(2005) 10 *Media & Arts Law Review* 325

NEW ZEALAND MEDIA LAW UPDATE

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INTRODUCTION

[325] Once again, freedom of expression has influenced most of New Zealand's media law developments in the last year. However, of particular interest is the fact that suppression cases feature more strongly than previously. The media, particularly the broadcast media, has made good use of freedom of expression arguments to secure access to otherwise suppressed material. However, there is also some evidence that the media is experiencing manipulation by the legal profession, which has its own agenda.

This update reports on defamation developments, including a Privy Council pronouncement on the ambit of parliamentary privilege, and the reaction of New Zealand Members of Parliament to that judgment. There is a brief discussion of a censorship case which determines what constitutes making an objectionable publication on the internet, and an outline of how the current censorship legislation has been changed for the first time by an amendment act. I note a recent important decision of the Broadcasting Standards Authority dealing with fairness requirements, and continue an on-going discussion of how the BSA is expected to incorporate the *Bill of Rights* into its decision-making processes. I also detail how the Press Council has ventured into the area of suppression and contempt of court recently.

Under the suppression heading, I detail two cases where the state television broadcaster, TVNZ, was successful. One of these was a claim to interview and film a suspected terrorist held in custody, and the other to gain access to tapes showing the French agents responsible for bombing a Greenpeace ship in Auckland harbour, pleading guilty to charges of manslaughter in 1985. However, against this, I outline a case in which it is made clear that interim name suppression may more often outweigh the principle of open justice and in which the judge even doubted that the press had standing in such cases. In a further case described, the judge excoriates the media generally for allowing itself to be manipulated by a lawyer intent on presenting a one-

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sided view of his clients' case to the public as well as in court. More optimistically, I wrap up the discussion by noting a case in which it is made clear that the open justice principles apply equally to civil cases, such as those involving taxation matters.

[326] In the area of privacy, I discuss a case which I suggest misinterprets the leading case, *Hosking v Runting*. I complete the update with brief discussions of funding of broadcast election programming and of an apparent revival of New Zealand's sedition offences.

DEFAMATION

Parliamentary Privilege

This update has previously discussed parliamentary privilege and *Buchanan v Jennings*,[2] which dealt with the issue of what can constitute repetition or republication if a defamatory statement outside the House. The question was whether an original defamatory statement protected by absolute privilege had been repeated outside the House even though the words used had not actually been repeated. The Court of Appeal accepted the idea that not resiling from a statement could be effective repetition or adoption by reference outside the House. This case was appealed to the Privy Council, which decided the matter in July 2004,[3] for essentially the same reasons of the majority of the Court of Appeal.[4] The New Zealand court had said that the MP involved, Jennings, had crossed a clear line because his statement was freely made outside the House and effectively repeated the defamation made in the House by refusing to resile from the original remarks. The Privy Council was not convinced by a persuasive dissent from Tipping J in the lower court, who thought that the only way the words spoken outside the House could take on any defamatory meaning was if words spoken *in* the House were called into question, which has, up to now, been prevented by parliamentary privilege. All judges were agreed, however, that there is no objection to the use of hansard to prove what was said or done in parliament as a matter of history. Thus, the doctrine of effective repetition seems firmly established in New Zealand. The decision of the Privy Council caused alarm among members of parliament who regard it as having a chilling effect on freedom of speech and the

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[2] [2002] 3 NZLR 145. See (2001) 6 *Media & Arts Law Review* 248 and (2003) 8 *Media & Arts Law Review* 230.
[3] *Jennings v Buchanan* [2004] EMLR 22; [2004] UKPC 36.
[4] Ibid [21].

media. The Privileges Committee has recommended amendment to the *Legislature Act* to make it clear that no criminal or civil liability will be incurred as a result of endorsement, adoption or affirmation of statements made under parliamentary privilege where the statement would not, but for the proceedings in parliament, give rise to the civil or criminal liability. Although this recommendation would halt the inroads made to parliamentary privilege within defamation law, and for that reason is desirable, it may be over-inclusive, because it would also provide protection from criminal offences such as sedition and blasphemy, assuming those offences are still seen as necessary. A national conversation about the latter has not been held. The Labour government has indicated it supports such a law change,[5] which would not be introduced until after the election later in the year.

Honest Opinion

In *Simunovich Fisheries Ltd v Television New Zealand Ltd*,[6] Allan J held that the plaintiff's imputations cannot impact on the question whether words are capable of amounting to expressions of opinion.[7] The judge is to determine whether the words complained of are capable of being opinion. If the words are so capable, whether they amount to opinion in the case is a question for the jury. The jury is to make such an assessment by relying on the publication itself, and not on imputations developed by the plaintiff at a later date. This is because the jury has to determine what the ordinary, reasonable reader would take from what has been published, being the words and possibly other facts which are generally known at [327] the time. Such a reader would not have access to the plaintiff's imputations. The focus of the judgment is on the application of life experience and commonsense to imagine the experience of the reader at the time of publication.[8]

Interim Injunction

In *Hodgson v Siemer*,[9] the High Court granted a rare interim injunction to replace an ex parte interim injunction directing a billboard to be taken down and material to be removed from a website. The plaintiff was a receiver of a company in which the defendant was a managing director. During differences about the receivership, the

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[5] Press Release, New Zealand Government, 1 June 2005.
[6] (Unreported, High Court, Auckland, CiV 2004-404-3903, 5 May 2005).
[7] Ibid [35].
[8] Ibid [36]–[37].

defendant erected a billboard which mentioned the plaintiff and referred readers to a website which contained statements the plaintiff alleged were serious allegations of criminal conduct and scandalous and outrageous breaches of professional and ethical standards. An application for rescission of the injunction and for an amended injunction were heard together. The parties agreed that the threshold for injunction to restrain defamatory material is higher than that normally applied. Clear and compelling reasons are required and the circumstances must be exceptional.[10] The judge noted determination of the matter was fact-dependant, and, having surveyed those, concluded this was one of those exceptional cases where the court could say there was no reasonable possibility of a defence of truth, honest opinion or qualified privilege succeeding.[11] However, France J noted her concern the injunction sought might be too broad. She did not think she could say the defences would fail in relation to statements that the plaintiff was not doing 'a good job' for example, or that comments to the effect that he had a 'dark side' or was a 'bully' should be restrained.[12] Declining to comment on submissions of both parties that where the higher defamation threshold applied, there was no need to also consider where the balance of convenience lay, the court found that in any event, this favoured the grant of injunctive relief, as there was no particular damage to the defendant which flowed from restraint.[13] The ex parte order was rescinded and replaced with an interim order which prevented publication by the defendant of any information containing allegations of criminal or unethical conduct or as to improper personal enrichment on the part of the plaintiffs, and which directed that the defendants not reinstate the billboard (which had been recently taken down).[14]

This decision demonstrates that while the courts are reluctant to act as censors, they will do so where the facts do not support tenable defences. Where, as here, the allegations are of serious criminality, documentation suggesting a defence of truth or honest opinion must be substantively supportive, and it seems likely that qualified

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[9] (Unreported, High Court, Auckland, CIV 2005-404-1808, 5 May 2005).
[10] Ibid [39], affirming *TV3 Network Services v Fahey* [1999] 2 NZLR 129, 132, discussed in (1999) 4 *Media & Arts Law Review* 191.
[11] Ibid [55]–[67].
[12] Ibid [60]–[62].
[13] Ibid [68].
[14] Ibid [83].

privilege will be not be available at all.[15] However, in terms of freedom of expression, it is heartening that even in one of these rare cases where censorship prevails, the courts take care to limit and control the eventual restraint order.

[328] *Damages*

Noted previously, the largest single award to date in New Zealand was made in *Columbus v Independent News Auckland Ltd*[16] where a jury awarded a record $675,000 in damages. More recently a plaintiff defamed in three articles was entitled to an award of $125,000, while another, less well known and defamed in one article, was awarded $25,000, by a High Court judge,[17]and a High Court jury awarded sums of $280,000, $270,000 and $230,000 to three former police officers against a newspaper publisher and its columnist for a column and article criticising the officers.[18] It is too early to tell whether there is an upwards trend, although some media are of the view this is the case.

CENSORSHIP

Making an Objectionable Publication

In a test case, *Kellet v Police*,[19] the High Court has examined what is required for a charge of 'making' an objectionable publication under s 131(1) of the *Films, Videos and Publications Classification Act* 1993, where the individual charged had downloaded images for his own use and periodically copied some material to CD Rom. It was held that simply copying material from a hard drive to CD Rom did not have the required element of creativity to constitute making. Thus, four convictions were quashed. However, in relation to another charge, the accused had downloaded material from more than one source computer using a file sharing program, and consolidated material from the different sources into one folder. This did amount to compiling or creating material and went beyond simple copying.

[15] On the latter point, the court followed the Court of Appeal in *Vickery v McLean* (unreported, CA 125/00, 20 November 2000) [18]–[19].

[16] (Unreported, HC, Auckland, CP 600/98, 7 April 2000). See (2000) 5 *Media & Arts Law Review* 195.

[17] *Chinese Herald Ltd v New Times Media Ltd* (unreported, High Court, Auckland, Civ 2000-404-1568, 11March 2004).

[18] *The Press*, 5 August 2004. The articles contained many factual errors and were unbalanced.

[19] (Unreported, High Court, Dunedin, CRI200541211, CRI2005541219, 29 April 2005).

Censorship Legislation Amended

The amendment to the censorship legislation noted in the previous update has been passed.[20] The Act has, among other things, increased penalties up to 10 years imprisonment; made child pornography an aggravating factor in relevant offences; created a new offence of possession with knowledge, and clarified that child nudity and offensive language can attract restriction. However, the amendment to classification criteria so that the use of urine or excrement in association with degrading or dehumanising or sexual conduct will not cause a publication to be automatically deemed objectionable,[21] but rather a factor to be given particular weight in the classification process, was lost. Therefore, the anomaly in the legislation, whereby material depicting such acts is deemed to be objectionable though the acts themselves are not criminal in any way, remains.

BROADCASTING STANDARDS

Fairness

In *Ellis v Radio New Zealand*[22] the Authority considered the broadcast of a pre-recorded interview conducted three days earlier, in which a young man made allegations which suggested that child care worker, Peter Ellis, convicted of sexual offences against children in 1993, had also sexually abused him. The Authority found that the interview breached the Principle 5 requirement of the Radio code that persons taking part in programs be dealt with justly and fairly. It stated as a general [329] principle that any program in which unidentified accusers allege that an identified person has committed serious but unspecified criminal offences is likely to be inherently unfair to the accused. Proof of guilt is not required before allegations against a person are broadcast, provided that the broadcast otherwise complies with broadcasting standards.[23] However, allegations must not be baseless or completely uncorroborated. Regardless of opportunities offered to the subject of such allegations to present the other point of view, allegations of such a nature were described by the Authority as generally impossible to defend.[24] In this case, Peter Ellis had been

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[20] On 21 February 2005, by 2005 (No 2). See (2004) 9 *Media & Arts Law Review* 243.
[21] Under s 3(2) of the Act.
[22] 2004-115. In this case, the Authority considered the issues raised were so important, it co-opted Christopher Toogood QC to assist it in its deliberations, though he of course had no voting rights: ibid [119].
[23] *Shields v TV3*, 2000-106/107.
[24] Above n 22, [123], [125].

offered the opportunity to take part in a 'sympathetic' interview on the day of the broadcast, but RNZ did not disclose to him the nature of the allegations which were to be broadcast. The Authority implied a requirement into Principle 5 of the Radio code that contributors or participants in programs be informed of the reason for their taking part and the role expected of them, unless reasons of public interest prevent this.[25] No such reasons were found in relation to Ellis.[26] Furthermore, any invitation to be interviewed must be reasonable. The invitation here was not to allow Ellis to comment on the allegations, but for a 'sympathetic' interview, which meant he would have been surprised by the allegations and unable to defend them.[27] There is some obligation on interviewers to seriously challenge important discrepancies if aware of them. Here the interviewer was aware of such discrepancies before the interview and did not mount such a challenge.[28] Further investigation is necessary before broadcasting statements which are uncorroborated hearsay. Although RNZ argued that imposing these requirements meant interfering in editorial style in broadcasting, the Authority noted that editorial style was not necessarily off-limits in terms of complying with broadcasting standards. In this case, the choice of editorial style placed an even stronger obligation on RNZ to present an alternative point of view, and because it had not done so, a breach of the standards had occurred.[29] Finally, the fact that a complainant has rejected an invitation to be interviewed does not, of itself, relieve a broadcaster of obligations under the code. Ellis had refused an invitation to be interviewed in this case (such invitation being unfair and unreasonable in any event), however, this was seen by the Authority as presenting a new challenge for the broadcaster to behave fairly nonetheless.[30]

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[25] Cf *Shields v TV3*, 2000-106/107. The Free-to-Air Television Code contains a new guideline 6b which provides: 'Contributors and participants in any program should be dealt with fairly and should, except as required in the public interest, be informed of the reason for their proposed contribution and participation and the role that is expected of them.' The first decision dealing with the guideline, *Hong and Chung v TVNZ*, 2002-118/119, involved inadvertent participants, in a reality television series. The Authority emphasised that filming, which might involve inadvertent participants, must involve some degree of public interest and, in all probability, take place in a public place. Further, if there is any comment about any of the inadvertent participants which could be considered critical, then the fairness standard requires that the participant be given an opportunity to respond.

[26] Above n 22, [125].

[27] Ibid [125].

[28] Ibid.

[29] Ibid [126]–[127].

[30] Ibid [129].

The Authority ordered Radio New Zealand to broadcast a statement (including an apology to Ellis) approved by the Authority. It also ordered Radio New Zealand to publish a statement in a display advertisement, approved by the BSA, in each of the four [330] metropolitan daily newspapers. The statement could not be in the classified advertising section and had to contain an explanation that Radio New Zealand has been ordered to publish the statement as a result of the Broadcasting Standards Authority's decision, a comprehensive summary of the Authority's decision, and an apology to Ellis. The Authority made this part of the order as an alternative to ordering Radio New Zealand to cease broadcasting for a period of time. The latter sort of order, would, the Authority determined, punish listeners rather than the broadcaster. The Authority also noted that because RNZ was not a commercial broadcaster, it could not make an order to refrain from advertising for a specified period, which it would otherwise have considered. The Authority also ordered Radio New Zealand to pay to the complainant costs in the amount of $5,300, and to pay to the Crown costs in the maximum amount of $5,000.

BSA and Freedom of Expression in the Bill of Rights

A series of High Court decisions has established some sort of consensus about how the *Bill of Rights* applies to broadcasting standards in New Zealand. In *TVNZ v BA*,[31] the media defendant appealed a decision of the BSA, in which a television news item complained about disclosed the fact that the complainant had given evidence to a hearing of the Medical Practitioners Discipline Tribunal. The item did not disclose her identity to all viewers throughout New Zealand, but the information disclosed enabled her to be identifiable to some fellow professionals in the city where she worked and to some clients who did not know of her role in the MPDT inquiry. The privacy aspects of the decision are dealt with below.[32] However, counsel for TVNZ also argued that the Authority had not properly considered freedom of expression and s 14 in the *New Zealand Bill of Rights Act* 1990. In *BA*, the Authority had not expressly referred to this Act. However, Miller J concluded that in this case it did deal appropriately with *Bill of Rights* issues.[33]

[31] (Unreported, High Court Wellington, CIV 2004-485-1299) and *TVNZ v BSA and BA*, CIV 2004-485-1300, 12 December 2004 — hereafter *BA*.
[32] See Privacy Section below.
[33] *BA*, above n 31, [36].

The question of how the Authority should deal with *Bill of Rights* issues and what the *Bill of Rights* should apply to in terms of the decisions and codes of practice of the BSA has received attention previously in the High Court. The Authority has recognised for some time that it is required to consider whether there is good reason to limit the right to freedom of expression. Although it does not always address the issue of the Bill in the same way in its decisions, the Authority set out the approach it wanted to take in *MacDonald v TVNZ*,[34] which it regarded as different from the five-step approach suggested in *Moonen v Film & Literature Board of Review*,[35] and better suited to the way the Authority exercises its legislative power to determine complaints. The Authority considers that whether a limit is 'reasonable' requires a consideration of all the circumstances of a complaint. This means it always ensures that its decisions are 'subject only to such reasonable limits prescribed by law in a free and democratic society', and that it interprets its empowering legislation in a manner which is consistent with the *Bill of Rights*. The Authority accepts that the *Broadcasting Act* clearly limits freedom of expression, but considers that the limitations envisaged by that legislation are reasonable and can be demonstrably justified in a free and democratic society in view of the important social objective of the legislation, the involvement of broadcasters in the development of broadcasting codes of practice, and the similarities between the system for regulating broadcasting standards in New Zealand and those in place in other free and democratic societies. In relation to whether the Authority's decisions are themselves reasonable, the Authority is of the view that the *New Zealand Bill of Rights Act* requires it to ensure that there is proportionality and a rational connection between the social objective of the *Broadcasting Act* and any limit imposed on the right to freedom of expression in each individual case.[36]

[331] In *TV3 Network Services Ltd v Holt*,[37] Rodney Hansen J noted that the BSA tended to use the same mantra or a similar form of words in its decisions when dealing with *Bill of Rights* issues, but did not infer from this that the approach was necessarily inadequate. The judge went on to suggest that the BSA did not need to test its decisions against the *Bill of Rights*, but only to test the standards in the

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[34] 2002-071/072.
[35] [2000] 2 NZLR 9, [16]–[20].
[36] See, for example, *The Prime Minister (Rt Hon Helen Clark) v TV3*, 2003-077/081, [61].

broadcasting codes themselves. However, in *TVNZ v Viewers for Television Excellence Inc*,[38] Rodney Hansen J's comments were rejected by Wild J, also in the High Court. This judge considered that the codes are simple sets of industry standards developed by broadcasters, for broadcasters, albeit under the Act, with the assistance and ultimate authority of the Authority.[39] Therefore, the *Moonen* balancing exercise was not required in relation to codes. In Wild J's view, the *Bill of Rights* applied to the *Broadcasting Act 1989*, and also to the decisions made under the codes.[40] The judge recognised that most of the decisions of the Authority will pass *Bill of Rights* justifiable limitations requirements, given the contents of the codes and the relatively 'tame' sanctions which the Authority can impose. Nonetheless, Wild J thought that in each case, the Authority has to consider the impact of its decision on freedom of expression.[41] In *BA*, Miller J accepted the position of Wild J. Currently, then, BSA decisions have to be the subject of a Bill of Rights analysis, and although the decision will withstand scrutiny if this is overt, such an approach can be implied from the context of the decision.

PRESS COUNCIL

Name Suppression and Contempt

The Press Council has pronounced recently on a significant aspect of name suppression and contempt of court and in this case, unusually, got involved in adjudicating a contempt matter. On occasion members of parliament state in the House the names of persons whose names have been suppressed by a court. Such MPs are protected from legal action by absolute privilege of parliament, but there is doubt whether the media are safe in publishing such statements. In an important decision, the New Zealand Immigration Service made complaints against the *Press* and the *New Zealand Herald*, respectively, because both newspapers published the name of a man claiming refugee status who had been identified by Winston Peters in the House of Representatives in a parliamentary debate.[42] These complaints were not upheld. Publication of the man's name was prohibited by s129T (5) of the *Immigration Act*

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[37] [2002] NZAR 1013. See (2003) 8 *Media & Arts Law Review* 318.
[38] [2005] NZAR 1.
[39] Ibid [33].
[40] Ibid [50]–[56].
[41] Ibid [56].
[42] Case 983 *New Zealand Immigration Service v the Press* (2004); Case 984 *New Zealand Immigration Service v the New Zealand Herald* (2004).

1987 which preserved confidentiality. An express order suppressing publication of the identity of the person had been made in the District Court but by this time both newspapers had published reports of the earlier parliamentary debate that included the name. On the same day the order was made, there was another debate in the House when Peters again repeated the name. Only the *New Zealand Herald* published the name in the course of reporting this further debate. This was alleged to be contempt of court. In a separate part of the same edition the *Herald* reported the court proceedings and the fact of the suppression order having been made. The *Press* in its report of the further debate and the court proceedings did not repeat the name of the claimant. The *Press* [332] argued that accurate reports of parliamentary debates have never been objected to in New Zealand. Legal advice sought by the Press Council concluded that the basic obligation of confidence in the legislation did not apply to the media, but a further subsection in it required those who published such confidential information to have a reasonable excuse. Publishing an accurate report of the debate in the House was found by the Council to be a reasonable excuse within the terms of the statute. As to whether the publication by the *Herald* was also a contempt, the Council noted that while Crown Law had apparently decided not to prosecute the matter, in the end, it would suggest primacy of the courts over parliament to find that a contempt had occurred. In so doing, the Council followed the House of Lords in *Attorney-General v Times Newspapers Ltd*[43] where it was said: 'Whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court.' In this decision, the Council also emphasised that the Press Council does not set legal precedents.

SUPPRESSION

Ability to Interview and Film Prisoners

Algerian refugee Ahmed Zaoui came to New Zealand in December 2002 on a false passport from Vietnam. The Refugee Status Appeals Authority granted him refugee status. However, he was detained for almost two years because a security risk certificate was issued in relation to him under the *Immigration Amendment Act* 1999, which the Minister of Immigration preliminarily accepted. Zaoui's lawyer, as is current practice, vigorously used the media to pursue her client's cause, as well as legal avenues. It was suggested that Zaoui, who has spent time in Algeria, Europe and

[43] [1973] 1 All ER 815, 823.

Asia, has connections with terrorist activity, but because the grounds on which the government considers him to be a risk to national security must remain secret, the ability of the public to inform itself, and of the media to assist in this process, is circumscribed. The debate continues. The security certificate is to be reviewed under a special process, much of which will also remain secret. In the meantime, Zaoui became a *cause celebre*, and hence a very attractive story. TVNZ wished to interview him in prison. Under the Penal Institutions Regulations 2000, the chief executive of the Department of Corrections has discretion to grant such an interview. He refused. Zaoui's counsel argued the matter to the Court of Appeal, which held that although the regulations were perfectly valid, the chief executive's refusal was unreasonable.[44]

The Court stated that though the discretion of the chief executive to refuse interview was broad, it might be qualified by the right of freedom of expression contained in the *New Zealand Bill of Rights*. The right had to be balanced against conflicting values. For example, if the detention was for criminal offending, the rights of victims would need to be taken into account, and more generally, normal imprisonment is intended, in part, to punish by removing some freedoms which can include freedom of speech. However, the Court noted that neither of these applied to Zaoui, who was detained for administrative reasons, and who, the Court accepted, had a legitimate interest in putting forward his account of things.

The Court recognised that practical reasons might also validly justify refusal of an interview. These include disruption and risk to security of the institution concerned. However, there appeared to be no such grounds argued by the chief executive in this case. The chief executive's reasons in this case were distilled by the court into a belief that an interview would add to the existing controversy and possibly damage the integrity of the current legal proceedings in which Zaoui was embroiled. It was also felt that Zaoui had been fully able to put his side of things, both in court, and in the media, through his lawyer. The Court of Appeal did not think these reasons were supportable. It did not believe the process of review of the security certificate, to be carried out by a retired High Court judge, would be influenced by any [333] television interview given by Zaoui, nor did it think that public confidence in the process would

[44] *TVNZ v Attorney-General* (unreported, Court of Appeal, CA169/04, 17 September 2004).

be undermined. Even if there was some effect, this risk did not outweigh Zaoui's free speech rights in this case. The chief executive was directed to reconsider the matter. The court took pains to point out that the decision had no precedential value because it only applied to the circumstances of this case.

The need for reconsideration by the chief executive was rendered pointless two months later when Zaoui won his appeal against a refusal to grant him release on bail. Just before the end of 2004, he was delivered into the care of the Dominican Friary in Auckland, to reside with them between 10.00 pm and 6.00 am, with twice-weekly requirements to report to the police. His lawyer advised the media that she had personally hand-washed his shirt ready for his release from custody. While on bail, Zaoui has been interviewed a number of times. He has been quoted in a celebrity vox pops column about people's hopes and dreams for 2005 as expressing a wish to go back to Algeria.

Interim Name Suppression

In a recent case involving what the judge described as 'odious' charges under the *Prostitution Reform Act* 2003, the accused was initially refused name suppression because the serious charges had a high and legitimate public interest which overcame any incidental prurience arising from publication. On appeal, Pankhurst J reviewed previous suppression cases,[45] and pointed out that they left open whether jurisdiction existed to grant media organisations leave to appeal, or even to be heard.[46] He regarded this case as a routine interim suppression appeal and doubted whether the *Press* newspaper had standing, at least without an application to be heard. Pankhurst J therefore did not pay any regard to submissions filed by that newspaper. The judge then took great care to articulate clearly a distinction between interim and final suppression orders in these cases. He noted that guilt is still to be determined in the former, and that open justice is of lesser significance where an interim order is made since there are legitimate private interests which warrant temporary protection until that question is resolved. The issue may be one of timing only since in most cases the facts will ultimately emerge at the trial. Pankhurst J thought that in this case, interim

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[45] *R v Liddell* [1995] 1 NZLR 538 (the leading case); *TVNZ v R* [1996] 3 NZLR 393; *Re Victim X* [2002] NZAR 938, [2003] 3 NZLR 220, [2003] NZLR 230; *Lewis v Wilson & Horton Ltd* [2003] 3 NZLR 546.

[46] *T v Police* (unreported, High Court, Christchurch, CHR-2005-409-000098, 7 June 2005) [17].

name suppression should continue because intrusion in relation to open justice would not be significant compared to the potential harm to the appellant's reputation, business interests and health, until the case was heard.[47] It seems then, that although open justice is to be the starting point in suppression cases, where interim suppression is involved, potential impacts on the accused may more easily determine the matter in favour of the accused. The issue of standing must wait another day. The media is understandably concerned about the implications arising from the judge's comments.

The Berryman Bridge Saga

In this extraordinary case, played out largely in the media, the Berrymans brought proceedings against the Solicitor-General and a coroner seeking a fresh inquest into the death of a beekeeper, Richards, who had died on the Berryman's property. Richards had been crossing a suspension bridge in a heavily laden truck [334] when it collapsed and he was thrown into the river below. The Berrymans suggested that the Coroner had not had a crucial report before him when he mistakenly concluded they were responsible for the death. This report, the Butcher report, arose from an Army Court of Inquiry that was held because the Army had been involved in the original construction of the bridge.

The Berrymans sought discovery of the Butcher report even though their solicitor had access to it by consent. In earlier proceedings, the judge, Wild J, refused discovery because he did not consider he had the power to grant it, and because Moodie, the Berrymans's solicitor, already had a copy. Moodie did not appeal this finding for the plaintiffs, but discontinued the proceedings and sought instead to publicise the matter in the media by a series of interviews, by giving a copy of the report to TVNZ, and by posting it on the internet three weeks later. In *Berryman v the Solicitor-General*,[48] Wild J was required to consider an application by the NZ Defence Force for an injunction restraining TVNZ from broadcasting any part of the Butcher report and for an order seeking return of the document. Freedom of expression was argued strongly by TVNZ and of special relevance was the fact that the document was now in the public domain, due to the actions of Moodie, who was apparently in contempt. Wild J found that what he had done imperilled the discovery process in all civil proceedings

[47] Ibid [26]–[27].

[48] (Unreported, High Court, Wellington, CIV 2003 485 1041, 3 May 2005).

and thereby the administration of civil justice generally. However, the judge ultimately found it would be futile to restrain the state broadcaster since the document was already in the public domain. In doing so, he took the approach applied in breach of confidence cases although the Crown had attempted to argue that this was a case about breach of a court order. Wild J noted that discovery obligations involve duties of confidence and held that there was no distinction between an undertaking which might give rise to confidence, and, as in this case, a court order.[49] The court also noted the practical futility of restraint in the circumstances, referring to a privacy case, *Tucker v New Media Ownership Ltd*[50] where injunctions were discharged when allegations of previous convictions of the plaintiff received wide publicity. Wild J refused to be blind to the reality in this case.[51] The court also dealt with the issue whether TVNZ would be in contempt if it used the Butcher report, and applied obiter in *Attorney-General v Punch*[52] to doubt that any of the mass media would be. Therefore TVNZ was not to be punished by being restrained just because it had received a copy of the report.[53]

When the matter of costs in the discontinued proceedings reached the court, the same judge made an order against the Berrymans on ordinary principles.[54] However, in relation to media law, this judgment is singular because it contains a final comment by the judge in which he directs barely veiled criticism at the media coverage of the case. Wild J's comments focussed on the behaviour of Moodie in making his clients' case in the media, by seeking to manipulate public opinion using carefully selected facts while obscuring those which were unfavourable. The judge carefully detailed how this was done, without spelling out that it could only have been done through the media and through failure of the media to check facts and to seek balance in its presentation of the story.[55] Justice Wild also noted a New Zealand characteristic of bashing institutions, which in this case he considered was directed at the New Zealand Defence Force, the Coroner, parts of the judicial system and his own court. Again, the

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[49] Ibid [39].
[50] [1986] 2 NZLR 716.
[51] See above n 48, [42].
[52] [2003] 1 All ER 289, 301.
[53] See above n 48, [44]–[45].
[54] *Berryman v the Solicitor-General* (unreported, High Court, Wellington, CIV 2003 485 1041, 11 May 2005).
[55] Ibid [69]–[73].

implication behind the judge's comments is that the media allowed itself to be manipulated and willingly took part in this process. The judge concluded by asking: 'As the facts of this matter gradually became publicly known, is it in order to ask whether all this bashing has been justified? And to ask what it has achieved?'[56] The [335] criticisms appear justified, at least in part. The reporting during the saga was one-sided and did not clarify the situation. This may have flowed in part from the source of the story in legal discovery proceedings. The media can be poor at reporting legal matters, and in this case, attempts to explain legal niceties and to make procedural matters look interesting were abandoned in favour of a 'human interest' story based on good and bad stereotypes.

Right to Use Videotape of Court Proceedings

A recent decision demonstrates clearly that applications to search court files will be determined by a balancing process in which neither the principle of open justice, nor privacy, has presumptive weight. The High Court has considered for the sixth time the court file containing a videotape of committal proceedings in which French agents, Alain Mafart and Dominique Prieur, pleaded guilty to a charge of manslaughter for their part in blowing up the Greenpeace ship the *Rainbow Warrior* in Auckland Harbour in 1985.[57] Twenty years after this shocking event, TVNZ wished to include the footage in a documentary about it. The original proceedings had been simulcast by closed circuit television to the media who could not fit in the courtroom, and the video tape had become part of the committal court record. TVNZ applied to search, inspect, and copy all or any part of the record, in particular, the videotape. Parts of the file have been made available previously but not the videotapes.

Not long after the trial, BCNZ, the state broadcaster, applied to use extracts of the footage in a documentary, and was injuncted from doing so.[58] In 1987, a law student, Amery, applied for access to do a thesis on the case and was declined.[59] The next year he applied again for more specific material, not including the tapes, some of which was released.[60] In 2000, Amery requested access to only the film of the guilty pleas

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[56] Ibid [72].

[57] *TVNZ v Mafart and Prieur* (unreported, High Court, Auckland, S89/90/85, 23 May 2005).

[58] *Mafart v Gilbert* [1986] 1 NZLR 434, upheld on appeal [1986] 1 NZLR 434.

[59] *Amery v Mafart* [1988] 2 NZLR 747.

[60] *Amery v Mafart* (No 2) [1988] 2 NZLR 754.

for a documentary being made about his life, and on the ground that the public had a right to know about the matter. This application was also declined.[61] In that decision, the court identified the primary purpose of the Criminal Proceedings (Search of Court Records) Rules 1974, which governed the situation, as being to ensure that from the conclusion of the trial, the privacy of defendants will be protected unless there is sufficient reason to allow disclosure. Even where access and use was granted, offenders would normally not be able to be identified. The discretion to allow a search was to be exercised cautiously, but permission to search might be granted where the interests of justice favoured it. To determine this, the court would have to balance the principles of open justice and freedom of expression under the *Bill of Rights*, against personal privacy and the need to protect the administration of justice.[62] In that case, the court rejected an argument that new guidelines allowing media coverage of criminal trials supported the application to search, and noted that although extended television coverage might now be allowed, this did not justify release of the tape which had been prepared for a different purpose and under a different regime.

In the most recent application,[63] Simon France J examined *R v Mahanga*[64] in which TVNZ applied for access to a videotape of an accused person's statement to [336] the police, which had become an exhibit in the trial and was therefore subject to the Search Rules. Simon France J concluded that the Court of Appeal had there held the earlier decisions were based on an assessment of public interest with a starting point of a strong presumption in favour of privacy, and that this approach was now wrong. The judge also examined *R v Wharewaka*[65] another recent High Court decision, and instead adopted the approach taken there by Baragwanath J, that neither open justice nor privacy has automatic priority in the balancing process. Therefore, the question to be asked was whether it is necessary to qualify one right to protect the underlying value in the other, and the qualification must be proportionate to the need.[66] Simon France J accepted that the passage of time and changed circumstances can alter this balance and looked to see whether this had happened since the last application to have access to the Mafart and Prieur tapes.

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[61] *Amery v Mafart* [2000] 3 NZLR 695.
[62] *TVNZ v Mafart and Prieur* (unreported, High Court, Auckland, S89/90/85, 23 May 2005) [28].
[63] Ibid [44].
[64] [2001] 1 NZLR 641.
[65] (Unreported, High Court, Auckland, CRI-2004-092-4373, 28 April 2005).

Simon France J concluded first that there was public interest in the tapes, and second, any privacy value in the recording was inherently very low. This was because the tapes showed the guilty pleas, a quintessentially public occasion. Nothing in new media guidelines which now allowed filming during the trial, detracted from this view. It was significant, also, that both Mafart and Prieur had chosen to publish books about the incident, rather than to keep it out of the public domain. The passage of time did not strengthen the privacy value because of the seriousness of the offence and the publication of the books. Furthermore, there was no unfairness to the agents in allowing access because they had consented to the inclusion of the tape as part of the court record and hence as being subject to the Search Rules. However, while this meant access was granted to the tapes, access to the administration and correspondence, the pre-sentence or probation report, and the sentencing submissions, was refused, as in the past.

The treatment by Simon France J of the competing rights as having equal weight goes against a view expressed by Tipping J in relation to privacy. In the leading privacy decision, *Hosking v Runting*,[67] Tipping J concluded that it is perfectly valid for the courts to formulate an appropriate free-standing tort of privacy, subject to a defence which protects freedom of expression when privacy values are outweighed.[68] He emphasised, however, that it is entirely possible for privacy values to outweigh freedom of expression on occasion.[69] In a later lecture,[70] Tipping J made it clear that he did not regard privacy and freedom of expression as starting on an equal footing in any balancing exercise, as in the United Kingdom, because a privacy right is not included in the *New Zealand Bill of Rights Act* 1990. For Tipping J, freedom of expression would appear to have greater initial weight, although it could still be trumped by privacy where appropriate. This approach would have produced the same result in *TVNZ v Mafart and Prieur* in any event, but in general, would tend to favour the media.

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[66] Ibid [26].
[67] [2005] 1 NZLR 1. See (2004) 9 *Media & Arts Law Review* 333.
[68] Ibid [236].
[69] Ibid [237].
[70] Canterbury University, July 2004.

Suppression in Civil Cases

It has been argued previously that the approach to open justice should be different in civil cases, in particular in tax cases where special considerations apply. The arguments in support of a more restricted approach are that disclosure of business or tax affairs may impact on the ability of parties to earn income or affect their business, that there is less public interest in being informed of the details of private disputes, that in general, the taxpayer regime is confidential, and that taxpayer cases are often test cases in which only some individuals are pursued while others retain confidentiality for their affairs. However, in a recent case,[71] the Court of Appeal has held that the open justice principles applies equally to civil [337] cases, although the situations which are said to justify confidentiality in the context of criminal proceedings are likely to differ from those in civil cases. Each case is to be addressed on its merits. Criminal cases involve coercive powers of the state, but civil cases equally involve coercive powers available to the courts. Thus both should be subject to the 'oxygen of publicity'. The court noted that in criminal cases there is a legislative basis for the exercise of the power to suppress publication of what happens in court, and that in civil cases, the exercise of this power depends on the common law. Generally, it has not been accepted that courts have any inherent power to bind third parties, therefore the view of the Court of Appeal is contentious. However, New Zealand courts have tended to take this approach, and in at least one UK case, *Venables*, this was also done.[72] The court then referred to the right of freedom of expression in the *Bill of Rights*, and proceeded to deal with the individual facts of this case. It noted that the drift in tax litigation recently had been towards treating them in the same way as ordinary litigation, and that in this case, the scale of the tax scheme was such that it might be thought the level of legitimate public interest in the matter is far higher than is usually the case with civil or even criminal litigation. Therefore, this case was subject to ordinary principles of open justice, although taxpayer information could be treated as confidential within that context if necessary.

[71] *Muir & Os v CIR* (2004) 17 PRNZ 365, leave to appeal declined by the Supreme Court: (2004) 17 PRNZ 376.

PRIVACY

What Must Be Offensive?

In *TVNZ v BA*,[73] Miller J upheld an appeal by TVNZ against a privacy complaint finding of the BSA. Unfortunately, his decision appears to be based on a misreading of *Hosking v Runting*[74] and a misunderstanding of whether or not invasion of privacy as a tort requires publicity of private facts which is offensive to the reasonable person, or that the private facts themselves meet this offensiveness test.

The television news item complained about to the BSA disclosed the fact that the complainant had given evidence to a hearing of the Medical Practitioners Discipline Tribunal. The item did not disclose her identity to all viewers throughout New Zealand, but the information disclosed enabled her to be identifiable to some fellow professionals in the city where she worked and to some clients who did not know of her role in the MPDT inquiry. The Authority applied its Privacy Principle (i),[75] which states: 'The protection of privacy includes legal protection against the public disclosure of private facts if the facts disclosed were highly offensive and objectionable to a reasonable person of ordinary sensibilities.' BSA decisions demonstrate that the Authority has been unclear whether this means *private facts* which must be offensive or *disclosure* of them. In the complaint from BA, the Authority noted its uncertainty in the past as to the distinction but it thought that in many instances these two matters are identical.[76] In *BA* they were not. The Authority thought that it was difficult to envisage a situation where the mere fact of giving of evidence to a statutory tribunal was 'highly offensive and objectionable' to the extent that its disclosure amounted to a breach of privacy. The fact of the complainant's simple participation in the MPDT proceeding did not meet the [338] criterion. However, the BSA then applied an offensiveness of disclosure rather than offensiveness of the facts test. It found disclosure of the complainant's identity was offensive taking into account the reasons given by the MPDT for suppressing the names of all witnesses at the tribunal hearing. One of these was that the complainant's ability to continue to function professionally

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[72] *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908.
[73] (Unreported, High Court Wellington, CIV 2004-485-1299) and *TVNZ v BSA and BA*, CIV 2004-485-1300, 12 December 2004 — hereafter *BA*.
[74] [2005] NZLR 1. See (2004) 9 *Media & Arts Law Review* 333.
[75] The BSA's seven privacy principles have been affirmed by the High Court in *TV3 Network Services Ltd. v Broadcasting Standards Authority*[1995] 2 NZLR 720.
[76] *BA v TVNZ*, 2004-070.

was jeopardised if she was identified, albeit to a limited number of people. This was compelling to the Authority and therefore it upheld the privacy complaint. It did not, however, state definitively that the test as to offensiveness of disclosure it had used should always apply.

TVNZ appealed the *BA* decision on various grounds, the most substantive being that the BSA had misapplied the decision of the Court of Appeal in *Hosking*. In order to determine the appeal, Miller J examined the joint judgment of Gault P and Blanchard J in *Hosking* where it was said that:

> there are two fundamental requirements for a successful claim for interference with privacy: 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and 2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person …’[77]

and further:

> We consider that the test of *highly offensive to the reasonable person* is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.’[78]

In *BA*,[79] Miller J concluded that the Authority had erred in interpreting these statements from *Hosking* as meaning that disclosure or publicity must be highly offensive. He considered that the Court of Appeal was merely emphasising that the test of highly offensive to the reasonable person is not the test of whether the facts disclosed are private, and noted that the scope of privacy is wider. The High Court therefore accepted the submission of counsel for TVNZ that the Authority had erred in law in citing *Hosking* for the proposition that it is disclosure of private facts that must be highly offensive.

It appears *BA* is clearly wrong. It can be challenged on two grounds: a simple grammatical and contextual analysis of the statements lifted by the judge from

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[77] *Hosking v Runting* [2005] NZLR 1, [117].
[78] Ibid [127].
[79] See above n 73, [50].

Hosking, and from first principles. When the two sentences: 'We consider that the test of *highly offensive to the reasonable person* is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private,' are merged after shedding all wastage, they read: 'We consider that the test relates to the publicity and is not part of the test of whether the information is private.' The merged sentence has two quite independent ideas contained within it — a positive statement that the test relates to the publicity and a negative statement that it has no relevance to determining what is private. Miller J's explanation can attach to the latter but not to the former.

Furthermore, Miller J's interpretation ignores entirely the placement of the crucial paragraph within the joint judgment in *Hosking*. It is part of a group under a heading which reads: '*Publicity that is highly offensive*'. This could not be clearer. It means that the only reading of the words must be one which determines the nature of the test to be applied (highly offensive to the reasonable person) and confirms what it applies to (the publicity of the private facts and not the private facts themselves).

If the matter is considered from first principles, it is also appropriate that *Hosking* should be interpreted in this way. This becomes obvious if we suppose that a person has suffered a rape and kept the information private, but a magazine later publishes the information. If the test is as suggested by Miller J in *BA*, there would be no remedy for invasion of privacy. The fact of being raped is probably not offensive, though it may invite sympathy. However, disclosure of the fact of rape is arguably offensive, [339] and therefore would support a remedy using the approach intended by the majority in *Hosking*. A similar approach would explain why supermodel Naomi Campbell was able to obtain judgment against the *Daily Mirror* in *Campbell v MGN*.[80] In the United Kingdom, the test focuses on whether a reasonable person in the position of the plaintiff would find disclosure to be objectionable. Once again, details of the drug treatment received by an addict are probably not offensive, and indeed, may be quite mundane in themselves. However, disclosure of the details while treatment is continuing might be offensive and indeed they were held to be so in *Campbell*. Baroness Hale, in particular, emphasised that the publication of

[80] [2004] UKHL 22.

information about a person's health and treatment for ill-health was unacceptable because it might jeopardise the continued success of that treatment. These are strong arguments, then, which suggest that Miller J's interpretation of *Hosking* is wrong and should not be followed.

State Broadcasters and the Privacy Act

In a recent unnoted decision,[81] the Privacy Commissioner dealt with a complaint that Television New Zealand breached Principle 6 of the *Privacy Act 1993* by withholding information from member of parliament Rodney Hide, about a complaint he had made concerning a current affairs program. Hide had appeared on the program and made a complaint afterwards to the broadcaster. A month later, he requested all information from the state broadcaster that anybody had prepared or received about the complaint, including any advice solicited by TVNZ about the matter. Some material was sent but six documents were withheld on the ground that the information in them was not about Hide but was the opinion of TVNZ executives about the complaint and therefore could not be personal information about him. The Privacy Commissioner was required to interpret whether the information was personal, and how this impacted on Principle 6 of the Act, under which an individual is entitled to have access to personal information held about him or her by an agency where it is held in a readily retrievable form. The media is exempt from the *Privacy Act* for news gathering activities under s 2 of the Act. However, the state broadcasters, TVNZ and Radio NZ, must comply with Principle 6.

The Commissioner took a wide view of the definition of personal information and concluded that it covered opinion material. She reached this view by looking at the provisions in the Act which allowed the withholding of information, including evaluative material, in certain circumstances.[82] Evaluative material is defined as 'evaluative or opinion material'.[83] The Commissioner concluded that the withholding sections would have no purpose if opinions were not to be seen as personal information under the Act. The Commissioner also considered obiter remarks of the Court of Appeal in *Harder v Proceedings Commissioner*,[84] which had taken a narrow

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[81] Ref 7859, 2 June 2005.
[82] *Privacy Act 1993* ss 29(1)(b) and 29(3).
[83] Ibid s 29(3).
[84] [2000] 3 NZLR 80.

view of the term 'personal information', but declined to follow these. She was also required to take into account the needs of efficiency and the free flow of information,[85] and acknowledged a chilling effect in that the latter would be inhibited if a state broadcaster is required to provide the information. However, she stated bluntly that this is the result of the legislative decision not to exempt the state broadcasters from this Principle in the Act. [340] Nor did the requirement to take these matters into account create a separate ground to withhold information under the Act. Therefore, as some of the information was personal information about Hide, it should not have been withheld. This included an email to TVNZ's general counsel which the Commissioner determined did not fall within legal professional privilege because it was not clear that its purpose was to seek legal advice. The rest of the information was official information and was referred to the Ombudsmen to be dealt with under their regime.

The state broadcasters have been concerned for some time about the ambit of Principle 6 and its effect on their activities. This decision has naturally raised concerns about communications made about programming. Whether it will chill actual program production and broadcast remains unclear.

ELECTION BROADCAST COVERAGE

Cabinet has approved a significant increase in funding for broadcast of election programs for the 2005 election. This implements a recommendation of the Justice and Electoral Committee in its report on the Inquiry into the 2002 General Election and reports into prior elections. Funding has not increased since 1990. A figure of \$3.2million is to be made available, the increase being represented by \$1.1million.[86]

SEDITION

New Zealand has sedition offences which appear harsh on paper. By s 83 of the *Crimes Act* 1961 everyone who makes or publishes, or causes or permits to be made or published, any statement that expresses any seditious intention is liable to imprisonment for a term not exceeding two years. By s 84 anyone who, *with a seditious intention*, prints, publishes, or sells or causes or permits to be printed,

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[85] *Privacy Act 1993* s 14(a).

[86] See *Beehive Bulletin* <www.scoop.co.nz> 11 March 2005.

published or sold any document, statement, advertisement, or other matter that expresses any seditious intention is liable to imprisonment for a term not exceeding two years. Persons can only be guilty under s 84 if they had a seditious intention; whereas under s 83 they can be guilty if they merely published a statement that expressed a seditious intention. This distinction is important for, if a newspaper were to be prosecuted under s 83, it is arguable that it could be found guilty even if it had only reported a seditious statement made by someone else. However, there is some safeguard in that statements must express a seditious intention.[87] A view with some currency has been that these offences, though worrisome, appear obsolete and it has been suggested that the crime of sedition be repealed altogether.[88] However, an Auckland man is currently before the District Court facing charges of seditious conspiracy as well as criminal damage. The charges arose following the man's arrest after an axe attack on the Auckland electorate office of the Prime Minister. Associated flyers stated that the attack was a protest about the government's attempts to steal Maori land through controversial foreshore and seabed legislation which had been introduced into parliament. It is likely that the freedom of expression contained in the *Bill of Rights Act* 1990 will influence the outcome of this case, as it continues to do in all areas of media law in New Zealand.

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[87] Defined in s 81(1) of the *Crimes Act* as an intention —

> (a) To bring into hatred or contempt, or to excite disaffection against, Her Majesty, or the Government of New Zealand, or the administration of justice; or
> (b) to incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws or Government of New Zealand; or
> (c) to incite, procure, or encourage violence, lawlessness, or disorder; or
> (d) to incite, procure or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order; or
> (e) to excite such hostility or ill will between different classes of persons as may endanger the public safety.

[88] Crimes Bill 1989, which was not enacted into law.