hate. Yet, the ordinary person would not allow the speaker of hate propaganda to affect their opinion in this way.

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<sup>59</sup> Frahvin, n.45 above, 334.

Given such difficulties, defining ‘incitement to hatred’ with sufficient precision to prevent overregulation may be impossible.<sup>60</sup> If so, a slippery slope towards the unwarranted restriction of expression becomes a real risk.<sup>61</sup> Terms such as “hatred” and “vilification” are ambiguous. With the rule of law requiring a clear proscription of legal obligations, hate speech laws may fail to meet the necessary level of certainty.

Such criticisms emerged in relation to the Electoral Finance Act 2007. Uncertainties within the Act were said to prevent candidates from predicting the legality of their actions, thereby compromising the rule of law doctrine. Such a fundamental flaw in the regulation of election advertising led to the Rule of Law Committee recommending the Act be repealed.<sup>62</sup> Any legislative scheme proscribing hate speech must take care to avoid similar ambiguities.

On the other hand, difficulties of circumscribing an offence should not determine whether such a provision is worthy of enactment. While it may nevertheless be relevant for a cost-benefit analysis, the advantages of hate speech regulation discussed above outweigh this minor problem. The harm posed is sufficient to warrant the enactment of initially ambiguous legislation. Moreover, clarification on uncertain notions may be possible through judicial interpretation, preventing any confusion existing indefinitely.

The notion that criminalising hate speech would force it underground is also contested. The argument suggests expressions of hatred will be harder to detect if its speakers are subject to

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<sup>60</sup> Huscroft, n.12 above, 194.

<sup>61</sup> Newman, n.34 above, 93.

<sup>62</sup> New Zealand Law Society. Electoral Finance Act: Summary Paper, [http://www.lawsociety.org.nz/\\_\\_data/assets/pdf\\_file/0015/4416/Electoral\\_Finance\\_Act.pdf](http://www.lawsociety.org.nz/__data/assets/pdf_file/0015/4416/Electoral_Finance_Act.pdf), 14<sup>th</sup> August 2008.

penalties. Yet, hate groups like the Klu Klux Klan already practice extreme forms of vilification. Implementing sanctions for such behaviour would make it more difficult for such groups to express hatred.<sup>63</sup> Detection of hate groups may be easier if legislation guides law enforcement authorities on what is and is not acceptable.

Some also argue that outlawing hate speech would force contempt against certain groups to be manifested through violence.<sup>64</sup> This proposition seems unconvincing. Firstly, there is little empirical evidence to support this assertion. Secondly, the long-term goal of outlawing hate speech is to displace such ideas from society. This should ultimately reduce the incidence rate of hate-induced violence as hate itself decreases. Thirdly, hate speech legislation does not outlaw all expressions of hate. Most formulations provide an exception for expression made in private. Furthermore, hate speech is only condemned if it focuses on a characteristic of a minority group. Expressions of hatred directed towards an individual, without any reference to their minority-group traits, are legitimate under this approach. Finally, this argument presumably refers to an aversion to breaking the law. Yet, this rationale is flawed. Given that the Crimes Act 1961 already criminalises assault, and hate-motivated violence receives a higher penalty,<sup>65</sup> it is absurd to suggest someone would choose to commit assault over hate speech. Assault would also likely carry a higher penalty than hate speech, further deterring would-be offenders of hate speech from committing the former.

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<sup>63</sup> Winton, "Hate speech in New Zealand: freedom of expression and racial disharmony: a dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Hons) (Dunedin, New Zealand: University of Otago, 2005), 45.

<sup>64</sup> MacPherson, n.16 above, 29.

<sup>65</sup> Sentencing Act 2002, s9(1)(h).

## 1.7 Conclusion

The mechanisms used to justify the protection of free speech are not absolute. They are subject to inherent limits that may permit the regulation of hate speech. With the democracy rationalisation, comes the qualification that not all expression promotes public participation. Furthermore, the harm caused by hate speech makes targets retract from society and abstain from expressing their opinion. In this way, the market of ideas will be incomplete. Such silencing will undoubtedly detract from feelings of self-worth that free speech allegedly endorses.

In the context of hate speech, advocates of prescription largely undermine liberal concerns. The inherent ambiguity in the concept of hatred and those worthy of protection from it, should not be decisive in the regulation of hate speech. Claims that bigots who use hate speech will resort to violence if the former is outlawed are ridiculous. Yet, Matsuda and others argue the extensive harm resulting from hate speech provides conclusive proof that hate speech should be prohibited.<sup>66</sup>

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<sup>66</sup> Matsuda, n.16 above, 50.

## Chapter 2: New Zealand's current hate speech legislation

The term “hate speech” does not feature in any New Zealand statutory provision. Instead, legislation that regulates incitement to hatred has the capacity to manage such expression. The primary statutory mechanism that impliedly deals with hate speech is the Human Rights Act 1993. Sections 61 and 131 have their origins in ss9A and s25 of the Race Relations Act 1971 respectively. Therefore, to determine the nature and scope of the Human Rights Act, it is necessary to consider its predecessor. Other legislation that can regulate hate speech is s3(3)(e) Films, Videos and Publications Classification Act 1993 (FVCPA), ss3 and 4 of the Summary Offences Act 1981, and ss66 and 311(2) of the Crimes Act 1961. Furthermore, the New Zealand Press Council, Broadcasting Standards Authority and Advertising Standards Authority have limited jurisdictions to regulate expressions of hate.

### 2.1 Race Relations Act 1971

The Race Relations Act 1971 declares New Zealand's intolerance for racial discrimination and incorporates the United Nations Convention for the Elimination of Racial Discrimination into domestic law.<sup>67</sup> Article 4(1) of this Treaty requires state parties to condemn all propaganda that promotes racial hatred and discrimination.<sup>68</sup> When Hon. D.J. Riddiford presented the Bill to the House, he recognised the international pressure on states to take measures to combat racial discrimination.<sup>69</sup> Hence, s25 created the offence of inciting

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<sup>67</sup> Race Relations Act 1971, Long Title.

<sup>68</sup> United Nations Convention for the Elimination of Racial Discrimination.

<sup>69</sup> *Hansard*, Vol. 373, 8<sup>th</sup> July 1971, 1700.

racial hatred. In New Zealand, race relations between Maori and Pakeha are promoted by such initiatives.<sup>70</sup>

Enacted in 1979, s9A makes it unlawful to use words likely to cause racial disharmony, regardless of mens rea.<sup>71</sup> However, in 1989 it was condemned as unworkable and unduly broad, and was repealed.<sup>72</sup> Petty claims overburdened Race Relations Conciliator.<sup>73</sup> Yet, in enacting the 1993 Human Rights Act, Chris Laidlaw criticised the earlier Parliament for not replacing s9A with something workable straight away.<sup>74</sup>

## 2.2 Human Rights Act 1993

In amalgamating the Race Relations Act 1971 and the Human Rights Commission Act 1977, the Human Rights Act 1993 solely prohibits hate speech based on a person's "colour, race, or national or ethnic origin".<sup>75</sup> Section 61 renders it unlawful to publish, distribute or broadcast material that is threatening, abusive or insulting, where it is likely to excite hostility against or bring into contempt any group by reason of their race, colour or ethnic origin.<sup>76</sup> Subsection 2 establishes a defence if the media "report of the matter accurately conveys the intention of the person who...used the words."<sup>77</sup>

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<sup>70</sup> McKillop, n.9 above, 42.

<sup>71</sup> Maxim Institute, "Hate Speech: Balancing expression, religion, discrimination and harm." *Maxim Institute Policy Paper, Law and Human Rights*, June 2004.

<sup>72</sup> McKillop, n.22 above, 51.

<sup>73</sup> Ibid.

<sup>74</sup> *Hansard*, Vol. 357, 13<sup>th</sup> August 1993, 16919.

<sup>75</sup> Human Rights Act 1993, ss61 and 131.

<sup>76</sup> Andrew and Petra Butler, *The New Zealand Bill of Rights: A Commentary* (Wellington: Lexis Nexis, 2005), 368.

<sup>77</sup> Human Rights Act 1993, s61(2).



Rather than being punitive, the statute promotes conciliation. This approach presumes “no man is entirely free from some form of prejudice” and therefore imposing penalties for racism is generally inappropriate.<sup>78</sup> Complaints go to the Human Rights Commission for approval in the first instance.<sup>79</sup> Only then, can the Human Rights Review Tribunal deal with the matter.<sup>80</sup>

In assessing whether words are threatening, abusive or insulting the courts adopt an objective test. As in *Neal v Sunday News Auckland Newspaper Publications Ltd*, the views of the overly sensitive complainant are inconclusive.<sup>81</sup> However, the inquiry into whether the speech is likely to excite hostility or bring into contempt, involves a different test. The Complaints Review Tribunal, in *Proceedings Commissioner v Archer*, deemed an objective approach unsuitable.<sup>82</sup> Instead, the focus is on those less perceptive or sensitive to racial differences, who are vulnerable to be excited to hostility.<sup>83</sup> Again, care is taken not to adopt the standards of the extremely sensitive.<sup>84</sup>

This less sensitive test is a lower standard than an objective approach. No reasonable person would be excited to hostility simply by the words of another because this would imply that racism itself was in fact reasonable. No speech would satisfy s61 were this the test. Essentially, liability under s61 requires the complainant to prove two things. First, that the

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<sup>78</sup> Sir Keith Holyoake cited in McKillop, n.22 above, 48.

<sup>79</sup> Human Rights Act 1993, s76.

<sup>80</sup> Jones, n.10 above, 66.

<sup>81</sup> (1985) EOC 76299.

<sup>82</sup> (1990) 3 HRNZ 123.

<sup>83</sup> Tessa May Bromwich, “Balancing Freedoms: A Critique of New Zealand's Hate Speech Legislation in Light of the New South Wales and Victorian Experience”, *Victoria University of Wellington Faculty of Law*, (Wellington 2005), 17.

<sup>84</sup> *Skelton v Sunday Star Times* (1996) 3 HRNZ 655, at [4].

expression was objectively threatening, abusive or insulting. Second, that the words are likely to excite hostility in those with a predisposition to hate.

Understandably narrower than s61, s131 Human Rights Act creates a criminal offence for inciting racial hatred. A person is liable for bringing into contempt or ridicule a group of persons on the grounds of colour, race, ethnic or national origin; or publishing or distributing written material that is threatening, abusive or insulting with the intent to excite hostility and ill-will.<sup>85</sup> The consent of the Attorney-General is required before a prosecution can proceed.<sup>86</sup> This creates a high threshold to prevent the unwarranted interference with freedom of speech.<sup>87</sup> To date there have been no criminal proceedings instigated under s131.

In its submission to the Government Administration Committee, the Human Rights Commission blames the lack of litigation on the need to obtain the Attorney-General's consent, establish intent, and predict the likely effect of the speech in question.<sup>88</sup> Yet, these very factors prevent frivolous claims under s131. Furthermore, the need to speculate how the audience will react to speech is also necessary under s61, about which the Commission does not complain. Instead, retention of s61 is specifically endorsed.<sup>89</sup> The 'likely to excite hostility' test is preferable to one requiring actual hostility or ill-will which would rely on society's reactions to an unreasonable extent.

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<sup>85</sup> Butler, n.76 above, 366.

<sup>86</sup> Human Rights Act 1993, s132.

<sup>87</sup> Butler, n.76 above, 369.

<sup>88</sup> Human Rights Commission, n. 42 above.

<sup>89</sup> Ibid.

### 2.2.1 Problems with the Human Rights Act

Accordingly, the provisions deal with extreme expressions of hatred.<sup>90</sup> The courts have further narrowed the scope of the Act by implying a humour exception. In *Neal v Sunday News Auckland Newspaper Publications Ltd*, the Court dismissed a complaint that an article published in the aftermath of the Melbourne Cup was racist, insulting to Australians, and encouraged New Zealanders to seek revenge against them. Instead, the Equal Opportunities Tribunal concluded that the piece was intended to be humorous. “Robust banter and leg-pulling [are] not unhealthy if kept within reasonable bounds”.<sup>91</sup> By excluding liability for satirical articles, the scope of the Race Relations Act, and by implication the Human Rights Act, is further limited.

However, in other respects, the court seems to suggest that hate speech provisions are too narrow. Arguably, *King-Ansell v Police*<sup>92</sup> signals an attempt by the judiciary to expand the scope of s131. The Appellant, the leader of the New Zealand National Socialist Party, published an anti-Semitic pamphlet that was deemed likely to excite hostility and ill-will. The sole issue on appeal was whether Jews, as the target group, shared a common ‘ethnic origin’. In a unanimous decision, the Court of Appeal concluded Jews share customs and beliefs derived from a common historical background, and therefore fall within ‘ethnic origin’ under hate speech provisions. In doing so, ‘race’ may require a wider definition to prevent the arbitrary regulation of hate speech.

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> [1979] 2 NZLR 531 (CA).

### 2.2.2 Is it demonstrably justified for the state to punish those engaging in hate speech?

The natural meaning of hate speech legislation undoubtedly impinges on freedom of expression.<sup>93</sup> Following the New Zealand Supreme Court's decision in *Hansen*, the next stage under a New Zealand Bill of Rights Act 1990 (NZBORA) analysis is to ascertain whether the Human Rights Act "can be demonstrably justified in a free and democratic society" under s5.<sup>94</sup> If the provision cannot be justified, this does not affect its validity.<sup>95</sup> Yet, such a conclusion would frustrate attempts to extend the target groups protected from hate speech.

The Attorney General did not issue a s7 warning for the Human Rights Act, and commentators disagree whether its provisions pass the s5 test. Butler comfortably asserts that New Zealand's hate speech legislation can be justified.<sup>96</sup> Section 131 is particularly warranted, as the intent requirement and the need to gain the Attorney-General's consent create a high threshold before free speech will be curtailed.<sup>97</sup> Furthermore, limiting liability to public acts reflects the liberal idea that the state should not interfere with the private sphere because its mandate, determined by the social contract, is limited to the public realm.

On the other hand, Rishworth alleges the Human Rights Act lacks sufficient justification under s5.<sup>98</sup> His primary concern is the lack of defences available.<sup>99</sup> This presumption is questionable. *The New Zealand Bill of Rights* text appears to target s61, yet subsection (2) provides an explicit defence for media reporting. Bromwich is therefore incorrect to assert

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<sup>93</sup> New Zealand Bill of Rights Act 1990, s14 affirms the right to freedom of expression.

<sup>94</sup> [2007] 3 NZLR 1.

<sup>95</sup> New Zealand Bill of Rights Act 1990, s4.

<sup>96</sup> Butler, n.76 above, 370.

<sup>97</sup> *Ibid.*, 369.

<sup>98</sup> Rishworth, n.19 above, 324.

<sup>99</sup> *Ibid.*

privacy is the only exception to liability.<sup>100</sup> Furthermore, liability under both ss61 and 131 can be avoided if the expression is not likely to excite hostility against or bring into contempt the target group.

Huscroft agrees that s61 does not satisfy the s5 requirements. He advocates for a truth defence when speech deals with matters of public concern.<sup>101</sup> In response, Moses recommends hate speech legislation should not be confused with defamation.<sup>102</sup> Whereas, the latter seeks to protect individual reputation, the former aims to prevent hate-inducing speech that adversely affects the community.

However, Moses seems to misinterpret Huscroft's argument. Rather than confusing the purposes of hate speech and defamation laws, his argument stems from the marketplace of ideas rationale for free speech. If true hate speech is prohibited, the quest for truth, encompassed by the marketplace of ideas, is compromised.

On the other hand, true speech that incites hatred may not preserve the marketplace of ideas either. While, at one point in time an allegation about a minority may be true, this may not continue to be the case. Over time, the assertion may become false, yet the harmful silencing that results from hate speech would remain indefinitely and prevent the target group challenging the validity of hate statements made towards them. Hence, the need to guarantee the freedom of the marketplace ad infinitum becomes impossible. Furthermore, the personal

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<sup>100</sup> Bromwich, n.83 above, 20.

<sup>101</sup> Huscroft, n.12 above, 206.

<sup>102</sup> Moses, n.40 above, 188.

autonomy of the target group would be compromised in the process. A truth defence cannot address the harm associated with hate speech.

Hence, it is debatable whether ss61 and 131 satisfy the s5 NZBORA test. Following *Hansen*, it must first be established whether there is a pressing and substantial need for the legislation.<sup>103</sup> The Human Rights Commission noted that many New Zealanders remain unconvinced that racism exists in this country.<sup>104</sup> Even MP Leslie Munro asserted that she was unaware of any racial discrimination in New Zealand when the Bill was before Parliament.<sup>105</sup> On the other hand, there is substantial evidence to suggest ethnic and racial minorities are exposed to expressions of hatred. The 2008 Annual Review of Race Relations reports that Chinese people were called “Asian monkeys” on the street and an African-American woman was told to “go home” because she was a “blackie” and a “nigger”.<sup>106</sup> A former KKK member has even warned about the presence of organised hate groups in New Zealand.<sup>107</sup> The UN High Commissioner for Human Rights affirms, “no continent, indeed no individual country, is free of these dangerous phenomena, and it would be inexcusable if countries failed to reach consensus on such important issues.”<sup>108</sup> Hence, while most claim to be ignorant to the fact, the expression of racial hatred is a problem for New Zealand society. The harm in silencing its victims, makes hate speech a pressing and substantial problem.

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<sup>103</sup> n.102 above. *Hansen* condoned the Canadian approach propounded in *R v Oakes* [1986] 1 S.C.R. 103.

<sup>104</sup> Human Rights Commission, n.42 above.

<sup>105</sup> *Hansard*, vol. 377, 28<sup>th</sup> November 1971, 5113. Evidently, D.J. Riddiford, another Member of Parliament at the time of the Act’s conception took a different view when he asserted that the legislation was instigated as a result of pressure from the international community to combat racial discrimination. This suggests New Zealand does have a problem in this regard. See *Hansard*, Vol. 373, 8<sup>th</sup> July 1971, 1700 for comments.

<sup>106</sup> Annual Review of Race Relations 2008.

<sup>107</sup> “KKK Leader Warns NZ on the Dangers of Hate Gangs”, TV3 News, 2<sup>nd</sup> May 2009, <http://www.3news.co.nz/Ex-KKK-leader-warns-NZ-on-dangers-of-hate-gangs/tabid/423/articleID/102257/cat/61/Default.aspx>, last accessed 09.09.09.

<sup>108</sup> United Nations Durban Review Conference, 20-24 April 2009, question and answers.

In order to satisfy s5, the legislation must also be “demonstrably justified in a free and democratic society.”<sup>109</sup> There are three aspects of this.<sup>110</sup> First, the means must be rationally connected to the objective. The Human Rights Act seeks to penalise those who commit hate speech. This is rationally connected to Parliament’s objective of improving race relations by reducing expressions of hatred.

Second, the means must impair the right as little as is reasonably necessary for Parliament to achieve its purpose. The Human Rights Act provisions do not represent an unqualified limitation on freedom of speech. The privacy exception and the need to prove that the expression is likely to excite hostility, ill-will or contempt make the provisions relatively narrow in scope. In addition, the media defence under s61(2) and Attorney General’s consent required for s131, means the right is impaired as little as possible while still satisfying Parliament’s purpose.

Thirdly, the means must bear a proportionate connection to the objective. The provisions contain numerous limitations on liability and impose relatively minor penalties. Conviction under s131 carries a maximum of 3 months imprisonment or \$7000 fine. Monetary penalties or an apology, and assurance the expression will not be repeated are available for breach of s61.<sup>111</sup> The limitations on liability already outlined further suggest Parliament did not over-react with the enactment of the Human Rights Act. Given the serious social problem of discrimination in a multicultural society such as New Zealand, these hate speech provisions

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<sup>109</sup> *Hansen*, n.93 above.

<sup>110</sup> *Ibid.*

<sup>111</sup> Human Rights Act 1990, s83.

are a proportionate response. Therefore, ss61 and 131 can be demonstrably justified. The s5 test is satisfied.

### 2.3 Films, Videos and Publications Classification Act 1993 (FVPCA)

The FVPCA also has the capacity to deal with hate speech. As both the long and short titles suggest, the primary focus of the Act is to deal with censorship law. Section 3(1) deems a publication “objectionable” when it describes, depicts, expresses or otherwise deals with matters such as sex, horror, crime, cruelty or violence in a way that is likely to be injurious to the public good. Classifying publication as objectionable under s3(3)(e) requires the censor to consider whether the publication represents that members of a particular class, bearing a characteristic specified in s21(1) Human Rights Act, are inferior. The characteristics specified in s21(1) include sex, marital status, religion, race, colour and disability. In short, this Act can protect more target groups than the Human Rights Act.

However, *Living Word Distributors Ltd v Human Rights Action Group* limits the application of the FVPCA.<sup>112</sup> The expression at issue in that case was two videos entitled, “Aids, What you Haven’t Been Told” and “Gay Rights/ Special Rights: Inside the Homosexual Agenda”. As Thomas J noted, such films conveyed the opinions of religious fundamentalists.<sup>113</sup>

The Court of Appeal concluded the films did not fall within the scope of the Act. Following *Moonen*,<sup>114</sup> s3(3) was interpreted as being limited by s3(1). The degradation of homosexuals

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<sup>112</sup> [2003] 3 NZLR 570 (CA).

<sup>113</sup> *Ibid*, [66].

<sup>114</sup> *Moonen v Film and Literature Review Board* [2000] 2 NZLR 9.



falls outside the class created by “matters such as sex, horror, crime, cruelty or violence” because it excludes attitudes and opinions. The grounds proscribed in s3(3) do not all relate back to the subject matter referred to in s3(1). This makes s3(1) a gateway provision for the censorship of material covered by s3(3). The expression of hatred towards homosexuals cannot be restricted under the FVPCA.

*Living Word* has been heavily criticised in recent years. McPherson condemns the decision for taking an overly-restrictive interpretation of s3(1).<sup>115</sup> The Department of Justice Report to the Internal Affairs and Local Government Select Committee on the Films, Videos and Publications Classification Bill affirms s3(1) is not intended to be limited to the matters listed.<sup>116</sup> Instead, s3(3)(e) is said to extend the scope of hate speech provisions beyond race.<sup>117</sup> *Living Word* created a lacuna in the law by categorising hate-inducing publications as falling outside both the FVPCA and the Human Rights Act.<sup>118</sup>

#### 2.4 Summary Offences Act 1981

Another statutory scheme commonly attributed with criminalising hate speech is ss3 and 4 of the Summary Offences Act 1981. Section 3 prohibits public behaviour likely to provoke violence against persons or property. Yet, the focus of this provision is the violent, not hate-filled, repercussions of such incitement.

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<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid, 12.

<sup>118</sup> Ibid, 6.

Furthermore, the intent needed to threaten, alarm or insult under s4(1)(b) reduces the protection afforded to minorities from hate speech.<sup>119</sup> In *Moss v Police*<sup>120</sup> the accused was convicted for making racist remarks towards his landlady. Moss made offensive remarks after the property owner told him to leave his rented property during an ongoing dispute.<sup>121</sup> When coupled with the recklessness requirement under s4(1)(c), Moss becomes an anomalous case. The mens rea requirement substantially limits liability.

## 2.5 Crimes Act 1961

According to Bassett and Geddis, numerous Crimes Act 1961 provisions also protect against hate speech.<sup>122</sup> Section 61 outlined the crime of sedition, whereby public safety is endangered by exciting hostility and ill-will between different classes of people.<sup>123</sup> However, it was repealed in 2007 following the Law Commission's recommendation.<sup>124</sup> Sections 66 and 311(2) also create secondary liability for inciting the commission of offences. Yet, the Crimes Act only regulates expression that encourages action, rather than hate speech itself. Like the penumbra of other provisions detailed, the Crimes Act simply prohibits fighting words, which can already be justifiably prohibited under the liberal discourse.

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<sup>119</sup> Winton, n. 66 above, 16.

<sup>120</sup> (HC Timaru AP 45/92 5<sup>th</sup> October 1992, Williamson J).

<sup>121</sup> Ibid.

<sup>122</sup> Andrew Geddis, "The State of Freedom of Expression in New Zealand", (2008) *ODLR.*, 668 and Bassett, Ian "Is hate speech legislation necessary or desirable?" <http://www.hatespeech.co.nz>, last accessed 21.09.09.

<sup>123</sup> Geddis, n.122 above, 668.

<sup>124</sup> Ibid, 669.

## 2.6 New Zealand Press Council

As a self-regulatory agency, the New Zealand Press Council aims to promote balanced and accurate reporting on diversity.<sup>125</sup> The Council receives complaints where newspapers, periodicals and journals have upset the reader and the publisher's response is inadequate.<sup>126</sup> In doing so, the Council protects against hate speech. Principle 8 of the Press Council Principles dictates, "publications should not place gratuitous emphasis on gender, religion, minority groups, sexual orientation, race, colour or physical or mental disability".<sup>127</sup> However, the reporting of public interest issues is permitted.<sup>128</sup>

Yet, such standards have been criticised. A lack of definition of "public interest" means the defence can be invoked arbitrarily to protect apparently harmful speech.<sup>129</sup> In *Roehl*,<sup>130</sup> the Council also formulated a defence of satire to justify the seemingly discriminatory comment against homosexuals by columnist, Ms McLeod. Nevertheless, the Press Council has invoked their principles in other cases to conclude the articles fell below the acceptable journalistic standards.<sup>131</sup> However, the consequences of such a decision are limited, with the council unable to enforce recommendations that the publication issue an apology.

Given the lack of enforcement mechanisms and jurisdiction available to the Press Council, its impact on condemning hate speech is limited. Whilst principle 8 covers many target

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<sup>125</sup> Grant Hannis, "Reporting on Diversity in New Zealand: The Case of 'Asian Angst'", ANZCA08 Conference, *Power and Place* (Wellington: July 2008), 4.

<sup>126</sup> MacPherson, n.16 above, 57.

<sup>127</sup> *Ibid*, 56.

<sup>128</sup> Principle 8, 1999.

<sup>129</sup> Hannis, n.125 above, 12.

<sup>130</sup> New Zealand Press Council, Ruling 915, Joseph Roehl against the Dominion Post, February 2003, [http://www.presscouncil.org.nz/display\\_ruling.asp?casenumber=915](http://www.presscouncil.org.nz/display_ruling.asp?casenumber=915), last accessed 29.09.09.

<sup>131</sup> For example see: North and South's "Asian Angst" detailed in Hannis, n.125 above, 13.

groups, it is only applicable to print media. This leaves the victims of verbal hate speech open to attack. Furthermore, the rulings of the Press Council are directed at the publication, not the journalist of the piece concerned. While journalists may be deterred from expressing hate in the future if publishers become weary of them, there are few immediate repercussions for the author of hate propaganda. They receive no penalties for the article already sent to print.

## 2.7 Broadcasting Standards Authority

The Broadcasting Standards Authority is another quasi-regulatory body involved in the regulation of hate speech. Section 4 Broadcasting Act 1989 requires the censorship of all forms of expression that breach the standards of good taste and decency. Moreover, s21(1)(e)(iv) Broadcasting Act enables the Authority to promote safeguards against discrimination contained in the codes of broadcasting practice.<sup>132</sup> Like the Press Council, the prohibited grounds of discrimination are relatively broad.<sup>133</sup> The Authority's powers are akin to the Press Council's in other respects too. There is similarly an exception to criticism for humorous works.<sup>134</sup> Jurisdiction of the Authority is limited to television and radio.<sup>135</sup> Furthermore, the only penalties available to the Authority are costs or the issuing of an apology.<sup>136</sup> Again, this would provide little deterrent for commercial broadcasters who can easily afford to pay court costs.

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<sup>132</sup> McPherson, n.16 above, 50.

<sup>133</sup> Broadcasting Act 1989, S21(1)(e)(iv).

<sup>134</sup> McPherson, n.16 above, 54.

<sup>135</sup> Ibid, 52.

<sup>136</sup> Ibid, 50.

## 2.8 Advertising Standards Authority

The Advertising Standards Authority aims to self-regulate advertising in New Zealand. Individuals can complain to the Advertising Standards Complaints Board, who applies the Advertising Code of Practice February 2009 when considering the merits of a case. The general principles of the Code expressly refer to the Human Rights Act and New Zealand Bill of Rights Act, presumably including the hate speech provisions of the former. Principle 2 of the Code for People in Advertising prohibits advertising that displays people in a way that is reasonably likely to cause serious or widespread hostility, contempt, abuse or ridicule. Hence, this provision has the capacity to deal with hate speech. While there are no specific target groups mentioned, perhaps Principle 3 of the same section provides guidance. It condemns advertising that causes serious or widespread offence on the grounds of gender, race, colour, sexual orientation, disability and many others. Therefore, the scope of Principle 2 seems very broad. The complaint presently before the Authority on Hell's Pizza "at least our brownie won't eat your pet dog" advertisement, may deal with the ability of Principle 2 to deal with hate speech.<sup>137</sup> Principle 6 provides a humour exception, but this may preclude the establishment the likely to incite hostility requirement. If Authority upholds a complaint, the advertiser is required to remove the advertisement. Like the Broadcasting Standards Authority and the Press Council, there is little deterrent in such an order. The advertisement will nevertheless be displayed for a significant period of time while the Advertising Standards Authority considers the matter, and the shock value of it will prompt additional publicity.

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<sup>137</sup> Refers to the incident in Mangere where a Tongan man killed and barbeques his pit-bull terrier cross. Stephanie Dearing, "New Zealand's Hell Pizza Continues: controversial ad campaigns" <http://www.digitaljournal.com/article/278346>, 28.08.09.

## 2.9 Conclusion

The scope of hate speech provisions in New Zealand are rather limited. The Race Relations Act 1971 and subsequent Human Rights Act 1993 outlaw hate speech based on race, colour, ethnic or national origin alone. Other statutory regimes have narrow application. *Living Word* severely limited the scope of the FVPCA by labelling s3(1) a gateway provision to s3(3). Legislation protecting target groups beyond race is limited to certain types of media. The Broadcasting Standards Authority, New Zealand Press Council and Advertising Standards Authority have a jurisdiction limited to radio, television broadcasts, and print media. Furthermore, the Crimes Act 1961 and Summary Offences Act 1981 only regulate expressions of hate inciting violence or action. Encouraging contempt is not enough. This affords minority groups little protection from the harm caused by hate speech.

### Chapter 3: New Zealand's international commitments

Most New Zealand hate speech legislation owes its existence to the state's international obligations. For example, a purpose of the Race Relations Act 1971, that preceded the Human Rights Act 1993, was to "implement the International Covenant on the Elimination of All Forms of Racial Discrimination".<sup>138</sup> According to both the Human Rights Commission and the United Nations General Assembly, New Zealand has ratified all major international human rights instruments.<sup>139</sup> This has substantial implications for New Zealand's policy on hate speech. Some argue New Zealand limits hate speech only to the extent required by international law. Therefore, the scope of New Zealand's international obligations provides a good framework from which to consider whether existing hate speech legislation is adequate.

#### 3.1 The origin of international instruments regulating hate speech

The international human rights movement began with the Universal Declaration of Human Rights in 1948.<sup>140</sup> It contains what are now regarded as fundamental human rights such as the right to freedom of expression,<sup>141</sup> freedom from discrimination,<sup>142</sup> and freedom of thought, conscience and religion.<sup>143</sup> As a member state of the United Nations since 24<sup>th</sup>

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<sup>138</sup> Race Relations Act 1971, Long Title.

<sup>139</sup> Human Rights Commission, n.42 above, 6 and United Nations General Assembly, Draft Report of the Working Group on the Universal Periodical Review, New Zealand, 4-15 May 2009.

<sup>140</sup> James Weinstein, "Extreme Speech, Public Order and Democracy: Lessons from The Masses" in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), 62.

<sup>141</sup> UDHR, Article 19.

<sup>142</sup> UDHR, Article 7.

<sup>143</sup> UDHR, Article 18.

October 1945, New Zealand supports the Universal Declaration. This founding human rights document has its origins in World War II atrocities, particularly those committed by fascist Germany.<sup>144</sup> Perhaps the anti-Semitic sentiment adopted by Nazis explains why many international documents only protect racial and religious groups from hate speech. These roots may also explain why the Court of Appeal in *King-Ansell v Police*<sup>145</sup> concluded Jews constituted an ethnic group for the purposes of s25 Race Relations Act, and later s131 Human Rights Act. It would be very strange if domestic law implementing international instruments did not cover the very group the latter aimed to protect from hate speech.

### 3.2 International Covenant for Civil and Political Rights

The International Covenant for Civil and Political Rights (ICCPR) is one of these instruments. Article 20 states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” This essentially requires member states to prohibit hate speech aimed at racial or religious groups.

New Zealand ratified the ICCPR on 28<sup>th</sup> December 1978, signalling their compliance with its provisions.<sup>146</sup> The government simultaneously entered a reservation that New Zealand will

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<sup>144</sup> Sylvia Cartwright, “Elimination of All Forms of Discrimination Against Women” (1998) *OLR*, vol.9, no. 2, 253.

<sup>145</sup> n.92 above.

<sup>146</sup> United Nations Treaty Collection,

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en), last accessed 22.09.09.



not legislate further under article 20 because the advocacy of national and racial hatred is already outlawed.<sup>147</sup>

Yet, the Human Rights Act 1993 prohibits hate speech targeted at a group of people based on their “race, colour, ethnic or national origin”. This may in fact be broader than purely racist hate speech.<sup>148</sup> On the other hand, New Zealand legislation does not protect religious groups. Therefore, the legislature is taking measures beyond their obligations under the ICCPR in one respect, but then falling short of compliance in another.

This can be rectified if the target groups covered by ss 61 and 131 Human Rights Act 1993 impliedly incorporate religious groups. However, this seems unlikely. Both Richmond P and Woodhouse J in *King-Ansell*<sup>149</sup> expressly exclude religious groups from protection under the Human Rights Act provisions. So, while Jews are protected because they share common historical roots, other religions are seemingly excluded from hate speech provisions. Despite Huscroft’s assertion that New Zealand can carry out its international commitments in more than one way,<sup>150</sup> the ICCPR unavoidably requires the denunciation religious hate speech. Hence, the Human Rights Act does not fulfil New Zealand’s international commitments.

Justifications for such inadequate protection from hate speech could lie in other articles of the ICCPR. Article 19(2) affirms freedom of expression that includes the “...freedom to seek, impart and impart information and ideas of all kinds....” Yet, the Human Rights Committee has suggested the limitations on freedom of speech required by article 20 are

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<sup>147</sup> Winton, n.66 above, 4.

<sup>148</sup> Maxim Institute, n.71 above.

<sup>149</sup> n.92 above.

<sup>150</sup> Huscroft, n.12 above, 203.

fully compatible with article 19.<sup>151</sup> Hence, were the Human Rights Committee to consider the Human Rights Act provisions under the First Optional Protocol, New Zealand is unlikely to be able to justify its position.

### 3.3 International Convention for the Elimination of All Forms of Racial Discrimination (CERD)

A similar process exists under the International Covenant for the Elimination of All Forms of Racial Discrimination. The Committee on the Elimination of Racial Discrimination monitors the implementation of the Convention by receiving inter-state or individual complaints, with permission of the member state in question. While New Zealand ratified the Convention on 22<sup>nd</sup> November 1972, it has not accepted the jurisdiction of the Committee to hear individual complaints under article 14.

CERD may explain why only racial groups are protected from hate speech in New Zealand. Article 4 requires state parties to prohibit by law all propaganda that attempts to promote racial hatred or discrimination. In *LK v The Netherlands*,<sup>152</sup> the CERD Committee found a violation of article 4 where the state did not prosecute a group of neighbours yelled ‘no more foreigners’ to a prospective homeowner and threatened to burn down his home. As Weinstein notes, article 4 is narrower than article 20 ICCPR because it relates to racial hatred alone.<sup>153</sup> Given this, perhaps the Race Relations Act should have been framed around

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<sup>151</sup> Dr Judy McGregor, EEO Commissioner, “Balancing responsibilities and rights: freedom of expression and hate speech in NZ”, *Ministry of Justice symposium on the Bill of Rights Act*, 7.02.06.

<sup>152</sup> Committee for the Elimination of Racial Discrimination Communication No 4/1991: Netherlands. 16/03/93, CERD/C/42/D/4/1991.

<sup>153</sup> Weinstein, n.140 above, 71.

CERD. As it stands, the narrow approach adopted by hate speech legislation begs the question whether New Zealand is actually complying with treaty requirements.

### 3.4 Conclusion

The generous scope of ss61 and 131 suggest New Zealand is a staunch protector of racial minorities from hate speech.<sup>154</sup> Yet, in relation to other groups, New Zealand seems hesitant to fulfil even its current international obligations under the ICCPR. There is a notable absence of protection for religious groups under current hate speech legislation. Perhaps it will take an international treaty of some kind to convince New Zealand that the Human Rights Act 1993 is worthy of extension to shelter a broader range of target groups.

On the other hand, some international documents already exist that could form the basis for such an expansion. The possible implications of the Convention on the Rights of Disabled Persons and others will be addressed when discussing each related target group.

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<sup>154</sup> Maxim Institute, n. 71 above.

## Part B

The inquiry undertaken in Chapter 2 suggests ss61 and 131 Human Rights Act 1993 are justifiable limitations on the right to freedom of speech. These provisions will form the basis for discussing whether hate speech directed at other target groups should be prohibited. I will presume that if there is a real and substantial need to address hatred towards religious groups, GLBT and the disabled, this will justify extension of the Human Rights Act. However, this presumption may be displaced if there are features of the relevant target group that prove particularly problematic. If any such objections are valid, this may prevent the simple expansion of New Zealand's primary hate speech legislation.

In 2004, the Government Administration Committee embarked on such an inquiry, only to abandon it after a largely negative public response.<sup>155</sup> Most submissions expressed apprehension that such a development would compromise the right to freedom of speech and democratic process.<sup>156</sup> Other concerns stemmed from the difficulty of establishing an effective threshold for hate crimes in general.<sup>157</sup> Nevertheless, the Government indicated concern about the scope of the Human Rights Act by instigating the investigation after *Living Word* concluded homophobic hate speech cannot be otherwise prohibited.

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<sup>155</sup> Andrew Geddis, n.122 above, 665.

<sup>156</sup> Stuart Dye, "Backlash on Hate Speech Proposal" from *The New Zealand Herald*, 18<sup>th</sup> March 2005.

<sup>157</sup> Ian Bassett, n.121 above.

## Chapter 4: Religious hate speech

Since the Race Relations Act 1971, there has been speculation about extending hate speech legislation to cover religious groups. The argument for prohibiting religious hate speech is probably the most compelling. Numerous other jurisdictions, subject to very similar international obligations, have prohibited incitement to hatred based on religious denomination. The United Kingdom, Canada and some Australian states all explicitly outlaw religious hate speech. The broad margin of appreciation afforded to member states under the European Convention of Human Rights means obligations imposed on the UK are no more extensive than those inflicted upon New Zealand by United Nations Conventions.

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### 4.1 United Kingdom

The United Kingdom has expressly criminalised incitement to religious hatred. In 2006, the Racial and Religious Hatred Bill was enacted to amend the Public Order Act 1986.<sup>159</sup> Section 29B(1) states:

“A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.”

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<sup>158</sup> Ahdar, n.9 above, 641.

<sup>159</sup> Racial and Religious Hatred Act 2006 (UK), s1.

Subsection 2 provides that a crime can be committed either in a public or private place, unless unheard in a dwelling house.<sup>160</sup> Subsequent sections create similar offence for intending to stir up religious hatred in various other mediums including written,<sup>161</sup> visual,<sup>162</sup> and sound recordings.<sup>163</sup>

This legislative amendment was motivated by the apparent injustices resulting from the prohibition of racial hate speech under s18 Public Order Act 1986. Judicial interpretations of ‘race’ led to some religions, such as Jews and Sikhs, being covered by the provision as ‘ethnic groups’.<sup>164</sup> Yet, Muslims, Hindus and Christians were left exposed to expressions of hatred.<sup>165</sup>

Furthermore, some strands of Christianity were protected from hate speech under the common law offence of Blasphemy. These laws protected those belonging to the established church from offensive expression.<sup>166</sup> Those belonging to another Christian denomination did not enjoy such immunity. Even after the separation of church and state, Catholics remained outside the scope of blasphemy law because their faith required them to “serve another prince”.<sup>167</sup> The process of neutralising the scope of hate speech legislation also led to the abolition of blasphemy under s79 Criminal Justice and Immigration Act 2008.

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<sup>160</sup> Ibid, s29B(2).

<sup>161</sup> Ibid, S29C.

<sup>162</sup> Ibid, S29D prohibits expression that incites religious hatred during the performance of a play.

<sup>163</sup> Ibid, S29E prohibits the showing, distributing or playing a recording. S29F covers broadcasting of visual imagery or sound.

<sup>164</sup> Ivan Hare, “Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine” in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), 294.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> John Locke, “A Letter Concerning Religious Toleration” in Hare, n.164 above, 291.

However, some criticise the UK approach. Rex Ahdar endorses Kay Goodall's opinion that the 2006 Act is almost unenforceable because it is so narrow.<sup>168</sup> Perhaps s29J provides the limitation in scope. It states:

“nothing in this part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of empathy, dislike or ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs of its adherents, or proselytising or urging the adherents of a different religion or belief system to cease practising their religion or belief system.”

In light of such a legislative statement, the purpose of prescribing an offence for inciting religious hatred becomes unclear. If a person is nevertheless free to ridicule, insult or abuse the beliefs of religious adherents, perhaps s29B(1) becomes meaningless. The only way to rationalise these two apparently contradictory provisions is to allow criticism of religious beliefs under s29J, yet prohibit the incitement of religious hatred towards the believers themselves under s29B(1). In the abstract, this distinction may sound convincing. Yet, ascertaining whether speech is aimed at a religious group or their beliefs may prove difficult in practice. Perhaps this explains

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<sup>168</sup> Rex Ahdar, “Religious Vilification: Confused Policy, Unsound Principles and Unfortunate Law” (Dec. 2007) *University of Queensland Law Journal*, vol. 26.2, 293. Kay Goodall, “Incitement to Religious Hatred: All Talk and No Substance” (2007) *70 Modern Law Review*, 113.

why there have been few prosecutions under the Racial and Religious Hatred Act 2006.<sup>169</sup>

#### 4.2 Canada

Similarly, the Canadian Criminal Code creates an offence of wilfully promoting hatred against an identifiable group.<sup>170</sup> ‘Identifiable group’ includes a section of the public distinguished by religion.<sup>171</sup> Defences prescribed in s319 include truth, faith, public interest and a media defence.<sup>172</sup> Like s131 Human Rights Act 1993, the consent of the Attorney General is required before a prosecution can proceed.<sup>173</sup>

#### 4.3 Australia

Excitement to hatred on religious grounds is also an offence in numerous Australian states. In New South Wales, s20C Anti-Discrimination Act 1977 renders it unlawful to incite hatred or contempt for, or subject to ridicule a person or group based on their race. Yet, ‘race’ is given an expansive definition to include ethno-religious origin.<sup>174</sup>

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<sup>169</sup> David Shaparo and Oonagh Sands, “free speech, hate speech and incitement”, (March 2006) *Solicitors Journal*, vol. 150(8), 239.

<sup>170</sup> Canadian Criminal Code, S318(7).

<sup>171</sup> *Ibid*, S318(4).

<sup>172</sup> Jones, n.11 above, 47.

<sup>173</sup> *Ibid*, 48.

<sup>174</sup> NSW Anti-Discrimination Act 1977, s4.



*Khan v Commissioner, Department of Corrective Services and Another* defined the term ‘ethno-religious origin’.<sup>175</sup> After noting the uncertainty of the concept, the Court concluded it signifies “a strong association between a person’s or a group’s nationality or ethnic culture, history and his, her or its religious beliefs and practices”.<sup>176</sup> Hence, religion per se is not a prohibited ground for expressions of hatred. However, if there is a correlation between the faith and the cultural origins of that group, religion will be implicitly covered by s20C.

Other states are more explicit in their prohibition of religious hate speech. The Victorian Racial and Religious Tolerance Act 2001 creates a separate offence for encouraging hatred towards religious groups.<sup>177</sup> Moreover, s124A Queensland Anti-Discrimination Act 1991 prohibits vilification against others on numerous grounds including religion. While federal legislation does not deal with hate speech, the attitudes of Australian states provide significant support for the regulation of religious hate speech.

#### 4.4 The argument for prohibiting religious hate speech

As in the United Kingdom, current racial hate speech provisions under the Human Rights Act apply to some religious groups. In *King-Ansell v Police*,<sup>178</sup> the Court of Appeal concluded that Jews were covered by the precursor to s131 because they shared the same customs and beliefs, allowing them to be classified as an ethnic group. Yet, Richmond P and Woodhouse J explicitly extinguished the possibility that the 1971 provision can include religious hate speech. This conclusion seems somewhat anomalous. Other religious groups will invariably

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<sup>175</sup> [2002] NSWADT 131(31 July 2002).

<sup>176</sup> *Ibid* [20].

<sup>177</sup> s8.

<sup>178</sup> n.92 above.

share customs and beliefs. After all beliefs, and customs adopted in manifestation of these beliefs, are the primary feature of religion. Woodhouse J even supports this by stating, “it does not follow that the identifying characteristics must be genetically determined at birth”.<sup>179</sup>

Such an assertion contradicts a House of Lords case that the Court of Appeal cites with approval. In *Ealing Borough Council v Race Relations Board*,<sup>180</sup> Lord Killbrandon suggests race, colour, national and ethnic origins are similar in that they are not acquired by choice. Moreover, commentators, including Ivan Hare, argue the law does not normally protect people from vilification based on lifestyle choices.<sup>181</sup> Conversely, Woodhouse J seems to suggest people can choose to which ethnic group they would like to belong.

*King-Ansell* implies other religious groups may receive protection under s131. By distancing themselves from the strict United Kingdom approach, the New Zealand courts take an apparently liberal approach to those qualifying as an ethnic group under the Act. Woodhouse J even agrees with Lord Simon in *Ealing* that the language adopted by the drafters of these hate speech provisions is “rubbery and elusive” that deems ‘race’ an imprecise concept.<sup>182</sup> As a result, the potential to extend the limits of the Human Rights Act increases.

The international community would also support such an expansion to protect religious groups. In March this year, Resolution A/HRC/4/L.12 of the United Nations Human

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<sup>179</sup> *Ibid*, at page 538.

<sup>180</sup> [1972] All ER 105.

<sup>181</sup> Hare, n.164 above, 308.

<sup>182</sup> *King-Ansell v Police*, n.92 above, 537.

Rights Council urged all member states to legislate against defamation of religion.<sup>183</sup> While the Resolution is not binding on member states, it is a distinct signal that the Council considers hatred towards religion a significant concern.

Apparently, the expression of religious hatred has increased recently. Ivan Hare reports “an increase in anti-Islamic statements following 9/11 and 2005 London bombings”.<sup>184</sup> In April 2009, the New York High Commissioner of Human Rights agreed that, “in many ways, since September 11, we have seen things like racial profiling and the targeting of particular ethnic and religious groups”.<sup>185</sup> For example, the infamous Danish Cartoons depicted the Prophet Mohammed wearing a turban and informing a suicide bomber that paradise had run out of virgins.<sup>186</sup> Even before the bombing of the World Trade Centre, Tatyana Suszkin distributed posters of Mohammed as a pig and writing the Koran with his toes.<sup>187</sup> The UK legislation was enacted to address these concerns, despite government denial that incitement to religious hatred is commonplace.<sup>188</sup>

Moreover, Race Relations Commissioner, Joris de Bres, notes that discrimination of religious minorities directly affects New Zealand.<sup>189</sup> In 2008, 5% of complaints to the Human Rights

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<sup>183</sup> Harris, n.1 above.

<sup>184</sup> Hare, n.164 above, 306.

<sup>185</sup> High Commissioner of Human Rights, Press conference by the New York office for the High Commissioner of Human Rights on the latest developments in Durban Review Conference Preparatory Process, (New York: Dept of Public information, News and Media Division, 6<sup>th</sup> April 2009).

<sup>186</sup> Ian Cram, “The Danish Cartoon, Offensive Expression and Democratic Legitimacy” in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), 311.

<sup>187</sup> Amnon Reichman, “criminalising religious offensive satire: free speech, human dignity and comparative law” in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), 331.

<sup>188</sup> Hare, n.164 above, 306.

<sup>189</sup> Joris de Bres, Race Relations Commissioner, New Zealand follow up to the Durban Declaration and Program of Action to Combat Racism, Discrimination, Xenophobia and Related Intolerances (Human Rights Commission, October 2008).

Commission were about discrimination based on religious or ethical beliefs.<sup>190</sup> The South Park Bloody Mary episode featuring a menstruating Madonna provides additional evidence of the ridicule of religion.<sup>191</sup>

Furthermore, the New Zealand Human Rights Commission suggests, “tolerance of religious diversity is very close to the elimination of racial discrimination”.<sup>192</sup> Perhaps regulating religious hate speech is a necessary corollary of eliminating racism.

#### 4.5 Natural competition between religions

The main argument against the regulation of religious hate speech is that it would compromise freedom of religion. Section 18 of the International Covenant on Civil and Political Rights, and s13 New Zealand Bill of Rights Act 1990 guarantees this right. The ability to “manifest [one’s] religion or belief in worship observance, practice or teaching”<sup>193</sup> inevitably involve the criticism of other religions in order to attract new followers.<sup>194</sup> Moreover, the lack of consensus on matter such as God, the universe and the path to enlightenment means that religious ideas will often compete with one another.<sup>195</sup>

Yet, this may be taking too simplistic an approach. Based on the current legislation, religious hate speech would also need to be likely to incite hostility against the target group. However, speech that only promotes one viewpoint without directly denigrating another may not

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<sup>190</sup> Universal Periodical Review for New Zealand, 5<sup>th</sup> Session, considered Thursday 7<sup>th</sup> May 2009.

<sup>191</sup> Ahdar, n.9 above, 629.

<sup>192</sup> 71<sup>st</sup> Session for the Elimination of All Forms of Racial Discrimination, periodic report of New Zealand, 31.07.07.

<sup>193</sup> International Covenant on Civil and Political Rights, article 18.

<sup>194</sup> Ahdar, n.9 above, 631.

<sup>195</sup> Hare, n.164 above, 308.

satisfy this test. Implicit criticism of other beliefs while promoting one's own may not be enough.

Furthermore, religious hate speech is expression that excites hatred against a person based on their belief, not against the religion itself. The UK House of Commons seems to have adopted this distinction.<sup>196</sup> Jones agrees that attacks on beliefs can be altogether separate from attacks on the individual.<sup>197</sup> For example, saying polytheistic religions are wrong does not necessarily incite hatred against adherents of Hinduism or Islam. Perhaps an extra step is needed to promote hatred against devotees of such religions based on their beliefs.

#### 4.6 Problem of scope

Another criticism of proposals to legislate against religious hate speech is that it would create a class of people unjustifiably immune from criticism. The intrinsic link between religion, morality and the state means that religious adherents often play an active role in public discussion on controversial matters.<sup>198</sup> Debates on issues such as abortion and same-sex marriages have a religious undertone. Therefore, if religious hate speech is prohibited, the religious groups themselves could launch one-sided public attacks without opponents being able to rebut.

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<sup>196</sup> See the above discussion about the relationship between s29J and s29(b)(1).

<sup>197</sup> Jones, n.10 above, 92.

<sup>198</sup> Memorandum to the Public Bill Committee on the Criminal Justice and Immigration Bill from the Department for Christian Responsibility and Citizenship, Catholic Bishops Conference of England and Wales, and the mission and Public Affairs Council of the Church of England, 22 November 2007.

This creates the problem of defining what constitutes a religion for the purposes of hate speech provisions. Reichman argues religion is more than just an opinion in that it connects people to God.<sup>199</sup> This makes religious sentiments worthy of protection.<sup>200</sup> Yet, this leaves atheism in a somewhat anomalous position. Atheism is commonly recognised as being like a religious belief, but its explicit rejection of a God would preclude protection under religious hate speech provisions according to Reichman's formulation. Similarly, Buddhism does not recognise the existence of a God in the Western sense of the word.<sup>201</sup> Nevertheless, such denominations are specifically mentioned in s21(1)(d) Human Rights Act 1993 as prohibited grounds of discrimination, just like religions who worship distinct deities. Apparently, the legislature makes no distinction between the affirmative belief in a God or Gods, and the categorical denial that one exists.

#### 4.7 Conclusion

There is significant support for the proposition that religious groups should be protected from hate speech under the Human Rights Act. Anti-vilification legislation in the United Kingdom, Canada and Australia all include religion as a protected target group. Moreover, extending the Human Rights Act in this way would conform with New Zealand's international commitments under the ICCPR and the Universal Declaration of Human Rights. In *King-Ansell v Police*, the New Zealand Court of Appeal adopted a liberal interpretation of 'ethnic origin' to include Jews. Perhaps religious groups deserve more

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<sup>199</sup> Reichmann, n.187 above, 339.

<sup>200</sup> Ibid.

<sup>201</sup> B.A. Robinson, "Buddhism, based on the teachings of Siddharta Gautama" on <http://www.religioustolerance.org/buddhism.htm>, 10.06.09.

explicit recognition as minorities worthy of protection from hate speech. The notable existence of religious profiling and discrimination supports this assertion.

## Chapter 5- GLBT hate speech

GLBT are arguably one of the most disadvantaged minorities in the western world. They are associated with the most undesirable people in society, including criminals, paedophiles and the diseased.<sup>202</sup> Yet, *Living Word* concluded GLBT hate speech cannot be prohibited under s3(3) FVPCA. The subsequent condemnation of this decision suggests there is a strong case for the prohibition of hate speech directed at sexual minorities in New Zealand. While no international instrument expressly requires state parties to outlaw homophobic hate speech,<sup>203</sup> numerous other Commonwealth countries have regulated hate speech targeting GLBT.

### 5.1 United Kingdom

The United Kingdom prohibited homophobic hate speech in October 2007.<sup>204</sup> Section 76 Criminal Justice and Immigration Act 2006 renders it an offence to use threatening words or behaviour, or to display any material that is threatening, if it intends to stir up hatred on the grounds of sexual orientation. The Act criminalises homophobic expression and “help[s] deter and tackle extremists who stir up hatred against Lesbian, Gay, Bisexual and Transgender people”.<sup>205</sup> In enacting this legislation, sexual orientation was brought in line

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<sup>202</sup> Dean R Knight “Im not gay- not that there’s anything wrong with that: are unwanted imputations of gayness defamatory” (2006) 37 *VUWLR*, 269.

<sup>203</sup> Jonathan Cohen, “More Sensorship less discrimination? Sexual orientation hate propaganda in multiple perspectives”, (2000) *McGill Law Journal*, vol. 46, 84.

<sup>204</sup> Ian Leigh, “Homophobic speech, equality denial and religious expression” in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), 381.

<sup>205</sup> gayNZ.com, Gay Commentators Slam UK fascist fags, <http://www.gaynz.com/forum/index.php?action=printpage%3Btopic=3330.0>, 25.10.07.



with racial and religious equality. Yet, the House of Commons chose to enact a separate hate speech provision to protect homosexuals rather than simply expanding the scope of others.<sup>206</sup>

The Criminal Justice and Immigration Act 2006 was not a response to a recent phenomena, but made it easier for inciters of homophobic hatred to be prosecuted. In *Hammond v DPP*<sup>207</sup> an elderly street preacher from Bornemouth was convicted under s5 Public Order Act 1986 after a crowd became hostile during his tirade about homosexuals. His claim that homosexuality was immoral made him liable for displaying a sign causing distress and alarm. However, causing alarm or distress is distinguishable from inciting hatred. The former depends on a reaction against the speaker, whereas the audience of hate speech exhibit their reaction towards an innocent target group. Hence, the Public Order Act offence provides only an indirect route to prosecuting hate speech. The Criminal Justice and Immigration Act 2006 circumvents this.

## 5.2 Australia

While fewer Australian states prohibit homophobic than religious hate speech, New South Wales and Queensland still provide significant support for the regulation of hate speech based on sexual orientation. In New South Wales, the Anti-Discrimination (Homosexual Vilification) Amendment Act 1993 outlaws homosexual vilification provided it does not take

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<sup>206</sup> Public Order Act 1986, s18 prohibits racial hate speech. Then, the Racial and Religious Hatred Act 2006 amended the former to include religious groups as target groups protected from hate speech.

<sup>207</sup> [2004] EWHC 69 (Admin.).

place during the course of religious instruction.<sup>208</sup> This recognises the potential clash between homosexuals' right to be free from discrimination and the right to freedom of religion.

Section 124A of Queensland's Anti-Discrimination Act 1991 prohibits the public incitement of hatred towards, contempt for or ridicule of a person or group on the ground of sexuality or gender identity. The scope of this provision is broader than its New South Wales counterpart. "Gender identity" includes transsexuals, transgender, and others who may not otherwise fall under "sexuality" or "homosexual".

The case of *Toonen v Australia*<sup>209</sup> provides international support for such provisions. Nicholas Toonen alleged ss122(a) and (c), and 123 of the Tasmanian Criminal Code violated his rights to privacy and equal protection of the law under articles 17(1) and 26 ICCPR respectively. The Criminal Code provisions outlawed all private forms of sexual contact between homosexual men. The Human Rights Committee concluded that the legislation violated the complainant's right to privacy because it allowed the state to unduly interfere with his private life. While the majority of the Committee reserved their opinion on whether the provisions violated article 26, they clarified that "sex", as a prohibited ground of discrimination under articles 2(1) and 26, did include sexual orientation. Cohen argues this may require state parties to the ICCPR to outlaw homophobic hate speech.<sup>210</sup>

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<sup>208</sup> S49ZT.

<sup>209</sup> (No. 488/1992), UN Doc. (CCPR/C/5D/488/1992 (1994) printed in Report of the Human Rights Committee, UN GAOR, 49<sup>th</sup> session, Supp No. 4 UN Doc A/49/40, Appendix (1994) 226.

<sup>210</sup> Cohen, n.203 above, 86.

### 5.3 Canada

In 2003, s319 Canadian Criminal Code added sexual orientation as a prohibited ground on which to wilfully promote hatred under s318. This extension to the law followed the cases of *Vriend v Alberta*<sup>211</sup> and *M v H*.<sup>212</sup> In the former, Cory J remarked:

“the exclusion, deliberately chosen in the face of clear findings that discrimination on the ground of sexual orientation does exist in society, sends a strong and sinister message. It could well be said it is tantamount to condoning or even encouraging discrimination against lesbians or gay men.”<sup>213</sup>

Similarly, the “destructive message” sent by the initial exclusion of sexual orientation from s318(4) meant the Canadian Criminal Code was overtly discriminatory.<sup>214</sup>

Moreover, the Cohen Report concluded, “however small the actors may be in number, the individuals and groups promoting hate in Canada constitute ‘clear and present danger’ to the functioning of democratic society.”<sup>215</sup> Cohen affirmed that s318(4) would likely be considered a reasonable limitation on freedom of expression under the *Keegstra*<sup>216</sup> analysis. In that case, Chief Justice Dickson suggested hate speech legislation aims to regulate the “intentional fostering of hatred against particular members of our society, as opposed to

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<sup>211</sup> [1998] 1 SCR 493.

<sup>212</sup> [1999] 2 SCR 3.

<sup>213</sup> *Vriend v Alberta*, n.211 above, per Cory J [100].

<sup>214</sup> R Robinson, House of Commons debate (4 April 2000) in Cohen, n.203 above, 75.

<sup>215</sup> 1966 Report of the Special Committee on Hate Propaganda in Canada, 24.

<sup>216</sup> Cohen, n.203 above, 80.

individuals.”<sup>217</sup> As an identifiable group, sexual orientation becomes worthy of protection from hate speech. Concern that Canada was undergoing a third wave of hate propaganda, characterised by an expansion of target groups, further supports this proposition.<sup>218</sup>

#### 5.4 The argument for prohibiting homophobic hate speech

GLBT are subject to hate speech, and accordingly discrimination, on a regular basis. According to Ingrid Hess, such hate propaganda has various themes.<sup>219</sup> These include notions that homosexuals spread sickness and disease, homosexuality undermines social institutions, and homosexuals conspire to corrupt others.<sup>220</sup> In 2001, Amnesty International noted that in some countries AIDS and HIV have been labelled the “gay plague” and same sex relationships dubbed “bourgeois decadence”.<sup>221</sup> Similarly, the infamous Reverend Phelps’ “God Hates Fags” website reports that “aids cure fags” and any sexual connection outside the marriage bed is “whoremongery and adultery”.<sup>222</sup> Jack Chen shares the experience of a gay man whose neighbours yelled “die AIDS faggot” at him and issued warnings such as “these men are gay, they are spreading AIDS, they are child molesters”.<sup>223</sup>

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<sup>217</sup> *R v Keegstra* [1990] 3 SCR 697, at page 722.

<sup>218</sup> Cohen, n203 above, 71.

<sup>219</sup> Ingrid Hess, *Prosecution and ‘anti-homosexual’ Publications* (Edmonton, Alberta: Alberta Justice, Appeals and Criminal Law Policy, 1996).

<sup>220</sup> *Ibid.*

<sup>221</sup> Amnesty International, *Crimes of Hate, Conspiracy of Silence Torture and Ill-Treatment Based on Sexual Identity* (London: Amnesty International Publications, 2001), 2. Online at [http://www.ai-lgbt.org/ai\\_report?torture.htm](http://www.ai-lgbt.org/ai_report?torture.htm). Cited in Dr. Ellen Faulkner, “Homophobic Hate Propaganda in Canada”, (2006-2007) *Journal of Hate Studies*, vol.5.63, 15.

<sup>222</sup> Westbro Baptist Church Home Page, <[www.godhatesfags.com](http://www.godhatesfags.com)>, last accessed, 20.08.09.

<sup>223</sup> Jack Chen, et. al., “sticks and stones: the nexus between hate speech and violence”, (1999-2000) 27 *Fordham Urb. LJ* 382.

Accordingly, another theme can be added to Hess' list: an association with society's undesirables. For example, one Canadian MP suggested extending human rights instruments to protect Gays and Lesbians would be akin to granting protection to "beastliest, paedophiles and necrophiles".<sup>224</sup> Dean R Knight affirms that GLBTs are often grouped alongside criminal and fraudsters.<sup>225</sup> Furthermore, Burn notes that heterosexuals use the word "fag" or "homo" to insult one another.<sup>226</sup> This carries implications for the social worth attributed to homosexuals.

New Zealand is not immune from homophobic expressions of hatred. The GayNZ website details a plethora of incidents vilifying sexual minorities. One recent account explains how Barry Bloomfield, a former Primary School Principal, was labelled a 'poofter' by colleagues and locked himself in his office out of fear.<sup>227</sup> Even more ominous is the murder of David McGee in 2004. His killer, a homosexual prostitute, alleged McGee touched his anus. The jury accepted that such conduct provoked a violent outburst, during which the Accused beat McGee 40 times. A manslaughter verdict resulted. Peter Wells argues this outcome suggests, "a homosexual's life is of little value".<sup>228</sup> Again, in July 2009, the homicide of Ronald Brown was excused as manslaughter after the Accused, Ferdinand Ambach, claimed the victim's

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<sup>224</sup> Faulkner, n.221 above, 9.

<sup>225</sup> Knight, n.202 above, 20.

<sup>226</sup> S.M. Burn "Heterosexuals' use of 'fag' and 'queer': Contributor to Heterosexism and Stigma, (2000) *Journal of Homosexuality*, 40, 1.

<sup>227</sup> Gay News.com Daily News Staff, "Gay School Principle Says He was Harassed", [http://www.gaynz.com/articles/publish/2/article\\_7824.php](http://www.gaynz.com/articles/publish/2/article_7824.php), 26.08.09.

<sup>228</sup> Peter Wells, "A Lonely Death", [http://www.listener.co.nz/issue/3358/features/2592/a\\_lonely\\_death.html](http://www.listener.co.nz/issue/3358/features/2592/a_lonely_death.html), 18-24.09.04.

sexual advances provoked him to beat Brown with a banjo before ramming its neck down his throat.<sup>229</sup>

The social value attached to homosexuality becomes even more apparent in the context of defamation. Courts across the Commonwealth have concluded that being described as gay, lesbian, queer or a sodomite is capable of being defamatory.<sup>230</sup> While, in 1996 McGechan J stated “homosexuality and lesbianism may be viewed less seriously now than 20 years ago”,<sup>231</sup> the New South Wales Supreme Court suggested accusations of homosexuality may still be defamatory.<sup>232</sup> Moreover, in *New Zealand Magazines Ltd v Hadlee*,<sup>233</sup> the Court of Appeal held rumours of lesbianism can lower an individual’s reputation in the eyes of right-thinking members of the public. This implies that homosexuality is inferior to heterosexuality.<sup>234</sup> Conversely, an allegation that someone belongs to a racial or religious minority is incapable of being defamatory.<sup>235</sup> This may render sexual minorities more worthy of protection from hate speech than racial and ethnic minorities such as Jews.

In other respects, GLBT and Jews share a similar social history. Both were victims of Nazism,<sup>236</sup> and have been both “a historical and contemporary target of societal

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<sup>229</sup> “Provocation should stay in the meantime: lawyers”, *New Zealand Herald*, [http://www.nzherald.co.nz/assault-and-homicide/news/article.cfm?c\\_id=124&objectid=10596554](http://www.nzherald.co.nz/assault-and-homicide/news/article.cfm?c_id=124&objectid=10596554), 11.09.09.

<sup>230</sup> Knight, n.202 above, 257. For example see: *Anderson v Kocsis* [1998] 86 OTC 107, *Cruise v Express Newspapers Plc* [1999] QB 931 (EWCA(Civ)), *Quilty v Windsor* [1999] SLT 346 (OH).

<sup>231</sup> *Television New Zealand v Quinn* [1996] 3 NZLR 24, at page 60.

<sup>232</sup> *Horner v Goulburn City Council*, unreported, SC (NSW), No. 21287/97, Levine J, 5 December 1997.

<sup>233</sup> [2005] NZAR 621 (CA).

<sup>234</sup> Knight, n.202 above, 20.

<sup>235</sup> Philip Lewis (ed.) *Gatley on Libel and Slander* (9<sup>th</sup> ed., London: Sweet and Maxwell, 1998), 25, cited in Knight, n.202 above, 270.

<sup>236</sup> gayNZ.com, n.205 above.

condemnation”.<sup>237</sup> The atrocities committed in Nazi Germany motivated international hate speech provisions, yet GLBT are not traditionally recognised as a minority worthy of protection.<sup>238</sup> Both Jews and homosexuals have nevertheless been subject to vehement hostility.<sup>239</sup>

However, the reactions of Jews and GLBT to hate speech differ. Jews have a more secure position in society, given the widespread recognition of their historical persecution, and are therefore better equipped to deal with prejudice.<sup>240</sup> On the other hand, homosexuals report that verbal attacks would likely have a lasting impact on their self-esteem.<sup>241</sup> Furthermore, recent studies have linked suicidal mentality with homosexuality,<sup>242</sup> suggesting marginalisation of sexual minorities has a lasting effect mental health. A further study on New Zealanders found around a quarter of self-harm inflicted by men, and a sixth of self-harm committed by women was attributable to same-sex attraction.<sup>243</sup> The apparently irreparable harm caused by homophobic hate speech surely warrants its regulation.

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<sup>237</sup> Laura Leets “experiencing hate speech: perceptions and responses to anti-semitism and antigay speech” (2002) *Journal of Social Issues*, vol. 58, issue 2, 342.

<sup>238</sup> Robert J Boeckmann and Carolyn Turpin-Petrosino “Understanding the harm of hate crime”, (2002) *Journal of Social Issues*, vol. 58, issue. 2, 343.

<sup>239</sup> Leets, n.237 above, 342.

<sup>240</sup> *Ibid*, 345-6.

<sup>241</sup> *Ibid*, 350, 356.

<sup>242</sup> R Herrell, “Sexual Orientation and Suicidality: a co-twin control study in adult men” (1999) *Archives of General Psychiatry*, vol. 56, issue 10, 867.

<sup>243</sup> NZ Aids Foundation, submission for the inquiry into hate speech, <http://www.nzaf.org.nz/files/Hate%20speech%20submission%20to%20inquiry%205%20oct%2004.pdf>, 6.10.04.

## 5.5 Relationship with religious freedom

A common objection to extending hate speech legislation to protect GLBT is its effect on religious freedom. Many religions object to the practice of homosexuality and adherents preach against it. Westbro Baptist Church, who operates the “God Hates Fags” website, relies on numerous biblical verses to justify their opposition to homosexuality.<sup>244</sup> Sodomites are inevitably condemned to Hell according to Romans 1:18-32, 1 Corinthians 6:9-11, 1 Timothy 1:8-11, Jude 7.<sup>245</sup> Perhaps this conflict explains why numerous legislatures have provided religious or faith defences to GLBT hate speech provisions.<sup>246</sup> In 2002, Imam el-Moumni escaped liability for denouncing homosexuality as a ‘contagious disease’ by invoking religious freedom.<sup>247</sup> Such a response is common under the ‘balancing of rights’ response to conflicts.<sup>248</sup>

Another frequent reaction to the contest between GLBT hate speech and religious freedom is to distinguish words from actions, thereby regulating religious expression in some situations.<sup>249</sup> The Supreme Court of Canada employed this approach in *Trinity Western University v British Columbia College of Teachers*.<sup>250</sup> Freedom of religion includes the right to believe that same-sex conduct is immoral, but not to act on those beliefs by discriminating against practising GLBT.<sup>251</sup> Gonthier and Bastarache JJ for the minority in *Chamberlain v*

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<sup>244</sup> Westbro Baptist Church, n.222 above.

<sup>245</sup> Ibid.

<sup>246</sup> See Anti-Discrimination (Homosexual Vilification) Amendment Act 1993 (NSW), s49ZT and Canadian Criminal Code, s318(4).

<sup>247</sup> Leigh, n.204 above, 390.

<sup>248</sup> Ibid, 389.

<sup>249</sup> Ibid, 395.

<sup>250</sup> [2001] 1 SCR 772.

<sup>251</sup> Ibid.



*Surrey School District No. 36*<sup>252</sup> endorsed this distinction. Moreover, UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief 1981 guarantees the right to freedom of religion, while allowing religious manifestations to be limited if necessary to protect social order or the rights and freedoms of others.<sup>253</sup> These approaches minimise the incompatibility of religion and homosexuality.

Yet, once again, the word/action distinction fails to account for the harm caused by hate speech. If religious communities are entitled to publicly advocate for the condemnation of homosexuality, and thereby incite hatred towards gays and lesbians, prejudice becomes more likely. In such an environment, homophobia will inevitably flourish. Arguably the balancing of rights approach is more appropriate.

Under this approach, it is unclear whether religious freedom or the right to equality, compromised by hate speech, should prevail. While some jurisdictions employ a faith defence,<sup>254</sup> the arguments for excluding such a defence are more convincing. Faulkner argues most hate speech targeting GLBT is not clothed in religious rhetoric.<sup>255</sup> Yet, research suggests social morality bears a strong correlation to religious beliefs, even when individuals are not religious themselves.<sup>256</sup> Perhaps the more a religious group advocates for the hatred of GLBT, the more likely it is that society as a whole will adopt such a sentiment. Further, if

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<sup>252</sup> [2002] 4 SCR 710.

<sup>253</sup> Article 1(1) and 1(3). This declaration was adopted by the GA under resolution 36/55, 36 UN GAOR.

<sup>254</sup> For example see: New South Wales, the Anti-Discrimination (Homosexual Vilification) Amendment Act 1993, s49ZT.

<sup>255</sup> Faulkner, n.221 above, 11.

<sup>256</sup> Amy Adamczyk and Cassidy Pitt, "Shaping Attitudes Towards Religion: The Role of Religion and Cultural Context" (June 2009) *Social Science Research*, vol. 38, issue. 2, 338-351. accessed online at Science Direct, [http://www.sciencedirect.com/science?\\_ob=ArticleURL&\\_udi=B6WX8-4VDS892-1&\\_user=100241&\\_rdoc=1&\\_fmt=&\\_orig=search&\\_sort=d&\\_docanchor=&view=c&\\_searchStrId=1018248244&\\_rerunOrigin=scholar.google&\\_acct=C000007718&\\_version=1&\\_urlVersion=0&\\_userid=100241&md5=762388d16d32df31917c2ce466783f93](http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6WX8-4VDS892-1&_user=100241&_rdoc=1&_fmt=&_orig=search&_sort=d&_docanchor=&view=c&_searchStrId=1018248244&_rerunOrigin=scholar.google&_acct=C000007718&_version=1&_urlVersion=0&_userid=100241&md5=762388d16d32df31917c2ce466783f93).

religious freedom is absolutely protected, an increasing number may invoke religious beliefs to justify their extreme expression. Meanwhile, GLBT hate speech will continue oppress its victims. Finally, the contest between rights may be largely illusory. Hate speech provisions do not prevent the expression of mere opinion, for example that homosexuality is sinful. The focus is on expression so radical that it incites contempt. A faith defence would completely undermine the principles underlying hate speech legislation in exchange for absolute defence to religious freedom.

#### 5.6 Is GLBT conduct inherited or learned?

A further argument against the extension of hate speech provisions, and one often adopted by religious adherents, is that homosexuality is a lifestyle choice. While the regulation of racial hate speech can be justified because race is predetermined at birth, the law does not traditionally protect people from the criticism based on their way of life.<sup>257</sup> However, scientists have failed to reach a consensus on whether sexual orientation is genetically predetermined or not.<sup>258</sup> The most recent studies indicate at least some correlation between genetic predisposition and sexuality. Iemmola and Camperio argue genetic factors linked to the X chromosome influence homosexuality.<sup>259</sup> Furthermore, Levay and Hamer speculate that size of the hypothalamus in a man's brain influences sexuality.<sup>260</sup> By studying brain

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<sup>257</sup> Faulkner, n.221 above, 12.

<sup>258</sup> *Sawyers and others v TVNZ*, Broadcasting Standards Authority, Decision 1996- 155, 14<sup>th</sup> November 1996.

<sup>259</sup> AC Cianni, F Iemmola, SR Blecher, "Genetic factors increase fecundity in female relatives of bisexual men as in homosexuals", (2009) *Journal of Sexual Medicine*, Vol.6, issue 9, 449.

<sup>260</sup> Simon Levay and Dean H. Hamer, "Evidence for a Biological Influence in Male Homosexuality" (May 1994) *Scientific American*, 22.

features determined at birth, Ivanka Savin also concluded that sexual orientation is an inherited characteristic.<sup>261</sup> Homosexuality may therefore be involuntary.

Nevertheless, in *King-Ansell*, Woodhouse J stated, “it does not follow that the identifying characteristics must be genetically determined at birth”.<sup>262</sup> Hence, the Court of Appeal saw Judaism as a personal choice. If sexual orientation is a learned characteristic, this may not preclude the protection of GLBT from hate speech.

## 5.7 Conclusion

The United Kingdom, Queensland, New South Wales and Canada outlaw GLBT hate speech. Such jurisdictions have recognised the harm suffered by GLBT as a result of such expression. New Zealand is not immune from this tradition of vilification. The recognition homosexuality as a defaming characteristic under the law of defamation, speaks volumes about New Zealand’s social attitude toward sexual minorities. Even ex-All Black, Jeff Wilson, was deeply offended when accused of being gay by an editorial.<sup>263</sup>

Given this social background, sexual orientation should be a prohibited ground on which to incite hatred. A faith defence would undermine the entire purpose of hate speech legislation. Furthermore, whether sexual orientation is determined by nature or nurture is immaterial to the regulation of homophobic expression.

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<sup>261</sup> Andy Cochlan, “Gay or Straight, its Determined at Birth”, (21 June 2008) *New Scientist*, 10. The study found that homosexuals’ brain possessed the same characteristics as the brain of heterosexual members of the opposite sex.

<sup>262</sup> n.92 above, at page 538.

<sup>263</sup> Knight, n.202 above, 249.

## Chapter 6- disability hate speech

People with physical, mental and cognitive impairments represent 10% of the global population, and are therefore the largest minority.<sup>264</sup> Despite the vulnerability with disability, there is little global support for the proposition that hate speech legislation should protect this group. No Commonwealth country has prohibited disability hate speech. Yet, this is not decisive. According to the Queen's speech, the UK Criminal Justice and Immigration Bill 2008 was meant to include disability as a target group protected from hate speech.<sup>265</sup> While this intention did not manifest itself in the resulting legislation, it nevertheless indicates that the issue is on the radar of the UK legislature.

The Convention on the Rights of People with Disabilities further recognises that the rights of individuals with disabilities deserve special protection. The social stigma involved compromises the ability of disabled people to fully enjoy their fundamental freedoms.<sup>266</sup> As a party to this Convention, New Zealand has agreed to combat prejudice against persons with disabilities by promoting positive perceptions and greater social awareness of impairments.<sup>267</sup> Article 21 also guarantees the right of disabled people "to seek, receive and impart information and ideas on an equal basis with others".

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<sup>264</sup> Convention on the Rights of Persons with Disabilities, Some facts about persons with disabilities, 2006 <http://www.un.org/disabilities/convention/facts.shtml>, last accessed 2.09.09.

<sup>265</sup> S.Aspris, "hate crime- we know it happens but how can we stop it?" (2008) *Community Living*, vol. 21, issue. 4, p13.

<sup>266</sup> Convention for the Rights of People with Disabilities, preamble.

<sup>267</sup> Convention on the Rights of Persons with Disabilities, Article 8(a)(ii). Convention on the Rights of Persons with Disabilities, n.269 above.

Arguably, the Convention compels states to regulate hate speech where it projects a negative image of disabled people, and compromises their ability to communicate equally with others. The UN recognises that those with impairments are more vulnerable to violence and abuse.<sup>268</sup> Provided hate speech towards the disabled exists, New Zealand may be implicitly compelled to outlaw it.

The Government's Disability Strategy reflects aspirations of the Convention as a "powerful tool for change".<sup>269</sup> Stigma, prejudice and discrimination characterise the ignorance exhibited by many. In April 2001, the Government vowed to take steps to achieve a fully-inclusive society by breaking down the social barriers that cause disability. The Government's objectives include developing national and local anti-discrimination policies, and ensuring the rights of disabled people by promoting self-advocacy. Perhaps equal social participation of people with disabilities necessitates the prohibition on hate speech to neutralise the public forum.

### 6.1 The argument for prohibiting religious hate speech

Hate speech directed at the disabled is more subtle than other forms of hate propaganda. There are no organised groups advocating contempt against the handicapped.<sup>270</sup> In fact, the problem may only be visible to those targeted by the expression. Perhaps this explains why James Weinstein believes:

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<sup>268</sup> Convention on the Rights of Persons with Disabilities, n.269 above.

<sup>269</sup> Robyn Hunt, "Disabled People Face Discrimination", Human Rights Commission, <http://www.hrc.co.nz/home/hrc/newsandissues/disabledpeoplefacediscrimination.php>, 10.06.09.

<sup>270</sup> Mark Sherry, "Don't ask, tell or respond: silent acceptance of disability hate crimes", 8.01.03, <http://www.wwda.org.au/marksherry2.pdf>, 08.01.03, 3.

“There is not nearly the same reason to try to use the force of law to eradicate ‘hate speech’ against [the disabled]. People nowadays simply do not hate the mentally retarded or physically disabled in the way that too many people hate blacks, Jews, or gays.”<sup>271</sup>

Ian Cram agrees that it is “far from certain” that a pressing social need exists to justify the regulation of disability hate speech.<sup>272</sup>

On the other hand, there is abundant evidence to suggest a problem exists. In the media, disability hate speech is rampant. In recent years, there have been numerous complaints about use of the word “retard” in popular culture. The movie, *Tropic Thunder*, was heavily criticised for the gratuitous use of the word to portray characters with learning difficulties.<sup>273</sup> It includes a character called Simple Jack, played by Ben Stiller, who is constantly referred to as a retard. Moreover, in 2004, the Broadcasting Standards Authority received numerous complaints about a Black Eyed Peas’ song entitled, “Let’s Get Retarded”.<sup>274</sup> While the complaint of indecency and bad taste was dismissed, The Edge radio station nevertheless

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<sup>271</sup> Private communication of 24 December 2007, on file with author in E Heinze, “Cumulative jurisprudence and human rights: the examples of sexual minorities and hate speech”, School of Law, Queen Mary, London, 1 April 2009, (April- June 2009) *The International Journal of Human Rights*, Vol. 13, No.s 2–3, 200.

<sup>272</sup> Ian Cram “hate speech and disabled people” in Anna Larson and Caroline Gooding, *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing Ltd, 2005), 79.

<sup>273</sup> Walkingisoverrated: New Zealand Disability News, Views and Reviews, “Is the word ‘retard’ up there with ‘Nigger’?”, 27<sup>th</sup> August 2008, <[http://walkingisoverrated.com/wp-content/uploads/2008/08/tropic\\_thunder.jpg](http://walkingisoverrated.com/wp-content/uploads/2008/08/tropic_thunder.jpg) \o>, last accessed 28.09.09.

<sup>274</sup> BSA Complaint 2004-105, <http://www.bsa.govt.nz/decisions/2004/2004-105.htm>, 02.09.04.

stopped playing the version that used the word “retard”. This reflected the Authority’s view that the song lyrics had “seriously upset, offended and adversely affected many listeners”.<sup>275</sup>

Timothy Shriver, Chairman of the American Special Olympics, and others label this term hate speech because it perpetuates the image that disabled people are second-class citizens worthy of ridicule.<sup>276</sup> Patricia E Bauer likens “the r-word” to racist and sexist slurs.<sup>277</sup> Words like ‘idiot’, ‘moron’, ‘spastic’, ‘spas’, ‘lame’, ‘psycho’, ‘loony’ and ‘schizo’ have similar effects.<sup>278</sup>

Hate speech towards disabled people in the media has a reverberating effect on society. Young people are particularly susceptible to media influence. Perhaps this explains why phrases such as “you are so retarded”, are common in schools.<sup>279</sup> Furthermore, many children with physical and mental impairments report being called, ‘mutant’, ‘drongo’ and ‘dipstick’ by their peers.<sup>280</sup>

Yet, young people are not the only ones to adopt such attitudes towards disabled people. Similar behaviour by adults arguably condones playground expressions. In Germany, a man disabled man committed suicide after he was reminded “under Hitler you would have been

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<sup>275</sup> Allegations of Gary Watt, the Complainant, that the Authority condoned even if the song did not intend to offend anyone.

<sup>276</sup> [Walkingisoverrated.com](http://walkingisoverrated.com), n.273 above. Also see: Kyron, The special parent.com, “the r-word isn’t just hurtful, its hate speech” <http://thespecialparent.com/2008/08/09/hate-speech-and-tropic-thunder/>, 09.08.08.

<sup>277</sup> Patricia E Bauer, “Tropic Thunder- Once Upon a Time there was a retard”, News and Commentary on Disability Issues, 1<sup>st</sup> August 2008, <http://www.patriciaebauer.com/2008/08/01/once-upon-a-time/>, last accessed 14.09.09.

<sup>278</sup> E Heinze, n.271 above, 199.

<sup>279</sup> Robin M Smith and Mara Sapon-Shevin , “Disability Humour, Insults and Inclusive Practice” (2008-2009) *Social Advocacy and Systems Change*, vol. 1(2), 2.

<sup>280</sup> Mike Constantine (Producer) *Sticks and stones: a video about name calling and putdowns*, 1995, NZ.

gassed” and “you are living off our taxes”.<sup>281</sup> Moreover, Mencap details the experience of a female in Suffolk who, while travelling on a bus, was told “you’re spastic, you can’t look after yourself or go anywhere by yourself, you’re a spastic and spastic people should have people looking after you”.<sup>282</sup> In 1999, Glenn Hoddle, the English Football Association Manager, suggested disabilities reflect bad karma from former lives and were therefore warranted.<sup>283</sup> A similar sentiment was expressed towards paraplegic, Nicholas Steenhout, who was told, “God punished you and I hope he punishes you some more”.<sup>284</sup> These cases are not exceptional. Mencap reports 88% of people with intellectual disabilities have been bullied in the past year. Moreover, this may underestimate the problem, with many incidents going unreported.<sup>285</sup> While, bullying includes, but is not limited to serious verbal barrages, this nevertheless highlights a significant social problem.

Even more problematic is the link between such expressions of hatred and hate-motivated crimes. The vulnerability of those with physical, mental and cognitive impairments is tested through verbal harassment, which then escalates to physical violence when their weakness is confirmed.<sup>286</sup> In Europe a blind woman was told “you people belong in concentration camps” before her stick was thrown down an escalator.<sup>287</sup> Even more disparaging is the case of Eric Krochmaluk, a cognitively disabled man, who was kidnapped, choked, beaten, burned with cigarettes, taped to a chair, had his eyebrows shaven and was abandoned in a

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<sup>281</sup> Richard Light, “A real horror story: the abuse of disabled people’s human rights”, *Disability Awareness in Action Human Rights Database Report 2002*.

<sup>282</sup> Mencap Campaigns Department, *Living in fear: the need to combat the bullying of people with a learning disability*, (London: Mencap, June 1999), 14.

<sup>283</sup> E Heinze, n.294 above, 199.

<sup>284</sup> Mark Sherry, n.271 above, 5.

<sup>285</sup> Ian Cram, n.272 above, 70.

<sup>286</sup> Mencap, n.282 above, 12.

<sup>287</sup> Cram, n.272 above, 65.



forest.<sup>288</sup> The frequency of such incidents would likely decrease if ideas of disdain could be displaced from society by hate speech legislation.

Discrimination towards disabled people may be similarly affected by hate speech legislation.<sup>289</sup> In June 2009, the Human Rights Commission reported found 28% of people with disabilities had experienced explicit discrimination.<sup>290</sup> Furthermore, in 1999 disability was the most common ground of discrimination reported to the Human Rights Commission.<sup>291</sup> These statistics may explain why the Human Rights Commission advocated for the inclusion of disability in hate speech provisions.<sup>292</sup> Legislation prohibiting incitement to hatred may be able to modify social attitudes in a way that has positive repercussions for anti-discrimination initiatives.

## 6.2 Marginalisation

The historic marginalisation experienced alongside expressions of hatred provides another compelling reason to prohibit disability hate speech. Like Jews and Homosexuals, Hitler alleged the disabled threatened Aryan purity.<sup>293</sup> The euthanasia programme, code-named T4, was responsible for the death of over 100,000 impaired people who were condemned as ‘unworthy of living’.<sup>294</sup> Like the absence of hate speech legislation protecting GLBT, it is

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<sup>288</sup> Sherry, n.271 above, 5.

<sup>289</sup> Kryon, The special parent.com, n. 276 above. Also Mencap, n.282 above, 5.

<sup>290</sup> Hunt, n.269 above.

<sup>291</sup> Minister for Disability Issues, *NZ Disability Strategy: Making a World of Difference* (Wellington: Department for Disability Issues, April 2001), 7.

<sup>292</sup> Human Rights Commission, n.42 above.

<sup>293</sup> Cram, n.272 above, 68.

<sup>294</sup> Light, n.281 above. Cram, n.272 above, 68.

disconcerting that handicapped people remain susceptible to hate speech considering their similar historical social experience to Jews.

### 6.3 The problem of definition

An objection to the prohibition of disability hate speech is circumscribing exactly what constitutes a “disability”. Care must be taken not to adopt an overly broad definition to prevent claims that the legislation cannot be demonstrably justified, under s5 NZBORA. However, disability is now widely accepted to be a social construct.<sup>295</sup> Hence, its meaning is heavily dependent on social context and can change over time. Anne Bray notes that issues of permanency, how the condition was acquired, and cut-off points continue to permeate debates on the definition of mental impairment.<sup>296</sup>

Nevertheless, the accepted definition of mental disability has endured since 1992, when it was first formulated by the American Association for Mental Retardation. Therefore, ‘mental impairment’ imposes:

“substantial limitations in present functioning. It is characterised by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use,

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<sup>295</sup> Anne Bray, *Definitions of intellectual disability: review of the literature prepared for the National Advisory Committee on Health and Disability to inform its project on services for adults with intellectual disability* (Dunedin: Donald Beasley Institute, June 2003), 1.

<sup>296</sup> Ibid.

self-direction, health and safety, functional academics, leisure and work.

Mental retardation manifests itself before age 18.<sup>297</sup>

The UK Disability Discrimination Act, Americans with Disability Act and the Convention for the Rights of People with Disabilities frame 'physical impairment' in similar terms. It must be long-term, and hinder the individual's ability to carry out day-to-day activities,<sup>298</sup> substantially limit one or more major life activities,<sup>299</sup> or interfere with social participation.<sup>300</sup> All focus on extensive social exclusion. This high threshold ensures the definition of 'disability' is sufficiently narrow to justify the outlawing of disability hate speech.

#### 6.4 Is legislation the best way to deal with this problem?

There is an argument that terms like 'retard' and 'psycho' are in such common usage that prohibiting disability hate speech would require heavy censorship.<sup>301</sup> Hence, there are more appropriate ways to deal with expressions of contempt directed at those with physical and mental impairments. However, the innocuous use of such words are not the focus of hate speech legislation. Only when 'retard' is incorporated into a hate-inducing dialogue is it classified as hate speech. Presuming only extreme cases of speech inciting contempt continue to be prohibited; the threat of serious censorship is minimal.

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<sup>297</sup> Luckasson et al, *The Criminal Justice System and Mental Retardation* (Baltimore: PH Brookes Publishing Co. 1992), 1.

<sup>298</sup> Disability Discrimination Act (UK) 2005, s2(1).

<sup>299</sup> Americans with Disabilities Act 1990, s3.

<sup>300</sup> Convention on the Rights of People with Disabilities, article 2.

<sup>301</sup> Heinze, n.271 above, 201.

The International Association of Chiefs of Police provides recommendations to tackle hate speech, which are not limited to legislative means.<sup>302</sup> These include increasing awareness about prejudice and intolerance, providing support for victims, and implementing school programmes to educate about diversity in the hope that society will purge itself of these evils. Yet, the Association also recognises that legal sanctions are necessary to punish the perpetrators of hate speech and deter others. Apparently, education alone is not enough.

This does not automatically presume that incitement to hatred provisions should be extended to protect the handicapped. Ian Cram suggests other enactments, namely the UK Harassment Act 1977, can effectively deal with disability hate speech.<sup>303</sup> Section 1 prevents a person pursuing a course of conduct which knowingly amounts to harassment. ‘Course of conduct’ requires there to have been at least two incidents. The New Zealand Harassment Act 1997 has similar requirements.<sup>304</sup> However, arguably this does not address the true harm of hate speech. The oppression and silencing resulting from hate speech, is not dependent on repetitive conduct by one person. Rather, the same harm is inflicted if two people make separate hate-inducing comments. Furthermore, the cardinal aim of hate speech legislation is to protect those with scant political influence.<sup>305</sup> The provisions of the Harassment Act cannot adequately address this.

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<sup>302</sup> International Association of Chiefs of Police (1998) in Sherry, n.270 above, 5.

<sup>303</sup> Cram, n.272 above, 77.

<sup>304</sup> Harassment Act 1977, s3, defines “harassment” in terms of “a pattern of behaviour”.

<sup>305</sup> Heinze, n.271 above, 199.

## 6.5 Conclusion

Despite contrary assertions, disability hate speech represents a serious, albeit more subtle, problem. Some continue to blame those with physical and mental disabilities for societal problems and advocate distain towards them. While commonly used terms like ‘retard’ and ‘psycho’ alone may not incite hatred, other disability slurs undoubtedly do. Given the historical treatment of disabled people as unworthy, and the relatively stable definitions of mental and physical impairment, the prohibition of disability hate speech is a rational response to a significant social harm. Incitement to hatred legislation would be the most compelling instigator of change in social attitudes towards the physically and mentally impaired.

## Conclusion

Hate speech does nothing to further the rationales behind freedom of speech. The oppressive silencing caused by extreme expressions of distain has a reverberating effect on democracy, the marketplace of ideas and personal autonomy. Hence, resistance to hate speech legislation on this basis is fundamentally incoherent. Associated harm cannot preserve open discussion for all sections of society. Therefore, hate speech can distort what the democratically accountable interpret as public opinion. Accordingly, hate speech legislation represents a justifiable limitation on freedom of speech.

Sections 61 and 131 Human Rights Act 1973 are New Zealand's primary hate speech provisions. They outlaw incitement to hatred based on "colour, race, ethnic or national origin". Other legislation, including the FVPCA, Crimes Act 1961 and Summary Offences Act, all have limited capacity to deal with hate speech. Some provisions rely on resulting action and others are limited to expressions in the media. None address the problem of hate speech generally. The Broadcasting Standards Authority, New Zealand Press Council and Advertising Standards Authority suffer similar flaws. Thus, a lacuna exists in New Zealand law whereby some minority groups are left vulnerable to expressions of hatred.

Furthermore, this gap in hate speech legislation cannot be justified by resorting to New Zealand's international obligations. Article 20 ICCPR requires state parties to outlaw expression that incites both racial and religious hatred. Given that the Human Rights Act only prohibits racial hate speech, New Zealand's reservation that current legislation already gives effect to article 20 is flawed. Were hate speech provisions framed around CERD

obligations, the limited target groups covered may be more defensible. As it stands, New Zealand is in violation of international treaties.

Article 20 alone provides a strong justification for extending the Human Rights Act provisions to include religious hate speech. The approach adopted in other jurisdictions supports this conclusion. The United Kingdom, Canada and Australian states all prohibit expressions of distain directed at religious groups. Furthermore, judicial interpretations of existing provisions in *King-Ansell v Police*<sup>306</sup> have already gone some way in expanding their scope beyond their literal interpretation. The need to prohibit religious hate speech is also greater since the recent increase in religious profiling.<sup>307</sup>

The case for regulating homophobic hate speech is almost equally as compelling. While it lacks the endorsement of a UN Human Rights Commission Resolution, the United Kingdom, Canada and numerous Australian states have enacted homophobic hate speech legislation. Moreover, the harm caused by such expression further rationalises its prohibition. GLBT people are commonly associated with society's most undesirable people.<sup>308</sup> Furthermore, evidence suggesting sexual orientation is a partly biological characteristic, makes it analogous to race, and therefore strengthens the argument for prohibition of homophobic hate speech.

Unlike religious and GLBT, disability hate speech receives little attention. Perhaps the subtlety of the denigration explain this. Words such as 'retard' are so commonly used that

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<sup>306</sup> n.92 above.

<sup>307</sup> Hare, n.164 above, 306.

<sup>308</sup> Knight, n.202 above, 20.

the use of such words in hate dialogue can be overlooked.<sup>309</sup> There is also evidence that disabled members of our society tolerate more explicit expressions of hatred. Yet, especially limitations associated with disability may prevent such incidents being reported as readily.<sup>310</sup> While some argue ‘disability’ is too broad to justify regulation, definitions of both physical and mental impairment are relatively stable. Accordingly, extension of the Human Rights Act to include disability is probably demonstrably justified.

Hate speech legislation should be expanded to shelter religious groups, GLBT and the disabled. The scope of this paper prevents an exhaustive analysis of all minority groups that may require similar protection. Yet, in protecting race alone, it is apparent that ss61 and 131 Human Rights Act are inadequate. Immediate legislative attention is needed to address the profound harm associated with hate speech.

*“Hate cannot drive out hate; only love can do that. Hate multiplies hate, violence multiplies violence, and toughness multiplies toughness in a descending spiral of destruction....The chain reaction of evil--hate begetting hate, wars producing more wars-- must be broken, or we shall be plunged into the dark abyss of annihilation.”<sup>311</sup>*

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<sup>309</sup> Smith, n.279 above, 2.

<sup>310</sup> Cram, n.272 above, 70.

<sup>311</sup> Martin Luther King Jnr, *Strength to Love* (New York: Harper and Rowe, 1963) 37.



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