

THE FREEDOM TO HATE

A ban on two Canadian far-right activists speaking at Auckland Council venues has ignited the debate over where we draw the line between hate speech and freedom of expression. **by KARL DU FRESNE**



GETTY IMAGES

A recent public forum in Wellington on "Hate and the Internet" opened with a caution to the audience. A man seated in the front row was introduced as a "safe-space ambassador" whose job, we were told, was to "call out" any speaker who breached the code of conduct for the event, which stipulated that those taking part were to respect people and "keep it safe".

As it turned out, the occasion was polite and civilised, as you'd expect of a weekday lunchtime talkfest at the National Library. But the fact that the organisers deemed it necessary to appoint a "safe-space ambassador" seemed to indicate one of two things: either a feeling that some people need to be protected from opinions and ideas they might find confronting, or a recognition that the tone of public debate on sensitive issues has deteriorated to the point that a referee must stand ready to shut things down. Perhaps both.

It's against this backdrop that debate about hate speech is steadily gathering momentum. It hasn't got legislative legs yet, but that may be only a matter of time. Justice Minister Andrew Little is non-committal when asked whether he thinks we need more laws against hate speech, but he points out that the Human Rights Act, which is the logical place to make changes, is up for review next year.

Little acknowledges that he gets correspondence about the issue and says some MPs are talking about it – a fact confirmed by Labour's Christchurch Central MP Duncan Webb, who told the *Listener* he had considered drafting a member's bill dealing with hate speech, but had backed off pending next year's review.

Nothing more sharply demonstrates the ideological divisions over hate speech than the firestorm triggered by Auckland Mayor Phil Goff's recent banning of two Canadian "alt-right" commentators who were scheduled to speak at the Auckland Council-owned Bruce Mason Centre.

Goff said he didn't want Lauren Southern

and Stefan Molyneux stirring up religious or ethnic tensions. Supporters of his edict painted the Canadians as purveyors of hateful diatribes against minorities, including Muslims and transgender people, but free-speech advocates said the ban perfectly illustrated the risk posed to freedom of expression if tighter constraints are drawn around what people can say.

The dispute is now headed to court after a newly formed organisation, the Free Speech Coalition, hastily raised \$50,000 to seek a judicial review of the legality of Goff's decision. The campaign has the support of business, academic and political figures, including former National

and Act Party leader Don Brash, former Labour Party minister Michael Bassett, business leader Ashley Church and University of Canterbury academic Melissa Derby.

EXTREME LANGUAGE

The issue of hate speech is fraught with complications. How should it be defined, particularly when one person's hate speech is another's legitimate expression of opinion? And crucially, who does the defining?

Perhaps even more vexing, how is the notion of hate speech to be reconciled with freedom of expression – a fundamental tenet of liberal democracy, and a right guaranteed to New Zealanders under the Bill of Rights Act?

Existing law makes no explicit reference to hate speech, but under Section 61 of the Human Rights Act, it's unlawful to broadcast, publish or distribute material that is "threatening, abusive or insulting" and "likely to excite hostility against, or bring into contempt, any group of persons in New Zealand on the ground of colour, race, or ethnic or national origins". It's also unlawful to use such language in a public place, or even in private if the speaker knows it's likely that the words will be published or broadcast.

Section 61 treats such behaviour as a civil matter rather than a criminal one, with complaints going to the Human Rights Commission. For more extreme acts of offensive speech,



Called out: from top, Stefan Molyneux, Lauren Southern, Phil Goff.

Section 131 of the same Act makes it a criminal offence to publish or use words that are threatening, abusive or insulting with the intent of exciting ill-will or hostility against the people targeted, or that are likely to bring them into contempt or ridicule. Offenders risk three months in prison or a \$7000 fine.

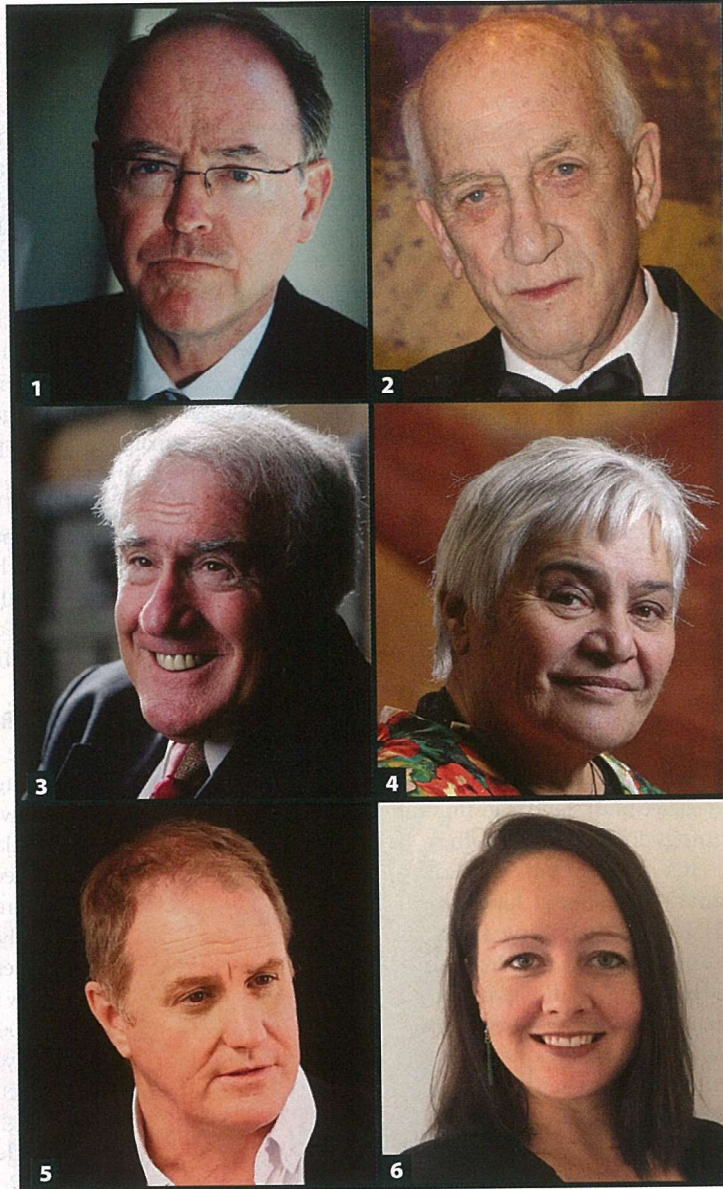
The crucial difference is that under s131, the offender must *intend* to “excite hostility or ill will” – a tougher legal test than under s61. Prosecution under s131 also needs the consent of the Attorney-General. But lawyers agree that the legal threshold is high under both sections of the Act. And the wording in both sections is open to varying interpretations, effectively leaving it to the courts to determine precisely what is meant by words such as “threatening” or “likely to excite ill will”.

The courts also have to weigh extreme language against the Bill of Rights Act, which grants everyone “the freedom to seek, receive, and impart information and opinions of any kind in any form”.

These are complex issues that the judiciary has had surprisingly little chance to clarify. There has been only one recorded case of a criminal prosecution for what might now be termed hate speech, against far-right activist Colin King-Ansell in 1979. He was prosecuted under the former Race Relations Act, which had similar wording to the present statute, for distributing a pamphlet that was held to vilify Jews. He was sentenced to three months in prison but appealed and ended up paying a \$400 fine.

Complaints made under the Human Rights Act usually relate to alleged discrimination (for example, in jobs and housing) rather than offensive speech, and are dealt with by the Human Rights Commission.

The commission has no power to make



1. Don Brash. 2. Sir Bob Jones. 3. Sir Geoffrey Palmer. 4. Dame Tariana Turia. 5. Ashley Church. 6. Melissa Derby.

rulings, but offers mediation between the complainant and the person complained about. If complainants are dissatisfied with that process, they can go to the Human Rights Review Tribunal, a quasi-legal body that functions independently of the commission.

This was the course followed last year

“If we don’t test ideas in the most robust way possible, how do we know how strong they are?”

when Labour backbencher Louisa Wall, the MP for Manurewa, brought a complaint under s61 against newspaper publishing group Fairfax Media (now Stuff) over the publication of two Al Nisbet cartoons that Wall says portrayed Māori and Pasifika people as “welfare bludgers and poor parents who were preoccupied with smoking, drinking and gambling”.

When the tribunal upheld Fairfax’s right to publish the cartoons, Wall – who is Māori – appealed to the High Court in a landmark case, the first such complaint ever dealt with by the court under s61 (see sidebar, page 22).

In a judgment seen as significant in the evolution of the law relating to what might be termed hate speech, the court agreed that the cartoons were insulting – a point conceded by Fairfax. But it stopped short of finding that they were likely to bring Māori and Pasifika into contempt or excite hostility against them.

Now, Wall is looking at the possibility of drafting legislation that would impose a “duty of care” on media organisations not to publish or broadcast such material – a move guaranteed to alarm free-speech advocates.

CONFRONTING HATE

Is the current legal framework adequate to deal with hate speech, however it might be defined? As with many things, it depends who you ask.

The *Listener* spoke to several prominent academics who argue against new laws to regulate hateful speech. Professor Ursula Cheer, dean of law at the University of Canterbury and author of the authoritative *Burrows and Cheer Media Law in New Zealand*, believes there are already appropriate remedies in the Human Rights Act, and she thinks it’s right that the threshold for legal action should be high. Crucially, she believes the balance in law between freedom of expression and limitations on harmful speech is “about right”.

“Politicians are cautious about limiting free speech and I think they’re right to be,”

NEWSPIX: HAGEN; HOPKINS; JANE USHER



Testing ideas: top, the “day of freedom” march in London in May; left, a man at the march confronts a Muslim; right, members of the group Stand Up To Racism counterprotest.

says Cheer. “We live in a democracy and you must be very careful about crimes that could encompass more speech.

“You have to be careful about how you define it, and you have to be careful about how you prosecute it and how it’s interpreted, if it ever gets to court. The state can use these sorts of offences to control people.”

Auckland University of Technology history professor and free-speech advocate Paul Moon is emphatically against tougher restrictions on what we can say.

“Some people believe that the mere fact of them finding something offensive means it constitutes hate speech and there should be some regulation or prohibition, which is very dangerous because all it then takes is for them to claim they were offended for the speech to be regulated or put under threat,”

says Moon.

Comments that some people deem to be hateful, he says, may be seen by others as quite necessary and truthful.

Moon opened up a new front in the debate last year when he initiated an open letter, signed by a broad cross section of

“A law change could confer protection on Muslims while Christianity would continue to be fair game for mockery and insult.”

high-profile New Zealanders, warning that freedom of speech was under threat in New Zealand universities. The 27 signatories came from both sides of the political divide and included Sir Geoffrey Palmer, Dame Tariana Turia, Don Brash and Sir Bob Jones.

The letter was triggered by a controversy at the University of Auckland in which a group calling itself the European Students Association claimed it had been forced to disband because of threats of violence against its members. The signatories argued that ideas should not be suppressed just because they were thought to be offensive or wrong-headed.

It was possibly no coincidence that the letter also followed a speech in which the

Are we a tolerant society?

Offences against religious minorities suggest an undercurrent of prejudice.

Both Jews and Muslims in New Zealand have been the targets of what might be termed hate

crime.

Jewish headstones in cemeteries have been desecrated on several occasions, typically by being defaced with swastikas. It happened in Dunedin in 2015 and Auckland in 2012. The offender in the Auckland case, a 20-year-old man, was convicted of wilful damage, sentenced to 320 hours' community service and ordered to pay \$3000 in reparations.

The judge said the offence could be classified as a hate crime but commended the offender for taking part in a restorative justice conference with members of the Jewish community.

Jewish graves were also targeted at Makara Cemetery, near Wellington, in 2004. But the living as well as the dead

Jewish headstones in cemeteries have been desecrated.

have been targeted.

Juliet Moses, a spokeswoman for the NZ Jewish Council, says a four-year-old boy wearing a traditional Jewish skull cap was hit on the head on his way home from school in Auckland in 2014.

Reports of other Auckland incidents have found their way into the *Times of Israel*. In one, a group of men allegedly shouted "f---ing Jews" at a boy walking in Remuera. And Moses says a rabbi was verbally assaulted in Karangahape Rd.

She says extreme anti-Jewish comments



Juliet Moses; desecrated headstones in Auckland's Grafton Cemetery.

are common online: "All Jews should be exterminated", that type of thing. Part of me doesn't even blink at extreme statements like that."

She has been targeted personally with hate mail, often emblazoned with swastikas. "It would surprise a lot of New Zealanders to learn that this sort of thing goes on.

"Social media has certainly exacerbated things. The discourse has deteriorated. There's so much name-calling and polarising, much of it anonymous."

Is it easier to dehumanise imagined enemies online? "Yes, that's a large part of it. Plus people can choose their news sources and find websites where there are others of a similar world view and they can get affirmation."

Yet Moses thinks existing legal safeguards against hate speech are adequate and says the NZ Jewish Council doesn't favour tougher laws. It does,

however, support proposals for police to gather statistics on the incidence of hate crime.

Where does she think the balance lies between hate speech and legitimate freedom of expression? "That's the million-dollar question, isn't it? That's partly why we would oppose a change in the law, because everybody has a different definition of what hate speech is.

"The best way to challenge hate speech is through debate and discussion in the marketplace of ideas. And to do

that you need to get things out in the open."

Mehpara Khan, too, knows what it feels like to be targeted as a member of a religious minority.

Khan, a Muslim, had stopped at a public toilet in Huntly with friends last year when she was attacked by a woman who hurled abuse, threw cans of beer at her and tried to punch her.

She had the presence of mind to record the attack on her cellphone and posted it online, showing her assailant calling Khan and her friends "f---ing Muslim bitches" and telling them to "get out of my patch". Police used the video to identify the offender, a 27-year-old woman who subsequently pleaded guilty to two charges of assault and one of insulting behaviour.

The court heard she was drunk at the time and didn't remember the incident. She was sentenced to 12 months' supervision.



Khan, who works in corporate communications, was wearing a hijab at the time so was instantly identifiable as a Muslim. Did she consider it a hate crime?

"On paper, when you look up what a hate crime is, you can compare it to what happened and say, 'Oh yeah, that looks and feels and sounds like a hate crime', but to my mind, a hate crime looks and feels a



Mehpara Khan; her attacker.

bit more premeditated.

"It was definitely fuelled by prejudice, definitely fuelled by some racial or Islamophobic undercurrent, but I don't think you could call it a hate crime."

Khan, a Muslim, was attacked by a woman who threw cans of beer.

It wasn't the first time Khan had been targeted. She has been told to go back where she came from (although she's New Zealand-born), and was once confronted in a McDonald's outlet by a man who began screaming at her about Israel and Palestine.

"After that incident, I decided that if anything like that happened again, I wasn't just going to stand there and do nothing. When things like this happen to you, it takes a little bit of your power away. It makes you feel like a victim, and

that didn't sit very well with me."

Was she happy with the outcome of the Huntly incident?

"I'm a really strong believer in restorative justice, so I would really have liked to see her [the offender] get a bit more help and rehabilitation. I think that with crimes like these, there needs to be dialogue – a chance to sit down and have a conversation, to confront your prejudices."

Khan sees merit in creating new hate-crime legislation, "simply because it gives us a framework in which we can operate. Although I didn't necessarily deem this a hate crime, I think there's an unwillingness to admit that's what it was. It's an easier pill to swallow if you say 'I was assaulted' rather than



"I was the victim of a hate crime."

Asked whether she thinks New Zealand is a tolerant society, she hesitates for a long time.

"That's a really hard question for me to answer. When what happened to me went public, there was a lot of outrage and I received a lot of public support. For a lot of people it came as a shock, which for me signifies that it's not a reality for a lot of people.

"That to me signifies hope. On the whole, we're doing all right, but ... it all depends on who you talk to and what community they come from.

"It's challenging. There's no easy answer."

then Race Relations Commissioner, Dame Susan Devoy, called for the Government to review hate-speech law, suggesting that free-speech arguments could too easily become a cover for threatening and harmful language.

Moon accuses the Human Rights Commission, of which Devoy was a member until her recent retirement, of wanting to tighten the rules governing what people can say – a claim the commission rejects.

Massey University sociologist Paul Spoonley is another who questions the need for tougher hate-speech laws. This is very much Spoonley's territory as he has written extensively about ethnic minorities, and earlier in his career he researched neo-Nazism in

The blogger said that Jews were a slap in the face to the human race and were not welcome in this country.

Britain and white supremacist groups in New Zealand.

Spoonley, who chaired the "Hate and the Internet" forum, is concerned about the proliferation of extreme comment on the internet, but doesn't believe the solution lies in stricter legislation.

In Spoonley's view, the best response to hate speech is to get it out in the open where it can be confronted and countered. "For me, having worked with extremist groups, there is no point in having legislation or policies that drive them underground.

"We need to know about them and their views. Whether it's hate speech or something else, the response to views you don't agree with, or which have negative effects on our community, is to present arguments and views that undermine those."

It was perhaps surprising, in view of that stance, that Spoonley recently told RNZ's *Morning Report* he was not opposed to a ban on the Canadians Southern and Molyneux. He said he was very much in favour of free speech, but questioned whether free speech was advanced by "hateful and extreme" views.

Spoonley says there's a paucity of hard information on the extent of hate speech and hate crime in New Zealand, and he supports a Human Rights Commission proposal that the police should actively gather data – an idea endorsed last year by Police

The right to offend

Cartoons published in two newspapers pose “duty of care” questions.

Labout MP Louisa Wall argued in the High Court that two newspaper cartoons by Al Nisbet were so insulting in their treatment of Māori and Pasifika people that they were likely to excite hostility towards them or bring them into contempt.

The court accepted that the cartoons, published by Fairfax Media (now called Stuff), were insulting. It said they depicted Māori and Pasifika parents as “lazy, neglectful, gluttonous smokers and drinkers”. But the court found, in a landmark ruling issued in February, that they did not breach the Human Rights Act.

In essence, the judgment says that although it may be offensive to subject Māori and Pasifika to crude racial stereotypes, it’s not unlawful.

Justice Matthew Muir, who wrote the judgment, is New Zealand’s first openly gay High Court judge and said, when he was appointed in 2014, that he hoped to bring to the position a sensitivity to difference and to minority interests. But the judgment is seen as confirming that legal action under the Act must pass a high threshold to succeed.

Wall says she won’t appeal the decision, but she plans to take a different tack by drafting legislation that would impose a “duty of care” on media organisations not to publish or broadcast such material.

Muir said the case raised important issues in terms of the interface between the right to freedom of expression and the legislature’s “legitimate interest in enhancement of racial harmony by the suppression of certain types of publications”.

The cartoons were published in the *Marlborough Express* and the *Christchurch Press* in 2013. They followed an announcement of government funding

for the KickStart Breakfast Programme in low-decile schools.

One cartoon depicted a group of adults, dressed as children, eating breakfast and saying, “Psst ... If we can get away with this, the more cash left for booze, smokes and pokies.” The other showed a family sitting around a table littered with Lotto tickets, alcohol and cigarettes and saying, “Free school food is great! Eases our pov-

erty and puts something in you kids’ bellies”.

In both cartoons, the characters depicted were clearly Māori or Pasifika.

The Human Rights Review Tribunal, to which Wall initially complained, found the cartoons may have offended, insulted or even angered people, but their publication was not unlawful.

Upholding the tribunal’s decision, the court

said that to be unlawful, conduct had to be at the serious end of the spectrum, which excluded low-level insulting speech. The law allowed room for the expression of views that might offend, shock or disturb.

The court agreed with the tribunal that the space within which issues could be raised and debated must be kept as broad as possible and added that “it is not in the wider interests of society to confine publications only to those which do not shock, offend or disturb”.

Crucially, the court held that it was irrelevant that the cartoons caused stress to Māori or Pasifika or “put them down”. What mattered was whether the cartoons were likely to excite hostility against them.

But the court didn’t let Fairfax off scot-free. It concluded by saying that both the tribunal and the court took the view that the cartoons were “objectively offensive”, which should be a cause for reflection by the two newspapers and their editorial teams.



High Court action: Louisa Wall.

Commissioner Mike Bush, and seen by some free-speech advocates as a possible precursor to more restrictive hate-speech laws.

But Spoonley is wary of using police data as justification for tougher laws. “For me, it would take something very substantial to inhibit free speech. I do think we need leadership and public acknowledgement and support for those people who are targeted, but legislation is only part of a spectrum [of responses] and I don’t think it should be a priority.”

INTOLERANCE ONLINE

The notion of something called hate speech is not new. The term was used in 2000 during a celebrated legal action brought by a gay-rights group against the New Zealand distributors of two American videos that were alleged to be homophobic.

“Some people believe that the mere fact of them finding something offensive means it constitutes hate speech.”

The Film and Literature Board of Review classified the videos as objectionable, thus making it a criminal offence to show them or even own them – a decision eventually overturned by the Court of Appeal.

The board subsequently reversed its ban on the videos, but called for law changes to prohibit “hate propaganda” – a call taken up, unsuccessfully, in submissions by the Office of Film and Literature Classification to a parliamentary select committee in 2004.

Internationally, the concept of hate speech has a longer history. Spoonley says the term was coined by American legal scholars in the late 1980s.

Definitions vary. The Council of Europe says hate speech covers “all forms of expressions that spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”.

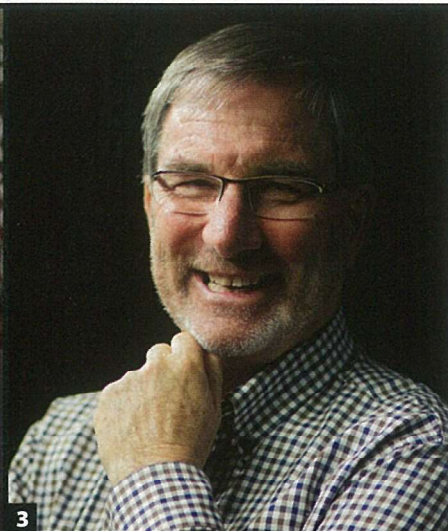
Facebook, which recently adopted stricter controls on what users can post online, uses more specific criteria. Its policy targets direct attacks on people’s “protected characteristics” such as race, ethnicity, national origin, religious affiliation, sexual



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1. Duncan Webb. 2. Andrew Little. 3. Paul Spoonley. 4. Dave Moskovitz. 5. Ursula Cheer. 6. Paul Moon.

orientation, sex, gender identity, serious disability or disease.

That list gives a clue to why hate speech has become a bigger issue now than it was, say, 10 years ago. As Western societies diversify, and as a widening range of minority groups agitate for protection against discrimination, opinions that are seen as oppressive or harmful are coming under more critical scrutiny.

The other factor fanning concern over hate speech is that the digital revolution has provided platforms for extreme opinions that previously received limited circulation. Martin Cocker, chief executive of Netsafe, says his staff see thousands of online comments every day that denigrate people on the basis of their race, religion or sexuality.

Netsafe is the independent agency that deals with complaints under the Harmful Digital Communications Act, passed in 2015. Cocker says the Act is more about cyberbullying than hate speech (it was passed following the Roast Busters scandal,

in which young men boasted on social media about getting girls drunk and then having sex with them), but there's some overlap.

To be classified as harmful, a digital communication must cause serious emotional

The best response to hate speech is to get it out in the open where it can be confronted and countered.

distress to an individual, Cocker says. "The real question is, at what point do you call it hate speech that needs intervention? At what point do we draw the line, and how do we balance it against freedom of expression?"

It's a very tricky exercise."

Cocker agrees that it can be easy to dehumanise people via the internet. "It's called disinhibition. As humans, we react to the cues that we see in another person. If I'm face to face with you and I say something offensive, you'll react with a facial expression or whatever. My brain will read those cues and react to them. Even on the phone I can pick up cues through your voice.

"That interaction is missing online, which enables people to be more abusive without feeling the consequences."

And because the internet has low barriers to entry, says InternetNZ chief executive Jordan Carter, it's relatively easy to disseminate hateful speech. This is problematic for his organisation, which Carter describes as having a utopian vision in which the internet can make the world a better place.

It was InternetNZ that organised the

"Hate and the Internet" forum. Carter says he came away from that with a clearer understanding of what hate speech is. "It's not annoying speech or insulting speech. It didn't feel to me like it's a case of, 'You're saying mean things to me, so that's hate speech.'"

As for that "safe-space ambassador", Carter says the intention was to make forum participants feel able to express themselves freely without fear of being shouted at or having fingers wagged in their faces.

CROSSING THE LINE

Most speakers at that forum framed the issue in the context of verbal attacks on women and ethnic minorities, and most argued implicitly that some boundaries had to be placed around free speech.

Māori broadcaster and te reo promoter Stacey Morrison said freedom of speech was not under threat, but qualified that by saying it would be best if that freedom was based in fairness – "that is, freedom for all and not just a select few".

"In the context of our history, we should consider who has most often enjoyed freedom of speech and whose freedom of speech has most often been suppressed or neglected."

Morrison mainly addressed the issue in terms of race, saying that only people who were the targets of racism could define what racist speech was. "They are most often the voices of the suppressed and neglected."

Green Party MP Golriz Ghahraman, an Iranian-born former refugee, recalled being targeted with an "incredible onslaught of hate" during last year's election campaign. This didn't surprise people of colour whom she knew, but it did shock her Pākehā friends and colleagues.

The messages ranged from those she called mildly misogynistic – "men calling me sweetheart" – to threats of sexual violence, "go back home" taunts and inflammatory statements such as "it's time to load our shotguns – we're being taken over".

The perpetrators were usually anonymous, Ghahraman said – "no one does it visibly, in person".

Wellington business consultant Dave Moskovitz brought a touch of levity to the proceedings, describing himself as a "walking bullseye" for purveyors of hate speech: "middle aged, Pākehā, cis, hetero, male, geek, property owner, investor, company director, immigrant, American, religious, Jew, and – wait for it – Zionist".

But the tone turned serious when Moskovitz told of a New Zealand white nationalist blogger who published an online guide to "Zionists in your neighbourhood" and included a photo of Moskovitz's house. The blogger went on to say that Jews were a slap in the face to the human race and were not welcome in this country.

Moskovitz said the same man later said in a newspaper interview that Jews should have been exterminated – "and that's where the line was crossed. Saying you do not like a

There is a problem with online hate speech. "It's very real to the extent that some people commit suicide over it."

group of people, while repugnant, is exercising free speech. Implying that they should all have been killed is quite another thing. That borders on incitement."

DISHARMONIOUS SPEECH

The forum was the subject of a critical online piece by Auckland media commentator John Drinnan, who observed that none of the panellists were promoters of free speech.

Not quite true: Spoonley has identified himself as pro-free speech, and Moskovitz says he gets "really nervous about people censoring stuff because it might be slightly offensive to me" and worries about "the line being drawn lower and lower as people get a lower tolerance of offence".

Drinnan also linked the forum with what he alleged was an attempt by the Human Rights Commission, one of the sponsors of the event, to push the issue of hate speech. He says the commission sometimes behaves like a state-sanctioned activist.

It's hardly the first time the commission has been accused of taking an ideological line on hate speech. Moon in particular has been critical of the government agency, recently accusing it of pushing a concept of "disharmonious speech" as justification for new legislation.

He bases this claim on the commission's submission last year to a United Nations committee reviewing New Zealand's compliance with the Convention on the Elimination of All Forms of Racial Discrimination. One of the commission's recommendations was that the Government "review the adequacy

of current legislation in addressing and sanctioning hate speech and incitement to racial disharmony, including hateful and disharmonious speech targeted at the religion and beliefs of ethnic minority communities".

The commission points out that because the Human Rights Act refers only to people's colour, race or ethnic origins, it doesn't prevent "religious hate speech". The commission is particularly concerned about Muslim New Zealanders, who are not protected under present law because religion is not synonymous with ethnicity.

But Moon fears that a law change could confer protection on Muslims while Christianity would continue to be fair game for mockery and insult. The irony, he says, is that this would be in conflict with the commission's own anti-discrimination rules.

The commission was also forced onto the defensive last year when it called for the police to begin compiling statistics on hate crime. Even Moon thinks this isn't necessarily a bad idea, but the suggestion aroused fears that it could be a first step toward the criminalising of politically incorrect speech.

Not so, according to Janet Anderson-Bidois, the commission's chief legal adviser. She says some people have confused hate speech with hate crime, which is generally defined as offences that directly harm or threaten people, such as assaults, harassment, offensive letters or damage to property.

The two are different, she says, although they sometimes overlap. "The commission's positions on hate speech and hate crime quite often get conflated."

"We have very strongly pushed for recording of hate crime – actual crimes committed against someone because of disability, gender, sexual orientation or race," Anderson-Bidois says.

"Anecdotally, we hear that hate crime is quite a big issue, especially around sexual orientation and race. But when it's only anecdotal, you can't easily look at causes."

So, what might a hate crime look like? Anderson-Bidois says the attack on a Muslim woman in Huntly in February 2017 (see sidebar, page 20) was an example, as would be the murder of a gay or transgender person if it was motivated by hatred of such people.

At present there is no such offence as a hate-motivated crime, but the Sentencing Act allows judges to view hostility toward a particular group of people as an aggravating factor in offences such as assaults, and to increase the severity of the sentence accordingly.



1. Martin Cocker. 2. Jordan Carter. 3. Janet Anderson-Bidois. 4. Stacey Morrison.

THE RIGHT TO BE SAFE

Free-speech advocates such as Moon regard the commission with deep suspicion. Its public stance on freedom of expression has sometimes seemed half-hearted or ambiguous. But the commission is able to point to the *Wall v Fairfax* cartoons case as evidence of its commitment to free speech.

The commission took part in those legal proceedings and supported the Human Rights Review Tribunal's rejection of Wall's complaint against the Nisbet cartoons. It noted that "international law mandates a high threshold for intervention to ensure the right to freedom of expression is infringed as little as possible".

Anderson-Bidois insists that the commission isn't bent on rewriting the laws governing hate speech. All it's doing, she says, is suggesting they should be reviewed to ensure they're still "fit for purpose".

New Zealand has become culturally far

more diverse since the Human Rights Act was passed and the internet was then still in its infancy. Anomalies have arisen, she says.

"You can say something online that causes harm and breaches the Harmful Digital Communications Act, but you could say a similar thing on a street corner and not breach the Human Rights Act. Whatever your view on it, you have to admit it's a bit anomalous and a bit confusing."

Of course freedom of speech comes into it, "but with rights come responsibilities. People also have a right to be safe.

"We're still working our way through these issues – that's why we want respectful, informed discussions. The more people understand, the more they can contribute to debate."

TESTING IDEAS

In the meantime, some politicians are taking an interest. Labour's Duncan Webb,

who was a lawyer and legal academic before entering Parliament last year, shares the commission's view that the law needs to be reviewed.

Webb believes the law should recognise that there are other forms of hatred, such as hatred of gays and Muslims, besides that directed at racial or ethnic groups. In this respect, his views appear to line up with the commission's.

Crucially, he thinks hate-speech offences should be dealt with under the Summary Offences Act, in common with other "socially disruptive" offences, such as intimidation and disorderly behaviour. That would have the effect of criminalising speech.

Webb says he's acutely aware of the tension between freedom of expression and hate speech, but he doesn't think the free-speech defence can be applied in cases where speech is calculated to injure or terrorise people.

"Rights cut across each other," says Webb. "Any unfettered right to free speech cuts across someone else's right to exercise their religious freedoms.

"I'm not concerned so much about deeply offensive political speech as an anti-Muslim tirade in a public place for no motivation other than to terrorise."

Such sentiments are unlikely to reassure free-speech champions such as Moon. He says all New Zealanders should be disturbed by what's happening in countries such as Britain, where people are being prosecuted for what many would regard as legitimate opinions.

Moon agrees there is a problem with online hate speech. "It's very real to the extent that some people commit suicide over it – hence the Harmful Digital Communications Act. That's a separate category.

"But there's a real danger of confusing honestly held opinion with attacks on people, and by lumping it all into this category of hate speech they conflate targeted speech, aimed at destroying or bullying people, with honest expression of opinion."

So, we need to distinguish attacks on people from attacks on ideas and beliefs?

"Yes, I think we do, because if we can't attack ideas, if we don't test ideas in the most robust way possible, how do we know how strong they are? That's been a principle for centuries." ■

Next week, the way hate-speech laws vary from country to country and what we can learn from them.