

Controlling Anti-gay Hate Speech in New Zealand

The *Living Word* Case from beginning to end

by

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Abstract

This thesis explores the two attempts to control hate speech against the lesbian, gay and bisexual communities in New Zealand. It argues that freedom of speech is not absolute and there are methods to control it for the good of society. The thesis examined the primary documents, regarding *Living Word*, tracing the history of that attempt to control the hatred generated by these videos. It examines what happened during that period and how discourse developed, and provides recommendations for future consideration. I argue the videos in question form part of the continuum of discourse surrounding sexual orientation, and inform, and are informed by, the discourse surrounding homosexuality in wider society. Seen as being at one end of the spectrum of that discourse, they encourage discrimination and hatred against members of the non-heterosexual communities, and may therefore be regarded as hate speech.

There is little in New Zealand that addresses hate speech against these communities. There have been two attempts to control this type of hate speech. The first was regarding Paul Cameron's *Exposing the AIDS Scandal* (1988) before the Indecent Publications Tribunal, seeking to have the publication ruled indecent as it held gay men and people living with AIDS as inherently inferior to other people, and it demeaned and degraded them. This attempt failed as the Tribunal held that the invective was not concentrated enough to be classed as hate speech. It did, however, provide a definition of hate speech that can be developed in New Zealand law.

The second was the case known as the *Living Word* case, after the appellant. This complaint to the Office of Film and Literature Classification was laid by the Human Rights Action Group (Wellington) against *AIDS: What you haven't been told* (1989) and *Gay Rights/Special Rights: Inside the homosexual agenda* (1993).

The videos represent lesbians, gay men, bisexuals and transgender people, and people living with HIV/AIDS, as inferior to other people by reason of their

sexuality or HIV status, and degrades, demeans and dehumanises them. Therefore, a classification of objectionable was sought. The Office held the videos to be hateful, but felt that those communities were strong enough to withstand the assault these videos made.

On appeal to the Film and Literature Board of Review, the Board concluded the video did treat members of those communities as lesser people, and did degrade, demean and dehumanise them and classified the videos as objectionable. The New Zealand distributors of the videos, Living Word Distributors, appealed to the High Court, which dismissed the appeal. Living Word then appealed to the Court of Appeal, seeking to narrow the gateway of material that could be censored and on the grounds the classification interfered with their freedom of speech. The Court of Appeal overturned the earlier decisions, narrowed the gateway of material that could be censored, and remitted the videos back to the Film and Literature Board of Review.

The study concluded that hate speech is, in terms of the Films, Videos and Publications Classification Act, injurious to the public good, and ought to be able to be classified.

Acknowledgements

As I have completed this thesis, and having discussed the issues raised within it with a number of people, academic and non-academic, my thoughts and ideas have modulated over time, perhaps becoming more concrete than when the case first came up in 1995. Although I still believe hate speech is something that needs to be controlled, my reasons for seeking that control have changed. Although still concerned about the violence hate speech causes to individuals, I now take a more broad based approach.

Among the people I have discussed this with over the years is David Herkt who, while he comes from almost diametrically opposed position, has always been able to put that position well. In doing so, he has allowed me to see flaws in earlier thinking that helped it develop into what, I hope, is a stronger position.

I would like to thank the original members of the Human Rights Action Group (Wellington), in particular the late Sister Paula Brett Kelly who gave advice on a range of human rights issues, and was involved with the Group until her employment with the Human Rights Commission. To Jeremy, Steve, and Sarah and Jon, and to the others, thank you for your help, and for putting up with me at the meetings we held.

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Table of Abbreviations

AAVP	Aotearoa Anti-Violence Project
ACT	Association of Consumers and Taxpayers (a New Zealand political party, referred to as ACT).
AIDS	Acquired Immune Deficiency Syndrome
APA	American Psychiatric Association
<i>AWYHBT</i>	<i>AIDS: What you haven't been told</i> (Jeremiah Films, 1989)
Board	Film and Literature Board of Review
BORA	New Zealand Bill of Rights Act 1990
CDC	Centre for Disease Control
CHP	Christian Heritage Party
CUA	Civil Union Act 2004
ECHR	European Court of Human Rights
FVPCA	Films, Videos and Publications Classification Act 1993
FVPCB	Films, Videos and Publications Classification Bill 1992
GLEE	Gays and Lesbians Everywhere in Education
<i>GR/SR</i>	<i>Gay Rights/Special Rights: Inside the homosexual agenda</i>(Jeremiah Films, 1993).
HAD	Homosexual Advances Defence
HRA	Human Rights Act 1993
HRB	Human Rights Bill 1992
HRAG	Human Rights Action Group (Wellington)
HRC	Human Rights Commission
HRCA	Human Rights Commission Act 1977
ICCPR	International Covenant on Civil and Political Rights
ISIS	Institute for the Scientific Investigation of Sexuality
LAGANZ	Lesbian and Gay Archives of New Zealand
LGBT	Lesbian, gay, bisexual and transgender
<i>Living Word</i>	<i>Living Word Distributors Limited v Human Rights</i> <i>Action Group (Wellington)</i> [2000] NZCA 179 (31 August 2000)
LWD	Living Word Distributors Limited
<i>Moonen</i>	<i>G A Moonen v Film and Literature Board of Review</i> [1999] NZCA 329 (17 December 1999)

MP	Member of Parliament
NGRC	National Gay Rights Coalition
NSW	New South Wales
NZAF	New Zealand AIDS Foundation
NZCCL	New Zealand Council for Civil Liberties
NZHLRS	New Zealand Homosexual Law Reform Society
OFLC	Office of Film and Literature Classification
PLWHA	People living with HIV or AIDS
SAPB	Sentencing and Parole Bill 2001
SOP	Supplementary Order Paper
SPCS	Society for the Promotion of Community Standards
<i>Toonen</i>	<i>Toonen v. Australia</i> , Communication No. 488/1992, U.N. DocCCPR/C/50/D/488/1992 (1994).
UDHR	Universal Declaration of Human Rights
UNAIDS	Joint United Nations Programme in HIV/AIDS
UNHCR	United Nations Human Rights Committee
WHO	World Health Organisation

Chapter 1: Introduction

Speaking on Leviticus 18:22: 'Do not lie with a man as one lies with a woman; that is detestable.' "The Bible clearly teaches about these abnormalities. Sexual abnormalities are a deep cancerous tumor in the entire society. ... We know God's righteous decree that those who live that way deserve death",

Rev. Åke Green, sermon on "Is Homosexuality Genetic or an Evil Force that Plays Mind Games with People? July 20, 2003 - Borgholm, Sweden

This thesis is about one of the two efforts by lesbian and gay activists in New Zealand to control part of the discourse of hate speech against their communities. To provide context, it briefly traces the history of the lesbian, gay, bisexual and transgender (henceforth LGBT) communities in New Zealand, and then examines these two attempts to control anti-gay discourse.

The first of these was on the publication *Exposing the AIDS Scandal* (Cameron, 1988) taken to the Indecent Publications Tribunal (IPT) in 1993, which was overtaken by changes in censorship legislation. The second, with which I was closely associated, was based on what became known as the *Living Word* videos that some regarded as containing hate material targeting LGBT people. Starting at ground level through activist's work, including myself, it proceeded through the legal system before being addressed, in part at least, by Parliamentary Select Committees.

The thesis argues that hate speech, whether oral, presented visually, or in writing, should be controlled; and that so far – despite apparent provisions in law which took that position – this has not been satisfactorily implemented. Such control would benefit more than the LGBT communities. I argue that the failure to date is due to legal judgements based on a misunderstanding of Parliament's intention and a lack of understanding of the effects of anti-gay discourse on LGBT communities. I suggest in the conclusion some remedies that could be used to control anti-gay discourse, and the discrimination, hatred, and violence it engenders.

The motivation of this thesis is to examine some underlying questions. What is it that allows people to think they may discriminate against the LGBT community? Why do governments not act to end active and passive discrimination against the LGBT community contained in legislation, despite the Human Rights Act (henceforth HRA) being passed in 1993? I argue that the answers may lie in the discourses around homosexuality – in particular the anti-gay discourses – that seek to separate out members of the LGBT community as “the other”, not worthy of rights.

Despite the freedom from discrimination provisions of s19 of the New Zealand Bill of Rights Act 1990 (BORA) and s21 HRA, discrimination against the LGBT communities continues to exist. Some of this – such as the restriction of marriage to opposite sex couples only, the prevention of adoption by same sex couples, or the allowance of the homosexual advances defence (as a provocation defence) – is legislative discrimination by Government. Other examples, such as the recent banning of drag queens and gay men from Temperance bar in Wellington, are private discrimination (GayNZ, 2008).

I do not examine whether publications may or may not be injurious to the public good, or the harms – or absence of harm – that may occur because of the availability of any publication. This has been done elsewhere (Conway & Siegelman, 1984; Signorile, 1993), including Parliamentary debates which resulted in the passage of the Films, Videos and Publications Classification Act 1993 (FVPCA). As the Hon Jenny Shipley, then Minister of Social Welfare, stated:

The Government has decided that ... it could not take the previous Government's approach. The Government will not require that a direct link between hard-core material and harm to our community be proved before the censor can ban or restrict material. Instead, the Government will instruct the censor to limit material if it is likely to result in harm or to cause harm

(Shipley, in *Hansard*, 1993a: 15989).

The argument for the FVPCA as currently written

links censorship of pornography with realisation of equality. In an equal society there is no place for material which discriminates or degrades one gender or people of a particular sexual orientation

(Butler & Butler, 2005: 361).

Thus, as Parliament has decided that certain material is harmful, and should be censored – a position with which I agree – this thesis does not revisit this issue.

The effects of hate speech, however, are widely debated (Butler, 1997; Kintz & Lesage, 1998; Maniaci & Rzeznik, 1993; Matsuda, Lawrence, Delgado & Crenshaw, 1993; McIlhenny & McIlhenny, 1993; Satinover, 1996; Society for the Promotion of Community Standards, 2001a, 2001b; Whillock & Slayden, 1995). Historical evidence indicates hate speech leads to actions of hatred and violence (Goldhagen, 1996; Hørnshøj-Møller, 1997), while more recent evidence indicates violence against the LGBT communities is inflamed by anti-gay statements made by religious and political leaders (Agence France Presse, 2008; Alexeyev, 2007a, 2007b, 2007c; Green, 2003). Examples include the Mayor of Moscow calling gay pride parades

satanic,

and homosexual relations

unnatural for human nature

(Alexeyev, 2007a),

or Pastor Åke Green (2003) calling gays a cancer on society. Such comments negatively affect the prevailing discourse surrounding LGBT people, the social milieu and climate, which in turn increases levels of violence against them (Herek, 1992, 1999).

Furthermore, including ss61, 63, and 131 in the HRA, which target racial harassment, racial disharmony, and its incitement, the New Zealand Government has already agreed that some forms of speech may be harmful against certain groups and have further impact than just the words themselves.

Organisation of the thesis

This thesis is divided into fifteen chapters including this introduction. The second chapter provides definitions for the terms used throughout, providing an understanding of the issues at the core of the debate. The third chapter is the literature review, examining the literature used in writing this thesis, and which informed me about the issues discussed, while the fourth examines the methodology used. Chapter five briefly examines a history of homosexuality and censorship in New Zealand from pre-colonial times to 1993, when the HRA and FVPCA were enacted. The sixth chapter examines some of the debate around the Human Rights Bill 1992 (HRB) while it was before the Select Committee in 1993 prior to passage and enactment. This indicates the discourse of the time, which had changed little between the debates over the Homosexual Law Reform Act 1986, and the Civil Union Act 2004 (CUA).

Chapter seven examines the effects of hate crimes, and the use of the homosexual advances defence. This includes discussion of the effects of hate speech and the general discourse around homosexuality on these Acts, and the passage of the Sentencing and Parole Reform Bill 2000 (as the Sentencing Act 2001 and Parole Act 2001). This legislation included a specific section dealing with violent crimes motivated by hate. Chapter eight examines the case against *Exposing the AIDS Scandal* (Cameron, 1988) before the IPT.

Chapters nine, ten, eleven and twelve follow the *Living Word* case, from the time the initial complaints were laid before the Office of Film and Literature Classification, hereinafter, OFLC, (chapter nine), then before the Film and Literature Board of Review, henceforth, the Board, (chapter ten), and then before both the High Court (chapter eleven) and the Court of Appeal (chapter twelve). Chapter thirteen examines the debates before Parliamentary Select Committees that were charged with looking at the operation of the FVPCA and the issue of hate speech in general, though both referred to *Living Word*.

Chapter fourteen brings together discussion on the issues centring on the hate speech controversy. It covers an analysis of the effects of hate speech and how they may be controlled. I argue that the Court of Appeal exceeded its authority in reaching a decision that effectively nullified the intent behind the relevant

part of the legislation in question, contrary to s4 BORA. In the conclusion in chapter fifteen, I make recommendations on what I believe should have happened, and what may yet happen.

The thesis is informed by feminist and queer theories, as well as gay liberationist politics, as discussed in the methodology chapter.

In the next chapter, I explain and define some terms used in this thesis, and, in particular, the genesis in law of the term “freedom of speech”.

Chapter 2: Terms and definitions

During this thesis, there will be terms continuously used, so it is important to clarify and define them. Meanings may differ when applied to other topics, and are crucial to the debate on hate speech. Such terms include “freedom of speech” “injurious to the public good”, “social justice”, “hatred”, “hate literature”, “harassment”, and “harm minimisation”. Some of them, such as “hatred”, contempt, etc., carry the dictionary definition.

Freedom of Speech

That the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament

Bill of Rights 1688 c.2 1 William and Mary Session 2 (An Act declaring the Rights and Liberties of the Subject and Setleing the Succession of the Crowne).

That for redress of all greivances and for the amending strenthneing and preserveing of the lawes Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members

Claim of Right Act 1689 c.28, Scotland (The Declaration of the Estates of the Kingdom of Scotland containing the Claim of Right and the offer of the Croune to the King and Queen of England).

It is from these two Acts of two separate Parliaments, which were later to form the Parliament of the United Kingdom, that the idea of freedom of speech exists. It is from these that descend the First Amendment to the US Constitution, passed over 100 years later, then to s14 BORA, passed over 300 years later:

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.

Rather than its American constitutional counterpart:

Congress shall make no law ... abridging the freedom of speech

(Cornell University Law School, undated),

which appears to brook no limitations, the Title of BORA states it is based on the International Covenant on Civil and Political Rights (ICCPR). Article 19 of that, dealing with freedom of speech is:

Article 19

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

(United Nations, 1966a, emphasis added).

It is clear, 19(3) does allow for limitation on freedom of expression.

Although I can find nothing earlier, there were probably debates about freedom of speech in Parliaments prior to the Commonwealth of Oliver Cromwell. Nevertheless, there appears to be no act of Parliament that enshrined freedom of speech until the 1688 and 1689 Acts. The Magna Carta is silent on the issue, and although the Declaration of Arbroath of 1320 implies such freedom though does not mention it, that Declaration was never an Act of Parliament. The original freedom of expression in the Bill of Rights 1688 and Claim of Right 1689 applied only to Parliament, as part of Parliamentary privilege, yet it later devolved upon the people. While those Acts are primary pieces of legislation, BORA is a subsidiary piece of legislation that can be overridden by Parliament.

While Parliamentary privilege is now a given – things can be said in Parliament that cannot be said elsewhere (though even that is subject to

restrictions) – there are restrictions on the freedom of expression provided in BORA. These restrictions are meant to be

subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (s5 BORA).

Nevertheless, although some legislation is clearly in breach of BORA, a court may not

hold any provision of the enactment to be impliedly repealed or revoked, **or to be in any way invalid or ineffective**; or decline to apply any provision of the enactment simply because it contradicts BORA (s4 BORA, emphasis added). It is this section that makes BORA subsidiary legislation.

BORA contains other freedoms as well. A right to certain things, such as speech, religion, movement, etc., which may be termed positive freedoms, and freedom from certain things, such as not to be deprived of life, not to be subjected to torture, etc., which may be termed negative rights. Positive rights and negative rights are not opposites, but are worded differently. While freedom of speech is often claimed to be a positive right, freedom from discrimination contained in s19 of BORA has been termed a negative right because of its wording, as it

does not explicitly require positive Governmental action to prohibit private acts of discrimination

(Geiringer & Warburton, 2000: 23).

As Butler and Butler (2005: 529) indicate,

in some instances the government will be required to undertake positive action in order to prevent the denial of minority rights

such as in s20 BORA. The same could therefore be said of s19 BORA, dealing with the right not to be discriminated against.

Marketplace of ideas

First mooted by Holmes J in *Abrams v United States*, the marketplace of ideas is essentially an adaptation of Adam Smith's economic ideas being applied to speech, relying on faith being:

placed in the market to reach the correct conclusion provided that the market is allowed to function uninhibited by external restrictions. The central concern is to

find the truth, and the best way of achieving it is seen to be unrestricted public debate

(Butler & Butler, 2005: 307).

Nevertheless, there are problems with this, although it has been one of the most influential and pervasive theories supporting freedom of expression. Public discourse is often through the media, who chose what, or what not, to report. Thus facts can be hidden, while a truth, as revealed by the media and whatever vested interests they support, prevails (Butler & Butler, 2005: 308). Consequently, the dominant discourse can prevail over minority rights.

Hatred

Collins Cobuild Dictionary (2003: 667) defines hatred as

an extremely strong feeling of dislike for someone or something.

The Indecent Publications Tribunal (IPT), in its ruling on *Exposing the AIDS Scandal* (Cameron, 1988), used the definition

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; and 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

(IPT, 1993: 3).

Although these appear to be different, because of their wording, they are essentially the same. Synonyms for hatred: revulsion of feeling, aversion, antipathy, odium, enmity, phobia, etc., (Kirkpatrick, 1998: 607, entry 888) emphasise these meanings.

Nevertheless, as Whillock and Slayden (1995: x) point out in their introduction

each culture has approved objects of hatred. We may hate liars and thieves. We hate those who murder. We may even hate those who hate others.

They also point out that hatred

is more encompassing, as Aristotle noted, than lesser emotions such as anger, which is directed against individuals. Hatred may also take aim at whole classes of persons or people

(Whillock & Slayden,1995: xiii).

and point to the American McCarthy hearings of the 1950s as an example of how

whole cultures may be induced, invited, or permitted to hate people or ideas they fear, or who are perceived as threats to their dearly held values

(Whillock & Slayden,1995: x).

Therefore it can be seen that “hate” or “hatred” can not only have a narrow application through the use of the terms “dislike” or “revulsion” in relation to individuals who are murderers, thieves, or liars, which may be personal dislikes or hatreds; but can in fact be widened to encompass whole groups of people who can be hated on the basis of their political affiliation, their race, religion, or sexual orientation.

“Degraded”, “dehumanised”, “demeaned”, “hostility”, “contempt”, “disharmony” and “harassment”

Although some words may be defined in the legislation to which they pertain – in the case of this thesis, the HRA and the FVPCA – most of the words pertaining to those Acts: “degraded”, “dehumanised”, “demeaned”, “hostility”, “contempt”, “hatred”, “disharmony” and “harassment”, all have the ordinary dictionary meaning attached to them (Personal communications, OFLC, 10 June 2005; Human Rights Commission, 20 May 2005). Nevertheless, the OFLC also uses the terms “degraded”, “dehumanised”, “demeaned”

collectively to refer to depictions where people are reduced to the status of objects

(Personal communication, OFLC, 10 June 2005).

Gay, lesbian, bisexual, transgender, homosexual, LGBT, and sexual orientation.

In this work, I use the terms “gay”, “lesbian”, and “homosexual”, as well as the term “sexual orientation”. In section 21(1)(m) HRA, the term “sexual orientation” is defined as

a heterosexual, homosexual, lesbian, or bisexual orientation.

While it would be acceptable to leave it as such a definition, this may be taken to mean only those who identify as such, and not those who may be lesbian or gay but do not identify as such, or people who may be *perceived* as such. I believe that in order to include those who may not necessarily self identify, it is necessary to include that part of the definition contained within section 21(2)(b)(ii) HRA where it includes people who are a specific prohibited ground for discrimination is

suspected or assumed or believed to exist or to have existed.

Thus, for the purposes of this work, the terms “lesbian” and “gay” will include people who self identify as such, but also to those who may be lesbian or gay but do not identify as such, or those who may be perceived to be so.

There is, however, much debate about the use of these terms. Lillian Faderman, for example, has difficulty with these terms as a descriptor of identity. She has suggested using the term lesbian

as an adjective

to describe women’s

committed domestic, sexual, and/or affectional experiences

rather than using it as a noun

to describe their identity

agreeing with postmodern views of identity as precarious and unstable

(Faderman, 1999: 1–2). Nevertheless, the terms are defined in the New

Zealand law in the HRA, and thus must be retained here.

Although I will mainly be concentrating in this thesis on issues surrounding hate speech aimed at the lesbian and gay communities, the same sort of speech, or worse, is also directed at the transgender communities. Thus I also include

those communities within this work, even if I do not always make this explicit. Communities may also experience the effects of hate speech based on race, ethnicity or colour, or a number of other grounds. However, this is outside the scope of this thesis.

Community

Opponents of LGBT equality, including Joseph Nicolosi (1991) and Elizabeth Moberly (1983), argue there is no such thing as a “gay community”, but rather a “homosexual lifestyle” or “subculture”. Some queer theorists, for different reasons, also state that there is no such thing as a gay community. Michael Warner (1993: xxv-xxvi) argues that the idea of a

community also falsely suggests an ideological and nostalgic contrast with the atomization of modern capitalist society. And in the liberal-pluralist frame, it predisposes that political demands will be treated as demands for toleration and representation of a minority constituency.

However, there are many different communities which make up the society in which we live. Some, such as the Maori Community, are based on familial, ethnic, or racial backgrounds. A religious community consists of people who share the same faith and set of values. A community can also be defined through Sarason’s (1974, cited in D’Augelli & Garnets, 1995: 294) definition:

A community is more than a political or geographical area. It contains a variety of institutions which may or may not be formally or informally related to each other – or not related. It is made up of myriads of groups, transient or permanent, which have similar or different purposes and vary in size, power, and composition. It possesses resources and vehicles for their distribution. Its groups and institutions vary considerably in size, purposes and the power they possess or seek. And a community has a distinctive history, which, although it may be no longer relevant in the psychological sense, is crucial for understanding some of its present qualities and social, political, religious and economic characteristics.

For the purposes of this thesis then, “the community” or “communities” will be restricted to those men who identify as gay and women who identify as lesbian, who may or may not be still coming to terms with their sexual

orientation, including those who identify as “queer”, and those who are perceived to be such.

Human Rights Action Group, (Wellington)

The Human Rights Action Group, (Wellington), consisted of 12 people from a variety of representative groups, including some lesbian, gay and bisexual members as well as heterosexual members, but also members from the Disabled People’s Assembly, a Catholic nun, and other groups. There were similar groups in Auckland and Christchurch. We all had an interest in human rights issues, having been formed during the debates on the HRB as that proceeded through Parliament prior to its 1993 enactment. For the purposes of this thesis, which looks at an action taken by the Human Rights Action Group, (Wellington), it is referred to after this as ‘HRAG’, or ‘we’. I was the co-ordinator of this group.

Hate literature, hate speech

Although dictionary definitions are relatively clear for some words, and some phrases, such as “inherently inferior” defined as

a permanent attribute of lower status, rank, or ability” (OFLC, personal communication, 10 June 2005)

are defined elsewhere, there are some words which, when combined, may have a different meaning from their individual dictionary meanings – a form of linguistic Gestalt where the whole is greater than the sum of the parts. “Hate” and “literature” have two specific meanings in the dictionary:

“Hate”

an extremely strong feeling of dislike

“ Literature”

- i. novels, plays, and poetry,
- ii. all the books and articles published about a subject, and
- iii. information produced by people who want to sell you something or give you advice

(Collins Cobuild, 2003: 666, 841).

However, although hate literature may consist of “novels, plays and poetry”, and also be “information produced by people who want to sell you something or give you advice”, the product for sale being hate, or the advice being offered is on who or what to hate, it certainly isn’t “all the books and articles published about a subject”.

In New Zealand law, hate literature has been defined as material that:

- a) expresses views about a minority group which is identified by one or more characteristics to which stigma is attached;
- b) expresses those views with malice or hatred or opprobrium;
- c) attempts to persuade others to adopt those views thereby inciting prejudice, discrimination or violence against the minority;
- d) by its manner of expression would be emotive, hyperbolic or offensive to the minority; and
- e) has expressed the vitriol contained within it in a concentrated manner

(IPT, 1993: 2, 11).

This seems a definition that can be applied succinctly to published material that is intended to cause, or bring about

an extremely strong feeling of dislike for someone

that

takes aim at whole classes of people

(IPT, 1993: 3)

based on their race, religion or sexual orientation.

Hate speech may be defined in a similar way. However, Whillock and Slayden (1995: xiii) point out that

the deliberate use of hate by rhetors is an overt attempt to win, to dominate by rhetorical – if not physical – force

and that

strong emotions such as hate are used to polarize particular groups in order to organize opposition, solidify support, and marshal resources toward forcing a ‘final solution’ to a thorny problem. This polarization predisposes audiences to negate likely opposing claims, typically utilizing a literal and often highly symbolic object of hatred at which anger is focused. ... any culture (and any group, dominant or subordinate) can and does use hate speech to establish in-groups and out-groups.

As Mari Matsuda (Matsuda, Lawrence, Delgado and Crenshaw, 1993: 23) points out,

hate speech flaring up in our midst includes insulting nouns for racial groups, degrading caricatures, threats of violence, and literature portraying Jews and people of color as animal-like and requiring extermination.

She also reasons that

racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group. The spoken message of hatred and inferiority is conveyed on the street, in school yards, in popular culture, and in the propaganda of hate widely distributed in this country (Matsuda, et al, 1993: 23).

In terms of sexual orientation, these insults can be seen in the use of ‘faggot’, ‘poofter’, ‘queer’, etc., and even use of the word ‘gay’ has recently become disparaging, meaning ‘stupid’ in street parlance. These are often blended with other more traditional offensive words, such as ‘bloody’, ‘fucking’, and others.

I would, however, suggest that the use of these derisive terms cannot be seen in isolation. I believe they are part of the greater picture, and people feel ‘safe’ using them, because they are not, in their view, violent. Although such words may be, as Matsuda (et al, 1993: 18) indicates

a psychic tax imposed on those least able to pay,

I also believe that people feel ‘safe’ in using such epithets because the societal beliefs that allow what appears to be less offensive material to be published encourages such hatred: the discourse of ‘gays are paedophiles, gays are diseased, which leads to ‘gays are satanic, gays are ...’.

These are included in the five definitions above, from the IPT. Therefore hate speech, which in this thesis includes oral, written and visual representations, is that which meets those five points.

“Injurious to the public good”

This latter phrase is used in the FVPCA, and is defined by the OFLC, but is often used by groups or people who think they understand what it means. I

have seen and heard it used by members of the Society for the Promotion of Community Standards (SPCS) in submissions to Parliamentary Select Committees to describe sex work (SPCS, 2001a) in what was a moral condemnation of sex work, rather than looking at it as a whole. Although the phrase “injurious to the public good” does include harm to the public as a whole, it

is different from harm to individuals or to particular groups, though harm of subsets could injure the good of the public as a whole

(Personal communication, OFLC, 10 June 2005).

In defining the phrase, the OFLC consulted widely with various groups, and through that consultation, it was considered that a publication is likely to be injurious to the public good if it:

- a) creates or reinforces inaccurate stereotypes about women
- b) creates unrealistic expectations about sexual behaviour and appetite
- c) increases the risk of inappropriate behaviour
- d) promotes unsafe sex which in turn undermines personal and public health
- e) encourages violent tendencies in society through repeated exposure to violent imagery
- f) erodes widely agreed moral standards
- g) encourages young people to have sex
- h) changes attitudes to women in a negative way
- i) increases the risk of copycat behaviour
- j) exposes people to bad ideas they might otherwise never have been exposed to
- k) offends or shocks viewers with unexpected language or images
- l) frightens, upsets, or disturbs particularly younger viewers

(Personal communication, OFLC, 10 June 2005).

In their decisions, the OFLC therefore

tend[s] to focus on injury caused by altering public perceptions, attitudes or tolerances rather than caused by a publication bringing about certain kinds of behaviour

(Personal communication, OFLC, 10 June 2005).

When the OFLC classified the video game *Manhunt* (OFLC, 2003: 11), they stated that injury to the public good occurred through personal injury as

the likelihood of injury arises from a player's lengthy and repeated exposure to the game's extreme violence, significant cruelty and horror, and from the gameplay constantly encouraging the player to escalate the levels of violence. While it is acknowledged the game involves fictional characters and settings, its entertainment value lies in allowing the player to enact and repeat regular acts of violence upon human characters over a long period of time, and in encouraging the player to increase the brutality and goriness of the violence he or she inflicts.

Similarly, in their decision on *Postal 2: Share the Pain* (OFLC, 2004: 9), the OFLC stated that injury to the public good occurred through personal injury as the game is designed, and has the capacity, to allow the player to test how much violence and humiliation he or she can inflict on human beings and animals in a variety of everyday settings and circumstances. Players choose to expose themselves to most of the violence in the game, the quantity and cruelty of which can be gradually accommodated and increased as the player becomes increasingly callous and inured to the violence inflicted. A player's power both to initiate violence and to control the level of violence is a part of the process by which this accommodation is made. The constant crass racist, sexist, and homophobic references motivate the player's crimes and further encourage the player to accept and escalate the violence he or she inflicts. The player's ability to elect the amount, type, and speed with which the violence is escalated into extreme cruelty requires an antisocial attitudinal shift, (and reinforces such attitudes in those who already have them) that is likely to be injurious to the public good.

In reference to hate speech, perhaps the phrase "injurious to the public good" is already covered by the definition of "hate literature" by the IPT. Such a definition can be seen to cover several of those points made by the OFLC, slightly amended. It:

- a) creates or reinforces inaccurate stereotypes about a group based on a defined trait
- b) increases the risk of inappropriate behaviour
- c) encourages violent tendencies in society through repeated exposure to violent imagery, or incitement to violence
- d) changes attitudes to a group based on a defined trait in a negative way
- e) increases the risk of copycat behaviour, and

- f) exposes people to bad ideas they might otherwise never have been exposed to.

Therefore, I believe hate speech can indeed be defined as “injurious to the public good”. This is amplified when speech directly encourages violence against a group by the use of the phrase “and needs to be eliminated”, or similar, such as Anita Bryant’s clarion call of the 1970s

Kill a Queer for Christ

(Donaghe, 2002).

This may particularly be the case where hate speech may alter “public perceptions, attitudes or tolerances rather than [causing] a publication [to bring] about certain kinds of behaviour”, as indicated above, thus reducing LGBT people to the status of objects to be ridiculed at best, or killed at worst.

Similarly, the OFLC also has a compounded definition of “highly offensive language”. Rather than just being

language that only offends individuals or that is vulgar only mildly offensive, the OFLC defines it as

language that is highly offensive to the public in general.

The OFLC

does not consider any particular word to be ‘highly offensive’. Instead [they] judge the language on the context in which it is used and the extent, manner and degree of the language

(personal communication, OFLC, 10 June 2005).

For example, in considering the classification of the DVD *Curb Your Enthusiasm: Season 3 Disc 2*, and eventually classifying it R13, the OFLC looked into the context of the expletives that were used throughout.

The extent and degree is such that the material has the potential to shock and disturb. Children do not have the emotional maturity to deal with language at this level and are particularly likely to be affected. A related harm is the possibility that the humorous context might encourage very young viewers to use the language themselves or be harmed by the associated stigma of using such highly offensive language

(decision 500504, cited in personal communication, OFLC, 10 June 2005).

Harm minimisation

The term “harm minimisation” is usually applied to public health objectives where it means minimising the potential harm to an individual rather than trying to prevent a particular behaviour. In a public health context, harm minimisation accepts that some people always have and always will engage in risky behaviour, such as using drugs. Harm minimisation seeks to minimise the harm associated with these behaviours without proscribing them entirely. Harm minimalists believe no one should be denied health services merely because they take risks. Further, harm minimisation seeks a social justice response to drug use, rather than criminalising it (Ministry of Health, 2003).

Often used in respect to drug use, “harm minimisation” is based on the following rationale:

Despite drug education and treatment programmes many individuals will choose to inject illicit and licit drugs for varying periods of time.

People must be provided with knowledge and skills necessary to make informed choices about risk behaviours.

The wider, non drug using community faces a greater danger from the wider spread of HIV and hepatitis infections than it does from the effects of drug use itself.

The harm reduction model accepts that in the absence of a vaccine or an effective cure behavioural change is the only device we have to minimise the spread of HIV and other blood-borne diseases.

Needle Exchange offers an excellent opportunity to educate people who inject drugs on an individual basis. Through regular contact the safer injecting/safer sex message can be reinforced

(Needle Exchange New Zealand, 2003-2006).

Nevertheless, the term “harm minimisation” may also be applied to censorship issues, and, I believe, to human rights issues. In classifying publications with

an age restricted classification, the OFLC admits the behaviour exhibited in the publications occurs within society, but by restricting the availability of that material to people over a certain age, it reduces harm to those under that age, thus minimising harm to society as a whole. The case of *Curb Your Enthusiasm* noted above is an example of harm minimisation within censorship at work. In doing so, the OFLC examines how a publication may

- a) cause people who lack sufficient emotional and intellectual development and maturity to:
- b) Be disturbed or shocked
- c) Be more likely to harm themselves or others
- d) Regard others or themselves as degraded, demeaned or dehumanised

(personal Communication, OFLC, 10 June 2005).

Although the Human Rights Commission (HRC) does not regard the concept of harm minimisation relevant as they are concerned with the impact of the type of harassment (under ss 62 and 63 HRA) on the individual (personal communication, HRC, 20 May 2005), I believe that it is. The HRC, through the applications of sections 61 to 63 HRA admits that certain behaviours – racial disharmony and racial and sexual harassment – exist. By seeking remedies through mediation between the person harassed, or the group to whom disharmony was directed, and the person who did either of these, the HRC is educating the person who committed the harassment or disharmony. While it may not stop the person who committed these types of acts from thinking about that person, or target group, in such a way, such mediation allows that person to realise the harm they have caused to the person or group targeted, in the hope of modifying their behaviour. By seeking to modify behaviour rather than outlaw it, such mediation is a form of harm minimisation as it reduces the possibilities of that person causing the same harms to others, and makes other people aware that such behaviour is not acceptable, thus modifying their behaviour, preventing those harms from occurring.

Indeed, in the case *Bissett v Peters* [2004] Human Rights Review Tribunal 33, the HRC stated, at paragraph 4 of their submission that

a ‘harms based’ analysis supports the proposition that people should be spared the psychological harm and alienation that can result from racist remarks. The harm is not so much the attitudes engendered in others, as the erosion of self-worth in the victims, their withdrawal from society and the inequality that results. Hate speech silences its victims and contributes to a climate of disrespect for women and minorities. Regulation that limits speech about race is seen as symbolic, sending positive messages of inclusion and concern to ethnic minorities and demonstrating a legislative commitment to eradicating racism

(HRC, 2004: 2).

Thus, sections 61 to 63 HRA, in seeking to reduce the “psychological harm and alienation” and the “erosion of self-worth ... withdrawal from society and inequality”, can be seen to be harm minimisation at work.

Social justice

Social justice is another term often used. I have heard it used to refer to issues pertaining to equality when attending Select Committee hearings on the Human Rights Amendment Bill 1999, the Prostitution Reform Bill 2000, and the Civil Union and Relationship (Statutory References) Bills 2004. Caritas, a Catholic Justice and Peace organisation defines social justice as allowing a person to live

in freedom and dignity

(Caritas, 2001).

Thomas Behr, writing for the Acton Institute, indicates the term was first used in 1840-1843 by a Sicilian priest, Luigi Taparelli d’Azeglio (Behr, 2003). South Africa’s Ministry for Welfare and Population Development (1997) defines social justice as an

ideal condition in which all members of a society have the same basic rights, security, opportunities, obligations and social benefits.

John Rawls (1999), drawing on writings of Mill, Bentham, Kant, and Locke proposed that each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared

by others. Rawls (1999) conceived this idea as being apolitical and consisting of six basic liberties, being:

- i. freedom of thought;
- ii. liberty of conscience as it affects social relationships on the grounds of religion, philosophy, and morality;
- iii. political liberties (e.g. representative democratic institutions, freedom of speech and the press, and freedom of assembly);
- iv. freedom of association;
- v. freedoms necessary for the liberty and integrity of the person (viz: freedom from slavery, freedom of movement and a reasonable degree of freedom to choose one's occupation); and
- vi. rights and liberties covered by the rule of law.

Nevertheless, Rawls indicates that some restrictions on freedom of speech, for example, must exist in order to balance these liberties (Rawls, 1999: 178).

These basic liberties give rise to two principles of justice:

- a) Each person is to have an equal; right to the most extensive scheme of basic liberties compatible with a similar scheme for others;
- b) Social and economic inequalities are to be arranged so that they are both:
 - i. Reasonably expected to be to everyone's advantage, and
 - ii. Attached to positions and offices open to all

(Rawls, 1999: 53).

This gives us some idea of what social justice may be concerned with, and, in the case of Caritas, how it may be applied. Brian Barry (1989: 146), states that social justice is predicated primarily of the basic structure of a society. This structure is made up of the institutions that together determine the access (or chances of access) of the members of a society to resources that are the means to the satisfaction of a wide variety of desires. These resources can be grouped under three headings: power, status, and money.

That is, that *all* people have equal rights before the law, not special rights granted by belonging to one particular group. For example, if someone has a right under law provided by their race or religion, (such as freedom from harassment or discrimination [c.f., ss61, 63, 131 HRA 1993]), then all people, regardless of their race, religion, ethnicity, sexual orientation, etc., should have access to that same right. This is not the case at present, and is witnessed by

the personal observation that some people seem to think that because they have a certain religious belief, they should have rights others should not have, or are free to denigrate others, or deny others access to equal rights, on the basis of their sexual orientation, or other grounds, including a differing religion. While these people claim that allowing LGBT people the same rights they enjoy is giving LGBT people “special rights”, they get upset when others point out that they are claiming that same right.

This was particularly so in front of the Select Committee considering the Parliamentary Inquiry into the Operation of the Films, Videos and Publications Classification Act 1993, that was held in 2001. When claiming that I, as the respondent in the *Living Word* case,

was seeking the right on the part of the censor to ban forms of harm which lie not in some form of depicting, debasing or degrading activity, but in the hearing of or the promotion of ideas – in particular ideas which the majority may consider wrong or harmful. ... The *Living Word* case is an example of the desire of a minority group to close off debate on contentious views with respect to their lifestyle and the moral acceptability of their conduct ...

(McKenzie & Rishworth, 2001: 2, 3),

Mr McKenzie was asked if he felt that I had been asking for “special rights”, to which he replied that was indeed the case. However, when later asked if it could therefore be implied that he, and other groups, were seeking to deny equality of rights to LGBT people, by denying them freedom from harassment, could it also be true that he was championing the “special right” of those groups to espouse discrimination and harassment against those groups, he reluctantly agreed that was the case, while looking surprised that such a suggestion could even be made (personal notes, discussion with Sue Bradford MP, 2001).

“Special Rights”

What then are “special rights”, given this phrase is used so often by those opposed to the equality of rights for LGBT people? To those who oppose this equality, the struggle by LGBT people to have equality before the law in all

things are “special rights” (Jeremiah Films, 1989, 1993; The Report, 1992, 1996). The implication being that in order to qualify for certain types of rights, deemed as “special” by the commentators, you must meet a definition of “minority status”. That “minority status” was given in the video *Gay Rights/Special Rights: Inside the Homosexual Agenda* (Jeremiah Films, 1993, henceforth *GR/SR*) as being delivered by a US Supreme Court Ruling that stated that in order to qualify for such status, the grounds on which it is sought must exhibit

immutable characteristics like race and gender, financial discrimination, and political weakness.

Arguing that LGBT people did not qualify for “minority status”, they stated that being gay or lesbian is a choice, not immutable, that LGBT people are richer than the average American (by the use of an unscientific poll reported in the gay magazine *The Advocate*), and that LGBT people demonstrate anything but political weakness.

What they omit is that this ruling they claim defines “minority status” was over-ruled long before the video was made and is therefore irrelevant. The term “minority class status” in itself does not appear in US law, but is a term invented by the religious right (DeLapp, 1993: 6). Furthermore, writing in *BLK*, Arlene Zarembka (1993: 18) stated:

On the one hand, the right-wing uses the phrase to drive a wedge between racial/ethnic minorities and lesbians and gay men, arguing that discrimination against racial/ethnic minorities is ‘status based,’ whereas discrimination against lesbians and gay men is ‘behavior-based’. In fact, most discrimination and violence against lesbians, gay men, and bisexuals occurs because a person is or is thought to be gay, and not because of any behavior. On the other hand, (the Right wing) uses the ‘protected minority class status’ phrase to undermine white support for civil rights protections in general, by falsely claiming that laws give racial and ethnic minorities some sort of ‘special rights and privileges’, ‘advantages’, and ‘elevated status’.

Thus it can be seen that the term “special rights”, dependent as it is upon a non-existent quasi-definition, is built upon a foundation of sand. However, can the term “special rights” be used to mean anything? I believe it can. I believe

the term can indeed be used where some group, based on race, ethnicity or other status, enjoys legal rights not allowed to other members of society by right of their membership of a group not covered under s19(2) BORA. But, if the term can be so defined, does this have any relevance to New Zealand?

Although discrimination on many grounds is prohibited under the HRA, and Acts which have been passed since then seeking to ensure equality for X (where X is any particular group in society), they have always been inclusive and sought to include other groups to ensure equality. An example of this is the CUA 2004, where no distinction is made by reason of race, colour, ethnicity, gender, sexual orientation, etc. Yet even then, the Christian right called it “special rights” for LGBT people (SPCS, 2004d; Whitehead, 2004). The only distinctions being on the grounds of age – a person must be over 16 to enter a Civil Union, and not in a familial relationship within the bounds of consanguinity. Although countries overseas have passed such laws, they have generally excluded heterosexuals from being able to form Civil Unions. The UK Civil Partnership Act 2004 is an example of this exclusive legislation.

I therefore believe the term “special rights” may only be used in New Zealand – if at all – where a protection under law is given to a certain group, or groups, but denied to others. Examples of this in New Zealand law may be sections 61, 63 and 131 HRA, which aim to prevent disharmony and harassment based on

the **colour, race, or ethnic or national origins** of that group of persons, yet are denied to people on the basis of disability or sexual orientation who are also targeted by such actions.

The “Vox Deus” argument

In seeking to prove that homosexuality can be changed, many opponents of the LGBT communities cite various Biblical verses. However, New Zealand is a secular country in which many religions are represented. To give favour to any one religion over another in law could be seen as a breach of ss13 and 15 BORA.

Furthermore, many verses in the Bible are highly contested in their meaning (Boswell, 1980; Wright, 1985), and different Christian denominations often interpret the same verse in different ways. This would make it difficult to come to any definitive interpretation of what a law based on any particular biblical verse that some claim to condemn homosexuality was intended to mean.

I believe then, that the Vox Deus argument, where one uses the words of any sacred book to lend credence to an argument (“Because god says ...”), is a convenient way of getting out of an inconvenient situation, and can be compared to the deus ex machina plot.

This chapter has given the terms and definitions used in this thesis. The next examines the literature reviewed during the writing of this thesis.

Chapter 3: Literature Review

“Hate speech” is a wide topic, covering many areas, with each group of affected communities being subjected to different sorts of hate speech. Nevertheless, often the results are the same, and the motivation of those seeking to denigrate, demean and dehumanise certain groups of people because of some characteristic that binds that group as one, are often similar. To examine all the different aspects of hate speech, and how those aspects affect different groups in different ways, is beyond the scope of this thesis. The focus of the present study is hate speech affecting the LGBT communities.

There is very little previous analysis of hate speech in New Zealand as it affects these communities (Beck, 2000). Internationally, however, there is a large corpus of work that analyses hate speech, or supports freedom of expression, or supports greater controls on hate speech (Allport, 1958; Butler, 1997; Clayton, 1997; Collins, M, 1992; De Cecco, 1985; DeLapp, 1993; Farrior, 1996; Goldhagen, 1996; Herek, 1992; Huebner, Rebchook, & Kegeles 2004; Kintz & Lesage, 1998; Knoll, 1994; Matsuda, Lawrence, Delgado & Crenshaw, 1993; Puplick, 2000; Scahill, 1994; Tomasulo, 1998; Whillock & Sladen, 1995; Zarembka, 1994).

Linda Kintz and Julia Lesage (1998) have collected a range of essays which examine how the Christian right have used the media – mainstream and Christian – to increase their power and visibility, and the effect the media has had on the organising practices and political mobilisation of the Christian Right. The chapter in their book by Ioannis Mookas looks directly at the effects of, and harms caused by, *Gay Rights/Special Rights*.

New Zealander David Beck (2000) examines the legal rationale behind the Court of Appeal’s *Living Word* decision, comparing it to the intention of Parliament, and indicates how it deviates from those intentions when the FVPCB 1992 was debated.

Chris Brickell (2008) examines the history of gay men from the goldfields of Otago of the 1860s, where sexual activity between men seemed rife yet rarely commented on if taking place in private, to law reform in the 1980s. Brickell indicates there have been a series of changes in the way homosexual activity between men has been treated, swinging between tolerance and bigotry and back again. Brickell (1999) examines the New Zealand mainstream media portrayal of lesbians and gay men. This indicates there has been a shift in the portrayal of homosexuality in New Zealand, but that there remains a deep seated homophobia under the surface by positioning heterosexuality as normative yet neutral, thus marking homosexuality as illegitimate.

Similarly, Flo Conway and Jim Siegelman (1984) demonstrate how propaganda put out by religious right has had negative effects on American society. This was one of the earliest analyses of the religious right and the negative impact their propaganda has on society. It can be seen how these same tactics have been used here in New Zealand by similar groups, almost as if they have been directly imported. Similarly, Michael Signorile (1993) indicates how powerful anti-homosexual discourse in the media can be, and the effects this has on people's lives, not just at a personal level, but also a national level.

Various articles examine the important role cinema has played in the propagation of propaganda and hate speech, ranging from the anti-Jewish rhetoric of films made in Nazi Germany to articles about *The Gay Agenda* (The Report, 1992), and political campaign films. Among these is Frank Tomasulo's (1998) examination of how the anti-Semitic discourse of film influenced the mind of the German people during World War II, and allowed the Holocaust to occur. Daniel Goldhagen (1996) did a similar examination to the same ends. David Deitcher (1994) investigates how *The Gay Agenda* (The Report, 1992) has been used to attempt to limit public arts funding. Again examining how film captures the minds of viewers, Joanne Morreale (1991) dissects Ronald Regan's 1984 campaign film and how that affected the political mind of America during a period in American politics when the religious right felt themselves to be under political threat.

Gordon Allport (1958) examines the ideas behind prejudice and hatred, how these affect people, and how hate speech eventually leads to violence through a five point scale: antilocution (the open expression of antagonism), avoidance (of members of the disliked group), discrimination, physical attack, and extermination.

Australian Anne Scahill (1994) examines the validity of hate speech and its control in her home country and the effects those controls have had. Chris Puplick (2000) examines other issues surrounding hate speech, with particular focus on the negative effect it has on the Australian LGBT communities.

Both the United Nations and the European Court of Human Rights (ECHR) have a large amount of information about freedom of expression, and how it should be allowed or controlled in certain circumstances. These documents are mainly covenants and declarations. These also allow a stronger theory of liberation to be developed, that enhances the lives of the targeted communities.

Stephanie Farrior (1996) examines the before and after discussions about the control of certain types of hate speech in international documents, primarily the *Universal Declaration of Human Rights* (United Nations, 1948), henceforth UDHR. She completes this by looking at the *travaux preparatois*, the drafts and related legal preparatory papers of human rights instruments, indicating restrictions on freedom of speech which may be reasonable. David Knoll (1994) examines the developments in anti-vilification law in Australia and allowances for freedom of expression in both Australia and the USA, and agrees with Farrior in an Australian context.

Andrew and Petra Butler (2005) provide an overview of BORA, a commentary on each of the rights secured by that Act, and how they related to the ICCPR. They devote considerable comment to freedom of expression, the restrictions on that already in place in a New Zealand context, and show how the Court of Appeal has allowed BORA to restrict private rights, not just those provided by legislation or the judiciary. They indicate that prohibitions on hate speech,

which they state has a destabilising and divisive effect on society (2005:364), can be a justifiable limitation on s14 BORA (2005: 370).

Grant Huscroft (1995: 212) argues the opposite, and states that

personal and group reputations, long valued in New Zealand can no longer be presumed to justify the limitations on freedom of expression which now exist

and asks if this is

a price we are willing to pay

for freedom of expression. In so doing, he seems to support the repeal of defamation law and other restrictions on freedom of expression which are duly allowed under article 19 ICCPR, and would thus form reasonable limitations on s14 BORA. If this were so, then anyone could say any number of untruths about someone, or some product, without any factual basis, and ruin their reputation or the market value of that product unfairly. Huscroft (2003) repeats this. I strongly reject this proposal.

Examining the effects hate speech has on groups targeted by its authors, Rita May Whillock and David Slayden (1995), looking mainly at issues of culture and society, have assembled a collection of essays examining the definitions, stratagems, symbolism used, and issues of freedom of expression. They indicate hate speech has negative effects on those it is targeted towards. Similarly, Mari Matsuda, Charles Lawrence III, Richard Delgado, and Kimberlè Crenshaw (1993) discuss the effects of hate speech on people of colour, and how serious and wide ranging these adverse effects can be. Although this concentrates on people of colour, parallels can be drawn to sexual orientation and gender issues.

In particular, Lawrence (in Matsuda, Lawrence, Delgado & Crenshaw, 1993: 69-70) notes:

One of my students, a white, gay male, related an experience that is quite instructive in understanding the fighting words doctrine. In response to my request that students describe how they experienced the injury of racist speech, Michael told a story of being called "faggot" by a man on a subway. His description included all of the speech-inhibiting elements I have noted previously. He found himself in a state of semishock, nauseous, dizzy, unable to muster the witty, sarcastic, articulate

rejoinder he was accustomed to making. He was instantly aware of the recent spate of gay bashing in San Francisco and that many of these incidents had escalated from verbal encounters. Even hours later when the shock subsided and his facility with words returned, he realized that any response was inadequate to counter the hundreds of years of societal defamation that one word —“faggot” — carried with it. Like the word “nigger” and unlike the word “liar,” it is not sufficient to deny the truth of the word's application, to say, “I am not a faggot.” One must deny the truth of the word's meaning, a meaning shouted from the rooftops by the rest of the world a million times a day. The complex response “Yes, I am a member of the group you despise and the degraded meaning of the word you use is one that I reject” is not effective in a subway encounter. Although there are many of us who constantly and in myriad ways seek to counter the lie spoken in the meaning of hateful words like “nigger” and “faggot,” it is a nearly impossible burden to bear when one is ambushed by a sudden, face-to-face hate speech assault.

But there was another part of my discussion with Michael that is equally instructive. I asked if he could remember a situation when he had been verbally attacked with reference to his being a white male. Had he ever been called a “honkey,” a “chauvinist pig,” or “mick”? (Michael is from a working-class Irish family in Boston.) He said that he had been called some version of all three and that although he found the last one more offensive than the first two, he had not experienced—even in that subordinated role—the same disorienting powerlessness he had experienced when attacked for his membership in the gay community. The question of power, of the context of the power relationships within which speech takes place, and the connection to violence must be considered as we decide how best to foster the freest and fullest dialogue within our communities.

Furthermore:

Racist speech also distorts the marketplace of ideas by muting or devaluing the speech of Blacks and other despised minorities. Regardless of intrinsic value, their words and ideas become less salable in the marketplace of ideas. An idea that would be embraced by large numbers of individuals if it were offered by a white individual will be rejected or given less credence if its author belongs to a group demeaned and stigmatized by racist beliefs. ...

[R]acist speech decreases the total amount of speech that reaches the market by coercively silencing members of those groups who are its targets. I noted earlier in this chapter the ways in which racist speech is inextricably linked with racist conduct.

The primary purpose and effect of the speech/conduct that constitutes white supremacy is the exclusion of nonwhites from full participation in the body politic
(Lawrence, in Matsuda, Lawrence, Delgado, & Crenshaw, 1993: 78-79).

While concentrating on the psychological sequelae of hate crimes, Greg Herek and Kevin Berrill (1992) examine the negative effects that hatred has on the lesbian and gay communities. Herek (1992, 1997-2008, 1999) has also independently published several psychological papers dealing specifically with the negative effects of hatred on the lesbian and gay communities. Similarly, Anthony D'Augelli and Charlotte Patterson (1995) show the negative psychological, social and physical effects of hatred aimed at members of the LGBT communities.

Other studies examining the effects of hate on the lesbian and gay communities are those by David Huebner and colleagues (2004) who examined the experiences of verbal and other harassment, discrimination, and violence that occurs against members of the LGBT communities. James Warner and his colleagues (2004) examined how speech and violence negatively effects the mental health of LGBT people in England and Wales.

These studies report on the causes and adverse effects of hate speech. Many also propose remedies, some of which have already been enacted in various pieces of legislation. Legislation that specifically deals with hate speech would have to be examined, then adapted to a New Zealand context. Already Canada (1985), the United Kingdom (both Westminster, 1986, 1998; and the Scottish Parliament, 2004), various Australian states (Australian Capital Territory, 1991; New South Wales (NSW), 1977; Queensland, 2001; South Australia, 1996), and New Zealand (HRA, 1993) have some types of legislation targeted at controlling forms of hate speech. Some of this legislation covers only hate speech directed at race or ethnicity. Others are wider, and include sexual orientation specifically, or as "other grounds".

In New Zealand, the debate over the CUA 2004 gave opportunities for many who thought antagonism shown by some during the debates on the

Homosexual Law Reform Act 1986 was a thing of the past, to see that these same points of conflict continue to exist. In some cases, they may be put more delicately – if that is an appropriate word to use – but in many others, they are just as blunt and hateful as ever.

Literature on hate speech increases daily. This overview has addressed the major books and articles dealing with hate speech up to and including 2007.

In the next chapter, I explain the methodology used, and the theories that informed me during the period of the *Living Word* case as it progressed from 1995 to 2001.

Chapter 4: Methodology

Some information about the *Living Word* case is contained in Hansard, the record of the Parliamentary debates, and in submissions to Parliament on Bills that affect the lives of LGBT people, and in Parliamentary Enquiries into specific topics, such as hate speech, or the operation of the FVPCA. The major resource is the *Living Word* case, over the videos *AIDS: What you Haven't Been Told* (Jeremiah Films, 1989, henceforth *AWYHBT*) and *GR/SR*. These videos became central to what was later referred to that case, after the appellants, Living Word Distributors Ltd. (LWD), in the cases before the High Court and Court of Appeal in Wellington. On behalf of HRAG, I was the respondent in those cases.

Until now, there is no complete written record of how the *Living Word* case developed, from its beginning in Wellington when one of the above videos was shown, to its finale with the Court of Appeal narrowing the gateway and ordering the Board of Review to look at the case afresh, putting more emphasis on the right to freedom of expression, and the subsequent Parliamentary hearings. Available resources are my collections held at the LAGANZ and the decisions of the OFLC, the Board, the High Court, and the Court of Appeal. But these are disjoint, separate and difficult to obtain. The history of the case can, however, be traced in its entirety from these.

In order to put the case in perspective, it is also necessary to look at what has happened in the past, to examine the discourse on homosexuality at the time the *Living Word* case wound its way through the judicial process, tying in streams of thought from LGBT history in New Zealand. Also important are the debates around the HRB, and hate crimes, as well as issues of hate speech and its effects.

While much of the hateful articles against LGBT individuals and communities are from overseas, there is also much that is “home-grown”, particularly in submissions to Parliament on issues affecting the LGBT communities, for example, those by Adams, (1993); the Coalition of Concerned Citizens,

(1993); McKenzie & Rishworth, (2001); and SPCS (2004a). Some of this material may not initially appear to be hate speech, because it doesn't immediately use the expression "kill a faggot", but the intention behind the speech – to prevent equal rights for LGBT people, or to promote the view that discrimination against them is a good thing – may be enough to bring it into the hate speech arena. In this context, I define hate speech at its widest – not only that which outrightly states "kill a queer", but also that which may be classed as vilification, in that it seeks to demean and dehumanise people within those communities.

The most informative sources of information for this thesis are the primary documents held by myself, the OFLC, the Lesbian and Gay Archives of New Zealand, and in the Parliamentary Library. I have kept extensive files on the cases I have been involved with since the first complaint was laid in February 1995. These may be more comprehensive than any other single source, as it includes all the submissions made, by HRAG, myself and others up to and including the rehearing by the Board, and the submissions specifically mentioning hate speech issues that have been made to Parliament. Reading the submissions to Parliament on almost any Bill that has had a positive effect on the lives of lesbians, gay men, and bisexuals, such as the HRB, the Civil Union Bill 2004 and the Relationships (Statutory References) Bill 2004, as well as Inquiries by Parliament into Hate Speech, gives an idea of the absolute need for the control of hate speech on the one hand, and the total opposition to any controls on the other. I shall deal with the submissions on the HRB later in this thesis, as these provide an insight into the discourse around homosexuality in New Zealand at the time the videos in question were shown here.

During these public debates, through newspaper reports and letters to the editor, through broadcasts on television and radio, and latterly over the Internet, it was clear that a dichotomy existed, and still exists, in society in regards to the causes of homosexuality. The nature versus nurture or inherent/learned debate proved to be very strong, with a large number of people opposed to LGBT rights favouring the nurture/learned behaviour side of the debate, and many of those supporting equality of rights favouring either

the inherent/nature argument or not favouring either side, but noting that certain other chosen behaviours are provided protection from discrimination, such as political opinion and religious belief, effectively choosing the “does it really matter?” stance.

Of note to the majority of those opposed to controls on hate speech is the social standing of homosexuality, thus, it may be necessary to examine some theories regarding the origin and basis of homosexuality to put the claims made in the submissions against controls of hate speech into context. Andrew Sullivan (1996) identifies some arguments about homosexuality. These are the prohibitionist, who

wishes to cure or punish people who practice homosexual acts

thus deterring

others who might be tempted to stray into the homosexual milieu

(Sullivan, 1996: 22);

the conservative, who

combine[s] private tolerance of homosexuality with public disapproval

while not wanting

to see legal persecution of homosexual, they see no problem with discouragement or disparagement of homosexual sexual behaviour in the abstract

(Sullivan, 1996: 97);

the liberal, who

believe, like conservatives, that homosexuality as a social phenomenon is a mixture of choice and compulsion

yet they differ from conservatives as

liberals ask first how the individual is affected

seeing

the homosexuals rights infringed in various areas

including the right to privacy, freedom of expression, and to housing, employment, etc. (Sullivan, 1996: 135-136); and the liberationist who hold that

homosexuality is a construct of human thought, not an inherent or natural way of being,

yet for liberationists

full end of human fruition is to be free of all social constructs ... not only to rebel against the fiction of nature, but to rebel against the rebellion against nature, to defy the ways in which human thought seeks to constrain and control human freedom
(Sullivan, 1996: 57).

Two of these, the prohibitionist and the conservative arguments against homosexuality, can easily be seen in the submissions against the addition of sexual orientation to the HRB. However, the liberationist and liberal arguments in favour of homosexuality are not so easily identified in those submissions favouring of the addition of sexual orientation to the Bill.

Vera Whisman (1996) looks at the oral histories she collected during 1987 and 1988 of lesbians and gay men and their attitudes to how much choice they had in their sexual orientation, and if it really was a choice for them. Some believed it was a choice, others did not, while some had elements of both. Whisman (1997: 37) came to realise that
 accounts of choice cannot be so neatly dichotomised.

Simon LeVay (1996) examines much of the research that has been done into the causes of homosexuality from the time of Magnus Hirschfeld, through Freud, to studies that have looked at the effect of hormones, stressors and mental traits, to genetics. He examines what the result of this research has been, the effects of this research on LGBT people, and indicates some form of biological beginning to sexual orientation, rather than a behavioural beginning.

Timothy Murphy (1997) also looks at this research, noting that much of it has been questionable in its motives and is often methodologically unsound. He specifically looks at Simon LeVay's (1991) study of brain structure, Joseph Nicolosi's (1991) reparative therapy methods, and other studies from the 1990s. Murphy argues those scientists studying sexual orientation should not look at it simplistically, focussing upon homosexuality exclusively, or presupposing the pathology of that sexual orientation.

Michel Foucault (1978) looks at the construction of sexuality, how this has varied with changing language, societal beliefs and opinions resulting from that variation, and the corpus of knowledge that has been established around sexuality, with a greater discourse in more recent times opposing the theory of repression of sexuality occurring since the 17th century. Rather than the repression of sexuality, this discourse has allowed a greater acknowledgement of sex and sexuality, establishing it as the core of our identity. David Halperin (1995) expands on the interpretation of Foucault, looking at some of the critiques and criticisms that have been made of Foucault's work. In the first of two essays, he shows how – despite criticism from non-gay identified liberal critics – Foucault has been almost saint-like in the eyes of many LGBT activists and political thinkers. In the second essay, Halperin (1995: 13-14) shows how Foucault's life has provided a powerful model for many LGBT academics to allow them to combine critical analysis and political activism.

Michael Warner (1999) questions the concept of normalcy and the normalising of LGBT communities, asking if equal rights with heterosexuals, and any of the trappings that go along with that, are of any use to those communities. I agree with his comment that the disavowal of sex and sexuality in an attempt to fight stigma increases that stigma (1999: 46). However, I disagree with the politics he advocates:

a frank embrace of queer sex in all its apparent indignity, together with a frank challenge to the damaging hierarchies of respectability

(1999: 74).

I do not, however, support assimilation. A gay or lesbian identity is more than just sex, and focusing on such a narrow aspect omits other facets of identity upon which a person is built, such as race, ethnicity and other cultural and political characteristics. Indeed, in the videos in question, gay men and lesbians are often reduced to only their sexual components in efforts to oppress them (Jeremiah Films, 1989, 1993). When considered with his comments on community (Warner, 1993: xxv-xxvi), I do not find his position entirely convincing.

Judith Butler (1997: 4) critiques Matsuda et al (1993) with a response that appears to be *sticks and stones will break my bones*. This ignores the negative impact words have on people that increases their risk of suicide (Clayton, 1997; Fergusson, Horwood, Ridder & Beauvais, 2005: 979; Petrie and Brook, 1992; Rosenhan and Seligman, 1985: 342-343). Furthermore, Butler argues against the point made by Matsuda and McKinnon regarding the singular yet universalist nature of hate speech, seemingly indicating that such speech can be one or the other, not both (Butler, 1997: 92). She ignores their claims that a small number of a group of people who hear a statement about a minority may be offended by that statement, yet the majority may accept it as true, thus stigmatising the stated minority. Furthermore, some of that majority may act upon it as being true, thus discriminating, or committing acts of violence, against the now stigmatised minority.

These books allowed me to examine the nature/nurture, inherent/learned debate, as well as how sexuality has been constructed by societal expectations and norms. While I would still tend towards a belief that homosexuality is not something that is learned or is something that you can be “recruited” to, the “does it really matter” stance is more inclusive of the complexity of sexual orientation and its genesis, and is more supportive of liberation theory, which I do support.

Liberation theory holds that all LGBT people should be free from oppression and discrimination, allowing them to have the same full civil rights as other members of general society. This can be seen in the statement of the Auckland Gay Liberation Front Manifesto (1972). The first four demands are:

- i. That all discrimination by society against gay people should end and that all means should be utilised to remove the present attitudes existing so that gay people can live in freedom – now.
- ii. That all discrimination in law against gay people should end.
- iii. That all people have the right to sexual self-determination. We believe that all people should have the unhindered right to be homosexual, heterosexual or bisexual, according to their own free will, and appreciate the validity of their own sexual preference.

- iv. That we shall oppose all oppression against gay people and fight to overcome individual cases of discrimination, so that all gays shall have full civil rights – (“the right to life, liberty, and the pursuit of happiness”).

It was through this liberationist lens I examined the material, books and articles used in this thesis. HRAG believed that the material contained within the videos in question, and other anti-gay material, led to the oppression of LGBT people, thus to discrimination and to violence against them. Evidence gained from eyewitnesses during the screenings of the videos, and from personal testimony by those involved, indicated that violence was occurring as a result of the screenings of these videos.

During the *Living Word* case, material was selected because it supported the case we were building. Material opposing our point of view was also examined to develop counterarguments against it. During the writing of this thesis, material outside this rather narrow focus was examined in order to develop arguments and examine counterarguments opposing the point of view the HRAG had taken. As a result of this reading, some of my attitudes have changed, while some have been strengthened. My conclusions, including those on the most appropriate remedies, are argued at the end of the thesis.

Shulamit Reinharz (1992: 240) states ten themes used in feminist research.

1. Feminism is a perspective, not a research method;
2. ongoing criticism of non-feminist research continues;
3. that feminist research is guided by feminist theory;
4. strives to represent diversity;
5. attempts to develop special relationships with those studied;
6. defines a special relationship with the reader;
7. such research may be transdisciplinary;
8. may use a variety of methods;
9. aim to create social change; and
10. includes the researcher as a person.

As a member of HRAG, I was intimately involved in this case, although my views have modified by reading the materials from others, many of which

included alternative or conflicting views to my own. As Reinharz (1992: 34) indicates, this is an important feature of feminist research, as the problems caused from being that experiential insider are modified by including opposing views. Furthermore, in completing this thesis, I aim to create some form of social change to the current dominant discourse on hate speech in New Zealand. While much of this thesis is essentially an historical overview of the Living Word case, and thus may not have an immediate change on society, it provides information that others may use as background to research they may undertake, or cases they seek to be heard before the Film and Literature Board of Review and the Courts.

My status as an insider

During the debates in question, as a member of HRAG, helping to drive the issues forward, speaking to others in the LGBT communities, contacting similar groups overseas and within New Zealand, and often acting as the front-person for this campaign, I was clearly an ‘insider’. As Trinh Minh-ha (1991: 65) notes in respect to outsiders looking in:

An objective constantly claimed by those who “seek to reveal one society to another” is “to grasp the native's point of view” and “to realize his vision of his world.” Fomenting much discord, in terms of methodology and approach, among specialists in the directly concerned fields of anthropology and ethnographic filmmaking in the last decade, such a goal is also diversely taken to heart by many of us who consider it our mission to represent others, and to be their loyal interpreters. The injunction to see things from the native's point of view speaks for a definite ideology of truth and authenticity; it lies at the center of every polemical discussion on “reality” in its relation to “beauty” and “truth.” To raise the question of representing the Other is, therefore, to reopen endlessly the fundamental issue of science and art; documentary and fiction; universal and personal; objectivity and subjectivity; masculine and feminine; outsider and insider.

Nevertheless, an outsider can never truly experience, but can only present a form of legitimized (but unacknowledged as such) voyeurism and subtle arrogance – namely, the pretense to see into or to own the others' minds, whose knowledge these others cannot, supposedly, have themselves; and the need to define, hence

confine, providing them thereby with a standard of self-evaluation on which they necessarily depend

(Trinh, 1991: 66).

This imposes a 'we know better' type of attitude.

Yet I was an insider looking in as well as looking out, though trying to be, at the same time, an objective observer. As Trinh (1991: 69) indicates:

An Insider's view: the magic word that bears within itself a seal of approval. What can be more authentically "other" than an otherness by the Other him/herself? Yet, every piece of the cake given by the Master comes with a double-edged blade.

Nevertheless, Trinh (1991: 74) states:

The moment the insider steps out from the inside, she is no longer a mere insider (and vice versa). She necessarily looks in from the outside while also looking out from the inside. Like the outsider, she steps back and records what never occurs to her the insider as being worth or in need of recording. But unlike the outsider, she also resorts to non-explicative, non-totalizing strategies that suspend meaning and resist closure. (This is often viewed by the outsiders as strategies of partial concealment and disclosure aimed at preserving secrets that should only be imparted to initiates.) She refuses to reduce herself to an Other, and her reflections to a mere outsider's objective reasoning or insider's subjective feeling. She knows, probably like Zora Neale Hurston the insider-anthropologist knew, that she is not an outsider like the foreign outsider. She knows she is different while at the same time being Him. Not quite the Same, not quite the Other, she stands in that undetermined threshold place where she constantly drifts in and out. Undercutting the inside/outside opposition, her intervention is necessarily that of both a deceptive insider and a deceptive outsider. She is this Inappropriate Other/Same who moves about with always at least two/four gestures: that of affirming "I am like you" while persisting in her difference; and that of reminding "I am different" while unsettling every definition of otherness arrived at.

Nevertheless, this does leave me open to criticism: "Of course he'd say that, he's biased towards the homosexualist point of view, and seeking to impose those points of view on others". Yet people who would use that type of criticism would all too often omit their own heterocentrist bias that treats

homosexuality as “the other”, and therefore something lesser. As Matsuda, Lawrence, Delgado and Crenshaw (1993: 14-15) state these are:

arguments for absolutist protection of speech made without reference to historical context or uneven power relations. Academic freedom and intellectual pursuit are alleged to be threatened by ‘leftist speech police.’ People of color, women, gays, and lesbians who insist on the inclusion of their voices in academic discourse and who speak out against persons and practices that continue to injure and demean them are said to impose a ‘new orthodoxy’ upon the academy.

Similarly, Lawrence (in Matsuda, Lawrence, Delgado, & Crenshaw, 1993: 78-79) noted:

the experience of one of my gay students provides a paradigmatic example of how ideas are less acceptable when their authors are members of a group that has been victimized by hatred and vilification. Bob had not “come out” when he first came to law school. During his first year, when issues relating to heterosexism came up in class or in discussions with other students, he spoke to these issues as a sympathetic “straight” white male student. His arguments were listened to and taken seriously. In his second year, when he had come out and his classmates knew that he was gay, he found that he was not nearly as persuasive an advocate for his position as when he was identified as straight. He was the same person saying the same things, but his identity gave him less authority.

Being so close to the case, I believe I am in an expert position. I am “the Other”, and am able to understand that viewpoint, yet from my readings and listening to the debates, I can also understand the position of those who took the opposing view, and can look at those views objectively, seeing their faults and good points, where those who espoused them may not. Nevertheless, by taking this to the academic sphere, I am no longer ‘the Other’, or merely an insider, I look

in from the outside while also looking out from the inside

(Trinh, 1991: 74),

yet I believe I have been able to prevent myself from suspending meaning or resisting closure. I would hope, however, that, being an insider, my arguments are taken seriously and that identifying as such does not lessen my authority, but gives me more.

This thesis is to provide information about a particular case. I hope that the arguments presented will enable those interested in the control of hate speech to gain knowledge of that pivotal case, and that it will add to the knowledge of hate speech in general. I trust that it will produce the required changes in societal thought, judicial processes and legislative action to benefit the LGBT and other relevant communities affected by hate speech.

In this chapter, I examined the methodology used in this thesis, while in the next, I begin looking at a brief history of homosexuality in New Zealand.

Chapter 5: Homosexuality and Censorship in New Zealand to 1993

This chapter is a brief history looking at specific events affecting, and affected by, the dominant discourse around homosexuality in New Zealand. I argue that these events, and the censorship affecting all things homosexual, were part of, and caused by, the dominant discourse of the time, yet also helped that discourse evolve. This is an illustrative background only, and is not to be taken as exhaustive.

Prior to colonisation, several sources indicate that homosexuality was accepted among Maori (Te Awekotuku, 2001; 2005).

In 1836, during European colonising, the preacher William Yate left New Zealand for Sydney, where his past behaviour caught up with him. He had been a missionary in New Zealand since 1828, though was subsequently sent back to Britain in disgrace following a church hearing into his behaviour in New Zealand and elsewhere. During his time in New Zealand, Yate formed sexual relationships involving mutual masturbation and oral sex with as many as 100 young Maori men (Parkinson, 2005: 19). Henry Pilley, a contemporary of Yate, was also returned to Britain in 1838, proven to be

a most depraved young man

(Chapman, 1838, cited in Parkinson, 2005: 21)

after committing

very indecent conduct with some of the European boys

(Wade, 1837, cited in Parkinson, 2005: 21).

Pilley's interests had been among the sons of other missionaries (Parkinson, 2005: 19).

With the signing of the Treaty of Waitangi, English law had effect in New Zealand, and homosexuality became illegal. Initially punished with life imprisonment, with a minimum of 10 years, with, or without, hard labour (ss58-60, Offences Against the Person Act 1867). Flogging was added to the punishment in 1893 (ss153-154, Criminal Code 1893) in the wake of the Wilde trials in the UK, and carried over into the 1908 Crimes Act. Although flogging

and hard labour were deleted from the list of punishments in 1941, it was not until 1961 that the sentence was reduced from life imprisonment to a maximum of seven years (ss141-142, Crimes Act 1961).

The law was clear: homosexuals who indulged in certain acts were to be punished. Although secular law had moved away from Old Testament injunctions of death in Leviticus 20: 13, such men were still a moral abomination requiring punishment.

From 1908 on, the law was applied to men who were caught having sex with other men. Generally, though not exclusively, homosexuality only made headlines where gay men or lesbians were described in terms of perversion, were murdered, or were murderers – or attempted to commit murder – and as such were a stern warning to the general population about “people like that”.

Christoffel (1989) states that in 1910, the first Indecent Publications Act was passed, combining various pieces of censorship legislation, staying in force until 1954. There was no definition of ‘indecent’ in that Act, but it did specify criteria that magistrates

should take into account when determining the indecency of material

(Christoffel, 1989).

As the Act

deemed indecent ‘any document or matter which relates or refers ... to any disease affecting the generative organs of either sex, or to the complaint or infirmity arising from or relating to sexual intercourse, or to the prevention or removal of irregularities in menstruation, or to drugs, medicines or appliances, treatment, or methods for procuring abortion or miscarriage or preventing conception’ there were concerns from the medical authorities

(Christoffel, 1989).

However, if

the work was of ‘literary, scientific, or artistic merit or importance’, and that the act of the accused was not of ‘an immoral or mischievous tendency’,

a defence was available. Christoffel (1989) thus noted

the Act thus spelt out for the first time the distinction between work which was of ‘literary, scientific, or artistic, merit’ and that which was not. The purpose, according

to the Attorney General, John Findlay, was to protect the 'liberty which improves and ennobles a nation' while removing the 'license which degrades'.

The Cinematograph Film Censorship Act was passed in 1916, which made it illegal to show any film which had not first been approved by a government-appointed censor. Virtually the only directive given to the censor was that no film should be approved which 'in the opinion of the censor, depicts any matter that is against public order and decency, or the exhibition of which for any other reason is, in the opinion of the censor, undesirable in the public interest'

(Christoffel, 1989).

W. Jolliffe was appointed New Zealand's first Chief Censor. When Jolliffe died in office in 1927, his assistant, W.H. Tanner, replaced him. The phrase 'in the opinion of the censor', in this Act provided wide powers to the Censor, and although there was a provision for distributors to appeal to a Board where cuts were made, or a film banned, it was impossible to appeal the *approval* of a film. The other phrase within the Act that was of concern, which led to questions in Parliament, was 'undesirable in the public interest'. As a result of these Parliamentary questions, it was revealed that these were

specifically included so films could be censored for political reasons, in particular their effect on army recruitment

(Christoffel, 1989).

When the Evening Post interviewed Jolliffe about his role as Censor in 1917, he said

It is difficult to formulate principles which will apply to every case, but matter coming within the following classes is not allowed to pass:

The commission of crime in a manner likely to be imitated, especially by the young, or to give information as to methods to persons of a criminal tendency;

indecent in the matter of dress;

the treatment of religious subjects in an irreligious or irreverent manner;

matter likely to promote disloyalty to the King and country, or to adversely affect friendly feeling towards our Allies;

matter likely to effect class hatred

(cited in OFLC, 2006: 5)

In 1920, Charles McKay, then the Mayor of Wanganui, shot and wounded D'Arcy Cresswell, following threats from Cresswell to expose McKay as pervert after McKay had given him a private viewing at the Sarjeant Art Gallery, which included a copy of *Wrestlers*, and a viewing of McKay's collection of female nude pictures. At the trial, McKay's lawyers claimed he was seeking treatment for 'homosexual monomania'. McKay was sentenced to 15 years imprisonment with hard labour, serving seven years. He then left for the UK, becoming a successful journalist. Cresswell may himself have been blackmailed to get rid of McKay as mayor of Wanganui, for McKay was not popular at that time (Parkinson, 1985).



Illustration 1: Photo of *Wrestlers*, © Peter Peryer

Also in 1920, the Legislative Chamber, Parliament's former appointed upper house,

debated the need to 'strengthen and make more drastic the censorship of cine-films ... with the object of eliminating the noxious elements which are tending to destroy the moral sense of so many young persons'. The capture of the film market by Americans, observed the editor of the Manawatu Daily Times, meant that New Zealand youth were seeing life 'through the artificial, spurious and meretricious glare of Broadway, New York' (Editorial, 18 October 1920). Thus in 1920 a system of classification was introduced, although these served merely as recommendations and it was left to parents to police their children's choices. A 'U' (for 'universal') certificate indicated 'suitable for everyone', while 'A' indicated 'suitable for adults only'

(Watson & Shuker, 1998).

During the late 1920s and early 1930s, an increasing number of films had sound, and were thus more complex than the earlier silent movies. While few films had been banned prior to the advent of sound,

in 1930, a record 102 films (3.9 percent of the 2,626 submitted) were banned, indicating that the censor was taking a cautious approach to the sound revolution. The introduction of the voluntary Hays Code in the American industry in 1932 seems to have made films from that country more acceptable to the censor, and bannings were rare by the end of the decade

(Christoffel, 1989).

While

in 1935 a Committee of Inquiry into the Motion Picture Industry, after considering various submissions and evidence on 'the effect of films on juveniles', came down in favour of the status quo. Its report concluded that 'the censorship of films is at present carried out in a very satisfactory manner', and that it was up to 'parental control' to observe the certificates issued by the censor

(Watson & Shuker, 1998).

Furthermore, during the 1930s, comic books began arriving. Initially reprints from newspaper comic strips,

During the 1930s, these became orientated more towards action, violence, romance and adventure with the likes of Buck Rogers becoming popular. Action and violence

became more predominant from 1937, when comic books started to feature original material, thus removing the restrictions imposed by the family orientation of most newspapers. Superheroes such as Batman and Superman appeared on the scene.... In 1938 a deputation met with the Ministers of Customs and Education to discuss their concern about comic books. Later that year several comics were banned under the new import licensing regulations, which restricted publications placing 'undue emphasis' on sex, obscenity, horror, crime and cruelty

(Christoffel, 1989).

Eric Mareo killed his wife in 1935 because of her lesbian relationship with Freda Stark, and in 1944 a 19 year old New Zealand soldier killed a 25 year old American soldier. Claiming the US soldier had made sexual advances towards him, the New Zealand soldier was acquitted (Laurie, in Laurie & Evans, 2005: 13).

During World War II, censorship reached new heights as the country sought to protect itself and its soldiers. In that year,

the Labour Government introduced stringent censorship of newspapers, the post, telegraph, radio, and books. The Director of Publicity, J.T. Paul, was placed in charge of press censorship. In April 1940 he announced that he would suppress all outgoing news 'likely to convey a prejudicial view to overseas countries concerning the National War effort in New Zealand'. Newspapers were forbidden to publish stories on certain topics without his approval, and he could prosecute the publishers of any item he judged prejudicial to the public interest. Internal mail was selectively censored, and there was blanket censorship of all other postal communications. Up to 250 staff were employed to censor letters, including 22 full-time and seven part-time translators. Radio scripts were previewed by the censor, but there was no need to censor radio news, which at the time consisted entirely of summarised newspaper stories. A special Customs Department committee was set up to examine books; it banned many political works

(Christoffel, 1989).

The late 1940s saw a Parliamentary Commission into censorship. When Mr Nordmeyer, the Minister of Industries and Commerce at the time asked the Chief Censor Arthur von Keisenberg what he disliked about films, he was reported in the *Dominion* of 26 May 1948 to have said he disliked,

things that might be regarded as salacious or suggestive. He also objected to the use of swear words. He added that he thought it undesirable that children should see pictures dealing with marital problems and infidelity, unhappiness in the home and ill-treatment of children. He added that a survey of the excisions and rejection in films over a given period disclosed for the most part scenes and dialogue that ordinary decent and just-minded people would agree upon as being undesirable. Ordinary men and women did not wish in their entertainment to have their moral, religious, nervous or political susceptibilities offended. In New Zealand the code of censorship appeared to be broadly more liberal than in most English-speaking countries. The fact that extremely few complaints were received from either the public or welfare organisations would indicate that the public's feeling was generally accurately gauged. It must be admitted, however, that there appeared to be room for improvement. There was also a lack of awareness among the public as to the significance of censorship recommendations. The commonest fallacy was that the adult certificate was a covert hint that there was something naughty in the film, and that it was a trade trick to entice patronage

(cited in OFLC, 2006: 5).

In the post war era, it is likely any film portraying homosexuality as normal would have been classed as offending the 'moral, religious, nervous or political susceptibilities' of 'ordinary men and women'.

In June 1954, Juliet Hulme and Pauline Parker murdered Pauline's mother, Honora, in Victoria Park, Christchurch. As much has been written about this case – books, chapters in books, novels, and even a film – it is sufficient to say that entries in Pauline's diary indicated there may have been a sexual relationship between her and Juliet. This linked lesbianism and murder, a doubly unpleasant prospect in the public view at that time. Excerpts from Pauline's diary, printed in various tabloid newspapers, entered New Zealand's mythology on homosexuality. It acted as a cautionary tale with which to warn women, especially young girls, of the possible consequences of such 'unnatural' relationships. The jury took less than three hours to convict them on 28 August 1954. As they were under 18, they were sentenced to be detained at Her Majesty's pleasure, but were released after five years (Glamuzina & Laurie, 1991).

In 1957, new regulations related to film censorship were promulgated. This provided a range of classification: G for general release, replacing the former U; Y for material approved for people 13 and older; A for adult viewing, adults being classed as people over 16; S for a special class where it may be released for general viewing but where parts may be disturbing to young children and nervous women; and R, restricting the film to various age groups, gender segregated audiences, or specialised groups, such as film societies, etc., (Mirams, 1957). These regulations were later formalised in the Cinematographic Films Act 1961, which also liberalised laws around the licensing of projectionists and exhibitors licences, but criminalised the transportation of inflammable films around the country (Department of Internal Affairs, 1962).

The 1959 novel *A Way of Love* by New Zealander James Courage was published in the United Kingdom. However, with

its subject a young man's homosexual relationship with an older man,
despite being

discreet to a fault, and even self-apologetic by modern standards ...

it was banned in New Zealand under the censorship laws in place at the time (Harris, 2006).

In that same year, the Government realised something had to be done about censorship laws. The Secretary for Justice formed a committee of people working in the book trade to examine how changes could be made. This met four times, with the final meeting in April 1962, and resulted in a major overhaul of the way publications were classified by the introduction and passage of the Indecent Publications Act 1963. The formation of the IPT, to which people could appeal the Censor's classification, was an important improvement (Christoffel, 1989). It was under this Act action was later taken by Customs against Lawrence Publishing, the publishers of OUT! Magazine, and by Phil Parkinson against Cameron's *Exposing the AIDS Scandal* (1988).

In 1960 a judge sympathised with two sailors who had assaulted homosexual Roy Jackson, who died from a fall from a deck on board the Whangaroa,

which “was their home”, acquitting them of manslaughter (Laurie, in Laurie & Evans, 2005: 13). But the fall followed the assault. Was Jackson pushed, or was he trying to escape from an assault that may have killed him?

On 23rd January 1964, Charles Aberhart was killed in Christchurch’s Hagley Park by a group of youths, aged between 15 and 17. They assaulted him, one robbing him, and they left him dying. His body was found by a passing cyclist at 10.30 that night, who had seen the offenders, and knew them. When questioned by police, all but one of the perpetrators admitted it, and pointed their finger at the person who denied guilt. They described it as a “queer bashing”. On 5 May, they were tried for manslaughter, a lesser charge than murder, and the trial took 5 days. On summing up the case, the judge reminded the jury it was not necessary to specifically identify the actual person who had struck the blow in order to prove the case. Yet seven hours later, the all male jury returned a verdict of not guilty for all six accused. Despite the admissions of guilt, and the judge instructing them to produce a guilty verdict, the jury seemed to have tried Aberhart rather than the accused. While Aberhart had earlier been imprisoned for one year following a conviction of indecent assault after consensual sex with another man, his killers walked free (Simpson, 2009).

Simpson (2009) cites Ian Breward’s (1965) article in *Landfall*:

Homosexuals in New Zealand labour under a triple disadvantage. They are regarded with disgust, suffer severe legal penalties if convicted, and worst of all, are not even guaranteed the posthumous satisfaction of seeing their assailants brought to justice; that is, they are not considered equal with other citizens before the law.

Yet despite this seeming condemnation of the way New Zealand treated gay men, Simpson (2009) points out that Breward’s framework is tempered with the words “abnormal” and “sickness”, and that he describes homosexuality as not exactly a sickness but as something which should not be regarded as a crime.

Simpson (2009) also cites Vincent O’Sullivan’s (1964) article in *Comment*, which shows that the trial was not about the accused but

a conspiracy against a dead man ... infused with the notion that 'the sexual proclivities of the victim should somehow alleviate the guilt of the accused, as if in some way the vice of one rubbed off as virtue on the other'. [O'Sullivan] was particularly outraged by the statement in the summing up of one of the defence lawyers who said 'Even if they went to Hagley park to look for homosexuals, there is no offence in this'.

As a result of the then dominant discourse, ineffective medical treatments were often imposed for homosexuality. These involved the use of drugs to make a person sick, or electric shock aversion therapy – not to be confused with electro-convulsive therapy. In the former, a mild to sharp shock is administered to a person to make them averse to certain stimuli. In the case of gay men, the stimuli were images of naked, or near naked men, in an attempt to cure them of their attraction to men. The latter involves applying a large shock to a restrained person, making their entire body convulse, and was used in the treatment of various mental illnesses such as severe depression (Davison & Neale, 1996: 33).

One person who underwent such aversion therapy in 1964 was Ralph Knowles, at that time 20. He states he was not unhappy being homosexual, but pressures from his church and serious conflicts with his religious views led him to be treated. This consisted of two five day sessions of drug therapy where apomorphine was administered, whisky drunk, and images of homosexual activities shown in order to get him to associate the images with severe illness. Electroshock treatment, administered on an outpatient basis was also attended. Nevertheless, the treatment failed, and Knowles found himself cruising for men shortly after treatment. He records that rather than feeling sick, he felt relief at being back to normal (Knowles, in Edgecombe, Keevil and Bowers, 2008).

Upon reporting this, Knowles was persuaded to take a second course, including injections of testosterone to increase sexual desire, though not affecting the direction of that desire, this also failing. Knowles does not regret the treatment, saying it was what society expected, but is grateful the therapy

showed him that such treatment was futile, and he was therefore able to get on with his life as a gay man (Knowles, in Edgecombe, et al, 2008).

Perhaps it was as a result of this dominant discourse – that homosexuals were either morally repugnant or mentally ill – or perhaps because the jury was all male, who may have felt finding in favour of a dead gay man would have been an affront to their masculinity (also as a result of the dominant discourse), or perhaps because of the youth of the defendants, they were all found not guilty of manslaughter.

This occurred less than two years after the publication of Irving Bieber's (1962) study, which described homosexuality as a mental illness caused by an absent/distant father and a close/binding mother, and that it should be treated in a medical environment. As Simpson (2009) points out

In 1964, to describe a homosexual as sick rather than morally evil was actually a rather daring thing to do publicly.

Homosexuality was regarded as a sickness until 1973 when the American Psychiatric Association removed homosexuality from the DSM, the Diagnostic and Statistical Manual of Mental Illness (Herek, 1997-2008).

Although the general feeling among psychologists is that Bieber's outdated theory is not the 'cause' of homosexuality among men (Davison & Neale, 1996: 361), there are some people who continue to believe and promote Bieber's scenarios as the 'cause' of homosexuality among men and women (Rogers & Medinger, 2008; Moberly, 1983; Nicolosi, 1991), even within New Zealand (Belding & Nicholls, 1996). Nevertheless, the ideas at the time, and for some time afterwards, centred around the claims that homosexuals were either evil and therefore had to be punished, or sick and thus had to be treated (Davison Neale, 1996, 361-362; Ings, 2008; Simpson, 2009). Sex and sexuality education in New Zealand at the time, where such existed, was focused on promoting the heterosexual ideal of opposite sex parents and their children. Sexual intercourse was something that happened between a man and a woman, and only after marriage (Glamuzina & Laurie, 1991: 151; Cox, 2005: 68).

In 1965, the Chair of the IPT, Sir Kenneth Gresson, said

The dominant consideration is that freedom of expression must be restrained when the welfare of the public so demands. The Tribunal established by the Indecent Publications Act 1963 has the difficult task of determining, in a particular case, the line which must not be overstepped. Many factors are relevant – the age of the prospective reader, the quality of the writing, the apparent purpose of the writer, race, tradition, philosophy, religion, education, morality and the opinion and sentiment of the community so far as ascertainable. Of necessity the decisions of the Tribunal must be the judgment of the members subjectively regarding the particular publication (or sound recording) which the Tribunal has to consider. ... It remains to be seen whether the new legislation (the Indecent Publications Act was two years old at the time of writing) will be regarded as an advance. So far there seems to be a disposition on the part even of those who are opposed to any censorship at all to accept the decisions of the Tribunal as the conscientious discharge of a difficult task, though inevitably there are critics of such decisions as have been given

(OFLC, 2006: 5-6).

Nurse Doreen Davis cut the throat of her colleague Raewyn Petley in 1967 and was acquitted of murder, with Petley

portrayed as a 'hunting lesbian' who had cut her own throat, and that Davis, her former lover, was an innocent seduced by [Petley]

(Laurie, in Laurie & Evans, 2005: 13).

New Zealand's Wolfenden Committee, later known as the New Zealand Homosexual Law Reform Society (NZLRS) continued campaigning to reform sections of the Crimes Act 1961 criminalising male homosexual behaviour. Mainly lobbying MPs and conservative people and groups in society, it hoped to gain support for a law change. Morrison (1975, cited in Glamuzina, 1993: 34) noted the Wolfenden Committee was

a reformist organisation with no in-depth analysis of the causes of oppression of lesbians and gay men;

believing

politics was the part of the possible

and that

it would be best not to upset those Parliamentarians who just wanted to reform the law.

The following year, 1968, the Association presented a petition to Parliament with 75 prominent signatories, asking for the laws regarding homosexuality to be reformed. As Glamuzina (1993: 34), notes

Predictably, the petition was ignored.

It can therefore be seen that in New Zealand up until 1972, the dominant discourse said that gay men were sick, needing treatment, and they could be subjected to violence: either by external means, or internally by subjecting themselves to demeaning and degrading treatment. Although some of this attitude was to remain, change was in the air.

From 1972 onwards, a major redefining of what it meant to be gay began in New Zealand, when an increasing number of lesbian and gay rights groups appeared. Rather than sitting passively, as victims of the law, they began to demand equality under the law. Rather than as murderers and murdered, they began to turn the tide against the homophobia endemic in society, and the dominant discourse that homosexuality was a sickness.

Although there were calls for legislation decriminalising male to male sex prior to the beginning of Gay Liberation, the push for a change to the laws became stronger in 1972, with several 'gay liberation' groups being formed, lesbians prominent in this. From then on, Gay Liberation groups formed, split, and re-formed. Many later groups used the term "rights" instead of "liberation", a reflection of growing conservatism (Glamuzina, 1993: 36), though I think it may have been a political move to link "gay rights" with "human rights".

1974 was also a busy year for lesbian and gay activists as momentum built. Most importantly, for lesbian (and particularly) gay male rights, the Crimes Amendment Bill 1974, which would have decriminalised homosexual activity between two men over 21, but not containing any anti-discrimination clauses, was introduced by the Hon Venn Young, MP for Egmont – the electorate in

which I lived at that time. This Bill was sent to a Select Committee, which reduced the age of consent to 20, but did not include any recommendations made by Gay Liberation groups, who protested the Bill as a result. Gerald Wall, Labour Member of Parliament for Porirua, introduced an amendment which made any communication that homosexuality is ‘normal’ to people under 20 punishable by two years imprisonment. This would have made the Bill intolerable if it had passed. The Bill was defeated on its second reading on 4 July 1975 with a vote of 34 to 29, with 23 MPs absent or abstaining – a highly criticised figure. The defeat of this Bill appears to have been the reason for the collapse of many Gay Liberation Groups around the country (Auckland Gay and Lesbian Lawyers Group, 1994: 93; Glamuzina, 1993: 25).

Despite this setback, the struggle for lesbian and gay rights continued.

Two important things in the world of politics happened in 1976. Early that year, the tabloid newspaper *The New Zealand Truth* sensationally claimed Marilyn Waring, the National Party MP for Waipa, was a lesbian (Young, 2005). The second event was more insidious, with an even greater level of homophobia, relating back to the “homosexual = disease” discourse as well as the “homosexual = criminal” discourse. Chris Brickell (2008: 335) describes it thus:

In 1976 Robert Muldoon, the National Party Prime Minister, announced to Parliament that Labour MP Colin Moyle had been ‘picked up by the police for homosexual activities’ several months earlier. Muldoon claimed he had received a phone call from the police who told him that Moyle had been driving slowly past the Harris Street toilets, a long-established Wellington beat, with his window wound down. An undercover officer, suspected Moyle of soliciting, Muldoon said, and approached him for questioning. First Moyle told the police he was researching homosexual men’s lives in advance of Venn Young’s legalisation Bill, then he said he had been tailing the detective, thinking him a burglar, Muldoon heightened the discrepancies in Moyle’s explanations, an enquiry ensued and the MP resigned from Parliament.

In 1976, the Government passed the Film Act. The Chief Censor was now to determine only whether a film “is or is not likely to be injurious to the public

good”. In determining injuriousness to the public good, the censor was required to take into account a number of specific criteria. These included:

- i. the likely effect of the film on its audience;
- ii. its artistic or other merits;
- iii. the way in which the film depicts anti-social behaviour, cruelty, violence, crime, horror, sex etc;
- iv. the ‘extent and degree to which the film denigrates any particular class of the general public by reference to the colour, race, or ethnic or national origins, the sex, or the religious beliefs of the members of that class’;
- v. other relevant circumstances, such as likely time and place of exhibition

(Christoffel, 1989).

Also during 1976 the Human Rights Commission Bill was introduced, and in October the formation of a national lobby group was proposed by a group of Christchurch activists (Turner 1980, cited in Glamuzina, 1993: 39), bringing about the formation of the National Gay Rights Coalition (NGRC), consisting of a loose federation of many small gay and lesbian rights groups in June 1977 (Glamuzina, 1993: 40; Auckland Gay and Lesbian Lawyers Group, 1994: 93). Later that month Gay Liberation, Victoria University, submitted to the Select Committee on the Human Rights Commission Bill, demanding an end to discrimination against LGBT people, and that these two groups be included in the prohibited grounds of discrimination (Glamuzina, 1993: 39).

The Human Rights Commission Act 1977 (HRCA) was passed in July 1977, and included sex, marital status, or religious or ethical belief of that person as prohibited grounds of discrimination. Despite vigorous lobbying by lesbian and gay groups, sexual orientation was omitted from this Act (Auckland Gay and Lesbian Lawyers Group, 1994: 93). Protection from discrimination on the grounds of colour, race, or ethnic or national origins had been included in the Race Relations Act 1971.

In 1979 NGRC stated that the bottom line for any future legislation decriminalising sex between men was to have an equal age of consent to that of heterosexuals, and contain anti-discrimination clauses. While Labour MP Warren Freer from Mt Albert Electorate, was willing to put forward a

decriminalisation Bill in 1979, it contained an age of consent of 20, and was abandoned. He again put forward another decriminalisation Bill in 1980, essentially the same, but with an age of consent of 18, but it too was abandoned, and

the sabotaging of two decriminalisation Bills contributed to the demise of the NGRC over the next two years

(Auckland Gay and Lesbian Lawyers Group, 1994: 94).

In July 1980 Wellington lesbians sought to place an advertisement on local buses. Despite widespread protest, the Council refused the advertisement, which was simple and non-confrontational, reading

Lesbians – contact your local community

with a contact Post Office box number (*Lesbian-feminist Circle*, 35, 1980: 16-18, cited in Glamuzina, 1993: 58).

In December 1980 the NGRC submitted demands that protection be given to LGBT people to the HRC, giving them the same protection as groups already protected under the HRCA 1977. This was rejected. Wellington lesbians connected with the Lesbian Centre, also made submissions to the Commission, and these were similarly rejected.

The Chief Human Rights Commissioner, anti-lesbian P. J. Downey, who supported the rejection of these submissions, said that he thought in some circumstances discrimination was justified

(Glamuzina, 1993: 44).

This resulted in pickets of the HRC offices in Christchurch and Auckland in January and February 1981. A ‘dykecott’ of the March 1981 census also resulted as a consequence of the Commissioners comments and

some lesbians defaced their census forms with the slogan ‘No rights – no responsibilities’

(Wellington Lesbian Newsletter, 13, 1981, cited in Glamuzina, 1993: 59).

After defeating the Freer Bill in 1980, the NGRC asked a group of Auckland lawyers to draft a Bill that would ensure decriminalisation and equality. This group became one of many Gay Task Forces which sprang up around the country after the demise of the NGRC in 1981, writing what became known as

the Equality Bill, which went through several rewrites, before the draft Bill collapsed in 1983 over disputes relating to the degenderising of laws (Auckland Gay and Lesbian Lawyers Group, 1994: 94).

In 1985, after sixteen drafts, and consultation dating from 1984 between members of the various Gay Task Forces, lesbian groups, and Fran Wilde, the Homosexual Law Reform Bill was presented to Parliament as a Private Members Bill by Wilde. Consisting of two parts, the first contained the decriminalisation of homosexual acts between consenting men over the age of consent, set at 16; the second contained an amendment to the HRCA to include sexual orientation in the relevant sections. It was referred to the Justice and Law Reform Committee – by 51 votes to 23 – on its introduction. Opposition by a group of cross party MPs and the Salvation Army saw a petition against the Bill being organised. This was presented to Parliament

‘in a spectacle which to many suggested a Nuremberg rally’ and claimed to have 835,000 signatures

(Auckland Gay and Lesbian Lawyers Group, 1994: 95).

The second reading passed in late 1985, but the stress of the campaign was leading to trade-offs among MPs, with some supporting decriminalisation but opposing human rights legislation, thus appearing “liberal”, but cautious – attempting to be seen as “balanced”. Amendments to see the age of consent raised to twenty, then eighteen, were successively defeated, but in doing so, it was realised that it would not be possible to have both the age of consent at sixteen and the human rights clauses. Accordingly part two of the Bill was defeated, but part one went through to a third reading passage on 9 July 1986 with 49 MPs voting for decriminalisation, and 44 against, despite a report by the Haylen Research Centre stating that 75.5% of people were against an employer being able to discriminate against homosexuals by firing them, and only 12.1% support for employers being able to discriminate in such a way (Auckland Gay and Lesbian Lawyers Group, 1994: 96).

At a dinner held in July 1996 to celebrate the tenth anniversary of the passage of the Homosexual Law Reform Act, Wilde spoke of some of the horrors of

the campaign, and the hate mail she received during it. While some was religiously based, much of it was an expression of sheer hatred, which only strengthened her resolve to ensure the passage of the Bill. The hatred and violence expressed in the letters did, however, have its toll (personal discussion with Wilde, 10th Anniversary, Homosexual Law Reform).

In 1987, the HRC marked its tenth anniversary with a review of the HRCA, and recommended the addition of several new prohibited grounds of discrimination, among which was sexual orientation. The memory of the 1985/1986 campaign may have been too close for comfort, as the Government seemed to be unwilling to revisit the subject at that time. The Minister of Justice, and later Prime Minister, the Hon Geoffrey Palmer was more interested in passing his New Zealand Bill of Rights Bill. This Bill was passed in 1990, and contained at s19(1) the following:

Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

A Department of Justice memo of 21 December 1987 on the HRC and the draft HRCA Amendment Bill to Palmer did not contain any reference to sexual orientation (LAGANZ manuscripts, Wilde papers).

Following the review of the HRC in 1987, various gay and lesbian groups met with the Human Rights Commissioner in 1988 and 1989 (Discussion with Phil Parkinson, curator LAGANZ, September 1999). In April 1989 *Salient* interviewed Belinda Howard of Lesbian Action for Visibility Aotearoa and Paul Kinder of Gays and Lesbians Against Discrimination about the possibility of a Bill being put before Parliament later that year which would

outlaw discrimination against gays and lesbians

(Dawson, 1989: 9).

Kinder identified two types of discrimination that exists in society: that which is overt and blatant, and that which is surreptitious and subtle; with the latter type

by far the majority, and the most assiduous and hurtful. ... because they are more difficult to pin down

(Dawson, 1989: 9).

Howard stated that the wording of any clause inserted in the HRCA 1977 to protect lesbian and gay men should not have the expression “sexual orientation”, but that

the crucial expression should be ‘lesbianism or gayness’, or a phrase of like effect

(Dawson, 1989: 9).

The rationale may have been that the inclusion of the already privileged heterosexuality would have given it more prestige, while this wording would probably have made the prohibitions against discriminating against people on the basis of being lesbian or gay more effective, and would make the terms, and people, more visible, though this is not stated in the article.

In a memo by the Ministry of Justice (14 March 1989) to Palmer on the draft HRCA Amendment Bill, the Ministry recommended at page 9 that sexual orientation be defined as

heterosexual, homosexual, or bisexual preference or the condition of being a transsexual or a transvestite (LAGANZ manuscripts, Wilde papers).

In the Christian newspaper *Challenge Weekly* (2 February 1989), Graeme Lee, who became the co-leader of the Christian Coalition prior to the 1996 election, knowing a draft Bill was being prepared, said

Imagine the chaos of the military, schools, police, Christian churches and others if they are forced by law to employ homosexual personnel. On April 16 1986 Parliament defeated the discrimination clauses of the Homosexual Law Reform Bill by 49 to 31 votes. This is the way it should remain.

He expressed concern that as the inclusion of sexual orientation may be presented as part of the HRCA amendment Bill

it will be a Government measure and not open to a conscience vote, and therefore he said

the move is deceitful and hypocritical

(Challenge Weekly, 1989).

Lee expressed this attitude several times until after the passage of the Human Rights Act 1993 (personal recollection). John Terris MP wrote to Ms Wilde

six days later about this article to let her know about it, asking for her opinion and if a response was needed. It is not recorded if she replied (LAGANZ manuscripts, Wilde papers).

Similarly, in the *Nelson Evening Mail* (14 March 1990), the National party candidate for Nelson, Nick Smith, attacked an advertisement aimed at promoting male sexual health and containing information on a gay support group, which included a post office box number:

it is disgusting that public money from the health budget is being used in this way when hundreds of Nelsonians are unable to get proper medical care because of long waiting lists and a lack of funds.

The report further stated Mr Smith said the use of

taxpayer funds to promote homosexuality is obscene

(*Nelson Evening Mail*, 1990).

Nick Smith, who became Minister for the Environment in 2008, also voted against the Supplementary Order Paper (SOP) introduced by the Hon Katherine O'Regan to amend the HRB to include sexual orientation.

On May 16 1989, Labour Party Caucus Justice Committee urged the inclusion of sexual orientation in any antidiscrimination legislation as it

will enhance male homosexual self-worth which in turn will reduce unsafe sexual practices and save lives;

also noting that exemptions for the police and military are

not to be considered to be founded unless they come up with specific cases

(LAGANZ manuscripts, Wilde papers).

In a Justice Department brief for the Caucus Committee of 27 June 1989, at point 4, page 1, the Department urged the inclusion of sexual orientation in the proposed HRCA Amendment Bill as

sexual orientation is an inherent part of a person's nature.

The reasoning was that

prohibiting discrimination on the grounds of political belief does not involve a judgement about the desirability of particular political views. Equally, preventing

discrimination on the ground of sexual orientation does not apply any view on the respective merits of homosexuality or heterosexuality

(LAGANZ manuscripts, Wilde papers).

Sometime in May or June 1989, Deirdre Milne, Chairperson of the NZAF wrote to Brion Duncan, Assistant Commissioner, Human Resources, for the Police. She pointed out that New Zealanders did not want discrimination against gays in any employment. Duncan replied on 28 June saying that the Police had

not yet formally decided the issue,

but that

it is the opinion of senior officers that [the police] should continue to press for an exemption from the provisions which would allow homosexual persons into the police

(LAGANZ manuscripts, Wilde papers).

In July 1989, TV1 announced the formation of the Christian Heritage Party (CHP), interviewing John Allen, the founder and first leader of the Party. Allen admitted the newly formed party wants to stop homosexuality being promoted as an

acceptable alternative lifestyle

as

this is contrary to God's law,

but would be unable to recriminalise homosexuality as doing so

would not, in itself, have any real effect

(Newstel Log, 13 July 1989, in LAGANZ manuscripts, Wilde papers).

Graham Capill, then leader of the CHP, stated in the 1999 and 2002 election campaigns that they would seek to overturn the Homosexual Law Reform Act 1986 (personal recollection), their manifesto in 1999 stated that they

support the right of individuals to choose their own lifestyle, but press for restrictions on the promotion or advertising of liquor, cigarettes, gambling, drug abuse, pornography, suicide, prostitution and homosexuality (especially to school students)

(CHP, 1999: 9).

In September 1989 the New Zealand Nurses Conference urged the passage of the HRCA Amendment Bill to include sexual orientation (LAGANZ manuscripts, Wilde papers). However, in May 1999 Gays and Lesbians against Defamation, Hamilton, opposed

- i. using the words 'sexual orientation' in place of 'gay' and 'lesbian';
- ii. the inclusion of bisexuality or heterosexuality;
- iii. any exemptions for any occupational groups such as teachers, police and armed forces;
- iv. and any provision which was not positive discrimination and affirmative action for gay and lesbian people;

but supported efforts of the transsexual and transvestite communities and sought their inclusion in the Bill (Minutes of the meeting held 25 May 1989, LAGANZ manuscripts, Wilde papers).

Later in 1989 the NZAF released the results of two studies. One, by Lee Rampton (1989), indicated that 75% of gay and bisexual men living in the Auckland region had been subjected to verbal abuse, physical assault, threatened with violence, or feared for their safety. The other, by Rosser and Ross (1989), compared data obtained in Auckland and Adelaide.

Discrimination on the basis of sexual orientation had been illegal in South Australia since 1985. The results showed that 20.1% of the Auckland respondents had been subjected to physical violence, 56% subjected to verbal threats, 64.2% subjected to blatant homophobia in the workplace, 49.1% had non accepting family members, and 93.1% had been subjected to anti gay jokes. The Adelaide results indicated there was a significant differences on two of these variables: homophobia in the workplace (49.2%), and anti gay jokes (77.2%).

On 10 October 1989, D. W. Farlow, the Occupational Health and Safety Technical Advisor of the Employers Federation wrote to the Wellington Gay Task Force reiterating that

the Federation clearly stated its opposition to widening the Human Rights Commission Act to include sexual orientation as an unlawful ground of discrimination in employment. ... the Federation made the point that any extension in antidiscrimination legislation limits the employers ability to manage anti discrimination legislation does not bring about a change in attitude; education is preferable to statutory constraint. ... practical difficulties are likely to be encountered by employers

(LAGANZ manuscripts, Wilde papers).

In November 1989 the Labour Women's Council wrote to the Wellington Gay Task Force supporting their call for human rights legislation to include sexual orientation (LAGANZ manuscripts, Wilde papers).

In December 1989 the New Zealand AIDS Foundation (NZAF) made its written submission to the Select Committee considering the New Zealand Bill of Rights Bill 1989. They strongly supported the concept of a Bill of Rights which would attempt to specify the fundamental rights and freedoms of all New Zealanders (NZAF, 1989: 3), and wished to have clause 18, (now s19), amended to have sexual orientation included as well as HIV/AIDS disability (NZAF, 1989: 67). The Foundation was strongly against the creation of a hierarchy of rights: being either explicitly mentioned, interpreted by the Courts, or not covered at all, as this implies

that discrimination against members of some groups is less serious than that against members of other groups and continues to reinforce the message that some New Zealanders are second class citizens

(NZAF, 1989: 62).

They gave 157 examples of discrimination against gay men (NZAF, 1989: 6-27).

The Foundation felt a Bill of Rights would be

an unequivocal declaration of public policy

and cited the Human Rights Commissioner, Rae Julian, as saying

By having a law which states where you may not discriminate, there's automatically an implication to discriminate on other grounds.

The NZAF therefore claimed that

the Bill of Rights will worsen discrimination on the grounds of sexual orientation and disability unless these are explicitly listed in clause 18

(NZAF, 1989: 61).

The Foundation also suggested a definition of discrimination devised from Canadian State and Federal law:

any differential treatment that disadvantages an individual on the basis of that individual's actual or presumed membership in, or association with, some class or group of persons, rather than on the basis of personal merit

(NZAF, 1989: 65).

No definition of discrimination exists within either BORA or the HRA.

During 1989 the press had been cautiously supportive, with the *Dominion* reporting the results of Rosser and Ross (1989) in May, discussing the dangers of violence against a group in the community. However the *Dominion Sunday Times* reported in September 1989 the formation of gay cure groups New Image in Lower Hutt, Exodus in Auckland, Rock of Life in Christchurch, and Renew in New Plymouth; and how these groups had the support of MPs Trevor Young, (Labour, Eastern Hutt), Whetu Tirikatene-Sullivan, (Labour, Southern Maori), and Jim Bolger, leader of the National Party. Nevertheless, rural newspapers such as the *Marlborough Express*, the *Wairarapa Times Age* and the *Bay of Plenty Times* all reported, under different headlines, the delay in drafting the HRCA Amendment Bill. All of these reports discussed deficiencies within current laws and identify sexual orientation as one of these deficiencies (LAGANZ manuscripts, Wilde papers).

In March 1990, Richard Northey's electoral newsletter, *Northey News*, surveyed people within his electorate. Of the people who responded, 79% thought that employment discrimination against people on the basis of their sexual orientation should be banned (Northey, 1990: 1). In that same month the NZAF made a press release giving the figures of the Rampton and the Rosser and Ross studies (LAGANZ manuscripts, Wilde papers).

BORA came into force on 25 September 1990. Sexual orientation was omitted, but pressure within the governing Labour Party to introduce an

amendment to the HRCA led to the Hon Bill Jeffries, then the Minister of Justice, to introduce such an amendment

as the last work Parliament prior to the 1990 Election

(Auckland Gay and Lesbian Lawyers Group, 1994: 96).

Mr Jeffries had voted against the Homosexual Law Reform Bill in 1986, and his attitudes had not appeared to change over the intervening years, and upon introducing the HRCA Amendment Bill 1990, stated that he would vote against it because it contained sexual orientation as one of the prohibited grounds of discrimination (Auckland Gay and Lesbian Lawyers Group, 1994: 96).

The incoming National Government after the 1990 election decided to introduce a new Bill rather than proceed with the Bill introduced by Jeffries, though it was not until 15 December 1992 that the Minister of Justice, Douglas Graham, introduced the HRB which would extend the prohibited grounds of discrimination and restructure the Commission in the way proposed in 1987 (Auckland Gay and Lesbian Lawyers Group, 1994: 96). Debate had raged among the National Party caucus over the inclusion of sexual orientation. Initially Katherine O'Regan, Associate Minister of Health, wanted sexual orientation to be added to the Bill before it was presented to the House, but this was vetoed by the caucus (Personal discussion, 1999).

Debate over this Bill was strenuous. A number of submissions, predominantly from Christian groups, opposed the addition of sexual orientation. Much of this is covered in the following chapter.

The Films, Videos and Publications Classification Bill (FVPCB) was also been introduced in 1992, a Bill which rolled censorship of films, books, etc., into one office under the supervision of a Chief Censor, all under one standard, and updated the definitions to take into account modern technology. Debate was held up until after the HRA had been passed, although that Act did not come into force until February 1994. During the Committee Stages of the FVPCB the Government added sexual orientation, among other grounds, to what was to become subsection 3(3)(e). This had the effect of allowing publications that

held people to be inherently inferior as a result of their sexual orientation, disability, race, ethnicity, or other ground under the HRA 1993, to be censored. This seemed to be the solution to combating hate speech. Nevertheless, this was not to be, as I shall show in the following chapters.

Chapter 6: The debates around the Human Rights Bill 1992

In this chapter I examine the debates and activities around the HRB, introduced to Parliament in December 1992. Much of this discourse indicates the polarisation of homosexuality in society, and sets out the two opposing discourses that continued to exist at that time, when the *Living Word* videos were being discussed, and at other times when issues affecting the rights of LGBT people have been debated in Parliament since. I was an active participant during this debate, taking part in the lobbying process writing numerous letters to MPs.

The rights of LGBT people had long been supported by Katherine O'Regan, who stated during the second reading of the bill on 27 July 1993:

The issue of human rights and sexual orientation began for me many, many years ago after watching the BBC production of the life and times of Quentin Crisp, called *The Naked Civil Servant*. That was a true story, and I believe that much discrimination continues today for those people who are either homosexual or lesbian men and women

(Hansard, 1993b: 16948).

During the Bill's introductory debate, Graeme Lee stated:

I totally object to and oppose the amendment that seeks to introduce another right – the right of sexual orientation – which is in itself a soft word for sexual behaviour. It is totally preposterous to consider sexual behaviour as a basis for a right. ... Back in 1986 Parliament rejected that change by 49 votes to 31 on the very simple basis that sexual behaviour was not an appropriate reason to change a law and to give to a minority certain rights that deny at the same time freedoms to the majority. ... If homosexuality was an unchangeable condition it might have been different. Homosexuality is a learned behaviour. Homosexuality is a learned behaviour, it is a changeable condition, and we are debating the introduction of a matter that not even the United Nations in its International Covenant on Civil and Political Rights acknowledges. We do not want to discriminate against people in this country, and there is no discrimination against the homosexual community in the context that has been suggested. ... The goal of the international homosexual groups is to achieve that bench-mark, because from that flows the right to make claims to have homosexual marriages, to make claims to have homosexual adoptions, and to have

quotas in the work-place. ... What is for the greater good of society in New Zealand today? If there was one single thing, surely it would be the upholding, the continuance, and the strengthening of the family unit. Homosexuals are declared to be anti-family. They state themselves to be anti the family

(Hansard, 1992b: 13211-12).

This outlined Lee's Christian position, consisting of claims made without supporting evidence. As will be seen, the same tack was taken by many anti-gay groups.

Upon introducing the SOP that added sexual orientation to the HRB as a ground of prohibited discrimination, O'Regan quoted part of a letter from an ex-serviceman who, while gay, had not experienced any problems in the military during World War II, but who was concerned about the discrimination that was then current in society (Hansard, 1992b: 13209). O'Regan stated that the Hon Warren Cooper, Minister of Defence, had no difficulties in accepting that discrimination on the basis of sexual orientation should be prohibited in the armed forces (Personal discussion, (1999). This was also reported in the *New Zealand Herald*, which also reported on O'Regan's encouragement of people to write submissions in support of her SOP to the Select Committee (Collins, S., 1992; Orsman, 1992a, 1992b). While cautiously supportive, Wellington's *Evening Post* did not report this encouragement (Evening Post, 1992). The final version of this SOP included the word "lesbian" in the definition of sexual orientation (O'Regan, 1993).

During the campaign, O'Regan received many letters. Some were negative, with some of these quoting Biblical passages. While O'Regan did not tell me which passages they were, I suspect they were from Leviticus 18: 22 and 20:13; Deuteronomy 22: 5 and the Pauline Epistles: Romans 1: 24-32; 1 Corinthians 6:9-10, and 1 Timothy 1: 9-11 (Collins, 1958: 116, 118, 193, 148-149, 164, and 200). Many were written by D. Elliott-Hogg of Tauranga and Mies Oomen of Pahiatua, some which were also published in newspapers. Most of the letters were supportive. Unlike Wilde during the Homosexual Law Reform campaign, she did not receive any threatening or abusive phone

calls (Personal discussion, 1999). Her private secretary, Beverley Kirbell, confirms this (Personal communication with Beverley Kirbell, 1999).

Lianne Dalziel, as a member of the Select Committee, was impressed by the number of gay and lesbian teachers who put their employment at risk to make submissions to, and appear before, the Committee, and was grateful the media did not report this. She feels that the lack of reporting about individual lesbian and gay teachers was a positive thing. The established Churches – Anglican, Catholic, Methodist and Presbyterian – tended to show acceptance and understanding of the issue as a whole, though some individual churches among these did not support the inclusion of sexual orientation. The largest group of Churches opposed to the inclusion of sexual orientation were fundamentalist: Baptist, Evangelical and Pentecostal churches. She became very sick of hearing the Bible being abused during the whole procedure, though LGBT religious groups, such as Ascent and Galaxies also made submissions, and appeared to be supported by their Churches (Personal discussion, 1999).

Dalziel also noted that the extreme religious groups tended to focus on, and appeared obsessed with, male to male sexual acts – never lesbian sex. The list they gave her of homosexual activities is almost the same that appearing in *Exposing the AIDS Scandal* (Cameron, 1988: 148-152). Dalziel believes the submission of The Lion of Judah, formerly New Image, later known as The Community of the Immaculate Heart of Mary, would have been the most negative submission received by the Committee. She believes it would have been laughable if they had not been so serious. In it, she states they outlined their methods of curing people of their homosexuality. She believed these to be derived from methods used in World War II, complete with deprivation, excessive guilt, and brainwashing techniques (Personal discussion, 1999).

During the Select Committee process, it became apparent to Dalziel that lesbians should be visible in the proposed legislation, and convinced the Committee that the word “lesbian” should be included in the definition of “sexual orientation”, the Committee then discussed the matter with O’Regan in

order that it be added to her SOP (Personal discussion, 1999). Indeed, during the second reading of the Bill on 27 July 1993, Dalziel said

When one talks about homosexual people one is talking about gay men and lesbians. One is talking not just about men, but also about women, and that seems to have been lost in the debate. This apparent obsession with a particular sexual act ignores lesbians completely

(Hansard, 1993b: 16911).

During the debate, Grant Thomas, National Party MP for Hamilton West, reminded people that

Prior to the 1990 election, the National Party promoted the clarion call for the promotion of a decent society

(Hansard, 1993b: 16931).

Indeed, The Hon Jenny Shipley, in her reply to me of 27 April 1993, stated

A 'decent society' does not discriminate against its citizens

(LAGANZ manuscripts, Sawyers papers).

An unexpected boon, it allowed me to relate antidiscrimination to a "decent society" and discrimination to an "indecent society". In my letter to Grahame Thorne, I referred to this 'decent society', and in a hand written reply he said

It is not about homosexuality although the extreme elements of NZ society will make that their big play! 'The Decent Society' doesn't want bigotry, hatred and violence ...

(LAGANZ manuscripts, Sawyers papers).

During the campaign, I wrote in excess of 750 letters to MPs, community groups, and newspapers. Of the 133 petitions presented to the Select Committee, 56 petitions were against the inclusion of sexual orientation, mainly received during the period 10 November 1992 to 22 April 1993, and 57 petitions were in favour of the inclusion. The majority of petitions in favour of the inclusion of sexual orientation were received between 5 May 1993 and 21 June 1993, with 19 being presented on 6 May (LAGANZ manuscripts, Sawyers papers). It was reported in *Challenge Weekly* (1993: 1) that the CHP had organised 2000 petitions against the inclusion of sexual orientation to be presented to Parliament (LAGANZ manuscripts, Sawyers papers). These did not appear, and one wonders how many of the 56 petitions against the inclusion of sexual orientation originated from the CHP.

There were 697 submissions on the HRB, but when supplementary submissions are included (two or more submissions from the same person or group), that increases to 748. Only 81 of these did not include a reference to sexual orientation, and seven submissions were from Government Departments, such as the Ministry of Justice, who provided advice to the Committee. The majority of the submissions supported the inclusion of sexual orientation to the Bill, but an examination of some of those that were opposed revealed that the discourse of “homosexuality = evil and must be punished” still existed.

For example, the Reverend Barry Buckley (1993: 1), a Pentecostal Minister, said the addition of sexual orientation

will contravene the already established prohibition on the grounds of religion or ethical belief. ... homosexuality is not acceptable practice and contravenes the basic tenants of their [Christian] religious or ethical beliefs.

Joanne Phimester (1993: 2) said:

My objection [to the addition of sexual orientation] stem not only from my moral and ethical position as a Jewish Christian, but also as a citizen concerned for the whole of New Zealand society if passed.

She cites (1993: 2) Genesis 19: 1-29 and 1 Corinthians 6: 9-11 by reference only rather than quoting the passages, and states that

To pass the proposed amendments would be to further turn New Zealand, traditionally Godzone, a country internationally reknowned [sic] as a decent society, into another Sodom and Gomorrah.

A letter from Mrs Nelly Mojel to Jim Bolger was passed on the Committee as a submission by his office at her request. In it she said:

Dear Prime Minister, I implore you to intervene in this ugly battle between CHRISTIAN LIFE STYLE and HOMOSEXUAL LIFE STYLE. ... I wish this entire Bill concerning discrimination would be dropped altogether (1993: 1).

She attached a copy of the editorial from *Challenge Weekly* (Massam, 1992), claiming “lobbyists would deny us *our* rights”. Also attached is a letter of 23 February 1993 asking for her letter to the Prime Minister to be treated as her

submission. A further attachment, as 19A, gives more information behind her pleas, predominantly that homosexuality is

against GODS Law

(1993: 1; 19A, p1).

Slightly differently, Jill Ferguson (1993: 1), submitted against the addition of sexual orientation, etc., as

This will put an additional strain on our already over-burdened medical resources, and of course our over-burdened tax-payers. ... Far more people will have their 'human rights' denied by the above changes than will be helped by them.

Similarly, Mr R.S. Challis (1993: 1) stated he does not

belong to or subscribe to any narrow-focus church or community group. ... The practice of homosexuality is unnatural conduct. Between males this act is dirty, revolting and abhorrent practice. Nature in its wisdom rebels against the practice – (to whit) the Aids [sic] epidemic.

Women for Life (1993: 1), opposed the Supplementary Order Paper, and requested a greater restriction on HIV positive people:

If homosexuals are allowed to teach and **display** their sexual orientation, they will be in a powerful position to present homosexuality as the norm. Sexual orientation may be the business of the person concerned, but when it involves influencing young people, it ceases to be their business.

... Churches must have the right to exclude **practicing** homosexuals from **preaching** when it comes to the teachings of the Church.

We are also concerned that this Amendment will mean that homosexual, bisexual and transvestites will be able to demand acceptance as foster or adoptive parents. We believe the children have the right to be brought up in a normal heterosexual environment for the benefit of their health and mental and emotional stability (emphasis in original).

The Coalition of Concerned Citizens (1993) also submitted. Similar to the handbook they put out in 1985 during the Homosexual Law Reform Bill debate, the main point of their argument is that HIV will become more prevalent and spread quicker if people are unable to discriminate on the basis

of a person's HIV status, and that this will therefore put “innocent” people at greater risk of HIV infection.

In their submission the Coalition points to the case of Dr David Acer and six of his patients who contracted HIV after visiting his dental surgery. The Coalition indicates this is a case of non-sexual transmission of HIV, and uses this as an example to oppose the SOP. Yet they omit the contradictory evidence regarding that case. Although patient I claimed they had seen Dr Acer three times, in 1987, 1988, and 1989, to have cavities filled, records of their visits show their first and only visit was in 1988 to have their teeth cleaned by a dental hygienist, and were not seen by Dr Acer. Their family moved to another practice in May 1989. Patient G also claimed he had only injected drugs once, in 1973, and had only had sex with women twice. Yet evidence indicated patient G continued to use drugs, and had been having unprotected sex with an HIV positive sex worker. Patient C denied he had ever had sex with men, yet evidence showed he had anal sex with other men on at least six times, and that one of these men had tested positive for HIV. Kimberly Bergalis, the patient named by the Coalition, who was patient A in the case, claimed to have been a virgin, yet a gynaecological examination indicated she was not. She tested positive for the sexually transmissible HPV type 18 – unlikely to appear internally if it had not been transmitted sexually. Similarly, other patients were untruthful about their sexual histories and risk factors, and there were several other errors in the original CDC investigation (Barr, 1996). Nevertheless, there are some who argue in favour of the CDC’s initial findings (Brown, 1996).

Later in their submission, the Coalition (1993:4) attempts to paint gay men as a vector of disease, claiming

homosexual intercourse is the most sexually efficient way to spread hepatitis B & C, HIV, Syphilis and a host of other blood borne diseases. This is because rectal sex, which about 90% of homosexuals engage in is dangerous

Yet the Coalition ignores the fact that heterosexuals also engage in anal sex. A study by the Fred Hutchinson Cancer Research Centre examining the incidence of anal cancer, found that 21.5% of the women in the control group – the group

which showed no signs of cancer – reported having anal sex. This compared to 11% of controls from an earlier 1987 study (Woodward, 2008). They also claim that because homosexuality is

an unhealthy activity and a threat to non homosexuals by the way of the spread of contagious diseases like hepatitis, and as is starting to emerge, Aids (1993: 5) society must be free to discriminate against homosexuals.

A number of submissions were sermons on the evils of homosexuality.

Typical of this type of submission was the one from the Upper Hutt Baptist Church (1993: 1-2), who submitted that

Our opposition arises out of our concern for the moral well being of our nation and our desire to see God's standards for sexual morality upheld in our nation.

They also note the

Moral decline of our Nation,

that the

proposed amendment will promote [this] Moral Decline

which will result in

God's Judgement of New Zealand.

They quote 2 Chronicles 7: 14 in a paragraph on the “Churches Part in Moral Decline”, and also Ezekiel 16: 49 – 50. The submission claimed that Sodom and Gomorrah were destroyed because

It was known for it's sexual sin, but it was also for it's arrogance,

They also quoted in full Leviticus 18: 28, Amos 4: 7 – 9, and Isaiah 45: 7. In a section on “God's Compassion”, they quote in full Jonah 3: 10 and John 3: 16.

This established their submission as a purely Vox Deus argument.

Mrs Mies Oomen (1993: 1) stated:

If this legislation is passed into law, it would give a privileged status to homosexuals, bisexuals, transsexuals, transvestites and would automatically deny other law-abiding citizens their democratic rights to have their children protected from unnatural sexual influences in school, youth clubs, Boy Scouts, sports clubs, etc..

Similar claims were made by many others.

The CHP (1993: 5-6) stated in part of its submission:

Homosexuality is not a disease/sickness, but a chosen behaviour. Those who have given up homosexuality bear testimony to this. We should not therefore pamper to them, but give them a measure of hope that it is possible to change. To ban discrimination simply leaves them, unchallenged, in their current condition and confirms them in their morally repulsive practices [sic].

Homosexuality is immoral and unnatural. The very biology of mankind suggest it to be such. It leads to the destruction of the human race, as propagation is impossible. It therefore should not be tolerated, let alone provided for.

Homosexuality is destructive of family life. God ordained marriage between one man and one woman in a lifelong relationship. To ban discrimination is to 'normalise' these relationships, putting it on equal footing with other forms of sexuality, thus redefining family life away from the normal expectation.

Having decided that homosexuality and bisexuality are 'conditions' like other handicaps or diseases, what is there to stop us from considering paedophiles or bestiality to also be other valid options that should receive protection from the law? We must not forget that just 15 years ago homosexuality was considered just as repulsive as some of these other sexual practices. Where do we draw the line?

To ban discrimination is to remove traditional freedoms and rights from others. As a Christian landlord, I have the right to discriminate as to who I have on my property. This will be removed. As a Christian Headmaster, I have had a choice as to who I employ on my staff, thus choosing how I ultimately train students in my school. As a Christian Parent I could object to my children attending sex education classes, especially where I believe that homosexuality is wrong and that that is being promoted. If I find out my dentist is a practicing homosexual and therefore at greater risk of AIDS than a heterosexual, I will not be able to change dentist for that reason. What this legislation does is removes freedoms from decent, good, law-abiding citizens and grants privileges to a small group of 'alternative' life stylers.

It is argued that we need this legislation for health reasons; that as more freedom is given to homosexuals the easier it will be to educate them about AIDS. This is utter rubbish! This argument was used when the Government wanted to decriminalize homosexuality. If that move did not help then, neither will this. It is a fact that 90% of AIDS victims are homosexual and far from encouraging them to continue in that life style we should be trying to send a clear message that this practice is wrong and

AIDS is a direct result of such promiscuity. Any change in the law will not assist the question of greater access to health care for homosexuals – they have full access to health care right now.

There is much discussion of various activities that homosexuals, and, in the view of the CHP, homosexuals alone, practice: oral sex, anal sex, mutual masturbation, and various fetishes. In regards to a possible exemption to the Act for the Police and Armed Forces, the CHP (1993:8) claimed:

Such behaviour is inappropriate in the Armed Forces and the police, where, because of the authority structure, a more senior ranking officer could impose such behaviour on a lower ranking officer. Trust and respect is essential in these institutions and this ban will undermine such standards.

One could also object to this move on the ground of consistency. Just six years ago the police could prosecute a person for this behaviour. Now they will have to tolerate them in their own ranks. So much for the absolute standards of the law!

They were also concerned about the rights and privileges of church leaders, that churches would not be allowed to discriminate against employees, and implied, but did not overtly state, a link between homosexuality and paedophilia:

Whilst clause 42 gives a number of exceptions for the purpose of religion, it is not at all clear whether it covers meetings outside church buildings. Neither is it clear to me whether this section would allow a church to refuse to employ a homosexual or bi-sexual organist or grounds-person, if they so desire.

Active homosexuals cannot be refused employment as teachers in State Schools, Colleges, any kindergarten, child day care centre, or employment as a school caretaker, school counsellor, sports coach, Boy Scout leader, Boys Brigade leader, hostel supervisor, or a myriad of other clubs that most New Zealanders would not wish to see lead by homosexuals. Any job a homosexual applies for and is refused, entitles him/her to lay a complaint of sexual discrimination with the Human Rights Complaint Division. If this division cannot resolve the matter it is referred to the Human Rights Tribunal who can impose penalties of up to \$5,000. (See Clause 127 – Enforcement).

Church leaders and responsible, 'normal' persons, with religious beliefs condemning sodomy, the homosexual behaviour or de facto relationships, could be accused,

under clause 100, for causing '(c) Humiliation, loss of dignity, and injury to the feelings of the aggrieved person.' Under this Act, 'religious belief' is also protected.

Whose rights will prevail?

(CHP, 1993: 8-9).

They, like the Coalition of Concerned Citizens are making claims that LGBT people are immoral and therefore evil, and are diseased – though not in a psychological sense – because they have *chosen* to be lesbian or gay, and it is thus an *alternative lifestyle*. They also claim that homosexuality destroys family life – but do not say how it does so – as if merely making the claim is sufficient. For some MPs, it was. Yet they forget that if discrimination against people on grounds that were “chosen” was not prohibited, it would be perfectly acceptable to discriminate against Christians and others who hold religious beliefs simply because they choose to hold those beliefs. They cannot claim that to allow discrimination on the basis of choice is acceptable when it comes to one ground – sexual orientation – but not on another ground: religion.

The Lion of Judah, a

non-profit charitable group that offers counselling to homosexuals who wish to change their sexual orientation

(1993: 4),

made a 215 page submission, dedicated to

All those who have overcome their broken sexuality

(1993, cover).

They were assisted by Neil and Briar Whitehead, also long time campaigners against equal rights for people based on their sexual orientation. The submission was split into nine chapters, with a separate introduction, appendices and bibliography.

In their introduction, they confused homosexuality with bisexuality, claiming that most gays (70%) are married and secretly practising their homosexuality...

(1993: 6).

They do not provide any reference as to where they obtained this figure.

Again, without referencing it, they claim (1996: 6) that

80% to 90% of gays practice anal sex.

There is no reliable way of checking their assertions. They make other claims throughout their introduction but provide no proof. While this may concern those who question material that is not referenced effectively, it appears to be sufficient proof for those who wish to believe it.

Although the introduction (1993: 6) claims that

80% to 90% of gays practice anal sex,

in chapter one (1993: 30) this becomes

80% to 95% of gays have had anal sex (Saghir & Robins, 1973; Connell et al, 1990) compared with 25% of heterosexual men reporting anal/oral sex (Cameron, Procter & Forde, 1985).

Besides their use of an article by Paul Cameron, and one study that was 20 years old by the time they made their submission, there is also an obvious flaw in comparing anal sex to anal/oral sex. The percentages they claim still indicates more heterosexual men have anal and oral sex than the total number of gay men. Claiming the Kinsey's (1948: 651) data of 10% is wrong, the highest estimate they come up with for gay men is 5% (1993: 53-60). For example, if we say that all that 5% practice anal and oral sex, out of 100 men, it would mean that five are gay and have had anal and oral sex. Yet of that same number, 25% of the 95 remaining presumably heterosexual men, a total of around 24 have had anal and oral sex. Although the *rate* may be higher, the actual numbers are far lower. Nevertheless, they misread the Kinsey data which indicates that only 4% of

white males are **exclusively homosexual throughout their lives**, after the onset of adolescence

(1948: 651, emphasis in original).

The Lion of Judah (1993: 32) describes gay men as a reservoir of disease that is a threat to others by stating:

Heterosexual HIV incidence is growing (Anderson & Ray, 1992), largely through infection of female partners through homosexual men, and through IV drug use.

Yet the AIDS Epidemiology Unit (1993: 3) at Otago University indicated that in the twelve months from January to December 1992, two women and four men were infected with HIV through sharing needles, and two men and four

women were infected with HIV through heterosexual sex. However, it was not until 2007 that the place of infection was identified. It was reported in February 2008 that

In 2007 a total of 60 people (31 men and 29 women) were diagnosed with heterosexually acquired infection. ... There has, however, been a small but steady rise in the number of people infected heterosexually in New Zealand – 16 in 2007 compared with 11 in 2006 and 8 in 2005. Of these 16 people (5 men and 11 women) infected in New Zealand, almost half were infected by a partner who had been heterosexually infected overseas. The remainder were infected by a partner who had been infected through homosexual contact, injecting drug use or the means of infection of the partner was not reported or unclear

(AIDS Epidemiology Unit, 2008: 2-3).

Thus the inaccuracy of the Lion of Judah claims can be seen.

They also claim (1993: 53) that since the numbers of gay men in New Zealand is negligible, anti-discrimination measures are not necessary:

About four per cent of the New Zealand male population are active homosexuals. About 70% of these men are married. The number of men who are exclusively homosexual is probably about 0.7%. In principle it is they who are pressing for this legislation; married homosexuals are not.

They do not reference this claim, making it only an assertion, and as 70% of 4% is 2.8%, leaving 1.2%, how, and from where, do they get 0.7%?

Ignoring the reality that affects LGBT people, and how society enforces a compulsory heterosexuality (Rich, 1982), in making a point about the claimed percentages of gay men marrying, Lion of Judah claim:

Gays have traditionally argued that they are forced into [marriage] by society's attitudes towards homosexuals and that if there were no discrimination they would not marry. This does not accord with the facts (1993: 62).

And later:

... homosexual men perceived stigma where there was not necessarily any
(1993: 64).

Yet the Lion of Judah itself promotes the idea of heterosexual marriage (normal, moral, healthy, good) as a way to overcome homosexuality (broken sexuality, evil, immoral, diseased, bad). As such, I would argue they are

adding to that societal stigma and compulsory heterosexuality. They then claim:

What homosexuals do to their wives is a far worse discrimination than anything inflicted on homosexuals. As we have mentioned, such a woman is usually traumatised by the discovery that her husband has been secretly homosexually active for years. She has been seriously wronged (1993: 69).

Throughout their submission, they make this error: confounding same sex sexual activity with homosexual men, rather than admit that these men may be bisexual. Even though the case studies they provide are from an article called *A study of the married bisexual male* (Brownfain, 1985), they continually refer to them as homosexual or gay. They paint this person as being evil, purposefully deluding those around them, as a reservoir of disease, and therefore as a person who cannot be trusted or allowed to participate equally in society.

They also deliberately conflate homosexuality and paedophilia, by erroneously calling paedophilia a sexual orientation (1993: 87):

Yaffe (1981) described attempted treatment of paedophilia. By paedophilia we mean a sexual orientation or preference towards young children. Since this is illegal in most countries, paedophiles try to change their orientation. Yaffe quotes one case in which the preference of a man for young boys was changed by therapy to a homosexual preference for adult men, and comments that small groups seem to be reasonably successful in changing preference. This is not merely creating people with suppressed desires, but changing the object of their desire.

Yet the gender to which the person was attracted remains the same. It is not sexual orientation – the *gender* to which a person is attracted – that has changed, but the *object preference*. The subject was attracted to young children in the same way that a gerontophile is attracted to the elderly. Paedophiles, are, on the whole attracted to the youth of the object preference, with studies having shown that men who sexually molest children who are not related to them are sexually aroused by images of naked children, while men who sexually molest children within their families are aroused by images of heterosexual sex (Davison & Neale, 1996: 341-342). Furthermore, Both

Davison and Neale (1996: 342) and Rosenhan and Seligman (1989: 435) indicate that paedophiles have a high degree of religiosity and moralism, with Rosenhan and Seligman (1989: 435-436) also adding that paedophiles are 'highly Victorian and rigid in their own sexual attitudes' [and] 'they generally believe in the double standard'. They also 'see themselves as devout, read the bible regularly and they pray often for cure of their pedophilia'.

The American Psychiatric Association's (APA, 2000: 571) *DSM 4 revised* classifies Paedophilia as a paraphilia. This Manual defines a paraphilia as recurrent, intense, sexual urges, fantasies, or behaviours involving unusual objects, activities, or situations, which cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. Along with paedophilia, paraphilias include exhibitionism, fetishism, frotteurism, sexual masochism, sexual sadism, transvestic fetishism, voyeurism, and a catch all, paraphilia "not otherwise specified" (APA, 2000: 569). Paedophilia is defined by the APA (APA, 2000: 571) as:

sexual activity with a prepubescent child (generally age 13 years or younger).

The individual with Pedophilia must be age 16 years or older and at least 5 years older than the child. For individuals in late adolescence with Pedophilia, no precise age difference is specified, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account.

The World Health Organisation (WHO, 2006), in its *International Statistical Classification of Diseases and Related Health Problems 10th* version has a similar, though more concise, definition. It is therefore quite clear that adults having consensual sex with each other do not fit this definition, regardless of whether they are having sex with the same, or opposite, gender.

Much of the Lion of Judah's argument is also developed around biblical verse, what I term a Vox Deus argument – using the "voice of god" to bolster argument – a form of an appeal to an authority.

In chapter four Lion of Judah cite various studies that claim that gay men can change their sexual orientation (1993: 86-111). Of the studies or reports

purporting to indicate a change in sexual orientation, ten are from the period 1956-1979, and a further eleven are from 1980 to 1992. Yet only four of these were written in the five years from 1987 to 1992, two of which are articles in the newsletter of Exodus International, the *Exodus Standard*. Exodus is

a world-wide Christian organization helping people affected by homosexuality and promoting the message that ‘Change from homosexuality is possible through the power of Jesus Christ’

(Exodus International, 2008).

One of the remaining studies from between 1980 and 1992, is a study completed by E.M Pattison and M.L Pattison (1980), which looks at “11 white men who claimed to have changed sexual orientation from exclusive homosexuality to exclusive heterosexuality through participation in a Pentecostal church fellowship” (Pattison & Pattison, 1980: 1533). All of the subjects were taken from referrals by Exodus International. One of the subjects – Gary Cooper – later said,

of all the thousands they had available to them, they could only find eleven whom they thought were successful enough to be included

(Maniaci & Rzeznik, 1993).

Pattison and Pattison (1980) also claim that of the eleven, eight became detached from homosexuality, while three had succeeded in functioning heterosexually, with two reaching a Kinsey Scale of 1. However, these two men, Gary Cooper and Michael Bussee, dispute that. They subsequently left the ex-gay movement after the study was completed, but prior to publication, and eventually began living with each other (Maniaci & Rzeznik, 1993).

This tends to indicate their studies are very selective, biased towards their own point of view, may be based on invalid data, and are often dated, ignoring more recent, contrary, studies. I believe this invalidates the Lion of Judah’s claims.

In chapter five, Lion of Judah (1993: 113-127) posit the theory that appears in the video, that in order to qualify for rights, a group must meet five criteria (1993: 113; Jeremiah Productions, 1989). These five criteria are, supposedly a

result of a US Supreme Court Ruling cited by Roger Magnuson (1990, in Lion of Judah, 1993: 113-115):

- a) A demonstrable pattern of discrimination (must show that the group has poorer housing, jobs, income, and education);
- b) The discrimination causing substantial injury (should not be trivial);
- c) The discrimination is based on criteria that are arbitrary and irrational;
- d) The discrimination is directed at a class of people with an unchangeable or immutable status (such as skin colour, disability, etc., and with no access to other legal remedies);
- e) The class being discriminated against is without moral fault.

However, DeLapp (1993: appendix 3, p2) states that US statutes and court rulings indicate that to be a minority, a group should

represent an 'insular and discrete minority' and that it is subject to 'arbitrary and capricious' treatment,

and that

Civil rights statutes don't require that a group possess any immutable characteristics like race or sex; don't require that the group is economically disadvantaged; and, don't require that the group is politically powerless.

Furthermore, she states:

Civil rights legislation is simply protection against discrimination. ... Extending civil rights protections to lesbians, gay men, and bisexuals will *not* nullify the Civil Rights Act of 1964

(1993: appendix 3, p2).

It would therefore appear that the "list" is as invalid in America as it is in New Zealand.

In chapter 5 Lion of Judah claim that there is no evidence of discrimination against lesbian and gays, yet in chapters seven and eight (1993: 129-144; 146-148) they specifically give cases where gay men and lesbians have been discriminated against, and have won the case, allowing them either recompense or equality before the law.

The rest of chapter five is a defence of their position that it is acceptable to discriminate against people on the basis of their (homo)sexual orientation, and after citing part of the Genesis story, they claim (1993: 121):

We submit that deeply and genuinely held religious or ethical belief is not an arbitrary or irrational ground on which to make a distinction between homosexual and heterosexual.

Yet some would hold that believing in any such creation story is irrational, as is believing in a virgin birth, that someone can walk on water, or that bats are birds and insects have four legs (Leviticus 11: 13-25). Dawkins (2006: 163-207) points out numerous examples of why belief in a religion may be classed as irrational, drawing examples not only from Christianity or Judaism, but also from Islam, Cargo cults, and other religions.

Their remaining chapters compound the errors they have already demonstrated, continually use outdated research, and magnify on their Vox Deus arguments. Furthermore, as part of the appendices, they include Michael Swift's "Gay Revolutionary", but giving it the title "The Homosexual Agenda" (Lion of Judah, 1993: 215). Ironically they leave in the first sentence that shows the essay is a fantasy, perhaps in the hope that the words

We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies

(Swift, 1987)

will be more memorable and stick in the mind than the sentence that states this is an outré fantasy.

Surprisingly, the New Zealand Police Association (1993), at paragraph 7.3 in their submission stated:

The Police Association has no interest in the sexual orientation of its members nor potential recruits if their sexual orientation does not interfere with their ability to effectively perform the duties of a sworn member of the Police,

but at paragraph 7.4 they noted that the Commissioner of Police should have the discretion to refuse an applicant on the grounds they are behaviourally unacceptable for the job.

They also state that this would therefore see applicants with

intense homophobia or transvestism as extreme examples ... refused

entry to the Police. This seems at odds with the submission of the New Zealand Police (1993), written by the Commissioner of Police, John Jamieson, who opposed O'Regan's Supplementary Order Paper. Jamieson claimed concerns with maintaining public acceptance and credibility, and the recruitment

of people who are openly homosexual will impact on levels of public trust and support

Furthermore, to allow openly homosexual police officers would threaten discipline and morale in the ranks, would present difficulties where officers have to search members of the public, and that it would mean that police officers would be open to public allegations about their conduct (1993: 1-2). The Select Committee felt that this was a personal submission from Commissioner Jamieson rather than a submission from a government body, such as the Police (Personal discussion with Lianne Dalziel, 1999).

Brett Ravelich (1993) provides an interesting counterpoint to the Police submission. Ravelich was a Police Officer inducted in September 1985 at the Auckland Police Station, then realised he was gay. After training at the Police College he was posted to Gisborne, but had met, and started a relationship with, someone in Wellington while at the College. He asked to be transferred to Wellington as he felt his work, and his relationship, would suffer if he did not do so, stating in his report in explanation of request for transfer that:

My stress was compounded by the fact that I felt unable to confide in either my superiors or my colleagues. All members of my Section were married men. As well, I was aware that many would have been hostile to my predicament. I felt unable to confide in my superiors because I felt they would also be unsympathetic and I feared that there would be a real likelihood of my being discharged from the Police, one way or another

(1993, attachment 1 p1).

Ravelich requested a transfer, which was

accurate in every respect except that the gender is different and my commitment to my lover and relationship would not generally be called an engagement

(1993, attachment 1 p2).

This was written on 6 August 1986, less than a month after the passage of the Homosexual Law Reform Act 1986.

An investigation began, and a hearing was held on 17 September and 17 October 1986, before Judge Willis, (retired). Constable Ravelich was charged with knowingly making a false report (that he mis-stated the gender of his partner). He originally pled not guilty, but on the day of the hearing changed that to guilty. Willis J in his judgement stated:

When I was approached to sit at the tribunal I was informed that a member of the Police had been charged with making a false report. No other information was given to me and I assumed that a Constable had made a false report in respect of some enquiry in which he had been engaged. My attention was drawn to the nature of the complaint by a colleague who had read of it in the newspaper. At that time I had not seen the morning's edition. A great deal has been made of this report which quite clearly is accurate and so accurate it must have come from official papers. The Police service is concerned that this particular matter should have received so much publicity. The defendant is concerned and so am I. Submissions made on behalf of the Police seem to imply it was the defendant who leaked the information. In view of the nature of the offence I would regard it as being remarkable that one charged as he was should seek publicity. So far as I am concerned, the press somehow or other obtained information and made it public

(1993, attachment 2, p2).

I have spoken with Ravelich several times, and he assures me that he had not that leaked the information to the media. Doing so would have made his position even more precarious. Furthermore, there was information in the newspaper reports that he was unaware of at the time - information only held by the Police prosecution team. The prosecution suggested during the hearing that

by his deception of his superiors the defendant had shown himself capable of mendacity in achieving his own end

and that

he could not be regarded as a trustworthy member of the Police and had sacrificed his right to remain in the service.

Willis J continues:

The fact is that the member is charged with making a false report. He has pleaded guilty. The charge relates to a personal matter and does not affect any member of

the public. It is true that if the authorities had been aware of the true reason for the transfer it would not have been granted and it is true that others who had a prior right to transfer may have lost that right. The fact remains that the false statement was related to a personal matter and not to any member of the public. The background to this particular matter has been detailed in the summary presented to me and I have no doubt it is of concern to the authorities. It is however not my concern. I am dealing solely with a charge of making a false report and it is on that basis, and that basis alone, that I must make a decision

(1993, attachment 2 p3-4).

The officer investigating, Inspector Gillman, stated he had found Ravelich to be frank, forthright, and honest, but he would have been unable to obtain a transfer had he told the truth on his original requests. Gillman stated that Ravelich was in a catch 22 situation, and otherwise seemed sympathetic to Ravelich (1993, attachment 3 p1-2).

The SPCS (1993), made a submission of 17 points over 38 pages, with a further 24 appendices forming a total of over 108 pages. The introduction is an executive summary of the contents of the submission. They point out that the UK had not, at that time, passed any

'gay' rights or anti-discrimination law

and that

Section 28 of the Local Government Act 1988 (U.K.) forbids local authorities to promote homosexuality.

They also point out that

In the following places in the U.S.A., anti-discrimination legislation or city ordinances relating to sexual orientation have recently been repealed:

State of Colorado, 1992

City of Portland, Maine, 1992

City of Tampa, Florida, 1992

City of Springfield, Oregon, 1992

City of Concord, California, 1992

(SPCS, 1993: 2).

They indicate that it is a good thing these places had their anti-discrimination statutes overturned, because, in their eyes, homosexuality is a choice, is immoral and therefore evil. One wonders what their attitude would be to

overturning anti-discrimination statutes that provided other groups with protection against discrimination where those groups have a choice, such as religious or ethical belief.

The Society claims the Bill

favours minority groups at the expense of the rights of the rest of the community. The law is warranted in doing so only in cases of clear injustice, and where there are no competing rights. The Bill appears to aim for liberality but could be an engine for tyranny by a minority against the rest of society: [Appendix 1](#) records the outcome of a complaint by a lesbian against her two non-lesbian flatmates (it amounted to 'reverse discrimination'). Under the New Zealand Human Rights Bill we can expect similar cases, with the possibility of a similar settlement under Clauses 92 and 93 [now sections 80 and 81 of the Act] of the Bill. A defendant will be put to great anxiety, difficulty, and expense to defend a claim of discrimination, and could easily feel coerced into agreeing to such a settlement as were the two young women in Wisconsin. That some of the grounds of Clause 34 [now section 21] overlap will make the complainants position stronger and compound the difficulties for the defendant

(SPCS, 1993: 2).

Like *Lion of Judah* (1993), they state that the Commission is too powerful, for the same reasons as *Lion of Judah*, but also that

[Clause 11](#) [now section 7] of the Bill is inadequate to ensure that only appropriate persons are appointed as Human Rights Commissioners

(SPCS, 1993: 2, emphasis in original).

The SPCS (1994: 13) state the definition of “sexual orientation” in the proposed amendment will include paedophilia,

in whatever form it may take – heterosexual, homosexual, or bi-sexual orientation: moreover, the criminal law does not provide protection against the risk they pose because it punishes only proved acts of paedophilia. Many homosexuals are paedophilic, i.e. have a sexual interest in young children: see [Appendix 1A](#), ‘Sheffield Morning Telegraph, 21.8.75, news report re child sex’ (p4).

Furthermore they claim that

even though the O'Regan amendment purports to limit itself to 'orientation', in practice it will be difficult to distinguish between discrimination on the grounds of sexual orientation and that on the ground of sexual behaviour. It is generally

behaviour which manifests orientation, and it will be difficult for a defendant to show what he was objecting to

(SPCS, 1993: 4).

From pages 10 to 18 they have a diatribe against homosexuality, then follow this from pages 19 to 21 with statements about how unnatural homosexual behaviour is. They suggest the ideas that the proposed amendment would allow a greater flood of pornography into New Zealand (SPCS, 1993: 22), how it would have other negative effects on young people not already covered (SPCS, 1993: 22-23), how it would allow children to “come out” at school (SPCS, 1993: 23), how separate public toilets for 'gays' would be required to be set up by local bodies (SPCS, 1993: 24), how it would allow same-sex marriages (SPCS, 1993: 24-25), how homosexuals could not be refused employment as public toilet attendants or kitchen hands preparing food (SPCS, 1993: 25), and how it would be bad for morale in the Armed Forces if homosexuals were allowed entry (SPCS, 1993: 26). They also cover the “effects on health” citing material by Dr George Rekers (1982) and how deleterious to public health the “promiscuous” homosexual is. They also point out that by removing the legal restraint, groups such as the Lion of Judah will no longer be able to operate (SPCS, 1993: 27), how dangerous this would be on youth who may be “tempted” to become homosexual when they would otherwise be heterosexual (SPCS, 1993: p 27-28), and claim that homosexuality is against family values (SPCS, 1993: p 28-29). They do not explain *how* homosexuality is against family values. They also try to claim the discredited 1985 petition against the Homosexual Law Reform Bill as evidence of general society’s negative attitudes towards homosexuality (SPCS, 1993: 30).

Paul Adams (1993: 1) opposed the addition of sexual orientation to the Bill and states that people with HIV

need to be quarantined not let to run loose. Medical Science let alone plain common sense tells us that.

He expresses concern about dentists with HIV passing on the virus. He also states

Again I strongly protest at the clause on sexual orientation. To have a male dressed as a female teaching children in class is beyond my conception.

He also states – as do others identifying as Christian – that this amendment will lead to a further decline in our nation.

In 1999, Adams was elected to Parliament as a list MP for United Future, a Christian based, family oriented, political party that gained support through its “It’s only common sense” slogan. Upon his election, he denied he wrote this submission, which is on his company letterhead, until confronted with a copy of it. At the time, I was asked questions about the case and provided the copy of his submission. The case was widely reported on broadcast and in print media.

Nevertheless, some churches, religious leaders, or Christian groups supported the addition of sexual orientation to the Bill: Ascent, Christchurch (1993); Auckland Community Church (1993); Right Reverend David Coles, Bishop of Christchurch (1993); St Andrews on the Terrace (1993); Wellington Sophia Catholic Women’s Network (1993); YWCA (1993); and many others.

Elwin Cunningham (1993, p 1) recommended the addition of sexual orientation to the Bill, stating that

There is no good reason to discriminate against peoples 'sexual orientation' except to be unpleasant to others.

Paul Rishworth (1993: 1), who would later represent LWD, submitted that he is predominantly concerned about, and opposed to, clauses 75 and 139 (now ss63 and 131 HRA regarding racial harassment and racial disharmony), and how it would be possible for a person to offend a person of another race, colour or ethnic background while telling the truth, and the apparent clash between these two sections and s14, freedom of expression, in BORA. He did not, however, mention the Supplementary Order Paper or make any comment on sexual orientation. Similarly, the Auckland Council for Civil Liberties Inc. (1993: 2), while supporting the inclusion of sexual orientation into the Bill, stated that the Council

remains committed to the principle of freedom of speech and therefore opposed to any unwarranted encroachment on this freedom. Although we have some reservation about this section [clause 75] we recognise its necessity in order to provide protection to minorities.

It can therefore be seen that the arguments against the addition of sexual orientation to the HRB appear to be centred on:

1. An appeal to authority, which can be split into two sections:
 - a) An appeal to scientific material, which is:
 - i. often outdated and has been surpassed by more recent developments, or
 - ii. is written from a conservative Christian perspective opposed to the rights of lesbian and gay people.
 - b) An appeal to the authority of the Bible and scripture, which can be termed a *Vox Deus* appeal, an appeal to the voice of God.
2. That homosexuals are a reservoir of disease ready to infect the rest of society;
3. That homosexuals do not deserve rights because they have chosen to be homosexual, and that this choice is immoral and evil (and is often closely associated with 1(b));
4. Homosexuals are a threat to
 - a) Children, and then attempts are made to link gay men with paedophilia, either implicitly or explicitly, and/or
 - b) Society and/or the family, yet there is no explanation of how this is so.
5. “Oh, Ick! A belief that because homosexual sex is so disgusting and dirty that no one could, or should, choose to do so” (Carol Queen, in Chapkis, 1997: 51-52), and therefore they don’t deserve rights.

The Select Committee reported back to Parliament on 22 July 1993. Graeme Reeves, the Chairman, noted

In respect of sexual orientation and having organisms in the body capable of causing disease, the committee received 640 submissions that expressed a view on the

inclusion of those matters as prohibited grounds of discrimination. Of those, 497 were in support of the proposal and 142 opposed it. As those grounds will be the subject of a conscience vote and further debate, the committee makes no recommendation to the House

(Hansard, 1993a: 16742).

John Robertson, the Labour MP for Papatoetoe, a Christian and member of the Select Committee, taking a stance against the inclusion of sexual orientation added

Legislation such as this does not change attitudes; education changes attitudes. Many of the groups that presented submissions to the subcommittee have a responsibility in that education process, and many carry that responsibility through

(Hansard, 1993a: 16745).

Echoing the thoughts of those who did support the inclusion of sexual orientation, Steve Maharey, member of the Committee and Labour Party MP for Palmerston North, said

The principle that we work on is one that I guess we would call citizenship – that is, if one belongs to New Zealand society, a series of rights ought to be available that would allow one to go where one wants, if it is legal to go there. One should have available the rights to have a job, to rent a house, and to have access to public places, and one should be able to do that because one is a citizen of this nation. ... I believe that New Zealanders now regard it as quite wrong, absolutely wrong, to discriminate against people on the grounds of their sexual orientation

(Hansard, 1993a: 16746-47).

Graeme Lee kept up his attack:

The part about sexual orientation was also offered as an issue that pertained to health. ... The arguments are fallacious. It is clearly, unequivocally, and categorically a political matter. ... It is not surprising that a large number of submissions were received about sexual orientation. The homosexual community is committed to ensuring that there is change. It is part of an international commitment that has been going on for some time, and, yes, overseas jurisdictions have changed

(Hansard, 1993a: 16747-48).

This raised a “homosexual conspiracy” spectre, a theme taken up by other MPs against the inclusion of sexual orientation. However, Chris Laidlaw, MP for Wellington Central, replied saying

The Minister appears to be putting it around the other way by claiming that somehow this Bill will provide for a conspiracy against the majority by the minority. That is not the case, and it is important that people remember that

(Hansard, 1993a: 16748).

Meanwhile, in an apparent attack against members of the Select Committee, John Banks, Minister of Police and National Party MP for Whangarei said

I wonder whether the responsible people – the member for Miramar, the member for Christchurch Central, the member for Papakura, and the member for Palmerston North – who came to the Select Committee, are the same people who have been sending me hypodermic syringes full of blood, threatening to kill me, and sending me explosives. I wonder if they are the same people

(Hansard, 1993a: 16749).

Steve Maharey interjected, and Hansard (1993a: 16749-50) records it as follows:

I raise a point of order, Mr Speaker. I take exception to the implication that people on the Select Committee have been sending the Minister hypodermic needles, and ask that he withdraw those comments.

Mr SPEAKER: 'I say to the Minister on his feet that normally the debate on the reporting back of a Bill discusses what happened at the Select Committee and how the Bill has come back from the committee.'

Hon. JOHN BANKS: 'I will say more about that in the second reading debate'.

Banks continued the conspiracy theory:

The highly organised global movement of so-called gay activists is here in New Zealand, alive, well-funded, and well in 1993, and it has got to the Select Committee. With regard to the matter of sexual orientation, gay activists say that it is about their civil rights. It is about unnatural sexual behaviour; that is what it is about. It is about health risks, not rights. What will be rubber-stamped by Parliament next – bestiality? ... If society does not condemn what is wrong, how can we teach our kids what is right?

(Hansard, 1993a: 16750).

Sonja Davies, Labour Party MP for Pencarrow said of Mr Banks' speech

That was one of the saddest speeches that I have ever heard made in the House

(Hansard, 1993a: 16750).

Copying a tactic used by the *Living Word* videos Whetu Tirikatene-Sullivan, Labour Party MP for Southern Maori, said

The United States Supreme Court judged that five requirements should be met before new anti-discrimination protections were granted for a class of people. The first one was a demonstrable pattern of discrimination; second, that the discrimination is causing substantial injury; third, that the discrimination is based on criteria that are arbitrary and irrational; fourth, that the discrimination is directed at a class of people with an unchangeable or immutable status; and, fifth, that the class that is being discriminated against is without moral fault

(Hansard, 1993a: 16751-52).

Christian newspapers also repeated these assertions during June 1993 (LAGANZ manuscripts, Sawyers papers). These are the same issues that DeLapp (1993) argues have been shown to be incorrect.

During the second reading of the bill on 27 July 1993, Banks made further accusations

Those people [homosexuals] have their own society, their own values, and their own literature – most of it obscene. I was recently sent unsolicited a copy of a publication called *Fire: Freedom of Interpersonal Relationships and Expression* – a catchy title with a frightening message. The authors want to legalise, among other things, sodomy with very young children, incest, and, would one believe, sex with animals. They also want to curtail the power of the censor. It is no wonder. I would be very happy to table the document after I have finished speaking. Is that what we mean when we talk about the decent society? The homosexual lobby is highly vocal, well organised, powerful, and sinister. ... That garbage is not important. It does not deter me. The lobby's most significant single victory was to shift the debate from behaviour to identity. They label anyone who does not agree with them as an opponent of their civil rights. That is just a clever and dangerous smokescreen and repeated accusations about being sent offensive material (Hansard, 1993b: 16916-17). A Police reply to an Official Information request (21 September 1999) about this sending of illegal material by mail said

files relating to breaches of the Postal Services Act 1987 were retained for two years and were then destroyed. Any files relating to such complaints made in 1992 or 1993 would have been routinely destroyed in 1994 or 1995

(personal communication with the Police 23 September 1999).

Also noted is that when asked by the Hon Mike Moore if he had laid complaints about this with the Police, Mr Banks evaded the answering the question (Hansard, 1993a: 16848-49).

While Lianne Dalziel later told me that the accusation by Mr Banks was not taken by her to be an accusation against members of the Select Committee (personal discussion, 1999), she said at the time

The Minister directed that accusation at committee members and that is absolutely unacceptable and is rejected by all members

(Hansard, 1993b: 16911).

Neither Dalziel nor O'Regan were present in the chamber when Banks produced the FIRE magazine, an illegal publication in New Zealand (personal discussion with the OFLC, September 1999), but O'Regan said that incidents like these are "grist to his mill" (personal discussion, 1999).

The debate was not without humour. The Hon Peter Tapsell, Labour MP for Eastern Maori, said

Sodomy is not seen in cattle, not seen in sheep, and not even seen in pigs. It is a perversion peculiar to man.

The Hon. John Falloon interjected

Yes, it is,

with Tapsell replying,

No, it is not,

and followed this with a reference to his perceived public attitudes to gay men:

This law will not change one bit the public attitude in regard to the homosexual.

Men will despise them and women will patronise them (Hansard, 1993b:16923).

Later, Ian Peters, MP for Tongariro said

My firm suspicion is that homosexuality in other than the specific group that I mentioned initially is a conditioned behaviour. Those who may have come through a boarding-school environment, who have served in the Navy, or in prisons, have been conditioned to adopt an unnatural behaviour.

Hansard records the reply of:

Hon. Members: 'Ha, ha!'

(1993b:16925).

In the third reading, recorded in Hansard as being on 27 July, Mr Peters followed this up with a reference to what Mr Tapsell had said:

Not even the animals do what we, by the passage of this legislation, are saying is acceptable behaviour [interruption]

(Hansard, 1993b: 16967).

The unreported interruption, from the Minister of Agriculture:

Obviously you haven't been down the back paddock for a while was audible from the gallery causing a ripple of laughter (Radio New Zealand, 28 July 1993). Nevertheless, it must be remembered that the MPs who said such things were serious in their beliefs.

To accusations that gay men make unfit teachers, the Hon Michael Cullen, MP for St Kilda replied

as the heterosexual father of two daughters I have never felt the slightest threat from male homosexuals in my entire life. The only threat, in terms of any threat at school, that could possibly come to those who are the fathers of daughters, by definition comes by and large from male heterosexuals. However, I shall be generous and not suggest that the House pass legislation discriminating against male heterosexuals being employed in girls' schools – which, after all, is the logic of much of what we have heard yesterday evening and this morning

Noting the sky had not fallen down as predicted by some during the Homosexual Law Reform debate, he continued:

We have heard the argument that homosexuality may be a learned behaviour. At the present time the developing research evidence is the reverse of that. But even so, it is an irrelevancy. Being Presbyterian is a learned behaviour as well – which is probably rather easier to unlearn, as history has demonstrated in large numbers of cases. But we do not thereby argue that one should discriminate against Presbyterians, or, indeed, people of any other set of views because the behaviour can be unlearned. It is an irrelevant argument; it is an argument about how some people feel uncomfortable about other people; how the fact that certain people are different makes them feel uncomfortable

(Hansard, 1993b: 16937-39).

Some MPs, such as Cam Champion of Wanganui, held referenda in their electorates on the subject of inclusion of sexual orientation in the Bill. Clem Simich, MP for Tamaki, pointed out that relying on such referenda

would be the wrong way to go. I doubt whether this would be the result, but on an issue such as this once again we could end up with the tyranny of the majority being imposed on the minority in this country and around the world,

and also that

There is extreme intolerance, mainly by young, heterosexual males, against homosexuals. They are oppressed, and because intolerance and oppression exist it is the duty of the House to pass legislation to lift that oppression, to help ease the intolerance, and to allow homosexual and lesbian people to feel better about themselves; to make them feel as though they are part of the community

(Hansard, 1993b: 16943).

Prior to the Second Reading, the House had gone into urgency, then rose at 11.15pm, reconvening on the 28th of July at 9.30am. Around 11am on the 28th, the House went into the Committee stages of the Bill. O'Regan introduced her SOP as number 238. Banks, as Minister of Police, moved SOP 239 to permit

persons to be refused employment or to be dismissed as members of the armed forces or the police on the grounds that they have a homosexual, lesbian, or bisexual orientation,

Lee, as Minister of Internal Affairs, moved SOP 243

to insert a new clause 40A permitting a health professional or person charged with the care of children to be refused employment or to be dismissed if the person has a homosexual, lesbian, or bisexual orientation.

O'Regan's SOP passed by 48-26 votes (Hansard, 1993b: 16955-56). I remember the feeling of relief that swept through me as I sat in the gallery above the Clerk of the Committee while he counted the votes and realised, before the announcement of the exact figures, the SOP was passed.

Dalziel noted most of the mail she received about the entire debate came after the passage of the Bill when she had appeared on TV1's *Fraser* programme on the evening of the 28 July with Graham Capill, leader of the CHP. The overwhelming majority of the mail she received was positive, and congratulatory, though some was negative, citing parts of the Bible (personal discussion, 1999).

Wellington's Evening Post ran a report on 29 July "More teeth to rights legislation", and a cartoon by Tom Scott with an MP addressing Parliament

Mr Speaker, on behalf of my Colleague, I move an amendment outlawing discrimination against any individual on the grounds of rabid mouth-foaming prejudice

(Evening Post, 29 July 1993: 2, 4).

Yet it may have been this "rabid mouth-foaming prejudice" that swung the vote in our favour, as Dalziel notes: the extreme views of some MPs did not persuade the majority of Members to vote against the inclusion of sexual orientation, but rather had the opposite effect (personal discussion, 1999).

Adams (1996: 13) notes the inclusion of sexual orientation is a

symbolic and necessary victory for lesbians and gays, it does not mean that this legal visibility is not problematic.

Equality within the law is problematic, a complex issue, and is often not considered to be enough as the former

legal structure and framework is retained

(Adams, 1996: 13, citing Smart, 1991).

Noting that

feminist and lesbian critiques of discourse highlight some of the implications of inclusion in anti discrimination legislation,

Adams (1996: 71) states

Rights are thought to create the space and opportunity for addressing issues, providing groups with a 'linguistic currency'.

Adams also notes Judith Butler argues that

when subjects are included in a discourse they are 'formed defined and reproduced in accordance with the requirements of those structures'

(Adams, 1996: 72, citing Butler, 1991: 2),

The HRA could therefore provide the framework for this discourse, delineating the conditions and subjectivity of the individual,

defining the parameters of normality and normalising that which lies outside

(Adams, 1996: 72).

Adams (1996: 72, citing Didi Herman, 1994: 250) argues that

rights discourse 'regulates, contains, and constitutes the subjects it represents'.

While the HRA may affirm lesbian and gay identity, it does so from a liberal standpoint of a minority deserving tolerance and protection (Adams 1996: 73). As evidence of this liberal standpoint, Adams cites O'Regan saying

Human rights demands of us tolerance and reasoned argument based on fact
(Hansard, 1993a: 16949).

The passage of the Human Rights Act 1993 can also be seen as fulfilling the aims of Gay Liberation by providing a way to end all discrimination against lesbian and gay people, and providing a climate where attitudes to homosexuality can be changed to allow us to live in freedom (points one and two of the demands); allowing lesbians and gays the right to be lesbian or gay, according to their own free will, (point 3), and allows a way to ensure that the right to life, liberty, and the pursuit of happiness (point 4).

The only point contained within the Auckland Gay Liberation Front Manifesto (1972) not met is point 5, which requires the formation of various lesbian and gay groups to provide those services – some of which are already met.

However, Gay Liberation is

concerned with the assertion and creation of a new sense of identity, one based on pride in being gay

(Altman, 1972: 109, cited in Jagose, 1996: 32).

It was through the use of identity politics, clearly identifying LGBT people as people who were being discriminated against, and showing that discrimination as unfair, that Parliament was convinced to add sexual orientation to the HRA. Without a clear identity of who was being discriminated against, and why, it would never have been possible to do this. Queer theory deligitimises

liberal, liberationist, ethnic and even separatist notions of identity ... its non-specificity guarantees it against recent criticisms made of the exclusionist tendencies of 'lesbian' and 'gay' as identity categories

(Jagose, 1996: 76).

Yet, if non-specific categories had been used, the term 'sexual orientation' would have been meaningless in defining who should get protection from discrimination. In this way, queer theory and the civil and political rights of lesbians, gay men and bisexuals are mutually exclusive. It may be necessary

therefore to continue with identity politics in order to gain the same rights that everyone else has been able to take for granted.

This chapter has examined some of the discourse around LGBT people used during the passage of the HRA 1993. The next discusses how that discourse developed until the debate on the Sentencing and Parole Reform Bill 2001.

Chapter 7: Hate crimes and the Sentencing and Parole Reform Bill 2001

Having examined how the discourse around homosexuality in New Zealand developed, and what the legislative changes meant to that discourse, it is also necessary to examine some of the effects of that discourse.

In 2001, the Labour Government introduced the Sentencing and Parole Bill (SAPB). Clause 9 of the Bill allowed actions that happened during the commission of the crime to be taken into consideration when sentencing was passed. At the time, I believed the Bill had some significant omissions in relation to hate crimes, that these should be addressed by the Select Committee considering the Bill, and by Parliament as a whole. Therefore I submitted to Parliament specifically addressing issues of hate crimes against the LGBT communities. Nevertheless, it must be remembered that similar actions occur against other groups of people simply because they belong to a specific or identifiable group. As a result of my submission, a new subsection was added to the Bill. This became subsection 9(1)(h) (New Zealand Government, 2002) after the Bill was passed:

9(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case: ...

(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

- i. the hostility is because of the common characteristic; and
- ii. the offender believed that the victim has that characteristic:

In my submission on the SAPB, I noted that

while many people around the world heard of Matthew Sheppard's death by pistol whipping and tying to a wooden fence in Wyoming in 1998 through various news media articles in newspapers, and on television and radio, New Zealand also has its own share of hate crimes directed at the LGBT communities. On 10 July 2001, Jason Johnson was killed at Whakamaru in the Waikato. Police suspected that the killing was a homophobic hate crime, and that there was no other motive. On 19 April

2001, Peter Kitchen was fatally assaulted in the Hawkes Bay and died in hospital on 23 April. His friend Jeff Pinfold was also assaulted in the attack. The people arrested for Kitchen's murder and the assault on Pinfold were heard by a witness immediately before the assault: 'Lets fuck these gay guys up'

(Bennachie, 2001b: 2-3).

This is only a sample of the violence that has occurred, and was only part of the greater amount of violence that affects LGBT people every day. Several other murders and assaults had happened over a number of years, and in each case a degree of homophobia, informed by the discourse of those opposed to homosexuality, was present.

Attacks on gay men in particular are often said to have been "spur of the moment" actions occurring after some form of "provocation" on the part of the victim. Yet these "spur of the moment" attacks have led to the death of gay men. In 1995, it resulted in the return of the attacker to the scene of the crime to continue an assault against an already unconscious and mortally wounded victim (*R v Campbell*, [1997]). In the case of Stephen Byrne attacker's in 2000, this "provocation" occurred and a "spur of the moment" decision was made, involving luring the drunken Byrne into an alleyway where the assault took place. According to the attackers, no premeditation took place, yet the sequence of events indicates that at least some premeditation existed (*Queen v Poki and Taylor*, [2000]).

While hate crimes affect many different people in many different ways, I am more aware of how crimes of hate affect the LGBT communities than other groups in society. That does not mean that hate crimes are not directed against other groups in society, just that I am unaware of the full extent of those hate crimes.

Many scholars have written about the effects of hate crimes on LGBT people. Lawyers have also made comment on these. Gregory Herek and Kevin Berrill (1992) have written extensively on how hate crimes, ranging from the slur, through victimisation, to violent attack resulting in death, affect lesbians and gay men. Berrill (1992: 19-45) compares various studies and finds that

between 79% and 91% of lesbians and gay men have been subjected to “low level” violence – verbal abuse, threats, etc. – and between 7% and 24% reported they had been assaulted in some way, solely because of their sexual orientation.

Even among some American Universities – Yale, Rutgers, Pennsylvania and Oberlin – between 40% and 65% of LGBT students responding to the surveys reported verbal attacks on them, between 84% and 98% had overheard anti-LGBT remarks, and between 1% and 5% had been victims of physical violence. Among this group of university students, between 88% and 94% of LGBT students who responded to the survey and who had been victims of some form of violence based on their sexual orientation had *not* reported the incident to any authority (Berrill, 1992: 33).

Berrill (1992: 26-27) also notes that on the whole, in relation to violence, gay men are predominantly the victims; and in the case of sexual assault, are about twice as likely as lesbians to have been victims. On the other hand, lesbians are more prone to fear for their own safety, have a higher expectation of violence, and are more likely to have modified their behaviour. Lesbians are also more likely to have suffered more verbal abuse from their families than gay men.

In America at least, race also has some factor in these attacks, with lesbians and gay men of colour being almost one and a half times as likely to report being followed, and up to twice as likely to have objects thrown at them than their white counterparts (Berrill, 1992). In these cases, racial epithets were combined with anti-gay or anti-lesbians slurs.

Berrill (1992: 30) also reports that the average perpetrator of anti-LGBT violence is a young (54% were identified as being under 21), white (40%, as against 30% black, 23% Latino, and 7% other), and male (92%). Most attacks (57%) are by groups of people.

Herek (1999: 945-51) reported in one of the largest studies completed in

America, approximately 25% of the 1089 male respondents and approximately 20% of the 1170 female respondents had been victims of serious criminal victimisation because of their sexual orientation, and approximately 40% of men and 50% of women had experienced other crimes not related to their sexual orientation. Lesbians reported only 36% of the hate crimes against them, while gay men reported 45.6% of hate crimes committed against them. Most respondents identified statements made by their attackers, or other perceptual clues, to identify if the crime was a hate crime or another sort of crime. Most attacks based on sexual orientation were preceded by verbal attacks. More than half of the respondents reported verbal harassment.

A series of studies completed by the Sydney based Lesbian and Gay Anti-Violence Project indicated that 29.8% of LGBT people in Sydney had been subjected to verbal abuse, 51.1% to physical abuse, 2.1% to sexual assault, and 4.3% to abuse by police in the 12 months to June 1993. Over three of the studies, from 1991 to 1993, between 42.6% and 73.1% of victims had been physically injured because of attacks against them (Cox, 1994: 17).

As a result of these community surveys, The NSW Police also completed a study into violence against the LGBT communities in 1994. Working with a randomly selected larger sample base, they found that in the 12 months preceding the survey, 14% of gay male respondents, and 12% of lesbians, were victims of physical violence. They compared this data to figures produced by the Australian Bureau of Statistics, which indicated that only 3.3% of Australian men are subject to actual or threatened assault, and 1.9% of Australian women are subject to actual or threatened assault, 50% of which were domestic violence related. The data from the NSW Police study does not include domestic violence. The NSW Police also noted there was consistency between studies relating to violence against the LGBT communities (NSW Police, 1995: 2-3).

The NSW Police report also found that only 18% of LGBT victims of violence reported the case to the police. Of those who did not report it to the police, 15% had a negative belief about police willingness to help, and 8% had

previously had a bad experience with the police. They also reported that over the five year period 1990 to the end of 1994, 22 murders had been committed in NSW that were gay hate related (NSW Police, 1995: 33; 3).

There are very few comparative studies in New Zealand. One study was undertaken before and during the initial debates on the Homosexual Law Reform Bill, when verbal abuse was likely to have been high. Completed by the Wellington Gay Task Force (1984), it indicated that 71% of respondents had been verbally abused, 42% had been physically threatened, 5% had been physically wounded, and about 28% had experienced other forms of violence because of their sexual orientation. The New Zealand University Students Association (1994) noted that anti-LGBT violence occurred on New Zealand University Campuses, with 55% of respondents experiencing some form of verbal harassment, 38% fearing harassment, and 12% experiencing physical assault. The period covered by this study included the debate on the HRB.

Herek (1999) noted that the psychological effects of violence against members of the LGBT communities resulted in higher scores on psychological distress measures, indicating that the victims of hate crimes against LGBT people had a strong and distinct negative effect on both the victims and members of those communities.

Johnston (1996, cited in Forde, 1998: 7) states

there is growing evidence that [gay men and lesbians] experience disproportionately high levels of violence, much in the form of hate crimes – attacks motivated by a deep animosity towards their group identity.

However, it must be remembered that much homophobic violence goes unreported because

discrimination often has very traumatic personal consequences that may limit the willingness of respondents to provide personal details that they may prefer to forget

(NZAF, 1991: 18).

The Homosexual Advances Defence (HAD), also known as the Homosexual Panic Defence, is where an

accused person alleges that he or she acted in self defence or under provocation in response to a homosexual advance made by another person, and is based on the theory that

a person with latent homosexual tendencies will have an excessive and uncontrollably violent response when confronted with a homosexual advance, and that the

theory is based upon 'homosexual panic' as some form of insanity or diminished capacity defence

(Criminal Law Review Division, 1998).

In New Zealand, HAD fell within the bounds set by section 169 of the Crimes Act 1961, dealing with provocation, and presumably applies only to cases of culpable homicide that would otherwise be murder

(Forde, 1998: 16).

However, because of the Court of Appeal ruling in *R v Campbell* [1996] this presumption had been considerably widened, and proportionality of the attack can no longer be taken into account.

Dale Jerome Marlon Campbell was accused of the murder of Ronald Anthony Anderson after it was claimed Anderson put his hand on Campbell's knee and smiled at him, whereupon Campbell hit Anderson twice across the face and head with a poker, then repeatedly punched him. Campbell picked up a nearby axe and repeatedly hit Anderson with it. He went outside, then returned and hit Anderson again with the axe. Anderson's skull had been extensively fractured and pushed in, and there were also extensive injuries to his face. The pathologist stated that at least 6 blows were delivered with severe force. The jury found Campbell guilty, and he was sentenced to mandatory life imprisonment. Campbell appealed against both conviction and sentence. The appeal was heard in 1996. The Court of Appeal quashed the case, declaring it a mistrial as

the Judge's misdirection about proportionality was likely to have misled the jury into believing that proportionality was crucial to the provocation defence

(*R v Campbell* C.A. [1996], Forde, 1998: 9).

At the second trial, during which Campbell broke down and was reassured by Justice McGechan, no instruction as to proportionality was made, and Campbell was found not guilty of murder, but guilty of manslaughter, and

sentenced to five years imprisonment (*R v Campbell* [1997])

It therefore appears that the New Zealand Judiciary, from the Court of Appeal down, are willing to accept that a claimed small touch from another man can drive a man so insane that he not only violently assaults the man who touched him, but returns to the unconscious man and hits him round the head with an axe.

Prior to the Court of Appeal ruling in *R v Campbell* [1996], *R v Marsters* [1996] was also heard at the High Court in Napier. Tai Tahi Marsters attacked Jim Curtis with a glass decanter, causing haemorrhaging in the brain, claiming the victim had made sexual advances. Curtis was found unconscious two days after the attack, with at least three blows to his head. Hospitalised, he was given reconstructive surgery and remained in a coma for three weeks. He was unable to appear at the trial because of the injuries received. Marsters was found not guilty by the jury and released (*R v Marsters*, [1996]). Curtis later wrote to *express*, explaining that those who died from injuries following anti-gay attacks were the lucky ones (Curtis, 2001). When I discussed his case with him in 2002, Curtis stated that he is still unable to lead a normal life and is dependent on others for many of his daily activities. He cannot remember the night of the attack. People who know Curtis have said it would have been out of character for him to have made any advances on any person.

These are just a few of the many attacks in which HAD has been used successfully to reduce the penalty the accused would otherwise have received.

Feminist scholars have claimed the provocation defence reflects the inherent patriarchal values of society. Critics of HAD state that it not only reflects this, but also reflects a heterosexual and homophobic male perspective, allowing male “aggression” to overcome normal rules of society when he feels his heterosexuality has been called into question. It provides an indirect sanctioning of homophobic violence, and, together with the Court of Appeal ruling, justifies violence directed against gay men. Wertheimer (cited in Forde, (1998: 14) states that

if every heterosexual woman who had a sexual advance made to her by a male had a right to murder the man, the streets ... would be littered with the bodies of heterosexual men.

Amnesty International deplores the sanctioning, in any form, of violence towards the LGBT communities. This includes hate crimes, and would include, by the definition they use, the use of HAD (Amnesty International, 2000: 1-6).

Following the recent cases *R v Weatherston* [2009] and *R v Ambach* [2009] the Government has announced it will repeal the provocation defence (New Zealand Herald, 2009). This was done 8 December 2009, with the passage of the Crimes (Provocation Repeal) Amendment Act 2009.

In an oral submission before the Government Administration Select Committee on the Inquiry into the FVPCA, the Proceedings Commissioner for the HRC pointed out to that Committee that hate speech consists of several elements, fitting into three different boxes, or levels of legislation, and that there is a level of progression that operates. The three boxes identified by the Commissioner are:

- i. Section 3(3)(e) FVPCA, which was intended to allow the OFLC to classify publications that treated people as inherently inferior because of their membership of a group protected under section 21(1) HRA.
- ii. Sections 61 and 131 HRA, dealing with racial disharmony and incitement to racial disharmony, which protect people on the basis of their colour, race, ethnicity and national origins.
- iii. Sections 62 and 63 HRA, dealing with sexual harassment and racial harassment, which protect people on the basis of their sex, race, colour, and ethnic and national origins

(personal discussion after the hearing, 2001).

In my submission on the Human Rights Amendment Bill (2001c), and on the Inquiry into the FVPCA (2001a), I recommended that sections 61, 63, and 131 HRA be amended to include all groups included in section 21(1) HRA. The HRC also supported the broadening of these sections to include other groups

protected by the HRA (HRC, 2001a), while the CCS (2001) supported the broadening of these grounds to include harassment and disharmony against people with a disability.

I believe that there is also a fourth and fifth box that can be brought into play. Both the Crimes Act 1961 and the Sentencing Act 2002 can be used to send a message to those who act on hate speech, and direct acts of violence towards people because of hatred of their group membership, that such actions are not permissible in a free and democratic society.

Nevertheless, some people believe that violence against gay men is justified. In a letter to the YWCA, Mrs Barbara Faithfull (2001) of the Credo Society, stated, that Jason Johnson deserved his fate because of his reported promiscuity:

After all, ... anyone so conducting himself and then meeting such a fate as that would surely have been the author of his own destiny.

This sort of attitude, that gay men are the victims of their own deeds, is antiquated and is the same sort of attitude that says that women who are raped were 'asking for it'.

Faithfull, writing on behalf of the Credo Society, had submitted on the HRB, using language similar to that used in the submissions of the CHP (1993), the Coalition of Concerned Citizens (1993), the SPCS (1993), and the Lion of Judah (1993).

In that submission, gay men – for the submission focuses on male to male sexual behaviour spreading disease – are seen as undermining the nation's integrity through a conspiracy of their own devising to form an ideologically driven left wing revolutionary political lobby, purposefully disseminating misinformation to the detriment of the society that it keeps "bamboozled" in a state of ignorance. It can thus be seen that those who accept the discourse that dehumanises gay men by treating as them as immoral, as evil beings, as sick, and as reservoirs of disease, can lead a person to accept that it is normal for violence to be directed at gay men (Credo Society, 1993: 1-2).

In the debate on the second reading of the Films, Videos and Publications Classifications Bill 1992, Graeme Lee, the Minister for Internal Affairs, and National MP for Hauraki, stated, near the conclusion of his speech:

The causal link between pornography and violence is now well established. It is correct that many people see violence against women as a reflection of the attitude towards women that is portrayed in pornography

(Hansard, 1993c: 17063).

The link between pornography and violence against women has been argued to be established (Dworkin, 1981, 1987; MacKinnon, 1989, 1993, 2005). Such a link may therefore also be true with other groups in society. When messages of the type are sent that a particular group is worthless, immoral, guilty, evil, sick and deserve what they get, then violence is an easy step for those who are disposed towards it (Mookas, 1998: 354-355).

It can thus be seen that discourse which attacks LGBT people can have negative effects on them, and may lead to violent attacks resulting in their death. This chapter has examined the development of discourse surrounding the LGBT communities from the passage of the HRA 1993 to the SAPB 2001. The next chapter examines the first attempt to control anti-gay discourse in New Zealand.

Chapter 8: History of the control of anti gay speech in New Zealand

There are many opinions on the control of speech and expression. Some claim all people should be free to make any utterances they want. Others feel that certain types of utterances, such as the old analogy of “yelling ‘fire’ in a crowded theatre” should be the only types of speech that are limited. A third group of people claim that while freedom of expression is a noble notion, certain types of speech that have negative effects on society as a whole, should be limited (Rudman, 2005). Some would place a fourth group in here as well: those who believe that any mention of sex should be prohibited, unless it is in a biblical quote, and that the only untrammelled speech should be that dealing with the promotion of, and supporting the beliefs of, a specific religion – anything that does not agree with their viewpoint should be controlled.

Some would probably place me in the third group, but that group also contains groups that advocate greater censorship, including all things that are related to sex or “obscenity” – whatever definition that is given. The first two groups are those who classify themselves as liberals, and often use the writings of J.S. Mill to validate their opinions. Yet they often forget that Mill did not support an untrammelled freedom of expression.

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed out among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people

(Mill, 1946: 49).

In 1985, the Homosexual Law Reform Bill was introduced into Parliament. The debate that followed was marred by opponents' claims that were informed by little else other than the "politics of ick", which Carol Queen (in Chapkis, 1997: 51-52) describes as:

The assumption is that because I find something icky no one else could ever consent to doing it. The question I always ask is whether 'oh ick!' is really the basis for a politics. For a lot of years, heterosexual people said 'oh, I could never have sex with people of the same sex, so therefore it must be sick, it must be immoral, it must be criminalized.' Well, some of us really can do this.

Claims were made about what gay men – for lesbians were hardly mentioned – were supposed to do with each other, conveniently forgetting that these same acts are also indulged in by heterosexuals. Tracts were written to cause an upsurge of antipathy towards gay men, and therefore against the Homosexual Law Reform Bill. Others were written that were called on the higher authority of the bible, to point out that homosexuality was against god's will. These were countered by pamphlets by NZHLRS (1985) and by material produced by Veritas (1985) addressing the theological comments against homosexuality.

The NZHLRS (1985) sought to shed light on opponents claims and some aspects of homosexuality by answering questions like "What are homosexuals?", "But what of the view that homosexuality is a threat to society, and especially the family?", and "What about the danger to children?"

Despite this, verbal and written attacks on the LGBT communities continued. Each attack appearing to be reasonable and appearing to contain elements of truth, when in reality, they contained a collection of misinformed myths, and suppositions. Yet there was little the LGBT communities could do to retaliate except point out the misinformation. There is no doubt some people actually believed what the opponents said. At the time I remember people partially agreeing with such statements as "there's no smoke without fire" and "they wouldn't be saying it if there wasn't some shred of truth about it, would they?" This was particularly effective if the statements were made by a person who was seen by society as having a position of respectability, such as a church

minister, priest, or other person of religion, because “priests can’t lie, can they?”

Despite the use of ‘the politics of ick’, the misinformation, and myths propagated, the Homosexual Law Reform Bill did pass, becoming an Act of Parliament on 11 July 1986.

Nevertheless, the same sentiments, comments and exhortations appeared during the debate on the addition of sexual orientation – defined as heterosexual, homosexual, bisexual or lesbian – to the HRB 1992. During that debate, much use of articles written by Paul Cameron was made by the opponents to the addition of sexual orientations to the Bill.

Paul Cameron published *Exposing the AIDS Scandal* (1988). It starts with:

If your hometown is anything like mine, things look about the same as they did six years ago. Oh, a few changes have taken place. The old library building has been torn down and replaced by one of those glass-covered saltine boxes. There’s a new shopping center just outside the city limits where once you saw the beginnings of woods and farmland. And the streets are a little more crowded, particularly around 5 o’clock in the afternoon when you’re tired and anxious to be home. But otherwise, the old place seems normal and benign. Just to walk down Main Street you’d never guess that something dangerous and sinister is at work here, that many of the people passing by may be killers, that some day soon one of them may even kill you or somebody you love.

If you think this is the beginning of an episode from the Twilight Zone, then think again. What I’m describing is not a fictional world suddenly invaded by alien monsters who have cleverly assumed human form. This is a very accurate description of Anytown, USA in the late 1980s. It is a portrait of the street where you live. It is America under the threat of AIDS

(Cameron, 1988: 1-2).

Cameron also claims (1988: 10) that

Columbus and his crew brought syphilis back from the new world in the 15th century, despite the evidence that syphilis had been in Europe for centuries before then, and since the at least the 1300s to the mid 1800s,

cinnabar, a mercury ore, had been used as a treatment for various sexually transmissible infections, including syphilis (WebSand, 2002). There is skeletal evidence that indicates syphilis was known to the western world – although perhaps viewed as another form of leprosy – well before Columbus made his voyage to what later became known as the Americas. But despite this, there is a continuing myth that syphilis was brought back by Columbus from the areas he visited (Educational Broadcasting Corporation, 2002).

Cameron's book is filled with half-truths and outright misinformation. He blames the spread of AIDS on

wilfully promiscuous homosexuals and our timid government;

how the Surgeon General

misled the public about how AIDS is transmitted

and other equally false premises (Cameron, 1988: back cover). He states that the "homosexual community" – and he includes lesbians in that statement – is

one of the most difficult elements in society

to deal with (1988: 25). He claims that

the biggest slice of the AIDS-blame goes to homosexuals. Without them the AIDS virus would barely exist in the west (1988: 29).

He claims that prior to the "AIDS epidemic" it was the "received wisdom" that condoms were the poorest method of contraception available,

with the possible exception of what was then called the 'rhythm method' (1988: 82).

But he does not say who that "received wisdom" was from, or, indeed, where he even obtained that information. Mis-citing several studies on the efficacy of condoms, Cameron (1988: 82-96) then contends that using condoms to prevent the transmission of AIDS does not work – he never mentions HIV as the virus that causes AIDS and only refers to the transmission of AIDS. Cameron (1988: 96) finishes that chapter with the comment:

Safe sex isn't just a slogan. It's a way to die.

Using a "telephone discussion" with a woman claiming to be a 15 year old girl and a person called "Sam" from the National Gay and Lesbian Task Force AIDS information hotline, Cameron (1988: 119-121) claims that "Sam" was trying to "recruit" the caller and that the Task Force

acts as a pimp for homosexuals.

He claims that all people should be tested and if the result is positive, or if they refuse testing, they should be put into a “soft quarantine” so that, while

they do not enclose people behind walls and barbed wire fences

they are excluded

from certain places and performing certain tasks (1988: 132-136).

For

anyone who deliberately or maliciously puts an innocent human being at risk

he proposes ‘hard quarantine’ in jail (1988: 136-138).

As an appendix, he includes a chapter on

What do homosexuals do? Are they born that way? And how ought we to respond?

(1988: 148-160).

In this, he examines the sexual acts that only homosexuals are supposed to do.

Like opponents of the Homosexual Law Reform Bill, he omits these same sexual practices are performed by heterosexuals as well.

Paul Cameron

Perhaps, at this point, some comment about Paul Cameron and his “research” needs to be made. Cameron obtained his PhD in psychology from the University of Colorado in 1966 (Williams, 1994) and for a while was a member of the American Psychological Association, and the Nebraska Psychological Association. He also became a member of the American Sociological Association. Until 1980, he had been an Associate Professor of human development and the family in the psychology department at the University of Nebraska (Family Research Institute, 2002). He had also taught at Stout State University in Menomonie, Wisconsin; Wayne State University; the University of Evansville, Indiana; the University of Louisville; St. Mary's College in Maryland; and Fuller Theological Seminary in Pasadena, California (Williams, 1994).

When his teaching contract was not renewed, Cameron founded his own organisation, the Institute for the Scientific Investigation of Sexuality (ISIS), which later became the Family Research Institute. The directors of the Institute are Paul Cameron and his son Kirk. Cameron has published a series of articles and pamphlets (Herek, 1997-2008). Most are from the early 1990s, and were used in Cameron's campaigns against equal rights for LGBT people during that period, and much of the information in them stems from his earlier "research" into, and articles on, homosexuality. In reality, they are merely extensions of his earlier pamphlets published by ISIS (Herek, 1997-2008).

Publishing under the auspices of ISIS, Cameron published nine pamphlets related to homosexuality:

Medical Aspects of Homosexuality (1985).

Child Molestation and Homosexuality (1985).

Murder, Violence and Homosexuality (1985).

AIDS, The Blood Supply, and Homosexuality (1985).

What Homosexuals Do (Its [sic] More Than Disgusting) (1986).

The Psychology of Homosexuality (1984).

What Causes Homosexuality And Can It Be Cured? (1984).

Homosexuality: Everybody's Problem (1985).

Criminality, Social Disruption and Homosexuality (1984).

Much of the information was taken from his own study completed in 1983 that was filled with methodological flaws (Williams, 1994).

Cameron successfully campaigned against a proposed local statute in Lincoln, Nebraska, that would have allowed LGBT people to be treated equally in a variety of local laws. He also campaigned for Colorado's Amendment 2, which removed equality of rights for LGBT people (Herek, 1997-2008; Geiersbach, 1994; Williams, 1994).

In a very real sense, Cameron's research is *not* research, but a collection of myths and personal biases that Cameron has tried to pass off as "research". Cameron's membership of the American Psychological Association (APA) dropped in December 1983 (Williams, 1994), though Cameron says he was not dropped as he had earlier resigned (Family Research Institute, 2002).

Nevertheless, according to the APA rules a person cannot resign while they are under investigation. Due to a complaint lodged on January 11 1982 by Natalie Porter, James Cole, Karen Kelly, Tim North-Shea, Daniel Bernstein, and Katherine Brzezinski-Stein to the Nebraska Psychological Association and the APA (Williams, 1994), Cameron was being investigated, and therefore could not have resigned (Herek, 1997-2008). Nevertheless, because the APA is prohibited under its own rules from admitting someone has been dropped from membership, Cameron can happily, albeit falsely, continue to claim he resigned (Herek, 1997-2008; Williams, 1994; personal communication with the APA, 1997)

Furthermore, one of the authors cited by Cameron in his pamphlets, (A.) Nicholas Groth, then Director of the Sex Offender Program at the Connecticut Department of Correction, heard how Cameron was using his studies in the pamphlet *Child Molestation and Homosexuality*. As a result, Groth laid a complaint with the Nebraska Board of Examiners of Psychologists stating that Cameron

... misrepresents my findings and distorts them to advance his homophobic views. I make a very clear distinction in my writing between pedophilia and homosexuality, noting that adult males who sexually victimize young boys are either pedophilic or heterosexual, and that in my research I have not found homosexual men turning away from adult partners to children. I consider this totally unprofessional behavior on the part of Dr. Cameron and I want to bring this to your attention. He disgraces his profession

(Williams, 1994).

As Geiersbach (1994) states:

Perhaps the most disturbing statement made by Cameron, however, occurred at the University of Nebraska Lutheran Chapel on May 3, 1982. In a tape recording obtained by the *Lincoln Star* newspaper, Dr. Cameron is quoted as saying: 'Right now here in Lincoln there is a 4-year-old boy who has had his genitals almost severed from his body at Gateway in a restroom with a homosexual act.' A *Lincoln Star* article (8 May 1982), was titled 'Cameron Used False Report'. This article and articles in the *Star* and *Lincoln Journal* (6 May 1982), pointed out that checks with the Lincoln police indicated that this and similar rumors about a 7-year-old boy and a 14-year-

old son of a prominent Lincoln family have no factual basis. Police were reported as 'baffled as to the origin of the story'. The following editorial statement later appeared in the *Lincoln Star* (10 May 1982):

'A leading opponent of the proposed Lincoln Human Rights Amendment spreads rumors of an alleged vicious incident calculated to damage the proposal's chances at the polls. When asked about it, he admits the rumor was without foundation. He refused to say from whom he heard the rumor. He says he will not use the rumor again unless he finds it to be true. Nonetheless, he still insists it 'could be true', even though responsible authorities in the city say there is not a shred of evidence that such an incident ever took place. The seed is planted, recantation to the contrary.'

It would therefore appear Cameron, who refused to name his "sources", probably invented a case that did not exist to win sympathy for his position. Scott Stebelman, co-chair of Lincoln's Coalition for Gay and Lesbian Civil Rights during that campaign, and present when Cameron made this claim, later recalled that

Everybody in the audience was outraged, and we were caught off guard because we had never heard anything like this. We knew he was wacko but never expected him to invent facts that could be challenged

(cited in Williams, 1994).

The Nebraska Psychological Association disassociated itself from Cameron and his ideas in 1984, stating:

The science and profession of psychology in Nebraska as represented by the Nebraska Psychological Association, formally dissociates itself from the representations and interpretations of scientific literature offered by Dr. Paul Cameron in his writings and public statements on sexuality. Further, the Nebraska Psychological Association would like it known that Dr. Cameron is not a member of the Association. Dr. Cameron was recently dropped from membership in the American Psychological Association for a violation of the Preamble to the Ethical Principles of Psychologists

(Herek, 1997-2008).

The American Sociological Association also repudiated Cameron in 1985, and passed the following resolution:

Dr. Paul Cameron has consistently misinterpreted and misrepresented sociological research on sexuality, homosexuality, and lesbianism and noted that

Dr. Paul Cameron has repeatedly campaigned for the abrogation of the civil rights of lesbians and gay men, substantiating his call on the basis of his distorted interpretation of this research

(Herek, 1997-2008).

At the time of the debate surrounding the addition of sexual orientation to the list of prohibited grounds of discrimination, many were unaware of what Cameron had done, and how the opponents to the addition of sexual orientation had used his material. This, however, soon came to light when the submissions and other material were examined.

Parkinson and the IPT

As a result of the use of Cameron's material, and its ever-increasing availability in New Zealand, Phil Parkinson laid a complaint about Cameron's book with the IPT on 15 May 1993. Parkinson argued that the IPT should examine Cameron's book *Exposing the AIDS scandal* (1988) as

it undermined confidence in public health strategies; and second, that it vilifies HIV infected segments of society, particularly men who have sex with men

and

that for these reasons, the book was injurious to the public good

(IPT, 1993: 2).

At that time, hate literature was not defined in New Zealand law. As a result, the IPT sought guidance from Crown Council, asking:

- i. Can this book be characterised as 'hate literature' as alleged by Mr Parkinson, and if so, is hate literature protected by the freedom of expression in s.14 of the New Zealand Bill of Rights Act 1990?
- ii. Does this book present information in a neutral manner, or does it condone or incite behaviour or activity that is injurious to the public good? In this respect, how might the Tribunal apply the matters set out in s.11(1) and (2) of the Act?

- iii. Does this book sufficiently misrepresent statistical, epidemiological and sociological information about HIV/AIDS that it undermines public health measures taken to control the spread of the virus?
- iv. Does the book represent a moral view of any segment of New Zealand society, and if so, how should that view be taken into account by the Tribunal when considering this publication?
- v. Can the Tribunal elect to determine the character of this book under s.10(a) of the Act without classifying it under s.10(b)?

(IPT, 1993: 1-2).

The IPT also heard evidence from Warren Lindberg, the then Director of the NZAF, and Dr James Robb, Dr Richard Meech, and from Nigel Dickson (IPT, 1993: 2). Mr Parkinson was represented by Charles Chauvel, who later represented HRAG before the High Court in the *Living Word* case in 1999.

Mr Parkinson submitted to the Tribunal on 28 September 1993 that hate literature could be given the following definition:

- i. It would express views about a minority group which is identified by one or more characteristics to which stigma is attached;
- ii. It would express those views with malice or hatred or opprobrium;
- iii. It would attempt to persuade others to adopt those views thereby inciting prejudice, discrimination or violence against the minority; and
- iv. Its manner of expression would be emotive, hyperbolic or offensive to the minority

(IPT, 1993: 2).

However, Crown Counsel, examining Canadian precedents in *R v Keegstra* [1990] 3 SCR 697 (cited in IPT, 1993: 3), gave the same definition of “hatred” in that judgement, being an

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; and 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 (at 777).

This was in terms of s319 of the Canadian Criminal Code, which reads:

319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of
- an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - an offence punishable on summary conviction
- (2) **Every one who**, by communicating statements, other than in private conversation, **wilfully promotes hatred against any identifiable group** is guilty of
- an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - an offence punishable on summary conviction
- (3) No person shall be convicted of an offence under subsection (2)
- if he establishes that the statements communicated were true;
 - if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
 - if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
 - if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.
- (4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.
- (5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section
- (6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
- (7) In this section,
- 'communicating' includes communicating by telephone, broadcasting or other audible or visible means;
 - 'identifiable group' has the same meaning as in section 318;

‘public place’ includes any place to which the public have access as of right or by invitation, express or implied;

‘statements’ includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations

(Government of Canada, 1985, emphasis added).

The paragraph of interest, both to Crown Counsel and the Keegstra case was subsection 2, highlighted above. It should also be noted that “‘identifiable group” in s318 is defined as:

(4) In this section, ‘identifiable group’ means any section of the public distinguished by colour, race, religion, ethnic origin or *sexual orientation*

(Government of Canada, 1985, 2004, emphasis added).

Nevertheless, the term “sexual orientation” was not added until 2003, several years after the Keegstra decision (Religious Tolerance.org, 2004).

In Keegstra, the Canadian Supreme Court defined subsection (2) to mean:

... an expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group ... (at 722)

(cited in IPT, 1993: 3).

The IPT believed that although there was no similar provision in the Indecent Publications Act,

elements of these definitions which if found to exist in this publication could arguably signpost injury to the public good. These elements would be the likelihood of creating extreme feelings of hatred or opprobrium towards a minority amongst a publications [sic] readership. This is rather similar to the reasoning used to identify likelihood of corruption under s. 11(1)(e) of the Act

(IPT, 1993: 3).

Furthermore, they stated that

such incitement of hatred could indeed be said to be a kind of corruption of readers. The effective undermining of public health measures could also be said to be a corrupting influence if it encourages people not to practice safer sex These elements, if present in this publication, therefore provide an argument that the book upsets the social harmony, or equality and mutual respect for others, or the sanctity of life, or physical or mental freedom or health, and thereby injures the public good

(IPT, 1993: 3).

The IPT also stated that with the passage of the HRA, which prohibited discrimination based on the presence in the body of organisms capable of causing illness and on sexual orientation (subsections 21(1)(h)(vii) and 21(1)(m) respectively of that Act), the publication in question “advocates an illegal act” if it “advocates such discrimination” (IPT, 1993: 3). As such, it would be “another factor” that would have to be considered when examining the way the book describes “matters of sex”, and whether or not those descriptions would be “injurious to the public good” (IPT, 1993: 3).

In the course of examining the book under question, the IPT also had to take into consideration BORA, in particular, s14, and, if applicable, s5.

Despite differences in wording, s14 BORA is equivalent to both Article 19 of the UDHR and to Article 19 ICCPR. Just as the latter article is limited

for respect of the rights or reputations of others

and

for the protection of national security or of public order (*ordre public*), or of public health or morals

(United Nations, 1966a),

so s14 of BORA is limited by s5 of that Act:

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

Nevertheless, this restriction on s14 is not, I believe, as wide a restriction as that allowed on Article 19 ICCPR, despite the preamble of BORA stating it gives effect to the ICCPR in New Zealand.

The IPT were left with three possibilities:

that the freedom of expression as set out in s. 14 of the Bill of Rights Act does not cover hate literature. ... that hate literature is protected by s. 14, but that restrictions on its availability is justifiedly limited under s. 5 of the Bill of Rights Act. ... that hate literature is protected and that no restriction on its availability can be justified under s. 5

(IPT, 1993: 3).

The IPT, however, noted that the latter choice was more theoretical than actual. If limitations are justifiable on relatively milder publications, then restrictions on hate literature are certainly justifiable
(IPT, 1993: 3).

They were therefore left with only the first two as practical solutions.

In discussing the first, the IPT referred to *Irwin Toy Ltd v Attorney-General for Quebec* (58 DLR (4th) 577, [1989] 1 SCR 927), and the test that case sets out to examine what may be allowable under the rubric of freedom of expression. The Supreme Court of Canada in that decision stated that:

Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct

(cited in IPT, 1993: 4).

Thus the expression “X is a Y on society that deserves to be eliminated” may be protected speech if X is some sort of cancer causing object, such as cigarettes, and Y is cancer; but not if X is a group of people, defined by some aspect, including sexual orientation, and Y is either an “abomination to” or “cancer on”. By calling for the elimination of that group of people, it is outside the bounds set by *Irwin Toy Ltd*, and is thus not protected speech. That would concur with both the limitations on Article 19 ICCPR.

Yet such language has been used within the last 5 years to describe groups of people. In its submission on the Prostitution Reform Bill, the SPCS stated:

The 'profession' of prostitution is a cancer on society and women 'sex workers' are among the many victims. The Reform Bill issues a season of 'open slather' in prostitution and opens up a Pandora's box. Prostitutes are predators and their trade is morally repugnant

(2001a: part 5).

Yet, when questioned, the secretary of the SPCS did not see how that statement was denigrating to women (as the majority of sex workers are women) in the same way that the Society claimed that sex work was denigrating to women. He stated that if it was denigrating sex workers, that was all the better as it would discourage them from entering the “trade”.

Present at this Select Committee hearing, I was astounded at his attitude, and his vehement condemnation of an entire group of people, regardless of their reasons for entering sex work. This however, only shows the first element “X is a Y on society”, though it is certainly intended to demean a group of people based on their occupation.

The quote at the beginning of this thesis was made in 2003 by Reverend Åke Green (2003) in a sermon against homosexuality who stated:

The Bible clearly teaches about these abnormalities. Sexual abnormalities are a deep cancerous tumor in the entire society. ... ‘We know God's righteous decree that those who live that way deserve death’.

Here can be seen both elements – “X is a Y on society”, as well as the “that deserves to be eliminated”. Thus it would appear that Åke Green’s comments about homosexuality would indeed breach the allowable limitation on freedom of expression. Not only conveying a meaning, it also incites violence. Although tried in the Swedish courts and initially found guilty, Green was later acquitted at a higher court, because of the “trump” card he played – he was citing God’s words, an appeal to a higher authority, in this case, a *Vox Deus* argument. As PlanetOut (2005a) reported:

The Goeta Appeals Court said that while Åke Green's views of gays can be ‘strongly questioned,’ it was not illegal to offer a personal interpretation of the Bible and urge others to follow it.

During the case, PlanetOut (2005b) reported that when asked if he understood gays would be insulted by his comments:

A defiant Green answered he understood that gays could be insulted by his sermon, but insisted the purpose was to encourage homosexuals to change their ‘ungodly’ behavior. ‘I want to warn young people about the consequences,’ he said. ‘When you tell the truth to a person, it can hurt’.

Although the State prosecutor appealed against the acquittal, the Supreme Court in Stockholm dismissed this in November 2005 (The Local, 2005), on the grounds that the sermon was protected by the freedom-of-expression provision of the European Convention on Human Rights (ECHR). Freedom of

Expression is allowed under Article 10 of that convention, but is limited under section 2 of that article:

The exercise of these freedoms, since it carries with it duties and responsibilities, **may be subject to** such formalities, conditions, **restrictions** or penalties as are prescribed by law and are necessary in a democratic society, **in the interests of** national security, territorial integrity or public safety, **for the prevention of disorder or crime**, for the protection of health or morals, **for the protection of the reputation or rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary
(Council of Europe, 1950, emphasis added).

This allows for greater restriction than those allowable under the ICCPR, yet appears to have been given a narrower reading by the Swedish Supreme Court. Furthermore, allowable limitations not only protect the *reputation* of others, such as laws against defamation, etc., but also to protect the *rights* of others. I believe this means to protect the rights of others from discrimination, violence, etc., and as such, could be used to prevent hate speech being spread.

The IPT also considered the decision in *Solicitor-General v Radio New Zealand* (Unreported, Wellington Registry, CP 531/92, 13 July 1993). At paragraph 19, that court stated:

What is guaranteed in freedom of expression is the right to everyone to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the opinion of others in the community. But some forms of expression are not within that guarantee

(cited in IPT, 1993: 4).

As examples of that which the court decided were not covered by s14 BORA, the IPT cited threats and violence, as well as comments made by the juror reported on Radio New Zealand in contempt of court that were at the heart of the case. They therefore went on to say that the Radio New Zealand case was the

authority for the proposition that not all forms of expression will be protected, and that the

forms of expression not protected [under s14 BORA] are physically violent forms of expression, and expression that violates a constitutional principle more fundamental than freedom of expression itself.

The IPT went on to claim that

the only possible constitutional principle as, or more, fundamental than the freedom of expression in this case is the right to be free from discrimination

(IPT, 1993: 4).

It can also be seen that by preventing protection for statements made that are in contempt of court, this ruling is also in line with the allowable restrictions for maintaining the authority and impartiality of the judiciary contained within the ECHR.

In the Radio New Zealand case, the IPT found that there was a collision of a form of expression and a competing constitutional principle.

However, in the case before them, the IPT went on to say

There is no collision here between freedom of expression and the right to be free of discrimination now contained within s. 19 of the Bill of Rights Act (as amended by the Human Rights Commission [sic] Act 1993). Instead of a collision, the two career past each other. A publication may incite discrimination, or it may condemn it, but unlike the ability of a broadcast to undermine the jury system, the publication itself cannot discriminate. Without diminishing in any way the fundamental importance of creating a society in which there is no discrimination, we find that the expression of opinion and the right not to be discriminated against are two very different concepts, both of which merit protection

(IPT, 1993: 4).

Referring to the Supreme Court of Canada decision in *R v Zundel* ([1992] 2 SCR 731) emphasising freedom of speech where that speech incites discrimination (in this case white supremacist, anti-Semitic material denying the Holocaust), the IPT (1993: 4-5) quoted:

... the guarantee of freedom of expression serves to protect the right of the minority to express its view, no matter how unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' of 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. ...

... This court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s.2(b) unless the physical form by which the communication is made (for example, by a violent act) excludes

protection: ... In determining whether a communication falls under s.2(b), this Court has consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most at need of protection under the guarantee of free speech

While it is known that material denying the Holocaust is false, the IPT then went on to claim that people would also consider what is written in *Exposing the AIDS Scandal* is false.

To me, this appears to be a rather wide jump to make. Without examining the context in which the material in *Exposing the AIDS Scandal* is produced, or examining the underlying beliefs of the people whose fundamental belief is that anything that seeks to prevent equal treatment for gays and lesbians must be true, I believe the IPT would not be in a position to make the above claim. The people to whom it is targeted – the religious right who seek to denigrate lesbians and gays – believe it to be true. I believe the IPT made an error here.

Although claiming during its assessment of the publication,

It is difficult to know for whom the book is intended,

the IPT does, nevertheless, state that

It is unlikely to appeal to people who do not share the authors view. Those who do share his moral view are no doubt convinced of the ideas the book attempts to convey

(IPT, 1993: 10).

In making this statement later in the decision, admitting it is likely only to appeal to people of the same moral view of the author, admitting that these people are already convinced the fallacies portrayed are true, I find it even harder to believe the IPT truly meant that people reading the book would consider it to be false.

The IPT then examines the relationship between BORA and Article 20 ICCPR. While section 1 of that Article prohibits propaganda for war, section 2 states that:

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

Noting that, in their opinion, this does not immediately appear limit freedom of expression, or whether it is better interpreted as a “justifiable limitation” under s5 BORA, the IPT claims that it may have been felt by the government that

New Zealand law already complied, either through s. 61 of the Human Rights Commission [sic] Act 1993, or through censorship of such material under the Indecent publications Act

(IPT, 1993: 5).

Section 61 HRA prohibits racial disharmony by preventing the publication or broadcast in a public place of material that is threatening, abusive, or insulting, which is

likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

The IPT also cite material from the United Nations Human Rights Committee (UNHRC) in cases where it has considered Article 20(2) and the limitations allowed under that Article on freedom of expression.

In *Taylor v Canada* (1983) 4 HRLJ 193, Taylor complained that his freedom of expression had been violated when he was prohibited from transmitting anti-Semitic statements over his telephone. The Committee ruled the complaint inadmissible as it was directly incompatible with Article 20(2) of the Covenant. Although only procedural, this indicates that the Human Rights Committee is of the view that the freedom of expression does not protect anything specifically excluded by Article 20(2)

(IPT, 1993: 5).

This appears to draw on the same material – anti-Semitic ideas – that the Canadian Supreme Court had ruled allowable, yet draws the opposite conclusion. Sexual orientation is not mentioned in Article 20 – or even the entire Covenant – although “national, racial, or religious hatred” is. Yet the very wording of Article 20(2) could, I believe, mean two things. Firstly, that advocacy of material that incites discrimination, etc., against people on the basis of their nationality, race or religion ought to be prohibited; or secondly, that advocacy of hatred on national, racial, or religious grounds that incites

discrimination, etc., against any person or group of people, ought to be prohibited. The former reading would narrow the groups *to which* protection would be offered under Article 20(2); the latter reading would narrow the grounds *from which* hatred may be incited.

Under the first reading, material that urged discrimination against people because of their nationality, race, or religion would be prohibited, so using the formula “X is a Y on society that deserves to be eliminated, because Z”, X would be a person's race – Australian for example, while Y or Z could be anything. Under the second reading, it would be material that urged particular types of hatred against any particular group. In this case, X and Y would be anything, but Z could be “because it's against our culture/race”, or “because <deity of choice> says so”. Certain types of material, such as anti-Semitic material, could be read in both ways as that incites hatred against a group of people because of that group's religion and because some people believe being Jewish “is an affront to decent white folk”.

The IPT cited a 1986 case from Sweden, that went to the European Commission on Human Rights, *Felderer v Sweden* ([1986] 8 EHRR 91), where that Commission

interpreting the freedom of expression provision in the European Convention, held that a term of imprisonment for publishing an ‘extremely’ anti-Semitic document was a violation of the freedom of expression, but that it was a justified limitation in a free and democratic society because the restriction on freedom of expression protected the democratic rights, including the reputation, of others (

IPT, 1993: 5).

As a result of this, the IPT decided that

any challenge to hate literature is better dealt with in terms of whether its restriction can be demonstrably justified in a free and democratic society (s. 5 of the Bill of Rights Act) rather than whether or not it should be protected by the freedom of expression (s. 14 of the Bill of Rights Act). Our view is reinforced by the fact that Article 20(2) was not specifically incorporated into the Bill of Rights Act, but left as an interpretive aid

(IPT, 1993: 5).

In previous cases in considering whether or not to ban something as indecent, the IPT had adopted the test in *R v Oakes* ([1986] 26 DLR (4th) 200), which establishes when any limit is reasonable and demonstrably justifiable in a free and democratic society, as per s5 BORA. The IPT (1993: 5) defined this test as:

- i. In adversarial proceedings, the onus of proof to justify the application of section 5 BORA is on the Crown.
- ii. The civil standard of proof by a preponderance of probabilities applies.
- iii. These requirements should be applied vigorously and will generally but not always require supportive evidence that should be cogent and persuasive.
- iv. The objective sought to be achieved by the proposed classification must relate to concerns which are pressing and substantial in a free and democratic society.
- v. The means utilised must be proportional or appropriate to the objective. In this connection, there are three aspects:
- vi. The limiting measures must be carefully designed or rationally connected to the objective;
- vii. They must impair freedom of expression as little as possible;
- viii. Their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the restriction of freedom of expression.

Accepting that due to Parkinson's complaint, issues surrounding hate literature were of a "pressing and substantial concern", the IPT believed that

hate literature is at least potentially subject to reasonable limits

(IPT, 1993: 6).

However, because they claimed there was no specific statute that dealt with hate literature (despite their earlier citation of s61 HRA as such an example), the IPT stated that they must apply the Indecent Publications Act under the assessment of s5 BORA, and its reasonable limitations in a free and democratic society.

At this point, the IPT noted that they had already done this type of assessment in the *Penthouse* decision, where they adopted the *Irwin Toy Ltd* [1989] test. Then they noted that as well as Article 20(2) ICCPR, the IPT cited the

International Covenant on the Elimination of All Forms of Racial Discrimination (United Nations, 1965), to which New Zealand is a party, which states at Article 4:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or 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:

Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

Sections (b) and (c) of that Article prohibit organisations which incite such discrimination, and prohibit public authorities from promoting racial discrimination (United Nations, 1965). Unlike Article 20(2) ICCPR, this can only be read to restrict freedom of expression where that expression promotes hatred *against* a group of people on the basis of their race, colour, etc.

Whilst noting that Parliament had international obligations to prohibit such hate literature, the IPT stated

it has done so only in a very limited fashion in s.61 of the Human Rights Commission [sic] Act 1993

(IPT, 1993: 6).

However, the IPT omit reference to s63 HRA which states

It shall be unlawful for any person to use language (whether written or spoken), or visual material, or physical behaviour that:

- i. Expresses hostility against, or brings into contempt or ridicule, any other person on the ground of the colour, race, or ethnic or national origins of that person; and
- ii. Is hurtful or offensive to that other person (whether or not that is conveyed to the first-mentioned person); and

- iii. Is either repeated, or of such a significant nature, that it has a detrimental effect on that other person in respect of any of the areas to which this subsection is applied by subsection (2) of this section.

Subsection 2 then lists the prohibited areas of discrimination, such as employment, etc. Again, this is a clear limitation on the freedom of expression, albeit only on the grounds of a persons race, colour, ethnicity and nationality, and appears to have been omitted by the IPT in their deliberations. It is also worded more strongly, and more explicitly than s61, as it is not limited to the printed or broadcast word, but also includes spoken words and physical behaviour.

The IPT also appears to have omitted s131 HRA from its deliberations. This section deals specifically with incitement to racial disharmony:

Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons, –

- i. Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or
- ii. Uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting
- iii. Being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

For the purposes of this section, ‘publishes’ or ‘distributes’ and ‘written matter’ have the meaning given to them in section 61 of this Act.

This section is, however, limited by s132, which requires prosecutions under s131 to have the consent of the Attorney-General. Again, however, this is only concerns incitement on the basis of race, ethnicity, colour or nationality.

The IPT did, however, acknowledge that they had a duty to

interpret the indecent Publications Act in a manner consistent with New Zealand's international obligations in appropriate cases. In light of these treaties, it is certainly possible to interpret 'injury to the public good' as including injury caused by hate literature

(IPT, 1993: 6).

However, the IPT does not appear to have examined how hate speech causes injury.

Observing that Parkinson submitted that the book is hate literature directed against men who have sex with men and people living with HIV, the IPT recognised that the international instruments discussed dealt only with hate literature in terms of race, etc., not sexual orientation (IPT, 1993: 6).

It should, however, be noted that it was not until 21 December 1999 in the case *Salgueiro v Portugal* that the ECHR read "sexual orientation" to be covered under "other grounds" in Article 14 ECHR, freedom from discrimination (ECHR, 1999). Nevertheless, the term "other grounds" in the ECHR had, since at least 1976 (ECHR, 1976), been expanded to more than just the listed grounds of

sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, [or] birth

contained within Article 14 of the European Convention (Council of Europe, 1950).

Furthermore, the UNHRC (1994), in paragraph 8.7 of *Toonen v Australia* stated

The State party has sought the Committee's guidance as to whether sexual orientation may be considered an 'other status' for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

Crown Counsel assisting the IPT,

argued that the reason definitions of hate literature have only made reference to race and religion is that these were the particular social evils legislatures were

attempting to remedy at the time. ... Further, the remedies themselves are based on fundamental principles for human dignity and equality, and the elimination of discrimination, both of which are relevant to discrimination on grounds of disease status and sexual orientation

(IPT, 1993: 6).

I would agree with Crown Counsel here. The original ECHR was drafted and approved in 1950 (Council of Europe, 1950), and the grounds contained in Article 14 have remained unchanged. Furthermore, as shown above, the extension of the phrase “other grounds” to include grounds other than the original twelve, such as rank within the armed services (ECHR, 1976) and sexual orientation (ECHR, 1999), as well as the result of the Toonen case before the UNHRC (1994), shows a continual development and expansion of the ideas of human rights protections.

Accepting that these principles were now in legislation, and that discrimination wider than that against race or religion was no longer to be tolerated, the IPT noted that the phrase “injury to the public good” is not defined under their enacting legislation, the Indecent Publications Act 1963, nor was there any listing of grounds of prohibited discrimination contained within that Act, unlike its successor, the FVPCA. In seeking to relate the phrase “injury to the public good” to the Indecent Publications Act, the IPT stated that

it is the underlying principles of equality and non-discrimination that are important to a finding of injury to the public good. In the context of censorship law and injury to the public good, we have no difficulty in defining hate literature in terms extending beyond race and religion to all the grounds covered in s.21 of the Human Rights Commission [sic] Act 1993, and indeed any other grounds, provided that injury to the public good is demonstrated

(IPT, 1993: 6-7).

As a result of this discussion and reasoning, the IPT found in principle that

hate literature is included in the freedom of expression contained within s.14 of the Bill of Rights Act. Its restriction or ban under the Indecent Publications Act is however a reasonable limitation on the freedom of expression justified by law in a free and democratic society and in light of New Zealand’s international obligations

(IPT, 1993: 7).

However, before the IPT could advance on this, it had to consider whether or not the book was admissible – did the book in question deal with “matters of sex, horror, crime, cruelty or violence” as prescribed by the Act? Acting for Parkinson, Chauvel argued that as the book dealt with matters relating to sexual health, it did indeed deal with matters of sex. The IPT agreed this was enough to render the book as being within that gateway as the definition provided by the Act was intended to be inclusive, and thus

does not exclude consideration of other matters

(IPT, 1993: 7).

Furthermore, the Tribunal also had to follow the ruling which defined indecency even further. In

Howley v Lawrence Publishing Company Ltd ([1986] 1 NZLR 404), Woodhouse P stated at 410 that the definition of indecency includes things other than matters of sex, horror, crime, cruelty and violence, but that those things must be injurious to the public good in order to be banned:

... it would be extraordinary I think if such a further category could be banned by the Act as being indecent without meeting the test of being injurious to the public good.

In other words, regardless of whether or not this book deals with matters of sex, horror, crime, cruelty, or violence, it can be brought into the definition of indecent and made subject to the Tribunal’s jurisdiction by the word ‘includes’

(IPT, 1993: 7).

Under section 10(a) of the Indecent Publications Act, the IPT was entitled to ‘determine the character of any book’, while section 10(b) of that Act allowed the IPT to classify such books. Nevertheless,

the Tribunal was at first tempted to merely determine this book’s character without classifying it. However, the closing words of s.10(a), ‘submitted for classification’ seem to preclude this option

(IPT, 1993: 7).

The IPT then went on to classify the publication, taking into account such things as the contents of the publication, the dominant effect of the book, its literary merit, medical, social or scientific character or importance, and

whether or not the book displays an honest purpose and an honest thread of thought.

When it was pointed out to the IPT by Parkinson that the American Sociological Association

censured Cameron for undermining the '*civil rights of lesbians and gay men through the distortion of sociological concepts and the falsifying of sociological research*'

(IPT, 1993: 7, emphasis added),

and this was repeated by Dr Nigel Dickson of the AIDS Epidemiology Unit at Otago University, the IPT came to the

opinion that the author's personal bias against homosexuality has destroyed his credibility as an expert on HIV and AIDS

(IPT, 1993: 7).

In describing the book, the IPT stated

The book itself is best described as a confused mess of factual statements, irrational extrapolations, shoddy research, overstatement, omission and a barely concealed personal bias

(IPT, 1993: 7).

The IPT then gave some examples from the book, ending with

There are a great many people in New Zealand who would strongly agree with the author's moral stance. There are a great many others who would strongly disagree that his moral stance has anything to do with the regulation or resolution of the epidemic. Our assessment of the book will be in terms of the criteria in section 11(1) of the [Indecent Publications] Act

(IPT, 1993: 7-8).

Assessing the dominant feature of the book, the IPT said that

the book is a strident condemnation of not only homosexuality, but the medical profession, the government, and the '*generally apathetic public*' (p.29) on moral grounds. Although gay people attract most of the author's ire, no one escapes it. The tone of the book is highly moralistic and its manner of presentation is simplistic and often misleading

(IPT, 1993: 7-8).

However, the IPT notes that unlike the pamphlets written by Cameron,

the book is a more diluted attack on homosexuality. The pamphlets concentrate his vitriol, but in the book it is dissipated and attaches to more people. If the pamphlets were brought before us, we would have no difficulty in finding them to be hate literature and consequently injurious to the public good because they concentrate the author's hate. The book is however much less concentrated. It is better viewed as a moral tract, or an attempt to demonstrate that the author's morality is a solution to the epidemic, than as hate literature

(IPT, 1993: 8).

Thus, in assessing the book, the IPT found that hate literature could be classified as restricted in some way, and such classification was a justifiable limitation on freedom of expression as allowable in a free and democratic society in terms of s5 BORA, but they found that the book did not meet the requirements of the test for hate literature, however faulty or false its reasoning or claims.

The IPT agreed with the definition of hate literature as provided by Parkinson, with an added rider:

- i. It would express views about a minority group which is identified by one or more characteristics to which stigma is attached;
- ii. It would express those views with malice or hatred or opprobrium;
- iii. It would attempt to persuade others to adopt those views thereby inciting prejudice, discrimination or violence against the minority; and
- iv. Its manner of expression would be emotive, hyperbolic or offensive to the minority

(IPT, 1993: 2).

The added rider was that

- v. the vitriol be concentrated

(IPT, 1993: 11).

The IPT, in finishing its consideration of *Exposing the AIDS Scandal*, stated that

Censorship cannot be carried out on the grounds of taste or bad research however. If censorship was to be done on this basis, there would be very little left to read in New Zealand

(IPT, 1993: 11).

However, although I agree with the intent behind this, I also believe that the amount of fallacious material within a book or publication, and the intent behind that book, as well as how that material affects the people it is targeted at should be considered. There is one other test I would apply. If it is believed that it is acceptable to make these claims about lesbians and/or gay men, is it also acceptable to say them about a group of people on the basis of their race or religion? I believe that if the IPT had substituted “blacks” or “Jews” in place of “gay” or “homosexual”, they would have had at least a small idea of how offensive, and hurtful, such literature can be.

Nevertheless, the vast majority of submissions against the Civil Union Bill (2004) contained elements of what Cameron teaches, and those submitters believed it to be the truth. One member of the Select Committee, the committee representative for United Future, also accepted those fallacies as the truth. Another member, the committee representative for ACT, also appeared to accept many of these fallacies as accurate (personal attendance at the hearings in Wellington).

In this chapter, I have shown how the IPT assessed the only case regarding anti-gay speech brought before them. In 1993, the law changed, and the FVPCA came into force. This included, at subsection 3(3)(e), a certain protection for people covered by the Human Rights Act 1993. The next chapter examines how that law was applied by the OFLC to the videos at the heart of the *Living Word* case.

Chapter 9: The Initial Complaint to the Office of Film and Literature Classification

On Thursday 2nd of February 1995, two days before the Devotion Parade and subsequent Party, a relatively unheard of Christian sect, Potters House Christian Fellowship, started handing out pamphlets in Manners and Cuba Malls:

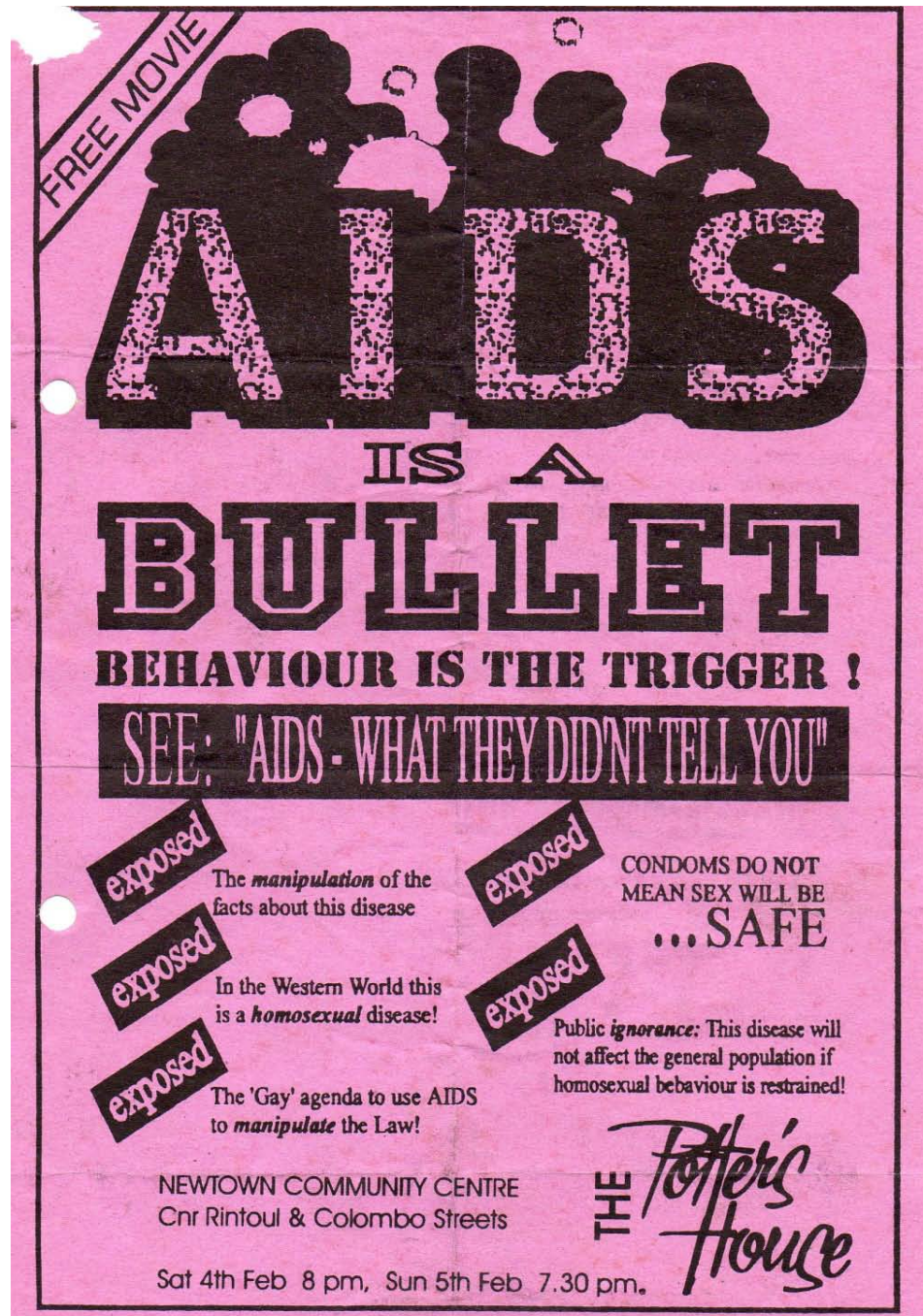


Illustration 2: First Wellington Pamphlet. They got the title wrong: *AIDS: What they didn't tell you*, instead of the correct title of *AIDS: What you haven't been told*

At that time I was unable to go to the showings of the video in question, although I saw it a couple of days later. Various friends had been to see the video, and reported they were shocked that such a video filled with fallacies could be shown, and treated as accurate.

Those who attended the viewings also reported the pastor in charge refused to let any alternative viewpoint known. He would not let any person speak who would not further the propaganda and myths promoted in the video. If any person spoke against it, he launched into a tirade of abuse, including accusing lesbians of performing fellatio on each other. Those present reported that much of the abuse related to sexual acts, and that they would all die of disease brought on by sexual depravity. Among the diseases he said that gay men in particular would die from was Gardnerella. Men cannot get Gardnerella, properly known as bacterial vaginosis. It is not fatal.

Despite this, several of his congregation nodded, or said “amen” in agreement. There was no freedom of expression allowed at the apparently public meeting. They were only interested in their mistruths and myths.

Given the tone and content of the pastor’s sermon, together with the content and timing of the video, those present believed that the showings of *AWYHBT* at the time of both the Devotion and Hero Parades, could only have been designed to:

- a) spread distrust of the lesbian and gay communities,
- b) degrade and demean people living with HIV, and
- c) promote discrimination against members of the lesbian and gay communities and people living with HIV.

In light of this, a group of us who were members of HRAG, concluded that something needed to be done about these videos. We discussed what the videos contained, how that was presented, and what that presentation could result in. One suggestion was that we lay a complaint with the censorship authorities – the OFLC. The meeting broke up and we began looking for information that could inform our complaint.

Submissions on AIDS: What you haven't been told

The video itself is written in a documentary style, but the misinformation and myths that it tells and perpetuates are insidious, and incite hatred towards LGBT people and people living with HIV/AIDS (PLWHA). The video makes false claims in regard to the effectiveness of condoms in protecting people from HIV infection, encouraging a sense of helplessness:

‘nothing works, so why should I bother’ (HRAG, 1995a: 1).

In that submission, we noted that

A vulnerable young man, going through a particularly difficult coming out process, who saw the video, was severely disturbed and frightened by its messages of hate, hopelessness and supposedly biblical overtones. This has been a serious blow to his self esteem as a person, and drastically disrupted his coming to terms with his sexual orientation due to its malicious propaganda

(HRAG, 1995a: 2).

HRAG believed that this in itself was sufficient for it to be injurious to the public good as it may have a similar effect on other young people who were, for whatever reason, vulnerable. The young man in question was 16 at the time he saw the video with others, had recently been thrown out of home by his mother and stepfather due to his sexuality, and his faithfully religious father and stepmother would not allow him to stay with them unless he was “cured”.

The video also exploits and capitalises on the vulnerability of people living with HIV, using their own words out of context in such a way as to indicate that they are pariahs who prey on the young for sexual gratification, and to infect “innocent” mothers and children. Thus, HRAG believed the video degraded, demeaned, and dehumanised people living with HIV in terms of s3(3)(c) FVPCA. The video also sensationalised aspects of the LGBT communities in a disparaging manner, representing them as inherently inferior to others simply because of their sexual orientation, covered by s3(3)(e) FVPCA (HRAG, 1995a: 3).

Then the FVPCA specifically stated:

3(3) In determining, for the purposes of this Act, whether or not a publication (other than a publication to which subsection (2) of this section applies) is objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication-

...

(c) Degrades or dehumanises or demeans any person:

...

(e) Represents (whether directly or by implication) that members of any particular class of people as 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(1) of the Human Rights Act 1993.

People who attended a showing of this video in Hamilton reported that the same pamphlet had been handed out, and the pastor who ran it used the same tactics as those in Wellington – closing down freedom of expression, allowing only agreement, and offering abuse heavily laced with sexual comments at those who tried to disagree with him.

The companion video, *GR/SR* was not shown at this time, but was viewed by HRAG. Noting that it, too, was a “pseudo-documentary”, we stated that this video also seeks to incite hatred and discrimination against LGBT people, and PLWHA, and would have a dangerous effect on young people.

Starting with the “I have a dream” speech by Martin Luther King Jnr, this video seeks to set racial minorities against LGBT people and PLWHA. It uses images of white, seemingly privileged, lesbians, gay men and PLWHA, and morphs into a speech by Larry Kramer, who paraphrased Martin Luther King Jnr’s speech, claiming he had “perverted” that speech. Gay Rights/Special Rights ignores the fact that there are LGBT people of colour, and that HIV affects all people, regardless of their skin colour (HRAG, 1995b: 1).

Claiming no gay or lesbian had lost their job, or housing, or been denied other services due to their sexual orientation, *GR/SR* sought to reinforce these myths and falsehoods, making claims that sexual orientation was a ‘behavioural lifestyle’ and not an orientation. Again, using their words out of context, the video quotes LGBT people and PLWHA, tries to link homosexuality with polygamy, adultery, satanism, paganism, and paedophilia. It leads people to believe that such actions are never committed by heterosexuals, seeks to sensationalise aspects of the LGBT communities in a disparaging manner, and again seeks to demean, dehumanise, degrade and treat as inherently inferior to others, LGBT people, and PLWHA (HRAG, 1995b: 1-2).

The video invents falsehoods, or at least repeats them. It claims the ‘Gay Rights Movement’ – portrayed as monolithic and omnipotent with a singular voice and opinion – has made certain demands, and also claims that:

homosexuality will bring about the collapse of small business;
 gays want the children of heterosexual parents by ‘twisting’ the educational system;
 gays are trying to destroy the family;
 homosexuality is compulsive – sexually and emotionally;
all gays are into urolagnia, coprophilia, anilingus, fellatio and cunnilingus, anal penetration by objects, hands, and penii;
 23% of young gay men have colostomy bags;
 in the UK, gays are 18 times more likely than heterosexuals to break the age of consent laws; and
 it is part of the ‘gay agenda’ to have sex any way you please with anyone you please.
 The video ignores heterosexuals take part in the same sexual acts as LGBT people, ignores that the then age of consent in the UK was 16 for heterosexual sex and 21 for homosexual sex, and sets aside any differences in the way the law negatively affects LGBT people in comparison to heterosexuals

(HRAG, 1995b: 3).

In the submission (1995b:3) we noted that we believed both videos were objectionable under the definitions given in the [Films,] Videos [and Publications] Classification Act 1993, subsections 3(c) and 3(e), and that the videos can be classified as hate literature in terms of the Indecent Publications Tribunals Ruling 160/93. We therefore make complaint against this video in terms of those subsections, and that ruling, and seek that they be classified as objectionable.

On 26 July 1995, HRAG received a letter from the OFLC stating that leave had been granted to submit *AWYHBT* to the office, and required HRAG to contact Potters House, Wellington; Challenge Christian Video, Auckland; LWD, Auckland; Wellington Sexual Health Services, NZAF, Auckland, and the Film and Video Labelling Authority. A similar letter was received on 4 August 1995 in respect to *GR/SR* requiring us to contact those same groups, except Wellington Sexual Health, but including the HRC, and the Lesbian and Gay Archives of New Zealand (LAGANZ). This was in order that the named groups would have the opportunity to view the submissions made and provide them with the right of reply or to make submissions of their own.

On 15 December 1995, the OFLC sent HRAG copies of the submissions received from those groups for comment. The initial date for the return of comment was to be the 26th of January 1996, but was later extended to the 30th of January 1996.

Submissions on Gay Rights/Special Rights

Living Word Distributors (LWD) claimed that we had stated the video was a 'documentary' saying that the

Traditional Values Coalition states they produce 'information motion pictures & videos'

(LWD, 1995: 1).

In reply, HRAG stated a dictionary definition of 'documentary', and noted it was clear the video was not a documentary, having referred to it in the original submission as a 'pseudo-documentary'. HRAG also noted that although LWD called it an 'information motion picture & video',

it does not present facts, information, in a balanced manner, but does contain fabrications and misinformation in an unbalanced manner. As such it is propaganda rather than an 'information motion picture & video'

(HRAG, 1996: 1, emphasis in original).

LWD stated that the terms used by HRAG to describe the video are

exceptionally emotive. The writer gives no evidential proof that the content is any of these things. The Video clearly presents at the beginning a 'Discretionary Warning'. As the theme of the subject is to 'inform', to claim that it would be 'injurious to the public good' seems to suggest the writer wishes to suppress the informative objective

(LWD, 1995b: 1).

HRAG noted in our submission that

It must not be forgotten that senior members in the Traditional Values Coalition have publicly said '... all fags have AIDS and should be burnt at the stake' (Pat Buchanan, US Senator and TVC member, 1984); 'Hitler had it right, those fags should all be gassed to stop them spreading AIDS' (Jesse Helms, US Senator and TVC member, 1986); 'Homosexuals are sick. If they won't get treatment, they can't be counted as real people and don't deserve the rights that decent Christian people have' (Billy Graham, US Evangelist and senior TVC member, 1993); ... 'homosexuals are depraved. ... They want to convert our children. They want us to believe they are not responsible for AIDS. They want the same rights as decent people. They want special rights ... They don't deserve any rights at all but should be kept under lock and key until they change their evil ways (Lou Sheldon, US Evangelist and founder of the TVC)

(HRAG, 1996: 1-2).

They tried to claim that King's "I have a Dream" speech was

included to demonstrate the deliberate misquote by Larry Kramer, ... and to draw the contrast between the '1964 Civil Rights Act' and the gay/lesbian platform

(LWD, 1995b: 1).

This ignores that Kramer's speech actually begins with "To paraphrase Dr King ...". Kramer was therefore deliberately putting his meaning into that speech, and it was not a deliberate misquote, but a deliberate paraphrase showing the continuing inequalities in American law in regards to LGBT people,

to show the differences between what racial minorities in the USA have gained from the Equal Rights Act; and the oppression that lesbians and gays still suffer because of inadequate protection through various State and Federal laws in the USA. Many States in America still treat homosexual acts as criminal behaviour

(HRAG, 1996: 2-3).

LWD (1995b: 1) tried to claim that

there are no 'recent medical reports and findings' that give clear evidence [sic], that homosexuality is an orientation rather than a behavioural lifestyle. In fact, the weight of evidence would tend to support the latter.

At that time, HRAG provided a list of eleven studies and articles on both sides of the argument, which indicated homosexuality was a natural phenomenon, and not caused by nurture (HRAG, 1996: 3-6).

They also stated that

the video does not in any way claim 'that all gay men and lesbians are paedophiles'. The other comments could only be construed as the impressions of the writer and would not, I believe, be generally supported by most persons. Statements such as those spoken by Michael Swift, Gay Community News, to the effect 'We will sodomise your sons ..., etc.,' would certainly dumbfound many parents

(LWD, 1995b: 1).

Again this is incorrect, and the quote from Michael Swift is deliberately incomplete in the video. Also, HRAG

did not, in original submission, claim that the video says that 'all gay men and lesbians are paedophiles'. We stated that the video seeks to perpetuate that myth by implication

(HRAG, 1996: 6-7).

LWD claimed:

It is interesting that the writer suggests that the content 'sensationalises' and presents 'certain parts of the gay and lesbian communities in a disparaging manner'. Does the writer have concern that some behaviour is shown for the purpose of edification. Only a generalised personal view of the writer is given without any specific scene or event referenced. Dennis, an AIDS patient and former homosexual speaks of having 'partners that are without number' and 'one night at least 50 partners'. This is not for the purpose of sensationalisation but to inform the viewer of behaviour which is not uncommon within the gay and lesbian lifestyle. It is for the viewer to establish their own adjudication

(LWD, 1995b: 1-2).

As the NZAF pointed out,

The video 'Gay Rights Special Rights' is propaganda of an extremely one-sided kind. It uses a variety of devices to present its makers' view of reality, such as sinister music under pictures of cheerful parades, a highly selective use of images, kaleidoscoping-out [sic] of innocuous images (to make them seem more indecent), and biased juxtaposition of pictures (such as homeless black children against a gay pride parade) and words with pictures (such as a man carrying a baby, probably his own, while it speaks of paedophilia)

(NZAF, 1995: 2).

In reply to the comment about 'Dennis', above, HRAG stated:

Regarding his statement about 'Dennis'. This would be the exception rather than the rule. It is in fact probably physically impossible. If the night is taken as being from 6 pm to 6 am, that is 720 minutes, divided by 50, that gives 14 minutes and 24 seconds on average per encounter. We seriously doubt this claim and its possibility. There are many celibate lesbians and gay men, but this is **not** mentioned. The excerpt **is** therefore for the purpose of sensationalism as nothing else is offered to allow the viewer to form their own opinion

(HRAG, 1996: 7, emphasis in original).

LWD (1995b: 2) also disputed the fact that the video contained false information:

To state that 'certain demands' as presented by the Gay Rights Movement 'are false' requires substantiation by the writer.

The NZAF (1995: 2) had stated the video

includes many factual errors, some of which must be deliberate: For example it is simply not true that gay men and lesbians in the US have never been denied access to businesses once their sexuality was known. The reference to the relative prevalence of underage sex in the UK omits the crucial fact that homosexual acts in the UK had an age of consent of 21 when this film was made, while the age of consent for heterosexual acts was 16 (thus equating sex between 20-year-olds with paedophilia), it quotes as serious the obvious and well-known parody, 'We shall sodomise your sons....' The most extreme and radical gay and lesbian positions and sexual practices are presented throughout the video as typical.

The easiest part to show that the video contains false information is in its claims from the article by Michael Swift. The original article begins

This essay is an outré, madness, a tragic, cruel fantasy, an eruption of inner rage, on how the oppressed desperately dream of being the oppressor

(Swift, 1987).

This line, omitted in the video and other conservative religious writings where Swift's article has been quoted, shows that the article is intended to be a parody, yet the video expresses the idea that the lines

We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. We shall seduce them in your schools, in your dormitories, in your gymnasiums, in your locker rooms, in your sports arenas, in your seminaries, in your youth groups

are intended to be what is desired, and is part of some sort of "Gay Agenda".

By taking an article out of context, the video manages to instil the idea that gay men are a threat to children – in particular boys – and are therefore to be feared. Intentionally doing so is making a fiction of the original article.

The video claimed that the 1993 March On Washington Demands contained

seven broad demands encompassing fifty five sub-demands for gays, lesbians, bisexuals, and transgenders.

By comparing the demands claimed in the video, with the actual demands made in the 1993 March on Washington, similarities initially exist between the two, however, these similarities decrease as the list goes on. Placing these side by side, with the actual 1993 March on Washington *Demands*, provided by the National Gay and Lesbian Task Force, on the left, and the claims in *GR/SR* on the right, the fabrications can easily be seen:

Demand/Claim One

Actual demand made

We demand passage of a Lesbian, Gay, Bisexual and Transgender civil rights bill and an end to discrimination by state and federal governments. Including the military; repeal of all sodomy laws and other laws that criminalize private sexual expression between consenting adults

Claim in the video

repeals all sodomy laws and legalises any and all forms of sexual expression; age of consent laws would be changed to allow sex with youth; and dress code laws would be repealed to allow all forms of dress or non-dress

The claim to change

age of consent laws would be changed to allow sex with youth can therefore be seen to be a fabrication. Although it may be claimed by those opposed to the rights of transgender people that providing transgender people with rights and ending discrimination against them would result in dress code laws would be repealed to allow all forms of dress or non-dress, this is not an accurate claim. Transgender people would be living and dressing in the gender appropriate to them. To make the claim such as that contained in the video is, I believe, to deliberately take the Demands out of context in a misleading and mischievous way.

Demand/Claim 2

Actual demand made

We demand massive increase in funding for AIDS education, research, and patient care; universal access to health care, including alternative therapies; and an end to sexism in medical research and health care.

Claim in the video

diverts massive funds from the defence budget to cover AIDS patients medical expenses; calls for taxpayers to fund cosmetic sex change operations for transgenders; and supply IV needles to drug addicts

There is no mention in the original demand about supplying needles to drug users, or of any form of needle exchange. There is nothing “cosmetic” about sex reassignment surgery. It is major surgery only undergone after lengthy assessment and consideration by both the person concerned and medical and psychological health professionals.

Demand/Claim 3

Actual demand made

We demand legislation to prevent discrimination against Lesbians, Gays, Bisexuals and Transgendered people in the areas of family diversity, custody, adoption and foster care, and that the definition of family include the full diversity of all family structures.

Claim in the video

legalises marriage between members of the same sex; legal adoption, custody, and foster care would also be allowed within these new homosexual family structures.

The video is most accurate with this claim, yet attempts to make it appear as if is something wrong or distasteful. The imagery shown at this point – two people in wedding dresses, a white child, a wedding certificate in the name of two women (without making it clear the certificate is not valid and made specifically for the mass commitment ceremony held while the march was on), is designed to repel those who hold negative views about same sex marriage, or oppose any recognition of same sex couples. The background music can only be described as ‘sinister’.

Demand/Claim 4

Actual demand made

We demand full and equal inclusion of Lesbians, Gays, Bisexuals and Transgendered people in the educational system, and inclusion of Lesbian, Gay, Bisexual and Transgender studies in multicultural curricula.

Claim in the video

requires full inclusion of lesbians, gays, bisexuals, and transgenders in education, child care, and school counselling programmes.

Again, the video is moderately accurate with this, but plays to the prejudices of those who oppose equal rights for LGBT people. The original demand is seeking to ensure that LGBT teachers are not arbitrarily fired from their teaching positions on the basis of their sexual orientation or gender identity. The video again seeks to sensationalise this as if it is something bad. Yet heterosexual people are not fired from their positions as teachers simply because they are heterosexual. Together with the fiction the video introduces at demand one,

age of consent laws would be changed to allow sex with youth, and the fallacy they claim at demand seven, as well as discussion about two books available in some school libraries, it is intended to imply that LGBT teachers are paedophiles seeking to prey upon children. This implication is false.

Demand/Claim 5Actual demand made

We demand the right to reproductive freedom and choice, to control our own bodies, and an end to sexist discrimination in all forms.

Claim in the video

requires that contraceptive and unrestricted abortion services be available to all people regardless of age.

There is no mention in the original demand of such services being available to all people regardless of age as claimed by the video. However, allowing such services to be available would be of great help to public health efforts. Full and complete sexual health programmes offering a range of options promote better sexual health than abstinence only programmes. As Gregory Paul (2005: 6-7) points out:

... rates of adolescent gonorrhoea infection remain six to three hundred times higher in the U.S. than in less theistic, pro-evolution secular developing democracies. At all ages levels are higher in the U.S., albeit by less dramatic amounts. The U.S. also suffers from uniquely high adolescent and adult syphilis infection rates, which are starting to rise again as the microbe's resistance increases. The two main curable STDs have been nearly eliminated in strongly secular Scandinavia. Increasing adolescent abortion rates show positive correlation with increasing belief and worship of a creator, and negative correlation with increasing non-theism and acceptance of evolution; again rates are uniquely high in the U.S. (Figure 8). Claims that secular cultures aggravate abortion rates (John Paul II) are therefore contradicted by the quantitative data. Early adolescent pregnancy and birth have dropped in the developing democracies (Abma *et al.*; Singh and Darroch), but rates are two to dozens of times higher in the U.S. where the decline has been more modest (Figure 9). Broad correlations between decreasing theism and increasing pregnancy and birth are present, with Austria and especially Ireland being partial exceptions. Darroch *et al.* found that age of first intercourse, number of sexual partners and similar issues among teens do not exhibit wide disparity or a consistent pattern among the prosperous democracies they sampled, including the U.S. A detailed comparison of sexual practices in France and the U.S. observed little difference except that the French tend – contrary to common impression – to be somewhat more conservative.

In completing an Internet search I found various private bodies, such as The Silver Ring Thing, provide abstinence only services in the other countries

included in Paul's study, but I was only able to find that the US, at a government level, is the only country to actively promote abstinence only programmes.

Paul (2005: 1) points out that the

United States is the only prosperous nation where the majority absolutely believes in a creator and evolutionary science is unpopular,

and is therefore a theistic nation. Italy, Ireland and Spain were the only other countries that had over 40% of the population absolutely believe in God – yet even they had under 50% of their populations do so (while more than 50% of their populations believe in evolution). Only the US had more than 50% of the population absolutely believe in God, with over 60% of the US population believing so and less than 45% accepting evolution. These findings are again confirmed in his later, more comprehensive, 2009 article. Paul (2009: 417) notes:

Because highly secular democracies are significantly and regularly outperforming the more theistic ones, the moral-creator socioeconomic hypothesis is rejected in favor of the secular-democratic socioeconomic hypothesis (in agreement with Paul [2005] and Zuckerman [2006], as well as the results of Marks, Abdallah, Sims, and Thompson [2006] and Norris and Inglehart [2004]). A study to the contrary has yet to emerge despite the widespread promulgation of the moral-creator socioeconomic hypothesis.

Paul's 2005 and 2009 articles indicate that a higher rate of theism correlates with a higher rate of societal ills, such as a large incidence of sexually transmissible infections. A full and inclusive sexual health programme, proposed by the March Demands is a better choice for society than faith based abstinence only programmes, espoused by the Traditional Values Coalition and other religious groups in America.

Demand/Claim 6

Actual demand made

We demand an end to racial and ethnic discrimination in all forms.

Claim in the video

provides for taxpayer funding for artificial insemination of lesbians and bisexuals, and forbids religious based

concerns about homosexuality from being expressed.

The claim made by the video regarding Demand 6 is a deliberate fabrication. There is no similarity in the claim to the original demand. The voiceover in the video is accompanied by images of a heavily pregnant woman holding a sign pointing towards her belly that reads 'Lesbian Love Child'. This fades, as the second fictional claim is made, to a black man holding a sign which reads 'Keep your Church out of my Crotch'. Both images are designed to create antipathy towards LGBT people.

Demand/Claim 7

Actual demand made

We demand an end to discrimination and violent oppression based on actual or perceived sexual orientation/identification, race, religion, identity, sex and gender expression, disability, age, class, and/or AIDS/HIV infection.

Claim in the video

requires organisations such as the Boy Scouts of America to accept homosexual Scoutmasters. (Quotations from *GR/SR*, 1993).

Again, there is no similarity between the actual demand made and the claim in *GR/SR*. Another fiction invented by the video makers, specifically to imply, as at claim one and four, that gay men in particular are targeting youth, specifically boys. The implication is that gay men are paedophiles. It is specifically made to inflame prejudice against the LGBT communities.

To state, as LWD do (1995b: 1), that the video does not

'sensationalise' and present 'certain parts of the gay and lesbian communities in a disparaging manner',

or that the video does not contain false information is either absolute fiction or a position grounded on wilful ignorance.

Perhaps the makers of the video were taking the advice of Dr George Rekers, author of *Growing Up Straight* (1982) to heart:

... mixing a little truth with a 'healthy' dose of error is a strategy designed to implant fear and confusion

(cited in SPCS, 1993).

Subsequent events:

Wellington

On Thursday 8th February 1996, members of Wellington's Potter's House Christian Fellowship began handing out pamphlets advertising *AWYHBT*. It clearly had R16 printed on the flyer, yet the person who handed it to me admitted she was 15. She would be attending the showing of the movie as she said her "pastor told me to go". The video was to be shown at Newtown School Hall on 10th February, the same day as the Devotion parade was held in Wellington's streets in the afternoon, and the dance party later that evening.

The pamphlet makes the following claims:

FREE MOVIE

"AIDS - WHAT YOU HAVEN'T BEEN TOLD"

A film that the AIDS council wants BANNED!
This Movie has caused PUBLIC OUTCRY.

exposed
The manipulation of the facts about this disease.

exposed
CONDOMS DO NOT MEAN SEX WILL BE...SAFE

R16

exposed
The 'Gay agenda to use AIDS to manipulate the Law.'

exposed
quote: Dr Robert Noble (Reader's Digest)
Condoms give a false sense of security there is no 'safe sex'. Passing out condoms is like issuing water pistols to fight a major fire"

exposed
Public ignorance: This disease will not affect the general population if homosexual behaviour is restrained.

In the Western World this is largely a homosexual disease:
Quote: "In the fourth quarter of 1994, 12 people were notified as having AIDS. All were men, and all reported having had sex with other men. Almost all of the cases notified in 1994 were homosexual or bisexual men..."
The Dominion (Wellington)

(Evidence for the above given on the night)

HEAR ONE MAN'S TESTIMONY WHO'S LIFE WAS CHANGED THROUGH THIS FILM

NEWTOWN SCHOOL HALL 7 PM
MEIN ST
NEWTOWN SAT 10 FEB

a potter's house presentation

ELITE CIRCULARS 0809 80 63 87

Illustration 3: Second Wellington Pamphlet

The last claim (in the Western world ...) forgets that AIDS notifications lag behind HIV seroconversion, and to report it accurately, the flyer should have had the number of HIV diagnoses rather than AIDS notifications.

Nevertheless, HIV diagnoses are not entirely accurate of the number of HIV positive people in a given population as many people are not tested, and may be carrying the virus for years, asymptotically. So long as they show no symptoms, they may never have an HIV test. It may therefore be several years before a person, infected during any given time period, is tested for HIV.

Furthermore, the first claim is inflammatory and incorrect. The NZAF, in its submissions on *AWYHBT*, never asked the OFLC to ban the video. They stated that such a decision would be up to the OFLC, and the NZAF (1995: 2) recommended an age restriction of 18, rather than the current R16. A letter was sent to the Office of Film and Literature advising them of the showing.

The custodian of the school hall seemed to be unaware of the problems caused by the showing of *AWYHBT* a year earlier when spoken to on the Friday, 9th February. In a letter to her of that date, explaining our concerns, I mentioned the errors in the pamphlet in regard to the NZAF. I also mentioned that the World Health Organisation estimates that, at that time, 17 million people had HIV, of which 79% were infected heterosexually, indicating the HIV is not solely a homosexual disease. The latest statistics from AIDS New Zealand were also given – that 25.3% of positive tests results were among heterosexual women in the 12 months ending 30 September 1995 (AIDS Epidemiology Unit, 1995). Information about the safety of condoms was also provided to counteract the claims made in the video.

In a follow up call, the custodian stated that there had been a bomb scare in the Hall the night the video was shown. However, she told me that the Pastor of Potter's House did not call the police, and initiated a search of the building themselves after evacuating it. Others who had been present that night had claimed they were surprised by the actions taken by Potters House leadership, although the Pastor had claimed that he had been in contact with the police

before starting the search. I mentioned in the call that these actions were unusual, and that several people had told me they believed the bomb scare to be a hoax, perpetrated by Potters House. I also offered to speak with the police in relation to this alleged bomb scare.

I also mentioned that the Newtown Community Centre, where the video had been shown the previous year, had entered a clause into their hall hire agreement that restricted groups from denigrating other sectors of the community, suggested perhaps the school could look at this also, and reiterated this in a letter sent on 1 March 1996.

During the Devotion Parade on the Afternoon of the 10th of February, members of Potters House marched in front of the parade in protest, making offensive comments through loud hailers. From their position, it appeared that they were being provided by a police escort. Other members also walked along the streets beside the parade making similarly offensive comments. Someone watching the parade was seriously assaulted by one of the protesters, sufficient to cause blood to flow from their nose and mouth. I was in the parade, and saw the person who had been assaulted after it happened, but did not see the assault take place, nor did I speak to the person assaulted after the parade. Police officers on duty did nothing to prevent the offensive comments, did not prevent members of Potters House marching in front of the parade, and claim not to have seen the person who was assaulted. There is no record of that person making a complaint to the police in respect to the assault.

The Wellington City Council (1994) bylaws at the time stated:

17.10 MEETINGS AND PROCESSIONS ON ROADS

17.10.1 No person shall without the prior written authority of the Council or the City Traffic Engineer:

Take part, on any road, in any assembly or combine with other persons in such a way as to impede pedestrian or vehicular traffic thereon, or to prevent or hinder ready access to shops or premises facing on the road; or

Make any public address or organise or conduct any public meeting, gathering, or demonstration, or attempt to organise or gather together a crowd, on any road; or

Except with such consent as aforesaid, no person shall hold organise or take part in any parade or procession whether in vehicles or on foot on any road.

17.10.2 In determining whether to grant or withhold permission as aforesaid the Council or the City Traffic Engineer shall have regard:

To conditions of Traffic movement, both vehicular and pedestrian, at the time of the proposed assembly or procession, but

To the likelihood of danger to life or property, or the likelihood of undue public disorder being caused or attracted by the proposed activity.

To whether the proposed activity will cause unreasonable annoyance or inconvenience to other road users or of people living and working in the vicinity.

17.11 LOUDSPEAKERS

17.11.1 No person shall operate a siren, loudspeaker or other voice or sound amplifier, be it on foot or from a moving or stationary vehicle, in pursuance of any right or permission exercised or granted under Clauses 17.10 to 17.14 hereof, or otherwise, on any road without having first obtained the written permission of the City Traffic Engineer. (Wellington City Council, 1994)

In a letter to David Pegram of Gays and Lesbians Everywhere in Education (GLEE), the Area Maintenance Officer of the Council noted that

Approval was not given to the group of people who marched in front of your procession on 10 February,

that to hold any march without the council's authority was a breach of the bylaw above, and that

Council bylaws are enforced by the New Zealand Police

(Letter, 29 April 1996, Council to Pegram, on file, LAGANZ: Bennachie Collection).

Accordingly, GLEE laid complaints with the Police, asking why they had allowed the members of Potter's House to march in front of the parade, and distribute offensive pamphlets and be verbally abusive (Pegram to Police, 19

March 1996, on file, LAGANZ: Bennachie Collection). Inspector Drew of the Police replied that:

The grant or denial of a permit is a council matter which is of no concern to the police except as it affects road safety or maintenance of the peace.

The police role on this occasion was to ensure the marchers' safety by controlling traffic, and to intervene if necessary to deal with the actions of marchers or spectators which contravened criminal law. I was satisfied after the march that we had fulfilled both obligations.

Every group, including those aligned for and against homosexuality, has the right to free speech in New Zealand. The police will not interfere lightly with that right

(R Drew to Pegram, 28 March 1996, on file, LAGANZ: Bennachie Collection).

Following the letter to the custodian of the Newtown School Hall (1 March 1996), the principal of the school contacted me, and stated she had been told by the pastor of Potter's House, Karl Dodunski, that the OFLC had said they had finished their work on the film, had not reclassified it, and it was no longer being considered for classification. As a result, they had received their video back, and that was why they had shown it. I informed her those claims were false, and that the OFLC had not completed its work on the videos, the classification was still being undertaken.

The principal also expressed other concerns relayed to her from Pastor Dodunski, that HRAG and the gay community were trying to ban Potter's House, that the custodian had checked with Newtown Community Hall about the good will of Potter's House, and the bomb scare. I stated the claims by Potter's House were incorrect, and that we were only trying to get Potter's House to be honest and to stop presenting misinformation as if it were fact, and were not interested in preventing them from going about their lawful business. I reminded her of the Ninth Commandment that Christians supposedly obey in accordance with the bible:

Thou Shalt Not Bear False Witness

(Exodus 20: 14, in Collins, 1958).

I also stated several people were concerned about the claims regarding a bomb scare and how members of Potter's House had reacted. I offered to write to the police and request an investigation into this, and repeated the feeling by several that this was a hoax.

Writing to her later (26 March 1996), I repeated much of the above, and that I would be in contact with the police. I noted I had been in contact with the Newtown Community Hall, and none there could recall speaking to the custodian of the school hall. However, given the stress the custodian was under during that time, she may have been defensive and confused about events. I included the submission from the NZAF that clearly shows the allegations by Potter's House were incorrect. After discussions with others, I wrote to Senior Sergeant Ken McLeod of the Wellington Police regarding this issue (10 May 1996, LAGANZ, Bennachie Collection). Discussions with McLeod indicated the Police had doubts about the veracity of the bomb scare as well, particularly as they did not receive any complaint or notification about it at the time it happened.

Unhappy with the reply from the Police regarding the complaint about Potter's House interfering with the parade, GLEE, wrote to the Police Complaints Authority, stating that policing of the Devotion Parade was unsatisfactory due to interference by Potter's House through their breach of bylaws, a police matter not actioned, and the response from Drew, as they took:

... objection to the tone of his reply and in particular his assertion that the protesters were only exercising their right of freedom of speech

(Pegram to Police Complaints Authority, 28 April 1996, on file, LAGANZ: Bennachie Collection).

While Potter's House did have the right to protest from the pavement, Pegram believed

they had no right to march at the head of the parade apparently escorted by a police car

(Pegram to Police Complaints Authority, 28 April 1996, on file, LAGANZ: Bennachie Collection).

Christchurch

In mid-April 1996, Pastor Kim Robertson of Potter's House Christian Fellowship, Christchurch, showed *AWYHBT*. He told Yvonne Moore in a radio interview on NewsTalk ZB that:

... the point of showing it, as I mentioned on CTV [Canterbury Television] last night, [...] is suicide prevention. If one person doesn't get AIDS from our effort and expenditure, I [...] I think that it's totally well worth the effort

(NewsTalk ZB, 1996b).

When Moore asked if they had requested anyone from the NZAF to talk to people and answer questions after the film, Robertson replied:

We've put up 350 posters Yvonne, [...] and, and we're putting out 4000 handbills. We're inviting anyone who wants to come along

(NewsTalk ZB, 1996b).

When pressed, given the film deals with the subject of AIDS, and that Robertson had already admitted that some of it was dated, and specifically asked if he had invited someone from the NZAF to speak to the congregation, Robertson replied:

No, I don't, I don't believe [...] especially after viewing this video, the video speaks for itself, I don't go along with some of the statistics that the AIDS Foundation is quoting. For example, [...], in, in, [...] one, ah recent quote they made us, 79% of AIDS victims are heterosexual. Well, that may be on a world wide scale, but are we talking third world or first world?

(NewsTalk ZB, 1996b).

Dan Knowles, of the NZAF's Christchurch office, had been invited by Moore to take part, said that the figure was worldwide, and pointed out that:

... contracting HIV, and being diagnosed with AIDS has got nothing to do with what people are. It's to do with what people do...

(NewsTalk ZB, 1996b).

Robertson then tried to claim that a billion people would have AIDS by 2010, quoting Dr William Haseltine, who he claimed was from the French Academy of Sciences.

I could not find original speech on the Internet, and it does not show up on a search of the French Academy of Sciences web page (<http://www.academie-sciences.fr/>).

Nevertheless, WHO and the Joint United Nations Programme on HIV/AIDS (UNAIDS), provide statistics that indicate Haseltine overestimated, with approximately 33.2 million worldwide infected with HIV by mid 2007 (UNAIDS/WHO, 2007:2).

However, when challenged about his church, and asked if it is a mainstream church, Robertson replied:

Well, it's a fairly well recognised church in Australia, it's, it's a world, [...] it's an international um, [...] fellowship of churches. We have a number of, [...] of, of churches in the fellowship, [...] I think up near a thousand now around the world. It's very fundamental and, [...] we *are* extreme. We *do* believe the truth. The truth is fundamental after all, and ah, we're a [...] we're a church of concerned Christians. There [...] you know there are a lot of concerned Christians out there. We're just one church of a lot of churches. Our theology us in line biblically, is [...] is straight down the bible. If it's in the Bible, I'm willing to talk it, if it's not in the Bible, I'm not interested

(NewsTalk ZB, 1996b, emphasis added to text to indicate emphasis in voice).

Their 'truth' appears to be removed from fact, and they prefer to show fictional distortions. It does not surprise me that many Christian groups who label themselves "fundamental" and hold anti-gay views seem to completely ignore the strictures of the Bible they claim to obey, forgetting the Ninth of the Ten Commandments:

Thou Shalt Not Bear False Witness

(Exodus 20: 14, Collins, 1958).

Sadly, because they seem to be told what to say, what to think, what to read and what to do by others, they seem to be unable to discern the truth or accept facts as being real when they are presented to them because those facts contradict what they have been told to believe.

When Knowles pointed out what the video claims – that it promotes a fear that HIV may become airborne or transmitted through insect bites – Robertson tried to claim that Knowles was “making statements that are not true”. Yet the video does make these claims, and these methods of transmission are discussed, despite them not being possible. Moore comments that the video therefore appears to be

completely irresponsible in its portrayal of AIDS
and that Pastor Robertson is
going to misinform the public and this is a dangerous thing
(NewsTalk ZB, 1996b).

In reply, Robertson says:

I [...] I totally agree. I one hundred per cent agree about misinformation. As we're
awa, [...] aware, when AIDS broke out there was a lot of misinformation. But I would
like to reinforce, that I have, [...] I can get hold of more up to date information,
probably as up to date as what Dan can. There's no problem with up to date
information

(NewsTalk ZB, 1996b).

Yet when asked if he would continue to show an outdated film filled with misinformation, he replied:

Of *course* I'm going to show the film. People need to see, [...] the truth never dates
Yvonne. The truth, the truth is relevant. People can see the *truth* in the movie. I'm,
[...] I'm not saying there's stuff in the movie that's not relevant today

(NewsTalk ZB, 1996b, emphasis added to indicate emphasis in voice).

Even when Moore told him that airborne transmission, and other methods of transmission were ‘old myths’, and trying to pass them off as being accurate is ‘just nonsensical’ and ‘absolutely wrong’, Robertson claimed:

Well, all I can say Yvonne, is that the video speaks for itself. I'm a pastor presenting
a video. We have lots of different presentation of different issues. I'm *not* a health

expert, I'm a pastor of a church. I'm pastor for five years now. I think I understand the bible fairly well. I present the truth of the bible, that's my interest

(NewsTalk ZB, 1996b, emphasis added to indicate emphasis in voice).

Moore then asked Robertson:

Can I just put one final question to you pastor Robertson? We've heard from Dan, we've heard his concerns. Would you be prepared to have a spokesperson from the AIDS Foundation there at the meeting after the showing, talking about the movie, and facts and fallacies?

(NewsTalk ZB, 1996b).

Robertson replied with

Absolutely not!

(NewsTalk ZB, 1996b, emphasis added to indicate emphasis in voice).

On the Monday after the video was shown, 22 April 1996, John Dunne spoke to Kathleen Smitheram, also of NewsTalk ZB, who had been to see the video.

Dunne asked Smitheram for her impression. She said:

I think, probably, the pastor is quite right, he had up to date information from the, the, um, centre in Otago, epidemiology centre in Otago, but I think it's a *selective* truth that he's dealing in here. The movie, *AIDS: What you haven't been told*, very cleverly put together video, plays on the fears and emotions of people. It, um, it's sanctimonious and insidious drivel quite frankly Johnny

(NewsTalk ZB, 1996a, emphasis added to indicate emphasis in voice).

When asked if the movie was outdated, and agreeing that it was, Smitheram also mentioned that she did not think it was a video about AIDS, to which

Dunne asked if it was homophobic in its presentation. Smitheram replied with:

It's very homophobic. I thought I was going to find out something that I didn't know, you know, when I listened to the publicity on the Friday and thought, 'I'll go and have a look'. But, it, probably for the first fifteen minutes deals with *very basic* facts about AIDS, then it slides, *very cleverly* and subtly, into this anti-homosexual feeling and fervour. Um, they have this whole section on sado-masochism, which, which leads you to believe that's all any of them ever do; um, it talks very subtly about the cost health wise in the hundreds of thousands of dollars, it will cost to keep these people alive, you know, over a year, I think one chap quoted a figure of \$100,000. Um, then it goes on to homosexuals and children. They show this wonderful shot of,

of, like a father with a, a three year old toddler on his shoulders and say 'homosexuals and children'. Well, you've got no idea whether the man's a homosexual or just a father down at the beach with his child

(NewsTalk ZB, 1996a, emphasis added to indicate emphasis in voice).

Later Smitheram continued saying she felt the video was very anti-homosexual

(NewsTalk ZB, 1996a, emphasis added to indicate emphasis in voice).

Others attending the video showing noted the presence of children who appeared as young as twelve, (discussions with Dan Knowles, NZAF; and Chris Arneson of Christchurch). Chris Arneson, writing in June, also told the OFLC what it was like to sit through a video presentation as a PLWHA, acquired from an infected blood transfusion in sub-Saharan Africa in the early 1980s. He pointed out the presence of people under 16 at the showing, and how the misinformation in the video deliberately incites discrimination against people who, like him, are living with HIV and/or AIDS. Arneson discussed how disturbed he was that the video had not been classified, yet had been before the Office for over a year. He sought to have the video banned immediately, due to the misinformation it contains and the myths it perpetuates as:

The film does us great harm (and your bureaucratic dragging of feet compounds that harm)

(Arneson to OFLC, 16 June 1996, emphasis in original, LAGANZ: Bennachie Collection).

At around the same time, I began to receive threatening calls on the telephone. They left messages on the answer machine abusing me, and informing me I was "doomed to hell". I took the tape to the police, spoke with Senior Sergeant Ken McLeod, and discussed with him other issues in relation to Potter's House and the videos. He asked me to put these in writing, and supported an application to go onto the Unpublished Electoral Roll. I delivered the letter on 10 May, the last abusive call was received on the 12th of May, I made the application to the Electoral Office on the 13th May, when McLeod rang and asked if the calls had stopped as they had spoken to

members of the church on the Sunday. A week later, I let him know that I had received no calls since the 12th.

Hamilton

On 13 July 1996, Potter's House showed the video *GR/SR* at their church in Hamilton, organised by Pastor Watson. The events were covered in *The New Zealand Herald* (1996: 3), with two sentence article in a side bar:

Gays fight screening

Christians fought in Hamilton last night with gays trying to disrupt the screening of an anti-homosexuality film at the Potter's House Christian Centre in London St. The police were called and the gays left.

In speaking with Hayden Fowler from NZAF in Hamilton on 16 July, he stated there had been a fight at the showing of the video. While the protesters had attempted a peaceful protest, members from Potter's House had become very abusive, and eventually violent. Watson had made claims that all gay men are paedophiles, and "deserve to be dealt with" immediately before members of Potter's House became violent. The video also claims gay men are paedophiles and are "after the children".

An article appeared in the *Waikato Times* (1996: 3), stating:

The US film claims to expose the 'homosexual agenda'. A flyer promoting the film says homosexuality is 'targeting our youth. The Gay Lesbian agenda wants your child's mind and body!' Pastor Watson, who says public interest in the film is high, accuses gay and lesbian people of 'seducing the nation that theirs is a normal and innocent expression of human life'.

Fowler recounted that on 19th of July, Watson claimed in a radio interview about the showing of the video that "two burly men" had approached his fourteen year old son the previous night and told him they would burn down the church or their home if his father showed the film again. Fowler stated that the description given did not match any of the people present at the protest. The feeling was that this was a publicity stunt. On the evening of the 19th, the

following flyer was distributed in Victoria St, the main shopping area of Hamilton:

inside the homosexual agenda

GAY RIGHTS SPECIAL RIGHTS

Homosexuality is targeting our youth. The Gay Lesbian agenda plants your child's mind and body! Homosexuals are being granted legal access to public classrooms where they recruit and propagandise the innocent.

Homosexuals are redefining the family to include all forms of sexual preference and perversion. Your Business, School, City Council and Government will be forced to employ homosexuals, bisexuals and transgenders. Homosexual 'Marriage' is precursor to adopting children.

Will you allow only 1% of the population to steal your freedom and destroy basic morality?
THIS VIDEO WILL CHANGE YOU. . . AND ONLY YOU CAN CHANGE YOUR COUNTRY!

**Saturday
JULY 20
7:30PM**

**the
POTTER'S HOUSE**
River end of London St
HAMILTON

Illustration 4: Hamilton Pamphlet

At that showing, 75 protesters showed up, along with television crews, and other media. Some of the protesters formed a picket line, explaining how the contents harmed gays and lesbians, were offensive, and the video contained so much misinformation as to be totally untrue. Some people did not cross the picket line, although members of Potter's House did. There was no disruption

inside, but the ushers provided by the church, patrolled the aisles like security guards. Watson held a “question time” after the video had been shown, and offered the microphone to others – but only to members of his church – and all attempts by protesters to say anything were ridiculed, with comments about what they supposedly did sexually.

It was therefore difficult for the protesters to get factual information out. One person managed to provide information about the incidence of child sexual abuse that found no links between homosexual orientation and paedophilia, noting that it is not the sex of the victim that attracts the offender, but the youth of the victim, and that 21% of offenders came from a Christian fundamentalist background (Finkelhor, Williams, & Burns, 1988). This “flustered” Watson, who then made the claim that either 64% or 68% of serial murderers are homosexual. Due to the outrageous nature of this comment, several people, not just protesters, laughed at him, and the meeting broke up.

A series of articles and letters to the editor appeared in the Waikato Times over the next few days, indicating a polarisation of opinion. The gay newspaper, *express*, covered some of the debate (1996, pp1, 3):

Gay Danger: We're molesters, murderers and creators of mayhem

Two controversial anti-gay videos will screen in cities from Dunedin to Whangarei thanks to die country's 15 pentecostal Potter's House congregations.

Screenings by the church in Wellington, Christchurch and Hamilton have already prompted gay and lesbian protests. Now Hamilton Pastor Richard Watson says people in other centres where his organisation has churches will get an opportunity to view the American videos, *Gay Rights Special Rights* and *AIDS — What You Haven't Been Told*.

In Hamilton, the most recent scene of protest, the church has twice shown *Gay Rights Special Rights*. As *express* went to press last week, the pastor said he is likely to show the other video within a month, ‘perhaps this weekend. I was just waiting on what God wants me to do.’ Church members have promoted the screenings by handing out flyers in Hamilton's main street. Watson says the public has a right to know about ‘the homosexual agenda and their push to change the laws in schools

and in government.’

Asked if American talk of ‘the homosexual agenda’ is applicable here, he says it is. ‘I have evidence in New Zealand of exactly the same agenda.’ He cites material supporters have sent him — including the YWCA-produced booklet *Sisters for teenaged girls* — as an example of what he perceives as the greatest danger: infiltrating schools and children's minds with gay and lesbian propaganda.

That such infiltration has taken place is a central claim of *Gay Rights Special Rights*. At the first Hamilton screening one gay man stood in front of the video when it showed children entering a park, supposedly to be preyed on by homosexuals. Other protesters then joined him, scuffles began and most of the group of about 35 was ejected.

Quoting what he says is the gay ‘creed’, Watson says homosexuals believe anyone can have sex at any age, including children. Asked where the paper comes from, he names the National Committee of Gay Civil Rights. When pressed further, he says it was produced in America in 1984. ‘Homosexuality is targeting youth,’ he stresses. ‘I’ve spoken personally to homosexuals who have come out of homosexuality. They said that homosexuals do go after children as part of their recruiting.... Homosexuals have sex with boys in a large degree.’

Watson also claims eight of the 10 worst mass murderers of all time were gay men, and he cites other figures relating homosexuality to murder statistics. ‘People have dropped off reams of information to me, just members of the public have come to me,’ he says of the public response to the Hamilton video screenings. ‘There’s been a phenomenal response from around the country.’ Asked how many calls or visits he has had, he says: ‘it’s just a continual flow really over the last week. I’ve had a continual flow of people ringing. I’ve had no negative feedback on the phone.’

But Watson claims his son was approached in the street by two gay men who threatened the pastor's life. ‘Two very muscular homosexual men came to my son. He said they looked like homosexual — people say you can’t tell but I think you can, they’re quite blatant these days.... They said “you’re the pastor’s son aren’t you. Tell him not to show that video again or he’ll go down.”’

Hamilton gays question Watson's intimidation claim. Some claim they felt intimidated themselves when they attended *Gay Right; Special Rights* screenings. Dan

Coomey says the Potter's House members left him feeling 'quite threatened: they were ready to throw their weight around. There was no doubt about that.... Some of the women had their hands held behind their backs and someone was punched in the face.'

Says Hamilton gay man Bruce Hammington, who attended the first screening, 'I didn't realise how crazy they were — however they're quite dangerous as well.'

Potter's House in Hamilton showed *AWYHBT* on 31 July, which was only found out about afterwards. They had not advertised it as they had the earlier showings of *GR/SR*, and it appeared that it was only church members who attended.

It was not until 18 November 1996 that a decision was made by the Office of Film and Literature, making them

objectionable except if the availability of the publication is restricted to persons who have attained the age of 18 years

(OFLC, 1996a: 1; 1996b: 1).

This was one year and nine months after the initial complaint had been laid.

In this chapter, I have explained what happened during the period when the initial complaints were laid with the OFLC, the responses to the submissions made, and the events that occurred during this period. In the next chapter, I examine the submissions made to the Board of Review, and the events occurring during that period.

Chapter 10: Board of Review

After the OFLC had made its decision, it had to be published in the *New Zealand Gazette* as official notification of the decision by the tenth working day of the month following that in which the decision was made. This duly happened in the issue of the *Gazette* published on 12 December 1996.

Between the time the decision arrived in the mail and 12 December, discussions were being held among the HRAG membership, and other related groups and interested people in Auckland, Hamilton, Wellington and Christchurch. The law allowed 20 working days from the notification of a decision for an application of review to be made. With the Christmas and New Year break between 25 December and 15 January of the following year, we believed any application for review had to be in by 31 January 1997. However, a letter from the OFLC of 16 December indicated that we had until 17 February.

It was felt by many that the decision was adequate in many respects, and did, on the whole meet or exceed the expectations of HRAG. Nevertheless, we believed that the following paragraphs in the decision on the video *AWYHBT* were not accurate:

The discrimination in presenting homosexuals as the source and promoters of HIV/AIDS is framed in such a manner as to be condescending and sympathetic rather than hateful. The condemnation of homosexuality is not considered to present with such vitriol as to represent members of the homosexual community or people living with HIV/AIDS as being inherently inferior to other members of the public. Rather than to propagate fear and hatred, the obvious bias in the Fundamentalist Christian message is to proselytise the homosexual community and people living with HIV/AIDS. The discriminatory manner in which the video recording deals with information is considered under s3(3)(e) of the FVPC Act to be such that the general availability of the publication likely to cause harm to the public good because it propagates a morality intolerant of difference, as well as presenting a misinformative construct of disease contagion and safety in sexual activity.

The Classification Office has taken into account the views put forward in the submissions received from interested parties notified under s19(a) and the response heard in the consultation held with the Human Rights Commission representatives whose expert assistance was requested under s21. The conclusion that the publication does not fit the definition of 'hate literature'; as outlined in the IPT Decision No. 160/93 and advocated by the submitter and the representatives of the Human Rights Commission does not conclude that the publication is not harmful to the public good

(OFLC, 1996b: 9-10).

Members of HRAG, and other groups consulted, believed that *AWYHBT* was not merely condescending, but hateful, and that it was patronising of the OFLC to make that claim.

Together with the following paragraphs in the decision on *GR/SR* it was felt the OFLC had not sufficiently taken the effects of homophobia into consideration, and that while the LGBT *communities* may be strong enough as a whole to withstand the onslaught of these videos, the individual lesbians, gay men, bisexual and transgender people who may be targeted by those who believed (as a result of these videos) it was acceptable to commit acts of violence against them, were not:

In a similar fashion, rather than fitting the definition of 'hate literature' as used by the IPT, the video recording *Gay Rights Special Rights Inside the Homosexual Agenda* presents as discriminatory propaganda. Fundamentalist Christian values, moralities and concept of family are held up to acclaim and put on a pedestal. The fundamentalist position is strongly contrasted against the fight for Minority Class Status by lesbians, gays and bisexuals. The gay community's claims are derided with a clear intention to convert or preach the fundamentalist outlook to viewers. Thus the presentation is intolerant rather than hateful per se.

...

Having said that, the Classification Office recognises that New Zealand in the 1990's has safeguards within the Human Rights Act 1993 and the Bill of Rights Act 1990 to protect minority viewpoints as well as the freedom from discrimination. The Classification Office reiterates the IPT's assessment of the strength of the gay

community and believes that it is strong enough to withstand such a biased onslaught. (Decision No. 160/93 Ref. No IND 41/93). It is also felt that the wider adult community will be discerning enough to recognise the potential for injury to the public good in such a skewed and unbalanced presentation. However, the message might be misinterpreted by a less worldly younger audience. It is therefore considered that the discriminatory material contained within the video recording does require restriction to minimise the potential injury to the public good when making the video recording available

(OFLC, 1996a: 4, 12).

Realising any decision made by the Film and Literature Board of Review (the Board) may go against HRAG made the decision difficult, but not insurmountable. HRAG knew that if it was left unchallenged, the law would remain unclear, and the violence evident after each showing of the videos in Wellington, Christchurch, Nelson and Hamilton may continue. The video showings in Wellington in February 1996, in Christchurch in April 1996, and in Hamilton in July 1996, indicated that the Christian groups in question had no qualms about showing the videos to people who were under the recommended age, and who we believed may be vulnerable. As a result, HRAG decided to make application for a review of the decisions.

On 17 January 1997, HRAG lodged applications for review of the two decisions. In the application for review on *GR/SR*, HRAG noted that while the stance in the video was moralistic,

It presents this so called 'moral' message by presenting misinformation, outright lies, and out of context quotes and misquotes as the truth. It also uses misrepresented selective statistical and scientific information and research, omits contextual information, and promotes a strict fundamentalist Christian religious based viewpoint.

The overall tone, and message, of the video, is one of open condemnation of the struggle for equal rights for lesbians, gay men, transgenders, and bisexuals in America, is contemptuous of them, degrades, dehumanises, and demeans them, promotes hatred against them, and represents them as being inherently inferior to heterosexuals and to ethnic minorities, not worthy of equal rights

(HRAG, 1997a: 4).

Similarly, in the application for review of *AWYHBT* we noted that:

The overall tone, and message, of the video, is one of open condemnation of the struggle of lesbians, gay men, transgenders, and bisexuals in America to obtain sufficient funding for all bodies, (heterosexual, gay, research bodies, or public bodies), concerned to combat the HIV/AIDS epidemic, (ignoring the lack of interest shown by the Regan and Bush Administrations), is contemptuous of them, degrades, dehumanises, and demeans them, promotes hatred against them, and represents them as being inherently inferior to other groups

(HRAG, 1997b: 5).

In respect of *GR/SR*, citing DeLapp (1993: 2-3), we also noted that:

It is helpful at the outset to remember that this video is built on lies, misinformation, and right wing rhetoric, a tactic raised to an art-form by the Christian Right, by taking a piece of the truth and recharacterize it to a point that it no longer resembles its original shape. So, while it is tempting to try to piece together the 'facts' offered in some understandable form, the reality is that the bulk of this video is based on self-serving half-truths and outright lies. Whether it is their attempt to position themselves as the long-standing champions of Civil Rights (when their history has been one of antagonism to civil rights and association with the campaigns of George Wallace and David Duke [members of the KKK]) or their complete mischaracterization of the demands of the 1993 March on Washington for Lesbian, Gay and Bi Equal Rights and Liberation, they lie

(HRAG, 1997a: 4-5).

When submitting on *AWYHBT* we pointed out the same inaccuracies in the video that we had done before. Similarly, we continued to do so in our submission on *GR/SR*. In that video, Lou Sheldon makes the claim that gay men have never been denied access by law to business and restaurants. Yet by citing Martin Duberman (1995), HRAG (1997b: 10) showed that

in the State of New York, up until the end of the 1970's, it was illegal to serve convicted, identifiable, or self confessed homosexuals in a bar or restaurant.

This, of course, showed more inaccuracies in the video than we had previously pointed out. Again, it is a clear case of a religious leader falsifying the truth. Once more, it seems that people of faith are willing to disregard the

commandments of their own faith in order to try to deny rights to LGBT people.

In *GR/SR* the definition of homosexuality is given as:

the behaviour of active sex with members of the same sex.

HRAG (1997b: 11-12), pointed out that

this would be true only of homosexual sex itself. One may be homosexual and display homosexual behaviour, yet remain celibate. Homosexuality is more properly defined as being sexually attracted to a person of the same sex, whether one acts on that attraction or not.

Also in *GR/SR* the claim is made that

male homosexuals in Britain are eighteen times more likely to break the age of consent laws than heterosexuals

(HRAG, 1997b: 22).

However, as we pointed out

it must be remembered that at the time this video was made, the age of consent for homosexual sex in Britain was 21, and for heterosexuals was, and still is, 16. This meant that a young man who, on his twenty first birthday had sex with another young man four days younger than himself, was in effect breaking the law, and committing paedophilia. Similarly, two eighteen year old young men who went to bed with each other were also breaking the law, and therefore committing paedophilia. No mention is made in the film that the age of consent in Britain at the time was 21. The viewer is left to assume that the age of consent for homosexual sex was the same as that for heterosexual sex, or the same as in their own State or Country. This is again misleading, and is doubly so because of the [then recently made] change in the age of consent in Britain to 18

(HRAG, 1997b: 22).

In both videos, claims are made trying to link gay men with paedophilia, with Cathy Kay, in *GR/SR*, particularly trying to make this link. HRAG pointed out the fallacy of this claim. Furthermore, during the Human Rights debates of 1993, members of HRAG had gone through the major newspapers – *The New Zealand Herald*, *The Dominion*, *The Evening Post*, the *Christchurch Press*, *The Otago Daily Times*, as well as the smaller regional newspapers between 1 June 1992 and 15 July 1993, and had found 105 people convicted of sexually

abusing children. Of that, only two were identified as gay or bisexual men, of which one was also “mentally deficient”, and two were women. Of the remaining 101 convicted, there were two Pentecostal Pastors, one Anglican priest, one Catholic priest, and two leaders of Christian Communities, giving a total of six people who were religious leaders. The remaining offenders were related to the children abused in some way – predominantly father or grandfather – but also some uncles or step-fathers, and all were identified as being married (HRAG, 1997a: 31; 1997b: 23).

It would therefore appear that religious leaders are “three times” more likely than self identified gay and bisexual men to sexually abuse children. There are, of course, numerous qualifiers that would have to be made about the limitation of that claim: that it only consists of reports that made it to the newspapers, that newspapers don’t report on the heterosexuality of the offender but do report on the homosexuality or bisexuality of the offender (Personal communication with Tony Hughes, research director, NZAF, November 1996), etc. These limitations also exist for the claims made by the videos, which are either anecdotal or based on material sourced from Paul Cameron. Nevertheless, the videos do not state any limitations on the studies they use, but state it as fact. Nevertheless, citing Deborah Coddington (1996), we pointed out that

in New Zealand ... children are in much more danger from their parents and their priests, pastors and ministers, than from homosexuals

(HRAG, 1997a: 31-32; 1997b: 23).

Ironically, the leader of the CHP, which had attempted to link gay men with the seduction of youth and children in its submission on the HRB in 1993 (1993: 8), was later convicted of the sexual abuse of children, with offences going back as far as January 1990 and extending to February 1999 (*Queen v Capill*, Christchurch District Court, 14 July 2005).

We also showed that where these videos had been shown around the country increased feelings of animosity, hatred, and vilification of lesbians, gays, bisexuals, and transgenders. This violence engendered by the showing of this video could be

said to meet the grounds covered under s3(3)(d) of the FVPC Act as it has been used to promote or encourage criminal acts, either intentionally or unintentionally

(HRAG, 1997a: 39-40; 1997b: 28).

Nevertheless, as suspected in November when we received the decision from the OFLC, and as several of those consulted in December 1996 suggested, Potters House Christian Fellowship did show *GR/SR* again. On 8 March 1997, they started handing out the following pamphlet in Manners Mall, Wellington:

EXPOSED
THE HOMOSEXUAL AGENDA

Gay Rights
Special Rights

A Controversial movie the Homosexual minority wanted banned.

FREE PUBLIC SCREENING
Thistle Hall, cnr Arthur st
top of Cuba st.

R16
ID Required

*We retain the right of refusal of entry.

SAT 8th 7PM

THE HOMOSEXUAL AGENDA IS A THREAT TO YOU... YOUR FAMILY... YOUR COUNTRY!

Homosexuality is targeting our youth.

The Gay Lesbian agenda wants your child's mind and body.

Homosexuals are redefining the family to include all forms of sexual preference and perversion.

Your Business, School, City Council and Government will be forced to employ homosexuals, bisexuals and transgenders.

Homosexual 'Marriage' is precursor to adopting children.

This video will change you..and only you can change your country!

Illustration 5: Third Wellington pamphlet

The pamphlet identifies the film as being R16, when it had been made R18 following the decision publicised in the *New Zealand Gazette*, and reported in the *Dominion*, the *Evening Post*, and other newspapers. The *Dominion* (1996: 3) reported it under the headline “Film office restricts church videos”. As a result of this, we presented the following statement, written by myself, as a supplementary submission from HRAG:

On the 8th of March 1997, Potters House Christian Fellowship began handing out pamphlets regarding the video ‘Gay Rights/Special Rights: inside The Homosexual Agenda’ in Manners Mall, Wellington around 11.30 am.

Around 12 noon they congregated outside the Chaffers Park side of Wellington City New World, and were warned by the Police regarding breaching the Wellington City by—laws by marching illegally in front of the Devotion Parade, as they had in 1995.

They did, however, use a loud hailer and a sound amplifying system without permission from the Wellington City Council, thereby breaking some by-laws. The Police did not take any action in regard to this at the time.

While using the loud hailer, Pastor Dodunski and others quoted parts of ‘Gay Rights/Special Rights: Inside The Homosexual Agenda’, making links between homosexuality and paedophilia. He was accusing all gay men of being paedophiles because ‘they want your children’, a line taken out of that video. This was defamatory and an all out attack of vilification and hatred against the lesbian and gay communities.

This was further exacerbated by other people claiming to be ‘Christian’ who organised the printing of plain white T-shirts with the word ‘FAG’ on the upper left breast within the ‘banned’ symbol of a red circle and diagonal line. There was also writing on the right sleeve of the shirt, but I have been unable to make it out. These people also threw eggs at various floats. Some of those eggs hit people who were visiting Wellington specifically for Devotion, some hit young children who were with their mothers in the parade. Whether they were part of Potters House Christian Fellowship or not, I do not know, but their actions would fit in with the description of Potters House as ‘the guerrilla army of Christianity’ by their Hamilton Pastor, Richard Watson. It is believed that the T-shirts were printed by Muzzy Shirts in Petone. [This confirmed 14/4/97]

During the course of the Devotion Parade, members of Potters House Christian Fellowship handed out further copies of the pamphlet they had prepared in relation to the showing of *Gay Rights/Special Rights: Inside the homosexual agenda* to members of the public, some of whom were under 16 years of age.

The pamphlet stated that the video was being shown free at 7.00pm that evening at the Thistle Hall in Cuba Street. The pamphlet further stated, incorrectly, that the video was rated 'R16' and that identification would be required. A copy of the pamphlet is attached.

This latest pamphlet implies, by the use of the lines 'Homosexuality is targeting our youth' and 'The Gay Lesbian agenda wants your child's [sic] mind and body', that all gay men are paedophiles. These remarks are not only distasteful, defamatory, and personally offensive, but they degrade, demean and dehumanise gay men and lesbians. It is also suppositional, misrepresentative, and emotive. We believe that the pamphlets that have been used to advertise this video, and *AIDS: What You Haven't Been Told*, must also be taken into account along with the classification of the videos under sections 27(4) or 27(5) of the Act.

I attended the showing of the video, and saw no indication or signage of any type indicating the classification of the video as either the old classification of 'R16' or its new classification of 'R18'. ***There were several people present who appeared to be under the age of 18, including one who had admitted to me earlier in the day that she was only 17.***

At the end of the showing there was no opportunity given to rebut the false claims of the video, as one member stood up and started preaching while Pastor Karl Dodunski plugged in a guitar. The person preaching admitted that they were aware that the video had been reclassified by saying ***'This video has been rated R18, R16 or whatever, by the Classification Office. We don't care as we believe that this video should be seen by all people' or words to that effect. Therefore they were aware of the higher classification, but wilfully chose to ignore it to further their own ends.***

During the preaching afterwards they made links to the increasing murders and mass murders in New Zealand to the prevalence of homosexual acts, and in particular to the passage of the Homosexual Law Reform Act 1986, which they state is the cause of the moral breakdown in society

(HRAG, 1997c: 1-4, emphasis added).

Shortly afterwards, Colin Byford of the Traditional Values Coalition (New Zealand) sold a copy of *GR/SR* to a person who was 17 at the time. The copy of the video did not have a classification label – either the old R16 or the newer R18 – and the young person was not asked their age. As well as the complaint to the Board, a statement from the person who bought the copy of the video and a statement from me regarding the people who had thrown eggs at the Devotion Parade on 8 March, were given to the investigations section of the Censorship division at Internal Affairs (14 April 1997), and to the police (12 April 1997), for their action (on file, LAGANZ: Bennachie collection).

On 22 April, Jon Peacock, Inspector of Publication at Internal Affairs replied, stating they had been in contact with the group who had shown the video, and that they had claimed

they were unaware of the amended classification.

Yet I, and others, had clearly heard Dodunski, when preaching, preaching stating

This video has been rated R18, R16 or whatever, by the Classification Office. We don't care as we believe that this video should be seen by all people.

As a result of the claims of Potters House, Peacock had

advised the individuals concerned verbally and issued an official warning detailing the offences committed

(personal communication, 22 April 1997).

The complaint to the police was acknowledged on 17 April 1997 by Detective Inspector Brett Kane, who claimed that complaints in respect to bylaws were to be placed before Council (personal communication, 17 April 1997). Yet the Council had assured us in 1996 that the Police dealt with the enforcement of bylaws, and complaints were to be made to the police (letter, Wellington City Council to Pegram, 29 April, 1996, on file, LAGANZ: Bennachie Collection). As a result, Kane closed the investigation, prompting a telephone call, (during which Kane denied eggs had been thrown at people in the parade), and a letter (22 April 1997). It was pointed out he had adequate information to enable him to find the people who threw the eggs, and who wilfully breached the bylaws.

A copy of the letter was also sent to the Minister of Police, the New Zealand First MP Jack Elder, who in turn referred it to the Police Commissioner (Personal communication, 29 April 1997).

In his reply of 1 May, Kane tried to claim that he had told me

if any individual wished to make a complaint concerning violence against themselves and the offender for that specific incident was known or could be identified, then the police would investigate that specific complaint. I have, since your initial correspondence was received, sought a report from the acting sergeant policing the parade and I am satisfied that every effort was made to apprehend the 'egg throwers' on the day, but that was not successful despite the fact that police officers pursued these people

(Personal communication, 1 May 1997).

In reply, I stated:

You implied that throwing eggs at people with the intention of hitting them was not a serious offence, and was not assault, yet there are other cases where people have thrown eggs at people with the intention of hitting them and have been prosecuted. You also informed me that the people concerned would have to lay the complaints themselves, and that therefore you could not act without them or witnesses.

I have attempted to get the people concerned to lay complaints with the police, and this attempt is still ongoing. As I have said, because the police are not attempting to investigate hate crimes against gays and lesbians in the past, there is a very strong feeling within our communities of a lack of confidence in, and respect of, the Police to handle any complaint laid by gays and lesbians when hate crimes such as this occur. Your lack of action in this respect confirms this feeling.

As I said, I was asked by the person at the watch-house to supply the names and addresses of some of the people hit by the eggs thrown by those people wearing the t-shirts identified in the statement. I was told the investigation unit in charge of this would then get in contact with the people whose names I supplied and get statements off them. I have, as requested, supplied these names

(Personal communication 2 May 1997).

I also pointed out I was a witness, able to identify some of the people who threw eggs, particularly the one in the photograph supplied to the police. I

made it clear the police would be able to get the necessary information about them by contacting Muzzy T-Shirts, who printed their t-shirts. It was apparent to me, and I made it clear to Kane, that his inaction and lack of will to make even a phone call confirmed to many in the LGBT communities

that it is not worth complaining about hate crimes against our communities as the police will do nothing about it

(Personal communication, 2 May 1997).

Copies of that letter again went to the Minister of Police, with requests that he answer the questions posed in the initial letter to him. I again pointed out to him that during the Royal Visit of November 1995, the person who threw an egg at the queen had been arrested, charged, and convicted of assault, and that everyone, from the Monarch down, deserved the same level of protection (Personal communication, 2 May 1997). Copies of these also went to George Hawkins, the Labour Party spokesperson for the Police, to Tim Barnett, Labour Party MP for Christchurch Central, and to Richard Prebble, ACT MP for Wellington Central.

On 6 May 1997, I accompanied Adam Whitmarch and Neil Anderson to the police station to lay complaints. The complaints were taken by Constable Catherine Campbell who interviewed Whitmarch in my presence, and Constable John Burton, who interviewed Anderson. Although Burton took everything down accurately, Campbell omitted the part that when the eggs were being thrown from near the north east of the Willis St/Mercer St intersection, a police officer was in front of the person throwing the eggs, facing him, motioning him backwards. The officer did not give chase or try to stop the person throwing eggs.

As a result of the letters to Barnett and Hawkins, Annette King, Labour MP for Rongotai, then the only Labour Party MP based in Wellington city, asked written questions of the Minister of police, replies to which were received on 15 May 1997:

8810 Hon Annette King to the Minister of Police:

Was the person who threw an egg at the Prime Minister in Henderson on 18 April 1997 arrested; if so, how long after the incident was he arrested, and what was he arrested for?

Hon Jack Elder (Minister of Police) replies:

A person was arrested for throwing an egg which struck a person (not the Prime Minister) at the opening of the West City Plaza on 18 April 1997. He was arrested immediately after the incident and charged with disorderly behaviour and assault.

8811 Hon Annette King to the Minister of Police:

Where the people who threw eggs at the adults and children and who participated in Wellington's Devotion Parade on 8 March 1997 arrested; if not, why not?

8812 Hon Annette King to the Minister of Police:

How many complaints have police received about people throwing eggs at adults and children participating in the Wellington's [sic] 1997 Devotion Parade, and what action has been taken as a result?

8814 Hon Annette King to the Minister of Police:

Were the people who threw eggs at the adults and children who participated in Wellington's 1996 Devotion parade arrested; if not, why not?

Hon Jack Elder (Minister of Police) replied:

I am advised that no arrests were made. A general complaint was made to the police about how the parade was policed, and complaints from two persons alleging they had been struck by eggs. The complaints about being struck with eggs were not received until 6 May – some two months after the event.

Thousands of people watched the parade and, in some places, the crowd was 8/10 deep. There are no suspects and no real avenue of inquiry, given the size of the crowd watching the parade and the delay in the complaints being received.

The incidents complained of were not witnessed by the Police, who did, however, see a group of punk rockers throw eggs and fruit at Christian Coalition

members [sic] who were peacefully protesting. The punk rockers disappeared quickly into the crowd before they could be apprehended by the police.

The reply to this question [8811] also applies to questions for written answer Nos 8812, 8814 and 8815.

8813 Hon Annette King to the Minister of Police:

How many police officers were on duty at Wellington's 1997 Devotion Parade, where were they positioned during and after the parade, and what action, if any, did they take against people who were throwing eggs at adults and children participating in the parade?

8816 Hon Annette King to the Minister of Police:

How many police officers were on duty at Wellington's 1996 Devotion Parade, where were they positioned during and after the parade, and what action, if any, did they take against people who were throwing eggs at adults and children participating in the parade?

Hon Jack Elder (Minister of Police) replied:

I am advised there were 13 police officers on duty. These consisted of a parade control group of six officers who were responsible for crowd control. Four officers walked alongside the parade on foot and two officers followed at the rear of the parade in a police van. The traffic control group consisted of seven officers and these were responsible for controlling vehicle and pedestrian traffic at intersections.

No action was taken because the police were unaware of the alleged incidents. This parade was watched by a crowd of thousands, some of whom were 8/10 deep. The parade generally passed without incident and was well handled by the police.

The reply to this question [8813] also applies to questions for written answer No 8816

(Hansard, 1997: 5-6).

The Minister omitted answering the questions relating to 1996, instead treating them as if they were for 1997, and sought to detract attention by claiming

another group was throwing eggs, and there was insufficient evidence to prove eggs were thrown, despite the photographs and video given to the police, and their lack of desire to take a statement from someone who, although witnessing the events, was not one of the victims. Nevertheless, it did put the police on notice that their actions, or lack of actions, were being observed.

During 1997 there were several instances of anti-gay violence throughout Wellington. Few of these were reported to the police, and at least one person identified the people who assaulted him in mid June 1997 as members of a group of Christians who were preaching in Manners Mall. However, as the police had done nothing when he had been severely assaulted in April 1996, and he knew the police were taking no action over the identified person who had thrown eggs at the Devotion Parade, he would not report the case to the police as

they won't do anything, they don't even care

(Personal communication, 28 June 1997).

One gay venue close to the Manners Mall/Cuba Mall area of Wellington hired a doorman to provide security on Saturday nights, noting there had been six people in four weeks who had been assaulted because they were, or were suspected to be, gay. Only the heterosexual man who was suspected to be gay as he was seen by his attackers leaving a gay bar laid charges against his attackers (Personal communications with Daniel Fielding, 9 December 1997; Bennie, 1997).

It was not until 1 April 1998 that the egg thrower was convicted, and fined \$500 plus court costs of \$130 (R v Smith, Wellington District Court [1998]).

While the problem with the police continued, the Board sat on 22 May 1997 to discuss the review of the videos. After lodging the application for review, HRAG had been in contact with LGBT groups around the country, asking if they had received any reports of increased violence at the times the videos were shown in their centres. Although we had telephone records, and accounts of discussions indicating there was an increase in violence against LGBT people when the videos were shown, we only had documentation of nine cases

in writing – seven of which were in Wellington – and one each in Nelson and Christchurch. The Aotearoa Anti-Violence Project (AAVP) responded by stating that they had received six calls from people in February and March 1997 following showings of the video *GR/SR* in Wellington and Manukau. Until then, we had been unaware the video had been shown in the Auckland area. The AAVP reported the incidents had included comments such as “vicious AIDS spreader”, “murdering faggot”, and “hang the disease carriers”, etc. They also reported they had received

a number of comments from queer people within my community that they fear for their jobs and their credibility as they are aware workmates or family members saw or were told about the video and its message

**(Personal communication, Aotearoa Anti-Violence Project, 7 May 1997;
personal communication, Amy Ross, 7 May 1997).**

At the hearing, Julian Batchelor, of Open Air Campaigners, claimed he had only been told about the R18 rating that morning, and was surprised about that. He felt the movie was balanced, true and accurate, and was a good resource to show to youth, having shown it to 10, 11 and 12 year olds. Batchelor claimed he was concerned about truth and righteousness, and that young people should be shown the truth. Karl Dodunski, appearing for Potters House, claimed they had ex-homosexuals in his church, and that he has no vendetta against gay people, being very friendly with the “lesbian lady at the Newtown Community Centre”. Yet the person Dodunski claimed was still part of his church had spoken to me a week before the hearing, stating Dodunski had told him to leave in November 1996 after he admitted to still having sex with men. He had since rejoined Icebreakers, a group for LGBT and questioning youth. Furthermore, both lesbians involved with the Newtown Community Centre at that time had told me they did not like Dodunski, merely tolerated him.

Dodunski tried to back up his claims with biblical quotes, ignoring differing translations of those passages. He claimed he was there to propagate truth, the videos showed the truth, and that factual material should not be banned. When asked if non-factual material should be banned, he hesitated before replying

that “such material should not be banned either”. He claimed he had a right to show these videos based on his religious beliefs.

Although written submissions were made by those who supported the use of the videos, I was unable to obtain a copy for HRAG.

Parkinson covered his experience with material before the IPT when he laid his earlier complaint (IPT 160/93). He also covered the effects on Chinese immigrants of hate literature targeting them in the 1880s in New Zealand, and demonstrated how this had negative effects on their lives: the imposition of a poll tax, preventing the immigration of their wives, or of any Chinese women, and the second class treatment they received, encouraged by statements from politicians (Parkinson, 1997).

Negative comments from politicians and others in authority towards Chinese immigrants resulted in the actions of Lionel Terry. As Parkinson (1997: 12), recounts:

The well known outcome of anti-Chinese prejudice was the action of Lionel Terry. In the preface to his inflammatory poem ‘The Shadow’ he argued that ‘the labouring classes constituting the British Empire must be composed wholly of British, or at least of white people’ because ‘the natural hatred existing between the various races of the world can never be eradicated by civilisation or any other means without the sacrifice of racial purity’; that ‘the morals, methods of living, religious beliefs and general customs of the black and coloured races are totally strange, and in many cases revolting, to the white race, and therefore alien immigration into British Possessions has a tendency to produce degenerate habits and to lower the moral standard amongst their white inhabitants’ and ‘that by the importation of alien races into the British Empire their diseases are also imported and leprosy, bubonic plague and cholera are a few of the terrible scourges that have been spread in many parts of the Empire in consequence thereof.’ He concludes ‘Nature has distinctly demonstrated that the strength of any race, whether white, black or yellow, depends upon its purity. The violation of the laws of Nature means death.’

This lead Terry to believe it was acceptable to murder Chinese immigrants and in September 1880 wrote to Governor Plunkett announcing:

Having spent several years in various portions of the British Empire enquiring into the subject of the results arising from alien immigration, and being convinced of the evil consequences arising therefrom, I have decided to bring the matter before the public eye in a manner which will compel the attention it demands. I will not under any consideration whatever allow my rights and those of my brother Britons to be jeopardised by alien invaders; and to make this decision perfectly plain, I have this evening (Sunday) put a Chinaman to death in the Chinese quarter of this city, known as Haining street. I remain, Lionel Terry, British subject

(cited in Parkinson, 1997: 13).

Parkinson (1997: 12) notes:

Terry put his plan into action by shooting an aged Chinese to death. In this instance hate literature injured not only the well-being of the Chinese as a group but had fatal consequences for one chosen because he looked old and decrepit i.e. an easy victim.

In referring to the “Big Lie” technique, propaganda distorting the truth so much that no person would believe it could possibly be invented, Parkinson (1997: 16) notes:

The well known technique of the big lie has been taken to new lengths with the video industry, as exemplified by Gay Rights Special Rights, The Gay Agenda, AIDS: what you haven't been told and the hilariously silly religious documentaries for the gullible, (usually narrated by Charlton Heston), about the search for Noah's Ark, Volcanoes etc, all playing on images of the Last Days. Most of these are so self evidently fraudulent to any adult with half a brain that reasonable people will dismiss them out of hand. Unfortunately the viewers of TV3 seem to enjoy it. When you see the trailers to Gay Rights Special Rights you see the character of the work of Jeremiah Films and it is tempting to believe that this rubbish is unbelievable. But these documentaries have a sinister side; they are not just entertainment like the X Files. They are there to proselytise to audiences without the wit to see them as fictions.

In conclusion, Parkinson (1997: 17-18), stated:

The video *Gay Rights/Special Rights* is not an isolated curiosity. It is the most recent and probably the most insidious example of a well funded and long lasting campaign to denigrate gay people as deviates, unhealthy, evil, perverse and corrupting, to deny us the equal protection of the law through antidiscrimination legislation, to deny our legitimacy as a minority social group with particular characteristics (i.e. a

homosexual orientation – something which they deny even exists), to obstruct our effort to make a level playing field for our economic and social lives, to increase levels of public hostility towards us, and ultimately to reimpose the criminal sanctions on our sexual expression which were removed in New Zealand only a decade ago, and which remain still in half the states of the USA, from which this campaign is internationally organised.

The production of *Gay Rights/Special Rights* was by Lewis Sheldon of the Anaheim based California Traditional Values Coalition. Sheldon was one of three American antigay campaigners brought to New Zealand by the Campaign to Oppose Homosexual Law Reform in 1985 at which time he distributed gratis copies of an antigay tabloid *Midnight Alarm*, a copy of which can be supplied as an exhibit if required.

It is significant, as we examine hate literature, how much it draws out fears for public health and well-being by presenting images of contagion, of uncleanness and of moral corruption – traditional public health concerns – which are also the images by which minority cultures are traditionally stigmatised, as pointed out above with reference to the Chinese in New Zealand. Hate literature increasingly uses the terminology of public health to undermine the promotion of public health, and that is why the availability of hate literature is a public health problem that we should address.

Submitting on behalf of HRAG, I noted that while biblical phrases may be acceptable to some, they are not acceptable to all. I stated that there are several different translations of the bible – even in English (Collins, 1958; Bible Societies, 1972) – and many of these are quite different to each other, and when French, or German versions are also brought into consideration, then there are even more differences in translation, and in the number of ways certain phrases or words could be rendered in English. I made it clear that while it may be acceptable to some to have a childlike acceptance and understanding of the bible, modern scholarship, based on historical understandings, showed vast differences between such an understanding and a greater, and deeper knowledge of what the bible said. I said

In effect, what I am saying is that it is alright to have a childlike understanding and acceptance of the bible, if you are a child, but not alright to express this type of

understanding when you are a mature adult, capable of reading more, and understanding deeper, than what you are taught in parrot-like fashion

(HRAG, 1997d: 1-3).

In order to put the prohibitions on homosexuality into perspective, I provided a chart of biblical prohibitions against certain actions (Gay Task Force, 1985: 28). Though not exhaustive, it allows comparisons to be made:

Activity	Approximate number of times condemned in the Bible (conservative interpretations).		
	Old Testament	New Testament	Total
Adultery/Fornication	55	25	80
Fornication	5	39	44
Witchcraft/Sorcery	14	9	23
Usury	20	0	20
Idolatry	93	34	127
Indifference to the poor and needy	100+	100+	200+
Supposed homosexuality	3	5	8

It can therefore be seen the bible is less concerned about what some fundamentalist and evangelical Christians believe to be homosexuality, than it is about usury – lending money and charging any interest. Yet lending money at interest, even low interest rates, is practiced by banks and other lending institutions on a daily basis in the modern world. Similarly, there are 80 references prohibiting adultery – ten times the number supposedly prohibiting homosexuality, and at Leviticus 20: 10, both parties are to suffer the same penalty as homosexuals are supposed to suffer at Leviticus 20: 13, condemned in the same way, with the same words (HRAG, 1997d: 4).

I pointed out that the videos had been shown at least twice since the R18 rating had been placed upon them, yet people under 18 had been present during at least one of them. I pointed out that if the word homosexual, or lesbian, was exchanged for a word relating to race or ethnicity, or even religion, the videos would read like right wing or white supremacist propaganda, and immediately be found unacceptable by all. I indicated there were similarities in style between both *GR/SR* and *AWYHBT* and a film like *Der Ewige Jude* showing

them the stills of that film from the Holocaust History website (Hørnshøj-Møller, 1997).

I noted that everywhere these videos were shown, during the week after they were shown, there was an increase in anti-gay violence. The last time they had been shown, HRAG had received information about cases of violence in Hamilton (2), Auckland (6), Nelson (5), Christchurch (10), and Wellington (15). By using D'Augelli and Garnets (1995), Herek and Berrill (1992) and Whillock and Sladen (1995), I was able to show the Board the effects of negative language on LGBT people. In turn, I was able to show how this harm to LGBT people would be harmful as a whole to society, and thus be injurious to the public good (HRAG, 1997d: 7-10).

Using the example of the Board's (1997a: 11-13) decision on the Vegas Girl Billboard regarding the definitions of degrading, demeaning, and dehumanising, and how the phrase "any person" must mean any reasonable person, not a particular individual, I attempted to show that LGBT people are reasonable people, from many areas of society and walks of life, representing every facet of the society of which they are part. Being members of the greater society, a cross section of, and sharing the same values of, with wider society and found in nearly all levels of strata in that society, we believe the Board can only find that these groups are indeed reasonable persons

(HRAG, 1997d: 12).

In regard to issues affecting freedom of expression, I submitted that while proponents of the videos claimed that banning the videos would impinge on their freedom of expression, they were already preventing freedom of expression during the meetings these videos were shown. I pointed out that there were several parts of each video that would be classed as defamatory if said about one person, and questioned whether it is acceptable to defame a group of people in such a way as to subject them to an increase in violence. I made the claim that there are therefore two considerations to be taken into account, the freedom of expression, or the freedom from discrimination, and the violence engendered by that discrimination. I pointed out that ss61-63 and 131 HRA

already limited freedom of expression in New Zealand as it was not acceptable to defame groups of people on the basis for their race, colour, or ethnicity, and that it was not acceptable to sexually harass someone. Given these precedents in New Zealand legislation, and the limitations on freedom of expression elsewhere in the world to protect people on the basis of a group identity, HRAG believed

that a person's right to live free from discrimination, harassment, and violence is paramount above the right to freedom of expression

(HRAG, 1997d: 18).

The Board made its decision and this was published on 19 December 1997, with little time to react before the Christmas break. The decision included both videos in one, rather than two decisions. In its summary, the Board (1997b: 12-15) stated:

... the videos argue that a homosexual orientation is responsible for the spread of HIV, and that sexual orientation should not be a legally prohibited ground of discrimination. The second opinion, one that is contained in *Gay Rights/Special Rights Inside the Homosexual Agenda*, is of course largely redundant in New Zealand where the rights condemned by the makers of that video are already enshrined in the Human Rights Act 1993. Advocacy of an opinion, no matter how offensive the opinion is, ought not to be the subject of censorship. These videos however go beyond mere advocacy of an opinion. They contain opinion based on misinformation of the nature described above, which is targeted by s. 3(3)(e) of the Act, and which by definition is of special importance to the Board in deciding whether or not the availability of these videos is likely to be injurious to the public good.

The inclusion of s. 3(3)(e) into censorship legislation indicates that it was Parliament's intention that the representation of a group of people as inherently inferior could be injurious to the public good. We have found, in the words of s. 3(3)(e) and 3(4)(a), that the dominant effect of these videos is to represent that those people who are living with HIV and those people of a homosexual orientation are inherently inferior to other members of the public by reason of those identified characteristics. Although the inclusion of s. 3(3)(e) indicates that such representation is sufficient to make the availability of a video recording likely to be injurious to the public good, the Board also finds that such representation creates consequential risks: that confidence in public health cautions could be undermined; that people

could be encouraged not to practise safer sex for fear of being identified as members of the groups portrayed as inherently inferior by the videos; and that people who do not identify as homosexual but who participate in risky sexual activity may not realise the danger to which they expose themselves. Such representation, as well, creates the risk that some people will develop or maintain attitudes, or will act in other ways, detrimental and discriminatory towards homosexuals and people living with HIV as a result of watching these videos. This is the reason why Parliament included reference to prohibited grounds of discrimination in both censorship legislation and the Bill of Rights Act.

Such inclusion is also consistent with a significant amount of academic writing on whether or not to censor expression that treats people as inherently inferior or that incites hatred towards people by reason of characteristics they possess. The best exponent of such theory is probably Mari Matsuda of the University of Hawaii who argues in 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 Mich. L. Rev. 2320 at 2323 that

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.

She goes on to argue at 2375 that

Laws against dissemination of child pornography and the law of defamation and privacy are examples of areas in which the law recognises that certain forms of expression are qualitatively different from the kind of speech deserving absolute protection. The legal imagination is able to contemplate what it feels like to hear lies spread about one's professional competency, to have one's likeness used for commercial gain without consent, or to hear unwanted obscenities on the radio. When the legal mind understands that reputational interests, which are analogised to the preferred interest in property, must be balanced against first amendment [read s. 14 of the Bill of Rights Act in New Zealand] interests, it recognises the concrete reality of what happens to people who are defamed. Their lives are changed. Their standing in the community, their opportunities, their self—worth, their free enjoyment of life is limited. To see this, and yet to fail to see that the very same things happen to the victims of racist speech, is selective vision.

The selective consideration of one victim's story and not another's results in the unequal application of the law. When victims of racist speech are left to assuage

their own wounds, we burden a limited class: the traditional victims of discrimination. The application of absolutist free speech principles to hate speech, then, is a choice to burden one group with a disproportionate share of the costs of speech promotion.

It is no great stretch of a legal imagination to see that the principles underlying the regulation of racist speech are equally applicable to speech representing that homosexuals and people living with HIV are 'inherently inferior'. Indeed, Mr Parkinson's submission indicates that the reason why legal definitions of hate literature have generally made reference to race and religion is that these were the particular social evils Parliament was trying to remedy at the time. The remedies themselves are based on fundamental principles of respect for human dignity and equality, and the elimination of discrimination, both of which are relevant to discrimination on grounds of disease status and sexual orientation, both of which have now been explicitly incorporated by Parliament into s. 3(3)(e).

Although s. 3 of the Act is the provision most relevant to the classification of these videos, it cannot be read in isolation of both the Bill of Rights Act 1990 and the Human Rights Act 1993. All of the submissions either explicitly or implicitly deal with the need to find a way to balance or reconcile what appear in this case as two apparently competing interests, that is, the freedom to seek, receive and impart information and opinions of any kind in any form in s. 14 of the Bill of Rights Act 1990; and the right to freedom from discrimination in s. 19 of the Bill of Rights Act 1990. Although s. 6 of the Bill of Rights Act requires ambiguities in the Films, Videos, and Publications Classification Act 1993 to be given a meaning consistent with the rights and freedoms contained in the Bill of Rights Act 1990, it offers no guidance on which of two apparently competing rights in the Bill of Rights Act should be chosen to resolve any such ambiguity. Further, both the freedom of expression and the right to be free from discrimination can be subject to reasonable limitations which are prescribed by law and which can be demonstrably justified in a free and democratic society in terms of s. 5 of the Bill of Rights Act 1990. Both the freedom of expression and the right to be free from discrimination must also give way to a clearly contradictory statute in terms of s. 4 of the Bill of Rights Act 1990. In this respect, it is significant that Parliament, after enacting the Bill of Rights Act 1990, has explicitly incorporated as criteria to be given 'particular weight' in a censorship statute the prohibited grounds of discrimination in the Human Rights Act 1993. Parliament appears to have signalled its intention to limit the freedom of expression set out in s. 14 of the Bill of Rights Act 1990 first by enacting the Films, Videos and Publications

Classification Act 1993, and secondly by allowing the freedom of expression to be limited by reference to the prohibited grounds of discrimination in the Human Rights Act 1993. The reference to these prohibited grounds of discrimination in the Films, Videos and Publications Classification Act 1993 must also be taken as an indication that Parliament intended that the freedom of expression may be subordinated to the right to be free from discrimination if such expression falls within s. 3(3)(e) of the Act. There is, then, in the legislative scheme of the Films, Videos and Publications Classification Act 1993, the Human Rights Act 1993 and the Bill of Rights Act 1990, some indication that in a contest between the freedom of expression and the right to be free from discrimination, at least with respect to publications falling within s. 3(3)(e) of the Films, Videos and Publications Classification Act 1993, that the right to be free from discrimination should prevail.

It would therefore appear that the Board accepted the view of HRAG that freedom from discrimination, and the hatred and violence such discrimination can lead to, should be paramount, thus allowing limitations on freedom of expression. As a result of this, the Board classified the videos as Objectionable, no longer available for public or private circulation, and they believed

this classification to be a reasonable limit on the freedom of expression consistent with s. 5 of the Bill of Rights Act and consistent with Parliament's intention in incorporating the prohibited grounds of discrimination in the Human Rights Act 1993 into the Bill of Rights Act 1990 and s. 3(3)(e) of the Films, Videos and Publications Classification Act 1993

(Board of Review, 1997b: 18).

Nevertheless, there was one Board member who, while not dissenting from the decision, would have preferred to classify the videos as R18 with excisions,

and wished to record her concern that this decision should not be interpreted as precedent for suppressing mere opinion, as opposed to opinion plus misinformation of a nature that makes s. 3(3)(e) of particular importance

(Board of Review, 1997b: 18).

The members of HRAG believed we had won. Membership had been declining since the OFLC decision in November 1996. By the end of December 1997, there were only three of us left in Wellington. Four were

elsewhere in the country, three were in Australia - in Sydney and Melbourne - and three were on their OE, an unable to be contacted. Two of those who had moved from Wellington, had moved again subsequently and were also no longer able to be contacted. Because we believed we had won, and there was little else to be done at that time, we almost began to dismantle the Group, with one more event to be held in February of 1998 when two people elsewhere in the country would be in Wellington, and two from Sydney would be visiting.

Chapter 11: The High Court

Nevertheless, on 12 February 1998, HRAG received notification from John Oliver, Crown Counsel acting on behalf of the Board of Review, that the New Zealand distributor of the videos had lodged an appeal against the Board's decision. This was to be heard in the High Court in Wellington. The appeal could only be on questions of law, and their lawyers, Armstrong-Murray and Paul Cavanaugh, had assessed five such grounds:

Was the Film and Literature Board of Review ('the Board') in error in holding that the videos, because they dealt with matters pertaining to homosexual people and to the spread of sexually transmitted diseases, thereby deal with matters 'such as sex, horror, crime, cruelty, or violence' and so fall into the category of publications covered by s3(l) of the Films, Videos and Publications Classification Act 1993 ('the Act')?

The finding that is contested is to be found at page 7 of the decision, first and second paragraphs. The appellant submits that the videos do not deal with matters 'such as sex, horror, crime, cruelty, or violence' and therefore do not fall within s3(l), as publications liable to be held objectionable.

Was the Board in error in failing to properly apply the definition of 'objectionable' (s3(l)) by concluding that, because in its opinion the videos represented homosexual persons and people 'living with HIV' as inherently inferior to others (being one of the criteria to which it is directed to give particular weight under s3(3)(e) of the Act, the videos were for that reason 'likely to be injurious to the public good' in terms of s3(l).

In so concluding, the Board failed to give any independent force or effect to the words 'likely to be injurious to the public good', and in effect determined that the videos were objectionable simply because s3(3)(e) could be held to apply to them. The portions of the Board's decision so challenged, are to be found at the first complete paragraph at page 13, at page 15, lines 15-21; page 17 at lines 4-8.

Was the Board in error in failing to give any or any proper consideration to the matters listed in s3(4) which, as that subsection states: 'shall also be considered'? The only reference to s3(4) matters may be found at page 13 lines 5-8.

Was the Board in error in its application of s(3)(e) by determining that the videos, because they expressed certain views about homosexual orientation, the link between that orientation and Aids, and the political agenda of certain homosexual persons, thereby depicted homosexual persons as ‘inherently inferior’? Reference is made to the decision at page 12, commencing, line 4 to page 13, ending line 2.

Was the Board in error in failing to correctly apply the provisions of the New Zealand Bill of Rights Act 1990 to its determination and to the interpretation of s3 of the Act? The Board assumes that s3(3)(e), although directed at representations depicting persons as inherently inferior, is concerned with protecting persons from discrimination such that s3(3)(e) may thereby be taken to implement a right in the Bill of Rights and so construed as to justify suppression of opinion. Reference is made to page 15 of the decision, line 11 to line 18.

In holding that the enactment of the Act signalled an intention by Parliament to subordinate freedom of expression in s14 of the Bill of Rights (page 15, lines 11-18).

In giving insufficient importance to the affirmation of freedom of expression in s14 of the Bill of Rights in its determination.

In holding that its determination to classify both videos as objectionable was a reasonable limit on the freedom of expression consistent with s5 of the Bill of Rights, page 18, lines 12-16.

In interpreting ‘freedom of expression’ in s14 of the Bill of Rights so as to not to include an expression which is or may be injurious to the public good, page 17, line 13 to foot of page.

In purporting to give effect to s19 of the Bill of Rights to support its determination and its interpretation of the Act, even though in neither video is there evidence of any relevant discrimination against any group by any body or person subject to the Bill of Rights so that s19 therefore had no application.

In failing to give any consideration to the expression ‘injurious to the public good’ in s3(1), and in also failing to properly apply the Bill of Rights to the interpretation and application of that phrase pursuant to s6 of the Bill of Rights

(Murray & Cavanaugh, 1998: 2-6).

These were, however, re-ordered when the case went to eventually went to Court 13 October 1999, with the appellant placing Bill of Rights Act concerns

at ground 1 (formerly ground 5); the “gateway” of “such as” at ground 2 (formerly ground 1); the tests of ‘objectionable’ and injuriousness to the public at ground 3 (formerly ground 2); and cross referencing s3(4) of the Act became ground 5 (formerly ground 3). The original ground 4, on ‘inherently inferior’, was changed, and became:

Failing properly to address and apply the statutory test for ‘objectionable’ in s 3 of the Act by not having regard to the ‘extent and degree to which, and the manner in which’ the publication made (as held by the Board) representations as to homosexual persons

(Cavanaugh & Rishworth, 1999: 2).

Introducing their submissions, the appellant stated (Cavanaugh & Rishworth, 1999: 2):

This is an important case. Two videos have been classified as ‘objectionable’ and banned because of the *opinions* they are said to express on matters of values, politics, and social policy.

The Board itself acknowledges that this is the type of expression at stake: in its Decision (reported as *Re Gay Rights/Special Rights: Inside the Homosexual Agenda* (1997) 4 HRNZ 422 (p 425, lines 7 – 14)). It says that each of the videos presents an ‘opinion’ about the ‘political and social ramifications’ of claims by gay people for ‘equal rights’ and about the spread of HIV and AIDS.

In short, the case concerns expression of a type which is at the very *core* of the right to freedom of expression in s14 of the Bill of Rights; moral and political expression.

The starting point, it is submitted, is that this type of expression ought not to be banned by censors (here the Board of Film and Literature Review) unless there is the clearest mandate to do so in law.

In what follows it is submitted that there is no clear legislative mandate to ban either video. These videos clearly ought not to have been banned. Opinion on such matters is protected by the Bill of Rights.

The Board partially recognises this in its acknowledgement that *opinion* ought not ordinarily to be banned. The Board’s attempted justification of its decisions is that the videos contain ‘misinformation’ as well as opinion (p 432, line 35-41).

It is the appellant's contention, however, that what the Board terms 'misinformation' is: for the most part, simply expressions of opinions with which the Board disagrees; or a misdescription of each video's message.

Further, even if there were 'misinformation', which is vigorously contested, the position would be no different. Freedom of expression under the Bill of Rights is not contingent on having one's facts correct (nor, it might be added, is it contingent on the Film and Literature Review Board agreeing with one's statements).

While correct in claiming the case was important, they were incorrect in stating that the claim the videos were full of misinformation was a "misdescription" of the videos' message. There was sufficient evidence to prove that the videos were factually incorrect. To state that errors of fact are misinformation is truthful. To claim otherwise, and to make the claim the description of misinformation is a misdescription, indicates, to me at least, a degree of incredulity.

However, in the Court, the main areas of contention were ground 1 on issues around freedom of expression in s14 BORA, and the gateway test: whether or not the videos came under the rubric of "such as sex, horror, crime, cruelty or violence", contained in Ground 2. Comment was also made by counsel for the appellant about the "apparent" misinformation, indicating the videos contained no misinformation, but fact.

There are no specific limitations on freedom of expression in s14 BORA, unlike those contained in the ICCPR, reference to which is contained in the full title of BORA (emphasis added):

An Act—

To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights

The ICCPR does, however, at Article 19(3) provide limitations on freedom of expression, and therefore these should be classed as ‘justifiable limitations’ under s5 BORA. This Article states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- i. For respect of the rights or reputations of others;
- ii. For the protection of national security or of public order (*ordre public*), or of public health or morals.

The prevention of discrimination and violence, thus ensuring the safety of citizens, should, I believe, meet the requirements of protecting the public order and public health, and thus would be, in my opinion, a justifiable limitation.

Under their section on BORA, they stated that:

Section 5 of the Bill of Rights recognises that rights may be reasonably limited to such extent as is ‘demonstrably justified in a free and democratic society’. But the censorship decisions here impose more than a reasonable limit. Opinions on matter of morality and social policy ought not to be suppressed in a free and democratic society. Even if it can be said that there are factual errors leading to the expression of the opinion, that is immaterial.

In short, the ultimate question on the appeal is ‘has this decision resulted in a restriction of freedom of expression that is not justifiable as a reasonable limit in a free and democratic society?’ If it has so resulted, then it is not a decision authorised by s3

(Cavanaugh & Richfield, 1999: 4-5).

While I agree that most opinions on social policy should be able to be expressed, and not restricted, there are limitations to that freedom where questions of social policy and morality endanger the well being of groups of people in society. If there were no such limitations, then it would be acceptable to allow discussions about bomb making, to call for the death of unbelievers, or at least those who do not believe in the same deity as you, and to openly advocate for the persecution of groups of groups in society, etc. All of these are questions of social policy and morality, yet are restricted in one way or another.

Furthermore, freedom of expression is indeed limited in various ways, not least of which is defamation. The messages behind these videos are that gay men spread disease, are paedophiles seeking children, and are not worthy of the same rights as everyone else. To state that, in the manner of these videos, about an individual, would lead to charges of defamation. If one claims that “X is Y” or “X does Y”, and Y is false, one may have to pay damages for defamation, because it does not meet the standard of truth required to defend defamation charges in New Zealand courts. However, if you say “In my opinion, X is ...” or “In my opinion, X does ...” and complete this with “and I believe that opinion to be honest”, and even back it up with some form of evidence, although you are not required to prove every opinion, then, at most, you may be required to publish an apology.

Although counsel for the appellant claims the videos are opinion, not once in either of them does the word “opinion” appear. Throughout the videos, when LGBT people are accused of something, it appears as “homosexuals are ...” or “homosexuals do ...”, and uses the language of absolutes. It never says “in our opinion, homosexuals are ...”, or “in our opinion, homosexuals do ...”.

Because of the mass of misinformation and factual errors in the videos, if defamation of groups were allowed in New Zealand, I believe there may be a good case against these videos. Furthermore, the videos present this absolutist term in respect to information that is not factual. During the hearing, Heron J requested Counsel for HRAG to provide a list of the misinformation within the video. On 13 December, a memorandum was filed that contained examples of 41 items of misinformation in respect to *GR/SR*, and 56 items of misinformation in respect to *AWYHBT*.

Upon the Introduction of a Bill, the Attorney General is required to report to Parliament if there are any inconsistencies between the introduced Bill and BORA. Such a report is a section 7 report. Counsel for the appellant claimed:

There is, however, no reason to conclude that Parliament intended the Films, Videos and Publications Classification Act 1993 to authorise individual censorship decisions that are inconsistent with the Bill of Rights. This is because:

There was no report by the Attorney-General under s7 of the Bill of Rights when the Films, Videos and Publications Classification Act 1993 was introduced as a bill. Nor is there any mention in Hansard that the legislature saw itself as overriding freedom of expression in the Bill of Rights

(Cavanaugh and Rishworth, 1999: 7).

Yet this claim is false. Upon the introduction of the FVPCB, the Attorney General, Paul East, reported to Parliament as required under BORA:

As the House knows, one of my responsibilities under section 7 of the New Zealand Bill of Rights Act 1990, is to advise the House on the introduction of any Government Bill when any provision of the Bill appears to be inconsistent with any of the rights and freedoms contained in the Bill of Rights 1990.

Clause 121 of the Bill makes it an offence to for any person to possess an 'objectionable' publication. That expression is contained within clause 3 of the Bill and encompasses both depictions that are objectionable in themselves and objectionable when considered against the criteria and balancing factors listed in the clause.

An obvious feature of the clause is that the publication possessed by a defendant may not have been classified as objectionable at the date on which it was found in that person's possession. If the nature of the publication is disputed, the publication will be referred to the classification office for a decision on whether or not it is objectionable. If it is found to be objectionable, the offence of possession of an objectionable publication will be established – although the publication had not been found to be objectionable at the date, or dates to which the possession charge relates. That is the consequence of clause 121, which does not confine the offence to publications classified as 'objectionable'.

Although it is not free from any doubt, it is my opinion that it would be inconsistent with the purpose and scope of clause 121 to confine the possession offence to classified material. The provision relates to the possession of both material that is classified and material that has yet to be classified. Accordingly, there is nothing in section 6 of the Bill of Rights 1990, which requires a court, where possible, to interpret an enactment in a way consistent with the Bill of Rights 1990, can apply. One cannot interpret that provision in a way that will allow it to conform with the New Zealand Bill of Rights Act 1990.

... Accordingly, pursuant to section 7 of the Bill of Rights Act 1990, I report to the House that clause 121 of the Films, Videos and Publications Classification Bill is inconsistent with the Bill of Rights 1990

(Hansard, 1992a: 12764-65).

Butler and Butler (2005: 204) also state that a section 7 report was done for the Films, Videos and Publications Classification Bill. The problem which arises is that it is not a mandatory report, but only where, in the opinion of the Attorney General, a Bill, as introduced to the House, is inconsistent with BORA that a report need be done (Butler & Butler, 2005: 199). Furthermore, until 1995, a report need only be a statement in the House, as was done in this case, or partly by statement and partly by written report (Butler & Butler, 2005: 202). It is therefore clear that, according to the standards of the time, an Attorney General's report was completed on the FVPCB, contrary to the claim made by the appellant's counsel.

Counsel for the appellant continued their claim under s14 BORA indicating there had been no discussion of s3 of the FVPCB during the Parliamentary debates:

It is not merely possible, it is mandatory to interpret and apply s3 so that it does not extend to legitimate a censorship decision that is inconsistent with s 14 of the Bill of Rights. Only if s3 were taken to expressly, or by necessary implication, override the Bill of Rights could such a decision be made.

Plainly s3 does not expressly override the Bill of Rights. Nor does it implicitly do so. The reasons it cannot be read as implicitly doing so are the same as set out above: that it was not seen by the Attorney – General or the House as doing so, and that s 6 militates against all but necessary implications. No implication that the Bill of Rights is overridden is necessary here

(Cavanaugh & Rishworth, 1999: 7-8).

Yet Parliament had considered s3, then clause 3, of the Bill. Jenny Shipley, then Minister of Social Welfare, who introduced the Bill on behalf of the Minister of Justice, stated:

In relation to the new classification criteria, one of the most important features of the Bill is clause 3, which explicitly outlines the type of material that will be prohibited or restricted. ... The decision to prohibit or restrict the availability of any publication is a serious matter. The Bill proposes that a decision be made according to a uniform set of statutory criteria. The decision to prohibit a publication turns on whether that publication is objectionable. The term 'objectionable' replaces the term 'indecent', which is used currently in both the Indecent Publications Act and the Video Recordings Act. For the purposes of the Bill, clause 3(1) provides that 'a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters of sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good

(Hansard, 1992a: 12759).

Discussion of clauses 3(2), 3(3) and 3(4) occurs stating that the Bill is to employ the "contextual" to censorship matters. In relation to subclause 3(3), Shipley states:

I will mention briefly some factors that now must be given special weight or attention in subclause (3). For example, subclause (3)(a) deals with material that describes or depicts a range of extreme violent behaviours. Subclause (3)(b) deals with the exploitation of nudity of children or young people. Subclause (3)(e) relates to material that represents, either directly or by implication, members of the public by reason of their colour, race – ethnic or national origin – sex, physical or intellectual capacity, or religious beliefs of members of those classes. In summary, the Bill retains useful features of existing law but builds upon them to provide classification authorities with much clearer, firmer, and more workable guidelines

(Hansard, 1992a: 12760).

From the remaining Hansard records, it is clear that Parliament, not just government, intended that material classed as objectionable was to be banned, and that material not classed as objectionable could be restricted. It is therefore very clear that Parliament knew, and intended, that this Bill was to be a justifiable limitation on the freedom of expression allowed under s14 BORA. Furthermore, in subsequent discussions with Dalziel and O'Regan, they have both said that Parliament as a whole know that they were dealing with censorship of materials, that this necessarily meant a limitation on freedom of

expression, and was therefore a justifiable limitation (Personal communications, 1999-2006).

Counsel for the Board stated in reply to the appellants claims:

In *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, the High Court dealt with the issue of balancing the right to freedom of expression with other freedoms and rights affirmed in the Bill of Rights Act 1990. The Court indicated that freedom of expression is intrinsically limited in certain ways.

The High Court held at page 59 that:

What is guaranteed in freedom of expression is the right to everyone to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community. But some forms of expression are not within that guarantee.

The Court then went on to hold that the right to freedom of expression did not outweigh the right to a fair and impartial trial under s 25 of the Bill of Rights Act. The Court held that the right to freedom of expression is qualified by the necessity to preserve and protect fundamental elements in the jury system such as the finality of the verdict, the preservation of frankness and deliberation and the privacy of jurors. In determining this limitation of right to freedom of expression the Court had regard to the tests for reasonable limitations prescribed by law (under s 5 of the New Zealand Bill of Rights Act) as laid out by the Canadian and New Zealand jurisprudence

(Oliver, 1999: 24).

The effect of that, and other judgements, legislation, and regulations made under legislation, is that freedom of expression is not absolute, and there are limitations upon it in many different ways. Counsel for HRAG (Chauvel, 1999a: 2-11) expanded on these, and upon the apparent clash between the right to freedom from discrimination, and the hatred and violence that may cause, and the right to freedom of expression, as discussed above during the hearing of the Film and Literature Board of Review. As a result, they concluded (Chauvel, 1999a: 11):

In its legislative context, the Parliamentary intention that FVPCA form part of a raft of measures to better enhance New Zealand's anti-discrimination laws, and to protect those particularly vulnerable to discrimination from its ill-effects discrimination, is clear.

The statutory framework is internationally unique, and

Means that foreign and pre-1993 domestic authority can only be applied to the extent permitted by the August 1993 changes; and

Means that, in this country, fundamental principles of legality must be taken to include at their heart the freedom from illegitimate discrimination, or the oft inevitable effect thereof: illegitimate denigration; and

Means that the decision of the Board is therefore particularly apt.

In reply, counsel for the appellant stated:

The appellant's case is, it follows, not a complaint about what Parliament has done. It is a complaint that the Board in this case has made a decision in respect of each video that breaches s 14 of the Bill of Rights, and that there is nothing in s 3(1) and (3) of the Films Act that mandates or even permits a decision that breaches rights in the Bill of Rights. The section permits reasonable limits on freedom of expression, not unreasonable ones. If Parliament had intended it to permit unreasonable limits, we could have expected it to say so (or the Attorney-General to have reported that it was doing so).

It is explicit in the Respondent's and the Board's submissions that one should approach this as a case where rights are in conflict and to decide which should 'prevail'. It is respectfully submitted that this is the wrong approach. It is important to be clear about the rights involved:

The New Zealand state through the Board is restricting not only the appellant's freedom of expression but that of all New Zealanders to receive it: note s 14 expressly extends to the right 'to receive and impart information'.

The state is not discriminating against the Respondents, or anyone else.

Nor even do the videos discriminate, since they cannot by themselves actually do anything. They are simply watched.

Even if, contrary to fact and common understanding, a video could 'discriminate', the resulting 'discrimination' would be perpetrated by the video-maker or its importer. It would not be a case of the state discriminating against the affected

group of persons. (And the Bill of Rights gives rights only against the state and public actors.)

Rather, the point is that Parliament has accepted that publications might need restriction or banning in order to protect groups of citizens from being depicted by other citizens as inherently inferior, and to prevent those ideas from taking root and causing harm. (Note that this is not restricted to minority groups: after all, every person has a race, a sex, a political opinion, a sexual orientation).

When it comes to justifying as 'reasonable' the limits that s3 places on freedom of expression, its purpose – of preventing harm that may be wrought by private actors – is significant. The protection of people from depictions that infringe s 3(3)(e) is a statutory reason for limiting freedom of expression.

The appellant accepts all the above. But the point is simply this: there is no clash of rights in the Bill of Rights. S19 (rights against discrimination) is not implicated at all: the state is not doing any discriminating here. Rather, the state (through the Films Act) is limiting freedom of expression so as to promote equality and seek to prevent private acts of discrimination in the future.

All this is to say that the Board's predecessor, the Indecent Publications Tribunal, had this point correct when, in *Re Exposing the AIDS Scandal*, it said (in a passage that the Board actually quotes in its Decision) that freedom of expression and freedom from discrimination do not collide but 'career past each other' because a publication itself cannot discriminate

(Rishworth, 1999: 10-12).

While a publication itself cannot discriminate, it can incite discrimination, hatred, and violence towards a particular group in society – this is what Parliament had decided in enacting s3(3)(e) FVPCA and ss61-63 and 131 HRA. S19 BORA, while affecting public discrimination by government bodies, was not intended to affect private bodies. Nevertheless, section 21 HRA does affect private bodies, and both BORA and the FVPCB were amended due to the passage of the HRA to include, among other things, sexual orientation.

Furthermore, if, under s3 BORA, public bodies cannot discriminate against a person on the basis of their sexual orientation under s19 BORA, then the Board would have been remiss in its actions if it had turned a blind eye to issues of sexual orientation, as the Board itself is a public body that has to abide by the requirements of BORA. Butler and Butler (2005: 94) indicate the Court of Appeal regarded the Board to be covered by s3 BORA, and in accordance with *Re J (an infant): B and B v Director General of Social Welfare* [1996] 2NZLR 134, 146 (CA) (in Butler & Butler, 2005: 124-125), the Board would have had to take the effects of private acts into account, including private discrimination. However, as Butler and Butler indicate (2005: 125) the Court of Appeal, rather than taking this precedence into account, made an ad hoc decision contrary to, and without reference to, the earlier decision in *Re J*.

The other main ground of appeal, the “gateway” of “matters such as sex, horror, crime, cruelty or violence”, counsel for the appellant submitted that:

The expression ‘such as’ in s 3(l) is designed to extend the reach of the ‘objectionable’ concept to publications which are not about ‘sex, horror, crime, cruelty or violence’. Plainly, however, the words are words of limitation: they cut down the total field of all publications and limit it to those publications which are ejusdem generis with the previous words.

It is submitted, first, that the Gay Rights Special Rights Video cannot be characterised as being about sex, nor about a matter ‘such as’ sex. The video is about politics; it is an argument against law reform proposals. The accident that the law reform proposals are advanced by and relate to the interests of members of a group distinguished by a particular sexual orientation cannot convert the publication into one that ‘describes, depicts or otherwise deals with’ matters ‘such as’ sex,

Construed ejusdem generis with sex, horror etc the words ‘matters such as’ must be taken to extend only to publications that appeal to some prurient (sex) or illegitimate and potentially harmful interest (horror, crime, violence: cruelty): an example would be a publication that deals with bomb-making or drug production. These may do so in a manner that is not caught by the word ‘crime’ or ‘violence’, and yet be capable of being injurious to the public good.

The harm wrought by including the Gay Rights / Special Rights video within s 3 is this. It effectively elevates the Films Act into a means for censoring political debate about matters to do with sexual orientation. The superficial link between sexual orientation and sex is taken to confer jurisdiction on the censors. This is an odd result, since a publication made, say, by a gay organisation that cast aspersions on religious persons (by, say, implying they were all bigoted and thereby inherently inferior) would not be similarly susceptible to banning. Being about religious persons, it could not be said to depict or describe a matter such as sex, nor anything else in s 3.

The Board's approach, therefore, exposes to potential censorship anything that is adverse to the gay and lesbian community, on the grounds that the arguments made against their positions depict them as inherently inferior, while not similarly catching arguments made about other groups. This is viewpoint discrimination of the type struck down by the Supreme Court of the United States in *R A V v City of St Paul* 120 L Ed 2d 305 (1992) where it was said (p 323) there can be 'no authority to licence one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules'.

If there is an alternative way of reading s 3(l) it should therefore be so read. There is an alternative way: 'such as' means matters like sex and horror etc, which appeal to prurient interest or deal with seriously illegal or violent themes.

A similar argument may be made about the AIDS video although admittedly the connection between sex and the asexual practices spoken of the video is a little more real. Even so, the AIDS video is about the public health dangers of AIDS, and the claimed illegitimacy of the homosexual lifestyle, and so the submissions above can equally be made with respect to the AIDS video

(Cavanaugh & Rishworth, 1999: 35-36).

In reply, Counsel for the Board said:

The Board set out s 3(1) in full and then concludes that although the videos do not strictly speaking depict 'sex, horror, crime, cruelty or violence' the definition is inclusive but qualified by the final phrase 'injurious to the public good'.

In reaching this conclusion, the Board referred to *Collector of Customs v Lawrence Publishing Company Limited* [1986] 1 NZLR 404 where the Court of Appeal, in looking at the definition of indecency under the Indecent Publications Act 1963, concluded

that matters other than sex, horror, crime, cruelty and violence were included within that definition but those other things had to be injurious to the public good in order to be banned. The Board held that in dealing with a sexually transmitted virus and with matters of sexuality, the videos deal with matters 'such as' sex, and consequently fall within s 3(1)

(Oliver, 1999: 15-16).

In addition to this, counsel for HRAG, Charles Chauvel, said:

There is no doubt, then, that Parliament intended to permit the broad and inclusive definition adopted by the Board. Did such doubt exist, *Hansard* assists to dispel it. The Hon. Graeme Lee, Minister of Internal Affairs at the time of the enactment of FVPCA stated:

... I must assure the house that whilst a list of material that is automatically prohibited is not exhaustive – nor is it intended to be – the classification office can determine that a publication is objectionable for reasons other than those listed (Hansard, 1993: 17063).

The then Minister of Justice, Hon. Doug Graham, added that:

the inclusion of the words 'such as' in clause 3(1) ensures that the definition of the matters likely to be considered harmful is not closed off. That is important, because the legislation must have the flexibility to accommodate changing social perceptions. In summary, the Bill manifests a clear intention to strengthen the censorship laws, and gives censors the tools to carry out that task... (Hansard, 1993: 17052).

It should also be noted that in its decision in *Toonen vs the State of Tasmania*, the United Nations Human Rights Committee held that the word 'sex' included, in the context of the International Covenant on Civil and Political Rights (ICCPR), and for the purpose of the protection of human rights and the prevention of discrimination, 'sexual orientation'.

The videotapes '*AIDS: what you haven't been told*' (AWYHBT) and '*Gay Rights/Special Rights: Inside the homosexual Agenda*' (GRSR) attempt to link certain types of sexual behaviour and the spread of sexually transmitted diseases.

The Appellant's description of the videotape GRSR as a videotape 'about politics' is, with respect, far too general. Airing and discussion of arguments against certain law reform proposals cannot take place unless the substance of and issues contained in those proposals are similarly aired and discussed. It is no 'accident' that the

proposals 'relate' to matters of sexual orientation. On the contrary, such matters go to the heart of the proposals. This is simply not a video about politics generally, or wholly about politics to the exclusion of other matters.

Moreover, in discussing homosexual persons, the videotapes make direct links between a person's sexual orientation and their sexual behaviour. Examples include:

*'no one should have special rights or privileges or minority status **because of their sexual behaviour**'* (Ralph Reed, transcript *GRSR*, p14, ll 4-7).

*'Our intent is to see that ... every one being treated fair and equal, and they are being treated fair under the law as a citizen of America, but **their behaviour** should not dictate special preference for them'* (Cheryl Coleman, transcript *GRSR*, pp 14-15, ll 32-4).

*'... it's bad law to codify into public policy a special protection based on nothing other than **what you do in the privacy of your own bedroom**,* (Ralph Reed, transcript *GRSR*, p15, ll 9-12).

*'To most people when they think about homosexuals, as pictured in the media, its ... two guys, ... who simply have a very deep affection for each other. They wanna be partners through life ... to help each other financially and so on. The national media does not tell us anything about the abhorrence of these people. **The ingestion of faeces, they engage in such things as the anal intercourse, they engages in such things that known's as fisting**, in which one person takes his fist and inserts it into the anus of the other person'* (Marlin Maddoux, transcript *GRSR*, pp44-45, ll 7-16; 31-2).

*'The ingestion of urine, urinating on one another it's called golden showers; they do rimming, where they lick one another's rectums. These are things that are going on, **and it's all part of the behaviour disorder that goes along with homosexuality**'* (Cathy Kay, transcript *GRSR*, p45, ll 7-13).

*'**A moderately active homosexual** can average thirty to fifty different sexual partners a year'* (Commentator, transcript *AWYHBT*, p16, ll 16-19).

*'The homosexual movement, and **they're practising homosexuality** if they believe in that'* (Judith Reisman, transcript *AWYHBT*, p23, ll 28-30).

(Emphasis added in all cases.)

Throughout the videotapes *AWYHBT* it is sexual behaviour, specifically homosexual sexual behaviour, that is discussed. By linking sexual orientation with sexual behaviour, it is clear that the makers of this videotape, and *GRSR*, are not merely

dealing with sexual orientation as defined in the Human Rights Act 1993. It is therefore equally clear that because these publications deal with 'matters pertaining to homosexual people', and also because these publications deal with matters pertaining to 'the spread of sexually transmitted diseases', that these videos deal with matters 'such as' sex

(Chauvel, 1999a: 4-7).

It was believed, therefore, that due to earlier IPT and court decisions, the videos did indeed deal with sex because they discussed sexual behaviour in detail, and dealt specifically with sexual orientation, with the relevant decision of the UNHRC in *Toonen*. As stated earlier BORA was enacted to give force to the rights contained in the ICCPR, under which *Toonen* was decided.

In response, the counsel for the appellant stated:

Mr Chauvel deals with this at paras 5 to 15. There is nothing in paras 5 to 11 of the Respondent's submission with which the Appellant would disagree. Plainly, the words 'such as' appear in s 3 and must be given meaning. In the end the question is simply whether each video can be said to deal with matters 'such as sex'. That is where the parties differ.

It is worth noting that the underlying vision of s3(1), when linked with s 3(3)(e), is difficult to discern. It seems odd that virulent disparagement of persons on account of their race or religion will escape the impact of s3(3)(e) because it could be accomplished without dealing with matters 'such as sex, horror', etc. Conversely, on the Board's argument in its Decision and in Mr Chauvel's submission, when gay or lesbian persons are the subject of criticism then s 3(3)(e) potentially comes into play, simply because of the suggested link between 'sexual orientation' (which defines those groups) and the words 'matters such as sex' etc .

The appellant's argument, however, was that the fortuitous coextensiveness between the words 'such as sex' in s 3(1) and the inclusion of 'sexual orientation' in s 3(3)(e) ought not to lead to a simplistic conclusion that any publication about gay people is about sex or a matter 'such as' sex. Rather, the AIDS video is about public morality, and about public policy on health in light of the AIDS epidemic. The Gay Rights video is about law reform proposals.

A rigorous inquiry into whether s 3 properly extends to the publications in question is vital if we are to avoid a situation where one side of debates about morality and policy runs the risk of censorship (as here) while the other does not.

A word is necessary about *Toonen v Australia* case decided by the Human Rights Committee of the United Nations (referred to in para 10 of Respondent's submissions). It is one thing to say, as the Committee did, that 'sex' includes sexual orientation for the purposes of a list of prohibited grounds of discrimination. It is quite another to extend that observation so as to suggest that for all purposes 'sex' includes sexual orientation, wherever and whenever it appears in legislation. In s3 of the Films Act the reference to 'sex' is a plain reference to visual or literary depictions of sexual acts and sexual organs, not to sex as an abstraction nor even as a synonym for gender.

In any event, the Board's decision was not that sex included sexual orientation, but that the videos depicted matters 'such as' sex. It is that assertion that the Appellant challenges. The videos do not deal with matters such as sex, but with politics, public health and morality

(Rishworth, 1999: 12).

On 1 March 2000, Heron and Durie JJ issued their decision. In respect to the gateway issue, they stated:

Dealing with the second ground of appeal first, there are two questions, whether the videos deal with sex as such and whether the videos deal with some other topic within the ambit of S.3. As to the first, sex is defined in the Shorter Oxford Dictionary as including '*Physical contact between individuals involving sexual stimulation of the genitals, sexual intercourse, spec. copulation, coitus.*' The appellant argued that the videos dealt only peripherally with sexual matters, being more to do with the politics of persons of certain sexual orientation, and accordingly that the definition contained in S.3(1) did not apply to them. While there is certainly a focus on a perceived homosexual agenda nonetheless homosexual sex is dealt with. The question is not whether this is central or marginal to the overall discourse but whether it forms part. It does, and that appears to us to satisfy the jurisdictional point, though whether it is dealt with in an objectionable way is another matter.

However as the Board's primary finding relates to the impact of the videos on a class of persons defined by sexual orientation the more pertinent question is whether the impact of publication on such a class is within the section's purview. The use of the

words 'such as' suggests the generality of the approach and the possibility of a publication which referred to none of the specified items still being the subject of classification as objectionable. Indeed the inclusion of references to s.21(1) of the Human Rights Act 1993: resupposes that some publications could avoid references to any of the matters which are used by way of illustration in s.3(1) and still be determined as objectionable and within the jurisdiction of the Board. The list may thus be added to but the reference to s.21(1) more explicitly justifies the inclusion of the topic of sexual orientation, as it does for race and gender. Again the manner in which sexual orientation is dealt with, and whether it is in fact objectionable on that ground, is a separate issue

(AP26/98, 2000: 6).

In respect to BORA, they indicated that the Board of Review had indeed given lengthy consideration of s14 BORA in respect to freedom of expression (AP26/98, 2000: 7-15). As a result, they dismissed the appeal, without awarding costs (AP26/98, 2000: 16).

This time, we did not relax, though there were only three members of HRAG left in Wellington. On 24 March, counsel for LWD lodged an appeal with the Court of Appeal.

Chapter 12: The Court of Appeal

When the papers were lodged with the Court of Appeal there were originally 11 grounds of appeal, including (1) a breach of the appellant's right to freedom of expression, (2) the Board is a specialist tribunal that the High Court has to defer to, (3) the Board did not take into account the BORA issues as held by the Court of Appeal in *Moonen v Film and Literature Board of Review* CA 42/99 of 17 December 1999, (4) the Board was wrong to classify opinion as objectionable even if it was misinformation, (5) the Board was wrong in claiming the videos contained misinformation, (6) the High Court was wrong in saying the Board interpreted the videos correctly, (7) the gateway of 'such as sex, horror, cruelty crime or violence', (8) issues of HIV/AIDS are not sex, (9) s3(4) FVPCA were not properly considered, (10) the High Court did not consider freedom of expression when considering whether the videos treated LGBT people as inherently inferior, and (11) the High Court and the Board were wrong in considering the videos treated LGBT people as inherently inferior to others.

Counsel for HRAG, and the remaining members, found it unusual that the appellant's counsel included reference to *Moonen v Film and Literature Board of Review* (CA 42/99 [1999], of 17 December 1999, henceforth, *Moonen*) claiming the Board had not taken it into account, as that case was not decided until almost two years after the Board had issued its decision. Although Heron and Durie JJ had not completed their decision on the High Court appeal, it is likely they would have been unable to take it into account as oral submissions to the court had been completed in October 1999, and none of these had addressed a case that had not yet been decided.

Realising the importance of this case in respect to freedom from discrimination, the effects on freedom of expression, and other issues, the Attorney General, the HRC and Race Relations Conciliator, the NZAF, and the New Zealand Council for Civil Liberties (NZCCL) all applied to be intervenors in the hearing by 20 May.

By the time the appellant's submissions were made, the eleven grounds had shrunk to five:

1. The gateway issue of 'such as sex, horror, cruelty crime or violence';
2. The High Court was wrong to defer the description and the assessment of the videos given by the Film and Literature Board of Review;
3. That the Film and Literature Board of Review had erred in failing to properly apply the requirement of the New Zealand Bill of Rights Act 1990 to freedom of expression (as provided by *Moonen v Film and Literature Board of Review* CA 42/99 of 17 December 1999);
4. That the Film and Literature Board of Review had erred in failing to properly apply s14 of the New Zealand Bill of Rights Act 1990 in holding that the videos contained misinformation, and through misdescribing the scenes from and opinions in the videos; and
5. The Film and Literature Board of Review had failed to give due consideration to section 3(4) of the Films, Videos and Publications Classification Act 1993
(Rishworth & McKenzie, 2000: 5-6).

After considerable discussion of the decisions of the Film and Literature Board of Review and the High Court, Counsel for the appellant concluded that:

The words 'such as' maybe [sic] read as linking the word 'matters' with the five categories that follow so as to indicate that matters which as ejusdem generis or closely resemble those categories are included within the meaning of the word 'objectionable'. Read in this way, 'such as' can be sensibly read as being designed to extend the reach of the 'objectionable' concept in publications which are not about 'sex, horror, crime, cruelty or violence' but are intended to be words of limitation. They cut down the total field of all publications and limit it to those publications that are ejusdem generis with those categories.

This interpretation of the section gives proper meaning and content to the five categories referred to, and also provides some sensible reason for Parliament having replaced the word 'includes' by the words 'such as'.

It is submitted that when s3(1) is read in this way it cannot properly be regarded as covering either of the videos which are subject to appeal. To come within the meaning of objectionable the reference to the item 'sex' in s3(1) must carry with it features which also render horror, crime, cruelty or violence objectionable. It is not every dealing with sex or treatment of a sexual theme which renders a publication

objectionable. It is submitted that the common feature which the treatment of sex may have with these objectionable items is a treatment which bypasses any rational approach and makes a debased appeal to the emotions; for example a masochistic delight in causing pain in the case of cruelty and in the case of sex a prurient or salacious interest which debases the sexual object.

There is nothing of that sort in either video. The Gay Rights video is primarily concerned with the politics of the 'gay movement' and whether sexual orientation should be included as a prohibited ground of discrimination. The AIDS video is primarily directed to the sexual health implications of the homosexual lifestyle in relation to the AIDS epidemic. Neither video can be said to deal with sex or sexually related issues in a prurient or salacious way. That is simply not the videos' point

(Rishworth & McKenzie, 2000: 12-13).

They argued therefore that in order to get through the gateway of sex, horror, crime, cruelty or violence, it must be *ejusdem generis*, or of the same kind, not merely a discussion about any one of the gateways, but an active portrayal of one or more of them. Their second argument was based on the decision in *Moonen*. The important part of that decision was that before something can be classed as objectionable, it must effectively be the worst of its kind in order to overcome freedom of expression. Anything lesser may be restricted, but cannot be banned (*Moonen*). There are, I believe, a number of problems that presents. However, as noted above, *Moonen* had not been decided at the conclusion of the High Court case, let alone when the Board made its decision in December 1997. Nevertheless, counsel for the appellant stated:

The Board's error is understandable in view of the timing (this case was decided by the Board two years before *Moonen*) but is error nonetheless. Further, for reasons advanced below, it is a more serious error. That failure is *all the more significant* because this case was not about s3(2) – which concerns child pornography and other essentially criminal activities, and where the Board's discretion is justly circumscribed. Rather, this case is about subsections 3(1), (3) and (4) in the context of the expression of *opinions on controversial moral and political matters*.

The High Court felt able to conclude that the approach prescribed in *Moonen* had in fact been observed by the Board in this case. The Court rested that conclusion on

the following passage. It will be submitted, however, that, far from signifying compliance with *Moonen*, this passage is completely at odds with it.

...

Moonen required the BOR to be *applied* to the FVPA when making decisions. It is not merely enough to *mention* it.

This means, first and foremost that the *manner of its impact* must be properly articulated. In *Moonen*, the relevant impact of the BOR was on the words in s3(2) – ‘promotes or supports’. Similarly, the Court made this requirement – of identifying possible meanings of enactments – plain in paras 16, 17 and 18 of *Moonen* (setting out general instructions on how to apply to BOR in statutory interpretation cases).

This was never properly done by the Board here. Indeed, it’s BOR discussion appears to be directed at a different end – to explain why, in the Board’s view, freedom of expression was not an issue at all. Even on its own terms, that discussion is flawed (and that is to be dealt with shortly). But the present point is simply that the passage of the Board cited by the High Court does not amount to compliance with this Court’s directions in *Moonen*.

A proper application of s14 BOR would have identified the critical words in s3 whose interpretation and application was to be discerned in light of the BOR. And when that exercise is undertaken, it can be seen that the interpretative impact of s14 is much greater here than in *Moonen*. For *Moonen* was all about s3(2) which deems certain publications objectionable. Here, however, the Board is required to exercise a discretion about classification, and the relevant criteria set out in s3 include:

... the extent and degree to which, and the manner in which, the publication ... [s3(3)] represents (whether directly or by implication) that members of any particular class of the public are inherently inferior ... [from s3(3)(e)] in such a manner that the availability of the publication is likely to be injurious to the public good [from s3(1)].

In short, deciding this case involved at least these three points of application of the BOR. At each step, the *Moonen* methodology requires adoption of such ‘tenable meaning and application as constitutes the least possible limitation’

(Rishworth and McKenzie, 2000: 19-21, emphasis in original).

Counsel for the appellant therefore held that s14 BORA had not been applied as required. Stating that this was compounded by a second error that was contrary to *Moonen*, that the Board had subordinated s14 – freedom of expression – to s19 – freedom from discrimination – BORA 1990. If this were so, they claimed that s14 would be removed from the equation entirely, while *Moonen* states that a lawful decision made under the FVPCA requires that s14 must be applied, not merely taken into account.

Furthermore, counsel for the appellant claimed that there was no “clash” between the right to freedom from discrimination in s19 BORA, and freedom of expression provided for in s14:

It is misconceived because it is *not* a case where Government owes two rights to two separate persons, such that its obligations to each of the two persons potentially conflict and need reconciliation. Rather, Government is here restricting the freedom of expression of the *appellant*. That is what engages s14. Government is not discriminating against the respondent or gay people in general. *There is no person before the court who may claim s19 as a shield against government action*. To repeat, the only person in this case that may invoke a right in the BOR is the appellant. The appellant is the person whose freedom of expression is the subject of abrogation by Government (through the Board).

Yet the Board’s approach assumes that the rights of persons under s19 to be free of discrimination are, as it were, ‘in play’. That assumption, if examined, rests on a very complex and unarticulated chain of suppositions. At its simplest, the implicit argument appears to be that:

if the videos are shown, then ...
 some members of the public ...
 may *in the future*, ...
 develop attitudes that
 may lead to acts of discrimination ...

But these discriminatory acts, even if they were to happen, would be perpetrated by *private* persons and not by Government, and hence by persons who are not even bound by the BOR to refrain from discrimination

(Rishworth & McKenzie, 2000: 23, emphasis in original).

Yet, I believe this is incorrect. While it is true that BORA applies to Government and its activities and not to private persons, and while the bulleted points in the appellants submissions are correct to a point, their counsel has not considered the acts of violence that surrounded the showing of these videos in each centre they appeared. If the Board did not act to classify the videos as restricted in some way, the Board is complicit in allowing violence against a minority to continue. Therefore the Board is effectively saying that it is acceptable to commit acts of violence against this group but not to commit them against other groups. As Ioannis Mookas (1998: 354-355) states:

Violence is always already present in the everyday lives of lesbians and gay men; it is part of the air we breathe. ... When added to the daily circulation of homophobic messages in popular culture, *Gay Rights/Special Rights* becomes a powerful incitement to violence, too powerful for some to resist.

Any government body that encourages this violence by indicating it is acceptable, by not making any attempt to prevent it, is discriminating against the LGBT communities, and is therefore in breach of s19 BORA. As indicated by Butler and Butler (2005), the Court of Appeal held the Board to be bound by s3 BORA, and, in accordance with the Court of Appeal ruling in *Re J*, private acts endangering rights allowed under BORA can be prevented by the judiciary.

Tony Ellis, counsel for the NZCCL concentrated solely on issues of freedom of expression, pointing out the videos constitute political speech, and are historical because they precede 1990 relating to an American political debate occurring at that time, presenting a religious/moral point of view in that debate. Given that *GR/SR* was made in 1993 and contains information from both pre and post 1990, it was not 'historical' at the time the original complaints were made in 1995. Furthermore, many of the concepts and ideas put forward in that video are still being discussed openly in America, and elsewhere, today. These ideas are used by individuals, groups and governments to restrict the rights of LGBT people, to criminalise (or continue the criminalisation of) LGBT people, and to execute LGBT people.

Nevertheless, counsel for the NZCCL did state:

As Sedly LJ said recently in **Redmond-Bate v DPP** (1999) 7 BHRC 375, 382-383

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome, the provocative provided it does not tend to provoke violence. Freedom to only speak inoffensively is not worth having

(Ellis, 2000: 3).

This is, of course, true, and I would have no qualms with it because it specifically states “*provided it does not tend to provoke violence*”. It is this violence, which occurred wherever and whenever these videos were shown in New Zealand that we were trying to stop, trying to prevent. As shown above, in a very real sense, these videos provoked violence. Nevertheless, Ellis continued to hold the position that these videos are propaganda rather than hate literature, neglecting the violence that occurs against the LGBT communities on a daily basis, to which these videos add, and to which these videos contribute (Mookas, 1993: 354-355). As a result, the NZCCL took the ‘free speech is paramount’ line rather than a ‘protection from violence’ line.

Although they acknowledged that *Moonen* came after the 1999 High Court hearing on the videos, NZCCL counsel insisted that the High Court had misapplied *Moonen*. How a Court could misapply a decision that had not been made prior to the hearing? At oral submission before the Court of Appeal, at which I was present, I remember their Counsel being asked this, though he appeared to ignore it, not providing a reply.

In support of their submission, they cited Article 19 ICCPR, which deals specifically with freedom of expression and the restrictions allowable. They included a quotation from the Human Rights Committee’s decision on Faurisson (United Nations High Commissioner for Human Rights, 1996b). This entry led me to believe that if the videos were about race, ethnicity or religion, the NZCCL would have supported restrictions on the videos. The paragraph they cited was the individual decision of Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein. Evatt, Kretzmer and Klein supported the majority decision of no violation of the right to freedom of expression, and stated at paragraph 8, cited in part by Ellis (1996: 17):

The power given to States parties under article 19, paragraph 3, to place restrictions on freedom of expression, must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive. Much offensive speech may be regarded as speech that impinges on one of the values mentioned in article 19, paragraph 3 (a) or (b) (the rights or reputations of others, national security, *ordre public*, public health or morals). The Covenant therefore stipulates that the purpose of protecting one of those values is not, of itself, sufficient reason to restrict expression. The restriction must be necessary to protect the given value. This requirement of necessity implies an element of proportionality. The scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. It must not exceed that needed to protect that value. As the Committee stated in its General Comment 10, the restriction must not put the very right itself in jeopardy UNHCR.

Nevertheless, at paragraph four of their individual decision, Evatt, Kretzmer and Klein stated that incitement to certain types of discrimination was an allowable restriction on freedom of expression:

Every individual has the right to be free not only from discrimination on grounds of race, religion and national origins, but also from incitement to such discrimination. This is stated expressly in article 7 of the Universal Declaration of Human Rights. It is implicit in the obligation placed on States parties under article 20, paragraph 2, of the Covenant to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The crime for which the author was convicted under the Gayssot Act does not expressly include the element of incitement, nor do the statements which served as the basis for the conviction fall clearly within the boundaries of incitement, which the State party was bound to prohibit, in accordance with article 20, paragraph 2. *However, there may be circumstances in which the right of a person to be free from incitement to discrimination on grounds of race, religion or national origins cannot be fully protected by a narrow, explicit law on incitement that falls precisely within the boundaries of article 20, paragraph 2. This is the case where, in a particular social and historical context, statements that do not meet the strict legal criteria of incitement can be shown to constitute part of a pattern of incitement against a given racial, religious or national group, or where those interested in spreading hostility and hatred adopt sophisticated forms of speech that are not punishable under the*

law against racial incitement, even though their effect may be as pernicious as explicit incitement, if not more so

(UNHCR, 1996b: 16, emphasis added).

While Article 20 cited by Evatt, Kretzmer and Klein, deals specifically with advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,

Article 26 prohibits discrimination, and allows effective protection against discrimination,

on the basis of

race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

(UN, 1966, articles 20 and 26).

The UNHCR held, in the Toonen decision of 1994, that “sexual orientation” is included in “sex” in articles 2 (paragraph 1) and 26 ICCPR (UNHCR, 1994, paragraph 8.7). Therefore, it could be held that “effective protection against discrimination” in Article 26 would therefore allow restriction on freedom of expression in the same way Article 20 allows restrictions on freedom of expression where that expression “constitutes incitement to discrimination, hostility or violence”, given the parameters set by Evatt, Kretzmer and Klein in the paragraph above. This was not addressed in the Court of Appeal.

Counsel of the HRC, Rodney Harrison QC, stated that the HRC’s main concern was not with the videos as such or a defence of specific censorship decisions, but was

to see that New Zealand’s censorship laws are fully effective to enable censorship bodies to deal effectively with publications which incite or promote, or have a tendency to incite or promote, the kinds of discrimination which the Human Rights Act seeks to prohibit directly, and to educate the New Zealand public against

(Harrison, 2000: 1).

He also stated that s3(3)(e) FVPCA

is seen by the HRC as both supporting and having been intended by Parliament to support those aims

(Harrison, 2000: 1-2).

In reference to the gateway issue, Harrison (2000: 6-7) pointed out that rather than a mechanical approach of *if a then b* – if it qualifies under the gateway then and only then can it be considered for censorship, the law should be approached holistically. It would be entirely possible to imagine a scenario in which a publication

so seriously degraded, dehumanised or demeaned a particular person or group of persons, but without describing, depicting, or otherwise dealing with any of the matters listed in 3(1) that questions of censorship on the grounds of injury to the public good might well arise

(Harrison, 2000: 7).

Similarly, it would be possible to envision a similar scenario where a person or group of people was represented as being inherently inferior to others because of their membership of that group.

For example, the images and text in *Der ewige Jude* (Hørnshøj-Møller, 1997) do so. Although it is an offence against s131 HRA 1993 to incite racial disharmony

on the ground of the colour, race, or ethnic or national origins of that group of persons,

it is not a crime. Nor is it a crime, or even an offence, to incite disharmony against a person because of their religion. It would therefore be possible to use images and text similar to that used in *Der ewige Jude* (Hørnshøj-Møller, 1997) to legally create a publication that incited disharmony against Christians, or a particular group of Christians, or Muslims, or <name of religion here>.

In terms of the appellants ground relating to a *Moonen* analysis of the Board's decision, counsel for the HRC pointed out that *Moonen* was only about freedom of expression, and that BORA not only had "freedom to" rights, but also "freedom from" rights, including freedom from discrimination, contained in s19 (Harrison, 2000: 22-23). He contended this interplay of freedom to/from was important and in order to consider whether a limitation on freedom of expression was justifiable under law,

some analysis of the nature of the (contemporary New Zealand) society in question is justified

(Harrison, 2000: 23).

Counsel then built up the argument that restrictions on freedom of expression allowable under s3(3)(e) FVPCA

in the context of s3 of the Act as a whole [have] been developed as an expansion of earlier statutory restrictions on freedom of speech, which were particularly directed to protection from racist utterance. These protections were progressively extended to other prohibited grounds of discrimination as these became the subject of human rights legislation. While the present case is about sexual orientation as a 'characteristic', it could just as easily have been about race, or gender, for example. Because s3(3)(e) properly and inevitably draws no qualitative distinction between the various prohibited grounds of discrimination, the s5 Bill of Rights evaluation must it is submitted likewise consider the implications of any limitation on freedom of speech in the context not merely of the particular prohibited grounds in issue, but across the whole range of grounds and consequently of protected groups

(Harrison, 2000: 24).

Harrison then showed the development of restrictions on freedom of expression across a number of New Zealand laws, from the repealed Race Relations Act 1971, the Films Act 1983 and the Video Recordings Act 1987, to those contained in the current HRA 1993 and the then current Employment Contracts Act 1991 (subsequently replaced by the Employment Relations Act 2000, continuing the same restrictions contained in the earlier Act). He continued, stating that

The New Zealand tradition, therefore, is not one of invariably upholding unrestricted freedom of speech at the expense of significant injury to the reputations or indeed the feelings of others, in particular racial or minority groups. ... Freedom of speech in New Zealand is therefore not seen as an end in itself, but as a means to an end. Unrestrictive freedom of speech has not been seen as conducive to the enduring vision of New Zealand as the tolerant, mutually supportive but essentially cohesive society

(Harrison, 2000: 25-26).

Counsel for the Attorney General, Claudia Geiringer, pointed out that the Board treated the videos as dealing with matters 'such as' sex because they

dealt with sexually transmissible infections and matters of sexuality, while the High Court treated them as dealing with matters ‘such as’ sex because homosexual sex was dealt with, and because the nature of s3(3)(e),

‘more explicitly’ justifies the inclusion of ‘sexual orientation’ in the matters within s3(1)’s purview

(Geiringer & Warburton, 2000: 8).

Geiringer also urged the Court to look at other cases and documents where ‘such as’ was giving a wider reading than a purely

salacious prurient, or gratuitous nature, for example, portrayals of explicit sex and violence

(Geiringer & Warburton, 2000: 8).

These documents not only included those relating to the drafting history of the Bill, but to international documents and treaties, such as the ECHR, where the phrase ‘such as’, given in the list

on any ground such as sex, race, colour, language, religion, political or other opinion ... or other status

has

been treated as illustrative and not exhaustive (see *Engels & Ors v The Netherlands (No 1)* (1976) 1 EHRR 647, para 72, and *James v United Kingdom* (1968) 8 EHRR 123, para 123)

(Geiringer & Warburton, 2000: 9).

Counsel for the Attorney General was making it clear that a restrictive meaning for ‘such as’, allowing only the five subjects of sex, horror, crime, cruelty or violence, would be contrary to national and international developments, and the intention of Parliament.

Considering the request for a *Moonen* analysis, Geiringer and Warburton (2000: 21) stated that

The Attorney-General agrees with the appellant that there is little support for the view that regulation of hate propaganda in this context triggers a direct conflict between ss14 and 19 of the Bill of Rights. However, even if s19 is not directly triggered, it is nevertheless highly relevant to the Board’s task in that it indicates a strong legislative commitment to the ideals of equality and human dignity which also underlie s3(3)(e) of the Classification Act.

Observing that the Convention for the Elimination of Racial Discrimination, the Convention for the Elimination of Discrimination Against Women and the ICCPR all contain obligations on States party to protect vulnerable groups from discrimination and hate propaganda, counsel for the Attorney General also noted that they tended to widen and extend the reach of anti-discriminatory principles. However, the restriction on freedom of expression in relation to hate propaganda has remained restricted to race and religion Geiringer and Warburton (2000: 22). Nevertheless, statutes in various countries and states are widening that limitation to include sexual orientation and other grounds. The Anti-Discrimination Act 1977 of NSW, in particular, ss38R-38T, 49ZS-49ZTA, and 49ZXA-49ZXC, which also make vilification on transgender status, homosexuality or HIV status illegal, is a case of a near neighbour which has done so. Similarly, Queensland amended their Anti-Discrimination Act 1991 to extend the anti-vilification section in s124A and the serious vilification section in s131A to include sexuality or gender identity.

Noting that the counsel for the appellant claimed that the videos were expressing a view that homosexual sexual activity is morally wrong and sinful, when judged against the teachings of the Bible and Christianity,

Frances Joychild, counsel for the NZAF, as Intervenor, agreed that if it were so,

there can be no censorship of them

(Joychild, 2000: 4).

Nevertheless, indicating that to suggest this is *the* theme of the videos was incorrect, she submitted that there are two dominant and most injurious aspects of the videos:

The first aspect is their likeliness to create, in the mind of the viewer, strong emotions of fear, horror and repulsion against homosexuals as a class and a powerful sense of threat to the viewer from homosexuals as a class. In seeking to attain this purpose they represent homosexuals as 'other' and inferior. The potential effect is intended and calculated – despite a few words which may be to the contrary in each. The videos seek to create their effect in two ways. First by linking people of homosexual orientation to a range of repulsive and abhorrent sexual practices. Examples abound but include:

67 The ingestion of faeces, they engage in such things as anal intercourse, they engage in such things ... that's known as fisting, in which one person takes his fist and, ah, its inserted into the anus of the other person.

The ingestion of urine, urinating on one another, it's called golden showers. They do rimming where they lick on another's rectums.

68 After a while I knew this was abnormal. Twenty three year old men with colostomy bags? ... I mean everyone was gravitating towards this intense sex.

81 An unquenchable sexual desire eliminates any moral integrity.

83 A moderately active homosexual, can average thirty to fifty different sexual partners a year. ... And those homosexuals who frequent gay resorts or bath houses can be involved in sexual orgies with ten to fifteen partners a night resulting in more than five hundred sexual partners a year.

Even when referring to non sexual aspects of homosexual life, such as emotional relationships, homosexuals are disparaged and these aspects are quickly linked to claimed sexual behaviour:

107homosexuality tends to be very compulsive, whither it an emotional level and sexual, or just plain sexual level; it's very compulsive, very controlling, um, so like I say, it can range from mutual masturbation all the way up to defecating on one another.

The videos also aim to provoke fear, repulsion and horror of homosexuals, by suggesting homosexuals as a class have a callous, cynical and calculated disregard for the safety, health and rights of others and in this way representing homosexuals as of a lower class. Examples include:

85 Since March 1985 a blood test for AIDS has been available to the general public, however, many homosexuals refuse to take the test.

88 Doctors warned officials that the blood pollution was directly attributable to donations from IV drug users and homosexuals.

Nevertheless public health authorities failed to act for three reasons. First there was pressure from the homosexual community which did not want to be discriminated against ... public health officials are far more concerned with appeasing the homosexual community.

(Emphasis added)

112 Those in the infectious disease area know that homosexuality spreads hepatitis B, venereal diseases and AIDS so we cannot say that this is a normal, healthy lifestyle, not matter how active they get politically.

119 As a result of political manipulation by homosexual leaders people with AIDS who have knowingly infected other go unprosecuted while doctors who simply tell a nurse that a person has AIDS, is subject to prosecution.

126 Also represented in the lesbian and gay rights struggle is an organisation called NAMBLA. Founded in 1978 the North American Man Boy Love Association may soon change its name to include all adult sex with children ...

127 They maintain that if an adult could have sex with a child, the adult's possibility of acquiring AIDS would be greatly reduced, if not eliminated.

127 The above commentary is followed by a scene of a gay man walking on the march with a child on his shoulders with a banner saying 'Parents Flag'. Thus linking gay fathers to paedophilia.

These descriptions of extreme and offensive sexual practices impugned to homosexuals, and representations that they have gross and callous disregard of the health and safety of others appears to be aimed to work on the aforesaid emotions so as to exhort and motivate people to 'act' against homosexuals, particularly (but importantly not exclusively) to deprive *homosexuals* of equality of rights.

(Joychild, 2000: 4-6).

Noting there is one reference stating those viewing the videos should love AIDS victims as Jesus loved lepers and one indicating they are against assaulting gay men, counsel for the NZAF notes that in the above

it is significant that these fighting words have an 'open ended' quality about them

(Joychild, 2000: 6-7).

Taking the above examples into consideration, and numerous others throughout the videos, responding to the gateway claim of the appellant, Joychild stated:

Regardless of whether 3(1) is a precursor to 3(3) submitted that the test is met.

While explicit descriptions of sexual behaviour, attributed to homosexuals as a class,

are not the majority of the words in the videos they play a pivotal role in the overall thesis and purpose of the video. The descriptions of sex are a necessary part of the engendering of repulsion, shock, and fear which again are the emotions used to motivate the viewer to 'act against the homosexual agenda'.

If, contrary to this the Court views the videos as not one *describing matters such as sex, horror* then it is submitted that the videos come within the wider ambit of the words *matters such as*. The words were deliberately inserted *so as not to close off the definition of matters likely to be considered harmful* and so as to *accommodate changing social perceptions*.

The presence of 3(3)(e) is an indication of a modern social perception, and one endorsed by Parliament, that persons, including homosexual persons, should not be represented as inherently inferior. To do so is harmful. As such material which may do this is entitled to be classified further to section 3 of the Act

(Joychild, 2000: 37-38).

Les Taylor and Antoinette Russell, counsel for the respondent, were clear that the Board was accurate in its assessment of the videos ability to meet the gateway requirements, as they specifically dealt with "matters such as sex ...", and indicating that Parliament was unambiguous in its intention to ensure that the phrase "such as" was wider:

The then Minister of Justice, Hon, Doug Graham, stated that:

the inclusion of the words 'such as' in clause 3(1) ensures that the definition of matters likely to be considered harmful is not closed off. That is important, because the legislation must have the flexibility to accommodate changing social perceptions. In summary, the Bill manifests a clear intention to strengthen the censorship laws, and gives censors the tools to carry out that task ... (Hansard, 1993, 17 052).

The impression gained from reading Counsel for the Appellant's submissions is that the word 'sex' as it appears in s3(1) is confined to meaning, essentially, the physical act of sexual intercourse and even then, on one suggested interpretation, is limited to sex which has 'features of horror, crime etc' (paragraph 5.21 of Appellants submissions). It is submitted that there is no justification for reading s3(1) such a way

(Taylor & Russell, 2000: 5).

Counsel therefore held that the words ‘such as’, were to be interpreted as meaning ‘for example’, and furthermore, in line with the submission from the NZAF, that in dealing with a discussion on same sex sexual acts, the videos therefore deal with matters ‘such as sex’ (Taylor & Russell, 2000: 6).

In regards to the *Moonen* analysis urged by counsel for the appellant, respondent’s counsel agreed with the HRC and others that not only must s14 BORA, dealing with freedom of expression be taken into account on such an analysis, but also s19, dealing with freedom from discrimination (Taylor & Russell, 2000: 9-12).

In reply, counsel for the appellant stated that the Minister of Justice’s statement before Parliament

does no more than indicate that matters of the same kind and nature as those referred to were intended to be included. This statement cannot be used to support an interpretation of the provision which would permit bringing under the subsection matters akin to the depiction of sex in a gratuitous of a salacious manner, cruelty, violence, horror – all indicate images of a grossly offensive and emotionally charged kind

(McKenzie & Rishworth, 2000: 6).

Much of their remaining submission reiterated points already made, yet continued to ignore the discrimination the videos engendered, the violence that followed them around the country, and that Article 19(3) ICCPR allows restriction on freedom of expression for

respect of the rights or reputations of others.

During the hearing, on 10 and 11 July 2000, I recall Gault J stating that if the Courts did not take s19 BORA into account, then they were not applying BORA correctly, as they have a duty to consider the whole Act, not just parts of it. Therefore it is possible to have a ‘clash’ between certain sets of rights, in this case freedom of expression and freedom from discrimination, and therefore the Courts or any judicial body would need to balance the whole, taking, as Harrison (2000: 6) said, an holistic approach. Tipping J then asked

McKenzie what would happen if, in allowing for freedom of expression, the court breaks the spirit of freedom from discrimination. The notes I took have McKenzie replying that the Government's wish to allow freedom from discrimination is worthy in some cases, *but not in others* (emphasis added). When Richardson J asked if the words of s3(3)(e) should be read down, McKenzie replied "yes". It therefore appears that counsel for the appellant believes some forms of discrimination against the LGBT communities are acceptable.

During the respondent's reply, Thomas J stated he had difficulty in seeing sexual orientation as a sub-branch of sex, and under the appellant's 'gateway' principle, sexual orientation would not be able to be read into it, yet also noted that a video based on race would also not be able to pass through the 'gateway'.

On 31 August, the Court of Appeal gave its decision. The Court agreed with the appellant that the gateway was the first hurdle before anything could be censored. As such, they remitted the videos back to the Board for reconsideration. Thomas J who concurred with the majority decision, but would have quashed the decision of the Board and the High Court entirely, agreed that the videos do cause harm:

While directed at the danger of an AIDS epidemic in the one case and the threat of an enlarged protection of civil rights embracing homosexuals in the other, both videos reveal an abhorrence of what is called the 'homosexual lifestyle'. This phrase is used persistently throughout the videos without being defined. It is, however, identified with promiscuous and irresponsible sexual behaviour by male homosexuals. Lack of balance is evident in the dogmatic way in which these characteristics are attributed to all homosexuals, and there is no recognition of the diversity of homosexual associations which do not accord with this stereotyped description. Nor is any appreciation shown as to the nature and depth of gay and homosexual orientation, such as the appreciation which has resulted in sexual orientation becoming a prohibited ground of discrimination in this and other countries. The propensity for such presentations to cause harm is apparent: they may mislead the uninformed; they simplify the issues in a manner which is unrealistic; they give credence to false facts and figures; 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 (*Living Word Distributors (Ltd) v Human Rights Group (Wellington)*, [2000] NZCA 179 (31 August 2000), para 67).

The Court explained their decision (*Living Word Distributors (Ltd) v Human Rights Group (Wellington)*, [2000] NZCA 179) thus:

- [25] Clearly, and as brought out in that para [4], s3(1) serves two purposes. The first is to define the reach of censorship in terms of the subject matter of the publication. The second is to set the test of ‘injurious to the public good’ as the yardstick for determining whether a publication which has qualified in terms of subject matter can be classified as objectionable.
- [26] ‘Such’ is a flexible relative word whose meaning is to be gathered from the context in which it is used. *The Oxford English Dictionary* (2nd ed) notes that syntactically it may have backward or forward reference. In combination, the words following the expression ‘such as’ may be demonstrative of the words which precede it without restricting the breadth of the preceding words; or they may introduce examples of a class and in context limit the meaning to the kinds or types specified. Clearly, the description of the subject matter in s3(1) is used in that latter sense. If it were intended that ‘matters’ should extend to ‘all matters’, there would be no need for the expression ‘such as’ and no sense in it.
- [27] The words ‘matters such as’ in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression ‘such as’ is narrower than ‘includes’, which was the term used in defining ‘indecent’ in the repealed Indecent Publications Act 1963. Given the similarity of the content description in the successive statutes, ‘such as’ was a deliberate departure from the unrestricting ‘includes’.
- [28] The words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words ‘sex, horror, crime, cruelty or violence’, as the

matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.

- [29] That, in our view, is the scope of the subject matter gateway. Thus, in answer to Mr McKenzie's alternative submission, there is no justification for reading down 'matters such as sex' by limiting the expression to abusive or degrading sex. However, features of that kind will be relevant at the next step in determining whether the publication deals with the subject matter in such a manner that the availability of the publication is likely to be injurious to the public good; and in applying subs (3) and (4).
- [30] Equally, the presence of the subject matter requirement of s3(1) cannot be ignored or by-passed or added to by invoking s3(3)(e). The subject matter provision is obviously designed as imposing an immediate limitation on the reach of the censorship laws. Parliament could never have intended that a simple test of 'injurious to the public good' could be used to ban discussion of any subject.
- [31] We are also satisfied that the High Court erred in concluding in its para [9] (para [15] above) that the reference to s21(1) of the Human Rights Act in s3(3)(e) of the 1993 Act justifies including sexual orientation, race and gender within the s3(1) net. In terms of the statutory scheme, and consistently with s3(1), the opening words of subs (2) 'A publication shall be deemed objectionable' and of subs (3) 'In determining ... whether or not any publication ... is objectionable' must refer to a publication qualifying as to subject matter under the preceding subs (1). That conclusion is reinforced by the consideration that subs (3) is concerned only with the weight to be given in determining whether the publication is objectionable. Further, all six categories in s3(2) and categories (a) to (d) of s3(3) can readily be related back to the subject matter referred to in s3(1). And, the written submissions for the Attorney-General note that, whereas international anti-discrimination principles have gradually extended their reach to protect wider classes of vulnerable persons, the international prohibitions of hate propaganda have remained confined to the categories of race and religion; and that prohibition of hate propaganda is not seen as synonymous with more general anti-discrimination protections.
- [32] In that context there could be no warrant for reading s3(3)(e) as importing all of the grounds of discrimination specified in s21(1) of the Human Rights Act as stand alone topics for potential censorship. Those grounds include age, religion, political opinion, employment status, and receipt of a social benefit as well as race, ethnic origin, disability, family status and sexual

orientation. If a publication dealing with a matter coming within s3(1) represents that members of a particular class of the public are inherently inferior by reason of a characteristic of members of that class within s3(3)(e), then s3(3) of course requires that particular weight be given to that feature of the publication. That is the purpose and effect of s3(3)(e) in the statutory scheme.

[33] In short, the 1993 Act recognises an obvious distinction between censorship legislation with its proper purpose and subject matter and anti-discrimination legislation with its own (different) purpose and subject matter. As well, each has its own remedies and sanctions. Section 3(1) sets boundaries of content-based regulation of speech. The applicability of s21 Human Rights Act grounds is included under s3(3)(e) as a factor to be weighed in relation to subject matter coming within s3(1), not as a separate reason for censorship.

[34] For these reasons we are satisfied that the High Court (particularly in its para [9]) and the Board erred in law in the interpretation of s3(1). However, it seems, in terms of the High Court's description of the videos (para [2]) and its initial conclusion in its para [8] (para 15 above), that the videos to some extent describe, depict or deal with sexual practices and accordingly may come within the expression 'matters such as sex'. It is unnecessary to examine this point any further because, for reasons we shall give when dealing with the second question, we are satisfied that the error of law involved there requires reconsideration of the videos by the Board and on any such reconsideration the Board will be required to determine in terms of our interpretation of s3(1) whether, as to subject matter, the videos can be considered for classification under the 1993 Act.

This in itself was sufficient for the appeal to be won and the videos sent back to the Board for reconsideration, but the Court also found the High Court and the Board had made an error in law in respect to *Moonen* and BORA:

[38] In its para [13] the High Court saw the right to free expression (s14) as clashing with the right to freedom from discrimination (s19) and thought that clash might be seen to be a specific pointer towards the modification of the s14 right to freedom of expression. It was because they saw s19 as incorporating 'the very same protection about which the decision of the Board is concerned' that they considered it not helpful to refer to s6 (the High Court's para [14]). While accepting that fundamental rights in the Bill of

Rights were not to be seen as taken away by general words in the 1993 Act, they considered that the argument ran straight into the s19 right (the High Court's para [17]). And they agreed that the sting in the videos, which according to the Board was the degradation of homosexuals, lesbians, bisexuals and others, ran counter to s21(1) of the Human Rights Act and was to be rejected by the Board in terms of the 1993 Act underpinned by s19.

- [39] As a matter of interpretation we have already suggested that the expression of the subject matter in s3(1) tends to point to activity rather than to the expression of opinion or attitude (para [25]). To construe likely injury to the public good in s3(1) in that light would accord with s6 of the Bill of Rights and provide a reasonable limit as can be demonstrably justified in a free and democratic society (s5).
- [40] Further, the balancing required by s3 must be infused by due consideration of the application of the Bill of Rights. The inquiry is whether the depiction in the videos of a qualifying subject matter (such as sex) is in such a manner that the availability of the publication is likely to be injurious to the public good. At that point s14 must be given full weight in the application of s3(1), but s19 does not apply directly. Section 3(3)(e) incorporates by reference the characteristics specified in s21(1) of the Human Rights Act as prohibited grounds of discrimination to which s19 applies. To the extent that s3(3)(e) has application of the particular subject matter of s3(1) the values underlying s19 are imported and become particular considerations in the assessment of objectionability under s3(1).
- [41] But in terms of the statutory scheme there is no direct clash of rights. Rather, it is a matter of approaching the ultimate inquiry under s3 as indicated in *Moonen*. The Bill of Rights is a limitation on governmental, not private conduct. The ultimate inquiry under s3 involves balancing the rights of a speaker and of the members of the public to receive information under s14 of the Bill of Rights as against the State interest under the 1993 Act in protecting individuals from harm caused by the speech. And the fundamental error on the part of the High Court was in treating s19 as prevailing over s14.
- [42] That same error permeates the Board of Review's approach in invoking s19 of the Bill of Rights. Indeed, while the Board noted that s6 of the Bill of Rights requires ambiguities in the 1993 Act to be given a meaning consistent with the rights and freedoms contained in the Bill of Rights, it concluded that the legislative scheme of the 1993 Act, the Human Rights Act, and the

apparently competing rights in ss14 and 19 of the Bill of Rights provided some indication that, in a contest between the freedom of expression and the right to be free from discrimination, at least with respect to publications falling within s3(3)(e) of the 1993 Act, that right to be free from discrimination should prevail (p434). They went on to hold (p435) that when the rights in s14 and s19 came into conflict with each other, 'the legislation gives precedence to the right to be free from discrimination'; and that if there is any doubt about that interpretation of the censorship legislation s6 of the Bill of Rights would suggest that such doubt should be resolved in favour of s19. Put bluntly, it is an assertion that s19 trumps s14 and, extraordinarily, that s6 produces that result.

[43] It may be that the Board in its decision intended to convey that on its assessment the test of likely injury to the public good in s3(1) was made out even after giving due weight to the freedom of expression, and that in its preceding review of the relevant statutory provisions it was merely recognising that censorship in that situation necessarily limits freedom of expression which is just what the legislature contemplated. However, as explained, the terms employed in that review go further than that and indicate error of law.

[44] It follows that both the High Court and the Board misdirected themselves in law as to the impact of the Bill of Rights in this case. The only reasonable course is to remit the matter to the Board of Review for it to begin afresh. In doing so it will obviously need to assess whether the focus of the videos was, as the High Court saw it (para [2] above), on the expression of political and social opinion

***(Living Word Distributors (Ltd) v Human Rights Group
(Wellington), [2000] NZCA 179).***

The Court therefore concluded that:

[51] The court has unanimously concluded that the Full Court erred in law, as did the Board of Review. The appeal is allowed, the decisions of the Full Court and the Board are quashed and the matter is remitted to the Board. On any reconsideration of the videos the Board will no doubt review their content having regard to the observations made in this judgment and the judgment of Thomas J. We should add that we cannot see any possible basis in law for importing into s3 of the 1993 Act the anti discrimination provisions on public health grounds of s21(1)(h)(vii) of the Human Rights Act, as the Board did in its decision (para [23] above)

***(Living Word Distributors (Ltd) v Human Rights Group
(Wellington), [2000] NZCA 179).***

This means that before any publication can be classified, it must deal with sex, horror, crime, cruelty or violence, and that the publication must depict such matters, and not merely be a discussion about them. Combining this with a *Moonen* analysis as required, it means that only publications that deal with active depictions of sex, horror, crime, cruelty or violence that are the worst of its kind, may be classified as objectionable, and publications may be restricted only if they deal with active depictions of sex, horror, crime, cruelty or violence to a lesser degree.

What the Court of Appeal has done, therefore, is to effectively nullify subsections 3(3)(c) and (e) of the Act, which Parliament had intended to be able to protect the vulnerable, which, I believe, is in breach of s4(a) of BORA:

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective

...

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

As a result, the Board requested submissions on the two videos. However, because of the restrictions imposed by the Court of Appeal, above, and regardless of submissions made pointing out the intent of Parliament, which indicates the intent behind s3(3)(e), and the ability to restrict freedom of expression under Article 19(3) ICCPR, the Board of Review had no option but to classify the videos as unrestricted as they did not fall within the matters sex out in s3(1) of the Act (Board of Review, 2001: 21-22).

Nevertheless, Stephanie de Montalk, in a dissenting decision stated that the videos should be able to be classified, and should retain the R18 rating imposed by the OFLC in 1996. Citing the paragraph from Thomas, above, she states:

It is my view that while the videos do indeed express attitudes and opinions, they also deal with sex or matters of sex in a manner that, in accordance with s3(l), is injurious to the public good, and therefore fall within the censorship scope of the Classification Act.

It is also my view that, given the likely effect of these videos on young persons at a stage in their lives when they are coming to terms with issues of sexual identity, and in particular on young persons who are reaching the realisation that they might be gay, they should be classified as restricted to persons 18 years of age and over

(de Montalk, 2001: 1).

That would have been the end of the matter, but politicians were sufficiently concerned at the Court of Appeal abrogating the right of Parliament to request a Parliamentary investigation. This is discussed in the next chapter.

Chapter 13: The Parliamentary Route

Films, Videos, and Publications Classification (Prohibition of Child Pornography) Amendment Bill 2000

The first Parliamentary business to arise as a result of the Court of Appeal's decision and subsequent decision by the Board was a Private Member's Bill by Anne Tolley, then the Women's Affairs spokesperson for the National Party. Her Bill, referred to the Government Administration Select Committee, sought specifically to have greater controls on child pornography, and was initially a response to the *Moonen* decision (Tolley, 2000).

Supporting the Bill in essence, in my submission, I noted:

I support the intention of Clause 4, but cannot support the way in which it is written. The *Living Word* decision showed that the Moonen decision can be used against any case referred to the Film and Literature Board of Review (the Board), or the Office, to drastic effect. When combined with the *Living Word* decision, the results are even more drastic. The gateway placed before the application of the Act would rule out many publications which could be classified as objectionable before the *Living Word* decision was made. Now, not only does the Office have to take into consideration the requirements in the Act – 'matters such as sex, horror, crime, cruelty, or violence', but can only consider the worst of those kinds under that gateway. The way in which clause 4 is written will not deal with this new requirement placed on the Office by the Court of Appeal through the *Living Word* decision. Thus it would entirely possible, even with this Bill enacted, to have child pornography available that would exploit those children sexually, or exploit their nudity, because they would not be 'the worst of their kind'

(Bennachie, 2000b: 3).

As a result of this, I recommended that subsection 3(1) of the principle Act be rewritten as:

3. Meaning of 'objectionable'---(1) For the purposes of this Act, being a reasonable limit on freedom of expression in a free and democratic society, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters such as but not limited to sex, horror, crime, vilification, hatred, cruelty, violence, or

genocide in such a manner that the availability of the publication is likely to be injurious to the public good

(Bennachie, 2000b: 4).

This would have the double intention of nullifying both the *Moonen* and *Living Word* decisions of the Court of Appeal, allowing the Act to operate in the way Parliament had intended. Because of the narrow focus on child pornography, I submitted:

Under the Bill as it is written, it would still allow graphic images of rape and other forms of pornography that the Bill was originally intended to capture. Even considering the *Living Word* decision, there are publications which would have been captured by the Act which would no longer be captured because of the *Moonen* and *Living Word* decision. This current Bill is too narrow in its focus to capture those and allow them to be censored. Freedom of expression would still be held paramount when it came to publications other than child pornography which are covered by this Bill. This would include, among others, publications that dealt with rape or other sexualised violence as long as it 'was not the worst of its kind'. It would also allow hate literature, which the Act was originally intended to cover. I shall devote some space to this

(Bennachie, 2000b: 6).

During the oral hearings I showed members a photograph that had been sent to me by e-mail that the Act had originally meant to capture: a posed photograph of boys around 14, partly or nearly completely undressed, but wearing parts of Scout uniforms. By the combination of the *Moonen* and *Living Word* decisions – it must involve sex, horror, crime, cruelty or violence with an active component, and be among the worst of its kind – it would no longer be able to be censored let alone classified in any way. Members clearly found the image distasteful and offensive, and were surprised that the image could no longer be considered for classification. The Chief Censor, present at the hearings, confirmed this.

Ironically, the SPCS, which had long sought an extension to, and toughening of, censorship law, opposed the Bill, ostensibly because it did not go far enough, but in oral submissions, admitted that they did not want to see a

change in law that could overturn the *Living Word* decision, despite their written submission claiming they supported a tightening of the legislation (SPCS, 2000: 3).

Nevertheless, David Lane, representing the SPCS, claimed during oral submissions I had misrepresented the *Living Word* decision, and attempted to say the *Living Word* decision did not mean the worst of its kind could only be considered for censorship, and that it did not mean that the ‘matter such as sex’ had to be active. Given an opportunity to reply, in a supplementary submission, I noted:

I was the respondent in the *Living Word* case that was heard before the Court of Appeal on 10 and 11 July 2000, with the decision being made on 31 August. ... Mr Lane was not a party to that case, nor was he present for the bulk of the case, or the delivery of the judgement. He accused me of misrepresenting the *Living Word* Decision. This is, with all due respect, incorrect. Mr Lane also stated that the videos in question in the *Living Word* case were political. That is a moot point. They are propaganda aimed specifically at a minority group in New Zealand, and are as bad as the propaganda film *Der ewige Jude* produced for Nazi Germany against the Jews. Propaganda is of necessity, political in nature, regardless of whether it is attacking a group of people on the basis of their race, religion, or sexual orientation. Given the *Living Word* decision, it would be difficult to see how the Chief Censor could now classify any hate literature targeted at any minority group in New Zealand as they have been able to do so in the past

(Bennachie, 2000c: 1).

I also cited various paragraphs from the *Living Word* decision, including paragraph 27, which specifically stated that

the collocation of words ‘sex, horror, crime, cruelty or violence’, as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude

(NZCA 179 [2000]).

I also reported the summation of Thomas J upon the delivery of the decision: that for a publication to be objectionable and injurious to the public good, it must be the worst of its kind (Bennachie, 2000b: 4).

Inquiry into the Operation of the Films, Videos and Publications Act and Related Matters

The outcome of this was an *Inquiry into the Operation of the Films, Videos and Publications Act and Related Matters*, rather than an amendment to the Act. This was heard in 2001.

Relying on a Vox Deus argument, the Reformed Churches of New Zealand came heavily in favour of the *Living Word* decision:

Christians are compelled to denounce homosexual practice as sinful and to be condemned and avoided. This warning is not just for homosexuals, but for all people both within and without the Church. When the Church objects to homosexuality she does so out of deep compassion for the sinner, and urges that person to repent of their sin of homosexuality and turn to Christ for Salvation.

If such a Church attitude is deemed to be '**objectionable**' in terms of the Act, the Church will be forced to rebel against any arm of Government which tries to muzzle her denunciation of sin

(Reformed Churches of New Zealand, 2001: 3).

The CHP (2001: 2) submitted:

Today, there are some who wish to prevent others from expressing their views about contentious issues. A current example is homosexuality. There are some in the present Government who appear unable to tolerate opinions which conflict with their own, and are seeking to repress, by legislation, those who would speak out against homosexuality. This is done under the guise of human rights. To Justify their planned abuse of power, they euphemistically label their opponents' views as 'hate speech' or 'hate propaganda'. Even if it is granted, purely for the sake of argument, that such labelling is correct then the Committee should take careful note of paragraph 31 of the *Living Word* decision in which the Court of Appeal stated that:

The written submissions for the Attorney-General note that, whereas international anti-discrimination principles have gradually extended their reach to protect wider classes of vulnerable persons, the international prohibitions of hate propaganda have remained confined to the categories of race and religion; and that prohibition of hate propaganda is not seen as synonymous with more general anti-discrimination protections.

This ignores changes to the NSW Anti-Discrimination Act 1977 that outlawed vilification on the grounds of homosexuality, etc., and the similar changes to the Queensland Anti-Discrimination Act 1991.

They continued:

We do not grant the propriety of the inclusion of sexual orientation in anti-discrimination legislation. New Zealanders are being forced to accept the lifestyles of others, which are plainly offensive to them. It must never be forgotten that freedom from discrimination is not universal. No one suggests that child molestation, drug addiction, or other aberrant behaviour be tolerated. Our society does not treat all with equal respect, nor should it do so. But now many New Zealanders are being forced to tolerate and accept that which is repulsive to them.

What makes this even more offensive is that homosexuals are not a vulnerable class of persons. They constitute a vocal and powerful group within New Zealand society. What happened in the *Living Word* case is demonstrative of their influence.

It is clear from the parameters of the inquiry that the Committee is considering the need for legislation to overturn the *Living Word* decision. To do so would not only violate the Bill of Rights Act 1990, but also be clearly repressive. It is of grave concern that freedom of expression appears to be of such slight importance,

The primary focus of the Act is, and should remain, censorship of pornography and violence. To remove the s3(1) gateway is to give the Classification Office virtual carte blanche to determine what is injurious to the public good, and to restrict freedom of expression accordingly. Such important decisions must remain the preserve of Parliament, and any restriction of the freedom of expression debated politically. Far too much is at stake to allow a handful of bureaucrats to make these decisions

(CHP, 2001: 3).

Similarly, this ignores the violence that, as Mookas (1998: 354) states, exists as part of the everyday part of the lives of LGBT people, and the psychological effects that has on LGBT people.

Opposing any move to criminalise hate speech, the SPCS stated that the claims of the falsehoods in the videos in question were not sufficient to consider them hateful as:

In the 'marketplace of ideas' metaphor 'truth' is contestable. The FVPA is not directed at policing 'truth' or opinions. It is about harm.

...

The FVPA does not deal in the ascertaining of truth or the suppression of error. There are areas of law – fraud, trade misdescriptions, defamation, etc – where expression may be punished for being false. But this is wholly different. Falsity must in those cases be proved. The reverse onus applies in defamation, but when put in issue there is still a requirement of proof (SPCS, 2001b: 7).

This, of course, ignores that the Defamation Act 1992 can only be used in cases of defamation against individuals, not against groups of people, a point I made in reply during oral submissions.

Continuing to read from their submission, Lane stated:

The aim of the videos is not to advance a thesis of inherent inferiority. It is the opposite, that all persons deserve (as the video makers see things) better than a lifestyle that may lead to death. The video is premised on the *worth* of all persons, and attributes inherent inferiority to no one (SPCS, 2001b: 8).

Questioned, Lane admitted that “a lifestyle that may lead to death” meant a “homosexual lifestyle”. This was not supported by the Committee members, even those who supported the SPCS (personal discussion with Sue Bradford, MP, who replaced Grant Gillon MP for some of the committee hearings).

During their oral submission, Peter McKenzie and Paul Rishworth expanded on their paragraph:

There are in our submission sound reasons for limiting such protection to racial discrimination and making no greater inroad into freedom of expression in relation to other minority groups referred to in the Human Rights Act. Social, political, economic, religious and moral attitudes differ, sometimes quite sharply, in relation to all of these other protected groups. To stifle even ill informed and distorted discussion or promotion of views on matters where there are such diverse attitudes is inconsistent with the open nature of New Zealand society. If one of these groups is singled out for protection as against others, again sharply diverging views will emerge. As has become the case with the blasphemy laws in most modern

democratic societies, to give one group in society the protection of its particular sensitivities as against freedom of expression on the part of others is to allow for a distortion of the freedom of expression generally permitted in an open society

(McKenzie & Rishworth, 2001: 4-5).

In doing so, Bradford asked if this meant they supported ‘special rights’ for churches, to which they admitted this was “most certainly the case” (personal notes taken at the hearing, discussion with Sue Bradford). They failed to see the irony in this as they had previously been condemning the application of ‘special rights’ to other groups.

Nevertheless, other groups supported us. Some, like the National Network of Stopping Violence Services (2001), the HRC (2001), and the OFLC (2001), were expected. Others, like the oral submissions by the Catholic Women’s League of New Zealand (2001) and the Islamic Women’s Council of New Zealand (2001) were entirely unexpected.

In my submission, I pointed out the legislative history of the Act, the intention of Parliament, and much of the material already provided in previous chapters of this thesis. I concluded, prior to making various recommendations on legislative change:

As noted above at paragraph 5.1, debate in New Zealand has referred to the United States paradigm of absolute freedom of expression, which is protected under the First Amendment of the United States Constitution – which includes unspoken speech such as mime. Yet this is often in conflict with other Amendments, such as the Fifteenth, which protect citizens against discrimination on the basis of race and religion, and the ninth, which prohibits the use of the Constitution to be used to deny rights held by the people. While the first amendment, allowing freedom of expression is an active freedom, the fifteenth amendment is passive, by shielding others from something that is unacceptable.

...

To paraphrase the second to last paragraph of David Knoll (1994): ‘If the exercise of the rights [of freedom of expression] by one citizen prevents another from exercising his or her rights [to be free of violence] then the law can choose to intervene.

Equally it can choose not to intervene. No intervention effectively condones the intimidation’

(Bennachie, 2001a: 36).

The Committee, whose report was not issued until 2003, correctly noted that the effects of the *Living Word* decision were far wider than just hate speech, but also had negative effects on other areas that the censor had previously been able to operate, as was intended:

To illustrate the impact of the *Living Word* decision on the operation of the censorship regime, we provide examples of material that prior to *Living Word* would have been deemed objectionable by the censor but that are now unable to be classified as objectionable. Such material includes covert filming, computer image files and photographs of naked children, publications representative of members of a particular class of the public, and offensive language

(Government Administration Select Committee, 2003: 17-18).

This Inquiry resulted in several recommendations. Those that related to hate speech were:

Section 3(1) of the Films, Videos, Publications and Classification Act 1993 (the Act) be amended to:

‘3. Meaning of “objectionable” – (1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters in such a manner that the availability of the publication is likely to be injurious to the public good.’

Such amendment will provide a focus on the ‘injurious to the public good’ test and capture, for example, matters, other than explicit activities of a sexual nature, such as nudity, offensive language, invasion of privacy, mental illness, suicide, sexual orientation and the sexual transmission of HIV contained in publications.¹⁵

Should recommendation 1 be unacceptable, Government members recommend the Act’s section 3(1) ‘gateway’ be widened by replacing the words ‘such as’ with ‘including’.

Members of the National Party recommend that the existing section 3(1) ‘gateway’ be extended by including offensive language and nudity that injures the public good.

The Act maintain consistency with the Human Rights Act 1993

(Government Administration Select Committee, 2003: 24).

The Committee believed that such an option, in respect of hate speech would:

... negate the need for the inclusion of a specific 'hate speech' section in the Act. If the Act is amended as we recommend, the censors would be able to address issues of this nature by application of the 'injury to the public good' test. The censorship net would be able to reach, for example, the material that vilified certain groups in the *Living Word* videos without the need to explicitly identify such groups in the Act. Government members find this acceptable, particularly as it will not elevate the importance of any one group over another

(Government Administration Select Committee, 2003: 23).

Nevertheless, the minority view of National Party members was:

... that section 3(1) should only be amended to include reference to 'offensive language and nudity'. National Party members are not persuaded that this section should be redrawn in an open-ended manner so as to deal with issues such as invasion of privacy. National Party members consider that such issues are better left to the general law

(Government Administration Select Committee, 2003: 17-18).

Films, Videos and Publications Classification (Meaning of Objectionable) Amendment Bill 2003

However, this was not to be the case, and in late 2003, Marc Alexander, MP for United Future, a party comprising members of the centrist United Party and the Christian fundamentalist based Future New Zealand Party, put forward a Films, Videos and Publications Classification (Meaning of Objectionable) Amendment Bill. The meaning of objectionable that would have resulted if his Bill (Alexander, 2003) had passed would be (new words in bold, old word struck through):

3(1) For the purposes of this Act, a publication is objectionable if it describes, depicts, expresses, or otherwise deals with matters ~~such as~~ **including, but not limited to** sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.

A publication shall be deemed to be objectionable for the purposes of this Act ~~if the publication promotes or supports, or tends to promote or support~~ **if the publication advocates, promotes, or encourages, or tends to advocate, promote, or encourage,—**

The exploitation of children, or young persons, or both, for sexual purposes; or
 The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct; or
 Sexual conduct with or upon the body of a dead person; or
 The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct; or
 Bestiality; or
 Acts of torture or the infliction of extreme violence or extreme cruelty.

This would have opened the gateway from the narrow interpretation provided by the Court of Appeal in *Living Word*. This was why he was criticised by members of his own party. Nevertheless, the Bill was sent to a Select Committee, but before it could be considered, the Government introduced its own Bill, the Films, Videos and Publications Classification Amendment Bill, which only included recommendation 3 from the Inquiry given above.

Films, Videos and Publications Classification Amendment Bill 2004

The SPCS (2004a: 1) submitted that they were pleased that the option to remove the subject matter gateway contained in s3(1) of the Act as recommended by the Committee as a result of the previous Inquiry has been discarded.

They again rejected the Chief Censors interpretation, which was correct and taken from the paragraph noted above, that the *Living Word* decision meant activity, not an expression of opinion or attitude. Their Supplementary Submission did little to advance this, seeking to show how insidious the reach of gay activism had become (SPCS, 2004b: 3-5). Rather than presenting any new evidence as oral evidence with supporting documents, Lane chose to read directly from their submission, an action that led to criticism from members of the Committee.

In my submission, I noted much of what I had said before, and added parts from the submission of counsel for the HRC before the Court of Appeal, and from my submission on the SAP Bill that had added increased sentences due to hate:

I submitted to the Justice and Law Reform Select Committee on the affects and extent of hate crimes against members of the LGBT communities when it considered the Sentencing and Parole Bill. As part of that submission, I included a list of attacks that I was aware of, either through reports in media or through personal contact with the victims. In most of the cases, anti-gay prejudices were verbalised before and/or during the attacks.

Different definitions of prejudice have been proposed over the years, but most of them include three key ideas. First, prejudice is an attitude—that is, a psychological predisposition or tendency to respond to an entity with a positive or negative evaluation (e.g., Eagly & Chaiken, 1993). These evaluations occur along various dimensions such as *good-bad* and *liked-disliked*, and are based on emotional, cognitive, and behavioural information (Zanna & Rempel, 1988). Once formed, attitudes can guide an individual's future actions. Second, the attitude is held toward a social group and its members. The targets of prejudice are evaluated on the basis of their group membership, not their individual qualities. Third, prejudice typically is a negative attitude, involving, for example, hostility or dislike (Herek, 2004: 17).

Often prejudices against specific groups are enforced during a period preceding anti-gay (or racist, etc.) violence. During a six week period in Wellington between April 1999 and June 1999, eight people were assaulted because they were, or were assumed to be, gay. Among these was Colin McLean, then a 22 year old gay man who was severely assaulted, requiring hospital treatment, on the south side of Courtney place near the St James. Police officers were in a car, parked, on the opposite side of the road, near Espressoholic. Despite cries from him and those who came to his assistance, the Police made no attempt to help him. The most tragic victim was Jeff Whittington, a 14 year old who was beaten to death less than four hours after Colin had been assaulted. The people who were convicted of his death, Jason Meads and Stephen Smith, are reported to have said that Jeff Whittington was a faggot, had girls make-up on and told them to 'get fucked'. They laughed and said that they had never seen anyone bleed out of the places he bled out of (CA 514/99, paragraph 39-41). As the counsel for the NZAF notes at paragraph 36 of their submission, '[s]omehow [Smith and Meads] had been desensitised by [Whittington] being a "faggot" to the fact that this man was a human being worthy of respect' (Joychild, 2000). This period of violence against gay men was preceded by anti-gay pamphlets and other literature being distributed on the streets of Wellington. While it is difficult to show a precise causal relationship between the availability of such material and anti-gay violence, there is enough evidence to indicate that there is a

correlation between the two. However, it should be noted that not all people who receive or read such material, will act upon it

(Bennachie, 2004a: 7-8).

In my supplementary submission, I stated:

The Department of Justice, advising this Committee in 1993 stated, in relation to what is now section 3(3)(e), 'While not a direct counterpart of human rights legislation, the paragraph is intended to cover the core types of social bigotry'. The Department of Justice emphasised 'social' in that advice. From this it can be seen what the intention of Parliament was, and how the Court of Appeal has read that down to a narrow definition based on active sex, horror, crime, cruelty and violence. It is now up to Parliament to reassert its authority, and specifically stress to the Court of Appeal, and to other bodies, what it's intention truly was

(Bennachie, 2004b: 1).

I also included comment about International covenants and the "marketplace of ideas":

International agreements to which New Zealand is party to, the UDHR and the ICCPR, guarantee freedom from discrimination and hatred. Those agreements also contain articles on the freedom of expression. Nevertheless, article 19(3) ICCPR does allow for the restriction of freedom of expression.

...

If a person, or group of persons, is allowed unfettered and untrammelled freedom of expression, as would be allowed under the 'market place of ideas', this does indeed put people at risk from speech directed against them with the aim of depriving them of some of their rights – the rights to freedom from hatred, discrimination and violence.

The 'market place of ideas' is a misnomer in and of itself. The 'market place of ideas' is a fine concept, but it assumes that all ideas have the same worth, ignoring that some ideas are dominant, and form part of the dominant discourse. Just as some things in a market place – the familiar, the comfortable – are popular and sold out very quickly, and other things sit on the shelves and are eventually discarded, the same happens with ideas. Ideas that the public are used to – those they are comfortable with – are accepted without question. Those they have been ingrained with through dogmatic indoctrination, are dominant. Something that contrasts with those ingrained and entrenched ideas, such as equal rights for lesbians and gays, is

easily rejected. On the other hand, something that supports the dominant discourse of homophobia, religious intolerance, or racism; something that allows people to think that it is acceptable to deny rights to lesbians and gays, or Jews, or Moslems, or Maori, or people with a disability, or any other group they dislike for any reason, is more readily accepted

(Bennachie, 2004b: 4-6).

I provided supporting evidence including media reports of violence against the LGBT communities, here and overseas, where anti-gay attitudes, which led to the violence, were shown to be linked with anti-gay material. This material indicated that hate material directed at the LGBT communities is injurious to the public good (Bennachie, 2004b, attachments).

However, rather than tackle the issue of hate speech itself, the Committee decided that a full Inquiry into issues of hate speech should be undertaken:

We considered carefully whether to widen the meaning of 'objectionable' in section 3 of the Act to include hate speech and concluded it was beyond the policy of this bill. The bill primarily caters, in terms of classification, for the proliferation of child sex abuse images via the Internet. Hate speech raises wider legal issues, including the fundamental right in a democracy to freedom of expression. In New Zealand this freedom may be subject to reasonable limits under section 5 of the New Zealand Bill of Rights Act 1990. Section 3 is a specific example of such limits. We were mindful of the need to be cautious in placing further limitations on freedom of expression, however well-meaning, without very careful scrutiny to ensure that any limitation is reasonable and not open to exploitation. Hate speech also falls within the right to freedom from discrimination, and will require further consideration of human rights law.

Therefore, the committee has initiated, under Standing Order 189(2), an inquiry into hate speech. Separately, the Minister of Justice has advised us that he will refer the topic to the Law Commission for further study. We anticipate this study and our inquiry will complement each other to provide a sound basis for the determination of these difficult issues

(Government Administration Select Committee, 2004: 3).

Inquiry into Hate Speech

The terms of reference for the Committee were included in the invitation to submit sent to me:

Whether or not further legislation to prohibit or restrain hate speech is warranted.

Whether censorship of material that vilifies certain groups would be a justified limitation on the rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990.

An appropriate threshold test for prohibition or restraint of hate speech.

Whether any prohibition or restraint of hate speech or hateful expressions would be a justified limitation on the rights and freedoms outlined in the New Zealand Bill of Rights Act 1990.

The steps taken by the international community to control hate speech and hateful expressions

(Personal communication from Lesley Fergusson, Clerk of the Committee, 22 October 2004).

In my submission, I reminded the Committee of the original intentions of Parliament, and the background to the *Living Word* case and decision. I covered the allowable restrictions on freedom of expression under article 19(3) ICCPR, a list of cases where people had been assaulted or murdered on the basis of their sexual orientation, and how misinformation about a group could be construed as defamation. Discussion of the work of Herek, D'Augelli, and others showed the effects of hate speech and hate crimes on members of the LGBT communities, while discussion of decisions under ECHR and the Optional Protocol to the ICCPR showed how sexual orientation had been included in the definition of sex or other status. Examples from the Canadian Criminal Code showed how the relevant sections had been used to prevent hate speech against the LGBT communities. I concluded with:

All of this indicates that freedom of expression is not absolute, but is set within specific boundaries that respect the rights and freedoms of other people to be free from discrimination, hatred and violence, or to be free from the incitement of discrimination, hatred and violence. Certain statements are seen as being unacceptable. For example, statements equating people to animals on the basis of their race or religion, is no longer acceptable in civilised society. ...

If such statements are unacceptable when it comes to race, religion, ethnicity and colour, then why are they acceptable when applied to people because of their sexual orientation? Or their sex, marital status, age, political opinion, employment or disability? The same standards should be applied across the board, and applied to all groups covered by subsection 21(1) of the Human Rights Act 1993. A strong case could be put forward to include 'transgender status' or 'gender identity' in that subsection as people who are transgendered are often the butt of discriminatory actions and verbal victimisation, and are belittled, demeaned and dehumanised because of their gender. I understand a Private Members Bill to do so is in the ballot, but this Committee has the ability to do something about that now

(Bennachie, 2005: 36-37).

Although the oral hearings were heard in early 2005, the Committee delayed making a decision until after the 2005 Election had been announced. As a result, they withheld their decision until after the Election. That Election led to a decrease in the Labour majority, meaning a greater reliance on smaller parties in order to form the Government. Although United Future had also decreased, there was an increase in the New Zealand First party presence. Both of these parties were needed by Labour to form a Government. As both had opposed the Inquiry into Hate Speech, they were able to have it stopped (New Zealand First and the New Zealand Labour Party, 2005). Consequently, the Committee did not report back to Parliament, and although the Christian right treated this as a great victory, it was an effective defeat for democracy and freedom from discrimination. As had happened with the Prostitution Reform Bill following the 2002 election, which saw an increase in United Future members, it would have been more correct for a new Committee to call for further submissions. By preventing this from happening democracy was, in my opinion, subverted.

Chapter 14 – Where to next? A discussion.

The failure of the Committee to report back left several issues stranded. There appeared little consideration of the issues of violence and discrimination. It had been agreed by the OFLC, twice by the Board, the High Court, and four Parliamentary Committees considering the issue of hate speech, that the 1993 Parliament had, by the inclusion of s3(3)(e), intended the FVPCA to cover hate speech. However, this had been sidestepped by the Court of Appeal.

However, more evidence had been given to the lower courts and to the Parliamentary Committees than to the Court of Appeal, for the Court of Appeal could only consider questions of law, not any other evidence.

Debate around the videos in question in the *Living Word* case has been centred predominantly around the absolutist paradigm of freedom of expression. The submissions by LWD and the New Zealand Council for Civil Liberties tend to this ideal, without thought, perhaps unwittingly, for what may result from such a paradigm in New Zealand. New Zealand is not America, yet the submissions from the counsel for LWD would tend to support the lack of restrictions existing in American law.

Nevertheless, it must be remembered that even American law puts some restrictions on freedom of expression: child pornography, for example, “fighting words” for another. Moreover, case law surrounding both of these is a minefield, with some decisions of the Supreme Court disallowing “fighting words” and other decisions supporting the right to express “fighting words” (Scahill, 1994: 25-26).

While the *Living Word* decision may be taken to read that *nowhere in New Zealand law is there any capacity to censor hate speech on the basis of religious belief*, I believe that I have indicated in my recommendations below, and reasoning above and to follow, a method in which such hate speech can indeed be censored. It would have consequences for New Zealand society if such hate speech was indeed unable to be censored. This would have a long,

and lasting, devastating, effect on the fabric of New Zealand society, with at least the first four points of Allport's scale, antilocution, avoidance, discrimination, and physical attack (Allport, 1958: 14-15), becoming more and more prevalent. Similarly, the three dimensions of anti-Semitism (source of malefic qualities, latent-manifest preoccupation, and putative perniciousness) indicated by Goldhagen (1996: 35-36) can be applied to any group, and could also be seen to increase if hate propaganda against specific groups were to be allowed.

The vast majority of anti-gay propaganda relies on the behaviour – real or supposed – of gay men. During the debates in 2004 before the Government Administration Select Committee on the Films, Videos, and Publications Classification Amendment Bill, the SPCS reported in several places repeats of Cameron's flawed and inaccurate studies (SPCS, 2004a, 2004b). These attitudes are further propagated by members of New Zealand's fundamentalist community. Furthermore, as seen in chapter 10, they are willing to break the law to promote these attitudes and hatred to young and/or vulnerable people, and to invent fallacies in their attempts to do so.

The Board heard from Julian Batchelor that he had showed the video to people as young as 12, even though the video was originally R16, and to 5th formers (15-16 year olds) after the video had been classified as R18. The group showing the videos around the country, Potters House Christian Fellowship, showed a similar willingness to defy the law and show these videos to people under the age restrictions. This is concerning, due to the ability of these videos to convince even adults of the "truth" of the misconceptions, misinformation, and lies contained within them. One only needs examine the statements of Nelson's Potters House Christian Fellowship pastor John Blackburn, who has said he would not hesitate to show them again:

'People don't like to hear the truth,' Mr Blackburn said.

'It was documented in the videos that homosexuals think about going into schools to violate young boys. Why bother saying it if it doesn't happen?' He said homosexuality was a sin in the eyes of God, like any other sin.

(Scanlon, 2000, emphasis added).

Under Article 19(3) ICCPR, freedom of expression may be restricted under certain conditions. Article 19(3)(a) indicates that material may be restricted to protect the “respect of the rights or reputations of others”; while Article 19(3)(b) indicates that material may be restricted

for the protection of national security or of public order (*ordre public*), or of public health or morals.

This of course must be balanced with Article 5 ICCPR which states that nothing in the ICCPR may be interpreted in such a way to allow any State, group or person the right to do anything which is aimed at destroying any of the rights and freedoms recognised by the ICCPR.

However, where freedom of expression may endanger the life the other people, the well being of other people, the general public order (*ordre public*) or public health, then there is adequate allowance under the ICCPR to restrict freedom of expression. Furthermore, by allowing LWD to have their right to freedom of expression untrammelled, it is specifically restricting the rights of lesbians, gay men, bisexuals and transgendered people allowed under Articles 17 and 26 ICCPR.

Similarly, the UDHR allows, at Article 19, freedom of expression. However, this is subject to the restrictions found at Article 29 which are similar to the restrictions in the ICCPR at 19(3) as well as a similar clause to Article 5 ICCPR. Under the Toonen decision, as indicated above, ‘sex’ is to be read as including ‘sexual orientation’ in these international agreements.

Farrior (1996: 12ff) notes there were several concerns about the width of freedom of expression in the UDHR, and several proposals were put forward to limit incitement to discrimination. She cites one of the British Government’s Comments:

[I]t would be inconsistent for a Bill of Rights whose whole object is to establish human rights and fundamental freedoms to prevent any Government, if it wished to do so, from taking steps against publications whose whole objects was to destroy the rights and freedoms which it is the purpose of the Bill to establish

(Farrior, 1996: 13).

It can be seen that the final draft, while not incorporating the later restrictions on freedom of expression contained in the ICCPR, is subject to far more restraint than the original clause proposed for the UDHR:

Subject only to the laws governing slander and libel, there shall be freedom of speech and of expression by *any means whatsoever*, and there shall be reasonable access to all channels of communication. Censorship shall not be permitted

(Farrior, 1996: 14, emphasis in the citation).

Farrior (1996: 21) notes that the UNHCR had considered entering clauses prohibiting hate speech to any Human Rights Instrument before the UN General Assembly as early as 1947. In the initial draft ICCPR, a clause prohibiting incitement to racial or religious hostility that constituted incitement to violence was included. Furthermore, there was concern over the causal connection they saw between such advocacy and the problem of discrimination

(Farrior, 1996: 22).

Though supported by the Soviet Union, other Eastern Bloc nations, and other nations, including France, these restrictions were opposed by the United States (Farrior, 1996: 21-23).

One can see in the *Living Word* videos the same techniques used by Riefenstahl in *Triumph of the Will* (1935, in Tomasulo, 1998: 99-118). Similarly, the same techniques are visible in *A New Beginning* (1984, in Morreale, 1991: 19-34). But unlike *A New Beginning*, instead of the 'I/you' merger, a 'we/them' dichotomy established. Nevertheless, I believe in *GR/SR* and *AWYHBT* there is the same "merger of histoire and discourse" that occurs in *A New Beginning* (Morreale, 1991: 28). This makes it difficult to tell truth from fiction, especially as the producers of these videos have carefully synthesised misinformation and complete falsehoods with the truth. Whatever

Goldhagen (1996: 35-36) states about anti-Semitism can also be said about homophobia:

It is his [sexual orientation], his [identification], or his [sexual behaviour].

The same three dimensions: source, latent-manifest, and perniciousness can be seen to exist in homophobia.

New Zealand ratified the ICCPR on 28 December 1978, and the Optional Protocol to the ICCPR on 26 May 1989. Article 19(3) ICCPR contains the ability to restrict freedom of expression under certain conditions. If this is not done, I believe it could constitute a breach of the rights of LGBT people, covered under “sex” in the ICCPR and the UDHR, or PLWHA covered under “other status” in those agreements. This could leave New Zealand open to international criticism and possible action before the UNHCR.

Herek and Berrill (1992) indicate that the effects of hate speech on a person’s self-esteem cannot be ignored. It has been shown in numerous studies that lack of self esteem can lead to suicide (Clayton, 1997; Fergusson, Horwood, Ridder & Beautrais, 2005: 979; Petrie and Brook, 1992; Rosenhan and Seligman, 1985: 342-343). The effects of showing these videos to lesbian, gay, bisexual and transgender emerging youth could be enormous, resulting in low self-esteem, and possible subsequent consequences. All these are certainly injurious to the public good.

Thomas J also, at paragraph 67 of the *Living Word* judgement of the Court of Appeal, noted the indirect harm that hate speech causes.

In paragraph 9 of their submission to the Board, the counsel for LWD (McKenzie & Rishworth, 2000b) cite paragraph 31 of the Court of Appeal decision, in which the Court states “the international prohibitions of hate propaganda have remained confined to the categories of race and religion”.

Nevertheless, New Zealand already has partial hate speech protection in the HRA. Currently, this only covers race, colour and ethnicity. Furthermore, NSW has anti-vilification sections directed against homosexual vilification and

transgender vilification in its Anti-Discrimination Act 1977, as well as racial vilification. South Australia and Queensland have grappled with the issue to greater or lesser degrees, Queensland having included vilification against race and religion into their Anti-Discrimination Act in 2001, and in 2002, included sexuality, (defined as homosexual, heterosexual or bisexual), into that section on vilification.

The United Kingdom Human Rights Act 1998 may, by being devolved from the ECHR, and by reference to Articles 10(2) and 14 of that Convention, offer protection from hate speech to everyone covered by the Convention. Article 10(2) of that Convention requires restrictions on freedom of expression as such a freedom

carries with it duties and responsibilities, [which] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the *prevention of disorder or crime*, for the *protection of health* or morals, for the *protection of the reputation or rights of others*, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

(Council of Europe, 1950, emphasis added).

Since at least 1999, sexual orientation has been included under “other status” in Article 14 of that Convention (*Salgueiro v Portugal*).

Similarly the Canadian Criminal Code already contains sections protecting people from hate speech (sections 318 and 319). In 2000, the Canadian Broadcasting Standards Council prevented the re-broadcast by Canadian radio stations a programme by Laura Schlessinger, who was broadcasting material deemed to be hate speech directed at LGBT people (Canadian Broadcasting Standards Council, 2000a, 2000b). Such use of Broadcasting Codes is a form of censorship. The

prohibitions of hate propaganda
are no longer

confined to the categories of race and religion
as claimed by the Court of Appeal in *Living Word* at paragraph 31, but even at that time were expanding, however slowly.

McKenzie and Rishworth (2000b) in their submission to the Board, cite paragraph 82 of the Court of Appeal judgement. Here Thomas notes that

[w]hat is emphasised in the perceived promiscuity and irresponsible sexual behaviour of male homosexuals

Again this is a reference to sexual behaviour: how the video “describes”, “expresses” or “otherwise deals with” sex. This should be compared to paragraph 59 of the judgement where Thomas again indicates the videos make reference to sexual behaviour. Yet in paragraph 82, Thomas concludes by stating

the videos are essentially political tracts
(NZCA 179 [2000]).

There are two ways of looking at this. One way is that all propaganda aimed at any minority is essentially political. The ICCPR specifically allows for restrictions on war propaganda – a political tract – at Article 20(1). While all hate speech is propaganda of a sort, not all propaganda may be hate speech.

The second way, that taken by Beck (2000: 22), suggests that Thomas

displays some confusion in what is motivating the producers and intended audience of the videos, by suggesting both that the material is ‘political’ [at paragraph 82 of the judgement] and a manifestation of religious ‘fundamentalism’

at paragraph 66 of the judgement.

It should also be remembered that Pat Buchanan, one of the religious right leaders in America, had stated in 1992:

The agenda Clinton and Clinton would impose on America—abortion on demand, a litmus test for the Supreme Court, homosexual rights, discrimination against religious schools, women in combat—that’s change, all right. But it is not the kind of change America wants. It is not the kind of change America needs.

...

There is a religious war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself. And in that struggle for the soul of America, Clinton and Clinton are on the other side, and George Bush is on our side

(Buchanan, 1992a: 4:05, 1992b: 4:18).

To many in America, this “war” continues. The production of these videos was part of the ammunition they manufactured to continue the “fight”. If this is true, then the videos could be classed as “war” propaganda, and thus able to be restricted under Article 20 ICCPR. However, I would not advocate this move as it would admit that such a “war” exists to be fought.

There are many other questions that Beck raises about the Court of Appeal judgement, which, while

legally sound, in the application of traditional legal method it is apparent that the Court has adopted a timid approach on the wider question of the controversial ‘social’ issue of ‘Gay bashing’

(Beck, 2000: 5).

Furthermore, Beck (2000: 5-6) also highlights how the Court of Appeal has failed

to identify that such an analysis [of the interplay of the HRA and the FVPCA] highlights a gap in the law.

During the *Living Word* case the appellant’s counsel questioned the applicability of s19 BORA and its apparent clash with s14 BORA. There is interplay between the two sections when one considers the restrictions on freedom of expression allowed under the ICCPR at Articles 19(3) and 20, and the relationships of Articles 7, 19 and 29(2) of the UDHR.

Seemingly ignoring the 1996 decision in *Re J, McKenzie and Rishworth* (2000b) argued that any discrimination which these videos incite is private discrimination and is thus outside the ambit of the BORA. Nevertheless, any government body is bound by the terms of BORA to “affirm, protect, and promote” those rights and freedoms. One of these is, at s19, freedom from discrimination. If a government body fails to take any and all relevant sections of BORA into account when making a decision, it has failed in its obligations under BORA. It is therefore concomitant upon the OFLC, the Board, the High Court, the Court of Appeal, and the Select Committee to not only consider s14

of BORA, but also any other section of BORA that may apply (Butler & Butler, 2005: 94). This includes ss5 and 19.

In their submission, counsel for the NZCCL noted that classifying these videos as objectionable was also a breach of the appellants rights under s15 of BORA. However, as noted in the HRAG submission to the Board (2000: 14), there is no theological or biblical discussion of homosexuality in the videos. Therefore s15 BORA has no impact. If there was some discussion of those supposed proscriptions, or some theological discussion, then s15 BORA may have some importance, though this would, of course, be a Vox Deus argument.

At paragraph 22 of their submission to the Board McKenzie and Rishworth (2000b), cite paragraph 45 of the Court of Appeal judgement. In this paragraph, Article 10 of the European Convention on Civil Rights is mentioned. As noted above, similar restrictions on freedom of expression are contained in Article 10(2) of the ECHR as are contained in Article 19(3) ICCPR.

At that same paragraph 22, McKenzie and Rishworth (2000b) mention the “marketplace of ideas”. As noted above, at Chapter 2, such an idea as the “marketplace of ideas” assumes a level playing field for all from the beginning, omitting any reference to the dominant cultural discourse that informs, and may misinform as these videos do, the general public. This omission negatively affects the ability of a person’s personal fulfilment if they are the target of hate speech which is based on the dominant cultural discourse. In this case, this culturally dominant discourse places LGBT people, and PLWHA into the paradigm of “the other”, allowing stereotypes to be accumulated and grow into urban myth – “all gays are paedophiles”; “all gays have AIDS”; “all lesbians are man-haters”; “all transgendered people are sick”, etc.

If the information flow is patently imperfect, then the free market principles cannot be applied [to ideas]. Allow vilificatory speech and the voices that are heard will lead to erroneous political decisions. Allow enough vilificatory speech and vilification will become credible. The credibility will then pursue the vilification into violence

(Knoll, 1994).

Violence against minorities is injurious to the public good.

Following the *Living Word* decision in the Court of Appeal, certain members of the Christian right in New Zealand celebrated. It is apparent they felt that the Court of Appeal vindicated their “right” to promote discrimination and hatred. This can be seen through the various letters and editorials in certain Christian publications, and on certain Christian programmes, for example, the SPCS, which had claimed, falsely, that the majority of gay men are paedophiles, using material from the *Living Word* videos and the discredited Paul Cameron (SPCS, 2004c). If this same ‘right’ to promote discrimination and hatred was directed towards Christians, they would complain their freedom to express their religion was being affected. If this same ‘right’ to promote discrimination and hatred was directed towards Jews, or Muslims, or people based on their ethnicity or colour, there would be massive public outcry. Allowing hate speech to go unhindered, untrammelled, without control gives its proponents a carte blanche to continue to promote hatred against LGBT people, as well as PLWHA, which I believe is injurious to the public good.

Effects of hate speech

Lawrence, Matsuda, Delgado and Crenshaw note (in Matsuda, Lawrence, Delgado, & Crenshaw, 1993: 1-2) there is a disproportionate representation of people of colour, and members of the LGBT communities among those supporting the sanctions against hate speech. The situation in New Zealand is similar. However, some LGBT people, such as author David Herkt, argue there should be no censorship whatsoever, and people should be free to read whatever they want, no matter how distasteful that may be to some people, and only self censorship applied (personal communications, 2005, 2008, 2009).

New Zealand already has partial hate speech laws. These are intrinsically linked to the HRA 1993, and deal specifically with Racial Disharmony and Harassment, and Inciting Racial Disharmony (ss61, 63, and 131). It is considered that these are a reasonable limitation on freedom of expression in a

free and democratic society in line with s5 of BORA 1990. These only deal with the grounds of the colour, race, or ethnic or national origins of that group of persons. As indicated previously, the original intention of subsection 3(3)(e) FVPCA was to allow the censor some power over certain types of speech that would be injurious to the public good that specifically incited hatred and discrimination against the groups protected by subsection 21(1) HRA by treating those groups as inherently inferior to others in society.

Although not focussing on the problems of hate speech directed at the LGBT communities, Mari Matsuda (in Matsuda, Lawrence, Delgado, & Crenshaw 1993: 22-23) believes this form of hate speech requires public restriction as well as a separate analysis because of its complexity and the deadly violence that may accompany the unrelenting verbal degradation of those subordinated due to gender or sexuality that destroys the idea that there are differences between words and deeds. Moreover, as Lawrence (in Matsuda, Lawrence, Delgado & Crenshaw 1993: 69-70) noted, there are similarities between racist speech and anti-gay speech.

The ICCPR allows restrictions on speech at Article 19(3) where those restrictions are

for respect of the rights or reputations of others,

and

for the protection of national security or of public order (*ordre public*), or of public health or morals.

Preventing discrimination, hatred, and violence against a certain group in society would qualify as respecting the rights of the people who comprised that group. The French term “*ordre public*” can mean

the protection of public security and the physical integrity of individuals as part of society

(Beadle, 2004)

and

can be understood as the rules that ensure the peaceful functioning of society

(Human Rights Watch, 2001).

Controls over hate speech would also be seen as therefore aiding the “*ordre public*”, in that they promote the “peaceful functioning of society”. Article 20 ICCPR allows for specific restriction on war propaganda and

advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The equal protection clause in Article 7 UDHR, by stating people are to be protected from incitement to discrimination, can be seen as a limitation on Article 19 ICCPR, which allows Freedom of Opinion and Expression.

Similarly, Article 29(2) contains similar restrictions to the freedoms allowed under the Declaration. Those

limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society

(Farrior, 1996: 14, 19).

Section 5 BORA could be seen in light of Articles 7 and 29(2) UDHR as demonstrably justified reasonable limitations on freedom of expression.

Similarly, s5 of BORA could also be seen as a justifiable limitation on freedom of expression under Article 19(3) ICCPR as restrictions on hate speech promote

respect of the rights or reputations of others,

and

the protection of national security or of public order (*ordre publique*), or of public health or morals.

Such restrictions would therefore be demonstrably justifiable in a free and democratic society.

The ECHR allows even more stringent restrictions on freedom of expression (ECHR, 2003):

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder

or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Restrictions on hate speech can therefore be seen to be in accordance with this Convention as well. The points made by Farrow (1996) can be seen in the wording on these allowable restrictions in the Convention.

The United Kingdom has both the Human Rights Act 1998 that allows for the rights and freedoms guaranteed under the ECHR to be given effect in UK law, and may therefore have the same restrictions on freedom of expression contained within that Convention; and the Public Order Act 1986, s19 of which prevents the publishing, etc., of material likely to stir up racial or religious hatred. Scotland has the Antisocial Behaviour, etc., (Scotland) Act 2004, which allows for the placement of Antisocial Behaviour Orders (ASBOs) on a person who

pursues a course of conduct that causes or is likely to cause alarm or distress to a person or group of people. Conduct includes speech, and the Act therefore places a restriction on freedom of expression. I would not advocate for the use of ASBOs, as I believe these may be misused, being dependant on the beliefs of the local authorities.

Canada has entered hate speech provisions into its Criminal Code at sections 318 and 319. While s318 is mainly about genocide, this is in line with recent developments at the United Nations in regard to crimes of genocide. S319 in particular specifically prohibits

communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace.

In Australia, the Commonwealth Broadcasting Services Act 1992 develops codes of Broadcasting and legislates that these codes are to prevent anything that is

likely to incite or perpetuate hatred against, or vilifies, any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, age, religion or physical or mental disability.

The NSW Anti-Discrimination Act 1977 prevents vilification, or serious vilification, of people based on their race, transgender status, homosexuality, or HIV status. The Australian Capital Territory's Discrimination Act 1991 prevents vilification, or serious vilification, on the basis of race, but has been amended by the Sexuality Discrimination Legislation Amendment Act 2004 to include sexuality, transsexuality and HIV status, as prohibited grounds of vilification. As noted elsewhere, Queensland also has anti-vilification sections in its Antidiscrimination Act, and, furthermore, prevents barristers from vilifying people on the basis of their sexual orientation and other grounds (Legal Profession (Barristers) Rule 2004). Victoria, on the other hand, still restricts vilification laws to the grounds of race and religion.

The word 'sex' in Article 2 ICCPR has been read indicatively to include 'sexual orientation' (UNHCR, 1994). As indicated above, sexual orientation has been included under 'other status' in the ECHR, and could equally be read to be included in 'other status' in Articles 2 and 26 ICCPR. Both the HRA and BORA make specific mention of sexual orientation as being a prohibited ground of discrimination. The FVPCA also specifically mentions sexual orientation, as does Standard 6 of the Broadcasting Standards Authority Codes of Practice for television, as does Principle 4 of the Code for People in Advertising by the Advertising Standards Authority.

Chapter 15: Conclusion

The previous chapters indicate that freedom of expression is not absolute, but is set within specific boundaries that respect the rights and freedoms of other people to be free from discrimination, hatred and violence, and the incitement thereof. Certain statements are seen as being unacceptable. For example, statements equating people to animals on the basis of their race or religion are no longer acceptable in civilised society. Statements about people on the basis of their race are also unacceptable, and are covered under the hate speech provisions of the HRA. If the Court of Appeal had not ruled to narrow the “gateway”, they would also have been covered by the FVPCA.

By examining the effects of hate speech in chapters 8, 9, 10, 13 and 14, it can be seen that hate speech is “injurious to the public good” in the words of the FVPCA. The continuum from antilocution (the open expression of antagonism), avoidance (of members of the disliked group), discrimination, physical attack, and extermination (Allport, 1958), can be seen to exist. Hate speech eventually leads to violence

If such statements are unacceptable with respect to race, religion, ethnicity and colour, then why are they acceptable when applied to sexual orientation?

Censorship and Human Rights Legislation fit hand in hand in the continuum of controlling hate speech and other material. It is possible to suggest changes to the HRA, the FVPCA, the Crimes Act 1961, and the Defamation Act 1992 that would enable a legislative control over hate speech similar to that in some states in Australia, and in Canada. I would suggest that ss61, 63, and 131 HRA are expanded to cover those groups included in s9(h) of the Sentencing Act 2002: race, colour, nationality, religion, gender identity, sexual orientation, age, or disability. I also believe that the FVPCA 1993 should be allowed to operate in the way it was intended. In order for that to happen, it would need amendment, or the Court of Appeal would need to revisit their decisions on *Living Word* and *Moonen*. This may require them to look at more evidence

than they normally would do. In doing so, the Act would be able to prevent the denigration of all groups in s3(3)(e), not only the LGBT community.

While it would be possible to write policy that would enable hate speech to be covered by the HRA and the FVPCA, this would be meaningless if there were no legislative base for this policy. It could be changed at will to either negate the policy or to strengthen the policy without public debate. Therefore, I believe both the solutions above, legislative and judicial, would provide the necessary protection from hate speech targeted against the LGBT, and other, communities.

If it is acceptable to say “Gays are a cancer on society that deserves to be eliminated?”, then what group would be next?

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