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Does a Bill of Rights Matter?: Comparing Australia and New Zealand[1]

Luke McNamara

Administrative or judicial decision-makers charged with responsibility for adjudicating on specific allegations that a legislative prohibition on hate speech has been breached are routinely expected to determine the scope of the hate speech law in question – but not in isolation. In a wider context of respect for human rights, they are expected to simultaneously protect, to the maximum extent possible, the right to freedom of expression. Although it has been criticised as too narrow a conception (Boyle 1992; Braun 2004; Foley 1995; McGregor 2006), this task is usually characterised as a *balancing* exercise (Coliver 1992; Iganski 1999) or an exercise in resolving a *conflict* (Sumner 2004). How adjudicators approach and resolve the balancing task is critical in giving meaning and shape to hate speech laws and, consequently, the degree of protection afforded to victims of racist speech. It is also important in establishing the practical parameters of abstract human rights, like the right to freedom of expression.

Drawing on case studies from two countries – New Zealand and Australia[2] – this chapter considers whether the adoption of a particular domestic legal form for recognising human rights – particularly the right to free speech – has had any discernable influence on the operational scope of legislative restrictions on hate speech. Although there is significant common ground across the two countries at the level of political values and underlying principles, there are significant differences in terms of the manifestation of these values in legal form. The differences are relatively subtle when it comes to the non-discrimination/

1 This chapter is an abridged version of McNamara 2007: ch 4.

2 The larger study on which this chapter draws is a four-country comparative study that includes the United Kingdom and Canada (see McNamara 2007). For a comprehensive review of the manner in which Canadian courts and tribunals have negotiated the hate speech/free speech line in the context of alleged breaches of Provincial/Territory human rights laws, see McNamara (2005).

Zealand, although there is little evidence that s 14 has *caused* the current approach to the interpretation of s 61 of the HRA, the status of the right to freedom of expression as a 'BORA right' has not been irrelevant: it has consistently been highlighted on those occasions where the NZHRC has sought to explain and defend the terms in which it strikes the free speech/hate speech balance. While factors attributable to local legal culture may be significant determinants of how the free speech/hate speech balance is struck – including the ascendancy of particular philosophical values at a given time – formal institutional arrangements for the recognition of human rights in domestic legal systems do not operate in isolation from the broader legal cultures. They both inform, and are informed by, those cultures so that it is possible to discern the influence of legal form in New Zealand (and relative 'form*lessness*' in Australia) in the discursive styles, strategies, and interpretive techniques of the protagonists in the free speech/hate speech debate. Ultimately, however, one of the primary insights offered by the comparative analysis presented in this chapter is that tensions are inevitably embedded in legislative attempts to articulate a line between protected free speech and prohibited hate speech. Even where competing human rights are codified in a bill of rights, it will remain difficult to completely alleviate these tensions as long as a society's broader legal-political culture is characterised by enduring disagreement and controversy about where the line should be drawn.

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