

The state of freedom of expression in New Zealand: An admittedly eclectic overview.

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1: Introduction: the social context of expression in New Zealand

In keeping with other liberal-democratic polities, New Zealand's law has long paid official veneration at the alter of freedom of expression. The reasons for doing so hardly need spelt out¹—if there is one article of faith in the liberal-democratic worldview, it is that the individual right to speak one's own mind is “a good thing”. Not that New Zealand's longstanding respect for expressive values reflects purely theoretical concerns. It also dovetails neatly with a set of national character traits. As Michael King concludes in his magisterial overview of New Zealand history:

most New Zealanders, whatever their cultural backgrounds, are good-hearted, practical, commonsensical and tolerant. Those qualities are part of the national cultural capital that has in the past saved the country from the worst excesses of chauvinism and racism seen in other parts of the world.²

This is a claim that, I wager, gives most Kiwis who read it a sensation of quiet pride and is a description that most would be happy for the rest of the world to hold of us as a people. On the whole, New Zealanders exult in the belief that theirs is a reasonably

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¹ But for an overview of those reasons, see E. Barendt, *Freedom of Speech*, 2nd ed, OUP, Oxford, 2005, at pp. 1-38; Law Commission, *Report 96: Reforming the Law of Sedition*, Law Commission, Wellington, March 2007, at pp. 26-50.

² M. King, *The Penguin History of New Zealand*, Viking, Auckland, 2004, at p. 520.

tolerant society, where the right to say what you think is part and parcel of a broader commitment to giving everyone “a fair go”.

However, least it be thought that this article is no more than a celebratory paean to the noble and tolerant Kiwi character, it is worth remembering that as a nation we actually have a somewhat chequered history when responding to words and deeds that challenge the prevailing social norm. Maori who sought to oppose the process of colonisation at Parihaka and elsewhere were met with force, up to and including military action.³ Archibald Baxter and his fellow conscientious objectors paid a notoriously high price for their principles during the First World War,⁴ with over 800 placed in detention camps during the Second World War for refusing to fight.⁵ During the 1951 Waterfront dispute, emergency regulations imposed rigid censorship, gave police sweeping powers and made it an offence for citizens to assist the workers involved; even giving food to their children was outlawed.⁶ Protesters against the Vietnam War received criminal convictions for actions such as chaining themselves to the front pillars of Parliament⁷ and attempting to lay an anti-war wreath during an ANZAC Day ceremony.⁸ The 1981 Springbok Tour produced brutal police action against peaceful protestors, albeit in the context of widespread civil unrest.⁹ Furthermore, as the Law Commission recently noted, the offence of sedition was used

³ For the history of Parihaka, see D. Scott, *Ask That Mountain: The Story of Parihaka*, Reed Publishing, Auckland, 2001; H. Riseborough *Days of Darkness: Taranaki 1878-1884*, Penguin Books, Auckland, 2002.

⁴ See A. Baxter, *We Will Not Cease*, Cape Catly Ltd, Auckland, 1994.

⁵ See N Taylor, *The Official History of New Zealand in the Second World War: The Home Front Vol. 1*, Historical Publications Branch, Wellington, 1986, at ch. 7.

⁶ *Waterfront Strike Emergency Regulations 1951* (SR 1951/24).

⁷ *Melser v Police* [1967] NZLR 437 (CA).

⁸ *Wainright v Police* [1968] NZLR 101 (HC).

⁹ See generally <http://www.nzhistory.net.nz/culture/1981-springbok-tour>.

sporadically to “attempt to control debate and expressions of political ideas and their consequences, by law.”¹⁰

This admittedly selective history is not intended to make the claim that *contra* the previous picture of New Zealanders’ as generally tolerant and broad-minded, really we are a community of crypto-fascists, unable to stomach any form of dissent or difference. Viewed in a comparative light, and accepting that every society will fall short of perfection, the country’s record on civil liberties is better than most.¹¹ However, such events serve to remind us that New Zealand’s origins as a geographically isolated, settler society inevitably placed something of a premium upon conformity and predictability in its citizens’ behaviour. It is thus little surprise that a small island country uncertain of its national identity—where survival, let alone growth and development, depended upon a high degree of social cooperation—would restrict the individual’s ability to challenge settled social practice. Consequently, forms of expressive behaviour frequently have been treated as an undesirable impediment to a properly functioning community, with measures taken to suppress or punish it. Simply put, a conservative impatience with “silly buggers” or “troublemakers” who are perceived to be “spoiling things for the rest of us” has been as much a part of the national psyche as a commitment to giving everyone “a fair go”.

However, as times change, social conditions also alter. The wave of neo-liberal restructuring from 1984 onwards transformed a previously Statist, highly regulated economy. More easily accessed forms of travel and communication exposed New Zealanders to greater and more varied international influences, while the rise of a globalised information age increased the perceived value of transmitting ideas and knowledge. The tide of the international rights revolution, along with the rise of

¹⁰ Law Commission, *Report 96: Reforming the Law of Sedition*, Law Commission, Wellington, March 2007, at p. 25.

¹¹ See, e.g., Human Rights Commission, *New Zealand Action Plan for Human Rights 2005-2010*, Human Rights Commission, Wellington, 2005.

identity politics in place of more traditional, class-based political ideologies, reoriented ideas about the appropriate role of the State as regulator of personal conduct. In turn, these developments spawned a myriad of changes in New Zealand's basic constitutional ordering. In 1993, a Mixed-Member Proportional voting system to elect members of Parliament was adopted. The rights of Maori as the indigenous inhabitants of New Zealand, recognised by the Treaty of Waitangi, have been accorded greater legal weight since the late 1980s.¹² Homosexuality was decriminalised,¹³ access to official information has been opened up¹⁴ and a Human Right Commission has been established as an independent monitor of human rights issues.¹⁵ And perhaps most notable in the present context, the enactment of the New Zealand Bill of Rights Act 1990 (NZBORA) gave statutory affirmation to a range of individual rights, including the s.14 guarantee: "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."

I am, of course, skipping lightly over a large span of history here and traversing a wide range of issues in a quite summary manner. However, this article is not meant to be an exercise in socio-legal history. The abbreviated discussion above instead is intended to illustrate a more general point: because expression is a social practice, requiring both a speaker and an audience, the boundaries of what a given society will and will not allow to be expressed can be expected to shift as that society changes. Therefore, a general, high-level commitment to the abstract principle of freedom of expression can remain constant over time, even as the actual regulation applied to particular expressive activities varies. We must thus recognise that New

¹² *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC); *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

¹³ *Homosexual Law Reform Act 1986*.

¹⁴ *Official Information Act 1982*.

¹⁵ *Human Rights Act 1993*.

Zealand's law incorporated free speech values prior to the enactment of the NZBORA, while that legislation's affirmation of the right to freedom of expression was itself the product of a shifting cultural *zeitgeist*. Consequently, it is too simplistic to say that the NZBORA's passage has in and of itself increased the perceived value of freedom of expression under New Zealand law. It undoubtedly has altered the particular *way* in which free speech values are manifested in legal and administrative decision-making processes. The s.14 guarantee has led to a new approach to discussing expressive values and the appropriate limits placed on these; a lexicon full of references to "legitimate purpose", "rational connection", "minimal impairment", "proportionality", and the like. However, answering the fundamental question—when, and to what extent, should New Zealand law intervene to prevent a person engaging in some given expressive activity—ultimately still depends upon a balanced assessment of societal values that on many occasions lie outside of the NZBORA.¹⁶ And the balance struck between these societal values can be expected to shift over time, as the background conditions and arrangement of New Zealand society itself alter.

While this article is presented as a survey of freedom of expression issues in New Zealand, adequately covering *all* the ways such issues are relevant to the nation's legal order would require a book length treatment. Therefore, the following discussion inevitably will have a somewhat eclectic and haphazard feel. It begins by recapping briefly some post-NZBORA developments in the common law of defamation and privacy. It then turns to look at the role the NZBORA has played in the realm of censorship. It concludes with a look at four very recent developments in

¹⁶ This point, of course, is inherent in the structure of the NZBORA itself. Section 5 states that "...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." This "justified limits" section has received extensive discussion by the Supreme Court in *Hansen v R* [2007] 3 NZLR 1 (SC).

the core expressive context of political speech: the abolition of sedition offences; expanding the scope for protest activity; restraining third party election expenses; and regulating the broadcast coverage of Parliament. I am conscious that this somewhat peripatetic approach means a number of important areas are not discussed. There is a particular gap regarding the role of the right to freedom of expression in relation to suppression orders and contempt proceedings.¹⁷ All that can be pleaded in defence of this lacunae is the sheer size of the topic, and the difficulty involved in trying to say anything meaningful about it in a necessarily limited number of words.

2: Developments in the common law of defamation and privacy

A question that took some time to attract the full attention of New Zealand's judiciary was what "horizontal effect" the NZBORA should have on New Zealand's legal system.¹⁸ This term refers to how the substantive rights recognised in a human rights instrument such as the NZBORA impact upon the legal rights and obligations that exist between private individuals, as opposed to "vertical" relations between citizens and the State. Although there can be little doubt that the NZBORA was intended to exert *some* horizontal effect upon New Zealand's private law,¹⁹ the exact nature and extent of that effect was not clear. And while some commentators did raise the issue in New Zealand,²⁰ it received nothing like (for instance) the sustained attention paid in the United Kingdom at the time of the introduction of its *Human Rights Act 1998*.

¹⁷ However, these topics recently have been reviewed thoroughly in S. Mount, "The Interface Between the Media and the Law", [2006] *N.Z.L.Rev.* 413.

¹⁸ See generally P. Rishworth, "New Zealand: Taking Human Rights into the Private Sphere", in D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study*, Routledge-Cavendish, London, 2007, at pp. 312-350.

¹⁹ White Paper, *A Bill of Rights for New Zealand* (1985) AJHR A6, at para. [10.18].

²⁰ See especially A Butler, "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261; P Rishworth *et al*, *The New Zealand Bill of Rights*, OUP, Melbourne, 2003, at pp.100-101.

Perhaps it is understandable, therefore, why it took nearly a decade for the courts to consider in detail what consequence the NZBORA's affirmation of a right to freedom of expression should have for the existing common law. This right has particular relevance in regards two areas: the existing corpus of rules relating to defamation; and the emerging jurisprudence regarding the protection of individual privacy. These two areas of law are discussed in turn.

(i): Developments in the law of defamation.

The most obvious post-NZBORA development in the field of defamation is the creation in *Lange v Atkinson* of the defence of qualified privilege “in respect of generally-published statements which directly concern the functioning of representative and responsible government...”.²¹ Rosemary Tobin has summarised the effect of this development as follows:

Provided they are made on a qualifying occasion — that is, where there is reciprocity of duty and interest in the maker of the statement and those who receive it — false statements of fact about the politician ... can be widely disseminated, subject only to the statutory malice provision of the Defamation Act 1992: s 19.²²

Much has already been written about *Lange v Atkinson*,²³ so I will not belabour the point here. However, it is interesting to note the rather limited role that the s.14 affirmation of the right to freedom of expression played in the announcement of this new defence. Although Elias J, then sitting in the High Court, believed it to be a

²¹ *Lange v Atkinson* [1998] 3 NZLR 424 at pp.467-8 (CA). See also *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

²² R Tobin, “Political Discussion in New Zealand: Cause for Concern?” [2003] *N.Z.L.Rev.* 215, at p. 216.

²³ P Rishworth *et al*, *The New Zealand Bill of Rights*, OUP, Melbourne, 2003, at pp. 317-321; J Burrows and U Cheer, *Media Law in New Zealand*, 5th ed, OUP, Melbourne, 2005, at ch. 3; S Todd (ed), *The Law of Torts in New Zealand*, 4th ed, Brookers, Wellington, 2005, paras [7.7]-[7.12]; A Butler and P Butler, *The New Zealand Bill of Rights Act: A Commentary*, LexisNexis, Wellington, 2005, at paras. [13.17.7]-[13.17.21].

necessary step on the grounds that “the NZBORA protections are to be given effect by the Court in applying the common law”,²⁴ the Court of Appeal preferred to base its ruling on a more general “right of New Zealanders to participate in the process of policy and decision making and to call the government to account”.²⁵ A general right to freedom of expression clearly is a central component of “calling the government to account”, but the Court of Appeal’s failure to expressly invoke the NZBORA’s statutory affirmation of this right is still revealing. It indicates, I suggest, that the Court likely would have recognised the existence of the defence even if s.14 of the NZBORA had not been enacted—much as the U.K.’s House of Lords went about reshaping the law of defamation prior to the *Human Rights Act 1998* incorporation of the European Convention on Human Rights’ right to freedom of expression.²⁶

There is then the question of whether this qualified privilege defence for commentary about politicians provides sufficient protection against the potential “chilling” effect of defamation actions. Grant Huscroft thinks not, opining that because the defence applies only in a limited range of situations which it falls to the courts to determine, “*Lange* is unlikely to be an adequate response to the problems caused by the law of defamation.”²⁷ John Burrows similarly thinks that there likely will be pressure to expand the scope of the defence: “It could even be that in the fullness of time the *Lange* privilege may come to apply to all who might be described as ‘public figures’.”²⁸ However, the basic premise of this reasoning—that wider legal protection for false expression is required lest the fear of defamation action “chill”

²⁴ *Lange v Atkinson* [1997] 2 NZLR 22 at p. 32 (HC).

²⁵ [1998] 3 NZLR 424 (CA) at p. 464, per Tipping J. However, Tipping J did go on to note that “striking a balance between freedom of expression and individual reputation is not easy. The striking of that balance must be informed by section 5 of the [NZBORA].” *Ibid.* at p.474.

²⁶ See *Derbyshire County Council v Times Newspapers Ltd and Others* [1993] AC 534 (HL); *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (HL).

²⁷ G Huscroft, “Freedom of Expression”, in P Rishworth *et al*, n.23 above, at p. 320.

²⁸ J Burrows, “Defamation”, in S Todd (ed), n.23 above, at p. 713.

otherwise desirable forms of expression—may be questioned. Ursula Cheer’s recent conclusions after surveying the actual impact of defamation law on the activities of news organizations are instructive: “the New Zealand media is aware of potentially chilling effects arising from the possibility of defamation claims, but that they generally think they can manage such risks and, on the whole, do so while making sure that the important stories see the light of day.”²⁹

Furthermore, for some defendants the prospect of a defamation action may not carry any chill effect at all. Indeed, some individuals or groups may positively *embrace* such a move as an opportunity to attract further publicity to its cause. The example of the “Save Happy Valley” coalition provides a concrete example of this phenomenon. This group is mounting an energetic campaign to prevent the S.O.E. Solid Energy from mining coal in the Happy Valley region of the South Island’s West Coast. In the course of this campaign, it published a parody copy of the company’s annual environmental report detailing (the group alleges) the true environmental consequences of the mining activities. Solid Energy then brought a defamation action in the High Court seeking to have this parody removed from the group’s website—a move that led it to welcome the “opportunity to debate the environmental record of the State-owned climate changer.”³⁰ While the litigation was settled by the group’s agreement to remove Solid Energy’s logo from the document in question, the press coverage generated by the case meant the allegations contained in the document received far more public attention than they otherwise would have. It is likely that the

²⁹ U. Cheer, “Defamation in New Zealand and its Effects on the Media—Self-Censorship of Occupational Hazard?” [2006] *N.Z.L.Rev* 467, at p. 534. See also U. Cheer, “Myths and Realities About the Chilling Effect: The New Zealand Media’s Experience of Defamation Law” (2005) 13 *Torts L.J.* 259.

³⁰ See <http://www.savehappyvalley.org.nz/node/290>.

Save Happy Valley campaigners have drawn a lesson from the “McLibel” case in the UK,³¹ whether Solid Energy has done so is open to debate.

(ii): *Developments in the law of privacy.*

In contrast to the rather subsidiary role played by the NZBORA, s.14 in the field of defamation, the creation of a tort of invasion of privacy involved a much more direct and extended judicial consideration of its consequences for the development of the common law. The existence of this tort finally was confirmed in *Hosking v Runting*,³² where a television personality sought to enjoin a magazine from printing pictures of his children taken on a public street while they were shopping. Although the claim failed on its facts, the Court of Appeal, in a 3-2 decision, accepted that invasion of privacy should be a recognised cause of action under New Zealand law. The majority concluded that while the tort would restrict the future publication of true facts, the limit this imposes on freedom of expression could be justified under s.5 of the NZBORA. Simply put, protecting the values of privacy—the majority did not go so far as to describe this as a “right”—provided a valid reason for restraining another’s right to publish factual material.³³ Conversely, the minority did not believe the new

³¹ See *McDonald's Restaurants v Morris & Steel* [1997] EWHC QB 336; *Steel & Morris v McDonald's Restaurants* [1999] EWCA Civ 1144. For an account of this litigation, see http://en.wikipedia.org/wiki/McLibel_case.

³² [2005] 1 NZLR 1 (CA). See also *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716 (HC); *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415 (HC); *P v D* [2000] 2 NZLR 591 (HC). For a discussion of the Court of Appeal’s ruling, see A Geddis, “*Hosking v Runting*: A privacy tort for New Zealand” (2005) 13 *Tort L.Rev.* 5.

³³ Actually, the Court of Appeal stated that “usually an injunction to restrain publication in the face of an alleged interference with privacy will only be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information. In most cases, damages will be considered an adequate remedy.” *Hosking v Runting*, above n.32, at para.[158] per Gault P and Blanchard J. See also J Wilson, “Prior Restraint of the Press” [2006] *N.Z.L.Rev.* 551. However, insofar as the fear of incurring such pecuniary liability may “chill” speech, the tort still imposes a potential limit on freedom of expression.

tort should be recognised, for the primary reason that it could not be demonstrated that it was “necessary” under s.5 to limit freedom of expression in this fashion.

I would make three points here.³⁴ First of all, all five members of the bench accepted that the NZBORA had a role to play in deciding what the private law should be on this matter. Although they did not spell out why exactly it should be so, they accepted (or assumed) that the NZBORA ought to have some measure of horizontal application. Second, the bench could not agree on precisely what role the NZBORA should play in their decision. The heart of this division lay in how much weight a court should give to the fact that Parliament has affirmed freedom of expression affirmed as being a “right”. The majority thought this right should only have an indirect application to the development of the common law, as one social value to be considered amongst others. The minority chose to give the right a more direct application, according it a degree of protection that can only be overridden in the most pressing of circumstances. Finally, the majority decision to create the new tort rested upon a range of factors beyond the NZBORA itself: the increased threat posed to privacy interests by the modern media; the range of steps already taken by the legislature to protect privacy; the experience of other nations (in particular, the UK) in protecting privacy; an assessment of the appropriate role of the judiciary in refining the common law to deal with emerging social conflicts.

Quite where this tort is headed is a matter for speculation. John Burrows has noted in a recent review of developments: “If given too free a rein, privacy could spread into areas where it does not belong, with the consequent threat to freedom of expression.”³⁵ This warning is apt, if somewhat tautological. However, recent cases do not appear to indicate any real judicial opening of the floodgates. The Hoskings’

³⁴ These draw heavily on A Geddis. “The Horizontal Effects of the New Zealand Bill of Rights Act, as Applied in *Hosking v Runting*” [2004] *N.Z.L.Rev.* 681.

³⁵ J. Burrows, “Invasion of Privacy — *Hosking* and Beyond” [2006] *N.Z.L.Rev.* 389, at p. 391. See also J. Burrows, “Media Law” [2006] *N.Z.L.Rev.* 769, at pp. 769-774.

substantive claim failed. The High Court in *Andrews v TVNZ* held that broadcasting the conversation of a couple involved in a car accident could not be shown to be “highly offensive” to a reasonable person in the defendants’ shoes,³⁶ while the broadcaster also could claim the defence of “legitimate public concern”.³⁷ The Court of Appeal in *TVNZ v Rogers* refused to grant an injunction to prevent the broadcast of a videotaped police interview with a person later acquitted of murdering a woman.³⁸ Even though a majority accepted there was a legitimate privacy issue involved, the court unanimously agreed that TVNZ could invoke the defence of legitimate public concern. This latter case remains before the Supreme Court at the time of writing, which may yet take a different view of the issues. But the evidence to date is that while the new invasion of privacy tort raises valid theoretical concerns in respect of freedom of expression, it has not had any really significant practical impact.

Developments in the field of censorship

New Zealand law allows for quite extensive censorship of forms of expression that are deemed to be “objectionable”, or to breach standards of “good taste and decency”. The former test applies to all “publications” that fall under the *Films, Videos and Publications Classification Act 1993*, while the latter is a part of the duties imposed on all broadcasters under the *Broadcasting Act 1989*, s.4.³⁹ The Office of Film and Literature Classification is charged with determining if a publication is “objectionable”, subject to an appeal to The Film and Literature Board of Review. A

³⁶ Unreported, High Court Auckland, CIV 2004-404-3536 28 March 2007, at paras. [67]-[72].

³⁷ *Ibid.* at paras. [91]-[94].

³⁸ [2007] 1 NZLR 156.

³⁹ These two censorship regimes by-and-large operate separately; see *In re Baise-Moi v Society for the Promotion of Community Standards* [2005] NZAR 214. However, a film that has been classified as “objectionable” by the Office of Film and Literature Classification may only be broadcast with the permission of the Chief Censor; *Broadcasting Act 1989*, s.4(2).

range of criminal offences, some of them strict liability, then apply to making, distributing or possessing material that is deemed “objectionable”.⁴⁰ The broadcasting standards contained in the *Broadcasting Act 1989* primarily are interpreted and applied by the Broadcasting Standards Authority, through a series of broadcasting codes of practice created in consultation with the broadcasters. Obviously, the role of each of these bodies bring them into direct conflict with the right to freedom of expression, as their entire *raison d’être* is to impose restrictions on expression in the name of some greater “public interest”. Some of the more notable developments with regard each body are considered in turn.

(i): Censorship of publications.

The interplay between the NZBORA’s affirmation of freedom of expression and the *Films, Videos and Publications Act 1993* has attracted extended discussion by the Court of Appeal in the course of two separate decisions in *Moonen v. Film and Literature Board of Review*.⁴¹ Delivering the Court’s judgment, Tipping J rejected the notion that the censorship regime laid down by the *Films, Videos and Publications Act 1993* forms a self-contained code that trumps any freedom of expression issues.⁴² Any classification—or, to call it by its true name, “censorship”—decision instead must take into account as far as possible the right to freedom of expression. Simply put, the baseline presumption should be that the expression in the publication is permitted, unless and until the precise statutory reasons for deeming it to be “objectionable” are fully met. Furthermore, the Court of Appeal has limited the scope of the statutory criteria to be applied when censoring a publication. In *Living Word*

⁴⁰ *Films, Videos and Publications Classification Act 1993*, ss.122-132.

⁴¹ [2000] 2 NZLR 9 (CA); [2002] 2 NZLR 754 (CA).

⁴² Compare with *News Media Ltd v Film and Literature Board of Review* (1997) 4 HRNZ 410 (HC).

Distributors Ltd v Human Rights Action Group (Wellington),⁴³ it ruled that the censorship regime only applies to publications dealing overtly with “matters such as sex, horror, crime, cruelty or violence”;⁴⁴ meaning that videos portraying homosexuality in a denigrating and demeaning light (but which did not depict any sexual activity) fell completely outside the Office of Film and Literature Classification’s purview. Consequently, the *Films, Videos and Publications Act 1993* does not serve as a general censorship regime for all forms of “harmful” or “undesirable” expression; it only encompasses those publications that meet the judicially narrowed “subject gateway” test laid out in the legislation. This aspect of the Court of Appeal’s interpretation of the legislation in *Living Word* attracted some passing parliamentary ire, on the ground that “the Act no longer appears able to provide a contemporary focus on the types of representations of most concern to the public.”⁴⁵ However, proposals to amend the legislation and override the Court’s reading have fallen by the wayside, primarily due to public hostility to greater censorship powers. Similarly, the stigma of appearing “politically correct” led the Government Administration Committee in 2005 to abandon an inquiry into whether the “racial hate speech” provisions contained in the *Human Rights Act 1993*, ss. 61, 131 should be widened to cover forms of expression that denigrates homosexuals, religious believers, and other minority groupings.

That said, it is a matter for the expert determination of the Office of Film and Literature Classification whether a given publication within the ambit of the *Films, Videos and Publications Act 1993* is “objectionable”.⁴⁶ This fact makes it difficult to challenge the Office’s (or the Board of Review’s) decision—not only for an

⁴³ [2000] 3 NZLR 570 (CA).

⁴⁴ *Films, Videos and Publications Act 1993*, s.3(1).

⁴⁵ Government Administration Committee, *Inquiry into the Operation of the Films, Videos, and Publications Classification Act 1993 and related issues*, AJHR I.5A, March 2003, at p. 16.

⁴⁶ *Society for the Promotion of Community Standards Inc v Film and Literature Board of Review (“Visitor Q”)* [2005] 3 NZLR 403 (CA).

individual whose expression has been censored, but also those who believe that some particular expression *should* have been censored. Consequently, efforts to either allow or prevent the availability of a publication in New Zealand must rely on challenging procedural steps taken by the Office and Board of Review. A series of cases involving films brought to New Zealand for screening at film festivals highlights this point.⁴⁷ A morals watchdog group, the Society for the Promotion of Community Standards, repeatedly appealed to the Board of Review the Office's decision not to classify certain films as "objectionable"; then brought court proceedings seeking an interim restriction order to prevent the films from being screened until this appeal was resolved. Because the films already were scheduled to be shown as a part of an organised festival and would have no realistic market outside of such festivals, such an interim order threatens to prevent their screening altogether. Nevertheless, the Courts have emphasised that the role of interim restriction orders in preserving the status quo means that protecting freedom of expression should not be the overriding factor when deciding if issuing such an order is "in the public interest".⁴⁸ If nothing else, this stance has forced festival organisers to begin the classification process at an earlier date, so as to allow for any delays that may be involved as this procedure runs its course. These challenges to the right to screen (allegedly) "objectionable" films also serve as a reminder that conflicts over free speech are a zero-sum game: for every person wishing to expand the boundaries of what may be said or shown, there will be some who decry the perceived damage done to values such as "decency", "morality", and "community standards".

⁴⁷ *Re Baise Moi* [2002] NZAR 884 (HC); *Re Baise Moi* [2002] NZAR 897 (HC); *Re Baise Moi* [2003] NZAR 200 (HC); *Society for the Promotion of Community Standards Inc v Elliott* Unreported, High Court, Wellington, CIV-03-485-1117, 16 June 2003; *Society for the Promotion of Community Standards Inc v Elliott*, Unreported, High Court, Wellington, CIV-2004-485-1741, 27 August 2004.

⁴⁸ *Re Baise Moi* [2002] NZAR 884 (HC); *Society for the Promotion of Community Standards Inc v Elliott*, Unreported, High Court, Wellington, CIV-2004-485-1741, 27 August 2004.

(ii): *Censorship of broadcasting.*

The Broadcasting Standards Authority (BSA) has developed an extensive body of decisions as to the meaning and application of the broadcasting standards contained in the *Broadcasting Act 1989* and related codes of practice, the breadth of which defy any attempt at summary.⁴⁹ Until recently, however, it was unclear just what role the NZBORA's guarantee of freedom of expression should play with regard to these standards.⁵⁰ Conflicting High Court decisions had held that only the codes of practice adopted to implement the required broadcasting standards need be NZBORA compliant,⁵¹ and that the actual decision reached by the BSA under the code of practice must be NZBORA compliant.⁵² While this may appear to be a distinction without much difference, in that on most occasions one would expect that applying a NZBORA compliant code will produce a NZBORA compliant outcome,⁵³ it could have consequences in terms of how amenable the BSA's decisions are to review by the courts.⁵⁴ If it is just the code of practice that needs to comply with the NZBORA, then the BSA's application of that code to a particular programme will be reviewable by the courts only on general reasonableness grounds.⁵⁵ However, if each and every decision reached under the code of practice must be NZBORA compliant, then the courts would seem to have far broader grounds on which to review a ruling by the BSA that a programme is in breach of some aspect of the code.

⁴⁹ The BSA's decisions are available at <http://www.bsa.govt.nz/latestdecisions.php>.

⁵⁰ The BSA has set out its understanding of its obligations under the NZBORA in *Browne v Canwest TVWorks Ltd*, Decision No. 2005-112, at paras. [88]-[98].

⁵¹ *TV3 Network Services Ltd v Holt* [2002] NZAR 1013 (HC).

⁵² *TVNZ v Viewers for Television Excellence Inc* [2005] NZAR 1 (HC).

⁵³ A. Butler and P. Butler, *The New Zealand Bill of Rights Act: A Commentary*, LexisNexis Ltd, Wellington, 2005, at para. [13.19.14].

⁵⁴ There is a statutory right of appeal from the BSA to the High Court, *Broadcasting Act 1989*, s.18.

⁵⁵ This is the position adopted by the House of Lords in *R v British Broadcasting Corporation, ex p ProLife Alliance* [2003] 2 All ER 977. For comment, see A Geddis, "If Thy Right Eye Offend Thee, Pluck it Out": *R v BBC, ex p ProLife Alliance*" (2003) 66 *M.L.R.* 885.

This issue again emerged in the course of litigation stemming from C4's decision to screen the "Bloody Mary" episode of the cartoon South Park.⁵⁶ The New Zealand Catholic Bishop's Conference appealed the BSA's decision that this programme—containing a depiction of a menstruating statue of the Virgin Mary—did not breach either the Good Taste and Decency or Denigration of Identifiable Groups standards contained in the relevant code of practice.⁵⁷ In reaching this conclusion, the BSA considered that it was obliged to give full effect to the NZBORA, s.14 when reviewing the programme.⁵⁸ Consequently;

Were the Authority to uphold the complaint, this would amount to a statement that broadcasters who offer satire, humour and drama as their fare may not offend against the religious convictions of others, and that such offence amounts to a breach of good taste and decency. That, in the view of the Authority, would be an unreasonable limitation of a broadcaster's right to freedom of expression, which includes the right to satirise religious issues.⁵⁹

On appeal in the High Court, Wild J rejected the Catholic Bishop's contention that the BSA had erred in considering the NZBORA when applying the relevant broadcasting standards.⁶⁰ Furthermore, he upheld the BSA's overall finding that the programme did not breach these broadcast standards, emphasising that "there are [no] universal standards of good taste and decency, that can and must be upheld irrespective of the context of the matter in issue."⁶¹ The particular expertise and experience of the BSA means it is to be accorded considerable latitude in assessing and applying these standards.⁶² Consequently, Wild J's judgment both affirms the relevance of the

⁵⁶ *Browne v CanWest TV Works Ltd*, Unreported, HC Wellington, Wild J, CIV 2006 4851161, 31 July 2007.

⁵⁷ Broadcasting Standards Authority, *Code of Broadcasting Practice: Free to Air Television*, August 2006 (at <http://www.bsa.govt.nz/pdfs/bsa-freetvcode.pdf>).

⁵⁸ *Simmons v CanWest TVWorks Ltd*, Decision No. 2006-022, at paras. [63]-[74].

⁵⁹ *ibid.*, at para. [117].

⁶⁰ n.56 above, at paras. [30]-[42]. Wild J thus restated a position he previously had taken in *TVNZ v Viewers for Television Excellence Inc*, n. 52 above.

⁶¹ n.56 above, at para [73].

⁶² *ibid.*, at paras. [40]; [50]; [52].

NZBORA's affirmation of freedom of expression to the BSA's role in maintaining broadcasting standards, while at the same time largely insulating from review its assessment of how that right is to be applied in a particular case.⁶³ It will be interesting, however, to see whether this judicial deference to the BSA's overall competence carries over to a case where it has decided a programme *is* in breach of the relevant standards, irrespective of the broadcaster's right to freedom of expression.⁶⁴ Might such a finding, likely accompanied by the imposition of a penalty on the broadcaster, attract more of a "hard look" standard of review by the courts?

Developments in the regulation of political expression

It is commonplace to note that while the right to freedom of expression "is as wide as human thought and imagination",⁶⁵ it is of most pressing concern with respect to matters of public political controversy.⁶⁶ Consequently, efforts to limit or prevent expression relating to Politics writ large should attract an increased level of scrutiny and face a greater justificatory burden. This article already has touched on one example of this phenomenon at work: the creation of the defence of qualified privilege with regard to comment about those who are, or are seeking to become, members of Parliament. However, there always will be countervailing interests even with regard expression about matters political. Speech that advocates governmental, social or cultural change still may be subject to limitations, provided the reasons for imposing those limits are sufficiently weighty. This final section considers four

⁶³ Wild J went so far as to say that a court will only overturn the BSA's censorship decision if it can be shown that this is "plainly wrong"; *ibid.*, at paras. [23]; [54].

⁶⁴ See, e.g., *Barnes v Alt TV Ltd*, Decision No. 2007-029.

⁶⁵ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA), at para. [15], per Tipping J.

⁶⁶ The *locus classicus* for this claim is A. Meiklejohn, *Free speech and its relation to self-government*, Harper, New York, 1948.

contemporary issues involving the regulation of political expression in New Zealand. In two of these examples—the abolition of New Zealand’s sedition laws and expanding the scope for protest activity—there have been moves to reduce or loosen potential limits on political expression. In the other two—restraining third party election spending and limiting the broadcast coverage of Parliament—there have been moves to impose or tighten such limits. The point is that even at the core of its application, the right to freedom of expression is still treated as a contingent one, subject to balancing against other competing interests and values.

(i): Abolition of the sedition laws.

In March of 2007, the Law Commission released its report on *Reforming the Law of Sedition*.⁶⁷ This document examined the criminal offences contained in the *Crimes Act 1961*, ss. 81-85, which impose a penalty of up to two years of imprisonment on a range of expressive activities motivated by a “seditious intention”. The statutory definition of this term includes “excit[ing] disaffection against, Her Majesty, or the Government of New Zealand”, “incit[ing] the public ... to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand”, and “excit[ing] such hostility or ill will between different classes of persons as may endanger the public safety”.⁶⁸ After reviewing the history of these offences, assessing them against the right to freedom of expression and examining how other jurisdictions deal with the issue, the Law Commission recommended their repeal. Four principal reasons were given for this conclusion:⁶⁹ the breadth and vague nature of the offences; their impact on freedom of

⁶⁷ Law Commission, *Reforming the Law of Sedition*, Report 96, March 2007.

⁶⁸ Crimes Act 1961, s.81(1).

⁶⁹ n. 67 above, at p. 11, para. [14]; p.68, para. [242].

expression (which could not be justified under the NZBORA); their potential use as an inappropriate form of political censorship; and the existence of a range of other provisions that specifically target many of the relevant harms that the sedition offences are intended to prevent.

The Law Commission's recommendation provoked a remarkably swift political response. Members of Parliament from four smaller parties—the Greens, Maori Party, United Future and Act—banded together to demand that the Government act on the advice. The Government then introduced legislation to do so. The *Crimes (Repeal of Seditious Offences) Amendment Bill 2007* unanimously passed its first reading in the House and received an expedited hearing from the Justice and Electoral Committee, which then recommended unanimously that the Bill be enacted.⁷⁰ Although the speed of this response may reflect a degree of MMP-era political posturing, as well as the fact that the present Government faces challenges progressing more contentious legislation through the House, it also demonstrates that the sedition offences generally were seen to be an antiquated and unnecessary relic of colonial law. During the first reading debate, for example, Labour's Russell Fairbrother claimed they:⁷¹

[hark] back to the days when society was ruled by the king or queen, and the hierarchy in society was understood by people at all levels of society. It is a very British and colonial approach to life, which, hopefully, we are moving away from.

Another way to view this development is that the kind of social threats the sedition offences originally were designed to combat—incitement to revolutionary activity, advocacy of violent opposition to the Crown, or the fomenting of rebellion against established authority—no longer appear to pose any real, imminent danger in contemporary New Zealand. We appear to have developed sufficient confidence in the overall legitimacy of our governing institutions and practices that we safely can

⁷⁰ Justice and Electoral Committee, "Report on the Crimes (Repeal of Seditious Offences) Amendment Bill", 120-1, 24 August 2007.

⁷¹ *Hansard*, 19 June 2007, vol. 640, p. 9975.

assume attempts to bring about an uprising against them will produce nothing more than overwhelming audience disinterest.

Supporting this analysis, recent moves by the Police to lay charges under the sedition offences highlight their relatively peripheral status. In 2006, a political protestor who put an axe through the Prime Minister’s electorate office window, then distributed pamphlets to the media urging “like-minded New Zealanders” to carry out similar acts, was convicted of publishing a seditious statement and sentenced to two months imprisonment.⁷² However, the fact he also was convicted of conspiracy to commit criminal damage for the act of smashing the window—and sentenced to a concurrent two-month term of imprisonment—made the sedition charge redundant. Similarly, police threats to charge a Dunedin pub owner with sedition for distributing a flier offering students the chance to win a petrol-soaked couch seemed to stretch the purpose of the offence to breaking point. If these are the sorts of expression being targeted by the sedition offences today, then they form little more than a cover-all charge for the actions of fools, rather than a bulwark against illegitimate attempts to bring about profound social change by violent or illegitimate means.

(ii): Expanding the scope for protest activity.

Historically, there has been no formal, stand-alone “right to protest” in New Zealand.⁷³ Protest activities instead have taken place where the law remained silent: the default position is that which is not expressly prohibited, is allowed. The country’s general cultural commitment to liberal-democratic values then ensured a measure of

⁷² A conviction and sentence upheld by the Court of Appeal; *R v Selwyn* [2007] NZCA 124 (4 April, 2007). This decision is quite remarkable in that it upholds the conviction without mentioning the NZBORA at all.

⁷³ See K. Keith, “The Right to Protest”, in K. Keith (ed), *Essays on Human Rights*, Sweet & Maxwell, Wellington, 1968, at p. 49; R. Hart, “The Mobs Are Out: The Right to Protest on Public Roads” (2001) 9 *Auckland U.L.Rev.* 311.

freedom to protest simply by making it too politically costly for parliamentarians to pass legislation preventing such activities. Furthermore, the courts on occasion have recognised the importance of permitting dissenting activities,⁷⁴ indicating that criminal offences should be interpreted and applied in a way that does not unduly restrict the ability of individuals to protest.⁷⁵ Finally, the NZBORA's affirmation of the right to freedom of expression—along with the allied rights to freedom of peaceful assembly (s.16), freedom of association (s.17) and freedom of movement (s.18)—now provides a statutory recognition of the importance of the kinds of activities traditionally associated with political protest.

A number of recent developments also point to increased official sensitivity to the importance of allowing protest action to take place. In 2000, for example, Parliament's Justice and Electoral Committee issued a report that strongly criticised the Police for intervening in protests against the visit of the President of China and recommended a range of procedural changes to prevent a repeat.⁷⁶ The Police subsequently made a number of payments to individuals arrested during those protests, tacitly recognising that their expressive rights had been breached. The courts also have been somewhat more solicitous of protest rights than they were in the past. In 1998, the High Court found that the right to peaceful assembly affirmed in the NZBORA, s.16, imposes a "reasonableness" requirement on a public official who seeks to invoke the Trespass Act 1980 against persons engaged in protest activity.⁷⁷ In 2004, the High Court refused to convict a protestor who burnt the New Zealand flag at an anti-war demonstration after using the right to freedom of expression affirmed in

⁷⁴ See, e.g., *Watch Tower Bible and Tract Society v Mount Roskill Borough* [1959] NZLR 1236.

⁷⁵ See, e.g., *Police v Christie* [1962] NZLR 1109, at 1113; *Melser v Police*, n.7 above; *Wainwright v Police*, n.8 above, at 103. Of course, in all of these cases the judicial recognition of a right to engage in dissenting speech did not prevent convictions from being entered!

⁷⁶ Justice and Electoral Committee, "Inquiry into matters relating to the visit of the President of China to New Zealand in 1999", *AJHR* I.7A (2000)

⁷⁷ *Police v Beggs* [1999] 3 NZLR 615 (HC).

the NZBORA to read down the offence of destroying this emblem “with the intention of dishonouring it.”⁷⁸ Although one may question the particular way that France J applied the s.6 interpretation provision so as to give the relevant legislation a rights consistent meaning—it appears to rewrite the statutory wording in a way the Supreme Court subsequently has indicated is inappropriate⁷⁹—the outcome demonstrates an increased judicial appreciation of the importance of allowing dissenting voices to express their views in a manner that may outrage the sensibilities of those witnessing the protest.

This appreciation of the value of dissent is also central to the Supreme Court’s recent decision in *Brooker v Police*.⁸⁰ In the Court’s first judgment to deal directly with freedom of expression issues, the majority redefined the concept of disorderly behaviour so as to give greater protection to the rights of protestors. Before turning to consider the case in detail, some background is necessary. The offence of disorderly behaviour, contained in s.4(1)(a) of the *Summary Offences Act 1981*,⁸¹ has long cast a shadow over protest activity. The offence allows for the arrest without warrant, with a fine upon conviction of up to \$1000, of any person who “[i]n or within view of any public place, behaves in an offensive or disorderly manner”. It is not necessary that the behaviour threaten to provoke a breach of the peace or other violent response.⁸² In two seminal cases dealing with protests against the Vietnam War, the courts stated that the behaviour only need to have the potential to so annoy or insult “right thinking members of the public”⁸³ as to justify the imposition of a criminal conviction.⁸⁴ Given

⁷⁸ *Hopkinson v Police* [2004] 3 NZLR 704 (HC).

⁷⁹ *Hansen v R* [2007] 3 NZLR 1 (SC) at paras. [150]-[158] per Tipping J; [236]-[254] per McGrath J; [287]-[290] per Anderson J.

⁸⁰ [2007] 3 NZLR 91 (SC).

⁸¹ Prior to 1981, a similar offence was contained in the *Police Offences Act 1927*, s.3D.

⁸² Indeed, such behaviour today is covered by a separate offence in the *Summary Offences Act 1981*, s.3.

⁸³ *Police v Christie*, n.75 above, at p. 1113; *Melser v Police*, n.7 above, at p. 443 per North P.

the fact that protest activity by its very nature is likely to provoke this response, the potential impact of this offence on dissenting voices is obvious. To give but one example, calling out “the Treaty was a fraud” in “a loud and commanding voice” during a Waitangi Day celebration held in the Beehive’s banquet hall resulted in an arrest and subsequent conviction for disorderly behaviour.⁸⁵ Similarly, a protestor who repeatedly used the word “fuck” during a political protest in a public square was arrested and convicted on the interchangeable charge of offensive behaviour, because some who heard him speak may have been offended in a “more than trivial way”.⁸⁶

This judicial approach largely survived the introduction of the NZBORA in 1990, with the courts continuing to rely on the legal tests developed before its enactment.⁸⁷ The pre-NZBORA authorities were said to already recognise the need to balance an individual’s right to free expression with other social values (even if different language would be used for that balancing test today).⁸⁸ Dissenting behaviour which fails the balancing test by generating an unacceptable level of annoyance or insult legitimately could be punished, as such a limit on expression is “demonstrably justified in a free and democratic society” as per the NZBORA, s.5.⁸⁹ Therefore, in 1996 the Court of Appeal upheld a naturist’s conviction for disorderly behaviour after he walked nude in the street outside his home, as his “conduct was such as would arouse feelings of anger, disgust or outrage in the average reasonable

⁸⁴ *Melser v Police*, n.7 above, at pp. 443 per North P, 444 per Turner J, 446 per McCarthy J; *Wainwright v Police*, above n.8, at p. 103.

⁸⁵ *Caithness v Police* (1986) 2 CRNZ 201 (HC).

⁸⁶ *Jeffrey v Police* [1994] 11 CRNZ 507 (HC), at p. 515 per Tipping J. On the relationship between “offensive” and “disorderly” behaviour, see *R v Ceramalus*, CA 14/96, 17 July 1996, at pp. 4-5 per Thomas J.

⁸⁷ See *Ceramalus v Police* (1991) 7 CRNZ 678 (HC); *Jeffrey v Police* [1994] 11 CRNZ 507 (HC); *Police v Geiringer* [1990-92] 1 NZBORR 331 (HC); *Garnham v Police* [1997] 3 NZLR 228 (HC); *Police v Beggs* [1999] 3 NZLR 615 (HC); *Stemson v Police* [2002] NZAR 278 (HC); *Phillips v Police* (2004) 20 CRNZ 1106 (HC); *R v Rowe* [2005] 2 NZLR 833 (CA).

⁸⁸ *R v Ceramalus* (CA 14/96, 17 July 1996), at pp. 10-11 per Thomas J.

⁸⁹ *Jeffrey v Police*, above n.86, at p. 513 per Tipping J; *Phillips v Police*, n.87 above at pp. 1109-1111 per France J.

person.”⁹⁰ The Court summarily rejected the naturist’s contention that this conviction unjustifiably breached his asserted NZBORA, s.15 right to express his “Christian beliefs”—any right to manifest his religious convictions automatically succumbed to the right of users of public spaces to be free from significant mental upset.

Mr Brooker’s case provided the Supreme Court with an opportunity to address the impact of the offence of disorderly behaviour on protest activities. It arose after Mr Brooker, irritated at being served with a search warrant late one Saturday night, took a guitar and protest sign to the home of the Constable who had served it on him. He knocked for some minutes on her door at 9:20 am, knowing she had just finished a shift of night duty and likely would be trying to sleep. When she told him to leave, he retreated to the roadside and commenced playing protest songs about her actions in what was described as “a normal singing voice”. This activity continued for some 15-30 minutes, whereupon the Constable’s colleagues arrived. When Mr Brooker refused to leave, he was arrested. At his trial in the District Court, Mr Brooker was found guilty of disorderly behaviour, on the ground that his actions amounted to “behaving in a way that right thinking members of the public would consider inappropriately annoying to members of the public.”⁹¹ Particular weight was given to the fact that his protest had taken place outside the Constable’s private dwelling rather than at the police station or another “more appropriate” protest environment.⁹²

Mr Brooker’s conviction was upheld by the High Court⁹³ and a unanimous Court of Appeal.⁹⁴ However, the Supreme Court overturned his conviction by a 3-2

⁹⁰ *R v Ceramalus*, n.88 above, at p. 6 per Thomas J.

⁹¹ *Police v Brooker* (District Court, Greymouth, 30 June 2003, Callaghan DCJ), at para [5]. Mr Brooker was then fined \$300, plus \$130 in court costs.

⁹² *ibid.*, at paras [31]-[32].

⁹³ *Brooker v Police* Unreported, High Court, Greymouth, John Hansen J, CRI 2003-418-000004, 16 October 2003.

⁹⁴ *R v Brooker* (2004) 22 CRNZ 162 (CA).

majority.⁹⁵ The majority was concerned that the boundary of acceptable protest activity in New Zealand law must take appropriate account of the affirmed right to freedom of expression under s.14, which applied to Mr Brooker’s particular protest against the Constable’s actions. Consequently, Elias CJ and Blanchard J emphasised that forms of expressive behaviour that generated feelings of annoyance—even considerable annoyance—in those exposed to it should no longer be deemed “disorderly” on that ground alone.⁹⁶ In order to give s.4(1)(a) a reading that adequately protects the right to freedom of expression under NZBORA, s.14, the behaviour instead must be “seriously disruptive of public order”,⁹⁷ in the sense of “substantially disturb[ing] the normal functioning of life in the environs of that place”.⁹⁸ Tipping J likewise thought the lower courts’ focus on the annoyance caused to the Constable was “problematic”.⁹⁹ His preferred test for determining whether behaviour is disorderly instead was, “if, as a matter of time, place and circumstance, it causes anxiety or disturbance which is beyond what a reasonable citizen should be expected to bear.”¹⁰⁰ While the minority also were at pains to recognise and affirm the importance of dissenting expression,¹⁰¹ they believed nevertheless that Mr Brooker’s particular actions had imposed an unreasonable burden on the Constable. She had a right to enjoy peace and tranquillity in her home that overrode Mr Brooker’s right to express his grievance directly to its source.¹⁰² Consequently, his conviction for the offence of disorderly behaviour represented a justified limit on his right to freedom of expression, as per s.5 of the NZBORA.

⁹⁵ [2007] 3 NZLR 91 (SC).

⁹⁶ *ibid.* at paras. [24], [33] per Elias CJ; [63] per Blanchard J.

⁹⁷ *ibid.* at para. [24] per Elias CJ

⁹⁸ *ibid.* at para. [56] per Blanchard J.

⁹⁹ *ibid.* at para. [84] per Tipping J. He then stated “I agree with what the Chief Justice has said in that regard.”

¹⁰⁰ *ibid.* at para. [90] per Tipping J.

¹⁰¹ See *ibid.* at para. [116] per McGrath J.

¹⁰² *ibid.* at para. [129] per McGrath J; para. [225] per Thomas J.

The division on the Supreme Court bench thus reflected differing judicial assessments of the weight to be attached to freedom of expression *vis-à-vis* privacy in the immediate case. For the majority, Mr Brooker’s right to expression required that the Constable must tolerate a relatively short, low-key form of protest designed to intrude unwelcome messages into her home. For the minority, the fact the expression had this intrusive effect justifies attaching a criminal penalty to it. However, Blanchard and Tipping JJ (along with McGrath J in the minority) took particular pains to point out the context-specific nature of their analysis and to stress that a different outcome may well be required for protest activity that occurs in even slightly different circumstances.¹⁰³ While it is understandable why this rather fact-sensitive approach to the issues was taken, it does limit somewhat the overall value of the decision as a precedent; Thomas J’s observation that “at this appellate level, something more is required than a ‘rejigging’ of the balance” perhaps has some bite to it.¹⁰⁴ At the least, the absence of any real “bright line” rules in the Court’s decision (indeed, the absence of any agreed test for what will amount to “disorderly conduct”) means that future cases, such as that involving the protestors who burned a New Zealand flag at this year’s ANZAC Day ceremonies in Wellington,¹⁰⁵ will be needed to clarify exactly how far the balance has shifted in favour of expressive freedom over audience peace of mind.

(iii): Restraining “third party” election spending.

¹⁰³ See *ibid.* at paras. [57], [64] per Blanchard J; para. [92] per Tipping J; paras. [140] [145], per McGrath J.

¹⁰⁴ *ibid.* at para. [154].

¹⁰⁵ “Anzac Day protestors in court over flag burning”, *NZ Herald*, May 22, 2007 (at http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10441104).

An unusually large amount of “third party” advertising activity took place during the 2005 election campaign.¹⁰⁶ Most notoriously, members of the Exclusive Brethren Church reportedly spent some \$800,000-\$1.5 million on leaflets that attacked the Labour and Green parties, while promoting policies closely connected with the National Party. (The widely varying estimates of the amount spent reflect the fact that there is no current requirement for third parties to disclose their election related expenditures.) Other groups, the unions and racing industry in particular, mounted their own advocacy campaigns with the aim of influencing voter preferences. Although there is some question as to whether *all* of this spending fell within the current rules governing election campaigning—some may have crossed the line and “appear[ed] to encourage or persuade voters to vote for a [political] party”,¹⁰⁷ or have failed to include the “true name and address” of the person responsible for publishing it¹⁰⁸—the great majority of it probably was lawful.

This kind of third party election spending raises at least two concerns.¹⁰⁹ Most obviously, basic notions of democratic equality may be compromised (or be seen to be compromised) if individuals or groups are able to use their wealth to try and influence the election campaign. The more wealth that an individual or group has, the more influence it may achieve (or be seen to achieve). There is also a related problem of political parties seeking to “farm out” their election advertising. Because New Zealand’s election rules put a cap on the political parties’ overall election expenses,

¹⁰⁶ See generally A. Geddis, *Election Law in New Zealand: Practice and Policy*, LexisNexis, Wellington, 2007, at pp. 147-151.

¹⁰⁷ The *Election Act 1993*, s. 221, makes it an “illegal practice” to publish any such advertising without first obtaining the written authorisation of the Secretary of the relevant party. Following the 2005 election, the Chief Electoral Officer referred one of the Exclusive Brethren leaflets to the police as potentially breaching this section, but the police declined to prosecute the matter.

¹⁰⁸ The *Election Act 1993*, s. 221A, makes it an “illegal practice” to publish an advertisement “relating to an election” without including this information. Again, the Chief Electoral Officer referred several instances to the police following the 2005 election, but none were then prosecuted.

¹⁰⁹ See A Geddis, “Democratic Visions and Third-Party Independent Expenditures” (2001) 9 *Tulane J. Int. and Comp. L.* 5.

there may be a temptation to use nominally independent individuals or groups to carry out advertising above and beyond the level otherwise allowed by law. Such extra spending may then give (or be seen to give) that political party an unfair advantage over its electoral rivals. The metaphor usually adopted to summarise these concerns is that of “the level playing field”, whether this be for groups in civil society or political parties directly contesting the election.

However, any move to limit the engagement of individuals or groups in the election campaign raises obvious freedom of expression concerns. Because money is so necessary to engage in effective, large-scale communication, capping the amount that third parties can spend on election related advertising (as well as imposing other regulatory controls such as registration or disclosure requirements) inevitably impacts upon their ability to communicate with the electorate at large. It may then be argued that preventing individuals or groups from engaging in election-related speech is wrong as a matter of principle.¹¹⁰ Communicating with voters at election time lies at the very heart of the right to freedom of expression, placing a very heavy justificatory burden on those who would restrain such messages. And it is debatable what immediate “harm” a limit on third party spending is designed to combat. There is only sketchy evidence that such spending can “buy” an election result—to use the concrete example of the Exclusive Brethren’s spending in 2005, it convincingly can be argued that the revelation of who was funding it, along with questions about the National Party’s knowledge of it, actually deprived National of victory at the polls. Furthermore, if the spending takes place independently of a party or candidate, concerns that it may lead to *quid pro quo* corruption are somewhat ameliorated. So if there is no definitive empirical evidence about the effect of spending on electoral

¹¹⁰ See, e.g., R. Partridge and J. Wilson, “Electoral Finance Bill Undermines Freedoms Protected by the *New Zealand Bill of Rights Act 1990*”, *N.Z. Lawyer*, 31 August 2007, p. 16.

competition, and no immediate link between such spending and the adoption of particular policies, how can it be justifiable for the State to limit such expression?

One possible answer lies in recognising the existence of differing basic conceptions of the electoral process.¹¹¹ In *Harper v Canada (A.G.)*,¹¹² the majority of the Canadian Supreme Court distinguished between a “libertarian” and “egalitarian” model of elections when rejecting a *Charter* challenge to the imposition of limits on third party election spending.¹¹³ The former places a high premium on the freedom of individuals and groups to participate at election time to whatever extent they wish, thereby imposing a high justificatory burden on those seeking to limit electoral communications. The latter emphasises the presumptive right of each member of society to have their interests equally recognised in the election process, with the *potential* or *perceived* impact of asymmetrically distributed economic resources on this right to equal recognition a valid matter for regulation. The Canadian Supreme Court then upheld the right of Parliament, as the directly elected representatives of the Canadian people, to make this basic value judgment about how the nation’s electoral process should be structured.¹¹⁴ In New Zealand, Parliament already has demonstrated a broad commitment to an egalitarian approach to election spending:¹¹⁵ limits apply to the campaign spending of political parties and candidates; tight restrictions exist on the use of the broadcast media for electoral purposes; sizeable donations to parties or

¹¹¹ See A. Geddis, “Representative democracy: what’s the law got to do with it?”, (2006) 12 *Otago L.Rev.* 197, at pp. 203-206.

¹¹² [2004] SCC 33.

¹¹³ *ibid.* at para. [62], per Bastarache J. See also C. Feasby, “*Libman v Quebec (A.G.)* and the Administration of the Process of Democracy Under the *Charter*: The Emerging Egalitarian Model” (1999) 44 *McGill L.J.* 5. For a discussion of the issue of third party election spending in Canada, see A. Geddis, “Liberte, Egalite, Argent: Third Party Election Spending and the *Charter*” (2004) 42 *Alberta L.Rev.* 429.

¹¹⁴ The European Court of Human Rights also has held that limits on third party spending are consistent in principle with the right to freedom of expression contained in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. See *Bowman v United Kingdom* (1998) 63 ECHR 175; A. Geddis. “Confronting the ‘Problem’ of Third Party Expenditures in United Kingdom Election Law” (2001) 27 *Brooklyn J. of Int. L.* 103.

¹¹⁵ Geddis, *Election Law*, n.106 above, at pp. 135-172.

candidates must be disclosed to public (albeit in an incomplete and patchy fashion). Simply put, New Zealand as a society does not appear to want its electoral processes to become dominated by the raising and spending of money, as has occurred in the United States (and, to a lesser degree, Australia). In this context, a decision to limit the spending of third party groups on electoral communications can be justified as a part of a wider scheme of regulation.

Nevertheless, even if some form of restrictions on third party activity at election time can be justified in principle, free-speech concerns may still arise out of any particular regulatory proposal. Both the Canadian Supreme Court and the European Court of Human Rights have ruled that restrictions on third party spending that preclude “meaningful participation” at election time cannot be justified.¹¹⁶ The introduction of the *Electoral Finance Bill* into the House in July of 2007 posed just such problems. This Bill would regulate any third party wishing to publish an “election advertisement” during the “regulated period”. The definition of “election advertisement” was drawn very widely, including “any form of words or graphics, or both, that can reasonably be regarded as ... taking a position on a proposition with which 1 or more parties or 1 or more candidates is associated.”¹¹⁷ The “regulated period” also was quite extensive, beginning on the 1st of January of any year in which Parliament is due to expire and ending on polling day.¹¹⁸ The Bill then proposed a range of restrictions on such expression.

- No person may publish, or cause to be published, any election advertisement during the regulated period unless the “promoter” of the advertisement either is a registered third party, or provides a declaration (under the *Oaths and*

¹¹⁶ *Libman v Quebec (A.G.)* [1997] 3 S.C.R. 569; *Harper*, n.112 above; *Bowman*, n.114 above.

¹¹⁷ *Election Funding Bill 2007*, cl. 5.

¹¹⁸ *ibid.*, cl. 4. In practice, given that elections usually are held in October or November, this period will last some 10-11 months. If a snap election is held in a year Parliament is not due to expire, the regulated period is a set 3 months from polling day.

Declarations Act 1957, s.9) that they will not spend more than \$500 in an electorate or \$5000 nationally on such advertising.¹¹⁹

- Only registered electors, New Zealand body corporates, or unincorporated bodies entirely made up of members who are registered electors may register as third parties.¹²⁰
- Registered third parties would be required to disclose publicly the identity of all donors giving more than \$500 and prohibited from receiving anonymous donations (or donations from a trust or like entity where the original donor cannot be identified) that exceed \$500.¹²¹
- Registered third parties are restricted to spending no more than \$2000 in any electorate, or \$60,000 nationally, on publishing election advertisements during the regulated period.

These proposals created a storm of controversy, with numerous voices challenging the Bill for its broad scope and quite severe curtailment of expressive freedoms.¹²² Of particular concern is the potential range of public policy-oriented communications that may qualify as “election advertisements” and thus become subject to the *Election Finance Bill’s* quite extensive regulatory requirements. The definition’s breadth may cause it to encompass messages that are not intended to influence an election, but rather are directed at legitimate matters of public policy.

¹¹⁹ *ibid.*, cl. 53.

¹²⁰ *ibid.*, cl. 14. Consequently, any group with any members who are under 18 years of age will be prohibited from registering as a third party.

¹²¹ *ibid.*, cls. 22, 42, 44, 47.

¹²² The New Zealand Law Society, for example, submitted that the Bill “...is likely to curtail the legitimate expression of opinions while failing to curb (and potentially even incentivising) clandestine conduct in relation to the electoral process. The bill as a whole represents a backward step in the integrity of democracy in New Zealand.” New Zealand Law Society, *Submission to the Justice and Electoral Committee on the Electoral Finance Bill*. The Human Rights Commission also submitted; “As currently drafted the Bill will infringe certain human rights - most obviously freedom of expression but also the right of all citizens to participate in the election process.” Human Rights Commission, *Submission of the Human Rights Commission on the Electoral Finance Bill to the Justice and Electoral Committee*.

The public debate that occurred in early 2007 around amending the *Crimes Act 1961*, s.59—the so-called “anti-smacking Bill”—is a case in point. Had this discussion taken place during an election year under the rules proposed in the *Electoral Finance Bill*, it would be very difficult to know how much of it would have constituted “election advertising”. Furthermore, while the spending caps on such “election advertising” may seem high in the abstract, it is not clear whether they really are sufficient to allow third parties to engage in “meaningful” communications with the electorate. A single page advertisement in the Saturday edition of the *Otago Daily Times*, for example, costs \$6000. Given that this publication only reaches some 100,000 readers, it would cost a registered third party a full 10% of its permitted nationwide spending to communicate in this fashion with a mere 2.5% of New Zealand’s population.

As at the time of writing, it seems highly probable that Parliament’s Justice and Electoral Committee will recommend that the *Electoral Finance Bill* be amended significantly.¹²³ Whether this advice is followed, or whether any resultant changes will be sufficient to allay concerns about the legislation’s effect on freedom of expression, remains to be seen. However, there are two further issues raised by this legislative proposal that should be noted in the context of this article. First, it was introduced into the House of Representatives without any attached notice from the Attorney General under the NZBORA, s.7. The Attorney-General’s failure to act reflected advice from the Crown Law Office that the various restrictions on expression contained in the *Electoral Funding Bill* could all be demonstrably justified as per s.5.¹²⁴ This analysis can be criticised for failing to fully appreciate the overall

¹²³ See A. Young, “Electoral bill no one wants”, *NZ Herald*, 11 August 2007 (at http://www.nzherald.co.nz/topic/story.cfm?c_id=247&objectid=10457070&pnum=0).

¹²⁴ Crown Law Office, *Electoral Finance Bill: Consistency with the New Zealand Bill of Rights Act 1990*, ATT395/15, 26 June 2007 (at <http://www.justice.govt.nz/bill-of-rights/bill-list-2007/e-bill/electoral-finance-bill.html>).

impact of the proposed regulations on the expressive rights of those wishing to involve themselves in public debate, as well as for being overly deferential to the Government's choices as to how such debate should be regulated. Consequently, Parliament was not as fully informed about the Bill's implications for the right to freedom of expression under the NZBORA as it should have been. Second, the *Electoral Finance Bill* tightly limits the fundraising of third parties without really altering the rules under which political parties and individual candidates operate. These latter electoral contestants will still be permitted to receive unlimited sums of money from donors who need not disclose their identity to the public,¹²⁵ while registered third parties must disclose each and every donor who gives more than \$500. The spectre of MPs placing more severe fundraising rules upon third parties than they themselves are required to abide by is troubling, to put it mildly.

(iv): Limiting the coverage of Parliament.

This last point reflects the general concern that arises whenever Parliament imposes limits on expression involving a degree of self-dealing. Thus, it may be feared that legislative moves to regulate third party electoral expenditures stem from politicians' desire to retain control over the issues debated at election time, rather than being a genuine effort to create a "level playing field". Equally, the Labour-led Government's attempt in 2001 to reintroduce the offence of criminal libel of election candidates, complete with a fine of up to \$5000 or three months imprisonment, was widely (and quite rightly) criticised as a case of politicians protecting their own interests. These sorts of concerns also came to the fore in relation to changes to the parliamentary rules governing the use of footage of parliamentary proceedings, brought in alongside

¹²⁵ See A. Geddis, "Hide behind the targets, in front of all the people we serve: New Zealand election law and the problem of 'faceless' donations", (2001) 12 *Public L.Rev.* 51.

the introduction of permanent cameras into the Debating Chamber. The House of Representatives adopted a Sessional Order containing a new set of controls on broadcasting Parliament's activities that, *inter alia*, prohibit the use of such footage for political advertising or election campaigning (except with the permission of all members shown), or for the purpose of satire, ridicule or denigration.¹²⁶ A breach of these rules may not only result in a broadcaster being denied access to coverage of Parliament (as actually happened to TV3 in 2006¹²⁷), but may also be treated as a contempt of Parliament.¹²⁸

The new rules attracted immediate and widespread criticism from a media concerned that a ban on “satire, ridicule or denigration” would overly inhibit their activities when covering and commenting on what takes place in the House.¹²⁹ However, Peter Dunne, leader of the United Future Party, defended the measure on the grounds that:

Parliament is the highest court in the land. It is entirely proper that there are some boundaries around how its presentation occurs. The media will always continue to satirise and to lampoon—that is a legitimate and strong historical tradition. But it is not a principle of democracy to start from the presumption that the first thing to be preserved is the right to satirise and to lampoon. That is a consequence; it is not a substantive principal argument.¹³⁰

On this analysis, the media stand accused of being more concerned with retaining their ability to use footage in edited or out-of-context ways to make MPs appear foolish or mendacious, rather than fully presenting to the public the reality of parliamentary practice. Consequently, the dispute reflects a basic disagreement

¹²⁶ House of Representatives, *Sessional and other orders of continuing effect made during the 48th Parliament*, 28 June, 2007. These new rules were recommended in a unanimous report of the Standing Orders Committee, “Television coverage of the House”, *AJHR* I.18A, June 2007.

¹²⁷ “TV3 punished for showing finger gesture”, *NZ Herald*, 28 August 2006, (at http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10398444).

¹²⁸ A Geddis, “Fines for contempt in New Zealand’s House of Representatives”, [2007] *Public L.* 425.

¹²⁹ A. Young, “It’s official: Politicians just can’t take a joke”, *NZ Herald*, 27 June 2007, (at http://www.nzherald.co.nz/topic/story.cfm?c_id=144&objectid=10448159&pnum=2).

¹³⁰ *Hansard*, Vol. 640, p. 10357, 28 June, 2007.

between why MPs believe parliamentary proceeding should be broadcast—to “make parliamentary debate more accessible to the public and to improve public understanding of the democratic process”¹³¹—and why the media seem to believe it should be broadcast—to provide them with footage that they may then use in whatever way they deem most suitable (even if only to boost their ratings).

That said, while there is reason to be somewhat suspicious of the media’s motives in contesting these rules, it noteworthy that MPs did not give any consideration when crafting them as to whether they were NZBORA consistent. Although the House is bound by this legislation by virtue of s.3(a), the report of the Standing Orders Committee makes no mention at all of the right to freedom of expression affirmed in s.14; much less does it inquire into whether the rules constitute a “demonstrably justified” limit on this right.¹³² Instead, the Committee seems to assume that because other legislative bodies have similar rules in place—the Parliaments of New South Wales and Victoria are specifically mentioned¹³³—it must be acceptable for New Zealand to adopt them as well. It need hardly be pointed out that this is a less than satisfactory form of scrutiny of the relevant freedom of expression issues.

Nevertheless, the NZBORA consistency of these new rules actually may not matter in the long run. The country’s television broadcasters—TVNZ, TV3, Maori TV and Sky News—have issued a joint statement that they will ignore the rules “where warranted”, and that if one broadcaster is ejected from covering Parliament for breaching the rules, all will cease covering it.¹³⁴ This act of defiance has caused the Act, National and Green Parties to revisit their earlier support for the rules, while

¹³¹ n.126 above, at p.3.

¹³² A point also noted by Steven Price; see A. Young, “TV rule puts limits on election ads”, *NZ Herald*, 28 June 2007 (at http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10448344).

¹³³ n.126 above, at p.5.

¹³⁴ “TV networks unite to ignore Parliament’s satire rules”, *The Press*, 6 July 2007 (at <http://www.stuff.co.nz/thePress/4118618a6427.html>).

Prime Minister Helen Clark has also called for “further dialogue” on the issue.¹³⁵ In short, the legal niceties surrounding this issue seem to play second fiddle to the public’s perception of it (“bloody MPs can’t take a joke”¹³⁶) and the power of the broadcast media to shape that perception. And given that MPs need the news media just as much as the news media needs MPs, there perhaps is little need for a guaranteed right of freedom of expression to protect their interests against parliamentary moves to limit it.

Conclusion

This article commenced with two claims. First, that New Zealand displayed a general (albeit less than total) cultural commitment to freedom of expression prior to the legislative affirmation of that right through the NZBORA, s.14. Second, that the way that this general cultural commitment cashes out in practice — the manner in which it has been balanced against competing social goods in particular circumstances — can be expected to vary over time in response to changing social and cultural circumstances. Therefore, I would argue, the introduction of the NZBORA did not represent any particular legal watershed in terms of recognising the importance of freedom of expression in New Zealand. And New Zealand’s approach to evolving freedom of expression issues since this legislation’s passage has continued to reflect the contested and contingent nature of the right. In the field of private law, the courts broadened the defence of qualified privilege in response to concerns about the potential “chill effect” that defamation law may have on criticism of public political

¹³⁵ “Clark backs more talks on satire ban” *NZ Herald*, July 10 2007 (at http://www.nzherald.co.nz/topic/story.cfm?c_id=289&objectid=10450580).

¹³⁶ A TNS-TV3 opinion poll of 1000 people found 71% disapproved of the new restrictions, while only 20% approved; see “Poll rejects MPs' new rules”, *Dominion-Post*, 14 July 2007, (at <http://www.stuff.co.nz/4127068a6160.html>).

figures. Yet similar concerns about the potential effect on expressive values of a tort of invasion of privacy did not stop the judiciary from creating this new private law action. Likewise, the continued existence of a censorship regime reflects an ongoing societal view that some forms of expression are inherently so disagreeable or undesirable that they should be prohibited altogether. However, the courts have been prepared — some would argue overly-so — to circumscribe this regulatory regime in the name of protecting the individual right to create, possess and distribute material that is distasteful to others. Even in the core area of political expression the regulatory picture is decidedly mixed. Motivated by a desire to safeguard dissent against established social practices, Parliament is in the midst of repealing the various “sedition offences”. A bare majority on the Supreme Court similarly were convinced in *Brooker v Police* of the need to limit the bounds of “disorderly behaviour” so as to preserve the rights of protest. At the same time, however, Parliament currently is considering whether to impose significant restraints on third party participation at election time through the *Electoral Funding Bill*, while it also has moved to restrict the broadcasters’ use of televised coverage of activities in the debating chamber. Consequently, it is difficult to discern any particularly coherent or consistent approach to expressive issues in New Zealand law. Perhaps all that can be concluded about the current state of freedom of expression under New Zealand law is that it is broadly recognised and respected as a valuable and important social good — until such time as another more valuable or important social good requires that it be restricted.