



Submission

Inquiry into Hate Speech

To: Government Administration Committee
From: Office of Film and Literature Classification
Date: 29 October 2004

Introduction

1. The Office of Film and Literature Classification is an independent Crown entity responsible for the classification of “publications” that deal with matters such as violence, cruelty, crime, horror and sex. The definition of “publication” in the Films, Videos, and Publications Act 1993 includes films, videos, DVDs, computer games, photographs, pictures, books, magazines, newspapers, letters, apparel and computer files. Parliament has also provided the criteria used to classify publications. The Office is required to assess the freedom of expression against a publication’s capacity to injure the public good on a daily basis.
2. Although the Office’s expertise is limited to classification law and policy, it cannot classify in a vacuum. Awareness of laws affecting speech generally must also inform the Office’s decision-making. Its classifications will form part of, and be assessed against, trends in the broader regulation of expression. This submission draws upon the Office’s knowledge of these trends.
3. The Classification Office submits
 - that current New Zealand legislation does not specifically or effectively address “hate speech”;
 - that although the Office has no information on the extent of hate speech in New Zealand, there is no reason to assume that New Zealand is especially immune or that the social harm remedied by hate speech legislation elsewhere does not exist here;
 - that there is substantial precedent for a limited restriction on the freedom of expression to remedy the social harm caused by speech that incites hatred against individuals and groups on the basis of characteristics that are already prohibited grounds of discrimination;
 - that those characteristics generally include race, ethnicity, colour, nationality, religion and sexual orientation; and

- that the extent to which a publication is hate speech should be a matter that is relevant to the publication's classification if Parliament decides that legislation providing for civil or criminal remedies is necessary or desirable.
4. The term "hate speech" has no current legal significance in New Zealand. There are, however, provisions of New Zealand law that some would consider to be within the ambit of a "hate speech" law, but which do not refer to the term "hate speech". They are
- the civil "racial disharmony" provision in s61 of the Human Rights Act 1993;
 - the offence of "inciting racial disharmony" in s131 of the Human Rights Act 1993;
 - the ability to ban, cut or restrict representations of inherent inferiority in s3(3)(e) of the Films, Videos, and Publications Classification Act 1993;
 - that part of the definition of seditious intention based on the incitement of hostility or ill will between different classes of persons as may endanger the public safety (s81(1)(e) of the Crimes Act 1961);
 - the crime of blasphemous libel¹ in s123 of the Crimes Act 1961;
5. The Office has experience in the application of one of those provisions, s3(3)(e) of the Classification Act. To determine whether a publication should be banned, restricted or unrestricted, s3(3)(e) directs the censors to give "particular weight" to the extent and degree to which, and the manner in which, the publication

represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21 of the Human Rights Act 1993.

A search of the New Zealand Censorship Database at www.censorship.govt.nz reveals that there have been at least 14 publications banned or excised with content falling with s3(3)(e).²

¹ Blasphemous libel is committed "by anyone who makes public words, pictures or conduct whereby the doctrines, beliefs, institutions, or sacred objects and rituals of the Church of England by law established are denied or scurrilously vilified or there is objectively contumelious, violent or ribald conduct or abuse directed towards the sacred subject in question, likely to shock and outrage the feelings of the general body of Church of England believers in the community". First Report of the Select Committee on Religious Offences in England and Wales, <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9515.htm>.

² There is a high probability that the number of publications banned, restricted or cut for s3(3)(e) content is much greater than 14. The Office's quarterly and annual reports on its service performance have concentrated on the mediums it has classified rather than the reasons for classification, because the Office's revenue is determined by medium rather than by content. Censors have therefore never been directed to record a publication's content in the Office's database, although occasionally this is done voluntarily.

Scope of Inquiry

6. The Committee's terms of reference ask
- whether or not “hate speech”, “material that vilifies certain groups” and “hateful expressions” should be censored, prohibited or restrained;
 - whether or not censorship, prohibition or restraint is a justified limitation on the freedom of expression;
 - what steps have been taken by the international community to control hate speech.

Whether or not censorship, prohibition or restraint is a justified limitation on the freedom of expression depends on what the expression is, what harm the expression has caused or is likely to cause, and on how the expression is restrained.

7. The Classification Office submits that any consideration of whether or not hate speech should be restrained must start with a presumption in favour of the freedom of expression. Restrictions on the freedom of expression should be used to remedy harm only when the harm caused by the expression outweighs the good, and only when no remedy other than restricting expression adequately addresses the harm.
8. Restricting speech that causes social harm is relatively common: many countries legislate to restrict one or more of defamation, obscenity, profanity, incitement to illegal acts, false advertising, advertising aimed at children, deceptive trade practices and fighting words. The restrictions are, however, targeted at specific harms in order to preserve as much of the freedom of expression as possible. The Government Administration Committee recently adopted this approach when it stated

Any limitation, however, on the freedom of expression should be clearly defined and deliberately considered. Rather than expand the scope of the censorship law generally, the bill as introduced focuses on tailoring appropriate solutions to identified problem areas.³

The benefits of free expression

9. Three reasons are commonly given to explain why democracies place such a premium on the freedom of expression. First, the freedom of expression is essential to the pursuit of truth. In the marketplace of ideas, good ideas will eventually defeat bad ideas.⁴ Second, the freedom of expression encourages participation in social and political decision-making. A democracy can only function properly if every citizen is able to contribute to the process of government.⁵ Third, the freedom of expression

³ Report of the Government Administration Committee on the Films, Videos, and Publications Classification Amendment Bill (91-2), presented 30 August 2004, p2.

⁴ Justice Holmes referred to the “power of the thought to get itself accepted in the competition of the market”: *Abrams v United States* 250 US 616 (1919).

⁵ *Globe Newspaper Co v Superior Court* 457 US 596, 604 (1982).

is essential to individual self-fulfilment. An individual who is able to express herself is able to flourish and achieve her full potential as a contributing member of society. If society is tolerant of expressions of individuality, those who speak, those who hear, and society as a whole, benefit.

10. Logically then, the only types of expression that should be restricted are those that make no contribution to the discovery of truth, participation in society, or individual self-fulfilment, and those that undermine the achievement of those goals. The importance of remedying the harm caused by such expression should outweigh the importance of preserving the freedom of expression with respect to the type of speech targeted. Given the importance currently placed on preserving the freedom of expression, it would have to be a serious harm to warrant a restriction on expression.

The harm caused by expression

11. Any definition of hate speech should be aimed at remedying particular harms. Three examples of speech, and a description of the harm they caused, are given below.
12. *Example 1.* Perhaps the most articulate expression of the type of harm that hate speech laws seek to remedy is found in an article by Professor Charles Lawrence.⁶ He describes a college football score-board 8 feet high and 25 feet long. On it was painted a cartoon character of a black student who was identified by his name and his mother's name. The student was Lawrence's nephew. There was a bullet drawn close to the student's head and a gun was drawn with its barrel pointing at his head. Three Ku-Klux-Klansmen were drawn underneath the student, one of whom was announcing the student's death. A burning cross was drawn beside the gun, under which was written "kill the tarbaby". Lawrence describes the harm:

I cannot help but believe that those people who speak of offence – those who argue that this speech must go unchecked – do not understand the great difference between offence and injury. They have not known the injury my sister experienced, have not known the fear, vulnerability and shame experienced by the Wisconsin co-eds. There is a great difference between the offensiveness of words that you would rather not hear – because they are labelled dirty, impolite, or personally demeaning -- and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see. It is instructive that the chief proponents for sanctioning people who inflict these injuries are women and people of color, and there are few among these groups who take the absolutist position that any regulation of this speech is too much.

⁶ Charles R Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" 1990 Duke Law Journal 431 at 461.

13. **Example 2.** Two videos, *AIDS What You Haven't Been Told* and *Gay Rights Special Rights*, maintain that the “gay agenda” and claims for “special rights” must be resisted because HIV is spread by homosexuality and the “homosexual lifestyle”, rather than by unsafe sexual practices that anyone, regardless of sexual orientation, could perform. Justice Thomas of the New Zealand Court of Appeal described the harm caused by these videos in these terms:⁷

The propensity for such presentations to cause harm is apparent: . . . they demean and trivialise homosexual associations which do not fit the popular negative stereotype; they are hurtful and oppressive to the homosexual community; they pose a wounding challenge to the personal belief that sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs; they may psychologically scar homosexual individuals who would not otherwise repress their sexual orientation; and they tend to victimise and alienate a sizeable proportion of the population.

Nevertheless, the Court of Appeal held that the reference to direct and implied representations of inherent inferiority in s3(3)(e) of the Classification Act did not remedy, and was not intended to remedy, these harms.

14. **Example 3.** A member of the public submitted a printout from the website www.tencommandments.org to the Classification Office asking that it be banned because it incited violence and was “designed to encourage hate crimes”. The printout⁸ included statements such as:

God has not prescribed that homosexuals should merely be spoken against, rejected, discriminated against, or banished from the nations, but He requires that they be put to death by every government under which they reside (Leviticus 20:13) and no sorrow should be had for them.

Thus we see that God requires death for homosexuality just as he requires death for murder. This tells us that homosexuality is at least equal to the heinousness of murder. All homosexuals should be regarded by every society to be just as much criminals as are cold-blooded murderers.

. . .

The responsibility God has given society is to hate homosexuality with a healthy hatred, regard it as a death worthy crime and for government to swiftly and faithfully carry out such a sentence upon gays and lesbians.

The Office found that such language “has the potential to spur readers to action reflecting the prejudices expressed”, that it “could have a serious impact on those young persons already struggling with feelings of ambivalence or depression related to their sexual orientation”, that it dehumanizes homosexuals to a high degree and

⁷ *Living Word Distributors Limited v Human Rights Action Group* [2000] 3 NZLR 570 at para. 67.

⁸ The statements in the printout continue to be published on the website, which was last checked on 30 October 2004.

that it represents them as inherently inferior.⁹ However, on the advice of the Human Rights Commission, the Office classified the publication as unrestricted because the “references to sexual acts and violence are of no greater specificity and frequency than similar references in the videos that were the subject of the Court of Appeal’s decision in *Living Word*”.¹⁰

15. Sociological analyses of expression such as this indicate a progression of harm which may be useful in drafting a definition of “hate speech”:¹¹

- First, the speaker (or writer or film-maker) will tell the audience what links them as a group, and blame others for their shared pain and anger.
- Second, the speaker will designate an opponent as the cause of the audience’s misfortune. The speaker will portray the opponent in extreme ways to make it difficult for anyone in the audience to support the opponent. The speaker will tell the audience how the opponent is likely to respond, making rebuttal from anyone in the audience difficult. The opponent is isolated.
- Third, the speaker will destroy the validity of characteristics that the isolated opponent uses to create its identity. Once those characteristics are destroyed, any response from the opponent, whether it is denial, counter-attack or atonement, will have no effect.
- Finally, the audience will want to distance itself from what it finds abhorrent. This will have a negative impact on a group that would otherwise have fully contributed to society and democracy.

Or put more concisely,

There is no genocide without supporting propaganda. There is no rape without misogyny; there is no gay bashing without homophobia. There is no lynching without the "N" word. This is not a poem; I mean it as a statement of fact. Without the language that says, 'this is not a person,' it is typically not possible for human beings to harm other human beings.¹²

16. None of these three examples could be said to assist in the pursuit of truth, to encourage participation in social and political decision-making, or to contribute to individual self-fulfilment. They instead silence ideas that should be in the marketplace, discourage participation of individuals in their democratic society, and contribute to an individual’s sense of inferiority. Expression such as this is therefore

⁹ OFLC No 200192, 4 July 2002.

¹⁰ Ibid. By way of contrast, in 2002 the Swedish Constitution was amended to prohibit the incitement of hatred against a group of people on the basis of their sexual orientation. A minister of religion who described homosexuality as an “abnormal, a horrible cancerous tumor in the body of society” and homosexuals as “perverts, whose sexual drive the Devil has used as his strongest weapon against God” in a sermon was found guilty of breaching this provision in June 2004 and was sentenced to a month’s imprisonment: (<http://www.prisonplanet.com/articles/august2004/060804criminalizingchristianity.htm>, and http://www.religioustolerance.org/hom_hat8.htm).

¹¹ Whillock and Slayden, *Hate Speech* (Sage Publications: London, 1995), pp28-54.

¹² Mari J Matsuda, *Hate Speech: What Price Tolerance?* Panel discussion 13 March 2003, Arlin M. Adams Center for Law and Society at Susquehanna University, <http://www.susqu.edu/today/Spring03/dialogue.htm>.

a candidate for restriction because the harms it causes overwhelm any claim it can make in terms of the general benefits of preserving the freedom of expression. “Tolerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay.”¹³

Legal recognition of harm

17. The Supreme Court of Canada in *Keegstra*¹⁴ interpreted the words “wilfully promotes hatred against any identifiable group” in s319(2) of the Canadian Criminal Code to mean

expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group

The Court went on to define “hatred” as

Emotion of an intense and extreme nature that is clearly associated with vilification and detestation. . . . Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill treatment on the basis of group affiliation.¹⁵

18. Recognition of the harm caused by hate speech is found in international instruments that also recognise the value of the freedom of expression. New Zealand is a party to two international treaties requiring restrictions on hate speech. Article 4 of the International Covenant on the Elimination of All Forms of Racial Discrimination provides that

States parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or other ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons, of another colour or ethnic

¹³ Mari J Matsuda, “Public Response to Hate Speech: Considering the Victim’s Story” (1989) 87 *Mich. L. Rev.* 2320 at 2323.

¹⁴ [1990] 3 SCR 697 at 722.

¹⁵ *Ibid.*, 777.

origin, and also the provision of any assistance to racist activities, including the financing thereof;

Article 20(2) of the International Covenant on Civil and Political Rights provides that

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Precedents

19. Hate speech laws seek to prevent harmful actions by restricting, before they happen, speech that is likely to contribute to the occurrence of those actions. This intervention supplements the deterrent power of legislation that punishes the actions after they have occurred. It seeks to remove one of the conditions that allow the actions to occur. Legislation in other countries does this by providing civil and criminal remedies against speech that harms groups defined by common characteristics. These characteristics are usually race, ethnicity, colour, and sexual orientation.
20. The following examples are not intended as a comprehensive list; they are cited merely as examples of the coverage of overseas legislation to enable comparison with existing New Zealand legislation.

Definitions of hate speech where the remedy is civil

21. Legislation that provides civil remedies requires hate speech to
 - be “words which are threatening, abusive, or insulting . . . 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”
(New Zealand: s61 Human Rights Act 1993)
 - “incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons” (*unless absolutely privileged or done in good faith*)
(New South Wales: Anti-Discrimination Act 1977)
 - “incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons” (*unless absolutely privileged or done in good faith*)
(Queensland: Anti-Discrimination Act 1991)
 - “interfere by threats, intimidation, or coercion, or attempt to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States”

and

“itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.”

(California: SB 1234, Omnibus Hate Crimes Act, 2004)

Definitions of hate speech where the remedy is criminal

22. Where hate speech is restricted by criminal sanctions, the speech must

- be “with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand . . . words which are threatening, abusive, or insulting . . . 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”

(New Zealand: s131 Human Rights Act 1993)

- be “threatening, abusive or insulting and . . . intended . . . or . . . may reasonably be inferred. . . to stir up hatred” (*defence of lack of awareness of content*)

(Ireland: Prohibition of Incitement to Hatred Act 1989)

- “incite hatred . . . by means which include threatening physical harm towards, or towards any property of, the person or group of persons”

(New South Wales: Anti-Discrimination Act 1977)

- “incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons . . . in a way that includes threatening physical harm towards, or towards any property of, the person or group of persons” (*defence of lack of awareness of content*)

(Queensland: Anti-Discrimination Act 1991)

- “incite hatred against parts of the population or invites violence or arbitrary acts against them, or attacks the human dignity of others by insulting, maliciously degrading or defaming parts of the population”

(Germany: s131 Penal Code)

- “incite hatred against any identifiable group where such incitement is likely to lead to a breach of the peace” (*defences of truth, religious opinion, public benefit, for the purpose of removing hatred*)

(Canada: s319 Criminal Code)

- “willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her . . . by the Constitution or laws of the United States”

(California: SB 1234, Omnibus Hate Crimes Act, 2004)

Characteristics of groups covered

23. Groups are identified in civil and criminal hate speech legislation by describing characteristics including:

- “colour, race, or ethnic or national origins”
(New Zealand: Human Rights Act 1993)
- “race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation”

(Ireland: Prohibition of Incitement to Hatred Act 1989)

- "race" which is defined to include “colour, nationality, descent and ethnic, ethno-religious or national origin”, “homosexuality”, and persons who are “HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected)”

(New South Wales: Anti-Discrimination Act 1977)

- “race, religion, sexuality or gender identity of the person or members of the group”

(Queensland: Anti-Discrimination Act 1991)

- “nationality, race, religion, or ethnic origin”

(Germany: s131 Penal Code)

- “colour, race, religion, ethnic origin or sexual orientation”

(Canada: s319 Criminal Code)

- “actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group of these actual or perceived characteristics”

(California: SB 1234, Omnibus Hate Crimes Act, 2004)

Hate speech and film classification

24. Finally, in recognition of the power of popular mediums, the Classification Guidelines 2000 issued under South Africa’s Films and Publications Act 1996 require

the Film and Publication Board to take into account the extent to which a film, video, DVD, computer game or publication depicts “prejudice”. Prejudice is defined to mean

“pre-judgment; bias; negative or hostile attitude (usually towards minority or outsider groups) based not on facts or individual experience but on group stereotypes”

25. A publication’s classification is dependent on how the prejudice is resolved:

A: suitable for all ages

If the film contains any prejudice or negative stereotyping, the context makes it clear that such prejudice is wrong. The issue is resolved in a way that both supports human rights values and can be understood by even young children.

PG: Parental Guidance

Issues of race, gender, and other expressions of intolerance must be resolved in a manner which shows respect for the inherent dignity of every individual and/or group treated in a way that would be understood by even young children. If the film contains any prejudice or negative stereotyping, the context makes it clear that such prejudice is wrong.

10: Not suitable for children under the age of 10 years

Issues of race, gender and other expressions of intolerance are resolved in a way that shows respect for the inherent dignity of every individual and/or group and may be understood by even young children. If bias or negative stereotyping occurs, it is resolved within the context of the story. The overall message supports human rights values.

13: Not suitable for children under the age of 13 years

Some scenes showing bias or negative stereotyping may occur. But these are within the context of the story and the outcome is positive. Human rights values are reinforced.

16: Not suitable for children under the age of 16 years

There may be scenes showing bias and negative stereotyping. There might not necessarily be a positive outcome in the plot development.

18: Not suitable for persons under the age of 18 years

[Bias and negative stereotyping not relevant.]

26. If the legislature has decided that the social harm caused by hate speech is sufficient to warrant civil or criminal remedies, then the extent to which a film requiring classification is itself hate speech should logically become a matter relevant to its classification. Not to make it so would tend to undermine the purpose of legislation providing civil and criminal remedies for injury caused by hate speech, and with respect to publications requiring classification, would result in a perception of government approval of films and other publications containing hate speech.

Summary

27. In summary, the Classification Office submits that

- current New Zealand legislation does not specifically or effectively address “hate speech”;
- that although the Office has no information on the extent of hate speech in New Zealand, there is no reason to assume that New Zealand is especially immune or that the social harm remedied by hate speech legislation elsewhere does not exist here;
- that there is substantial precedent for a limited restriction on the freedom of expression to remedy the social harm caused by speech that incites hatred against individuals and groups on the basis of characteristics that are already prohibited grounds of discrimination;
- that those characteristics generally include race, ethnicity, colour, nationality, religion and sexual orientation; and
- that the extent to which a publication is hate speech should be a matter that is relevant to the publication’s classification if Parliament decides that legislation providing for civil or criminal remedies is necessary or desirable.

28. The Chief Censor, Deputy Chief Censor and Information Unit Manager are happy to appear before the Committee to speak to the Office’s submission if the Chair so desires.