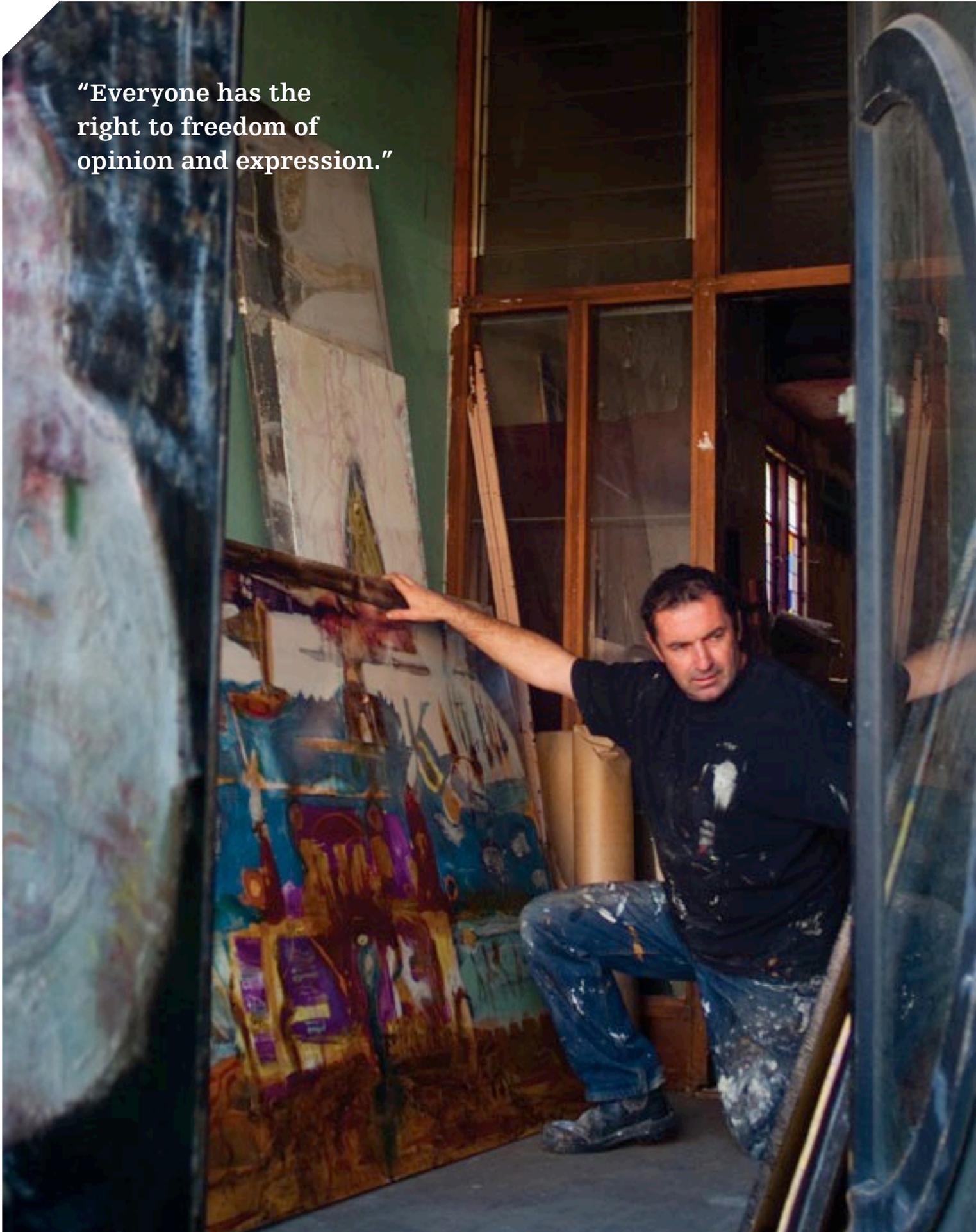


9. Freedom of Opinion and Expression

Wāteatanga o te Whakaaro me te Whakapuaki

“Everyone has the right to freedom of opinion and expression.”



Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Universal Declaration of Human Rights, Article 19

Introduction

Tīmatatanga

WHAT IS FREEDOM OF EXPRESSION?

Freedom of opinion and expression are rights which uniquely enable us to promote, protect and fulfil all other human rights. The rights enable us to expose, communicate and condemn human rights abuses. They also permit the celebration of human rights achievements.

Freedom of expression embraces free speech, the sanctity of an individual's opinion, a free press, the transmission and receipt of ideas and information, the freedom of expression in art and other forms, the ability to receive ideas from elsewhere, and the right to silence.

Freedom of expression is one of a number of mutually supporting rights (including freedom of thought, of association and of assembly, and the right to vote) and is integral to other civil and political rights, such as the right to justice, and the right to take part in public affairs. Equally, the right to freedom of expression impacts on social and cultural rights, such as the right to education.

Debate about freedom of expression is both wide-reaching and constantly evolving, in response to the development of the human mind, technological innovation and a globalised media, community practices and standards, and political and judicial responses. More constant is the fundamental idea that freedom of expression is designed to protect and enhance democratic ideals.

Three overlapping arguments have historically been used to advance the right to freedom of expression: the search

for truth, democratic self-government, and autonomy and self-fulfilment.

The search for truth relates to the competition of arguments and ideals that leads to the discovery of truth. When all ideas have been freely heard, "the jury of public opinion will deliver its verdict and pick the version of truth it prefers".¹

The role of freedom of expression in democratic self-government is best expressed by Lord Steyn:

The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice in the country.²

The democratic rationale has been prominently used in many major court decisions in recent years in the United States, Australia, the United Kingdom and New Zealand. For example, in cases involving former Prime Minister David Lange, in Australia, New Zealand and the UK, the Courts recognised that the democratic rationale for freedom of expression requires a limitation on defamation laws so that freedom of speech about public and elected officials is not chilled by potential liability.³

Others have argued that freedom of expression is an end in itself, not because it assists in truth-finding nor in pursuing democracy, but because it sustains the autonomy and self-fulfilment of individuals in society. This is why art and literature are routinely protected under the umbrellas of freedom of expression, and why some oppose censorship and suppression as intrinsically negative and doing more harm than good.

Freedom of expression has always been subject to limitations. Each of the arguments for freedom of expression accommodate some restrictions. For example, while the search for truth has permitted tolerance for offensive and unsettling ideas, perjury and false advertising are

1 Hargreaves R (2002), *The first freedom: A history of free speech*. Phoenix Mill, UK: Sutton Publishing Ltd. p 302

2 R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115 at 126 (HL)

3 Lange v Australian Broadcasting Corporation (1997), 189 CLR 520; Lange v Atkinson [1999] UKPC 46, [2000] 1 NZLR 257 (PC)

penalised. There may, too, be restrictions on the ‘time, manner and place’ of expression, such as the screening times of adult-only movies on public television. The autonomy argument similarly permits restrictions in the interests of the autonomy of others.

International context

Kaupapa ā taiao

LEGAL SOURCE

The most significant international legal source of the right to freedom of expression is set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR):

1. **Everyone shall have the right to hold opinions without interference.**
2. **Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.**
3. **The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**
 - a) **for respect of the reputation or rights of others**
 - b) **for the protection of national security or of public order, or of public health or morals.**

WHAT DOES ARTICLE 19 MEAN?

The right to freedom of opinion in paragraph 1 is a right to which the covenant permits no exception or restriction. It underlines that freedom of opinion is of a different

character because it is a private matter. “Everyone” means natural persons (which includes public servants, teachers, members of the defence forces) and legal persons, such as companies, trusts and incorporated societies.

The right to freedom of expression in paragraph 2 is the freedom to communicate opinions, information and ideas without interference, no matter what the content. Content neutrality, the idea that expression should not be restricted because of its message, ideas, subject matter or content, is a bedrock principle. This right protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. The New Zealand High Court has stated that freedom of expression guarantees “everyone [the right] to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community”.⁴

The dual aspect of freedom of expression both acknowledges individual rights (that no one be arbitrarily restricted in expression) and implies a collective right to receive any information whatsoever and have access to the thoughts expressed by others.⁵ Expression need not be in words and may include symbolic expression, including actions and physical conduct.⁶

The freedom to seek information means that a person has a right of access to information, subject only to prescribed limitations, and the freedom to receive information basically prohibits a government from restricting that freedom. The freedom to impart or convey opinions to others implies that the right to expression includes dissemination, for example in newspapers or the mass media. “Information and ideas of all kinds” embraces pluralism of thought and tolerance for unwelcome, new and challenging ideas. “Other media” includes radio, television, the Internet, mobile telephones, theatres and movies, and anticipates future media developments.

In his submission to the Commission, media lawyer Steven Price noted, with regard to the right in paragraph 2 to “seek, receive and impart” information, the increasing international recognition that this includes the right

4 Solicitor-General v Radio NZ Ltd [1994, 1NZLR 48 at 59

5 Jayawickrama, N. (2002), *The judicial application of human rights law: National, regional and international jurisprudence*. Cambridge, UK: Cambridge University Press

6 Rishworth P, Huscroft G, Mahoney R and Optican S (2003), *The New Zealand Bill of Rights*. Melbourne, Australia: Oxford University Press

of access to information held by the Government. The Internet enormously increases the ability for such information to be made available without the need for any request for access being made.

Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason, certain restrictions on the right are permitted; these may relate either to the interests of other persons or to those of the community as a whole.

However, in a general comment on Article 19, the Office of the United Nations High Commissioner for Human Rights states that when a state party imposes certain restrictions on the exercise of freedom of expression, these may not put the right itself in jeopardy.⁷ The necessity for any restrictions must be convincingly established and narrowly interpreted. In his report to the Human Rights Council in 2010, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression proposed a series of principles that will help determine what constitutes a legitimate restriction or limitation on the right to freedom of opinion and expression, and what constitutes an 'abuse' of that right.⁸

RELATED INSTRUMENTS AND INTERNATIONAL LAW

Other international instruments relevant to the right to freedom of expression include the United Nations Convention on the Rights of the Child (UNCROC), which uses almost the same words as the ICCPR, but specifically in relation to children (Article 13). The Convention on the Elimination of Racial Discrimination (CERD) also recognises the significance of freedom of expression (Article 5(d)(viii)).

Both these conventions refer to limitations on the right to freedom of expression. This indicates that certain categories of expression, such as pornography and speech inciting racial violence, are more likely to be subject to reasonable limitations than others, such as political or social speech.

Article 17(e) of UNCROC urges the encouragement of the development of appropriate guidelines for the protection of the child from information and material injurious to the child's wellbeing, bearing in mind Articles 13 and 18 concerning parental responsibilities.

In 2002, New Zealand signed the Optional Protocol to UNCROC on the Sale of Children, Child Prostitution and Child Pornography. It seeks to criminalise the production, dissemination, possession and advertising of child pornography. This was a response to international concern about the growing availability of child pornography on the Internet and other evolving technologies.

Racial incitement is specifically addressed in CERD, which requires that states declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, and all incitement to racial discrimination, as well as all acts of violence (or incitement to such acts) against any race or group of persons of another colour or ethnic origin.

The UN Committee on the Elimination of Racial Discrimination, created by CERD, has said that the prohibition of dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression.

The newest international convention, the Convention on the Rights of Persons with Disabilities (CRPD), in Article 21, emphasises accessibility. The convention obligates State parties to take all appropriate measures to ensure that disabled people can exercise freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and "through all forms of communication of their choice".

Communication is expressly defined in the CRPD as including languages, display of text, Braille, tactile communication and large print. Accessible multimedia and 'language' is defined as including spoken and signed languages and other forms of non-spoken languages.

⁷ Office of the High Commissioner for Human Rights (1983), *General Comment No. 10: Freedom of expression* (Article 19), 19th session – see para 4. Accessible online at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/2bb2f14bf558182ac12563ed0048df17?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument). Accessed 16 November 2010.

⁸ United Nations Human Rights Council (2010), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 14th session, A/HRC/14/23, 20 April 2010

Article 21 of the CRPD refers to the provision of information for disabled people in accessible formats and technologies, in a timely manner and without additional cost. It also promotes the use of sign languages and Braille in official interactions. It urges private entities which provide services to the general public, including through the Internet, to provide information in accessible and usable formats. The CRPD encourages the mass media, including Internet providers, to make their services accessible, and wants the use of sign language recognised and promoted.

While the significance of the right to freedom of expression has been treated differently in national jurisdictions, a broad consensus emerges from the international human rights framework: while some restrictions on expression (not opinion) are proper, there is a core to freedom of expression relating to the holding of opinions that should not be restricted at all. Bills of rights generally affirm these basic principles.

RECENT DEVELOPMENTS

Two specific global issues are currently impacting on how freedom of opinion and expression are manifested as rights and responsibilities in modern daily life.

The first is the rise and ubiquity of the Internet. A recent global survey of 27,000 adults in 26 countries showed that four in five adults believe access to the Internet is a fundamental right.⁹ The Internet and other border-defying high and low technologies have prompted vigorous debate about the extent to which governments should regulate them, if at all. Issues such as the State's involvement in Internet censorship in China, the extent to which the State moves to protect vulnerable children from pornography on the net, country bans on social networking sites such as Facebook, and the concerns about Google Earth and its impact on privacy, security and terrorism are provoking widespread public, media and political debate.

Some Internet advocates hold the view that it is simply impractical to attempt to legislate when new technology outstrips the law and its effects in day-to-day application. Others say that Internet-based issues, such as equity of

access, privacy, fraud, child pornography, and the right to security, require the State to regulate both rights and responsibilities. New Zealand is not immune from this debate.

The Institute for Human Rights and Business listed "Ensuring freedom of expression, privacy and security on the Internet" at eighth on its list of the top 10 emerging business and human rights challenges for 2010. It stated:

Billions of people use the Internet each day. Security, openness and privacy on the Internet have become critical issues as a result of the explosive growth in online traffic around the world. The implications for human rights are enormous and will require further engagement between governments, business and civil society in the years ahead.¹⁰

Access to the Internet also raises issues of inclusion, domestically and globally. The digital divide adds to the gap separating wealthy countries from poor ones, impacts on rural communities and disadvantages many women in the home.

The second worldwide phenomenon is the ongoing tension between freedom of expression and some forms of religion and belief. A 2008 amendment to a resolution on freedom of expression at the UN Human Rights Council required the UN Special Rapporteur on Freedom of Expression "to report on instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination". There has been fierce criticism from some countries and sections of civil society, for example the International Humanist and Ethical Union, that the new mandate turns the role on its head. Canada, which had historically sponsored the special rapporteur, said that instead of promoting freedom of expression, the rapporteur would be policing its exercise, and withdrew its support as sponsor of the main resolution renewing the mandate.

The UN General Assembly has, for five consecutive years, although with declining support year by year, passed a non-binding resolution calling for "adequate protection

9 'Netizens consider access a human right', *ABC News*, 8 March 2010. Accessed on 16 November 2010 at: <http://www.abc.net.au/news/stories/2010/03/08/2839530.htm>

10 Institute for Human Rights and Business (2010), *Top 10 Emerging Business and Human Rights Challenges for 2010*. Accessed 20 April 2010 from <http://www.institutehrb.org/news/top10for2010/>

against acts of hatred, discrimination, intimidation and coercion resulting from the defamation of religions, and incitement to religious hatred in general.” Sponsored by the 56-nation Organisation of the Islamic Conference, it has been condemned by other countries and some NGOs as laying the foundation for overly broad blasphemy laws. In general, the criticism distinguishes traditional defamation laws, which publish false statements of fact that harm individual persons, from defamation of religions that punish the peaceful criticism of ideas.

In his 2010 UN report, the special rapporteur said criminal defamation laws might not be used to protect abstract or subjective notions or concepts, such as national identity, culture, religion or political doctrine. International human rights law protected individuals and groups of people, not abstract notions or institutions which are subject to scrutiny, comment or criticism. The concept of defamation of religions did not accord with international standards regarding defamation, which referred to the protection of individuals, while religions, like all beliefs, could not be said to have a reputation of their own.¹¹

Both developments, human rights and the Internet and freedom of expression as it intersects with religion, have implications in New Zealand and are specifically referred to later in this chapter.

New Zealand context Kaupapa o Aotearoa

The right to freedom of expression is enshrined in the New Zealand Bill of Rights Act 1990 (BoRA), which states (section 14):

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

The Court of Appeal in *Moonen v Film and Literature Board of Review* said the right is “as wide as human thought and imagination”.¹²

Section 5 of the BoRA provides for limits on freedom of expression, as with other rights:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In its General Comment on Article 19 of the ICCPR, the Office of the UN High Commissioner for Human Rights stated that it is “the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s rights”.¹³

Several pieces of legislation aimed at promoting racial harmony, defending public morals, enhancing social responsibility, protecting children and protecting individual privacy and reputation, limit the scope of freedom of expression in New Zealand. Controversially, recent legislative change in New Zealand restricted political speech in an unacceptable form until it was repealed in 2009.

Because of the breadth of freedom of expression, the remaining part of the chapter concentrates on the balancing of rights and responsibilities in six major areas:

- political speech
- the right to protest
- religion
- race and ethnicity
- hate speech
- the Internet.¹⁴

11 United Nations Human Rights Council (2010), *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 14th session, A/HRC/14/23, 20 April 2010

12 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA)

13 Office of the High Commissioner for Human Rights (1983), *General Comment No. 10: Freedom of expression* (Article 19), 19th session – see para 3. Accessible online at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/2bb2f14bf558182ac12563ed0048df17?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/2bb2f14bf558182ac12563ed0048df17?Opendocument). Accessed 16 November 2010.

14 For a discussion of freedom of expression and censorship and sexually explicit expression; the media and freedom of expression; and freedom of expression and privacy, see Human Rights Commission (2004), *Human Rights in New Zealand Today – Ngā Tika Tangata O Te Motu* (Wellington: HRC), pp 138–146. Accessible online at <http://www.hrc.co.nz/report/chapters/chapter08/expression01.html>

There are two topical issues about specific aspects of freedom of expression that are, or are about to be, the subject of scrutiny. The first is the use of suppression orders by courts and the effect that has on freedom of speech. In October 2010 the Government announced that it was introducing legislation intended to clarify the circumstances in which name suppression orders could be made. The second concerns access to information as provided for in the Privacy Act and the Official Information Act and its local-government equivalent. The Law Commission is conducting a review of privacy values, changes in technology, international trends and their implications for New Zealand civil, criminal and statute law. The Law Commission's review of the Official Information Act and its local-government equivalent is intended to assess the acts to ensure they continue to operate efficiently. The project's focus is on the effective operation of the legislation for members of the public, officials, journalists, researchers and politicians.

POLITICAL SPEECH

The central importance of the right of free speech as the cornerstone of a functioning democracy is widely accepted in law and in practice. For example, Lord Nicholls of Birkenhead, delivering the judgment of the Privy Council in *Lange v Atkinson*, said:

Political debate is at the core of representative democracy. Comment upon the official conduct and suitability for office of those exercising the powers of government is essential to the proper operation of a representative democracy. The transcendent public interest in the development and encouragement of political discussion extends to every member of the community.¹⁵

In this section, freedom of expression relating to the financing of election campaigns and political protest is discussed.

Controversy over freedom of expression in New Zealand politics has recently centred on electoral finance reforms. The Electoral Finance Act 2007 imposed significant restrictions on election campaigns regarding what could

be said, who said it and when it was said. It represented what the Commission called a “dramatic assault” on freedom of expression. The legislation was repealed in 2009, largely in response to a broad political and public consensus that it created unwarranted and unjustifiable limitations on political speech. The Commission, for example, argued that it was a fundamental breach of Article 19 of the ICCPR. Specific concerns related to the stricter regime for election campaigning by third parties and the definition of election advertising, coupled with other restrictions on freedom of speech.

For a period after the repeal, the Electoral Act 1993 was reinstated as holding legislation until a review of electoral legislation could be completed. There was effectively no single definition of election advertising in the reinstated Electoral Act 1993, but rather a number of discrete provisions scattered throughout, which did not address media developments over recent years.

Significant consultation about reform of the electoral finance legislation was undertaken in 2009 to ensure that change was based on a broad consensus among parliamentary parties and the public. In its recommendations to the Government, the Commission urged a definition of election advertising that was clear and uniformly applicable and that outlined clear exceptions for the media and individual Internet users.

The definition of election advertising contained in proposed new legislation, the Electoral (Finance Reform and Advance Voting) Amendment Bill, has the same scope as the definition in the 1993 legislation – that is, campaigning that seeks to influence voting behaviour by encouraging or persuading voters, or appearing to encourage or persuade them to vote in a particular way. It is media neutral and covers both positive and negative campaigning, as well as all forms of communication, including new media. The definition makes it clear that news media coverage, Internet blogging and text messaging, and promotion by electoral agencies are activities not covered by the definition. The reforms, as they relate to election advertising, better address fundamental concerns about freedom of expression and opinion.

¹⁵ *Lange v Atkinson* [1999], UKPC 46 at [6], [2000] 1 NZLR 257 at 260

However, the prohibition on political parties purchasing broadcasting during election time is an unresolved political-speech issue.

THE RIGHT TO PROTEST

Two recent decisions of the courts have given extensive consideration to the right to freedom of expression, affirmed in section 14 of the BoRA, and the right to protest.

In *Brooker v Police*, in a majority decision, the Supreme Court overturned Allistair Brooker's conviction for disorderly behaviour.¹⁶ He had staged a protest outside the home of a police constable whom he believed to have acted unlawfully in obtaining a search warrant against him. The Supreme Court's decision was particularly influenced by the right to freedom of expression.

In *R v Morse*, in a majority decision, the Court of Appeal upheld Valerie Morse's conviction for offensive behaviour for burning a New Zealand flag at the Anzac Day dawn service at the cenotaph in Wellington in 2007.¹⁷ The central issue considered by the court was whether the conviction was consistent with Valerie Morse's right to freedom of expression as set out in the BoRA. On 5 October 2010, the Supreme Court heard Valerie Morse's appeal against the Court of Appeal's decision.

Brooker v Police

Mr Brooker went to the house of a police constable who had previously executed a search warrant on his property. Knowing that she had come off nightshift at around 7am one day, he went to her house at 9am and knocked on her door. When told to leave, he played his guitar and sang protest songs on the footpath, as well as displaying a protest placard. Mr Brooker's conviction for disorderly behaviour was upheld on appeal to the High Court and Court of Appeal, but overturned by a majority in the Supreme Court.¹⁸

The majority in the Supreme Court considered that disorderly behaviour evolves with changing public expectations. The affirmation in the BoRA of the right to freedom of expression forms part of the context in which

to assess the behaviour. For the majority, the behaviour did not cross the threshold that made it disorderly. The Chief Justice expressed it this way: "A tendency to annoy others, even seriously, is insufficient to constitute the disruption to public order which may make restrictions upon freedom of expression necessary."

In her decision in *Morse*, Justice Glazebrook commented on the effect of this case that "it can only be in exceptional and extreme cases that the right of freedom of expression (and particularly the right to protest) can legitimately be curtailed through the medium of the offence of disorderly behaviour, at least when it is exercised in a reasonable manner".¹⁹

R v Valerie Morse

Valerie Morse and others participated in a protest on Anzac Day 2007 at the dawn service in Wellington. As part of the protest, Valerie Morse burnt a New Zealand flag. She was charged with offensive behaviour and convicted after a trial in the District Court. An appeal to the High Court was dismissed.

The Court of Appeal, in a majority decision, dismissed an appeal against the decision of the High Court. The Court of Appeal considered whether burning the flag was protected by the right to freedom of expression and if so, whether the restriction on that right was a reasonable limit.

Justice Arnold, for the majority, concluded that the conviction for offensive behaviour was proper, even though Valerie Morse was exercising her right to free speech, protected by the BoRA, and that right includes such conduct as burning a New Zealand flag. The reasons for reaching this conclusion were:

- Anzac Day is an important commemorative day in the national psyche.
- The flag burning had taken place at the dawn service.
- Burning the flag was capable of being regarded as offensive, given what had been said in *Brooker*, due to the purpose and nature of the dawn service and the type of people who were present.

16 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 (SC)

17 *R v Morse* [2009] NZCA 623, [2010] 2 NZLR 625 (CA)

18 See the decision of Arnold J in *R v Morse* [2009] NZCA 623 at [16], [2010] 2 NZLR 625 at 630–631 (CA)

19 *R v Morse* [2009] NZCA 623 at [82], [2010] 2 NZLR 625 at 644 (CA)

- The flag burning had taken place in conjunction with the blowing of horns and was intended to disrupt the delivery of the major speech at the service.
- The disruption had interfered with the free-speech rights of the speaker and the audience – the right to freedom of speech includes the right to receive information and opinions from others.
- Those attending the service were also exercising their right to freedom of association.
- Valerie Morse's right to freedom of speech was being limited to the means of expression that may be used on such an occasion.

Some commentators have observed that the application of the BoRA by the courts is mixed. The consideration given to the BoRA in some court decisions and by some regulatory and administrative bodies shows that proportionality-based rights jurisprudence does not always infuse the reasoning of these bodies.

RELIGION

Tension between freedom of expression and depictions of the prophet Muhammad continues to provoke controversy. Twelve cartoons of the Prophet Muhammad, drawn by different cartoonists, were published in the Danish newspaper *Jyllands-Posten* in September 2005 and subsequently in three New Zealand newspapers and on two television channels.

The publishing of the cartoons prompted worldwide protests, death threats, trade boycotts and attacks on Danish embassies. The cartoonists involved face continuing threats five years after the initial publication.

In New Zealand, the Muslim community and others condemned the publication of the cartoons in some New Zealand media in a peaceful manner. The Prime Minister, the Rt Hon Helen Clark, rebuked the media, describing their decision to publish as "particularly ill-judged". She referred to the possibility of trade reprisals by Muslim countries such as Jordan, and expressed fears for the security of New Zealand troops in Afghanistan. ²⁰

Opposing views were expressed by New Zealand newspapers on the cartoons, depending on whether they had published them. Both sides cited freedom of the press. *The New Zealand Herald*, which did not publish the cartoons, said:

Cartoons that set out to give offence for no redeeming purpose leave a nasty taste in the mouths of most people, and media with mass circulation publications generally avoid them... There is plenty in Islam to question, criticise, satirise and cartoon, as there is in any religion, without giving offence for its own sake. No question of press freedom arises here. When events call for critical or humorous comment on any religion we reserve our right to publish it. ²¹

The Press which did publish the cartoons, stated:

The Press understands that the cartoons are offensive to some and acknowledges that, in themselves, the drawings are not newsworthy. But they are now at the centre of a global news story and the newspaper cannot pretend that they do not exist. Neither will it be cowed by the threat from those seeking to impose their taboos on the rest of the world. Freedom of speech – including at times the freedom to express distasteful, unfashionable and outrageous views – underpins our society. That is a principle The Press is willing and able to defend. ²²

The Race Relations Commissioner held a meeting of 15 media representatives and religious leaders, including the Federation of Islamic Associations, which affirmed that the media who published the cartoons did not set out to insult or offend, only to inform. The media apologised for the offence caused, but did not resile from the decision to publish, based on the context at that time. The meeting also resolved to support the importance of freedom of

²⁰ 'Cartoons pose new threat to trade', *New Zealand Herald*, 8 February 2006. Accessed 20 April 2010 from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10367290

²¹ 'Why we did not run those cartoons', *New Zealand Herald*, 4 February 2006

²² 'Freedom to disagree', *The Press*, 6 February 2006

the media. It acknowledged that such freedom is not absolute, but comes with responsibilities, which include sensitivity to diverse cultures and beliefs, and recognition of the diversity within cultures and beliefs. Two newspapers which published the cartoons, *The Dominion Post* and *The Press*, gave an undertaking not to publish them again.

The continuing debate about the cartoons was one of the subjects explored by visiting Cambridge philosophy professor Baroness Onora O'Neill. In an interview she questioned whether the current vernacular of freedom of expression claimed by the media who had published the cartoons was the "correct category for thinking about these things".²³ While 'freedom of expression' had become the words used in the 20th century rather than 'press freedom' or 'freedom of speech', traditional arguments for self-expression were based on an individual's rights to express themselves, even if the individual got things wrong or was offensive. She questioned whether major media conglomerates had similar rights of self-expression.

In 2010, the Commission provided advice about an article published in the Waikato University student newspaper about the 'Everybody Draw Mohammed Day' campaign.²⁴ The article was in protest against those who threatened violence against artists who drew the prophet. Some of the Muslim community were concerned about the potential impact on race relations. Dialogue between the student newspaper and the Waikato University Muslim Club prevented the issue from escalating.

RACE AND ETHNICITY

Freedom of opinion and expression should be viewed as a means of combating all forms of discrimination. The right has traditionally had a key role to play in the fight against racism and racial discrimination. Complaints about race and ethnicity which offend, but do not constitute hate speech, are often referred from the Commission to other regulatory bodies, such as the Broadcasting Standards Authority, in the case of radio and television; the New Zealand Press Council, in the case of magazines and

newspapers; and the Advertising Standards Authority, in the case of advertisements. These complaints mechanisms are often more appropriate than reliance on section 61 of the Human Rights Act 1993 (HRA), as complaints seldom reach the threshold at which the HRA applies.

An example is the "Asian angst" cover story in the December 2006 edition of the magazine *North & South*, which prompted enquiries to the Commission. Potential complainants were referred to the Press Council. The story was headlined "Asian Angst: Is it time to send some back?". It discussed immigration policy and crime, and referred to demands on legal aid and health services. It stated that in 2001 Asians made up 6.6 per cent of the population but were responsible for just 1.7 per cent of all criminal convictions. It went on to say: "However, according to Statistics New Zealand national apprehension figures from 1996 to 2005, total offences committed by Asiatics (not including Indian) aged 17 to 50 rose 53 per cent from 1791 to 2751."

It used phrases such as "gathering crime tide" and said the "Asian menace has been steadily creeping up on us". Complaints were laid by the Asia New Zealand Foundation, a journalism lecturer and a group of prominent Asian academics, journalists and community leaders. The Press Council upheld the complaint, stating:

Freedom of expression, affirmed by the New Zealand Bill of Rights Act and central to all Press Council considerations, is not unlimited. Amongst other things, it is subject to the prohibition on discrimination in the Human Rights Act 1993. This is reflected in the Council's principle 8, which provides: 'Publications should not place gratuitous emphasis on gender, religion, minority groups, sexual orientation, age, race, colour or physical or mental disability. Nevertheless, where it is relevant and in the public interest, publications may report and express opinions in these areas.'²⁵

23 Interview with Kim Hill, *Radio New Zealand National*, 18 September 2010

24 *Nexus Magazine* (2010) <http://www.nexusmag.co.nz/news/everybody-draw-mohammed-day>. Accessed 16 November 2010

25 New Zealand Press Council (2007), case no. 1091; Asia New Zealand Foundation against *North & South* http://www.presscouncil.org.nz/display_ruling.php?case_number=1091 Accessed 16 November 2010

The council affirmed the right of magazines to take a strong position on issues such as immigration policy and crime rates, with the proviso: “But that does not legitimise gratuitous emphasis on dehumanising racial stereotypes and fear-mongering and, of course, the need for accuracy always remains.”²⁶

The council said the key issue was the absence of correlation between the Asian population and the crime rate.

HATE SPEECH

New Zealand, like many other countries, has legislated to give effect to Article 20 of ICCPR, which requires state parties to ban “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. The UN Human Rights Committee has expressed the view that the prohibitions required by Article 20 are “fully compatible with the right of freedom of expression as contained in Article 19”,²⁷ but Article 20 does not relieve the state parties of the obligation to protect freedom of expression to the fullest extent possible.

Professor Paul Rishworth has said there are a number of reasons for racial disharmony laws that limit freedom of expression. These include avoiding harm. He states:

It is possible to trace genocide and acts of violence against racial and ethnic groups back to the development of attitudes in the community. And if the development of attitudes is targeted as a ‘harm’ to be avoided because it makes people more susceptible to incitements to violence, or more tolerant of violence being perpetrated by the state on racial groups, then the harm-avoidance rationale can be invoked to justify some speech restrictions.

Another reason relates to attempts to discourage discrimination. This rationale in

favour of regulating race-related expression suggests that speech that vilifies, promotes negative stereotypes and attitudes, so that people view those vilified as loathsome and unworthy and deserving of discrimination.

The psychic-injury rationale suggests people should be spared the psychological harm and alienation that might follow racist remarks. The harm is not so much in the attitudes engendered in others, as in the erosion of self-worth in the victims, their withdrawal from society and the resultant inequality. Regulation that limits speech about race is also symbolic, sending positive messages of inclusion and concern to ethnic minorities and demonstrating a legislative commitment to eradicating racism.²⁸

LEGISLATIVE PROVISIONS

Two provisions in the HRA limit freedom of expression about race. Section 61 prohibits expression that is threatening, abusive or insulting, and considered likely to excite hostility against or bring into contempt a person or group of persons on the ground of their colour, race or ethnic or national origins. It is the effect of what is said that counts, not whether the person did or did not intend to excite hostility. Although intention is irrelevant, the views of the “very sensitive” are not considered to be the appropriate yardstick to decide whether something is insulting.²⁹ There is an exception for the media: it is not unlawful to publish a report that accurately conveys the intention of the person who used the words.

Section 131 establishes a criminal offence similar to section 61, but with the additional words “with intent to excite hostility or ill will against, or bring into contempt or ridicule”. Incitement to racial disharmony has been a criminal offence since the enactment of the Race Relations Act 1971.

The application of sections 131 and 61

Section 131 of the HRA and its predecessor sections have rarely been used. It requires the consent of the Attorney-General to prosecute. The 1979 Nazi pamphlet case,

26 New Zealand Press Council (2007), case no. 1091: Asia New Zealand Foundation against *North & South*, http://www.presscouncil.org.nz/display_ruling.php?case_number=1091. Accessed 16 November 2010.

27 Office of the High Commissioner for Human Rights (1983), General Comment no. 11 *Prohibition of propaganda for war and inciting national, racial or religious hatred* (Article 20), 19th session – see para 2. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/60dcfa23f32d3feac12563ed00491355?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/60dcfa23f32d3feac12563ed00491355?Opendocument). Accessed 16 November 2010.

28 Rishworth P (2003), ‘The right to freedom of expression’, unpublished research paper written for the Human Rights Commission

29 *Skelton v Sunday Star-Times*, decision no. 12/96, CRT 24/95

King-Ansell v Police,³⁰ is the only reported prosecution. Section 61 has had the most difficult history of any of the provisions of the HRA. From 1977 to 1989, section 9A of the Race Relations Act also made it unlawful to use words that were considered likely to cause racial disharmony, regardless of the intention of the person who used the words. It was repealed in 1989 as a result of a number of problems identified in the wake of the “kill a white” case. In an address to students at Auckland University marae, remarks were made about “killing a white”. The provision applied to public areas only. As the comments were made on a marae, they were not considered to have been made in a public place.

The present section 61 differs in a number of significant respects from its predecessor. While extending its operation to private as well as public places, it narrows its scope by removing the reference to exciting ill will or bringing groups of persons into ridicule. The change, recognising the need to protect freedom of expression, raised the threshold at which the Commission can intervene.

Latest figures show annual complaints of racial disharmony to the Human Rights Commission to be high, as a result of the publication of an email from Hone Harawira about his trip to Paris while on official business in Belgium. In 2009, there were 799 racial disharmony approaches to the Commission, representing about 30 per cent of race-related complaints. However, 752 of these approaches were about Hone Harawira.³¹ After assessing the racial disharmony complaints, the Commission declined to pursue any of them through the complaints process. The Commission has offered mediation and taken other action in a number of these cases. Its decisions have been based on the high threshold in section 61, particularly when the impact of the BoRA is considered in relation to the words used.

In letters sent to the complainants, the Commission said that the offensiveness of a race-related comment is not sufficient on its own. The comment must also be a probable cause of ethnic hostility or contempt. The vast

majority of comments that are complained about are unlikely to contribute to serious ethnic unrest. In some cases, where the comments were broadcast on radio or television, complainants are referred to the Broadcasting Standards Authority.

‘Hostility’ and ‘contempt’ are not clear-cut terms, and the Commission’s interpretation of them must be consistent with the right to freedom of expression set out in the BoRA.

Racial disharmony complaints often concern statements made publicly about Māori-Pākehā relations and immigration, and comments made by national and local politicians or other public figures regarding minority communities.

Most of the statements about which people complain to the Commission have been publicly disseminated in newspapers, on radio (including talkback) and on television. The majority of complainants first find out about the statements from other media, including social networking websites (for example, a newspaper report on remarks broadcast earlier on radio or the net, or vice versa). Other media that feature in small numbers of racial complaints include advertising, shop displays and direct mail flyers.

There is a legitimate public issue about the efficacy of section 61 if racial disharmony complaints seldom reach the threshold at which the Commission may intervene. The Commission believes it is time for it to review section 61 and make recommendations to the Government about whether legislative amendments are required.

In 2004, the Commission stated that there were some important reasons for retaining section 61, regardless of the fact that it had seldom been effectively used. These included the rapid dissemination of xenophobia and racial intolerance via modern media and technology, and the symbolic power of regulation, indicating New Zealand’s acceptance that legislative protection and government regulation are required to protect the vulnerable.³²

30 King-Ansell v Police [1979] 2 NZLR 531

31 Human Rights Commission (2010), *Tui Tui Tuituia – Race Relations in 2009* (Auckland: HRC). Accessible online at http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/08-Mar-2010_14-17-15_HRC_RR_Report_2009web.pdf

32 Human Rights Commission (2004), *Human Rights in New Zealand Today – Ngā Tika Tangata O Te Motu* Wellington, New Zealand. Human Rights Commission, p 135. Accessible online at <http://www.hrc.co.nz/report/chapters/chapter08/expression02.html>. Accessed 16 November 2010.

In the ensuing six years, the Commission's additional experience of implementing section 61 has led it to recommend a thorough review of this controversial section of the HRA. One reason for review is the lack of use and effectiveness of section 61 as a statutory protection. A second reason is the fact that another section of the HRA provides stronger protection for hate speech. New Zealand's obligation to give effect to Article 20 of the ICCPR, which requires State parties to ban "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", is met by section 131 of the HRA, which makes inciting racial disharmony a criminal offence. The Commission believes that section 131 should be retained, but there is a need to consider the adequacy of the penalty provisions; the limit for the maximum fine of \$1000 for a breach of section 131, set in 1978; and the requirement in section 132 to obtain the Attorney-General's consent before instituting a prosecution under section 131.

In a submission to the Commission, the Media Freedom Committee of the Commonwealth Press Union stated that there is no need to change section 61, as its high threshold is appropriate in a democracy such as New Zealand. The Committee is opposed to removing the role of the Attorney-General in any prosecutions under section 131, as it provides for more accountability than if the decision was made by an unelected official.

In the past five years, not one racial disharmony complaint has reached the threshold that would require the Commission to intervene under section 61. In the age of the Internet and talkback radio, numerous public statements are published or broadcast that could be construed as "threatening, abusive, or insulting". This is part of what is required for such a statement to be unlawful under section 61. However, the next part of the section provides a stringent test, stating "being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the grounds of the colour, race, or ethnic or national origins of that group of persons". This

rules out almost all controversial comments about race, ethnicity, national origins or colour, because while the comments may make certain individuals or groups angry or hurt, they cannot reasonably be seen as increasing the risk of hostility against or bringing into contempt of others because of their colour, race or ethnic or national origins.

THE INTERNET

Technically, 'the Internet' refers to:

a network of thousands of intersecting networks – a "spider's web" of connections meshing the globe, crossing all time zones and borders, wherever there is a telecommunications infrastructure. ³³

The 'worldwide web':

is only one of several components that make up the big Internet picture. The most widely used application is email (electronic mail), which has become indispensable for business and personal communication... Other applications include file transfer protocol (ftp), which allows efficient movement of files from one computer directory to another, and USENET, which hosts thousands of special interest newsgroups that Internet users can subscribe to and participate in. ³⁴

There is no international treaty or other instrument governing the operation of the Internet. The Internet is not governed by any single regulatory framework or a single organisation; there is no government of the Internet. A loose coalition of bodies operate technical and other policies which, taken together, allow the Internet to function.

In 2006, the United Nations established the Internet Governance Forum. The purpose of the forum is to support the UN Secretary-General in carrying out the mandate of the World Summit on the Information Society, which is to promote discussion about the Internet. The forum notes:

³³ InternetNZ, 'Internet Overview' (Wellington, InternetNZ), <http://old.Internetnz.net.nz/aboutnet/Internet>. Accessed 16 November 2010.

³⁴ *ibid*

Communication is a fundamental social process, a basic human need and the foundation of all social organisation. It is central to the information society. Everyone everywhere should have the opportunity to participate and no one should be excluded from the benefits the information society offers. ³⁵

There are no particular laws governing the Internet, although 61 separate statutes refer to the Internet, including the Films, Videos and Publications Classification Act 1993, the Electoral Act 1993, the Copyright Act 1994, the Crimes Act 1961 and the Telecommunications (Interception Capability) Act 2004. While there is no specific law regulating the Internet in New Zealand, the operation of the Internet is subject to general New Zealand law, including human rights. This means, for example, that consumer contracts with registrars and Internet service providers (ISPs) must comply with New Zealand law.

The Department of Internal Affairs enforces the Unsolicited Electronic Messages Act 2007 (also known as the 'spam' legislation). The act prohibits unsolicited commercial electronic messages with a New Zealand link from being sent by email, with the aim of promoting good e-marketing practice and preventing New Zealand from becoming a spam haven. The law establishes a civil penalty for non-compliance.

A 2010 report about the Internet in New Zealand ³⁶ showed that 83 per cent of New Zealanders use the Internet, 5 per cent had formerly used it and 12 per cent had never used it. One-fifth of users were online at home for at least 20 hours a week and three-fifths for less than 10 hours. Over 80 per cent of users with a connection at home had broadband, while the rest had dial-up. The survey revealed that younger, wealthier and more urban people had more broadband access, and that Internet usage is age and income-linked. Younger people were more likely to use the Internet, and as a result were more likely to highlight its importance, create their own content and use the Internet as a way to socialise.

Statistics about access by people with disabilities are hard to find. However, the Commission noted strong net-based networks and use of electronic enquiries to complain about broadcaster Paul Henry's use of the word "retarded" about singer Susan Boyle on TVNZ's *Breakfast* show in 2009. One in 10 New Zealand users earns income from web activity and more than half use their bank's online services at least weekly.

Rural Women New Zealand based its strong advocacy over a number of years for universal rural broadband access on the right to social inclusion for all New Zealanders. Approximately 100,000 rural households missed out when some rural phone cabinets had broadband installed as part of the schools-based project in 2003–04. The Government has now promised that 93 per cent of rural communities will have access at city prices over the next six years. As well as the benefits of social connectivity, broadband access allows rural women to run home-based businesses, conduct banking services and reduce their travel. Provision of broadband access can be seen as part of the Government fulfilling its obligations in relation to imparting and receiving information. Access to the Internet is increasingly argued to be a human right.

New Zealanders also use the Internet to access the Government, mainly for information about services (47 per cent). This use of the Internet is impacting on the exercise of freedom of expression and participation in public life. For example, the volume of complaints now being received by the Commission has increased as people move to the Internet as a medium for making complaints and enquiries. At the same time, many organisations are moving into spaces such as social networking sites. Information stored on these sites is, in turn, accessed by some employers when making employment decisions, and used by some employees to comment on their employers. The implications of these developments for employment and human rights laws are still being grappled with. Of increasing concern, too, are the privacy implications of medical professionals in the United States accessing information about patients.

35 Internet Governance Forum Freedom of Expression and Freedom of the Media on the Internet <http://www.intgovforum.org/cms/dynamic-coalitions/75-foeonline>. Accessed 16 November 2010.

36 World Internet Project New Zealand (2010), *The Internet in New Zealand 2009* (Auckland: Institute of Culture, Discourse and Communication, AUT University). Accessible online at <http://www.aut.ac.nz/news/aut-news/2010/march/Internet-now-integral-to-new-zealanders-a-daily-life>

Some people's behaviours or attitudes are changing as a result of their use of the Internet – for example, attitudes to privacy. People's expectations of privacy are being changed and in some situations eroded by their behavioural patterns, or being reshaped by digital technology such as the ubiquity of telephones with cameras, the posting of personal information and images on social networking sites, and Street View being available on Google. In a submission to the Commission, the Media Freedom Committee of the Commonwealth Press Union observed that: "people are increasingly living their lives remarkably openly on the Internet".

The Internet has also changed the context in which freedom of expression might be assessed in at least three ways.³⁷ First, the Internet is cross-jurisdictional – there are no geographical or 'state' boundaries in the traditional legal or physical sense. Instead, a new space, the worldwide web, has been created. Second, copying information is exact and instantaneous in a digital world. Third, the gatekeeper role of other forms of media publication has been removed: anyone can access the Internet and anyone can provide information on the Internet. Another way the Internet has also changed the context in which freedom of expression might be assessed is that published information now has an infinite shelf-life.

The result is that there are new spaces in which rights and freedoms can be exercised, such as the freedom to publish and the freedom to receive information. At the same time, the exercise of this freedom through the Internet may challenge other fundamental human rights, such as the presumption of innocence, the right to a fair trial and the rule of law.

In relation to the rule of law, the most comprehensive judgment on name suppression involving the Internet is the 70-page decision of District Court Judge David Harvey in the 'whale oil' case.³⁸ Judge Harvey described it as a "case about the law speaking in the light of changing technologies", not a case about regulating the Internet.

The case involved a blogger campaigning against name suppression, who was found to have breached non-publication orders in various district and High Court cases. Judge Harvey said:

- A blog is conceptually no different from any other form of mass- media communication and fulfils the concept of publishing and publication.
- Publication of the information took place where the material was downloaded and comprehended, i.e. New Zealand, even though the server hosting the website was located in the United States.

The real essence of the case was about human behaviour, he said. He addressed the idea of "electronic civil disobedience" through the publication of certain names that were suppressed, saying that the blogger "seems to have acted in the mistaken belief that, for some reason, such behaviour utilising the Internet was beyond the reach of the law, and that the Internet introduced an element unanticipated by the law when the Criminal Justice Act was enacted in 1985".

The case suggests that there is nothing exceptional about the communications technology associated with the Internet that would save bloggers from being charged with breaches of law.

The democratising influence of the Internet also poses challenges to the ways in which the State seeks to uphold the rule of law. These are "challenges for which the State is not well equipped or accustomed".³⁹ Commentators have noted that, in some respects, the Government is at a technological disadvantage compared with the general public, and this poses risks both to its duty to uphold the rule of law and to the means by which it is able to respect and protect the rights of citizens.⁴⁰

On 19 October 2010, the Hon Simon Power, Minister Responsible for the Law Commission, asked it to undertake a review of the current regulatory regime for news media with respect to its adequacy in catering for

37 March Dr F, R v The Internet (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at <http://www.r2.co.nz/20091203/>. Accessed on 16 November 2010.

38 The Police v Cameron John Slater DC, CRN 004028329-9833, 14 September 2010 (DC)

39 Collins Dr D QC, Solicitor-General: R v The Internet (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at <http://www.r2.co.nz/20091203/>. Accessed on 16 November 2010.

40 See, for example, Professor Tony Smith and compare Steven Price and Robert Lithgow QC: R v The Internet (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at <http://www.r2.co.nz/20091203/>. Accessed on 16 November 2010.

new and emerging forms of news media. The minister requested that the review deal with the following matters:

- how to define “news media” for the purposes of the law
- whether the jurisdiction of the Broadcasting Standards Authority and/or the Press Council should be extended to cover currently unregulated news media and, if so, what legislative changes would be required to achieve this end
- whether the current criminal and civil remedies for wrongs such as defamation, harassment, breach of confidence and privacy are effective in the new media environment.

The Attorney-General, the Hon Chris Finlayson, has asked Professor Tony Smith, the Dean of Law at Victoria University, Wellington, to examine whether contempt-of-court laws are affected by the Internet. Professor Smith is undertaking the research in conjunction with recently retired Court of Appeal judge the Hon Sir Bruce Robertson.

A trial of a teenage boy in March 2010 for the murder of a teenage girl illustrated some of the tensions arising from the posting of information on the Internet. During the trial, the media were prohibited from photographing or filming the defendant; the prohibition extended to the sentencing process. The trial judge ruled that, despite his conviction, the defendant had a right to privacy, because of his youth; filming during the sentencing process would place undue pressure on the defendant and could have a detrimental effect on his future rehabilitation. Following the lifting of orders suppressing the defendant’s name, the media showed images of the defendant that he had posted on the Internet some time before the killing had taken place. The right to a fair trial can be also threatened when prejudicial information is posted on the Internet, where it might be Googled by jurors.

There are tensions in the diverse responses to Internet technological developments across the broad sweep

of public policy. Tensions are evident, for example, in relation to proposals to filter, through Internet service providers (ISPs), the content of material that users can lawfully access when they go online. On the one hand, the availability of a voluntary system by which ISPs may filter child pornography is seen as one of a number of essential tools which the State can use to prevent the harms related to child pornography.⁴¹ On the other, the use of state-sanctioned content-filtering mechanisms is seen, in principle, to raise major human rights questions and concerns about the chilling effect of state suppression of access to information, however objectionable such information might be.⁴² The use of filtering without the authority of laws passed by Parliament has also raised concerns.⁴³ This in turn raises the question of how the appropriate lawful balance can be determined in an otherwise unregulated environment.

There were similar tensions in proposals for termination of user accounts in relation to copyright violations. The Copyright (New Technologies) Amendment Act 2008 proposed termination of user accounts for ‘repeat infringers’. Some Internet advocacy groups have vigorously opposed termination of user accounts for repeated infringements of copyright. These groups argue that access to the Internet should be regarded as a fundamental human right, citing recent initiatives to legislate for this in Sweden and Switzerland.

Others argue that new freedoms should not permit the unfettered exercise of new violations of the rights of others. The tension caused when balancing the rights to freedom of expression and the intellectual property rights of copyright owners remains.⁴⁴ A key challenge is how these tensions can be negotiated to achieve technology-neutral and appropriate application of human rights standards.

Debates about responsible exercise of rights and negotiation of reasonable limitations on rights in the

41 ‘InternetNZ: Child porn filter “not the answer”’, *New Zealand PC World*, 28 January 2010, <http://pcworld.co.nz/pcworld/pcw.nsf/feature/Internetnz-child-porn-filter-not-the-answer>. Accessed on 16 November 2010.

42 See, for example, ‘Internet Filtering’, Tech Liberty NZ, <http://techliberty.org.nz/issues/Internet-filtering/>. Accessed on 16 November 2010.

43 See, for example, ‘Internet Filtering’, Tech Liberty NZ, <http://techliberty.org.nz/issues/Internet-filtering/>. Accessed on 16 November 2010.

44 Department of Internal Affairs (2007), *Creating Digital NZ: Working Paper 2: Strategy and Intellectual Property – Scoping the Legal Issues* (Wellington: Department of Internal Affairs). The proposals have been reviewed, with disputes to be referred to the Copyright Tribunal.

context of the Internet have, in part, been obscured by claims that the regulation of content is simply not possible because the Internet itself cannot be controlled. The implication is that attempts to apply human rights and other standards are futile and should be abandoned.⁴⁵ Others vigorously deny that attempts to uphold human-rights standards are ineffectual and insist that this is possible, at least in relation to locally hosted content.⁴⁶

As David Farrar noted in a submission to the Commission, there are two approaches to censorship on the Internet. One is to have sanctions for certain activities, such as viewing objectionable material or breaching name-suppression orders. The other is to have filters designed to prevent those activities in the first place. Farrar preferred the first approach, as the second had greater potential for abuse.

In its submission, Netsafe supports the idea of local regulation for locally hosted content, particularly to remove the possibility of New Zealand becoming a “safe haven” for such content, and notes that “a number of families report distress at young people consuming self-harming media hosted on United States servers that would be restricted in New Zealand”. Schools’ use of Internet companies that filter information on sexuality education and other topics is another issue that warrants debate, states Netsafe. “To what extent can such filtering be argued as ‘protecting’ young people and/or fitting the ‘moral’ exception for limiting freedom of expression?” The relationship between children’s’ rights under the United Nations Convention on the Rights of the Child (UNCROC) and the responsibilities of schools, and the ensuing contest between freedom of expression and protection from harm, raise human rights issues.

Another key challenge is how the law can keep pace with the Internet and related technology, the very use of which both upholds fundamental aspects of and challenges the reasonable limits of the exercise of the right to freedom of expression. For example, commentators in the Google Earth controversy, relating to security fears, have noted that there is little, if any, directly applicable international law.

There is a need to develop a human rights framework to apply both to the infrastructure of the Internet and to substantive Internet-related policy developments. This framework is needed to ensure a consistent approach to new technological developments, and the uniform application of universal and indivisible human rights standards. The fact that the Internet context is new and technologically complex should not deter efforts to scrutinise and apply these standards.

The Commission and InternetNZ began a discussion about human rights and the Internet at a July 2010 roundtable. It was agreed that the idea of a ‘charter of Internet rights’ should be further explored by those attending the next Internet Governance Forum in Lithuania, in September 2010. It was resolved that InternetNZ and the Commission, together with other stakeholders, would work to increase debate about the human rights elements of the Internet; advocate for equal opportunity and high quality access, especially for those living in rural areas; help promote minimal intrusion into individual freedoms and privacy; and promote digital citizenship. It was agreed that there was a need for greater research on the demographics of Internet use and the extent of the ‘digital divide’ in New Zealand. The UN special rapporteur will also focus primarily on the issue of access to electronic communications and freedom of expression on the Internet in his 2011 report.

Technology can be adapted to uphold human rights standards. and New Zealand human rights law. In response to the proposals for internationalised domain names, for example, the Domain Name Commission Limited, which has oversight of the .nz domain name space, has introduced new rules to allow the registration of Māori language macrons in .nz domain names. This step upholds both the right to language and recognises that te reo Māori is an official language pursuant to the Māori Language Act. These new macrons were released during Māori Language Week 2010.

45 See, for example, ‘Internet Filtering’, Tech Liberty NZ, <http://techliberty.org.nz/issues/Internet-filtering/>. Accessed on 16 November 2010.

46 See, for example, Law Commission (2009), NZLC R 109: *Suppressing Names and Evidence* Wellington, New Zealand; and Young W, Deputy President Law Commission: *R v The Internet* (Seminar Proceedings, December 2009. InternetNZ, Wellington). Accessible online at <http://www.r2.co.nz/20091203/>. Accessed on 16 November 2010.

Conclusion Whakamutunga

New Zealand has an enviable international reputation for upholding the right to freedom of expression. Invariably New Zealand achieves a high placing on the two international press-freedom indices, for example ranking eighth on the Press Freedom Index 2010. Where the right is infringed, there is strong legal, public and media comment, which tends to influence subsequent legislation, policy and practice. New Zealand has ratified Article 19 of ICCPR, the right to freedom of opinion and expression, and legislated domestically for freedom of expression in section 14 of the BoRA.

The BoRA has had the positive effect of progressively influencing the legislature, the judiciary, policy-making and public thinking about the importance of freedom of expression in a modern democracy, and has ensured a higher profile for this fundamental human right. The courts have also given a very high value to the right to freedom of expression, and have keenly scrutinised limits placed upon it.

The Commission believes that there is merit in reviewing the controversial section 61 of the HRA, relating to hate speech and race, because it is ineffective as a statutory protection and because there is another section which provides for stronger protection.

New Zealand enjoys a light-handed regulatory regime for broadcasting, the self-regulation of the print media and advertising. There is increasing debate about freedom of expression and the Internet. Higher-level discussion about rights and responsibilities is to be welcomed, given the pervasiveness of the Internet as a source of information and entertainment in the daily lives of New Zealanders. There is an opportunity for the Internet and human rights communities to continue to work together to lead debate about the rights and responsibilities inherent in Article 19, the right to freedom of opinion and expression.

The Commission has consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following

areas for action to advance the right to freedom of opinion and expression:

Section 61 of the Human Rights Act

Reviewing section 61 of the Human Rights Act 1993, to ensure that it fulfils its legislative purpose.

Human Rights and the Internet

Promoting and facilitating debate about access to the Internet as a human right, and considering whether a charter of Internet rights should be developed in New Zealand.